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RECONSIDERING THE LEGALITY OF HUMANITARIAN INTERVENTION: LESSONS FROM KOSOVO

JULIE MERTUS*

For nearly ten years, human rights advocates tried to focus public attention on Kosovo. They issued report after report of gross and systemic human rights abuses in the troubled region. Nearly all of the reports detailed crimes committed by Serb civilians and Serb police against Albanian civilians.\(^1\) They warned of escalating violence and impending forced deportations, and implored intergovernmental organizations and individual countries to take preventative action.\(^2\) International policymakers had overwhelming evidence that the pressure in Kosovo was mounting and that an even greater human rights disaster loomed near.\(^3\) Yet they treated the warnings as those of the boy who cried "wolf." Without the "wolf" of all-out war, inter-

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national leaders failed to treat Kosovo seriously. Indeed, international leaders failed to treat the Kosovo situation seriously even after many Albanians grew impatient with their campaign of “passive resistance” to Serb aggression and instead supported a new tactic of armed resistance. This situation became even more drastic at the end of 1997 when the Kosovo Liberation Army (KLA) was at the vanguard of armed resistance. Still, international leaders failed to take preventative action. Even after the hot spring of 1998, when Serb forces killed fifty-one members of an Albanian family in retaliation for KLA provocation, and after the summer of 1998, when Serb forces began a scorched-earth policy of destroying whole villages, international leaders obstinately refused to take effective action. Indeed, even after the Milosevic regime reneged on its October 1998 agreement to decrease its forces in Kosovo and instead continued attacks on civilians, murdering forty-one civilians in the village of Racak in January 1999, the international community still pre-


4. See FRIENDS OF BOSNIA, KOSOVO: WAR AND PEACE IN THE BALKANS 3 (undated factsheet).

5. See id.


tended that Kosovo was a small matter that would go away quietly.¹⁰

In March 1999, the "Contact group"—United States, Britain, France, Germany, Italy, and Russia—brought Kosovar and Serbian negotiators together in Rambouillet, France. The agreement on the table required autonomy to be restored to Kosovo, a NATO peacekeeping force to be installed, the KLA to disarm, and Milosevic to reduce his troops in Kosovo. Neither side liked the arrangement.

The agreement was unacceptable to Kosovars because it failed to require the complete withdrawal of Serbian troops and the guarantee of independence. At the same time, it was unacceptable to Serbs who refused to give up Kosovo and to permit the presence of an armed international military force. NATO threatened both sides: Kosovars would be cut off from any international support if they failed to sign and Serbia would be bombed if they failed to sign. Kosovars eventually signed the agreement, but Serbia refused. Then, on March 23, 1999, NATO war planes commenced military air operations and missile strikes in Yugoslavia. Suddenly, Kosovo was a lead story in every media outlet.¹¹ Kosovo finally came into focus, but the optic was blurred. In a rush to "do the right thing" or just "do anything" many human rights advocates, like the diplomats and pundits they criticized, started to get sloppy. They accepted a false slate of diametrically opposed choices—intervention or no intervention; protection of Serbian sovereignty or denial of Serbian sovereignty—without questioning what each choice actually meant under international law and without listening to the reasons proffered by the intervenors themselves.

Renowned human rights advocates, such as Czech President Vaclav Havel, offered human rights rationales for NATO's actions. Havel claimed that the alliance "acted out of respect for human rights" and that the war was "probably the first war that has not been waged in the name of 'national interests,' but rather the name of principle and values."\(^{12}\) If only this were true, the legitimacy of actions in Kosovo would be much clearer. The Clinton Administration considered but refused to base its actions in Kosovo solely on humanitarian grounds. Instead, the Clinton Administration, like other international leaders who have intervened in nation-states in the past,\(^{13}\) offered an array of justifications. Although humanitarian concerns were included "because we care about saving innocent lives,"\(^ {14}\) they were rolled together with other factors, most prominently: (1) the need for regional stabilization, or in Clinton’s words, "because our children need and deserve a peaceful, stable, free Europe";\(^ {15}\) (2) national security concerns relating to a long war and a large refugee flow, "because we have an interest in avoiding an even crueler and costlier war";\(^ {16}\) and (3) the need to protect NATO's reputation, because looking the other way "would discredit NATO, the cornerstone on which our security has rested for 50 years."\(^ {17}\) As Clinton explained these factors to the nation in his first public address on NATO intervention in Kosovo, he emphasized America’s economic and security concerns, not humanitarianism:

> [I]f America is going to be prosperous and secure, we need a Europe that is prosperous, secure undivided and free . . . . That is why I have supported the political and economic unification of Europe. That is why we brought Poland, Hungary

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13. Sean Murphy’s review of incidents of intervention demonstrates that “government officials of the intervening state (rightly or wrongly) based the legality of that state’s action on one or more other reasons.” See SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 85 (1996).


15. Id.

16. Id.

17. Id.
and the Czech Republic into NATO, and redefined its missions. . . .

In the Administration's announcements, White House spokesmen also stressed that "NATO had to address the problem [in Kosovo] now because a failure to act would have destroyed its credibility."19

Dr. Javier Solana, Secretary-General of NATO, similarly offered an array of extralegal justifications for NATO intervention in Kosovo. In his first address after the onset of NATO bombing, Solana emphasized more clearly than had President Clinton that NATO's "objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo."20 At the same time, Solana stated that the military action was necessary to "prevent instability spreading in the region"21 and to "support the political aims of the international community."22 Specifically, he characterized NATO's efforts as "support[ing] international efforts to secure Yugoslav agreement to an interim political settlement."23 This latter justification—the use of force to coerce a political leader to sign an agreement—clearly was extralegal. Indeed, 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. . . ."24 Thus, under the 1969 Vienna Convention, 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.25

18. Id.
21. Id.
22. Id.
23. Id.
25. Serbia did make a counteroffer. Although the proposal would have rejected the presence of NATO troops in Kosovo, it would have permitted the presence of other unarmed internationals. For the text of the proposal, see Rambouillet (visited Apr. 1, 2000) <http://www.jurist.law.pitt.edu/kosovo.htm#Rambouillet>.
By failing to specify clearly the legal parameters of their actions, the NATO allies exposed themselves to criticism suggesting that NATO was not operating under any legal grounds at all. Critics who argue that a humanitarian and human rights disaster did not exist in Kosovo before NATO attacks are wrong on the facts, however. By the time NATO began bombing, Kosovo Albanians had faced more than ten years of intense human rights violations under the boot of Serb forces. In the summer of 1998 alone, attacking Yugoslav and Serb paramilitary forces shelled an estimated three hundred thousand Kosovo Albanians out of their homes. Thus, contrary to the critics’ factual contentions, the wealth of information on gross and systemic human rights abuses in Kosovo prior to the NATO bombing provided sufficient evidence of a human rights basis for intervention. Nonetheless, many of the same critics point to

27. See Robert Hayden, Humanitarian Hypocrisy (visited Apr. 1, 2000) <http://www.jurist.law.pitt.edu/hayden.htm>. Hayden claims that “the wide Serbian offensive against Kosovo Albanians began after NATO’s attacks began.” Id. Though the Serbian all-out war against the Albanians commenced after NATO bombing, the nine years of intense Serbian harassment of Albanians provided the crux of NATO’s humanitarian argument, not the postbombing deportations and murders. Hayden contends further that “Yugoslav forces, until NATO attacks on them commenced, were fighting a guerrilla force, in much the same way that American forces had fought in Vietnam.” Id. Setting aside disputes regarding America’s actions in Vietnam and the validity of these actions, Hayden’s statements ignore the wealth of documentation that Yugoslav forces, Serbian police, and paramilitary troops were directly targeting civilians in Kosovo. For example, Physicians for Human Rights concluded, after extensive study, that:

Serb forces have engaged in a systematic and brutal campaign to forcibly expel the ethnic Albanian population of Kosovo throughout the province. In the course of these mass deportations, and over the past year in Kosovo, Serb forces have committed widespread violations of human rights against ethnic Albanians including: killings, beatings, torture, sexual assault, separation and disappearances, shootings, looting and destruction of property, and violations of medical neutrality.

valid legal concerns about the extensive list of various justifications for intervention that contained many questionable items, most notably, the desire to use force to coerce the signing of an agreement or the use of force to protect one's own reputation or the reputation of friends.30

Some champions of intervention openly acknowledged the illegality of the air strikes, but claimed moral legitimacy for such actions.31 Straying from legal justifications, however, the risks delegitimized international law and dismantled the gains of human rights advocates over the past decade. International law generally, and human rights law specifically, are most influential when communities perceive their terms as legitimate and fair.32 Legitimacy is central to the enforcement of human rights.33 Accordingly, only human rights processes and bodies perceived as legitimate will be taken seriously, and only states perceived as legitimate can enforce human rights norms successfully.34 As Thomas Franck explains:

In a community organized around rules, compliance is secured—to whatever degree it is—at least in part by perception of a rule as legitimate by those to whom it is addressed .... [P]erception of legitimacy ... becomes a crucial

30. See generally Hayden, supra note 27 (examining the hypocrisy of NATO humanitarian intervention); Thomas, supra note 26 (outlining the key violations of international law NATO committed).


factor . . . in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms.\footnote{Thomas M. Franck, \textit{Legitimacy in the International System}, 82 AM. J. INT'L L. 705, 706 (1988).}

Ad hoc justifications for the use of force, or the failure to use force, render the resulting actions and inactions indeterminate, and thus open to criticism as illegitimate.\footnote{\textit{See FRANCK, POWER}, supra note 32, at 50-66.} Whenever a political leader announces numerous and conflicting justifications for intervention, the determinacy of rules on the use of force are undermined and the status of the entire field of international law suffers.

At the same time, determinacy of rules alone does not necessarily comport with justice. Franck terms blind compliance with simple rules, "idiot rules," when the very simplicity of the rules leads to injustice, incoherence, and absurdity upon consistent application.\footnote{\textit{See id.} at 67-83.} To be perceived as legitimate and fair, the rules and their application must comport with notions of justice. In other words, a rule must be deemed just at both a substantive and a procedural level. If the principle of nonintervention becomes an oversimplified "idiot rule" that cannot be applied fairly to all circumstances, international leaders must articulate rules more in concert with principles of justice and fairness. At the very least, in order to be considered both legitimate and fair, the process by which decisions on intervention are made should be transparent, accountable, and open to participation from interested groups.\footnote{Today, these norms are recognized as essential elements of several areas of international law and practice. \textit{See Karen Ann Widess, Implementing Democratization: What Role for International Organizations?}, 91 AM. SOC'Y INT'L. PROC. 356, 360 (1997) (remarks of Gregory H. Fox).} In the Kosovo context, international leaders not only failed to base their decision to intervene in international law, they also failed to make their decision in a transparent, accountable, and open process.\footnote{This point is elaborated further in Julie Mertus, \textit{Doing Democracy Differently}, THIRD WORLD LEGAL STUD. (forthcoming 2000).}

This Essay argues for reconsideration of the justifications for humanitarian intervention grounded in the most basic source of
international law—the United Nations Charter. Some commentators have argued for "new law" or for an "emerging norm" that would permit humanitarian intervention. This is not necessary; existing law offers ample support for assessing the legality of the NATO intervention in Serbia proper and Kosovo. A close reading of the U.N. Charter supports humanitarian intervention in Kosovo-like situations—that is, in cases in which an outside alliance acts unilaterally to redress human rights violations committed by the regime of a third state. In such a scenario, the only legitimate reasons for undertaking humanitarian intervention are linked to affirmative human rights concerns. Further, the means of such intervention must be strictly limited by humanitarian law. The failure to give due attention to these justifications and limitations chips away at the legitimacy of international law.

This Essay is divided into two parts. Part I reads carefully the provisions of the U.N. Charter in order to set forth the legal conditions for intervention in Kosovo-like situations. It explains why the explicit Charter provisions pertaining to lawful use of force are not likely to be applicable in these cases. Intervention can be justified instead through reference to other U.N. Charter provisions that implicitly permit the use of force on limited grounds. This Essay examines provisions of the Charter largely overlooked in the humanitarian intervention debate—the "hu-

41. "Serbia proper" refers to the territory known as Serbia, without the formerly autonomous provinces of Vojvodinja and Kosovo. "Kosovo" refers to the area that was an autonomous province of Serbia under the last legal constitution for Yugoslavia, the Yugoslavia Constitution of 1974.
42. This Essay accepts the definition of humanitarian intervention offered by Professors Franck and Rodley: "The theory of intervention on the ground of humanity is properly that which recognizes the right of one state to exercise an international control by military force over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity." Thomas M. Franck & Nigel S. Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, 67 AM. J. INT'L L. 275, 277 n.12 (1973). Excluded from this definition, and from this Essay, are nonmilitary forms of intervention. This Essay also does not discuss humanitarian intervention for the protection of one's own citizens abroad, even though such intervention would be included in Franck and Rodley's definition. For a discussion of the latter, see N. RONZITI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY (1985).
man rights provisions"—and suggests a way to add greater legitimacy and coherence to the Charter by reading it as a whole, thereby relinking human rights to the use of force and sovereignty provisions.

Part II suggests substantive and procedural safeguards on the ability to use humanitarian intervention to ensure that, far from being the Pandora's box that critics envisioned, application of the doctrine can enhance the legitimacy of international law. This Essay concludes that in the case of Kosovo, serious questions remain as to whether these safeguards were followed.

I. RECONSIDERING HUMANITARIAN INTERVENTION UNDER THE U.N. CHARTER

The legal debate over humanitarian intervention in Kosovo has been posed as a tension between two competing principles: respect for the "territorial integrity" and "political independence" of states and the guarantees for human rights and "self-determination." As such, the debate implicates two competing purposes for the United Nations: ensuring "national sovereignty and maintenance of peace" versus ensuring human


44. 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, The University of Georgia School of Law, Georgia Society of International & Comparative Law Banquet (April 8, 1999) (speech on file with author).


46. Commentators who argue against humanitarian intervention tend to support the side of the debate advocating for the prevention of all transboundary uses of force. See, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 301 (1963) (stating that forcible intervention is unlawful and explaining that foreign interests abroad are not always a sufficient reason to intervene); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 117 (Bruno Simma ed., 1995) [hereinafter CHARTER]; Louis Henkin, The Use of Force: Law and U.S. Policy, in RIGHT V.
rights protection across and within state borders.\textsuperscript{47} This framing of the issue, however, obfuscates the real questions at hand. As this Essay explains, the principles of territorial integrity and human rights need not conflict; to the contrary, they complement one another. Indeed, "territorial integrity" cannot exist without human rights, and the realization of human rights can support the integrity of a territory.\textsuperscript{48}

The central focus for humanitarian intervention thus should not rest on the issue of "territorial integrity," but instead, should lie within the parameters set for the "use of force" by international law. As one leading treatise on the U.N. Charter observes, "[n]either legal writings nor state practice have so far clarified these terms [of the U.N. Charter pertaining to use of force] beyond doubt."\textsuperscript{49} At the outset, military action for humanitarian reasons appears to contradict the U.N. Charter's goal of promoting peaceful dispute settlement.\textsuperscript{50} The U.N. Charter is replete with references to peaceful cooperation in solving problems. For example, Article 2(3) flatly declares that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are


\textsuperscript{48} The main opponent to this view, Louis Henkin, counters: "Clearly 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." Henkin, supra note 46, at 61.

\textsuperscript{49} CHARTER, supra note 46, at 111-12 (footnotes omitted).

not endangered."51 The traditional methods of pacific settlement in international law are negotiation, inquiry, mediation, and conciliation.52 Through the use of these methods, international law encourages the use of any and all peaceful methods to avoid the use of force.

Of course, peaceful methods do not always work, and therefore it is important to determine when, if ever, there exists any legal basis for military intervention on humanitarian grounds. At face value, the words of the U.N. Charter appear to disfavor intervention, the opponents of which argue that intervention is susceptible to misuse53 and that what a state does within its own borders is largely its own business.54 To support their claim, these anti-interventionists point to the first part of Article 2(4) of the U.N. Charter, which declares that "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ."55 They also rely heavily on Article 2(7), which states that "[n]othing contained in the present Charter shall authorize

51. U.N. CHARTER art. 2, para. 3.
52. See J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (3d ed. 1998); see also U.N. CHARTER arts. 33-38.
53. See Robin A. Cooper, The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?, 78 AM. SOCY INT'L L. PROC. 68, 69-70 (remarking on the possible misuse of intervention as indicated by Domingo E. Acevedo); Barry M. Benjamin, Note, Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities, 16 FORDHAM INT'L L.J. 120, 147-48 (1992-1993) ("Any 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."); see also MYRES S. MCDouGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 416 (1961) (likening a policy of individual initiative to one of self-defense, both of which are susceptible to abuse); Oscar Schachter, The Right of States to Use Armed Force, 82 MICH. L. REV. 1620, 1638-41 (1984) (explaining collective self-defense and, in particular, American intervention).
54. Contemporary scholars rarely advance this argument so starkly. For a critique of this notion, see Reisman, supra note 34, at 869 (commenting on the old concept of "within the domestic jurisdiction of any state").
55. U.N. CHARTER art. 2, para. 4. This provision is self-executing because it does not require a state to do anything; it simply prohibits the commission of certain acts.
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. Together, the Charter provisions and subsequent interpretations of the use of force provisions initially appear to provide nearly an ironclad prohibition against intervention.

The Charter's prohibition against intervention, however, is not as strict as it may appear from a cursory reading of these articles. For instance, Articles 2(4) and 2(7) are subject to three explicit Charter exceptions. In addition, several arguments can be offered to show that the U.N. Charter permits, and even mandates, the use of force in limited circumstances. The following section first examines the application of express Charter provisions to Kosovo-like scenarios and then turns to the

56. U.N. CHARTER art. 2, para. 7.
57. The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty provides that:

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

Charter's implicit endorsement of intervention in limited circumstances.

A. Lawful Use of Force Expressly Recognized by the U.N. Charter

The U.N. Charter recognizes three main exceptions to the prohibition on the use of force. As we will see, however, none of the exceptions appear to apply to humanitarian intervention in Kosovo. First, under the U.N. Charter, states may act in self-defense. Specifically, article 51 of the Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." The term "inherent right" is significant because it refers to the customary right of self-defense that predates the Charter. This customary right of self-defense, which arguably includes anticipatory self-defense, was not negotiated away with the signing of the Charter. Thus, "rather than artificially limiting a State’s right of self-defense—it is better to conform to historically accepted criteria for the lawful use of force—including circumstances that exist outside the ‘four corners’ of the Charter."

Yet, 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 own states. The self-proclaimed Albanian Kosovo has never been recognized as a state, and the NATO countries un-

58. U.N. CHARTER art. 51.
62. See MURPHY, supra note 13, at 139.
The related doctrine of "collective self-defense" also would have to be stretched to apply to Kosovo. As the U.S. Army Operational Law Handbook explains, "to constitute a legitimate act of collective self-defense, all conditions for the exercise of an individual State's right of self-defense must be met—with the additional requirement that assistance is requested." The assistance in Kosovo could be seen as requested by Kosovars, but this explanation is inadequate because, once again, the Albanian state of Kosovo is not recognized internationally. The request for assistance must come from a recognized state or de jure government. This was not the case with respect to the intervention in Kosovo, and therefore the related doctrine of "collective self-defense" does not apply.

A second exception to the general ban on the use of force is Security Council enforcement actions under Chapter VII of the Charter. According to Article 24(1), the Security Council has "primary responsibility for the maintenance of international peace and security." The Security Council is authorized under Article 39 to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . ." The Council may then "decide what measures not involving the use of armed force are to be employed to give effect to its decisions." If these other measures have not been effective, "it may take such action by air, sea, or land forces as may be necessary

63. OPERATIONAL LAW HANDBOOK, supra note 61, at 2-5.
64. See id.
65. See U.N. CHARTER art. 2, para. 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 measures under Chapter VII.").
66. Id. art. 24, para. 1.
67. Id. art. 39.
68. Id. art. 41.
to maintain or restore international peace and security." Further, under Articles 25 and 2(5), all U.N. members are required "to accept and carry out the decisions of the Security Council" if such decisions are "clear and unequivocal," and are prohibited from aiding states with whom "the United Nations is taking preventive or enforcement action" respectively.

By definition, the Security Council enforcement actions are limited by the obvious requirement that the Security Council act. In the Kosovo conflict, the U.N. Security Council adopted three main resolutions prior to the NATO bombing. First, in March 1998, the Council issued Resolution 1160, in which it imposed an arms embargo on both parties and called upon the Federal Republic of Yugoslavia (FRY) and the leadership of Kosovo Albanians to enter into meaningful dialogue for a peaceful settlement of internal strife. It stated that "failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures." After the situation deteriorated over the summer, the Security Council adopted Resolution 1199, which found the existence of "a threat to peace and security in the region" and enjoined the FRY to certain actions, including ceasing "all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression." Again, 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." The

69. Id. art. 42.
70. Id. art. 25.
71. See Cooper, supra note 53, at 71 (remarks of Domingo E. Acevedo).
72. U.N. CHARTER art. 2, para. 5.
74. Id. para. 19.
76. Id.
77. Id. para. 4(a).
78. Id. para. 16.
concrete measures demanded in the resolution were never fulfilled. Nonetheless, the Security Council failed to consider a subsequent resolution clearly authorizing the use of force against the FRY, as it was clear that Russia and China would veto such a measure.  

After Richard Holbrooke brokered a deal with the FRY for the Organization for Security and Cooperation in Europe (OSCE) to establish a verifying mission in Kosovo, and NATO reached an agreement with FRY that would permit it to complement the OSCE mission with an air verification mission, the Security Council acted again. In Resolution 1203, adopted on October 24, 1998, it endorsed the OSCE and NATO agreements with FRY, demanded once more that FRY comply with the conditions set forth in Resolution 1199, and again affirmed that the situation in Kosovo posed a threat to the peace and security of the region. It would be a strain, however, to contend that any Security Council resolution authorized or approved of the use of force under any of these resolutions.

In contrast to Kosovo, the Security Council explicitly authorized NATO troops in Bosnia. Security Council Resolution 1031 authorized member states “acting through or in cooperation with [NATO] . . . to establish a multinational implementation force (IFOR) under unified command and control . . . .” Such direct authorization was absent from the Kosovo resolutions. Moreover, the Kosovo resolutions did not contain the type of indirect language that has been deemed to constitute adequate authorization for the legal use of force. The Security Council did not, as it did in Resolution 678 with respect to Kuwait, authorize mem-

79. See Simma, supra note 31. As Paul Szasz 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 from Paul Szasz to Julie Mertus (July 25, 1999) (on file with author).


ber states to use "all necessary means" to enforce previous Security Council resolutions or, as in the case of Resolution 794 for Somalia, authorize member states to use "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations..." The language of the Kosovo declarations implied only that the Security Council might authorize taking "all necessary means" in Kosovo at some stage in the future. That the Security Council failed to do so supports the argument that it contemplated, but rejected, such steps, not the argument that authorization ever materialized.

The argument that the Security Council implicitly authorized the NATO action in Kosovo ex post also finds little support in the facts at hand. The U.S. State Department attempted to portray the U.N. and NATO as working in synergy on Kosovo, in Strobe Talbott's words: "pool[ing]...energies and strengths on behalf of an urgent common cause." Talbott further claimed that "the U.N. has lent its political and moral authority to the Kosovo effort." This is an overstatement. Although the Council in Resolution 1203 expressly welcomed and endorsed NATO involvement in the OSCE verification mission, it did not give a green light to NATO's subsequent use of force in Kosovo. On the contrary, Russia and China consistently made clear that they would not support such actions. "[I]n light of this," Bruno Simma observed, "the view that the positive reception by the Council of the results of NATO threats of force could be read as an authorization of such force granted implicitly ex post is untenable."

The interrelatedness of NATO and U.N. actions over Kosovo prior to the NATO bombing might have indicated some degree of "synergy," but it did not fulfill the Chapter VII authorization requirement.

84. Id. para. 10.
86. Simma, supra note 31, ¶ 35 (quoting U.S. Secretary of State Strobe Talbott).
87. Id.
88. Id.
After the NATO bombing commenced, the Security Council had at least two opportunities to approve of the NATO intervention ex post. On May 14, 1999, at the height of the NATO bombing, the Security Council issued Resolution 1239. This resolution neither supported nor condemned the NATO bombing. On the contrary, the resolution was drafted carefully, at the behest of the Russians, so as to not give any ex post facto approval. It noted “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 reaffirmed the territorial integrity and sovereignty of all States in the region.

At the conclusion of the NATO campaign, the Council issued Resolution 1244. Although this resolution decided “on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required,” 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. Accordingly, 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 . . .” Regional arrangements may undertake any action in this regard that is “consistent with the Purposes and Principles of the United Nations.” One could argue,

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90. The author is indebted to Paul Szasz for this point.
91. S.C. Res. 1239, supra note 89.
93. Id. ¶ 5.
94. U.N. CHARTER art. 52, para. 1.
95. Id.
as Jordan Paust does, that “NATO is such a regional arrangement and NATO actions in the FRY are consistent with the serving of peace, security, self-determination, and human rights.”\textsuperscript{96} Nonetheless, collective self-defense treaties, such as the North Atlantic Treaty—the basis for NATO—do not provide an independent legal basis for the use of force; a legal basis for engaging in force still must be established from other sources of international law extrinsic to these treaties.\textsuperscript{97} If NATO actions are deemed to go beyond collective self-defense and are viewed as “regional enforcement actions” under Chapter VIII, they are invalid without prior or, in the very least, ex post Security Council authorization.\textsuperscript{98} Therefore, although regional arrangements such as NATO hold great promise in promoting peace and justice,\textsuperscript{99} the Security Council remains the key institution for determining whether and when enforcement actions are to be carried out.\textsuperscript{100}

Some commentators contend that, given its essentially “defensive nature,”\textsuperscript{101} NATO is not a “regional organization” capable of

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\item \textsuperscript{96} Jordan J. Paust, NATO’s Use of Force in Yugoslavia, 2 TRANSLEX: TRANSNAT’L L. EXCHANGE 3 (Special Supp. May 1999).
\item \textsuperscript{97} See OPERATIONAL LAW HANDBOOK, supra note 61, at 2-5.
\item \textsuperscript{98} See U.N. CHARTER art. 53, para. 1.
\item \textsuperscript{100} Jordan Paust argues that NATO action was not impermissible under Article 53 of the Charter because the Security Council was veto-deadlocked with respect to its ability to make decisions on enforcement actions. He explains that “[w]hen the Council is veto-deadlocked, it is unable to decide on measures ‘to give effect to its decisions’ (within Articles 41-42) or to decide on ‘action required to carry out’ its decisions (within Article 48).” Paust, supra note 96, at 3. Paust also contends that by majority vote, the Security Council should be able to provide authorization for regional action “even though, or especially because, such action is not ‘enforcement action under its authority.’” Id. This author declines to adopt either of these arguments, finding the argument under Article 106 of the U.N. Charter more persuasive.
\item \textsuperscript{101} See MURPHY, supra note 13, at 340 (“The North Atlantic Treaty Alliance, however, is structured as only a defensive alliance and has not been regarded by its members as a regional agency under Chapter VIII.”) NATO’s self-conception, however, has been changing. See Ivo H. Daalder, Brookings Institution, NATO, the UN, and the Use of Force (last modified Mar. 1999) <http://www.unausa.org/issues/sc/daalder.htm>.
\end{itemize}
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undertaking "enforcement actions" under Chapter VIII.\textsuperscript{102} Under this argument, the requirement of Security Council authorization would still apply, but the requirement itself would be based not on Chapter VIII, but on Chapter VII of the Charter. The distinction is without consequence in the case of the NATO action in Kosovo. Because the Security Council gave neither an express nor an implied ex post authorization for the action, the NATO action in Kosovo cannot be said to fall within either the Chapter VII or Chapter VIII exceptions.\textsuperscript{103}

B. Lawful Use of Force Implicitly Permitted Under the U.N. Charter

Although it would be a stretch to argue that the express provisions of the U.N. Charter permitting force apply to Kosovo, at least four interrelated arguments can be made that the U.N. Charter implicitly permits, or even mandates, the use of force in the case of Kosovo.

1. Use of Force as Not Violating "Territorial Integrity" or "Political Independence"

By its very terms, the Charter does not prohibit all threats or uses of force; the kind of force and intervention\textsuperscript{104} it does prohibit is inapplicable to the Kosovo scenario. Article 2(4) prohibits force against the "territorial integrity or political independence of any state ...\textsuperscript{105} Under the traditional concept of sovereignty, "even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its 'invasion' of the sovereign's domaine réservé."\textsuperscript{106} Embracing this traditional concept of sovereignty, however, requires accep-

\textsuperscript{102} See, e.g., Simma, supra note 31.
\textsuperscript{103} See supra notes 89-100 and accompanying text.
\textsuperscript{104} This Essay speaks alternatively of "use of force" and "intervention," using the common understanding of "use of force" as one form of intervention. This is not to assert that "use of force" and "intervention" are identical under the U.N. Charter. The U.N. Charter refers to "threat or use of force" by states in Article 2.4 and "intervention" prohibited to the United Nations in Article 2.7. See U.N. CHARTER arts. 2.4, 2.7.
\textsuperscript{105} U.N. CHARTER art. 2, para. 4.
\textsuperscript{106} Reisman, supra note 34, at 869.
tance of a limited conception of sovereignty that renders superfluous modern developments in international law concerning the interpretation of the core purposes of the U.N. Charter. The modern doctrine of human rights, which restricts the ability of states to mistreat its own citizens, would be equally impermissible under the traditional concept of sovereignty. Any intervention by outside states that would restrict the sovereign's ability to do as it pleases would come in direct conflict with this conception of sovereignty and, thus, would constitute unlawful intervention. This strict definition of sovereignty contradicts the modern understandings of both sovereignty and "territorial integrity."

One modern understanding of sovereignty refers not only to state borders, but also to political sovereignty—that is, to the ability of people within those borders to affect choices regarding how they should be governed and by whom. Those who threaten that ability, be they internal or external in origin, violate the sovereignty of the people. Accordingly, when another state intervenes to protect human rights in such circumstances, it is not violating a principle of sovereignty. Rather, it is liberating a principle of sovereignty. This kind of intervention, which could be termed "self-determination assistance," finds support in the numerous international instruments that recognize a right to self-determination, including Articles 1 and 55 of the U.N. Charter. The 1970 Declaration on Principles of International Law

107. See id. at 868-69.
109. Reisman, supra note 34, at 872.
110. Paust, supra note 96, at 3.
Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations observes that "[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination" and that "[i]n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."  Under this theory, intervention in Kosovo was permissible because it was designed to support the sovereignty rights of the peoples of Kosovo.

Another modern understanding of sovereignty maintains a focus on state borders, but stresses the various ways in which recent globalization has eroded the classical definition of sovereignty, thereby widening the parameters of permissible use of...
force under the doctrine of humanitarian intervention.\textsuperscript{114} Globalization is marked by two interrelated tendencies: the restructuring of the world economy on a regional and global scale through the agency of the transnational corporation and financial markets from above, and the rise of transnational social forces and transboundary networks\textsuperscript{115} concerned with environmental protection, human rights, and peace and human security from below.\textsuperscript{116} Numerous international institutions now exist to restrict the "operational sovereignty"—that is, a state's practical sovereignty, rather than its legal sovereignty—of states, including the International Monetary Fund and the World Trade Organization.\textsuperscript{117}


\textsuperscript{117} See RICHARD FALK, \textit{LAW IN AN EMERGING GLOBAL VILLAGE: A POST-}
Moreover, a growing number of international bodies now exist to restrict the "legal sovereignty" of states, such as the International Court of Justice, the International Criminal Court, and the various treaty-monitoring mechanisms of the U.N.\textsuperscript{118} In today's geopolitical climate, what happens to citizens inside particular state borders has become the business of other states and strict notions of sovereignty have begun to erode concomitantly.\textsuperscript{119} The efforts of nongovernmental and governmental organizations to provide humanitarian assistance and protection in the face of government opposition has also served to circumvent state sovereignty.\textsuperscript{120} Similarly, the new roles played by NATO, OSCE, and other international arrangements in response to the Kosovo crisis can be characterized as further evidence of this erosion in state sovereignty.\textsuperscript{121} Binaifer Nowrojee noted that the slow, but evident, waning of an absolute position on sovereignty "is leading to an emerging right, and perhaps even duty, for states to intervene on humanitarian grounds."\textsuperscript{122}

The modern understanding of territorial integrity also supports humanitarian intervention. As interpreted in treaties and diplomatic history, territorial integrity refers not to the territory of a state, but to the integrity of the territory.\textsuperscript{123} An essential condition of this integrity is the maintenance of certain standards of administration on the territory, including the protection of funda-


\textsuperscript{120} See Arnison, supra note 114, at 203-04.

\textsuperscript{121} Another view of sovereignty holds that its position is largely untenable for logical reasons. By definition, a sovereign power should be the supreme power, and in that sense it should operate vertically. If all states are to be considered sovereign powers, however, then the logic falters, for not one state will be the supreme, at least not in any legal sense. In this manner, it may be inevitable that the concept of sovereignty be eclipsed, because the nature of our global society is more horizontal than vertical. See Jarat Chopra & Thomas G. Weiss, Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention, 6 Ethics & Int'l Aff. 95, 106 (1992).

\textsuperscript{122} See Nowrojee, supra note 119, at 129.

\textsuperscript{123} See D'Amato, supra note 47, at 56-72.
mental human rights norms. Forfeiture of that duty of maintenance opens the door for intervention.\textsuperscript{124} Humanitarian intervention in such a case falls below the threshold set in Article 2(4) because the intervenors do not seek to deprive the state of its integrity; instead, they seek to enhance it.\textsuperscript{125} Intervention in cases like Kosovo may result in a loss of state control over some of its territory, but the loss of control is the result of the underlying gross and systemic human rights abuses, and not the result of an intervention designed "against territorial integrity."\textsuperscript{126}

Alternatively, intervention could be justified on a waiver theory. Under this theory, governments that commit violations of human rights are said to waive any claims to the protections normally offered by sovereignty against intervention by others because sovereignty is contingent upon compliance with international legal obligations.\textsuperscript{127} According to Fernando Tesón: "We have created the institution of state sovereignty to provide a shield for groups of individuals to organize themselves freely in political communities. . . . When human rights are instead violated, delinquent governments forfeit the protection afforded by article 2(4)."\textsuperscript{128} The waiver theory would permit humanitarian intervention in situations where states admittedly have violated Article 2(4).

\textsuperscript{124} 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 to act to end the violations of human rights. \textit{See} Michael J. Smith, \textit{Humanitarian Intervention: An Overview of the Ethical Issues}, in \textit{ETHICS AND INTERNATIONAL AFFAIRS} 271, 286 (Joel H. Rosenthal ed., 2d ed. 1999) (drawing heavily upon \textit{MICHAEL WALZER, JUST AND UNJUST WARS} (1977)).

\textsuperscript{125} \textit{See} \textit{MURPHY, supra} note 13, at 71 (paraphrasing, but not agreeing with, Michael Reisman's argument in \textit{Humanitarian Intervention to Protect the Ibos, supra} note 47, at 177). \textit{But see} Brownlie, \textit{infra} note 179 (arguing from a review of \textit{travaux preparatories} for the U.N. Charter that the phrase "territorial integrity" was added to the Charter).

\textsuperscript{126} \textit{See} \textit{TESÓN, supra} note 47 at 173.


\textsuperscript{128} \textit{TESÓN, supra} note 47, at 174.
It is paradoxical that the Milosevic government, which flagrantly disregarded the sovereignty of the internationally recognized states of Croatia and Bosnia-Herzegovina, is now claiming its sovereign rights. A regime built and sustained by intense human rights violations, such as the one led by Slobodan Milosevic in Belgrade, is not entitled to make claims of territorial integrity. Any state like Serbia “that is oppressive and violates the autonomy and integrity of its subjects forfeits its moral claim to full sovereignty.” Indeed, the Milosevic regime abrogated its own claims to territorial independence once it illegally deprived Kosovo of its autonomous statutes in 1989 and began its campaign of repression.

Additionally, the Milosevic-led regime cannot assert with authority the claim that NATO intervention violates its political independence. Intervention in violation of political independence refers—in Richard Lillich’s terms—to “those coercive measures designed to maintain or alter the political situation in another state.” With respect to Kosovo, Anthony D’Amato has observed that “[t]he NATO bombing [was] not directed against the political independence of the Federal Republic of Yugoslavia (clause 2 [of Article 2(4)], for there [was] no attempt to takeover its government; indeed, NATO [kept] trying to negotiate with its government.” While the FRY is likely to lose control over all or part of Kosovo, this will be the result of its own human rights violations and not because the NATO intervention was directed against the political independence of FRY.
2. Intervention Consistent with the Purposes of the United Nations

The U.N. Charter advances central principles that could not be protected in Kosovo without intervention. It is the principles of the Charter and not merely the letters of its provisions to which states should endeavor to conform. As Article 2(4) states, members of the United Nations are prohibited from acting "in any other manner inconsistent with the Purposes of the United Nations." It would seem, therefore, that interventions consistent "with the Purposes of the United Nations" are permitted.

The central purposes of the U.N. are set forth in Article 1 of the U.N. Charter. Humanitarian intervention in the case of Kosovo furthers perhaps the most central purpose of the organization—namely, the maintenance of international peace and security. Indeed, international peace and security must mean more than the absence of an internationally recognized war; human rights violations short of all-out war also constitute major breaches of peace and security. 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.

Other central purposes of the United Nations, also noted in Article 1 of the Charter, include developing "respect for the principle of equal rights and self-determination of peoples" and "encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." These articles appear to confirm the view that

137. U.N. Charter art. 2, para. 4.
138. Id.
139. See id. art. 1, para. 1.
141. U.N. Charter art. 1, para. 2.
142. Id. art. 1, para. 3; see also id. art. 55(c) (stating that the U.N. shall promote "universal respect for, and observance of, human rights and fundamental freedoms
people are rights-bearing entities and therefore it is appropriate
that states are the vehicles that should be held accountable for
the protection of those rights. The prohibition on the use of
force in Article 2(4) does not rule out intervention designed to
promote these goals. 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 free-
doms of individuals, intervention may be the only way to ensure
that the central goals of the United Nations are upheld.


A related argument contends that the U.N. Charter not only
permits intervention on humanitarian grounds, it requires it in
cases of gross and systemic human rights abuses. Articles 55
and 56 of the U.N. Charter implore "[a]ll Members [to] pledge
themselves to take joint . . . action in cooperation with the Orga-
nization for the achievement of . . . universal respect for, and
observance of, human rights and fundamental freedoms for all . . . ." As a first step, in 1948 the General Assembly
approved the Universal Declaration of Human Rights, which
declares that "recognition of the inherent dignity and of the equal
and inalienable rights of all members of the human family is the
foundation of freedom, justice and peace in the world."

for all without distinction as to race, sex, language or religion.

143. See Louis B. Sohn, The New International Law: Protection of the Rights of
Individuals Rather than States, 32 AM. U. L. REV. 1, 12 (1982). See generally LOUIS
B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS
(1973) (collecting many of the primary documents governing human rights, as well
as materials analyzing the same).

144. Commentators supporting this view include: D'AMATO, supra note 47 at 39;
TESON, supra note 47; Michael J. Bazyler, Reexamining the Doctrine of Humanitarian
Intervention in Light of the Atrocities in Kampuchea and Ethiopia, 23 STAN. J. INT'L
L. 547 (1987); 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); Rich-
ard B. Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for
Constructive Alternatives, in LAW AND CIVIL WAR IN THE MODERN WORLD 229, 231-
32 (John Norton Moore ed., 1974); Lillich, supra note 132; Myres S. McDougal & W.
Michael Reisman, Response by Professors McDougal and Reisman, 3 INT'L LAW. 438

145. U.N. CHARTER arts. 55(c), 56.
that date, the General Assembly and other regional and international bodies have adopted a host of human rights instruments.\textsuperscript{147} As Louis Sohn has argued, these instruments represent an authoritative interpretation of the U.N. Charter's human rights provisions.\textsuperscript{148}

As human rights have gained acceptance, the notion of state sovereignty has lost further ground.\textsuperscript{149} The internationalization of human rights suggests that the treatment of citizens within a state is a subject of international concern and no longer a matter of exclusive domestic jurisdiction.\textsuperscript{150} In other words, the international community has an interest in the protection of human rights of all people, regardless of state borders. Article 2(7) of the U.N. Charter, which prohibits intervention in the internal affairs of a state, thus cannot be said to apply to human rights violations.\textsuperscript{151} Where, as in Kosovo, a state is incapable of protect-

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\footnote{148. \textit{See Sohn, supra} note 143, at 8.}
\footnote{150. \textit{See Sohn & Buerenthal, supra} note 143, at 587-93, 672-89 (discussing the origin of domestic jurisdiction, as well as the need to intervene in matters that are traditionally within a state's domestic jurisdiction).}
\footnote{151. \textit{Cf.} Burns H. Weston, \textit{Human Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION} 14, 17-21 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992) (examining the definition of human rights and arguing that the U.N. charter is not clear about how human rights are to be viewed and protected).}
ing human rights or is itself the perpetrator, humanitarian intervention may be the only solution.

The right to life, which is included in all main human rights instruments, includes the right to emergency assistance and to protection from gross and systemic human rights abuses. 152 The trend in recent years has been toward the development and improvement of human rights monitoring and enforcement mechanisms. 153 If the target state is a party to any of the relevant human rights conventions, or if the human right can be said to be customary international law applicable to all states, humanitarian intervention can be grounded or categorized as a means of enforcing these obligations on behalf of the victims. 154 Matters concerning genocide, 155 crimes against humanity, 156 and

152. See generally JAIME ORÁA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992) (reexamining the emergent principles governing these human rights and the governing multilateral treaties).


154. This point, like many in this Essay, is not free from controversy. This suggests that individuals are third parties possessing rights under human rights treaties, thereby warranting state action for violations.

155. See Genocide Convention, supra note 147. The Genocide Convention, Article II defines genocide as:

   [A]cts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
   1. Killing members of the group;
   2. Causing serious bodily or mental harm to members of the group;
   3. Deliberately infecting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   4. Imposing measures intended to prevent births within the group;
   5. Forcibly transferring children of the group to another group.

Id. art. II; see LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 19-56 (1981).

156. Crimes against humanity are defined as:

   [M]urder, 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 Major War Criminals of European Axis (London Agreement), Aug. 8, 1945, 3 U.S.T. 1242 (footnotes omitted); see also Beth Van Schaack, The Definition of Crimes Against Humanity: Resolving the Incoherence, 37 COLUM. J. TRANSNAT'L L. 787 (1999) (examining the evolution of the crimes against humanity
certain war crimes\textsuperscript{157} are subject to universal jurisdiction and responsibility.\textsuperscript{158} In the case of Kosovo, leaving the question of genocide to one side,\textsuperscript{159} intervention was warranted due to the egregious violations of human rights, which posed a threat to international peace and security,\textsuperscript{160} and the rapid and overwhelming forced displacement of Kosovars, which also raised matters of grave international concern.\textsuperscript{161}

The human rights grounds for intervention are particularly strong where the group targeted for human rights violations is singled out because of its "race, sex, language or religion"—the groups explicitly mentioned in the U.N. Charter and reaffirmed as especially suspect classifications in other international instruments.\textsuperscript{162} The gross and systemic human rights abuses in Kosovo


\textsuperscript{159} Kofi Annan, the U.N. Secretary-General, found evidence supporting the claim that genocide was being committed in Kosovo. According to Annan, "[t]he vicious and systematic campaign of 'ethnic cleansing' conducted by the Serbian authorities in Kosovo appears to have one aim: to expel or kill as many ethnic Albanians in Kosovo as possible, thereby denying a people of their most basic rights to life, liberty and security." Press Release, SG/SM/6949 HR/CN/898, Secretary-General Calls for Renewed Commitment in New Century to Protect Rights of Man, Woman, Child—Regardless of Ethnic, National Belonging (last modified Apr. 7, 1999) <http://www.un.org/News/Press> (type SG/SM/6949 in the press release number field) (presenting Kofi Annan, Address to the Commission on Human Rights (Apr. 7, 1999)). For the argument that genocide was occurring in Kosovo, see Holly Burkhalter, Physicians for Human Rights, Statement on Genocide in Kosovo (last modified Apr. 8, 1999) <http://www.phrusa.org/new/gen.html>.


\textsuperscript{161} The U.N. Secretary-General recognized in his "Agenda for Peace" that refugee flows and other forced displacement and massive migrations are "both sources and consequences of conflict that require the ceaseless attention and the highest priority in the efforts of the United Nations." An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping, U.N. GAOR, 47th Sess., Agenda Item 10, ¶ 13, U.N. Doc. A/47/277, S/24111 (1992).

\textsuperscript{162} See supra note 147 (citing Conventions); see also Laura A. Donner, Gender Bias in Drafting International Discrimination Conventions: The 1979 Women's Con-
were at their core stridently racist acts. They were made possible because of dehumanization of the "other"—racism of the purest sort. Under such circumstances, intervention was particularly warranted.

4. Intervention as a Stopgap Measure

Another strong argument supporting NATO action in Kosovo rests on the U.N.'s own failure to act. If the United Nations were functioning as it was intended, unilateral intervention would be unnecessary. Yet, because the U.N. system has failed to function properly as a collective body addressing human rights and other security concerns, states retain the right to act unilaterally. The basic idea behind this argument—which Wil
Verwey has termed the "link theory"—is that U.N. member states were prepared "to accept an absolute obligation to refrain from unilateral resort to armed force on condition and presupposing that the United Nations would effectively safeguard international peace and security." The United Nations, however, never proved to be up to the task.

Institutions and mechanisms that would have warranted a state's relinquishment of its traditional rights were never established. Article 43 of the Charter envisioned a system wherein states would make available to the Security Council, "on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities . . . necessary for the purpose of maintaining international peace and security." These agreements were to be "negotiated as soon as possible on the initiative of the Security Council." Negotiations were effectively abandoned, however, by 1950.

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 stopgap measures until the signing of Article 43 agreements. As Sean Murphy notes, "while such action was authorized only

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168. U.N. Charter art. 43, para. 1.

169. Id. art. 43, para. 3.


171. See U.N. Charter art. 106.
During a transition period to allow for the conclusion of Article 43 agreements, that transition period has not yet ended. Accordingly, intervention in disputes such as Kosovo can be viewed as legitimate Article 106 collective actions undertaken only out of necessity because of failures by the United Nations.

The argument that state intervention is necessary because of the failures of the United Nations is supported by precedent. Enforcement actions by the Security Council historically have been hindered by the permanent member veto power. To circumvent this problem during the Korean crisis in 1950, however, the General Assembly exercised its own powers reserved under Articles 10, 11 and 14 to address "general principles of cooperation in the maintenance of international peace and security" and to "recommend measures for the peaceful adjustment of any situation." Specifically, the General Assembly adopted the Charter by the Uniting for Peace Resolution, which provides:

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the 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. These recommendations can include in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

172. Murphy, supra note 13, at 81.
174. See Reisman, supra note 136, at 280.
175. U.N. Charter art. 11, para. 1.
The General Assembly has in fact acted in this manner on several occasions.\textsuperscript{178} The argument for intervention in Kosovo would have been stronger if the General Assembly authorized the intervention. Nonetheless, there is a strong argument that it is permissible under Articles 106 and 43 of the Charter.

II. LIMITING PRINCIPLES

For all of the above reasons, the decision to intervene in Kosovo can be grounded firmly in the U.N. Charter. This, however, is not the end of the inquiry. For humanitarian intervention to be perceived as legitimate, further limiting principles must be applied to guard against misapplication or exploitation. In the colonial and cold war periods, the doctrine of humanitarian intervention was at times misused by strong states as a pretext for vigilante activity and for the occupation of weaker and politically disobedient countries.\textsuperscript{179} Today, more than ever before, only a few powerful states are in a position to use their economic and military power on behalf of human rights.\textsuperscript{180} Thus, the doctrine remains open to "cynical manipulation."\textsuperscript{181}

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case, however. Drawing from the U.N. Charter itself, U.N. Security Council resolutions, and other international instruments, particularly those pertaining to humanitarian law, it is possible to identify workable criteria that limit the scope of humanitarian intervention and enhance its legitimacy.182

Humanitarian intervention preferably would be carried out by the United Nations according to the provisions of the U.N. Charter, or at least through regional organizations with prior Security Council authorization.183 In light of the U.N. Charter’s goal of conflict minimalization,184 where there are treaty procedures, the relevant mechanisms should be attempted first, unless more immediate and forcible action is overwhelmingly necessary.185 Intervention should be carried out only by individual states or collective alliances if, as in Kosovo, international organizations have failed to address the human rights abuses.186 The intervening states should not have interests in the affairs of the target state beyond the human rights concerns.187 Although the motives of states will likely be mixed, at the very least those motives need to be overriding humanitarian rather than self-interested.188 Intervention need not be requested by the target state; otherwise, it would not be humanitarian intervention, but instead better char-

211, 213 (1983); Franck & Rodley, supra note 42, at 284.
183. See Bazyler, supra note 144, at 602; Fonteyne, supra note 165, at 266-67; Reisman, supra note 47, at 188.
184. U.N. CHARTER art. 2, para. 3.
185. See Fonteyne, supra note 165, at 264.
186. See Lillich, supra note 47, at 347-48; Benjamin, supra note 53, at 143.
187. See Lillich, supra note 47, at 350-51 (noting the impossibility of total disinterest).
188. See Bazyler, supra note 144, at 601-02.
acterized as humanitarian assistance. An alternative form of consent would require that the "victims of oppression must welcome the intervention" as opposed to the government of the target state. Although it is unclear exactly how such consent would be obtained, manifestations of the negative—the lack of consent—would be easier to detect.

A case for humanitarian intervention can be made when the human rights abuses are extreme and verifiable—that is, when the human rights abuses "shock the conscience." Specific circumstances warranting intervention might include "natural and human-made disasters, genocide, other large-scale human rights atrocities, and internal aggression placing large numbers of people in life-threatening danger." The case for intervention is particularly strong when the following criteria are met: (1) the abuses threaten widespread loss of human life; (2) intervention would likely avert a disaster; (3) the ongoing nature of the problem threatens the peace and security of the region; and (4) there has been a good faith attempt to use diplomatic and peaceful means of settlement. All of these factors were present in Kosovo.

189. See Anthony Clark Arend & Robert J. Beck, International Law and the Use of Force 128 (1993) ("Action must not be pursuant to the invitation by the legitimate government of the target state or done with that government's explicit consent . . . ") The crucial distinction between humanitarian assistance and humanitarian intervention is that the former is noncoercive and carried out with the consent, or at least acquiescence, of the state concerned. See Danesh Sarooshi, Humanitarian Intervention and International Humanitarian Assistance: Law and Practice, Wilton Park Paper 86, at 1 (Nov. 1993).

190. Tesón, supra note 47, at 126.

191. See id. (recognizing that tyrants often suppress popular expression).


194. With regard to the latter limitation, good faith attempts should not be per-
The only question is whether the means and method of intervention were appropriate. There is no need to come up with a new checklist of limitations for the means and methods of military intervention particular to humanitarian situations. Indeed, the laws of war already provide comprehensive restrictions. The most fundamental principle of the law of war is that combatants must be distinguished from noncombatants and military objectives distinguished from protected property or protected places, such as civilian property, cultural and religious property, and places. To this end, the 1977 Protocol Additional to the Geneva Conventions of 1949 (Protocol I) provides that "the civilian population as such, as well as individual civilians, shall not be the object of attack." Protocol I specifically prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population..." In provisions that are considered customary international law, Protocol I protects civilians from "indiscriminate attacks." Attacks are considered indiscriminate when they are "not directed at a specific military objective;" "employ a method or means of combat which cannot be directed at a specific military objective" (for example, "bombing in certain populous areas, such as a bom-

200. See OPERATIONAL LAW HANDBOOK, supra note 61, at 10-2
202. Id. art. 51, para. 4(a), 1125 U.N.T.S. at 26.
203. Id. art. 51, para. 4(b), 1125 U.N.T.S. at 26.
barding 'which treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village...');\(^{204}\) or "employ a method or means of combat the effects of which cannot be limited as required"\(^{205}\) by the protocol (for example, attacks that may cause collateral damage "excessive in relation to the concrete and direct military advantage anticipated").\(^{206}\)

In addition to limiting the choice of targets, humanitarian law limits the means of attack. Article 57 of Protocol I is of particular relevance because it requires military planners to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."\(^{207}\) Military planners must provide effective advance warning of attacks that may affect the civilian population.\(^{208}\) Whether NATO can justify its actions in accordance with these requirements remains to be seen. Grave concerns were raised by the number of accidental attacks on nonmilitary targets, due in some cases to planes flying at high altitudes where verification of targets was impossible\(^{209}\) and, in other cases, to faulty intelligence\(^{210}\) and apparent acts of negligence.\(^{211}\) Clearly,

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204. OPERATIONAL LAW HANDBOOK, supra note 61, at 5-5 (citing Protocol I, supra note 195, art. 51, para. 5(a)).


206. Id. art. 51, para. 5(a), 1125 U.N.T.S. at 26.

207. Id. art. 51, para. 2(a)(ii), 1125 U.N.T.S. at 29.


209. For example, on April 12, 1999, NATO bombed a civilian passenger train that was crossing a bridge, and on April 14, 1999, NATO attacked civilian refugee vehicles in Kosovo. See Michael Dobbs & Karl Vick, Scores of Refugees Killed on Road: NATO Says Jets Aimed at Military, WASH. POST, Apr. 15, 1999, at A1.


211. For example, the April 5, 1999 bombing of Aleksinac, a village about one hun-
the bombing was designed in order to avoid any allied casualties and 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 greatly—and, one could say, “disproportionately”—increase the risk to civilians merely to avoid casualties of your own military.\footnote{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.}

Also troubling is the choice of targets in the NATO campaign and the inadequacy of its efforts to limit civilian casualties in Kosovo.\footnote{See Human Rights Watch, \textit{NATO Urged to Respect Humanitarian Law: Inquiry into Aleksinac Bombing Demanded} (Apr. 7, 1999) \url{http://www.hrw.org/hrw/press/1999/apr/kosovo407.htm}.} U.S. Secretary of Defense William S. Cohen stated at the outset of the NATO campaign: “[NATO is] attacking the military infrastructure that President Milosevic and his forces are using to repress and kill innocent people. NATO forces are not attacking the people of Yugoslavia.”\footnote{See \textit{Human Rights Watch, Kosovo Human Rights Flash #37: Growing Concern About NATO Violating the Laws of War} (May 12, 1999) \url{http://www.hrw.org/campaigns/Kosovo98/flash6.html#37}. See generally Human Rights Watch, \textit{Select Chronology of NATO Attacks, March 24-May 7, 1999} (last modified May 18, 1999) \url{http://www.ess.uwe.ac.uk/Kosovo/Kosovo-Chronology9.html}.} Nonetheless, in the third week of the bombing, NATO forces began to target electrical facilities in Serbia proper, depriving much of the civilian population of electricity.\footnote{Secretary of Defense, William S. Cohen \& CJCS Gen. Shelton, \textit{DoD News Briefing} (Mar. 24, 1999).} 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.\footnote{See Philip Bennett \& Steve Coll, \textit{NATO Warplanes Jolt Yugoslav Power Grid}, \textit{WASH. POST}, May 25 1999, at A1.} All of these targets may be considered “dual-use” objects; that is, they may be used by the military as well as civilians. Under Protocol I, these “dual-use” objects may be legitimately targeted only if, “by their nature, location, purpose or use [they] make an effective contribution to military action,” and their capture, neutralization or destruction, “in the
circumstances ruling at the time, offers a definite military advantage."217 Whether all of the targets fulfill these criteria is open to question.218

First, it is unclear whether all the targets chosen 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 fostering a sense of Serbian victimization, made it easier for them to justify being perpetrators.219 Unlike the case of Rwanda, where the media disseminated directions for committing genocide, the media in Serbia did not disseminate military instructions.220 The Serb media was not as clearly related to Serbia's military actions.

Permissible targets do not encompass acts intended to "spread terror among the civilian population" because Protocol I prohibits these actions specifically.221 If the 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 under Portocol I. 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 under Protocol I.

Moreover, even if NATO believed that each of their targets were serving a military purpose, the target would have been forbidden if "the attack [was] expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects... which would be excessive in relation to the concrete and direct military advantage anticipated."222 This evokes the principle of proportionality.223 As embodied in Protocol I, the concept of pro-

219. See MERTUS, supra note 131, at 4.
222. Id. art. 57, para. 2(b), 1125 U.N.T.S. at 29.
223. See Judith Gail Gardam, Proportionality and Force in International Law, 87
portionality requires an ends-oriented comparative assessment: "The 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." If military planners are able to realize their goals without loss of civilian life, Protocol I suggests that they should change their course of action accordingly. Even assuming the targeting of the media was legitimate, military planners should have planned their attacks in a way that minimized civilian casualties. Yet, there is evidence to suggest that this did not happen. Indeed, Hurst Hannum has suggested that "the same result of knocking the media off the air could have been achieved by attacking transmission towers rather than the broadcasting stations in which civilians were likely to be found."

Other specific NATO targets are difficult to justify under the principle of proportionality. NATO's decision to target civilian factories owned by political associations of Milosevic, for example, does not appear to fit an ends-oriented assessment. As Human Rights Watch observed in a letter to U.N. Secretary-General Javier Solana:

Quite apart from civilian factories alleged to have served the military purpose of producing weapons or military supplies, several civilian factories seem to have been targeted simply because they were owned or operated by political cronies or supporters of Milosevic... Despite the political motivation for these attacks, the destruction of these objects seems to have offered no "concrete and direct" military advantage that might have justified the attacks under humanitarian law.

Similarly, NATO's attacks on Serbia's electrical grid were likely to have a severe impact on civilians in exchange for limited military utility. "[A] modern military such as Yugoslavia's will

224. OPERATIONAL LAW HANDBOOK, supra note 61, at 7-4 (emphasis omitted); see McDougal & Feliciano, supra note 53, at 241-44; Protocol I, supra note 197, art. 57, 1125 U.N.T.S. at 29.
225. ABCNews.com, supra note 220.
227. Id.
have back-up generators to service its military facilities, meaning that the attacks on civilian electrical transformers will have little if any lasting impact on the country's ability to wage war.\footnote{Id.} The targeting of the electrical transformers was also suspect under Article 54 of Protocol I, which prohibits the destruction of objects that are indispensable to the survival of the civilian population.\footnote{See Protocol I, supra note 197, art. 54, 1125 U.N.T.S. at 27.} Although not specifically mentioned in Protocol I, electrical transformers can be considered an indispensable object for modern societies such as Serbia, and the bombing of these transformers therefore was suspect.\footnote{See Solana Letter, supra note 208.}

Aside from pointing to specific bombing targets, the overall course of the NATO bombing can be called to task under the principle of proportionality. 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—"collateral damage"—was within the law.\footnote{While no law of war treaty defines this concept, its inherent unlawfulness is implicit in treaties referencing the concept.” OPERATIONAL LAW HANDBOOK, supra note 61, at 7-4 (indicating, however, that incidental damage does not result in a violation of international law).} Yet, the action became questionable when it became apparent that the bombing was not advancing military objectives effectively, but rather was felt mainly by Serb civilians. When it became clear that the military means chosen 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.

Accordingly, although the decision of NATO to intervene in Kosovo was legal, and the means and methods of the intervention were permissible initially, the NATO campaign, in the absence of sufficient evidence to the contrary,\footnote{NATO should be given the opportunity to provide evidence that it met the} appears to have
engaged in illicit conduct. It is ironic that after participating in flagrant violations of humanitarian law in Croatia, Bosnia, and Kosovo, the Serbs now have a claim of victimhood. In order to preserve the legitimacy of international law, any arguments of illegality in the use of force must be investigated thoroughly.

CONCLUSION

A close reading of the U.N. Charter supports humanitarian intervention in Kosovo. Although 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 and even mandating the action. Indeed, the strongest justifications for humanitarian intervention in Kosovo are linked to affirmative human rights concerns, subject to substantive and procedural limitations. Although the intervention in Kosovo was initially within the limits of international law, claims that the bombing campaign eventually strayed outside these limits warrant serious investigation. Meaningful humanitarian intervention does not threaten world order. Rather, it vindicates the fundamental principles upon which the United Nations was founded.

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