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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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1. See, e.g., HUMAN RIGHTS WATCH HELSINKI, *OPEN WOUNDS: HUMAN RIGHTS ABUSES IN KOSOVO* (1994); Human Rights Watch, *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo* (last modified Oct. 1998) <<http://www.hrw.org/reports98/kosovo/>>; *Systematic Rights Abuses Reported in Kosovo*, NEW EUROPE ON-LINE, Aug. 28, 1999, available in 1998 WL 24015766.

2. See Amnesty International, *Federal Republic of Yugoslavia: Time the Authorities Listened and Acted!* (last modified Apr. 29, 1998) <http://www.amnesty.org.uk/news/press/releases/29_april_1998-5.shtml>; Amnesty International, *Violence Sweeps Through Kosovo Province: International Effort Needed to Prevent Further Killings and Beatings* (last modified Mar. 5, 1998) <http://www.amnesty.org.uk/news/press/releases/5_march_1998-1.shtml>; International Helsinki Federation for Human Rights, *Kosovo: Time Is Running Out* (last modified Sept. 1, 1998) <[http://www.ihf-hr.org/appeals/hr.org/appeals/980830.htm](http://www.ihf-hr.org/appeals/hr.org/appeals/hr.org/appeals/980830.htm)>.

3. See Peter Humphrey, *Albanians Victims of Serbian Police*, *NEWSDAY*, June 1, 1993, available in 1993 WL 11375416; Neil King Jr., *Hague Panel May Indict Milosevic: Kosovo Killings Could Prompt Charges*, *WALL ST. J. EUR.*, Mar. 16, 1998,

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.⁴ 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,⁵ and after the summer of 1998, when Serb forces began a scorched-earth policy of destroying whole villages,⁶ 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 Kosovo⁷ and instead continued attacks on civilians,⁸ murdering forty-one civilians in the village of Racak in January 1999,⁹ the international community still pre-

available in 1998 WL-WSJE 3512577; U.S. Dep't of State, *Serbia-Montenegro Country Report on Human Rights Practices for 1996* (last modified Jan. 30, 1997) <<http://www.usis.usemb.se/human/human96/serbiamo.html>>; U.S. Dep't of State, *Serbia-Montenegro Human Rights Practices, 1995* (last modified Mar. 1996) <<http://www.usis.usemb.se/human/human95/serbiamo.htm>>.

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

5. See *id.*

6. See Human Rights Watch, *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo* (last modified Oct. 1998) <<http://www.hrw.org/reports98/kosovo/>>; see also Physicians for Human Rights, *Action Alert: Kosovo Crisis; Aid in the Balkans* (last modified Aug. 1998) <<http://www.phrusa.org/campaigns/kosovo.html>> (reporting extensively about the "intensive systematic destruction and ethnic cleansing of villages by Serb police"); Physicians for Human Rights, *Medical Group Recounts Individual Testimonies of Human Rights Abuses in Kosovo* (last modified June 24, 1998) <<http://www.phrusa.org/research/kosovo2.html>> (reporting "serious human rights violations, including detentions, arbitrary arrests, violent beatings and rape, throughout Kosovo during the past six months").

7. See Linda D. Kozaryn, *NATO Orders Air Strikes to End "Humanitarian Catastrophe"* (last modified Mar. 24, 1999) <http://www.defenselink.mil/news/Mar1999/n03241999_9903244.html>.

8. See Human Rights Watch, *Detentions and Abuse in Kosovo* (last modified Dec. 1998) <<http://www.hrw.org/reports98/kosovo2/>>.

9. See Human Rights Watch, *Human Rights Watch Investigation Finds: Yugoslav Forces Guilty of War Crimes in Racak, Kosovo* (last modified Jan. 29, 1999) <<http://www.hrw.org/hrw/press/1999/jan/yugo-prs.htm>>; see also Human Rights Watch, *A Week of Terror in Drenica* (visited Apr. 1, 2000) <<http://www.hrw.org/hrw/reports/>>

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.

1999/kosovo/> (documenting violations of international humanitarian law during the last week of September 1998).

10. See Fred Abrahams, *The West Winks at Serbian Atrocities in Kosovo*, INT'L HERALD TRIB., Aug. 5, 1998, at 6, available in 1998 WL 4793339.

11. See, e.g., Stephen Castle, *European Elections: Swing to Apathy in Every Part of Europe*, INDEPENDENT (LONDON), June 14, 1999, at 9, available in 1999 WL 15752459; Norman Harper, *Live a Moment of History*, ABERDEEN PRESS & J., May 6, 1999, at 16, available in LEXIS, News Library, Abdnpij File; R.C. Longworth, *Bridge to Brighter Future Must Span Ancient Hate*, CHI. TRIB., May 30, 1999, at 1, available in 1999 WL 2878571; *US Newspapers Roll Victory Drums in Kosovo Crisis*, AGENCE FR. PRESSE, June 4, 1999, available in 1999 WL 2615928.

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

12. Vaclav Havel, *Kosovo and the End of the Nation-State*, N.Y. REV. OF BOOKS, June 10, 1999, at 6, available in 1999 WL 9802362.

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).

14. Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 516, 518 (Mar. 24, 1999).

15. *Id.*

16. *Id.*

17. *Id.*

and the Czech Republic into NATO, and redefined its missions. . . .¹⁸

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.*

19. Jim Garamone & Linda D. Kozaryn, *NATO Attacks Serbs to Stop Kosovo Killings* (last modified Mar. 24, 1999) <http://www.defenselink.mil/news/Mar1999/n03241999_9903245.html> (quoting White House spokesman Joe Lockhart).

20. Dr. Javier Solana, *Press Statement* (last modified Mar. 23, 1999) <<http://www.nato.int/docu/pr/1999/p99-040e.htm>>.

21. *Id.*

22. *Id.*

23. *Id.*

24. Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 698.

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.²⁶ Critics who argue that a humanitarian and human rights disaster did not exist in Kosovo before NATO attacks are wrong on the facts, however.²⁷ 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.²⁸ In the summer of 1998 alone, attacking Yugoslav and Serb paramilitary forces shelled an estimated three hundred thousand Kosovo Albanians out of their homes.²⁹ 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

26. See, e.g., Raju G.C. Thomas, *NATO and International Law* (visited Apr. 1, 2000) <<http://www.jurist.law.pitt.edu/thomas.htm>>.

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.

See Physicians for Human Rights, *War Crimes in Kosovo* (last modified June 15, 1999) <<http://www.phrusa.org/new/kexec.html>>.

28. See Julie Mertus, *The Obvious Next Step-NATO Complicit in Genocide: Send Ground Troops Now*, CHI. TRIB., Apr. 1, 1999, available in 1999 WL 2859071.

29. See Julie Mertus, *International Displacement in Kosovo: The Impact on Women and Children* (last modified Apr. 21, 1999) <<http://www.law.onu.edu/organizations/international/displaced.htm>>.

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).

31. Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EUR. J. INT'L L. 23 (1999) (last modified May 11, 1999) <<http://www.ejil.org/journal/Vol10/No1/com.html>>; Hayden, *supra* note 27; Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999) (last modified Apr. 26, 1999) <<http://www.ejil.org/journal/Vol10/No1/ab1-1.html>>.

32. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) [hereinafter FRANCK, *FAIRNESS*]; THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) [hereinafter FRANCK, *POWER*]; see also Jose Alvarez, *The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations* by Thomas M. Franck, 24 N.Y.U. J. INT'L L. & POL. 199 (1991) (reviewing FRANCK, *POWER*, *supra*).

33. See Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 81-84 (1992) (asserting the notion that human rights protections are elementary to the legitimacy of states).

34. See generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990) (explaining the concept of popular sovereignty).

factor . . . in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms.³⁵

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.³⁶ 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.³⁷ 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.³⁸ 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.³⁹

This Essay argues for reconsideration of the justifications for humanitarian intervention grounded in the most basic source of

35. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988).

36. See FRANCK, POWER, *supra* note 32, at 50-66.

37. See *id.* at 67-83.

38. Today, these norms are recognized as essential elements of several areas of international law and practice. 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).

39. This point is elaborated further in Julie Mertus, *Doing Democracy Differently*, THIRD WORLD LEGAL STUD. (forthcoming 2000).

international law—the United Nations Charter. Some commentators have argued for “new law” or for an “emerging norm” that would permit humanitarian intervention.⁴⁰ This is not necessary; existing law offers ample support for assessing the legality of the NATO intervention in Serbia proper and Kosovo.⁴¹ 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.⁴² 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-

40. See, e.g., Report on Harvard Law School Panel Discussion (Apr. 23, 1999), 2 TRANSLEX: TRANSNAT'L L. EXCHANGE 5, 5 (Special Supp. May 1999).

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. RONZITTI, *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,⁴³ 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."⁴⁴ As such, the debate implicates two competing purposes for the United Nations: ensuring "national sovereignty and maintenance of peace"⁴⁵ by supporting the status quo political systems and territorial borders,⁴⁶ versus ensuring human

43. See, e.g., H. Scott Fairley, *State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box*, 10 GA. J. INT'L. & COMP. L. 29 (1980) (discussing the current legal validity of humanitarian intervention); David Schweigman, *Humanitarian Intervention Under International Law: The Strife for Humanity*, 6 LEIDEN J. INT'L L. 91, 99 (1993).

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).

45. See Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 190 (Lori Fisher Damrosch & David J. Scheffer eds., 1991) (indicating that, in drafting the U.N. Charter, human rights ranked below national sovereignty and maintenance of peace).

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.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.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."⁴⁹ At the outset, military action for humanitarian reasons appears to contradict the U.N. Charter's goal of promoting peaceful dispute settlement.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

MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 41-42 (Louis Henkin et al. eds., 2d ed. 1991); Michael Akehurst, *Humanitarian Intervention*, in INTERVENTION IN WORLD POLITICS 95, 104-07 (Hedley Bull ed., 1984); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1628-33 (1984).

47. Commentators who support humanitarian intervention stress the protection of human rights. See, e.g., ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 351-52 (1995); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 173-74 (2d ed. 1997); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 326-34 (1967); Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 167-78 (Richard B. Lillich ed., 1973).

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.

49. CHARTER, *supra* note 46, at 111-12 (footnotes omitted).

50. See U.N. CHARTER art. 2, para. 3; *id.* art. 33, para. 1; *id.* art. 38; K. Venkata Raman, *The Ways of the Peacemaker: A Study of United Nations Intermediary Assistance in the Peaceful Settlement of Disputes*, in DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS 367 (K. Venkata Roman ed., 1977).

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 states "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. SOC'Y 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. MCDUGAL & 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 state⁵⁶ The general prohibition on the use of force in Article 2(4) is supported by language in subsequent General Assembly resolutions.⁵⁷ 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. . . . [T]he 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.

G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 12, U.N. Doc. A/6014 (1965). The General Assembly affirmed this Resolution in the 1970 adoption of 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, Annex at 337, U.N. Doc. A/8028 (1970). See Antonio 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* 397 (A. Cassese ed., 1986). The International Court of Justice has not issued a definitive ruling on the merits of 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. 4, 125 (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-defence."); Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321, 327-33 (1989).

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."⁵⁸ The term "inherent right" is significant because it refers to the customary right of self-defense that predates the Charter.⁵⁹ This customary right of self-defense, which arguably includes anticipatory self-defense,⁶⁰ 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."⁶¹

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.⁶² The self-proclaimed Albanian Kosovo has never been recognized as a state, and the NATO countries un-

58. U.N. CHARTER art. 51.

59. See J.L. BRIERLY, *THE LAW OF NATIONS* 416 (Humphrey Waldo ed., 6th ed. 1963).

60. See, e.g., ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 201 (1963); MCDUGAL & FELICIANO, *supra* note 53, at 233-40. For a more restrictive view of self-defense ruling out anticipatory self-defense, see ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 230-36 (1986); MALCOLM N. SHAW, *INTERNATIONAL LAW* 790 (4th ed. 1997).

61. See *OPERATIONAL LAW HANDBOOK* 2-4 (1998) (discussing the U.S. Army's views on self-defense).

62. See MURPHY, *supra* note 13, at 139.

dertaking the intervention never were attacked or threatened with attack. Indeed, the NATO allies never have claimed that Yugoslavia threatened them with an armed attack. Thus, the self-defense exception would require an extremely expansive interpretation to apply to Kosovo.

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."⁶³ 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.⁶⁴ 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.⁶⁵ According to Article 24(1), the Security Council has "primary responsibility for the maintenance of international peace and security."⁶⁶ 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 . . ."⁶⁷ The Council may then "decide what measures not involving the use of armed force are to be employed to give effect to its decisions."⁶⁸ 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."⁶⁹ Further, under Articles 25 and 2(5), all U.N. members are required "to accept and carry out the decisions of the Security Council"⁷⁰ if such decisions are "clear and unequivocal,"⁷¹ and are prohibited from aiding states with whom "the United Nations is taking preventive or enforcement action"⁷² 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.⁷³ 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."⁷⁴ After the situation deteriorated over the summer, the Security Council adopted Resolution 1199,⁷⁵ which found the existence of "a threat to peace and security in the region"⁷⁶ 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."⁷⁷ 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."⁷⁸ 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.

73. See S.C. Res. 1160, U.N. SCOR, 3868th mtg., U.N. Doc. S/RES/1160 (1998) (adopting S.C. Res. 1160), in *Resolution 1160 (1998)* (last modified June 22, 1999) <<http://www.nato.int/kosovo/docu/u980331a.htm>>.

74. *Id.* para. 19.

75. See S.C. Res. 1199, U.N. SCOR, 3930th mtg., U.N. Doc. S/RES/1199 (1998) (adopting S.C. Res. 1199), in *Resolution 1199 (1998)* (last modified May 25, 1999) <<http://www.nato.int/kosovo/docu/u980923a.htm>>.

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.⁷⁹

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.⁸⁰ 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"⁸¹ 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,⁸² 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).

80. See S.C. Res. 1203, U.N. SCOR, 3937th mtg., U.N. Doc. S/RES/1203 (1998) (adopting S.C. Res. 1203), in *Resolution 1203 (1998)* (last modified June 22, 1999) <<http://www.nato.int/kosovo/docu/u981024a.htm>>.

81. S.C. Res. 1031, U.N. SCOR, 3607th mtg. ¶ 14, U.N. Doc. S/RES/1031 (1995), in *Resolution 1031 (1995)* (visited Apr. 1, 2000) <<http://www.un.org/Docs/scres/1995/9540526e.htm>>.

82. S.C. Res. 678, U.N. SCOR, 2963d mtg. ¶ 2, U.N. Doc. S/RES/678 (1990)

ber states to use "all necessary means" to enforce previous Security Council resolutions or, as in the case of Resolution 794 for Somalia,⁸³ authorize member states to use "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations. . . ."⁸⁴ 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.⁸⁵ 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."⁸⁶ Talbott further claimed that "the U.N. has lent its political and moral authority to the Kosovo effort."⁸⁷ 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."⁸⁸ 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.

(adopting S.C. Res. 678), in *Resolution 678 (1990)* (visited Apr. 1, 2000) <<http://www.un.org/Docs/scres/1990/678e.pdf>>.

83. S.C. Res. 794, U.N. SCOR, 3145th mtg. ¶ 2, U.N. Doc. S/RES/794 (1992).

84. *Id.* para. 10.

85. For a full analysis of all U.N. statements on Kosovo, see *Selected Documents of the United Nations Security Council Concerning Kosovo (Federal Republic of Yugoslavia)* (last modified July 13, 1999) <http://www.un.org/peace/kosovo/sc_kosovo.htm>.

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 1239.⁸⁹ 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.⁹⁰ 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. . . .⁹¹ At the conclusion of the NATO campaign, the Council issued Resolution 1244.⁹² 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,"⁹³ 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"⁹⁴ Regional arrangements may undertake any action in this regard that is "consistent with the Purposes and Principles of the United Nations."⁹⁵ One could argue,

89. S.C. Res. 1239, U.N. SCOR, 4003d mtg., U.N. Doc. S/RES/1239 (1999) (adopting S.C. Res. 1239), in *Resolution 1239 (1999)* (last modified May, 14 1999) <<http://www.un.org/Docs/scres/1999/99sc1239.htm>>.

90. The author is indebted to Paul Szasz for this point.

91. S.C. Res. 1239, *supra* note 89.

92. See S.C. Res. 1244, U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (1999) (adopting S.C. Res. 1244), in *Resolution 1244 (1999)* (last modified June 10, 1999) <<http://www.un.org/Docs/scres/1999/99sc1244.htm>>.

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."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.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.⁹⁸ Therefore, although regional arrangements such as NATO hold great promise in promoting peace and justice,⁹⁹ the Security Council remains the key institution for determining whether and when enforcement actions are to be carried out.¹⁰⁰

Some commentators contend that, given its essentially "defensive nature,"¹⁰¹ NATO is not a "regional organization" capable of

96. Jordan J. Paust, *NATO's Use of Force in Yugoslavia*, 2 TRANSLEX: TRANSNAT'L L. EXCHANGE 3 (Special Supp. May 1999).

97. See OPERATIONAL LAW HANDBOOK, *supra* note 61, at 2-5.

98. See U.N. CHARTER art. 53, para. 1.

99. See, e.g., John Norton Moore, *The Role of Regional Arrangements in the Maintenance of World Order*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT 122, 124 (Cyril E. Black & Richard A. Falk eds., 1971); Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987).

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.

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>>.

undertaking "enforcement actions" under Chapter VIII.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.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 intervention¹⁰⁴ it does prohibit is inapplicable to the Kosovo scenario. Article 2(4) prohibits force against the "territorial integrity or political independence of any state. . . ."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*."¹⁰⁶ Embracing this traditional concept of sovereignty, however, requires accep-

102. See, e.g., Simma, *supra* note 31.

103. See *supra* notes 89-100 and accompanying text.

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.

105. U.N. CHARTER art. 2, para. 4.

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.¹⁰⁷ Those who threaten that ability, be they internal or external in origin, violate the sovereignty of the people.¹⁰⁸ 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.¹⁰⁹ This kind of intervention, which could be termed "self-determination assistance,"¹¹⁰ finds support in the numerous international instruments that recognize a right to self-determination, including Articles 1 and 55 of the U.N. Charter.¹¹¹ The 1970 Declaration on Principles of International Law

107. See *id.* at 868-69.

108. See, e.g., Allan Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 225, 225-52 (Christian Tomuschat ed., 1993) (examining the distinction between external and internal self-determination).

109. Reisman, *supra* note 34, at 872.

110. Paust, *supra* note 96, at 3.

111. Article 1(2) states that the basic purpose of the U.N. is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ." U.N. CHARTER art. 1, para. 2. Article 55 ties the principle of self-determination to respect for human rights. See *id.* art. 55. The principle of self-determination is also found in the International Covenant on Economic, Social & Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, Annex 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." U.N. CHARTER art. 1, para. 1; see International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR,

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."¹¹² 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,¹¹³ thereby widening the parameters of permissible use of

21st Sess., Supp. No. 16, Annex at 52, U.N. Doc. A/6316 (1966); 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 123, U.N. Doc. A/8028 (1971) ("[A]ll peoples have the right freely to determine, without external interference, their political status and to 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).

Commentary on self-determination is extensive. See, e.g., LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); HAROLD S. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS (1967); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW (1977); MODERN LAW OF SELF-DETERMINATION, *supra* note 108; THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES (1997); NATIONAL SELF-DETERMINATION AND SECESSION (Margaret Moore ed., 1998); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE (1982); DOV RONEN, THE QUESTION FOR SELF-DETERMINATION (1979); SELF-DETERMINATION AND SELF-ADMINISTRATION: A SOURCEBOOK (Wolfgang Danspeckgruber & Arthur Watts eds., 1997) [hereinafter SOURCEBOOK]; Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COM. L.Q. 102 (1976); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971); T.M. Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3 (Catherine Brölmann et al. eds., 1993); Lung-chu Chen, *Self Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (W. Michael Reisman & Burns H. Weston eds., 1976); Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981).

112. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex at 123, U.N. Doc. A/8028 (1971).

113. See generally BETWEEN SOVEREIGNTY AND GLOBAL GOVERNANCE: THE UNITED

force under the doctrine of humanitarian intervention.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 networks¹¹⁵ concerned with environmental protection, human rights, and peace and human security from below.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.¹¹⁷

NATIONS, THE STATE AND CIVIL SOCIETY (Albert J. Paolini et al. eds., 1998) (discussing changes in sovereignty in the post Cold War era, and the United Nations' ability to deal with them); JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* (1992) (examining the impact of economic, technological, and institutional changes in sovereignty).

114. See Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, 17 FLETCHER F. WORLD AFF. 199, 203-04 (1993).

115. See Patricia Chilton, *Mechanics of Change: Social Movements, Transnational Coalitions, and the Transformation Processes in Eastern Europe*, in BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 189, 225 (Thomas Risse-Kappen ed., 1995) (explaining how "[t]ransnationalism takes account of coalitions of non-state actors across national borders"); Ronald Inglehardt, *Modernization and Postmodernization: Cultural, Economic and Political Change*, in 43 SOCIETIES 188, 188-90 (1997) (discussing the importance of organizational networks); Timothy W. Luke, *New World Order or Neo-World Orders: Power, Politics and Ideology in Informationalizing Globalities*, in GLOBAL MODERNITIES 91 (Mike Featherstone et al. eds., 1995) (discussing emerging local/global "webs"); Victor Perez-Diaz, *The Possibility of Civil Society: Traditions, Character and Challenges*, in CIVIL SOCIETY: THEORY, HISTORY, COMPARISON 80, 90 (John A. Hall ed., 1995) (noting emerging economic, social, and informational networks); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1035-50 (1996-1997) (discussing networks in international economic systems contributing to fragmentation). For an excellent case study of the impact of international networks on global politics in the context of the nuclear freeze campaign, see COALITIONS & POLITICAL MOVEMENTS: THE LESSONS OF THE NUCLEAR FREEZE (Thomas R. Rochon & David S. Meyer eds., 1997).

116. See Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. J. INT'L L. & POL'Y 1335, 1341-87 (1999); Richard A. Falk, *The Right of Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in SOURCEBOOK, *supra* note 111, at 335.

117. See RICHARD FALK, *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.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.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.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.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."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.¹²³ An essential condition of this integrity is the maintenance of certain standards of administration on the territory, including the protection of funda-

WESTPHALIAN PERSPECTIVE 60 (1998).

118. See generally THEODORE MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS (1986) (addressing some of the major human rights instruments and assessing the organs enforcing them).

119. See Binaifer Nowrojee, Recent Development, *Joining Forces: United Nations and Regional Peacekeeping—Lessons from Liberia*, 8 HARV. HUM. RTS. J. 129, 129-30 (1995).

120. See Arnison, *supra* note 114, at 203-04.

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).

122. See Nowrojee, *supra* note 119, at 129.

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.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.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."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.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)."¹²⁸ The waiver theory would permit humanitarian intervention in situations where states admittedly have violated Article 2(4).

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. See Michael J. Smith, *Humanitarian Intervention: An Overview of the Ethical Issues*, in *ETHICS AND INTERNATIONAL AFFAIRS* 271, 286 (Joel H. Rosenthal ed., 2d ed. 1999) (drawing heavily upon MICHAEL WALZER, *JUST AND UNJUST WARS* (1977)).

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

126. See TESÓN, *supra* note 47 at 173.

127. See W. MICHAEL REISMAN, NULLITY AND REVISION 666-67 (1971); see also Mitchell A. Meyers, Note, *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, 901-07 (1997), available in WESTLAW, ILSAJICL File.

128. 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.¹²⁹ 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."¹³⁰ 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.¹³¹

Additionally, the Milosevic-led regime cannot assert with authority the claim that NATO intervention violates its political independence.¹³² 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."¹³³ 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."¹³⁴ 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.¹³⁵

129. Letter from Branka Magas to Julie Mertus (Apr. 19, 1999) (on file with the *William & Mary Law Review*).

130. Smith, *supra* note 124, at 289.

131. See JULIE A. MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR (1999).

132. See Richard Falk, *Comments*, 68 AM. SOC'Y INT'L L. PROC. 192, 196-97 (1975) ("For the most fundamental postulate underlying the state system is the notion that one does not try to control political developments in foreign societies.").

133. Richard B. Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 209 (1969). But see CHARTER, *supra* note 46, at 117 ("[A]n incursion into the territory of another state constitutes an infringement of Art. 2(4), even if it is not intended to deprive that state of part of its territory . . .").

134. Anthony D'Amato, *International Law and Kosovo*, 2 TRANSLEX: TRANSNAT'L L. EXCHANGE 1, 1 (Special Supp. May 1999).

135. Jordan Paust has made a similar argument. See Paust, *supra* note 95, at 3.

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.¹³⁶ 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."¹³⁷ It would seem, therefore, that interventions consistent "with the Purposes of the United Nations" are permitted.¹³⁸

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.¹³⁹ 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.¹⁴⁰ 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"¹⁴¹ and "encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. . . ."¹⁴² These articles appear to confirm the view that

136. See W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 283-85 (1985).

137. U.N. CHARTER art. 2, para. 4.

138. *Id.*

139. See *id.* art. 1, para. 1.

140. The U.N. 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." U.N. SCOR, 47th Sess., 3046th mtg. at 143, U.N. Doc. S/PV.3046 (1992).

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.¹⁴³ 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 freedoms of individuals, intervention may be the only way to ensure that the central goals of the United Nations are upheld.

3. *Intervention Mandated Under Human Rights Provisions*

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.¹⁴⁴ Articles 55 and 56 of the U.N. Charter implore "[a]ll 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. . . ."¹⁴⁵ 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."¹⁴⁶ Since

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; TESÓN, *supra* note 47; 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); 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 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 (1969).

145. U.N. CHARTER arts. 55(c), 56.

146. G.A. Res. 217(A)(III), U.N. GAOR, 3d Sess., preamble, at 71 (1948).

that date, the General Assembly and other regional and international bodies have adopted a host of human rights instruments.¹⁴⁷ As Louis Sohn has argued, these instruments represent an authoritative interpretation of the U.N. Charter's human rights provisions.¹⁴⁸

As human rights have gained acceptance, the notion of state sovereignty has lost further ground.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.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.¹⁵¹ Where, as in Kosovo, a state is incapable of protect-

147. Some of the most important human rights instruments include: Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex at 197. See generally HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS (Winston E. Langley ed., 1992) (collecting global, rather than regional, human rights instruments).

At the 1993 U.N. World Conference on Human Rights, representatives of 171 states recognized that the human rights embodied in the U.N. Charter and in other international instruments were "beyond question." United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, ch. 1, para. 1, U.N. Doc. A/CONF.157/24 (1993), 32 I.L.M. 1661, 1664 (1993).

148. See Sohn, *supra* note 143, at 8.

149. See Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT'L L. & POL. 417 (1999); Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 279.

150. See SOHN & BUERGENTHAL, *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).

151. Cf. Burns H. Weston, *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 ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992) (reexamining the emergent principles governing these human rights and the governing multilateral treaties).

153. See Elsa Stamatopoulou, *The Development of United Nations Mechanisms for the Protection and Promotion of Human Rights*, 55 WASH. & LEE L. REV. 687, (1998).

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, ethnical, 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 inflicting 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 crimes¹⁵⁷ are subject to universal jurisdiction and responsibility.¹⁵⁸ In the case of Kosovo, leaving the question of genocide to one side,¹⁵⁹ intervention was warranted due to the egregious violations of human rights, which posed a threat to international peace and security,¹⁶⁰ and the rapid and overwhelming forced displacement of Kosovars, which also raised matters of grave international concern.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.¹⁶² The gross and systemic human rights abuses in Kosovo

concept).

157. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 1, 3, 13-16, 23-24, 6 U.S.T. 3316 (applying to attacks on and treatment of both internationals and co-nationals); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 146-47, 6 U.S.T. 3516.

158. See 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, 53-54 (1999).

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>>.

160. See U.N. SCOR, 47th Sess., 3046th mtg. at 143, U.N. Doc. S/PV.3046 (1992) (recognizing nonmilitary threats to peace).

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).

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.¹⁶³ Under such circumstances, intervention was particularly warranted.¹⁶⁴

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.¹⁶⁵ The basic idea behind this argument—which Wil

vention Compared with the 1965 Racial Convention, 24 CAL. W. INT'L L.J. 241, 248 (1994) (defining racial and gender discrimination).

163. See Julie Mertus, *Racism in Civil Conflict: Domestic and Global Dimensions* (Joseph Pearlcoyich & Michael Likosley, eds., Oxford Univ. Press forthcoming 2000).

164. The human rights mandate for intervention not only has strong legal foundations, it is grounded in moral considerations as well. Fernando Tesón has proposed that the protection and enforcement of the natural rights of its citizens is the ultimate justification for the existence of a state. See TESÓN, *supra* note 47, at 15-17; see also Richard B. Lillich, *Kant and the Current Debate over Humanitarian Intervention*, 6 J. TRANSNAT'L L. & POL'Y 397 (1997) (discussing classical western notions of intervention, morality, and sovereignty).

165. See Reisman, *supra* note 136, at 279 (discussing the role of state coercion in light of the U.N.'s failure as a security institution). The extent to which the U.N. Charter affected the doctrine of humanitarian intervention that existed prior to its adoption is the subject of a more expanded analysis. For centuries, sovereigns have claimed a right to intervene in the affairs of another state if its subjects were being grossly mistreated. See Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 214-26 (1974). Considerable debate also exists over the acceptance of the doctrine of unilateral humanitarian intervention during the drafting of the U.N. Charter, and the impact of the Charter on that doctrine. Compare Lillich, *supra* note 144, at 210-11 (arguing that the doctrine of humanitarian intervention was clearly established under customary international law, but was supplanted by the U.N. Charter), with W.D. Verwey, *Humanitarian Intervention Under International Law*, 32 NETH. INT'L L. REV. 357, 376-77 (1985) (questioning whether humanitarian intervention was ever recognized in preexisting international law). Professor Lauterpacht is conflicted as to whether the doctrine of humanitarian intervention has ever become part of customary international law. Compare 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 312 (H. Lauterpacht ed., 8th ed. 1955) ("There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substan-

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."¹⁶⁶ 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.¹⁶⁷ 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."¹⁶⁸ These agreements were to be "negotiated as soon as possible on the initiative of the Security Council."¹⁶⁹ Negotiations were effectively abandoned, however, by 1950.¹⁷⁰

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.¹⁷¹ As Sean Murphy notes, "while such action was authorized only

tial 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 human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible." (footnotes omitted)), with H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 46 (1946) ("The doctrine of humanitarian intervention has never become a fully acknowledged part of positive international law").

166. Wil D. Verwey, *Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective*, in *WORLD ORDERS IN THE MAKING: HUMANITARIAN INTERVENTION AND BEYOND* 180, 194 (Jan Nederveen Pieterse ed., 1998).

167. See Richard B. Lillich, *Forcible Self-Help Under International Law*, 22 NAVAL WAR C. REV. 56, 62 (1970) (reevaluating the U.N. Charter's prohibition on the use of force in the absence of collective security mechanisms 25 years after the Charter's adoption). But see Lillich, *supra* note 164, at 400 (noting the significant precedents for U.N.-authorized humanitarian intervention set in the 1990s).

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

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

170. See LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 317-26 (3d rev. ed. 1969).

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."¹⁷² 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.¹⁷³

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.¹⁷⁴ 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"¹⁷⁵ and to "recommend measures for the peaceful adjustment of any situation."¹⁷⁶ 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.¹⁷⁷

172. MURPHY, *supra* note 13, at 81.

173. Julius Stone has made a similar argument. See JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 94-98 (1958). On the contrary, Paul Szasz has argued that when the Security Council becomes paralyzed, "human rights are subordinated to the obligations to keep the peace." *Discussion, in THE UNITED NATIONS: A REASSESSMENT: SANCTIONS, PEACE-KEEPING, AND HUMANITARIAN ASSISTANCE* 142, 144-45 (John M. Paxman & George T. Boggs eds., 1973) (printing commentary by Mr. Paul Szasz of the Legal Office of the United Nations).

174. See Reisman, *supra* note 136, at 280.

175. U.N. CHARTER art. 11, para. 1.

176. U.N. CHARTER art. 14; see U.N. GAOR 1st Comm., 5th Sess., Annex, Agenda Item 68, at 2, U.N. Doc. A/1377 (1950).

177. G.A. Res. 377, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775

The General Assembly has in fact acted in this manner on several occasions.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.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.¹⁸⁰ Thus, the doctrine remains open to "cynical manipulation."¹⁸¹ This need not be the

(1950).

178. See G.A. Res. 498, U.N. GAOR, 5th Sess., Supp. No. 20A, at 1, U.N. Doc. A/1775/Add.1 (1951) (calling upon states to lend assistance to U.N. action in Korea); G.A. Res. 997-1002, U.N. GAOR, 1st Emergency Spec. Sess., Supp. No. 1, at 2, U.N. Doc. A/3354 (1956) (authorizing an emergency international force to secure and supervise the Suez Canal crisis); G.A. Res. 1004-1008, U.N. GAOR, 2d Emergency Spec. Sess., Supp. No. 1, at 2, U.N. Doc. A/3355 (1956) (resolving to furnish medical and food relief to Hungary); G.A. Res. 1474, U.N. GAOR, 4th Emergency Spec. Sess., Supp. No. 1, at 1, U.N. Doc. A/4510 (1960) (appealing to Members for contributions to a United Nations Fund for the Congo).

179. See, e.g., Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, 147-48 (Richard B. Lillich ed., 1973); Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291, 294 (1985). The I.C.J. warned of such abuse of humanitarian intervention by stronger countries in the *Corfu Channel Case*. See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9) ("Intervention . . . would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself").

180. See RICHARD FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 85 (1981).

181. Milner S. Ball, *Ironies of Intervention*, 13 GA. J. INT'L & COMP. L. 313, 314 (1983) ("[A] rule of non-intervention commends itself to us because the contrary rule so readily falls prey to cynical manipulation."); see also Roger S. Clark, *Humanitarian Intervention: Help to Your Friends and State Practice*, 13 GA. J. INT'L & COMP. L.

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 overridingly 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.

182. Numerous scholars have advanced criteria for limiting humanitarian intervention. See, e.g., JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* 186 (1972); Thomas E. Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157, 186-90 (1978); Fonteyne, *supra* note 165, at 258-68; Lillich, *supra* note 47, at 344-51; Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law* (pt. 1), 20 DENV. J. INT'L L. & POL'Y 305, 330 (1992); Ved P. Nanda, *The United States Action in the 1965 Dominican Crisis: Impact on World Order* (pt. 2), 44 DEN. L.J. 225, 267-74 (1967); David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 290-91 (1992); Jane M.O. Sharp, *Appeasement, Intervention and the Future of Europe*, in *MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 34, 34-55 (Lawrence Freedman ed., 1994).

183. See Bazylar, *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 Bazylar, *supra* note 144, at 601-02.

acterized as humanitarian assistance.¹⁸⁹ 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.¹⁹⁰ Although it is unclear exactly how such consent would be obtained,¹⁹¹ 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."¹⁹² 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."¹⁹³ 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.¹⁹⁴ 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) ("[A]ction 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).

192. OPPENHEIM, *supra* note 165, at 312. For a definition of "shocking the conscience," see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 & cmt. m (1987).

193. Arnison, *supra* note 114, at 208. Michael Reisman would also find legal humanitarian intervention warranted if undertaken to overthrow despotic and/or undemocratic regimes (without specific reference to human rights abuses). See W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643-44 (1984). D'Amato has made a similar argument. See Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 516 (1990). Given the great possibility that so-called "democratic interventions" could be misused for political and economic gain by the intervening state, however, interventions should not be permitted in the absence of demonstrable evidence of gross human rights abuses. See Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 649 (1984).

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.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ 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."¹⁹⁸ Protocol I specifically prohibits "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population. . . ."¹⁹⁹ In provisions that are considered customary international law,²⁰⁰ Protocol I protects civilians from "[i]ndiscriminate attacks."²⁰¹ Attacks are considered indiscriminate when they are "not directed at a specific military objective;"²⁰² "employ a method or means of combat which cannot be directed at a specific military objective"²⁰³ (for example, "bombing in certain populous areas, such as a bom-

mitted to lead to morally unjustifiable delay. See R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FLA. J. INT'L L. 435, 455-56 (1989).

195. See Tom Farer, *A Paradigm of Legitimate Intervention*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 316, 327 (Lori Fisler Damrosch ed., 1993).

196. The main sources of law for the laws of war include: The Conventions of the 1907 Hague Peace Conference, the Geneva Conventions of 1949, the 1977 Geneva Protocols, and customary international law. See DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 2d ed. 1989); Howard S. Levie, *The Laws of War and Neutrality*, in NATIONAL SECURITY LAW 307 (John Norton Moore et al. eds., 1990).

197. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 48, 1125 U.N.T.S. 3, 25 [hereinafter Protocol I]; OPERATIONAL LAW HANDBOOK, *supra* note 61, at 7-5, 7-9 to 7-10.

198. Protocol I, *supra* note 197, art. 51, para. 2, 1125 U.N.T.S. at 25.

199. *Id.*

200. See OPERATIONAL LAW HANDBOOK, *supra* note 61, at 10-2.

201. Protocol I, *supra* note 197, art. 51, para. 4, 1125 U.N.T.S. at 26.

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.

bardment '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 impossible²⁰⁹ and, in other cases, to faulty intelligence²¹⁰ and apparent acts of negligence.²¹¹ Clearly,

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

205. Protocol I, *supra* note 197, art. 51, para. 4(c), 1125 U.N.T.S. at 26.

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.

208. *See id.* art. 57, para. 2(c), 1125 U.N.T.S. at 29. Human Rights Watch has alleged that NATO failed to give adequate warning before bombing the television stations. *See* Letter from Human Rights Watch to Javier Solana, NATO Secretary General (May 13, 1999) [hereinafter Solana Letter], in *Human Rights Watch Letter to NATO Secretary General Javier Solana* (last modified May 13, 1999) <<http://www.hrw.org/hrw/campaigns/kosovo98/solana.shtml>>.

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.

210. The bombing of the Chinese Embassy in Belgrade apparently was due to faulty intelligence. *See* Steven Pearlstein, *NATO: Bombs Aimed in Error: China's Embassy Hit Instead of Supply Building*, WASH. POST, May 9, 1999, at A1; Daniel Williams, *NATO Missiles Hit Chinese Embassy: Alliance Again Pounds Belgrade*, WASH. POST, May 8, 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.²¹²

Also troubling is the choice of targets in the NATO campaign and the inadequacy of its efforts to limit civilian casualties in Kosovo.²¹³ 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.”²¹⁴ 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.²¹⁵ 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.²¹⁶ 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

dred miles south of Belgrade, apparently was due to negligence. See Human Rights Watch, *NATO Urged to Respect Humanitarian Law: Inquiry into Aleksinac Bombing Demanded* (Apr. 7, 1999) <<http://www.hrw.org/hrw/press/1999/apr/kosovo407.htm>>.

212. 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.

213. See Human Rights Watch, *Kosovo Human Rights Flash #37: Growing Concern About NATO Violating the Laws of War* (May 12, 1999) <<http://www.hrw.org/campaigns/Kosovo98/flash6.html#37>>. See generally Human Rights Watch, *Select Chronology of NATO Attacks, March 24-May 7, 1999* (last modified May 18, 1999) <<http://www.ess.uwe.ac.uk/Kosovo/Kosovo-Chronology9.html>>.

214. Secretary of Defense, William S. Cohen & CJCS Gen. Shelton, *DoD News Briefing* (Mar. 24, 1999).

215. See Philip Bennett & Steve Coll, *NATO Warplanes Jolt Yugoslav Power Grid*, WASH. POST, May 25 1999, at A1.

216. Human Rights Watch identified these incidents in a letter stating its concerns under international law to NATO Secretary-General Javier Solana. See Solana Letter, *supra* note 208.

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 Protocol 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-

217. Protocol I, *supra* note 197, art. 52, para. 2, 1125 U.N.T.S. at 27.

218. See Raju G.C. Thomas, *NATO and International Law* ¶ 6 (visited Apr. 1, 2000) <<http://www.jurist.law.pitt.edu/thomas.htm>>.

219. See MERTUS, *supra* note 131, at 4.

220. See ABCNews.com, *Is NATO Crossing the Line?: Chat with International Law Professor Hurst Hannum* (May 14, 1999) <http://www.abcnews.go.com/sections/world/DailyNews/Chat_hannum990514.html>.

221. Protocol I, *supra* note 197, art. 52, para. 2, 1125 U.N.T.S. at 26.

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."²²⁴ 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."²²⁵

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.²²⁶ 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.²²⁷

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

AM. J. INT'L L. 391, 391 (1993).

224. OPERATIONAL LAW HANDBOOK, *supra* note 61, at 7-4 (emphasis omitted); see MCDUGAL & 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.

226. See Solana Letter, *supra* note 208.

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."²²⁸ 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.²²⁹ 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.²³⁰

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.²³¹ 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,²³² appears to have

228. *Id.*

229. See Protocol I, *supra* note 197, art. 54, 1125 U.N.T.S. at 27.

230. See Solana Letter, *supra* note 208.

231. "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).

232. NATO should be given the opportunity to provide evidence that it met the

engaged in illicit conduct. It is ironic that after participating in flagrant violations of humanitarian law in Croatia, Bosnia, and Kosovo,²³³ the Serbs now have a claim of victimhood.²³⁴ 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.

proscriptions of international humanitarian law.

233. See, e.g., Human Rights Watch, *Multiple Eyewitnesses Confirm Killings Around Velika Krusa, Kosovo: Clear Policy of "Ethnic Cleansing"* (Apr. 2, 1999) <<http://www.hrw.org/hrw/press/1999/apr/kosovo402.htm>>.

234. In a suit filed before the International Court of Justice (I.C.J.) on April 29, 1999, Yugoslavia alleged, among other claims, that the NATO attack violated the Geneva Convention of 1949 and Protocol I. See *Legality of Use of Force Order* (Yugo. v. U.S.), 1999 I.C.J. 114 (June 2), available in <<http://www.icj-cji.org/icjwww/ldocket/iyus/iyusframe.htm>>. On June 2, 1999, the ICJ rejected the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia. See *id.* The Court, having found that it manifestly lacked jurisdiction to entertain the case, ordered by twelve votes to three that it be removed from the List. See *id.*