

THE IMPRINT OF KOSOVO ON THE LAW OF HUMANITARIAN INTERVENTION

*Julie Mertus**

For nearly ten years, human rights advocates have tried to focus public attention on Kosovo. They issued report after report of gross and systemic human rights abuses in the troubled region.¹ International policy makers' had overwhelming evidence that the pressure in Kosovo was mounting and that an even greater human rights disaster loomed near,² yet, they treated the warnings as that of the boy who cried "wolf" too many times without a wolf being present. Without the "wolf" of all-out war, international leaders failed to treat Kosovo seriously.

Flash ahead to March 23, 1999: NATO war planes commence military air operations and missile strikes in Yugoslavia. Suddenly, Kosovo becomes a lead story in every media outlet.³ Kosovo finally comes into focus, but the optic is blurred. In a rush to "do the right thing" or just "do anything," many human rights advocates, like the diplomats they criticize, start to get sloppy. They accept a false slate of diametrically, opposed choices – intervention or no intervention; protection of Serbian sovereignty or denial of Serbian

* Assistant Professor of Law, Ohio Northern University, author of *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR* (1999). See also Julie Mertus, *The Imprint of Kosovo on the Law of Humanitarian Intervention*, __ WM. & MARY L. REV. __ (2000) (*forthcoming expanding version of article*). The author acknowledges the support of the Ohio Northern University faculty summer research stipend and the research assistance of Katherine Guernsey and Barbara Wilson in the preparation of this article. In addition, the author would like to thank John Norton Moore, Paul Szasz and Jeff Walker for their insightful comments; the opinions expressed are those of the author alone.

1. See, e.g., Mertus & Mihelic, *Open Wounds: Human Rights Abuses in Kosovo*, HELSINKI WATCH, (1994); *Systematic Rights Abuses Reported in Kosovo*, NEW EUROPE ON-LINE, Aug. 28, 1998, at WL 24015766, Federal Republic of Yugoslavia: *Humanitarian Law Violations in Kosovo*, 10 Human Rights Watch Report 9(D) (1998) (visited Feb. 4, 2000) <<http://www.hrw.org/reports98/kosovo/>>.

2. See Peter Humphrey, *Albanians Victims Of Serbian Police*, NEWSDAY, June 1, 1993, at WL 11375416; U.S. Dept. of State, *SERBIA-MONTENEGRO HUMAN RIGHTS PRACTICES FOR 1995*, March 1996 (visited Feb. 4, 2000) <<http://www.usis.usemb.se/human/human95/serbiamo.htm>>; U.S. Dept. of State, *Serbia-Montenegro Country Report on Human Rights Practices for 1996*, January 30, 1997 (visited Feb. 18, 2000) <<http://www.usis.usemb.se/human/human96/serbiamo.html>>; Neil King Jr., *Hague Panel May Indict Milosevic: Kosovo Killings Could Prompt Charges*, WALL STREET JOURNAL EUROPE, March 16, 1998 at WL-WSJE.

3. See, e.g., Norman Harper, *Live a Moment of History*, ABERDEEN PRESS AND JOURNAL, May 6, 1999, at 16; *U.S. Newspapers Roll Victory Drums in Kosovo Crisis*, AGENCE FRANCE PRESSE, June 4, 1999; Stephen Castle, *European Elections: Swing To Apathy In Every Part Of Europe*, THE INDEPENDENT (LONDON) NEWS, June 14, 1999, at 9; R.C. Longworth, *Bridge To Brighter Future Must Span Ancient Hate*, CHICAGO TRIBUNE NEWS ZONE: C, May 30, 1999, at 1.

sovereignty – without questioning what each choice actually means under international law.

Czech President Vaclav Havel, among many others, claims that the NATO alliance “acted out of respect for human rights” and that the war was probably the first one that had been waged “in the name of principle and values.”⁴ If only this were true, the legitimacy of actions in Kosovo would be much clearer. But NATO did not act only in the name of human rights. Instead, leaders of NATO countries offered a cafeteria of justifications for their actions. The Clinton Administration considered but refused to base its actions in Kosovo solely on humanitarian rights grounds.⁵ Instead, the Administration offered an array of justifications. Humanitarian concerns were rolled together with other factors: the need for regional stabilization, the stemming of refugee flows, and the need to protect NATO’s reputation.⁶

Dr. Javier Solana, Secretary General of NATO, also bundled together humanitarian and non-humanitarian concerns. At one point, he said that NATO’s “objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo.”⁷ In another breath, he characterized NATO’s efforts as “support[ing] international efforts to secure Yugoslav agreement with an interim political settlement.”⁸ In other words – bombing to get a deal. This latter justification – use of force to coerce a political leader to sign an agreement – was clearly extra-legal. Under the 1969 Vienna Convention on the Law of Treaties, “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of principles of international law embodied in the Charter of the United Nations.”⁹ Legal justifications for the use of force in Kosovo should have been offered apart from the mere desire to force a political leader to sign a “take it or leave it” agreement.¹⁰

4. Vaclav Havel, “Kosovo and the End of the Nation-State,” *The New York Review of Books*, June 10, 1999, at 6.

5. The author spoke with members of Clinton’s staff who said that they considered and rejected the doctrine of humanitarian intervention as the sole grounds for intervention in Kosovo. Instead, they deliberately decided to come up with a laundry list of factors supporting intervention. Washington D.C. (June 1999).

6. Bill Clinton, Address to the Nation on NATO Airstrikes (March 24, 1999), in SECURITY ISSUES DIGEST March 25, 1999 (visited Feb. 4, 2000) <<http://usa.grmb1.com/s19990325h.html>>. See also Jim Garamone and Linda D. Kozaryn, *NATO Attacks Serbs to Stop Kosovo Killings*, U.S. Dept. of Defense, DefenseLink, March 24, 1999 (visited Feb. 4, 2000) <http://www.defenselink.mil/news/Mar1999/n03241999_9903245.html> (quoting White House spokesman Joe Lochart).

7. Dr. Javier Solana, Secretary General of NATO, Press statement (March 23, 1999) (visited Feb. 5, 2000) <<http://www.nato.int/docu/pr/1999/p99-040e.htm>>.

8. *Id.*

9. Vienna Convention on the Law of Treaties, May 23, 1969 Vienna Article 52, Entry Into Force: 27 January 1980, U.N. Doc. A/Conf 39/28, U.K.T.S. 58 (1980), 8 I.L.M. 679.

10. Serbia did offer a counterproposal. While the proposal would have rejected the presence of

By failing to specify clearly the legal parameters of their actions, NATO allies opened themselves up to the criticism that they were not operating under any legal grounds at all.¹¹ At the same time, by failing to provide clear legal justifications for intervention on human rights grounds, human rights advocates opened themselves up to criticism that they were outside the law.

Human rights advocates bought into the notion that the legal debate over humanitarian intervention consists of a tension between two competing principles: respect for the "territorial integrity" and "political independence" of states and the guarantees of "human rights" and "self-determination."¹² This framing of the issue hides the real questions at hand. The principles of "territorial integrity" and "human rights" need not conflict. On the contrary, they complement one another. In sum, territorial integrity cannot be had without human rights and the realization that human rights can support the integrity of a territory.¹³

Today, I will explain why "territorial sovereignty" should not be the focus when it comes to cases like Kosovo. Instead, more attention should be paid to the parameters set for the "use of force" by international law. In my brief remarks, I will outline the legal analysis of NATO actions under two sets of basic international law documents: the United Nations Charter and the Geneva Conventions. In doing so, I will examine two questions: 1) whether international law supports the decision to use force in Kosovo; and 2) whether international law supports the means chosen for the use of force in Kosovo. The short answer is yes and no.

At face value, the words of the United Nations Charter appear to favor anti-interventionists who are rightly concerned that intervention is susceptible to misuse.¹⁴ Anti-interventionists point to the first part of Article 2(4) of the

NATO troops in Kosovo, it would have permitted the presence of other (unarmed) internationals. For the text of the proposal, (visited Feb. 5, 2000) <<http://www.jurist.law.pitt.edu/ramb.htm>>.

11. See, e.g., Raju G.C. Thomas, *NATO and International Law*, available on the Web at (visited Feb. 5, 2000) <<http://www.jurist.law.pitt.edu/thomas.htm>>.

12. See, e.g., Paul Szasz, "The Irresistible Force of Self-Determination meets the Impregnable Fortress of Territorial Integrity: A cautionary fairy tale about the clash in Kosovo and elsewhere," Address at the University of Georgia School of Law, Georgia Society of International and Comparative Law, Banquet (April 8, 1999) (Speech on file with author).

13. The main opponent to this view, Louis Henkin, counters: "[c]learly it was the original intent of the Charter to forbid the use of force even to promote human rights . . . Human rights are indeed violated in every country . . . But the use of force remains itself a most serious – the most serious – violation of human rights." Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 61 (1989).

14. Domingo E. Acevedo, panelist at the American Society of International Law Proceedings, *Collective Self-Defense and the Use of Regional or Subregional Authority as Justification for the Use of Force* Address at the American Society of International Law Proceedings (April 12, 1984) in 78 AM. SOC'Y INT'L L. PROC. 1984, at 68, 73 (on the possible misuse of intervention); *But see* Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force To Prevent Human Rights Atrocities*,

Charter, which declares that states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . ." ¹⁵ They also rely heavily on Article 2(7), which states that "[n]othing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . ." The general prohibition on the use of force in Article 2(4) is supported by language in subsequent General Assembly resolutions. ¹⁶

Only three explicit Charter exceptions exist to the general prohibition on the use of force. None of these appear to apply to Kosovo. First, states may act in self-defense under Article 51 of the Charter. Even a broad reading of self-defense is not particularly instructive with respect to Kosovo. The concept of self-defense applies only to states; it does not protect individuals against their

16 FORDHAM INT'L L.J. 120, 147-48 (1992/1993) (stating that "[a]ny individual state action which is permitted, such as self-defense, may result in potential abuse, but this potential abuse applies to almost every legal rule. Obviously, not all states that invoke the doctrine of self-defense, a legal right, to justify their use of force, do so truthfully. The benefits of self-defense, however, legitimize the doctrine despite the potential abuse of its invocation. The same should be said for humanitarian intervention."). *Id.*; See also MYRES MCDUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 416 (1961); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

15. This provision is self-executing because it does not require a state to do anything; it simply prohibits the commission of certain acts.

16. The 1966 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Their Independent and Sovereignty provides that:

No State has the right to intervene, directly or indirectly, for whatever reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements are condemned . . . [T]he practice of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten international peace and security.

G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966). This resolution was affirmed by the General Assembly in the 1970 adoption of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121 (Annex), U.N. Doc. A/8028 (1971). See A. Tanca, *The Prohibition of Force in the U. N. Declaration on Friendly Relations of 1970*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 307 (A. Cassese, ed., 1986). The International Court of Justice has not issued a definitive ruling on the merits on humanitarian intervention in "Kosovo-like situations." Its decisions narrowly construe the right of states to use force on human rights grounds. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) ("The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defense."). *Id.* ¶ 249. See N. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L. Q. 321 (1989).

own states.¹⁷ The self-proclaimed Albanian Kosova has never been recognized as a state and the NATO countries undertaking the intervention were never attacked or threatened with attack. Thus, the self-defense exception would require an extremely expansive interpretation in order to apply to Kosovo.

A second exception to the general ban on the use of force is Security Council enforcement actions under Chapter VII of the Charter.¹⁸ Security Council enforcement actions are limited by the requirement that that the Security Council Act. The United Nations Security Council did adopt three main resolutions concerning Kosovo prior to the NATO bombing. First, in March 1998, the Council issued Resolution 1160, which imposed an arms embargo on both parties and called upon the FRY and the leadership of Kosovo Albanians to enter into meaningful dialogue for a peaceful settlement of internal strife.¹⁹ In September 1998, the Security Council adopted Resolution 1199,²⁰ which found the existence of "a threat to the peace and security in the region" and enjoined the FRY to certain actions, including "ceas[ing] all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression."²¹ The Security Council warned that "should the concrete measures demanded in this resolution not be taken, [it would] consider further action and additional measures to maintain or restore peace and stability in the region."²² In the third main Security Council Resolution, Resolution 1203, adopted on October 24, 1998, the Council endorsed the OSCE and NATO agreements with FRY, and demanded once more that FRY comply with the conditions set forth in Resolution 1199.²³ It would be a strain to contend that under any Security Council resolution the use of force was authorized or approved. On the contrary, as it was clear that China and Russia would veto the use of force,²⁴ the Security Council failed to include

17. SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 139 (1996).

18. See U.N. CHARTER, Article 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement mechanisms under Chapter VII.").

19. SC Res. 1160, adopted by the Security Council at its 3868th meeting, March, 31 1998 (visited Feb. 5, 2000) <<http://www.nato.int/kosovo/docu/u980331a.htm>>.

20. SC Res. 1199, adopted by the Security Council at its 3930th meeting September 23, 1998 (visited Feb. 6, 2000) <<http://www.nato.int/kosovo/docu/u980923a.htm>>.

21. *Id.* ¶ 4(a).

22. *Id.* ¶ 16.

23. SC Res. 1203, adopted by the Security Council at its 3937th meeting, October 24, 1998 (visited Feb. 6, 2000) <<http://www.nato.int/kosovo/docu/u981024a.htm>>.

24. Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 EJIL 1 (1999) (visited Feb. 6, 2000) reprinted at <<http://www.ejil.org/journal/Vol10/No1/ab1.html>>. As Paul Szasz has pointed out, the fact that the Security Council failed to act here cannot be interpreted as a rejection of any particular course of action. "In a sense, by failing to act it rejected all alternative courses of action, including full support for Milosevic." Paul Szasz, letter to Julie Mertus, dated July 25, 1999 (on file with author).

in these resolutions the magic use of force language – authorization of the use of “all necessary means.”²⁵

After the NATO bombing commenced, the Security Council had at least two opportunities to approve of the NATO intervention *ex post*. At the height of the NATO bombing, on May 14, 1999, it issued Resolution 1239.²⁶ This resolution neither supported nor condemned the NATO bombing. The resolution merely “not[ed] with interest the intention of the Secretary-General to send a humanitarian needs assessment mission to Kosovo and other parts of the Federal Republic of Yugoslavia” and “[r]eaffirm[ed] the territorial integrity and sovereignty of all states in the region.”²⁷ At the conclusion of the NATO campaign, the Council issued Resolution 1244.²⁸ While this resolution “decid[ed] on the deployment in Kosovo, under United Nations auspices, of international civil and security presence, with appropriate equipment and personnel as required,”²⁹ it was wholly *prospective* in nature. The resolution declined to comment on *previous* international intervention in Kosovo. These and other Council statements fall short of offering *ex post* approval of the NATO bombing and, thus, the Chapter VII exception to the use of force cannot be said to apply to Kosovo.

The third explicit exception to the general prohibition on the use of force, found in Chapter VIII of the Charter, permits actions undertaken by “regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security.”³⁰ Regional arrangements may undertake any action in this regard that is “consistent with the Purposes of the United Nations.”³¹ Even if NATO is seen as a regional arrangement under Chapter VIII, regional actions also require Security Council authorization, none of which was granted with respect to Kosovo.³²

25. Cf. SC Res. 678 (1990)(SC resolution re. Kuwait), adopted by the Security Council at its 2963rd meeting, on November 29, 1990 (visited Feb. 6, 2000) *reprinted* at <gopher://gopher.undp.org:70/00/undocs/scd/scouncil/s90/32> and SC Res. 794 (1992) (SC resolution re. Somalia), adopted by the Security Council at its 3145th meeting, on December 3, 1992 (visited Feb. 6, 2000) *reprinted* at <gopher://gopher.undp.org:70/00/undocs/scd/scouncil/s92/69>. The language of the Kosovo declarations implied only that the Security Council might authorize that “all necessary means” be taken in Kosovo at some stage in the future.

26. SC Res. 1239 adopted by the Security Council at its 4003rd meeting, May 14, 1999 (visited Feb. 6, 2000) *reprinted* at <http://www.nato.int/kosovo/docu/u990514a.htm>.

27. *Id.*

28. SC Res. 1244, adopted by the Security Council at its 4011th meeting, June 10, 1999 (visited Feb. 6, 2000) *reprinted* at <http://www.nato.int/kosovo/docu/u990610a.htm>.

29. *Id.* ¶ 5.

30. U.N. CHARTER, Article 52, ¶ 1.

31. *Id.*

32. U.N. CHARTER, Article 53, ¶ 1.

Thus, the explicit exceptions in the United Nations Charter do not apply to Kosovo. Is this the end of the story? No. Other provisions of the United Nations Charter implicitly permit the use of force under certain limited circumstances. This implicit grant of authority can be said to apply to Kosovo.

By its very terms the Charter does not prohibit all threats or uses of force. Article 2(4) prohibits force against the "territorial integrity or political independence of any state . . ." We need to look closely at these words. As interpreted in treaties and diplomatic history, "territorial integrity" refers not to the "territory of a state" but to the "integrity of the territory."³³ An essential condition of this integrity is the maintenance of certain standards of administration on the territory, including the protection of fundamental human rights norms. Forfeiture of that duty of maintenance opens the door for intervention.³⁴ Humanitarian intervention in such a case falls below the threshold set in Article 2(4) since the intervenors do not seek to deprive the state of its integrity but, rather, to enhance it.³⁵ Alternatively, intervention in such cases could be justified on a "waiver" theory. Under this theory, governments that commit violations of human rights forfeit any claims against intervention by others for the protections normally offered by sovereignty.³⁶

These arguments are in line with modern conceptions of sovereignty. The doctrine of human rights restricts the ability of states to do what it will with their own citizens. Also, sovereignty refers not only to state borders, but also to *political* sovereignty, that is, the ability of people within those borders to effect choices regarding how they should be governed and by whom.³⁷ Those who threaten that ability (be they internal or external in origin) violate the

33. See ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECTS* 56-72 (rev. ed. 1995).

34. A somewhat more extreme view is that governments who abuse the human rights of their citizens are in fact criminal in nature. Just as criminals lose their right to participate in the self-determination of their state, so does a government. Consequently, if a government can be viewed as criminal, it then becomes permissible for other states to take on the role of "policemen" and act to end the violations of human rights. Michael J. Smith, *Humanitarian Intervention: An Overview of the Ethical Issues*, in *ETHICS AND INTERNATIONAL AFFAIRS*, 271-295, 286 (Joel H. Rosenthal, ed. 2nd. ed. 1999), drawing heavily upon MICHAEL WALTZER, *JUST AND UNJUST WARS* (New York, 1977).

35. MURPHY, *HUMANITARIAN INTERVENTION*, *supra* note 19, at 71 (paraphrasing but not agreeing with the argument of W. Michael Reisman in *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167, 177 (R. Lillich, ed., 1973)). *Contra* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 265 (1963) (arguing from a review of *travaux preparatoires* for the United Nations Charter that the phrase "territorial integrity" was added to the Charter A COMMENTARY 117 (B. Simma, ed., 1994).

36. See W. MICHAEL REISMAN, *NULLITY AND REVISION* 844 (1971); See also Mitchell A. Meyers, *A Defense of Unilateral or Multi-Lateral Intervention Where a Violation of International Human Rights Law by a State Constitutes an Implied Waiver of Sovereignty*, 3 *ILSA J. INT'L & COMP. L.* 895 (1997).

37. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT'L L.* 866, 872 (1990).

sovereignty of the people.³⁸ Accordingly, when another state intervenes to protect human rights in such circumstances, it is not violating a principle of sovereignty, but instead bolstering it.³⁹

A more complete reading of the United Nations Charter further supports the use of humanitarian intervention in Kosovo-like situations. Here, I will suggest four points. First, the United Nations Charter advances central principles that could not be protected in Kosovo without intervention. The most central purpose of the organization is the maintenance of international peace and security.⁴⁰ International peace and security means more than the absence of war, there is a human rights element that must be remembered. Human rights violations short of all-out war also constitute major breaches of peace and security.⁴¹ In situations such as Kosovo, peace and security cannot be said to exist so long as the state is free to commit gross and systemic human rights abuses against its own people.

Second, Article 1 of the United Nations Charter includes, as a central purpose, development of "respect for the principle of equal rights and self-determination of peoples . . ."⁴² Also included as a central purpose is "encouraging respect for human rights and for fundamental freedoms without distinction as to race, sex, language, or religion . . ."⁴³ Self-determination does not mean the ability of all groups of people to make their own state, but rather the ability to participate in one's government and enjoy basic human rights.⁴⁴

38. See CHRISTIAN TOMUSCHAT, *MODERN LAW OF SELF-DETERMINATION* 229 (1993).

39. Reisman, *Sovereignty and Human Rights*, *supra* note 39, at 872.

40. U.N. CHARTER, Article 1, ¶ 1.

41. The United Nations Security Council has recognized that "non-military sources of instability in the economic, social, humanitarian, and ecological fields have become threats to peace and security." See U.N. SCOR, 47th Sess., 3046th mtg. at 143, U.N. Doc. S/PV.3046 (1992).

42. U.N. CHARTER, Art. 1, ¶ 2.

43. U.N. CHARTER, Art. 1, ¶ 3. See also U.N. CHARTER Art. 55.

44. Article 1(2) states that the basic purpose of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . ." Article 55 ties the principle of self-determination to respect for human rights. See *supra* note 44-45. The principles of self-determination are also found in the International Covenant on Economic, Social & Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967) ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue economic, social, and cultural development." *Id.* at Article 1); the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (same wording); the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) ("All peoples have the right freely to determine, without external interference, their political status and pursue their economic, social, and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter."). For an exhaustive collection of documents related to self-determination see DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS (Hurst Hannum ed., 1993).

The prohibition on the use of force in Article 2(4) does not rule out the use of force designed to the central goals of the United Nations. Where, as in Kosovo, a government flouts respect for the principles of equal rights and self-determination and violates the most basic human rights and fundamental freedoms of individuals, the use of force may be the only way to see the goals of the United Nations upheld.

Third, humanitarian intervention may be required or permitted under the human rights provisions of the United Nations Charter.⁴⁵ Specifically, Articles 55 and 56 of the United Nations Charter implore "all Members [to] pledge themselves to take joint action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all"⁴⁶ The international community has an interest in the protection of human rights of all people, regardless of state borders.⁴⁷ Where, as in Kosovo, a state is incapable of protecting human rights or is itself the perpetrator, the use of force on human rights grounds, that is, humanitarian intervention, may be the only solution. The grounds for intervention are particularly strong where the case at hand concerns allegations

45. Commentators supporting this view include: FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 173-74 (2d ed., 1997); Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 *STAN. J. INT'L L.* 547 (1987); ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT*, *supra* note 35, at 226; Michael J. LeVitin, *The Law of Force and the Force of Law: Grenada, the Falklands and Humanitarian Intervention*, 27 *HARV. INT'L L. J.* 621 (1986); Richard Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 231-32 (J.N. Moore ed., 1974); Richard Lillich, *Intervention to Protect Human Rights*, 15 *MCGILL L.J.* 205 (1969); Myres S. McDougal & W. Michael Reisman, *Responses by Professors McDougal and Reisman*, 3 *INT'L LAW* 438 (1969).

46. Paul Szasz argues that the provision "in cooperation with the organization" can only refer to actions that the United Nations undertakes itself, not actions that certain Members undertake where the United Nations is not taking any action. (Private correspondence with author, July 1999). The author is in agreement, however she would read both "taking action" and "in cooperation" broadly to include acts undertaken by states which are consistent with overall goals of the United Nations.

47. See Louis B. Sohn, *The New International Law: The Protection of Rights of Individuals Rather Than States*, 32 *AM. U. L. REV.* 1 (1982).

of genocide,⁴⁸ crimes against humanity,⁴⁹ and certain war crimes⁵⁰ subject to universal jurisdiction and responsibility.⁵¹

The final argument supporting NATO action in Kosovo rests on the United Nation's own failure to act. If the United Nations were functioning as it was intended, unilateral intervention would not be needed. Yet, because the United Nations system has failed to function properly as a collective body addressing human rights and other security concerns, states retain the right to act unilaterally.⁵² Article 43 of the Charter envisioned the creation of a system

48. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951. [hereinafter *Genocide Convention*] The Genocide Convention defines genocide as:

[A]cts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Id. at Art. II. See also LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY (1981).

49. Crimes against humanity are defined as:

"[C]rimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated . . ."

"Charter of the International Military Tribunal (IMT)," in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280. See also Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (1999).

50. See the Geneva Convention, Articles 1, 3, 13-16 and 23-24 (applying to attacks on and treatment of both internationals and co-nationals) and Articles 146-147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

51. Henry T. King, Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 53-4 (Winter 1999).

52. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985). The question as to the extent to which the United Nations Charter affects the doctrine of humanitarian intervention that existed prior to the adoption of the United Nations Charter is the subject of a more expanded analysis. For centuries, sovereigns have claimed a right to unilateral humanitarian intervention in the affairs of another if the subjects were being grossly mistreated. See Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the United Nations Charter*, 4 CAL. W. INT'L L.J. 203, 214 (1974). Considerable debate exists as to the extent of acceptance of the doctrine of unilateral humanitarian intervention at the time of the drafting of the United Nations Charter, and the impact of the Charter that doctrine. Cf. Richard Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L. J. 205, 210 (1969) with Wil D. Verwey, *Humanitarian Intervention Under International Law*, 32(3) NETH. L. REV. 357 (1985). Professor Lauterpacht conflicted himself as to whether the doctrine of humanitarian intervention has ever become part of customary international law. Cf. L. OPPENHEIM, INTERNATIONAL LAW 312 (H. Lauterpacht 8th ed. 1955) ("There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its nationals according to its discretion. But

whereby states would make available to the Security Council, "on its call and in accordance with a special agreement or agreement, armed forces, assistance and facilities . . . necessary for the purpose of maintaining international peace and security."⁵³ These agreements were to be "negotiated as soon as possible by the Security Council."⁵⁴ To this date, no such agreements have been negotiated. Article 106 of the Charter envisioned the creation of "transitional security arrangements" whereby signatories to the Charter could undertake joint action to maintain peace and security as stop-gap measures until the signing of Article 43 agreements. The NATO action could be seen as one such stop-gap measure.⁵⁵ All of the arguments, taken together, provide an international legal basis for the decision to use force in Kosovo. The next problem is whether the means of intervention in Kosovo was appropriate. Did the intervention itself violate international humanitarian norms?

The most fundamental principle of the law of war is that combatants must be distinguished from noncombatants and military objectives from protected property or protected places (i.e. civilian, cultural, and religious property and places).⁵⁶ To this end, the 1977 Geneva Protocol I Additional to the Geneva Conventions of 1949 (Protocol I) protects civilians from "indiscriminate attacks."⁵⁷ Attacks are considered indiscriminate when they are "not directed

there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.") with H. Lautherpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 46 (1946) ("The doctrine of humanitarian intervention has never become a fully acknowledged part of positive international law.").

53. U.N. CHARTER, Art. 43, ¶ 1.

54. U.N. CHARTER, Art. 43, ¶ 3.

55. The argument for intervention by states due to the failures of the United Nations is not without precedent. Enforcement actions by the Security Council have almost always been impossible owing to permanent member veto power. To circumvent this problem during the Korean crisis in 1950, the General Assembly exercised its own powers reserved under Articles 10-11 and 14 to address "general problems in the maintenance of peace and security" and to "recommend measures for peaceful adjustment of any situation." Specifically, the General Assembly adopted the Charter by the Uniting for Peace Resolution, which provides that:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of breach of the peace or act of aggression the use of armed force when necessary to maintain or restore international peace and security.

GA Res. 377A(V) November 3, 1950.

56. See Protocol I, Article 48. See also U.S. ARMY, OPERATIONAL LAW HANDBOOK (2000) 5-5.

57. Protocol I, Article 51(4).

against a specific military objective,"⁵⁸ "employ a method and means of combat the effects of which cannot be directed at a specific military objective,"⁵⁹ or "employ a method or means of combat the effects of which cannot be limited as required" by the protocol (e.g., attacks that may cause the "release of dangerous forces"⁶⁰ or collateral damage "excessive in relation to the concrete and direct military advantage anticipated."⁶¹)

Whether NATO can justify its actions in accordance with these requirements remains to be seen. Grave concerns are raised by the number of accidental attacks on non-military targets due to the planes flying at high altitudes where verification of targets was impossible.⁶² Clearly, the bombing was designed in order to avoid *any* allied casualties. To do so entailed a greater risk that civilians would be hit. It is not within the spirit of the Geneva Convention IV and Protocol I to increase disproportionately the risk to civilians to avoid casualties of your own military.⁶³ Collateral damage to civilians is permitted. But should all the damage to civilians be considered "collateral"?

Particularly troubling is the choice of targets in the NATO campaign and the adequacy of its efforts to limit civilian casualties.⁶⁴ United States Secretary of Defense, William S. Cohen, stated at the outset of the NATO campaign, "We are attacking the military infrastructure that President Milosevic and his forces are using to repress and kill people. NATO forces are not attacking the people of Yugoslavia."⁶⁵ Nonetheless, in the third week of the bombing, NATO forces began to target electrical facilities in Serbia power, depriving much the civilian population of electricity.⁶⁶ NATO also targeted the factories and other property belonging to supporters of Yugoslav President Slobodan Milosevic, Yugoslav television and radio stations, bridges, and civilian cars.⁶⁷ All of these targets

58. *Id.* ¶ (a).

59. *Id.* ¶ (b).

60. Protocol I, Article 56.

61. Protocol I, Article 51(5)(b).

62. For example, on April 12, NATO bombed a civilian passenger train that was crossing a bridge and on April 14, NATO attacked civilian refugee vehicles in Kosovo. See Michael Dobbs, Karl Vick, *Scores of Refugees Killed on Road; NATO Says Jets Aimed at Military*, WASHINGTON POST FOREIGN SERVICE, April 15, 1999, at A01.

63. One could not kill 1,000 Serbian or Albanian civilians in order to save one allied pilot. This would violate the principle of proportionality. The author is in debt to Paul Szasz for this point.

64. See generally Human Rights Watch, Select Chronology of NATO Attacks, March 24-May 7, 1999 (visited Feb. 6, 2000) <<http://www.hrw.org/campaigns/kosovo98/index.shtml>>.

65. *DOD News Briefing*, (March 24, 1999) (visited Feb. 6, 2000) <http://www.defenselink.mil/news/Mar1999/t03241999_t0324sd.html>.

66. Philip Bennett and Steve Coll, *NATO Warplanes Jolt Yugoslav Power Grid*, WASHINGTON POST, May 25, 1999 at A1.

67. Human Rights Watch identified these incidents in a letter stating its concerns under international law to United Nations Secretary General Javier Solana. The text of the letter is available on the Web at (visited Feb. 6, 2000) <<http://www.hrw.org/hrw/campaigns/kosovo98/solana.shtml>>.

may be considered a “dual-use” object, that is, the military as well as civilians may use them. Under Protocol I, these may be legitimately targeted only if, by their nature, location, purpose, and use, they make an “effective contribution to military action” and their capture, neutralization, or destruction, “in the circumstances ruling at the time, offers a definitive military advantage.”⁶⁸ Whether all of the targets fulfill these criteria is open to question.⁶⁹

It is unclear whether the targets chosen all made an effective contribution to Serbia’s military action. The media targets, to take one difficult example, were instrumental in spreading propaganda throughout Serbia and, by making Serbs feel like victims, the media made it easier for them to justify being perpetrators.⁷⁰ However, unlike the case of Rwanda, where the media disseminated directions for committing the genocide, the media in Serbia did not disseminate military instructions. The Serb media was not as clearly related to Serbia’s military actions.⁷¹

Some targets appear to have been chosen *because of* their impact on civilians. Protocol I prohibits targets intended to “spread terror among the civilian population.”⁷² If the main purpose of targeting the media, one of the most visible pillars of Serb society, was to spread terror among civilians, the targeting of the media was against international law. Similarly, if the purpose of targeting the electrical grid was to demoralize and terrorize the civilian population and not to achieve a concrete military objective, that target was impermissible. Statements made by allied forces during the air campaign seem to support the notion that these and other targets were chosen and deemed effective because of their psychological impact on civilians.

A word on the electrical grid: NATO’s attacks on Serbia’s electrical grid was likely to have had a severe impact on civilians in exchange for limited military utility. NATO knew this. Modern military such as Yugoslavia’s have back-up generators.⁷³ Thus, the attacks on civilian electrical transformers was likely to have little impact on the country’s ability to wage war. The targeting of the electrical transformers was also suspect under Article 54 of Protocol I,

68. Protocol I, Article 52(2).

69. See Raju G.C. Thomas, *NATO and International Law*, (and in particular part (6)) (visited Feb. 6, 2000) <<http://www.jurist.law.pitt.edu/thomas.htm>>.

70. This thesis is developed in JULIE MERTUS, *KOSOVO; HOW MYTHS AND TRUTHS STARTED A WAR* (1999).

71. Hurst Hannum has made this argument. See Chat with International Law Professor Hurst Hannum, *Is NATO Crossing the Line?* (ABC News World, May 14, 1999) (visited Feb. 6, 2000) <http://www.abcnews.go.com/sections/world/DailyNews/chat_hannum990514.html>.

72. See Protocol I, Article 51(2).

73. Human Rights Watch identified this issue in a letter stating its concerns under international law to United Nations Secretary General Javier Solana. The text of the letter is available on the Web at (visited at February 6, 2000) <<http://www.hrw.org/hrw/campaigns/kosovo98/solana.shtml>>.

which prohibits the destruction of objects that are indispensable to the survival of the civilian population. Electrical transformers are an indispensable object for modern societies such as Serbia.

Aside from pointing to specific bombing targets, the overall course of the NATO bombing and specific actions undertaken should be examined under the principle of proportionality.⁷⁴ The concept of proportionality requires an ends-oriented assessment. "The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained."⁷⁵ Should military planners be able to realize their goals without loss of civilian life, they should change their course of action accordingly. Throughout the bombing campaign, the principle of proportionality required NATO to undertake action designed to elicit some permissible objective. To the extent that the bombing campaign was viewed as necessary for ending human rights abuses and returning deported civilians, the action was within the scope of international law. Unavoidable and unplanned damage to civilian targets incurred while attacking legitimate military targets could be termed permissible "collateral damage." Yet, the action became questionable when it became apparent that the bombing was not effectively advancing military objectives and the impact of the bombing was one felt mainly by Serb civilians. NATO refused even to threaten the use of ground troops, which potentially meant an indefinite continuation of the bombing. When it became clear that the chosen military means were poorly related to the desired ends, the means should have been changed, that is, either ground troops should have been introduced along with the bombing or the bombing should have been halted and other means employed.

In summary, a close reading of the United Nations Charter supports the decision to intervene in cases like Kosovo. While the explicit Charter provisions permitting force do not appear to be applicable to the intervention in Kosovo, the Charter may be read as implicitly permitting such actions. The strongest justifications for humanitarian intervention in Kosovo are linked to affirmative human rights concerns, subject to substantive and procedural limitations. While the intervention in Kosovo was initially within the limits of international law, it also appears that the bombing campaign eventually strayed outside those limits.

74. See generally J. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

75. OPERATIONAL LAW HANDBOOK, *supra* note 58, at 5-4. (emphasis in original). See also McDougal & Feliciano, *Conditions and the Expectation of Necessity*, in LAW AND MINIMUM WORLD PUBLIC ORDER 240 (1961). See also Article 57 of Protocol I Additional to the 1949 Geneva Conventions (Protocol I).