

THE LEGALITY OF NATO'S INTERVENTION IN YUGOSLAVIA IN 1999: IMPLICATIONS FOR THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

*Jeffrey S. Morton**

I.	INTRODUCTION	75
II.	THE NATO INTERVENTION	76
III.	THE LAWS OF WAR	79
	A. <i>The Historical Evolution of the Laws of War</i>	79
	B. <i>Jus ad Bellum</i>	80
	C. <i>Charter Law: Contemporary Extensions of Jus Ad Bellum</i> ...	82
IV.	YUGOSLAVIA'S CLAIMS AGAINST NATO STATES	82
V.	THE LEGALITY OF THE USE OF FORCE BY NATO DURING THE KOSOVO WAR	84
	A. <i>A Strict Application of Charter Principles Relating to the Use of Force</i>	88
	1. Self-defense and Collective Self-defense	88
	2. Security Council Authorization	89
	B. <i>A Liberal Analysis of Charter Law</i>	92
	1. Ambiguous Authorization	92
	2. The Council's Refusal to Deem NATO's Actions Illegal	93
	3. Ex Post Facto Authorization	93
	4. Regional Responses to Threats to the Peace	94
	C. <i>Extra-Charter International Law</i>	95
	1. Humanitarian Intervention	95
	2. Intervention in Response to Genocide	98
VI.	CONCLUSION	99

I. INTRODUCTION

NATO's intervention in Yugoslavia in 1999 in response to violations of human rights raises a number of legal and moral questions concerning the right

* Professor Jeffrey S. Morton received his Ph.D. from the University of South Carolina in 1995, specializing in international law. The author of *The International Law Commission of the United Nations* (University of South Carolina Press, 2000) and numerous journal articles, professor Morton is currently Associate Professor of International Law & Politics and Director of Graduate Studies in the Department of political science at Florida Atlantic University.

of states to respond to humanitarian disasters. The decision by ten NATO members to intervene without an explicit authorization from the United Nations Security Council brings to the fore several legal issues relating to the right of states to impede upon the territorial sovereignty of other states, the balance between state rights and individual rights, and the role of the Security Council in controlling the international use of force. The scholarly debate over the legality of NATO's intervention has not produced a consensus on these issues. Despite a general agreement on the historical facts involved in the case the legal community is deeply divided over the most relevant and authoritative legal principles which should be used to reach a judgement on NATO's actions. As Pellet correctly notes, the divergent legal positions taken by leading scholars reflect the different "angles" from which they analyze the same debate.¹

While a full legal account of NATO's intervention requires both an assessment of the onset of the war as well as an analysis of the conduct of NATO forces once the war had begun, the scope of this article will be limited to the right of NATO to intervene, as restricted by contemporary *jus ad bellum* legal principles. A strict application of the United Nations Charter's requirement of a Council authorization results in a conclusion that NATO's intervention in Yugoslavia constitutes a violation of international law, while an assessment of the intervention that takes into account additional Charter principles, the totality of Security Council resolutions addressing the situation in Kosovo, and non-Charter international law provides grounds for a legal justification for NATO's actions. The International Court of Justice, where cases by Yugoslavia have been filed against the states involved in the intervention, will be the final arbiter of which assessment will prevail. This article begins with an overview of NATO's intervention in 1999. Next, a review of the evolution of the laws of war is undertaken, with particular attention paid to the emergence of Charter law and its implications for the traditional laws of nations. The following section outlines the case filed by Yugoslavia against the NATO states that participated in the intervention, which leads to a legal assessment of the intervention. A conclusion section addresses the chief legal and political issues raised by the NATO intervention in Yugoslavia and its implications for the progressive development of international law.

II. THE NATO INTERVENTION

Background information on the Kosovo crisis is well documented in the literature. Kosovo gained autonomy within the state of Serbia in 1946, and this special status was confirmed in the 1974 Yugoslav Constitution. The

1. Alain Pellet, *Brief Remarks on the Unilateral Use of Force*, 11 EUR. J. INT'L L. 385 (2000).

autonomy, however, was revoked in 1989, a move justified by Serbian President Slobodan Milosevic who claimed that the Serb minority in Kosovo was at risk. Kosovo Albanians, in response, resorted to the development of parallel institutions to protect the interests of the general population of the province, along with insurrection tactics aimed at either retaining the province's lost autonomy or gaining independence from Yugoslavia.

The situation in Kosovo became more explosive after the financial and governmental collapse in neighboring Albania in 1997, after which men, materiel and arms flowed freely across the unguarded border. The Kosovo Liberation Army (KLA) capitalized on the situation by increasing its attacks on Yugoslav positions and officials. Yugoslav forces responded with large-scale attacks on KLA and ethnic Albanian positions, resulting in more than 200,000 Kosovar refugees and displaced persons in 1998 alone. Three United Nations Security Council resolutions, invoking Chapter VII of the Charter, addressed the situation in Kosovo, regretting the loss of life and qualifying the situation as a threat to regional peace and security. The Russian Federation emphasized that despite the reference to Chapter VII no use of force was contemplated,² whereas the United States announced that NATO was planning military operations to guarantee, if necessary, compliance with the terms of the resolutions.³ The military threat pushed the Belgrade government to sign two agreements. The first agreement, concluded with the OSCE, established the Kosovo Verification Mission (KVM), which was charged with monitoring compliance with Security Council Resolution 1199. The second agreement, concluded with NATO, established a NATO air surveillance mission over Kosovo and defined the main technical aspects of the operation.

A diplomatic initiative was undertaken in January of 1999, when members of the Contact Group (France, Italy, Germany, Russia, the United Kingdom, and the United States) convened negotiations between the Kosovo Albanians and the Yugoslav government to address a political framework for Kosovo's autonomy within Serbia for a three-year period, deferring a final settlement. The agreement drafted at the Rambouillet conference warned of NATO action in the event that an interim settlement was not reached. When the Kosovo representatives accepted the provisions in the Rambouillet Accord and Belgrade rejected them, NATO commenced its military campaign ostensibly to halt what Vaclav Havel, President of the Czech Republic, referred to as "...the systematic, state-directed murder of other people."⁴

2. U.N. SCOR, 53rd Sess., 3930th mtg. at 3, U.N. Doc. S/PV.3930 (1998).

3. *Id.* at 5.

4. Vaclav Havel, President of the Czech Republic, Address to the Canadian Senate and House of Commons, (Apr. 29, 1999).

On March 24, 1999, NATO launched its air attack against Yugoslavia. The 78-day attack was commenced in response to failed efforts to negotiate a political settlement of the crisis over Kosovo's autonomy and the ensuing humanitarian dilemma in the province. The NATO intervention, labeled Operation Allied Force, was undertaken with five stated non-negotiable objectives, as follows:

1. An end to the killing by Yugoslav army and police forces in Kosovo;
2. Withdrawal of those forces;
3. The deployment of a NATO-led international force;
4. The return of all refugees; and
5. A political settlement for Kosovo.⁵

On the day that the NATO bombing began, President Clinton referenced three intentions of the intervention, namely, to avert a humanitarian catastrophe, preserve stability in a key part of Europe, and maintain the credibility of NATO.⁶ In the months following the conclusion of the war, United States Secretary of Defense William Cohen and General Henry Shelton, Chairman of the Joint Chiefs of Staff, gave a joint statement before the United States Senate Armed Services Committee which outlined the following objectives of Operation Allied Force:

- 1) Demonstrate the seriousness of NATO's opposition to Belgrade's aggression in the Balkans;
- 2) Deter Yugoslav President Slobodan Milosevic from continuing and escalating his attacks on helpless civilians and create conditions to reverse his ethnic cleansing; and
- 3) Damage Serbia's capacity to wage war against Kosovo in the future or spread the war to neighbors by diminishing or degrading its ability to wage military operations.⁷

A common denominator of the three expressions of intent that underpinned NATO's decision to intervene in Yugoslavia is the objective to end Yugoslav attacks on innocent civilians. It is upon the humanitarian objective that some NATO members justified their participation in the intervention.

5. Christine Chinkin, *Kosovo: A "Good" or "Bad" War?* 93 AM. J. INT'L L. 841, 845 (1999).

6. President Bill Clinton, *Statement Confirming NATO Air Strikes on Serb Military Targets*, FED. NEWS SERVICE, Mar. 24, 1999.

7. William S. Cohen & Henry H. Shelton, *Joint Statement on Kosovo After Action Review in the US Mission to NATO*, 6 SECURITY ISSUES DIG. 2 (1999).

III. THE LAWS OF WAR

The laws that regulate the use of force in international relations date to antiquity. In contemporary times, the international laws of war were codified in a series of multilateral treaties that sought to provide specificity to the legal rights and responsibilities of combatants involved in war. Before outlining the laws that regulate nations and their combatants, a brief review of the pre-modern development of the laws of war is provided. That section is followed by an examination of the laws of war with respect to the right of nations to go to war.

A. *The Historical Evolution of the Laws of War*

Rules that regulate warfare date, at a minimum, to classical Greek times, with two documented agreements establishing limitations on recourse in time of war. The first effort is reported by the geographer Strabo, who claimed that in the course of the War of the Lelantine Plain on the island of Euboea (*circa* 700 B.C.) the parties to the conflict agreed to ban the use of projectile missiles.⁸ A second agreement, again limiting combatants in time of war, is found in the writings of the orator Aeschines, who suggests that after the First Sacred War (*circa* 600 B.C.) the victorious states swore never again to cut off besieged fellow Greeks from food or water.⁹ While the formal development of the laws of war during classical Greek times appears to be limited to these two instances, less formal rules that regulate warfare developed in the form of unwritten conventions governing interstate conflict. Chief among these rules are the necessity of a declaration of war, the binding nature of treaties during war, the respect for non-military symbols, the right to request a return of dead soldiers, restrictions on the treatment of prisoners of war, and prohibitions on the targeting of non-combatants.¹⁰

During the Age of Chivalry, the rules that regulate military behavior were influenced by the Romans, whose principal focus was the regulation of the right to go to war, which, accordingly, required justification. Stacey notes that the two central justifications for going to war were defense of frontiers and the

8. See Everett L. Wheeler, *Ephorus and the Prohibition of Missiles*, 117 *TRANSACTIONS AM. PHILOLOGICAL ASS'N*, 157 (1987).

9. JOSIAH OBER, *Classical Greek Times, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 12, 12 (Michael Howard et al., eds., 1994).

10. For a review of literature relating to the norms of warfare during classical Greek times, see also FRANK E. ADCOCK & D.J. MOSELEY, *DIPLOMACY IN ANCIENT GREECE* (St. Martin's Press 1975); YVON GARLAN, *WAR IN THE ANCIENT WORLD* (Janet Lloyd trans., W. W. Norton ed., 1975); PIERRE DUCREY, *GUERRE ET GUERRIERS DANS LA GRECE ANTIQUE* (Payot 1985); W. KENDRICK PRITCHETT, *THE GREEK STATE AT WAR* (University of California Press 1971); PETER KARAVITES, *CAPITULATIONS AND GREEK INTERSTATE RELATIONS* (Vandenhoeck and Ruprecht eds., 1982); and VICTOR D. HANSON, *THE WESTERN WAY OF WAR* (Alfred A. Knopf ed., 1989).

pacification of barbarians living beyond the frontiers.¹¹ While the Romans contributed to the development of the laws of war as they pertain to the right to initiate conflict, the rules developed during classical Greek times relating to conduct in time of war were degraded. Prisoners could be enslaved or massacred, plunder was general, and no distinction was recognized between combatants and non-combatants.

By the eleventh century, however, the distinction between combatant and non-combatant began to re-emerge.¹² Knights were regulated in their treatment of other combatants at a time when the number of combatants was increasing. By the fourteenth century, the combined effect of knightly practice and legal theory gave rise to a formal system of military law. Secular in their creation, the laws of war at the time were little influenced by a more restrictive code of conduct that emerged from the church. In some ways, the church's position on the laws of war was more advanced and restrictive than the laws that emerged from either proclamation or practice of participants. On the issue of the right to go to war, the church held that for a war to be 'just' it must be preceded by a declaration issued by a competent authority, fought for a just cause, proportional, and toward the aim of establishing a condition of peace. The church's position on the rights and duties of combatants once war had commenced was much less developed, reflecting the church's primary concern with the onset of war.

Thus, while the evolution of international law as it pertains to war can be traced to pre-modern times, the development of a system of laws designed to regulate both the occurrence and conduct of interstate war remained at a primitive stage both in theory and practice until modern times. Parker concludes that most of the modern rules concerning restraint in war did not appear before the middle of the sixteenth century.¹³ The sections that follow examine the contemporary laws of war, with reference to their post-1500 development. The review focuses on the right of states to enter into war, *jus ad bellum*, solely, as that set of laws is essential to undertaking a legal analysis of NATO's intervention in Yugoslavia in 1999.

B. *Jus ad Bellum*

The legal right of states to enter into war has undergone a transformation over the course of modern history. In the aftermath of the Thirty Years' War (1618-1648) the Treaties of Westphalia ushered in the birth of modern

11. Robert C. Stacey, *The Age of Chivalry*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD, *supra* note 9, at 40.

12. See GLENN R. BUGH, *THE HORSEMEN OF ATHENS* (Princeton University Press, 1988).

13. GEOFFERY PARKER, *Early Modern Europe*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD, *supra* note 9, at 40.

international law. Without the overarching presence of the church, which had imposed a set of binding laws on states within the geographic confines of the Holy Roman Empire, states were required to negotiate a set of acceptable rules of military engagement. During the era of legal positivism, which peaked during the eighteenth and nineteenth centuries and continued to strongly influence international law during the twentieth century, influential legal scholars¹⁴ upheld the position that recourse to war was a sovereign right of states and that the competent authority of states enjoyed nearly unfettered *competence de guerre*. According to Beck, Arend and Vander Lugt, the essential characteristic of legal positivism is that international laws are binding only when grounded firmly in state consent.¹⁵

It was not until the conclusion of the First World War that international law began to move in the direction of a prohibition of the right of states to enter into war. Through its justification of the imposition of sanctions on Germany by maintaining that Germany and its allies were responsible for an act of aggression, Article 231 of the Treaty of Versailles characterized aggression as an illegal act.¹⁶ Article 15, paragraph 7 of the Covenant of the League of Nations restricted entry into war to instances when the aim was the "maintenance of right and justice."¹⁷ The movement to prohibit recourse to war was furthered by the 1928 Kellogg-Briand Pact,¹⁸ which bound states not to be the first to opt for war. The treaty states:

The High Contracting Parties solemnly declare ...that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.¹⁹

14. E.g., Johann Jacob Moser, Emerich de Vattel, Richard Zouche, John Austin, and Hans Kelsen.

15. INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Robert J. Beck et al., eds., 1996).

16. Treaty of Versailles, Art. 231, L.N.T.S. (1919).

17. LEAGUE OF NATIONS COVENANT art. 15, para. 7.

18. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art.1 L.N.T.S. 1.

19. *Id.* at art. 2.

C. Charter Law: Contemporary Extensions of *Jus Ad Bellum*

It is, however, not until the entry into force of the United Nations Charter that the international community adopted a general prohibition on the right of states to go to war. Article 2, paragraph 4, states "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."²⁰

On the basis of the principle of non-intervention alone, as espoused in Article 2(4) of the United Nations Charter, there is no legal recourse to war. The force of this prohibition has been reiterated and confirmed by a series of legal documents and agreements. General Assembly Resolution 2131 (1965) on the inadmissibility of intervention in the internal affairs of states, as well as General Assembly Resolution 2625 (1970) stand out in this regard.²¹ Further, the International Court of Justice, in its ruling in the Nicaragua case, reaffirmed the sovereignty and territorial integrity of states and the United Nations' prohibition on intervention.²² It can be argued, with reference to the 1969 Vienna Convention on the Law of Treaties, that the prohibition on resorting to force has evolved to the point of *jus cogens*, or compelling law.²³

At the same time, Charter law does make exceptions to the general rule that war is illegal. In three instances, states may legally enter into war: self-defense, collective self-defense, and authorization by the United Nations Security Council acting under Chapter VII of the United Nations Charter.²⁴ While there is much disagreement among international lawyers and scholars over precisely what gives rise to each of these three exceptions to the principle of non-intervention, it is clear that the right of states to go to war was dramatically restricted by the United Nations Charter.

IV. YUGOSLAVIA'S CLAIMS AGAINST NATO STATES

In response to NATO's bombing campaign, Yugoslavia instituted proceedings before the International Court of Justice on April 29, 1999, against the ten NATO members directly involved in the attack.²⁵ Yugoslavia asked the

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

21. G.A. Res. 2131, U.N. GAOR, 20th Sess., 1408th plen. mtg. at 20 (1965); G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883rd plen. mtg. at 21-22 (1970) (German version).

22. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

23. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 1.

24. U.N. CHARTER art. 39 (The right of self-defense is established in Article 51. The Security Council is empowered by Article 39 of the United Nations Charter, which states that the Council "shall determine the existence of any threat to peace, breach of the peace, or act of aggression" and then decides on the necessary coercive measures "to maintain or restore international peace and security.")

25. Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States.

court to hold each of the respondents individually responsible for certain breaches of international law arising from their participation in the air campaign. The Yugoslav case centered upon a series of alleged violations of the law of nations, specifically:

- 1) The obligation not to violate the sovereignty of another state;
- 2) The obligation banning the use of force against another state;
- 3) The obligation not to intervene in the internal affairs of another state;
- 4) The obligation to protect the civilian population and civilian objects in wartime;
- 5) The obligation to protect the environment;
- 6) The obligation relating to free navigation on international rivers;
- 7) The obligation to respect fundamental human rights and freedoms;
- 8) The obligation not to use prohibited weapons; and
- 9) The obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group.

Simultaneously, Yugoslavia submitted requests for the indication of provisional measures asking the Court to order each of the respondents to “cease immediately acts of use of force” and to “refrain from any act of threat or use of force” against Yugoslavia.²⁶ The allegations submitted by Yugoslavia against the NATO powers cover a vast range of international law, including the laws of war and human rights law. Since the scope of this article is limited to the legal restrictions on states relating to the onset of war, only the first three alleged breaches are relevant.

In order to establish the Court’s jurisdiction in each of the ten cases submitted, Yugoslavia invoked various bases of jurisdiction, including:

- 1) Article 36, paragraph 2 of the ICJ Statute in the cases against Belgium, Canada, the Netherlands, Portugal, Spain, and the United Kingdom;
- 2) Article 38, paragraph 5 of the Rules of Court in the cases against France, Germany, Italy, and the United States;
- 3) Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in the cases against all ten respondents;
- 4) Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia (1930); and

26. Concerning Legality of the Use of Force (Yugoslavia v. U.S.), Request for the Indication of Provisional Measures, 1999, I.C.J. No. 114 (June 2), available at <http://www.icj-cij.org>.

- 5) Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Netherlands and the Kingdom of Yugoslavia (1931).²⁷

The Court rejected Yugoslavia's requests for the indication of provisional measures on the basis that it lacked jurisdiction *prima facie*. The Court's rejection of the request for provisional measures by Yugoslavia to require the respondents to cease the military campaign was a serious blow to Yugoslavia's attempt to end the conflict, however, it did not affect the underlying issues relating to the legal status of the NATO intervention. In that regard, the Court declared itself profoundly concerned with the use of force in Yugoslavia, which "under the present circumstances ...raises very serious issues of international law."²⁸ It emphasized that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law.²⁹ Finally, the Court reminded the parties that they should take care not to aggravate or extend the dispute between them and that, when such a dispute gives rise to a breach of the peace, the United Nations Security Council has special responsibilities under Chapter VII of the United Nations Charter.³⁰

The underlying claim that NATO members violated the sovereignty and territorial integrity of Yugoslavia was not dismissed, save for the cases against Spain and the United States on the ground that the Court was manifestly without jurisdiction in the two cases since neither state had signed the Court's compulsory jurisdiction clause without reservation. The cases brought by Yugoslavia against the eight remaining NATO respondents, therefore, remains on the Court's docket.

V. THE LEGALITY OF THE USE OF FORCE BY NATO DURING THE KOSOVO WAR

A determination of the legal status of NATO's intervention in Yugoslavia in 1999 depends on a consideration of several issues, namely:

- 1) The extent to which international law upholds the sovereign rights and territorial integrity of states;³¹

27. *Id.*

28. *Id.* at ¶ 17.

29. *Id.* at ¶¶ 19, 48.

30. *Id.* at ¶¶ 37-38, 49-50.

31. U.N. CHARTER art. 2, para 7.

- 2) The impact of the rise of individual rights, as reflected in contemporary human rights law, on the sovereign rights of states;
- 3) The legal restrictions placed on states to prohibit the use of military force against other states;³²
- 4) The role of the UN Security Council in controlling the international use of force;³³
- 5) The interpretation of Security Council authorization of activity short of the use of force in response to threats to regional or international peace and security; and
- 6) Security Council *post facto* treatment of unauthorized uses of force.

While the aforementioned issue areas provide a definitive set of criteria upon which a determination of the legal status of NATO's intervention in Yugoslavia can be based, a final judgment of NATO's action depends on one's interpretation of Council resolutions, core Charter principles, legal principles embodied in traditional (pre-Charter) international law, and the legal obligations of states. As Falk remarks, "...the NATO initiative on behalf of the Kosovars has provoked extremely divergent interpretations of what was truly at stake, the prudence of what was undertaken, and the bearing of law and morality on this course of events."³⁴

At the heart of the debate are the values believed to be central to the world community. On this point, Cassese notes that "in the current framework of the international community, three sets of values underpin the overarching system of interstate relations: peace, human rights, and self-determination."³⁵ While legal scholars may concur with Cassese as to the three principle values underpinning interstate relations, there is disagreement over which of the values prevail over the others. At the time of the drafting of the United Nations Charter in 1945, it can be readily concluded that the "peace among nations" value predominated. This proposition is strengthened by the Charter's restrictive position taken on the right of states to use force in their international relations, the territorial integrity of nation-states, and the Security Council's monopoly on the authorization of force except in the case of self-defense.

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

33. U.N. CHARTER art. 33, 42.

34. Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 847 (1999).

35. Anthony 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, 24 (1999). (The "peace" that Cassese refers to would more accurately be termed "peace among nations" in order to distinguish it from "peace within nations.")

Prioritizing interstate stability comes at the expense of intrastate stability, as exemplified by the Security Council's non-involvement in numerous internal conflicts during the Cold War era.

Since the framing of the Charter, however, international human rights laws have been codified and have entered into force. The drafting of the Universal Declaration of Human Rights, considered by many to have entered into custom, the entry into force of the Genocide Convention, and the codification of numerous human rights conventions,³⁶ reflect a jurisprudence challenge to the notion that the peace among nations value prevails over the human rights value.³⁷ Since the Security Council's monopoly on non-defensive uses of force is based on the view that the peace among nations value takes priority over other values, it can be argued that the emergence of international human rights erodes the centrality of the Council in determining the legitimacy of intervention in support of human rights.

In performing a legal analysis of NATO's intervention in Kosovo in 1999, therefore, we are confronted with a dilemma. Do we strictly apply the United Nations Charter as it was drafted in 1945, with its preference for peace among nations over alternative values such as human rights? Do we allow a more liberal application of the Charter as it relates to the process of attaining Security Council authorization for intervention? Do we take into account the post-Charter development of human rights law and its implication for the use of force in response to humanitarian disasters? Is the NATO intervention in Kosovo simply another of a long list of post-World War II military interventions that a strict interpretation of Charter law deems illegal, or is it instead a watershed event that ushers in a new era of legally acceptable humanitarian interventions that do not require Security Council authorization? Hilpold states that the NATO intervention may constitute the most far-reaching challenge to the

36. *Universal Declaration of Human Rights*, G.A. Res. 217 A, U.N. GAOR, 3rd Sess., at 1, (1948), available at <http://www.un.org/overview/rights.html>; see also *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260 A (III) (1948); *Convention on the Political Rights of Women*, G.A. Res. 640 (VII) (1952); *International Convention on the Elimination of All Forms of Racial Discrimination*, Jan. 4, 1969, 660 U.N.T.S. 195; *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI) (1966); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI) (1966); *Convention on the Elimination of All Forms of Discrimination Against Women* (1979), available at <http://www.un.org/womenwatch/daw/cedaw/>; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46 (1984); *Convention on the Rights of the Child* (1989), at <http://www.unicef.org/crc/introduction.htm>; (for an exhaustive list of international human rights documents, see THE UNITED NATIONS AND HUMAN RIGHTS, 1945-1995 (United Nations Department of Public Information, 1995)).

37. I leave out of this discussion the self-determination value since, in my opinion, self-determination, despite a widespread acknowledgment of its existence in contemporary international law, has not risen to the level of the peace among nations or human rights values.

doctrine on non-intervention.³⁸ These are difficult questions that cannot be answered definitively at the present. There is no broad consensus among legal experts on the subject. The amount of scholarly attention paid to a legal assessment of NATO's intervention, however, underscores the vitality of the debate and signals that this jurisprudence debate is not over.³⁹

Three distinct analyses of NATO's intervention in Yugoslavia are presented below. The first, reflecting a strict interpretation of Charter law's restriction on the use of force, leads to the conclusion that NATO members acted outside the bounds of international law in intervening in Yugoslavia in 1999. Simma reflects a strict interpretation of Charter law when he states:

[I]f the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a humanitarian intervention by military means is permissible. In the absence of such authorization, military coercion...constitutes a breach of Article 2(4) of the Charter.⁴⁰

The second analysis, which reads more liberally into Charter principles as they relate to the process by which authorization for intervention is granted, takes into account implied Security Council authorization for intervention, a failed effort by the Russian Federation to formally label the intervention as illegal, and a Council resolution adopted after the Kosovo War was completed. Working within Charter law, this perspective makes possible the argument that NATO members, despite the lack of an explicit Security Council authorization

38. Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12 EUR. J. INT'L L. 437, 437 (2001).

39. See Peter H.F. Bekker, *Legality of Use of Force*, 93 AM. J. INT'L L. 928 (1999); Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503 (2001); Niels Blokker, *Is the Authorization Authorized?: Powers and Practices of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'*, 11 EUR. J. INT'L L. 541 (2000); Cassese, *supra* note 35; Jonathan I. Charney, *Anticipatory Intervention in Kosovo*, 93 AM. J. INT'L L. 834 (1999); Chinkin, *supra* note 5; Falk, *supra* note 34; Thomas Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 541 (1999); Tarcisio Gazzini, *NATO Coercive Military Activities in the Yugoslav Crisis (1992-7)*, 12 EUR. J. INT'L L. (2000); Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, 11 EUR. J. INT'L L. 361 (2000); Hilpold, *supra* note 38; Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspections Regime*, 93 AM. J. INT'L L. 124 (1999); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. (2000); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: the Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000); Pellet, *supra* note 1; and Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (1999).

40. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 5 (1999).

to intervene militarily, did not violate international law. Falk supports this more liberal interpretation of Charter processes, contending that “[s]o long as a purely textual analysis of the relevant norms is relied upon, the divergences between humanitarian imperatives and the prohibition of forcible intervention unauthorized by the United Nations cannot be satisfactorily reconciled.”⁴¹

The third analysis moves beyond Charter law, taking into account the totality of the unfolding situation in Kosovo, and recognizes the erosion of state sovereignty as a result of the rise of human rights. Reisman represents this perspective when he states that while “...all appreciate that NATO’s action in Kosovo did not accord with the design of the United Nations Charter ...a judgment must be made in light of the law at stake, the facts and feasible alternatives at the moment of the decision.”⁴²

A. A Strict Application of Charter Principles Relating to the Use of Force

Since 1945 international law, as reflected in the United Nations Charter, prohibits the use of force except in three instances: self-defense, collective self-defense, and after authorization by the United Nations Security Council. A determination of the legality of the NATO intervention, therefore, requires the application of the three Charter exceptions to the principle of non-intervention.

1. Self-defense and Collective Self-defense

The right of self-defense is firmly rooted in the United Nations Charter, as reflected in Article 51, which states: “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 ...”⁴³

It is commonly recognized that unless a humanitarian crisis transcends international borders and leads to armed attacks against other states, recourse to Article 51 [self-defense and collective self-defense] is not available.⁴⁴ Any effort to expand the concept of self-defense to include the right to grant emergency help to a people that is victim of an oppressive government has no basis in international law. It is clear, therefore, that a justification of the NATO intervention in 1999 cannot be found in an application of either self-defense or collective self-defense.

41. Falk, *supra* note 34, at 847.

42. Reisman, *supra* note 39, at 3.

43. United Nations Charter, Article 51.

44. See, Simma, *supra* note 40; Cassese, *supra* note 35.

2. Security Council Authorization

The determination of the legal status of the intervention from a strict interpretation of the Charter, therefore, rests on the presence or absence of an authorization issued by the Security Council. Scholars that base their legal assessment of NATO's intervention on a strict interpretation of Charter provisions conclude that the use of force by NATO members constitutes a violation of international law.⁴⁵

The Security Council addressed the deteriorating situation in Kosovo in a series of meetings in 1998 that resulted in three resolutions prior to the onset of NATO's aerial campaign. In its first resolution on the topic, the Security Council condemned the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the Kosovo Liberation Army.⁴⁶ Resolution 1160 also called upon the Federal Republic of Yugoslavia to take the necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions indicated by the Contact Group in its statements dated March 9 and March 25, 1998. The resolution prohibited the sale or supply of weapons, ammunition, military vehicles, equipment, and spare parts to Yugoslavia. The first Security Council resolution contained two important guidelines relating to the future international response to the situation in Kosovo. In a preambular clause, which was restated in operative clause five, the Security Council affirmed the commitment of all Member States to the sovereignty and territorial integrity of Yugoslavia. In so doing, the Council denied any right of intervention at that time. The affirmation of Yugoslav sovereignty and territorial integrity, however, was balanced by a warning found in operative clause nineteen, which emphasized that a failure to make constructive progress towards the peaceful resolution of the situation in Kosovo "will lead to the consideration of additional measures."⁴⁷ It is clear that the first Security Council Resolution on Kosovo does not provide an authorization for military intervention.

A second Security Council resolution was passed on 23 September 1998, in response to intense fighting in Kosovo that resulted in numerous civilian casualties and 230,000 displaced persons.⁴⁸ The resolution underlined the responsibility of Yugoslavia to create the conditions necessary for the return of refugees and displaced persons. While Resolution 1199 reaffirmed the sovereignty and territorial integrity of Yugoslavia, it also emphasized the need to ensure that the rights of all inhabitants of Kosovo were respected. The

45. See *id.*; Charney, *supra* note 39.

46. U.N. SCOR, 3868th mtg. at 1, U.N. Doc. S/RES/1160 (1998).

47. *Id.* at 4.

48. U.N. SCOR, 3930th mtg. at 1, U.N. Doc. S/RES/1199 (1998).

second Security Council resolution, moving in the direction of an authorization for intervention, affirmed that the deteriorating situation in Kosovo constituted a threat to peace and security. The rights of states to address the situation were limited by Resolution 1199, however, to the provision of available personnel to fulfil the responsibility of effective and continuous international monitoring in Kosovo, the provision of adequate resources for humanitarian assistance, and the application of the principles embodied in Resolution 1160. The Security Council again decided that “should the concrete measures demanded in Resolutions 1160 and 1199 not be taken, to consider further actions and additional measures to maintain or restore peace and stability in the region.”⁴⁹

In its third resolution, the Security Council expressed its concern and alarm over the deteriorating situation in Kosovo.⁵⁰ The resolution also reiterated the commitment of Member States to the sovereignty and territorial integrity of Yugoslavia. The Council’s endorsement of the sovereignty and territorial integrity of Yugoslavia was qualified but not undermined by the thirteenth operative of Resolution 1203, which states: “Urges Member States and others concerned to provide adequate resources for humanitarian assistance in the region and to respond promptly and generously to the United Nations Consolidated Inter-Agency Appeal for Humanitarian Assistance Related to the Kosovo Crisis.”⁵¹

Cassese notes that the action of NATO countries radically departs from the Charter system for collective security, “which hinges on a rule (collective enforcement action authorized by the Security Council) and an exception (self-defense).”⁵² Lobel and Ratner argue that, as a result of Article 2(4), explicit and not implicit Security Council authorization is necessary before a nation may use force that does not derive from the right of self-defense under Article 51.⁵³ They continue by noting that “[r]equiring clear Security Council authorization acts as a brake on the use of force by the international community: it is a procedural condition designed to fulfill the Charter’s substantive goal of ensuring that force be employed only when absolutely necessary.”⁵⁴ Simma, while recognizing that NATO’s action was in response to gross violations of human rights,⁵⁵ concludes that countermeasures to such atrocities must not

49. *Id.* at 5.

50. U.N. SCOR, 3937th mtg. at 1, U.N. Doc. S/RES/1203 (1998).

51. *Id.* at 5.

52. Cassese, *supra* note 35, at 24.

53. Lobel & Ratner, *supra* note 39, at 129.

54. *Id.*

55. Simma, *supra* note 40.

involve the threat or use of force, a legal position confirmed by the General Assembly's Declaration on Friendly Relations of 1970.⁵⁶

In the midst of the military campaign, the Security Council drafted and passed Resolution 1239 (1999) which effectively avoided a comment on NATO's actions.⁵⁷ The resolution commended the efforts of member states, the UNHCR, and other international relief organizations in providing relief assistance to the Kosovo refugees and urged all concerned to work towards the aim of a political solution to the crisis. At the conclusion of the aerial bombardment, the Security Council addressed the situation in Kosovo and passed Resolution 1244 (1999), which established an international security presence in Kosovo with express responsibility to:

- a) Deter renewed hostilities, maintain and where necessary enforce a cease-fire, and ensure the withdrawal and prevent the return into Kosovo of Federal and Republic military, police and paramilitary forces;
- b) Demilitarize the Kosovo Liberation Army (KLA);
- c) Establish a secure environment in which refugees and displaced persons could return home;
- d) Ensure public safety and order;
- e) Supervise demining;
- f) Support the work of the international civil presence;
- g) Conduct border monitoring duties; and
- h) Ensure the protection and freedom of movement of itself, the international civil presence, and other international organizations.⁵⁸

The opinion of the ICJ on the matter of the legal status of NATO's intervention will weigh heavily upon the international legal community. While the Court has yet to render a decision in *Yugoslavia v. NATO* members, its first pronouncements indicate that it is not willing to set aside the Charter's prohibition on the use of force in favor of a right of humanitarian intervention, as it declared itself to be "profoundly concerned with the use of force in Yugoslavia" and that "under the present circumstances such use raises very serious issues of international law."⁵⁹

The conclusion that NATO's actions constitute a violation of core principles of international law and, as a result, must be categorized as illegal

56. G.A. Res. 2625, *supra* note 21.

57. U.N. SCOR, 4003rd mtg., U.N. Doc. S/RES/1239 (1999).

58. U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (1999).

59. See *Concerning Legality of the Use of Force (Yugoslavia v. Belg.)*: Request for the Indication of Provisional Measures, 1999 I.C.J. NO. 105 (June 2).

reflects a strict adherence to Charter Law as it was initially codified, reluctant to take into account norms or legal developments since 1945.

B. A Liberal Analysis of Charter Law

To conclude that the NATO intervention in Yugoslavia in 1999 absent of explicit Security Council authorization was a legal act requires a closer examination of the actions of the Council as they relate to the unfolding humanitarian disaster in Kosovo and a consideration of alternative interpretations of Charter provisions as they relate to Council authorization for intervention. It is clear that the Security Council did not explicitly authorize states to use force to relieve the Kosovo population of its humanitarian plight. In fact, in each Council resolution the sovereignty and territorial integrity of Yugoslavia were explicitly upheld. Therefore, to contend that NATO acted in accord with prevailing international laws and norms, a more liberal interpretation of Charter principles as they relate to the process of authorized intervention must be undertaken.

1. Ambiguous Authorization

While an explicit Security Council authorization to use force is a central requirement of a strict interpretation of the United Nations Charter, the ambiguous nature of Council resolutions historically has given rise to the notion that authorization may exist despite the absence of an explicit Council authorization. Lobel and Ratner note that the Iraqi inspections crisis of 1998 raises similar questions relating to state intervention on the basis of an ambiguous Council authorization to use force.⁶⁰ In the Iraqi case, the United States and the United Kingdom asserted the right to use force in order to enforce inspections of weapons facilities based on Resolution 678 (1990), which authorized the use of force to liberate Kuwait from Iraqi control.⁶¹ In the Kosovo case, United States officials argued that the mere invocation of Charter Chapter VII with regard to the Kosovo situation was sufficient to authorize a resort to force.⁶² The Dutch representative on the Security Council contended that Resolution 1203 clearly stated that the Council was acting under Chapter VIII of the Charter and that NATO action followed directly from Resolution 1203.⁶³

60. Lobel & Ratner, *supra* note 39.

61. U.N. SCOR, 2963rd mtg. at 27-8, U.N. Doc. S/RES/678 (1999).

62. See John M. Goshko, *U.S., Allies Inch Closer to Kosovo Intervention; UN Council to Vote on Key Resolutions*, WASH. POST, Sept. 23, 1998, at A21.

63. See Press Release, U.N., Security Council Rejects Demand for Cessation of Use of Force against Federal Republic of Yugoslavia, U.N. Doc. SC/6659 (March 26, 1999), available at

2. The Council's Refusal to Deem NATO's Actions Illegal

Scholars have referenced the fact that the Security Council explicitly rejected the proposition that NATO's actions were illegal.⁶⁴ A resolution sponsored by the Russian Federation declaring that the NATO action was unlawful and directed that it be terminated was supported by only three states--Russia, China, Namibia--and was rejected by the remaining twelve Council members.⁶⁵ Thus, while no one contends that the Security Council specifically authorized the NATO intervention, Wedgwood recognizes that the omission of a Council authorization represents the unwillingness of Russia to endorse NATO's actions, which would have undermined Russia's influence over an issue that directly involved its interests.⁶⁶ Speaking before the vote, the Russian representative stated that the aggressive military action taken by NATO was a threat to international peace and security and grossly violated key provisions of the United Nations Charter. The United States representative, also speaking before the resolution was voted on, focused attention on the actions of Yugoslavia, stating that the Charter did not sanction armed assaults on ethnic groups or imply that the world should turn a blind eye to a growing humanitarian disaster. Canada's position was that the supporters of the Russian resolution placed themselves outside of the international consensus which held that "...the time had come to stop the continued violence perpetrated by the Government of the Federal Republic of Yugoslavia against its own people."⁶⁷

3. Ex Post Facto Authorization

While strict Charter advocates claim that explicit Security Council authorization for non-defensive uses of force must be granted *prior* to the onset of war, more liberal interpretations allow for Council authorization *ex post facto*, or after the fact. Much attention has been paid to Security Council Resolution 1244, which was passed after the aerial campaign had ended and an agreement on the resolution of the Kosovo situation had been concluded. Resolution 1244 (1999), as Pellet notes, dramatically changed the picture.⁶⁸ While it did not formally declare that NATO's intervention was lawful, it clearly endorsed the consequences of the intervention. Pellet concludes that "...there certainly were doubts as to the legality of NATO's action before 10

<http://www.un.org/News/Press/docs/1999/19990326.sc6659.html>.

64. Pellet, *supra* note 1; Wedgwood, *supra* note 39.

65. *Id.*

66. Wedgwood, *supra* note 39.

67. Press Release, U.N. SCOR, *supra* note 63.

68. Pellet, *supra* note 1, at 387 (*quoting* Wedgwood, *supra* note 39).

June 1999, [h]owever, when put together, the arguments in favor of its lawfulness become persuasive—and particularly so in light of Resolution 1244.”⁶⁹

4. Regional Responses to Threats to the Peace

Further support for a legal defense of NATO’s intervention can be found in Charter Article 52(1), which provides:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.⁷⁰

Pellet concludes that NATO’s intervention is an illustration of “regional or collective unilateralism.”⁷¹ He continues by arguing that actions taken by groups of states imply some checks and balances, both in the decision-making process and in action that purely unilateral interventions cannot.⁷²

A problem created by Article 52(1) is that, in the event of what Lobel and Ratner refer to as “contracting out” by the Security Council to individual member states or regional organizations to revolve a dilemma, the Council leaves states with wide discretion to use ambiguous, open-textured resolutions to exercise control over the initiation, conduct and termination of hostilities.⁷³ This problem is reflected in attempts by United States officials, in particular, to claim that the mere invocation of Charter Chapter VII with regard to the Kosovo situation was sufficient to authorize the resort to force.

The crucial question, however, remains the conditions under which a regional organization can carry out enforcement actions pursuant to subsequent Charter Article 53(1), which addresses the degree of control that the Security Council ought to exercise over such operations. Gazzini notes that Article 53(1) introduces a distinction between the utilization of regional organizations by the Security Council and the autonomous enforcement by regional organizations acting upon a Security Council authorization.⁷⁴ The scholarly community remains divided on this later, and most crucial, point. Some claim a strict

69. *Id.*

70. U.N. CHARTER art. 51.

71. Pellet, *supra* note 1.

72. *Id.*

73. Lobel & Ratner, *supra* note 39.

74. Gazzini, *supra* note 39.

control by the Council, including the start-up, supervision, and termination of enforcement actions,⁷⁵ while others recognize that under certain circumstances, such as genocide, an implicit authorization or *ex post facto* authorization by the Council may suffice.⁷⁶ In any case, Article 54 imposes upon regional organizations the obligation to keep the Security Council fully informed on the activities they contemplate to undertake or have already undertaken.

C. *Extra-Charter International Law*

The strongest case for the legality of NATO's intervention in Yugoslavia in 1999 is made with reference to extra-Charter international law. This position rejects the notion that international law begins and ends with the entry into force of the United Nations Charter, recognizing that pre-Charter legal principles and post-1945 legal developments provide states with certain rights and duties irregardless of the provisions laid down in the UN Charter.

1. Humanitarian Intervention

Hilpold notes that "...the events in the first half of 1999 reanimated the old discussions of whether there is a right to humanitarian intervention in international law."⁷⁷ Perhaps the strongest argument supporting the legality of NATO's intervention in Yugoslavia is one that rests on a perceived humanitarian intervention right. Wedgwood concurs that "humanitarian necessity" remains the core of NATO's justification for military force in Kosovo and, as noted earlier, was an expressed objective in every major NATO statement on the intervention.⁷⁸ Chinkin confirms that several official statements by NATO members reference the humanitarian interest in intervening in Yugoslavia in 1999.⁷⁹ Schachter reflects the humanitarian intervention perspective when he writes that "Even in the absence of ...prior approval [by the Security Council], a state or group of states using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned."⁸⁰

75. A. GIOIA, *The United Nations and Regional Organizations in the Maintenance of Peace and Security*, in *THE OSCE IN THE MAINTENANCE OF PEACE AND SECURITY* (M. Bothe et al. eds., Klumer Law International, 1997).

76. Simma, *supra* note 40.

77. Hilpold, *supra* note 38, at 442.

78. Wedgwood, *supra* note 39, at 832.

79. Christine Chinkin, *The State that Acts Alone: Bully, Good Samaritan or Iconoclast?*, 11 EUR. J. INT'L L. 31 (2000).

80. B.G. RAMCHARAN, *INTERNATIONAL LAW AND PRACTICE OF EARLY-WARNING AND PREVENTIVE DIPLOMACY: THE EMERGING GLOBAL WATCH* 126 (Martinus Nijhoff, 1991).

This legal justification for NATO's intervention is strongest because it reduces the role of the Security Council in authorizing the non-defensive use of force, the linchpin of the strict Charter interpretation school. The humanitarian intervention defense requires differentiating Charter Law from traditional international law, recognizing the two as concurrent legal systems albeit with substantial overlap. Even though both bodies of legal rules function in a similar way in many respects, Pellet observes that this does not mean that the Charter mechanisms are part of the general law of international responsibility or that both regimes are entirely intermingled.⁸¹ He continues by noting that "...some arguments in favor of NATO's intervention ...can ...be based on the law of state responsibility," a distinct yet complimentary legal regime that co-exists with Charter Law.⁸²

A legal justification of NATO's intervention on humanitarian grounds is supported by what French scholars have termed the *devoir d'ingérence*, or duty to intervene in response to a humanitarian catastrophe.⁸³ Advocates of the principle contend that regardless of the cause of a humanitarian catastrophe, external actors have a right and/or duty to intervene. Initially, the doctrine was designed to justify an intervention by humanitarian NGOs, however; its leading proponents have more recently attempted to extend the duty of intervention to states.

The humanitarian intervention defense, while not well-grounded in contemporary international law, led Hilpold to observe that "NATO's intervention in Kosovo has brought about a flurry of contributions in the legal literature suggesting the need to take a completely different stance towards the perennial controversial subject of humanitarian intervention."⁸⁴ Cassese provides a series of conditions, which could give rise to the right of humanitarian intervention even in the absence of any authorization by the Security Council, as follows:

- i) Gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central governmental authorities or with their connivance and support, or because of the total collapse of such authorities cannot impede those atrocities;

81. Pellet, *supra* note 1, at 387.

82. *Id.*

83. See, e.g., M. BETTATI AND B. KOUCHNER, *LE DEVOIS D'INGERENCE: PEUT-ON LES LAISSER MOURIR?* (Denoel 1987); PIERRE LEGROS, MARIANNE LIBERT, AND BERNARD KOUCHNER, *L'EXIGENCE HUMANITAIRE: LE DEVOIR D'INGERENCE* (Les Presses du Management 2000).

84. Hilpold, *supra* note 38, at 442.

- ii) If the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes, while at the same time refusing to call upon or to allow other states or international organizations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that those authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations or decisions of such organizations;
- iii) The Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power. Consequently, the Security Council either refrains from any action or only confines itself to deploring or condemning the massacres, plus possibly terming the situation a threat to the peace;
- iv) All peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion, and any other means short of force have been exhausted, notwithstanding which, no solution can be agreed upon by the parties to the conflict;
- v) A group of states decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of Member States of the United Nations;
- vi) Armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained. Moreover, it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies on the ground. The more urgent the situation of killings and atrocities, the more intensive and immediate may be the military in response thereto. Conversely, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed confrontation.⁸⁵

Application of the aforementioned criteria to the situation in Kosovo in the period leading up to NATO's intervention provides a strong justification for NATO's resort to force. For each criterion, a compelling case can be made for humanitarian intervention.

85. Cassese, *supra* note 35, at 27.

2. Intervention in Response to Genocide

The principal obstacle to establishing a right of humanitarian intervention, even under the conditions forwarded by Cassese, is that states could abuse the right in order to provide legal cover for interventions that serve their own narrow self-interest.⁸⁶ The fear historically has been that once granted, a right of humanitarian intervention would so undermine state sovereignty that the institution of international law would be rendered ineffective. What is possible, however, is an established right of humanitarian intervention in extreme cases, most notably in response to genocide. Justification for the assertion that protections afforded under the doctrine of state sovereignty are called into question in the event of the commission of the crime of genocide is found in Falk, who states that “genocidal behavior cannot be shielded by claims of sovereignty...”⁸⁷

It is established in international law that genocide constitutes an *erga omnes* offense, making it a concern of all states.⁸⁸ Consequently, in the event of the crime of genocide, every state may lawfully consider itself injured and is thus entitled to resort to countermeasures against the perpetrator. Simma concludes that “[i]n the face of genocide, the right of states, or collectivities of states, to counter breaches of human rights most likely becomes an obligation.”⁸⁹ Support for this contention is found in the judgment of the International Court of Justice in the 1996 case brought by Bosnia-Herzegovina against Yugoslavia.⁹⁰

Lobel and Ratner, who label NATO’s intervention in Yugoslavia as a violation of international law, nonetheless open the door to the possibility of unauthorized intervention in response to genocide.⁹¹ They state that “[b]ut in the extreme case of an ongoing genocide for which the Security Council will not authorize force, perhaps the formal law ought to be violated to achieve the higher goal of saving thousands or millions of lives.” They continue by stating that “[s]ilence by the Security Council might then reflect a community consensus that the legal requirement for its authorization ought to give way to

86. *Id.*

87. Falk, *supra* note 34, at 847.

88. See Jeffrey S. Morton, *The International Legal Adjudication of the Crime of Genocide*, 7 ILSA J. INT’L & COMP. L. 329 (2001) (for a review of the historical evolution of the genocide regime and a detailed assessment of the Genocide Convention (1948)).

89. Simma, *supra* note 40, at 2.

90. Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), 2001 I.C.J. (April 23).

91. Lobel & Ratner, *supra* note 39.

the moral imperative.”⁹² Franck and Rodley provide support of the humanitarian intervention defense without recognizing an existing norm or rule in international law that permits it.⁹³ They state that “In exceptional circumstances ...a large power may indeed go selflessly to the rescue of a foreign people facing oppression. But surely no general law is needed to cover such actions.”⁹⁴

VI. CONCLUSION

The anticipated implications of NATO’s intervention in Yugoslavia for the progressive development of international law and order are divergent, reflecting the three schools of thought on the right of state intervention. If the prevailing legal opinion is that the intervention, by virtue of its lack of Council authorization, constitutes a violation of international law, the principal implication is that the rights of individuals remain subservient to the rights of states.

If, however, a consensus develops around the proposition that NATO actions in response to the Kosovo crisis were legal, despite the absence of a formal Security Council authorization, the international legal order will have undergone a significant revision. Wedgwood notes that the war over Kosovo may mark the end of Security Council “classicism,” and the emergence of a limited and conditional right of humanitarian intervention, permitting the use of force to protect the lives of a threatened population when the decision is taken by what most of the world would recognize as a responsible multilateral organization and the Security Council does not oppose the action.⁹⁵ Cassese claims that “this particular instance of a breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace.”⁹⁶ Gazzini claims that a process of reinterpreting Article 2(4) is underway, and has been gaining ground since post-Cold War military activities took place in Somalia, Bosnia, Rwanda, Haiti and Liberia.⁹⁷ While state practice remains insufficiently consistent to make a broad-based claim on the emergence of an international norm allowing intervention in response to

92. *Id.* at 136.

93. Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT’L L. 275, 275 (1973).

94. *Id.* at 290-1.

95. Wedgwood, *supra* note 39, at 828.

96. Cassese, *supra* note 35, at 29.

97. Gazzini, *supra* note 39.

humanitarian disasters, a determination that NATO's intervention in Yugoslavia in 1999 was legal would represent a continuation of the trend since 1990. What distinguishes the Kosovo case from those that preceded it is that, in the previous cases, there was no claim that intervention was permissible absent of a Security Council authorization. Finally, the Secretary General's call for Council action to meet future humanitarian crises may draw support for what he referenced as the development of an "international norm in favor of intervention to protect civilians from wholesale slaughter."⁹⁸ Pellet concludes that it is essential that new 'community' mechanisms be found in the future in order to avoid being restricted to a choice between unqualified respect for the sovereignty and territorial integrity of a state committing gross violations of human rights, on the one hand, and the right of intervention without Security Council authorization, on the other.⁹⁹

What is clear from a review of the literature on the legal status of NATO's intervention in Yugoslavia is that very few scholars provide unqualified conclusions on the legality or illegality of the intervention. The majority of scholars that qualify the intervention as a violation of international law recognize that a counter case can be made. Simma, for example, despite his contention that NATO violated Charter Law, seems to consider that the intervention was "not that much illegal."¹⁰⁰ At the same time, those that conclude that NATO's actions reflect the emergence of a new legal norm permitting intervention without an explicit Security Council authorization to do so recognize the general United Nations prohibition on the use of force. Cassese downplays the illegality of the intervention, stating that "...any person deeply alert to and concerned with human rights must perforce see that important moral values militated for the NATO military action."¹⁰¹ And, it appears, the lines dividing the scholarly community are not static. Hilpold observes that "[t]he number of writers criticizing the concept of a right to humanitarian intervention—once decisively preponderant—seems to dwindle; even writers with a long record of opposition against such a legal right were looking for suitable justifications."¹⁰² It is also evident that the Kosovo case is not an exception, but rather another critical example of a rapidly changing norm of international law that places human rights on par with, or at exceptional times, superior to states rights. At present, Slobodan Milosevic stands trial on

98. Press Release, U.N., Secretary-General, Kofi Annan, Presents His Annual Report to the General Assembly, U.N. Doc. SG/SM/7136, GA/9596 (September 20, 1999), available at <http://www.un.org/news/press/docs/1999/19990920.sgsm7136.html>.

99. Pellet, *supra* note 1, at 385.

100. Simma, *supra* note 40.

101. Cassese, *supra* note 35, at 25.

102. Hilpold, *supra* note 38, at 442.

sixty-six counts of war crimes, crimes against humanity, and genocide, all committed while he was head of state. Prior to that, but also recently, it was determined that head of state immunity for Augusto Pinochet was superseded by recent human rights conventions, despite the fact that the crimes charged against him occurred while he was the head of state of Chile. If the international community is willing to sacrifice classic principles of immunity in order to uphold emerging principles of human rights, sacrificing state sovereignty to uphold the same principles is a matter of degree and does not represent a fundamental shift in legal thinking. As was evident in the judgment in the Nicaragua Case, the Article 2(4) prohibition on the use of force is a legal principle that is subject to change as the result of the development of a customary law norm.