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## Kosovo and the Limits of International Law

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# Kosovo and the Limits of International Law

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## **Abstract**

This article examines the legality and wisdom of the North Atlantic Treaty Organization (“NATO”) intervention in Kosovo in 1990. The Kosovo campaign pushed at the boundaries of international law in at least two important respects. First, NATO’s decision to engage in large-scale military action without prior Security Council authorization raised significant doubts about the status of the law governing the use of force and the viability of United Nations (“U.N.”) primacy in matters of international peace and security. Second, NATO’s high-altitude bombing campaign, conducted without a single NATO combat casualty but with significant civilian casualties within the FRY, called into question the appropriate relationship between means and ends in an intervention designed to save lives. The long-term impact of the Kosovo intervention in each of these areas of law remains uncertain.

# KOSOVO AND THE LIMITS OF INTERNATIONAL LAW

*David Wippman\**

## INTRODUCTION

In March 1999, the North Atlantic Treaty Organization (“NATO”) launched a massive seventy-eight day bombing campaign to force the Federal Republic of Yugoslavia (“FRY”) to end repression of Kosovo’s predominantly ethnic Albanian population and to accept NATO’s terms for the resolution of Kosovo’s future political status. International lawyers have been debating the legality and wisdom of the intervention ever since.<sup>1</sup>

The Kosovo campaign pushed at the boundaries of international law in at least two important respects. First, NATO’s decision to engage in large-scale military action without prior Security Council authorization raised significant doubts about the status of the law governing the use of force and the viability of United Nations (“U.N.”) primacy in matters of international peace and security. Second, NATO’s high-altitude bombing campaign, conducted without a single NATO combat casualty but with significant civilian casualties within the FRY,<sup>2</sup> called into question the appropriate relationship between means and ends in an intervention designed to save lives.

The long-term impact of the Kosovo intervention in each of these areas of law remains uncertain. It depends on whether future cases generate similar responses, and on the reaction of States generally to such responses. But one thing at least is clear. NATO’s intervention in Kosovo is part of and contributes to a broader phenomenon, a loosening of the legal and political constraints on the use of force that is directly related to the end of the Cold War.

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1. See *Editorial Comments: NATO’s Kosovo Intervention*, 93 AM. J. INT’L L. 824 (1999).

2. INDEP. INT’L COMMISSION ON KOSOVO, THE KOSOVO REPORT 94 (2000) [hereinafter THE KOSOVO REPORT], available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm> (reporting that approximately 500 Yugoslav civilians were killed in the bombing, and that no NATO service members were killed in action).

## I. NATO'S DECISION TO USE FORCE FOR HUMANITARIAN ENDS

Past instances of humanitarian intervention—cases that can plausibly be understood as a use of force to end grave human rights abuses—have been few and far between.<sup>3</sup> In most of these cases, a single State has intervened in a neighboring country, usually invoking a collective self-defense rationale, however implausible such a claim might be.<sup>4</sup> Such interventions have typically engendered one of two responses. Either most States have condemned them as violations of international law, or most States have tacitly accepted the interventions without probing too deeply into their legal basis.<sup>5</sup> Either way, the impact on international law and institutions has been relatively marginal.

But the intervention in Kosovo was unique in two respects. First, it was a collective action by the world's richest and most powerful States, the States most directly associated with and interested in the maintenance of the rule of law in international affairs. Thus, the intervention could not be dismissed as a simple and transient breach of international law or the aberrant action of a single State carrying little or no precedential value. Second, the States involved made relatively little effort to shoehorn the intervention into the legal categories available under the U.N. Charter for the use of force.<sup>6</sup> The United States in particular did not advance a specific legal rationale for the intervention, as it usually does when it engages in significant military action. Instead, the United States articulated a series of contextualized factors that in the U.S. view rendered the intervention "justified."<sup>7</sup>

These distinctive characteristics of the NATO intervention created an irresolvable tension between the formal law of the U.N. Charter and the actual practice of States whose conduct is central to international lawmaking. The breach of the Charter

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3. See Jules Lobel, *American Hegemony and International Law: Benign Hegemony, Kosovo and art. 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 28 (2000) (discussing how self-serving geopolitical interests, rather than humanitarian interests, often dictate a country's willingness to commit to humanitarian intervention).

4. See *id.* at 27.

5. See SEAN MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* (1996) (providing a thorough analysis of past cases).

6. See Thomas Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857, 859 (1999).

7. See Lobel, *supra* note 3, at 27.

was clear and apparent. NATO did not seek or receive Security Council authorization, and it was not acting in self-defense. For many international lawyers, the analysis ends there. But simply labeling the intervention illegal is unsatisfactory. The authority of international law rests on a reasonable congruence between formally articulated norms and State behavior; when the two diverge too sharply, the former must adapt or lose their relevance. The scope of the Kosovo operation, the identity of the participants, and the lack of a coherent legal rationale all combine to render it difficult to dismiss the intervention as an anomaly with no lasting impact on international law. But at the same time, the continuing disagreement within NATO and among States generally over the legitimacy and desirability of unauthorized humanitarian intervention make it difficult to discern any clear change or evolution in the law. The result is a persistent and disquieting uncertainty.

It is easy enough to make the case that NATO's intervention in Kosovo was illegal, and that such interventions should remain illegal in the future. The U.N. Charter insists that any non-defensive use of force must be approved by a Security Council supermajority, including all of the Council's permanent members.<sup>8</sup> In this way, the Charter guards against the possibility that interstate violence might spiral out of control, since any decision to initiate the use of force must garner an international consensus, one that includes the assent or at least the acquiescence of the major powers. Despite the Charter's concern for human rights, its central purpose was, and is, to "save succeeding generations from the scourge of war."<sup>9</sup> The Charter's design reflects a simple but fundamentally important utilitarian calculus: the risk of escalating interstate conflict inherent in any weakening of the constraints on the use of force outweighs the possible benefits of trying to carve out exceptions for cases of grave humanitarian need that, for one reason or another, cannot generate the Security Council consensus needed to authorize military intervention.

Against this strict positivist conclusion, it is possible to advance various indicia of legality that, taken together, might serve to mitigate any condemnation of NATO's intervention on international law grounds. First, Belgrade's actions in the region cre-

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8. See U.N. CHARTER art. 27, ch. VII-VIII.

9. *Id.* pmb1.

ated a clear threat to international peace and security, a threat explicitly recognized in numerous Security Council resolutions.<sup>10</sup> In its efforts to combat the Kosovo Liberation Army ("KLA"), a group fighting for Kosovo's independence (and one not above using terrorist acts to further its aims), FRY security forces engaged in violent repression of ethnic Albanians in Kosovo. Viewed in the context of recent Yugoslav history, the events in Kosovo were alarming. After all, the Belgrade authorities had already launched three wars on the territory of Bosnia, Croatia, and Slovenia. In the process, Milosevic and his allies had caused tens of thousands of deaths, wreaked untold economic harm, and destabilized much of central Europe, while earning indictments for themselves from the Yugoslavia war crimes tribunal. Many officials in NATO countries believed that Western reluctance to intervene early and forcefully in these prior conflicts, and in particular in Bosnia, led to many thousands of deaths that could have been prevented, and substantially raised the costs of Western intervention when it finally took place.<sup>11</sup> In addition, many believed (mistakenly, as it turned out) that Milosevic would back down in Kosovo if confronted with a clear threat of NATO military action, or at most, that Milosevic would endure a few days of relatively modest air strikes before accepting NATO's terms.<sup>12</sup> This view stemmed in part from prior experience: Milosevic and Serb forces in Bosnia quickly sued for peace after NATO bombed Serb military targets in 1995. In retrospect, it became obvious that the two situations were radically different, both in military and political terms, but at least at the outset, NATO hoped that any actual use of force in connection with Kosovo could be avoided or minimized.

Second, NATO action took place only after Belgrade's repeated failure to comply with pertinent Security Council resolutions, and only after extensive diplomatic efforts failed.<sup>13</sup> In a

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10. See, e.g., S.C. Res. 1199 (Sept. 23, 1998); S.C. Res. 1203 (Oct. 24, 1998).

11. See, e.g., President William J. Clinton, Remarks by the President to KFOR Troops (June 22, 1999), available at <http://clinton4.nara.gov/wh/new/html/1990622h.html>.

12. See Richard Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 851 (1999).

13. See U.S. Dep't of State, *Kosovo Chronology* (May 21, 1999) [hereinafter *Kosovo Chronology*], at [http://www.state.gov/www/regions/eur/fs\\_kosovo\\_timeline.html](http://www.state.gov/www/regions/eur/fs_kosovo_timeline.html) (providing a chronology of events in Kosovo that reflects the United States' efforts at negotiations with the FRY).

series of resolutions, the U.N. Security Council condemned Serb violence and repression in Kosovo, demanded that the FRY accept a negotiated settlement to the conflict in keeping with the Organization for Security and Cooperation in Europe ("OSCE") principles and Contact Group proposals, and imposed various sanctions under Chapter VII of the U.N. Charter to encourage FRY compliance.<sup>14</sup> In Resolution 1160, for example, the Council demanded that Belgrade withdraw its "special police units and cease[ ] action by the security forces affecting the civilian population."<sup>15</sup> Similarly, in Resolution 1199, the Security Council again demanded that Belgrade cease hostilities and negotiate a political settlement. The Council warned that "should the concrete measures demanded in this resolution . . . not be taken . . . additional measures to maintain or restore peace and stability in the region" would be considered.<sup>16</sup>

Throughout 1998 and the early part of 1999, the United States and its allies, at times with the cooperation of the Russian Federation and others, made numerous efforts to reach an agreement acceptable to Belgrade. In October 1998, Milosevic, facing the threat of NATO military intervention, agreed to withdraw troops from Kosovo and to allow the OSCE's Kosovo Verification Mission to send in 2000 observers to monitor the FRY's treatment of ethnic Albanians.<sup>17</sup> The Security Council approved the agreement and demanded cooperation from both sides.<sup>18</sup> Before long, however, Belgrade renewed its military activity in Kosovo. In response, the United States and other Western States demanded that FRY and Kosovo Albanian representatives meet in Rambouillet, France, for intensive negotiations on a comprehensive political settlement.<sup>19</sup> After weeks of negotiations, the talks broke down when Serb negotiators began to renege on previously accepted positions. Almost immediately, Serb forces resumed military activities in Kosovo.<sup>20</sup>

Third, FRY actions shortly before the bombing presented

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14. See Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 829-31 (1999).

15. S.C. Res. 1160 (Mar. 31, 1998).

16. S.C. Res. 1199, *supra* note 10.

17. See *Kosovo Chronology*, *supra* note 13.

18. S.C. Res. 1203, *supra* note 10.

19. See *Kosovo Chronology*, *supra* note 13.

20. See *id.*

NATO with at least the possibility of a major humanitarian catastrophe. In the year preceding the March offensive, indiscriminate FRY assaults on areas controlled by the KLA drove thousands of Kosovars from their homes.<sup>21</sup> Admittedly, the largest exodus did not occur until after NATO's bombing campaign began, when 800,000 Kosovars were driven across the borders into Albania and Macedonia as their homes and villages were looted and torched, and as many as 10,000 were killed. But NATO contends that the FRY simply took advantage of NATO's intervention to accelerate a preconceived plan—"Operation Horseshoe"—designed to pacify Kosovo by expelling most of its ethnic Albanian population. The speed with which the operation was executed suggests that NATO may have been right.<sup>22</sup>

Fourth, NATO's action was not narrowly self-interested. While concerns over regional stability played a major role, in addition to genuine fears for the security and rights of Kosovar Albanians, NATO did not act to impose a friendly regime, obtain control over territory or resources, or otherwise pursue any of the usual selfish aims often ascribed to States intervening under a claim of humanitarianism. Thus, the fears of abuse that underlie most objections to legalizing humanitarian intervention were not realized in Kosovo.

Finally, NATO's action commanded broad support in the international community. The breadth of this support was reflected in the reaction to a draft Security Council resolution supported by China, Namibia, and Russia condemning the NATO bombing. The draft was defeated by a vote of twelve to three.<sup>23</sup> This vote, coupled with later Security Council resolutions in support of the political settlement reached at the end of the bombing campaign, reflect, if not implicit approval, at least after-the-fact acquiescence by most members of the Security Council in NATO's decision to intervene.<sup>24</sup>

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21. *See id.* (noting announcement by United Nations ("U.N.") High Commissioner for Refugees on September 29, 1998, that as many as 200,000 Kosovars had been displaced by the fighting begun in February).

22. *See* Wedgwood, *supra* note 14, at 829 (arguing that evidence that Serbs began the offensive prior to NATO action, and the speed with which 800,000 Kosovo Albanians were deported, leads to reasonable belief that Belgrade had preconceived the plan).

23. *See id.* at 831.

24. *See id.*; *see also*, Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824, 826-27 (1999) (suggesting that the



All of these factors render NATO's decision to circumvent the U.N. Security Council less troubling from an international law standpoint than it might otherwise have been. But even collectively, these factors do not bring NATO's action within the formal law of the U.N. Charter. NATO deliberately did not seek Security Council authorization for its action because it knew that the Russian Federation would veto any authorizing resolution.<sup>25</sup> But under the Charter, it was up to the Security Council, not NATO, to determine whether conditions in Kosovo warranted military intervention. NATO's actions may have furthered important human rights objectives and attracted support from around the world, but if treated as lawful, would suggest that other States and regional organizations may make their own unilateral determinations on the need for force, with potentially grave consequences for world order. One need only imagine the Arab League intervening in Israel to prevent actual or anticipated mistreatment of Palestinians, or Russia intervening in the Baltic states to protect the rights of ethnic Russians, to grasp the risks.

But simply to characterize the intervention as illegal is unsatisfactory. International law rests fundamentally on State practice. If key actors proceed without reference to a norm, and act with general though by no means universal approbation, then declaring the act illegal carries little weight. In such cases, the States acting pay little or no political price except insofar as they weaken a norm from which they ordinarily benefit. Moreover, there may be future instances in which humanitarian concerns clearly outweigh the need for adherence to the U.N. Charter's precepts on the use of force.

With these considerations in mind, some scholars suggest that NATO's action in Kosovo should be treated as an "acceptable breach": an action contrary to formal treaty rules but desirable on humanitarian grounds and accepted, or even approved, by most States; an action that necessarily loosens somewhat the rules governing the use of force, but only modestly, given the

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U.N. Security Council's after-the-fact ratification of Resolution 1244 is evidence of its acquiescence in NATO's decision to intervene).

25. Cf. Henkin, *supra* note 24, at 827 (arguing that the experience of Kosovo will lead States or collectives to shift the burden of the veto, when they are confident of the Security Council's acquiescence in contemplated intervention, by acting first and then challenging the Security Council to terminate the action).

unique circumstances and the purposes for which force was used.<sup>26</sup>

The notion of acceptable breach is an attractive one in many respects. Even during the Cold War, States tended to accept, or at least ignore, isolated instances of military intervention with predominantly humanitarian outcomes. For example, Tanzania's intervention in Uganda, which ended the widespread human rights abuses of the Idi Amin government, attracted little criticism.

More recent regional interventions in West Africa also fit into this pattern. In 1990, the Economic Community of West African States ("ECOWAS") used force to end the civil war raging in Liberia; it neither sought nor received prior Security Council authorization. Other States generally welcomed, or at least acquiesced in, ECOWAS' decision to use force, and in subsequent resolutions, the Council implicitly supported the intervention.<sup>27</sup> ECOWAS again used force without prior Security Council authorization in 1996, this time to re-instate the ousted President of Sierra Leone.<sup>28</sup> Again, Security Council resolutions implicitly ratified the intervention, but only after the fact. In 1991, France, the United Kingdom, and the United States carved out safe havens for Kurds in northern Iraq; most States disagreed with the legal rationales advanced, but nonetheless acquiesced in the establishment of the safe havens.<sup>29</sup> Thus, the international community and the Security Council have evinced an increasing willingness in recent years to tolerate an occasional military intervention, if the decision-making is multilateral, and the purpose is genuinely humanitarian, even in the absence of prior Security Council authorization.

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26. See generally 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 (1974) (providing an early but incisive discussion of the pros and cons of the theory of acceptable breach).

27. See Jeremy Levitt, *Humanitarian Intervention by Regional Actors in International Conflicts, and the Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 347 (1998); David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 185-86 (L. Damrosch ed., 1993).

28. See Levitt, *supra* note 27, at 347; Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321 (1988).

29. See Lobel, *supra* note 3, at 29.

Treating instances of genuinely humanitarian intervention as acceptable breaches has the advantage of leaving the Charter rules governing the use of force at least formally intact, while not foreclosing occasional and exceptional cases in which interventions are unauthorized but nonetheless desirable on human rights grounds. As Ian Brownlie suggested many years ago, this approach may be analogized to the practice of many States regarding euthanasia: it is tolerated as on balance desirable in some cases, but not legalized for fear of undermining core principles mandating respect for human life.<sup>30</sup>

But the notion of an acceptable breach is something of an oxymoron. If the action is genuinely acceptable, it seems inappropriate to maintain that it should also be unlawful, even if the adverse consequences of treating it as a technical violation of the law are minimal. To continue to treat such actions as unlawful might inhibit States from acting in circumstances in which action is warranted.<sup>31</sup> Moreover, giving a wink and a nod to humanitarian interventions while maintaining that they are illegal may undermine respect for international law generally.

In any event, it is uncertain whether NATO's action can be fairly characterized as an acceptable breach. When ECOWAS acted in Sierra Leone and in Liberia, dissenting voices were few and marginal. Other States could treat these interventions after the fact as "peacekeeping operations," with relatively little cost to the basic Charter norms governing the use of force.

But when major powers, such as China and Russia, both permanent members of the Security Council, vocally oppose an intervention, it is hard to view it as falling within the acceptable breach paradigm, since that paradigm assumes broad tolerance of the intervention.

Moreover, it is debatable whether NATO's intervention fully satisfies the kinds of criteria usually advanced by advocates of legalizing humanitarian intervention. Such criteria commonly include the existence, or at a minimum, the imminent existence of widespread, grave human rights abuses involving substantial loss of life; the reasonable exhaustion of non-forcible remedies; a proportional use of force that is not likely to do more harm than

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30. Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139 (Richard B. Lillich ed., 1973).

31. Fonteyne, *supra* note 26.

good; the minimum impact on existing structures of governance consistent with accomplishing the humanitarian goals of the intervention; and humanitarian motives, or at a minimum, conduct consistent with a predominantly humanitarian objective.

Although the FRY committed substantial human rights abuses against Kosovar Albanians in the course of its struggle against the KLA, it is doubtful whether prior to NATO's intervention those abuses amounted to the kind of grave humanitarian emergency usually contemplated by advocates of humanitarian intervention. The U.N. Security Council did make note of a "dire humanitarian" situation prior to the intervention, but NATO's case rests in large part on the perceived need to avert the large-scale ethnic cleansing NATO believed would follow the collapse of the Rambouillet talks in the absence of a demonstration of Western resolve. NATO points to the mass expulsions and the roughly 10,000 deaths that occurred after the bombing started as proof that its concerns were well founded. In other words, NATO's action was in substantial part an anticipatory humanitarian intervention; it acted not so much to stop an on-going humanitarian catastrophe as to prevent one.<sup>32</sup>

It is, of course, far better to prevent atrocities than to respond after the fact. And in this case, NATO can point both to the general pattern of Belgrade's actions in the Balkans and to past atrocities in Kosovo as supporting the need for strong action immediately after Rambouillet's failure. Still, acting even in part on anticipation of future atrocities complicates any assessment of whether the threshold for emergency intervention has been met, since it is impossible to know with certainty the extent to which the anticipated abuses would actually have materialized in the absence of intervention. Thus, some scholars have questioned whether the abuses that followed Rambouillet would have occurred in the same way and to the same degree in the absence of NATO's commencement of its bombing campaign.<sup>33</sup>

Whether NATO exhausted diplomatic alternatives is also a

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32. See Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834 (1999).

33. See, e.g., Richard Bilder, *Kosovo and the "New Interventionism": Promise or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153, 155 (1999) (questioning whether anger and revenge prompted by the bombings were the motivating factors behind the atrocities and exodus); Lobel, *supra* note 3, at 30 (discussing significant increase in the scale of ethnic cleansing after the bombing began).

subject of dispute. As noted earlier, the United States along with other States engaged in extensive negotiations with the FRY culminating in the talks at Rambouillet. But NATO also made demands at Rambouillet that were difficult for any government to accept. Among other things, NATO insisted on substantial autonomy for Kosovo, with its final status to be determined at least in substantial part by a referendum within three years, with independence the almost certain result.<sup>34</sup> Moreover, NATO insisted that its forces should be permitted to move throughout the entire territory of the FRY to oversee its compliance with the terms being offered, something inconsistent with the FRY's constitution and ordinary conceptions of State sovereignty.<sup>35</sup>

The FRY's refusal to accept these terms triggered NATO's use of force. Yet when the conflict ended, NATO accepted terms less demanding than those it proffered at Rambouillet. Under the terms of the Military Technical Agreement and related agreements entered into at the end of the fighting, Kosovo does have near complete autonomy, but security is to be provided by forces acting under U.N. auspices rather than under NATO's control.<sup>36</sup> It was understood that NATO would play a key role in the implementation force, but that the force would also include Russian troops.<sup>37</sup> Moreover, the peace agreement left open the

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34. Rambouillet Agreement, *available at* [http://www.state.gov/www/regions/eur/kovo\\_rambouillet\\_text.html](http://www.state.gov/www/regions/eur/kovo_rambouillet_text.html). Ch. 8, art. 1(3) of the Rambouillet text provides:

Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.

*Id.* Although this language does not explicitly provide for a binding referendum, the United States told the KLA in writing that it interpreted the agreement as giving Kosovars a right to determine their future by referendum. *See* UNITED KINGDOM HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE FOURTH REPORT 1999-2000 [hereinafter FOREIGN AFFAIRS COMMITTEE REPORT], *available at* <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmffaff/28/2806.htm>.

35. The Military Annex to the Rambouillet agreement provided that "NATO personnel shall enjoy, together with their vehicles, vessels, aircraft, and equipment, free and unrestricted passage and unimpeded access throughout the FRY including associated airspace and territorial waters." FOREIGN AFFAIRS COMMITTEE REPORT, *supra* note 34.

36. Military Technical Agreement, June 9, 1999, *available at* [http://www.pbs.org/newshour/bb/europe/jan-june99/agreement\\_6-9.html](http://www.pbs.org/newshour/bb/europe/jan-june99/agreement_6-9.html).

37. THE KOSOVO REPORT, *supra* note 2, at 96.

question of a referendum on the province's future.<sup>38</sup> Thus, some critics of the Rambouillet negotiations suggest that NATO never expected Milosevic to accept its terms but went through the motions in order to build support within the Alliance for subsequent military action.<sup>39</sup> While NATO may well have been correct in concluding that further negotiations with Milosevic would be fruitless, particularly given his record in initiating prior Yugoslav conflicts, the judgment is necessarily a difficult one for outside observers to make.

Some critics of NATO's intervention even question whether NATO acted out of humanitarian motives, and whether it in fact achieved humanitarian ends. It has been suggested variously that NATO acted to preserve its credibility, to sustain its position in Bosnia and elsewhere in the Balkans, to demonstrate its post-Cold War relevance, to send a message to other States that challenging NATO carries risks, to avoid having to accept large numbers of refugees, or even to test modern weaponry and tactics.<sup>40</sup> While some of these suggestions are implausible, they illustrate the difficulty of ascertaining motives, which can be varied and complex, and which may change over time.

To some extent, the scope and intensity of the NATO intervention may have reflected a miscalculation. NATO clearly desired to end the escalating conflict between KLA and FRY forces. Presumably, NATO wanted both to protect innocent Kosovars and to avoid further destabilization of the region. From past experience, NATO could reasonably have believed that firm measures taken early might avoid a protracted and costly later involvement. NATO might also reasonably have concluded that a united front and a demonstrated willingness to use force would quickly force Milosevic to accept substantial autonomy for Kosovo and bring the crisis to a relatively prompt close.<sup>41</sup>

Once committed, NATO had little choice politically but to stay the course. When Milosevic refused to accept NATO demands at Rambouillet, NATO could not simply back down. Hav-

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38. *Id.* at 271.

39. See FOREIGN AFFAIRS COMMITTEE REPORT, *supra* note 34, at 66-67.

40. See, e.g., Bilder, *supra* note 33, at 156; see also FOREIGN AFFAIRS COMMITTEE REPORT, *supra* note 34, para. 72.

41. See FOREIGN AFFAIRS COMMITTEE REPORT, *supra* note 34, paras. 106-11 (indicating that NATO expected Milosevic to back down quickly when confronted with the use of force).

ing repeatedly threatened to use force, NATO had little choice but to do so. At that point, NATO's credibility was indeed "on the line," as various NATO officials emphasized.<sup>42</sup> It is doubtful whether NATO would have put itself into this position had it anticipated that Milosevic would attempt to outlast a NATO bombing campaign rather than quickly yield once it began. But having started, NATO had little choice but to continue until Belgrade capitulated.

Yet the bombing campaign was not well suited to the humanitarian purpose that provides its principal justification. As discussed below, the manner in which NATO military action was conducted rendered NATO largely unable to prevent ethnic cleansing on the ground. And some observers contend that the bombing itself helped trigger the kinds of abuses NATO was hoping to prevent. It is undisputed that the FRY greatly expanded its campaign against Albanian Kosovars once the bombing started. What is disputed is whether and to what extent the FRY's post-bombing atrocities constituted a response to the bombing rather than a pre-conceived plan that would have been carried out regardless of NATO's air assault. According to a report prepared by the U.K. House of Commons Foreign Affairs Committee:

It is likely that the NATO bombing did cause a change in the character of the assault upon the Kosovo Albanians. What had been an anti-insurgency campaign—albeit a brutal and counter-productive one, involving atrocities such as that at Racak in January 1999—became a mass, organised campaign to kill Kosovo Albanians or drive them from the country. This was partly because of the Serbs' reaction to the bombing, and partly because the launch of the campaign required that the OSCE monitors be withdrawn, thereby removing one of the obstacles to action against the Kosovo Albanians.<sup>43</sup>

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42. *See id.* paras. 72-74.

43. FOREIGN AFFAIRS COMMITTEE REPORT, *supra* note 34, para. 87. The Independent International Commission on Kosovo reached a similar conclusion:

We cannot know what would have happened if NATO had not started the bombing. It is however certainly not true that NATO provoked the attacks on the civilian Kosovar population—the responsibility for that campaign rests entirely on the Belgrade government. It is nonetheless likely that the bombing campaign and the removal of the unarmed monitors created an internal environment that made such an operation feasible. The FRY forces could not hit NATO, but they could hit the Albanians who had asked for NATO's support

NATO contends that the expulsion campaign would have occurred even in the absence of NATO military action.<sup>44</sup> But even if there was a causal link, on balance the human rights situation in Kosovo nonetheless ultimately improved as a result of NATO action. For the foreseeable future, at least, Kosovar Albanians are free to exercise substantial self-governance and need not fear repression or harassment in the exercise of their political rights. Serbs in Kosovo face a much bleaker situation, but can at least claim the protection of an international security presence.

What becomes apparent from a close look at the Kosovo operation is that it is not a textbook case of humanitarian intervention. NATO's action was not a direct and immediately effective response to a sudden eruption of genocidal violence. Instead, the circumstances were more complicated and more nuanced. NATO's objectives were multiple and varied over time, and the effects of its actions were mixed. Overall, it appears that NATO did act in Kosovo for predominantly humanitarian reasons and that it did ultimately achieve important humanitarian ends. This may be the most we can reasonably expect of any group of States prepared to use force for other than selfish interests. Still, the subjective nature of the humanitarian calculus in Kosovo makes it an ambiguous precedent. Thus, we are stuck for the time being in an uncomfortable limbo. It may be that the law in this area will and should evolve in a common-law fashion—that by cumulating experience from past cases with experience gained in future cases, criteria will emerge permitting us to distinguish lawful and unlawful interventions undertaken in the name of humanitarianism. But it might also be the case that unauthorized interventions reasonably characterized as humanitarian will be too sporadic, and too contested in their circumstances, to generate a meaningful rule. In other words, we may be stuck in limbo indefinitely.

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and intervention. It was thus both revenge on the Albanians and a deliberate strategy at the same time.

THE KOSOVO REPORT, *supra* note 2, at 31.

44. The FRY had clearly planned for the possible mass ethnic cleansing of Kosovo. As the Independent International Commission on Kosovo observed, "it is very clear that there was a deliberate organized effort to expel a huge part of the Kosovar Albanian population and such a massive operation cannot be implemented without planning and preparation." *See id.*



One response to the uncertainties surrounding humanitarian intervention is to improve the capacity of different actors to undertake such interventions while structuring a decision-making process that will minimize the risk of abuse. By doing so, it may be possible to increase the probability that the U.N. Security Council will authorize intervention in appropriate cases and the probability that States will be prepared to intervene. The British and Dutch governments have been working to persuade members of the U.N. Security Council to consider developing criteria to identify situations in which the permanent members would agree to refrain from exercising their veto.<sup>45</sup> This effort can be seen as an attempt to render the U.N. institutionally better able to deal with genuine humanitarian emergencies.

More important, however, and more practical, are efforts to strengthen the U.N.'s peacekeeping and peace enforcement capabilities. The U.N. and various individual member States have devoted extensive attention to this issue, partially as a result of perceived U.N. failures in maintaining and enforcing peace in places such as Somalia and Bosnia. A thorough analysis prepared by a team of experts under the direction of veteran U.N. diplomat, Lakhdar Brahimi, has identified numerous areas for reform, and the U.N. is in the process of reviewing and implementing many of the Brahimi recommendations.<sup>46</sup>

For the most part, though, the U.N. is not equipped or inclined to undertake large-scale coercive military interventions. The culture of U.N. peacekeeping continues to insist on seeking to maintain neutrality with respect to warring parties, and most countries contributing troops lack the capacity for more aggressive peace enforcement operations.<sup>47</sup> When force is needed to compel the termination of atrocities or the cessation of hostilities, the U.N. must ordinarily rely either on an individual State (such as France, which belatedly intervened in Rwanda in 1994) or a coalition of the willing (as in Bosnia, where NATO joined with other States to end the fighting in 1995).

Recognizing the U.N.'s limitations in this field, various regional organizations have begun to develop their own institu-

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45. Author's interviews with British and Dutch government officials.

46. *Report of the Panel on U.N. Peace Operations*, A/55/305 - S/2000/809 (2000), available at [http://www.un.org/peace/reports/peace\\_operations/](http://www.un.org/peace/reports/peace_operations/).

47. Author's interviews with U.N. peacekeeping officials.

tional capacities to engage in humanitarian and other forms of intervention. The European Union ("EU"), for example, is working to build a crisis response capability under the rubric of the European Security and Defense Initiative ("ESDI").<sup>48</sup> This initiative is intended to give the EU a significant military force capable of rapid deployment in crises, which could be used for humanitarian intervention among other things. The EU has yet to devote the resources that would be necessary to make ESDI a reality, but it has at least started down that road. Similarly, the recently formed African Union ("AU"), which is modeled on the EU, includes conflict prevention and management among its central aims.<sup>49</sup> The AU is seeking to develop its own crisis response capabilities.

One of the most interesting developments in this regard is the 1998 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.<sup>50</sup> This Protocol established a Mediation and Security Council that "shall . . . authorise all forms of intervention and decide particularly on the deployment of political and military missions" when the conditions for application are met.<sup>51</sup> These conditions include interstate aggression, but also cases of internal conflict "that threaten[ ] to trigger a humanitarian disaster," that involve "serious and massive violations of human rights and the rule of law," or that involve "an overthrow or attempted overthrow of a democratically elected government."<sup>52</sup> To this end, the Protocol obligates member States to designate military units to be available on a stand-by basis for fulfillment of the Protocol's aims.

The extent to which the Protocol is designed to enable and even require member States to act in the absence of Security Council authorization or the consent of the target State is unclear. But ECOWAS has already intervened without Security Council authorization in Liberia and Sierra Leone, and found its

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48. See NATO Fact Sheet, *Strengthening European Security and Defense Capabilities*, Dec. 15, 2000, at <http://www.nato.int/docu/facts/2000/dev-esdi.htm>.

49. See Constitutive Act of the African Union, art. 9 (2001), available at <http://www.oau-oua.org/LOME2000/Africa%20Union%20Constitutive%20Act%20ENG.htm>.

50. See Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, available at <http://www.ecowas.int/>.

51. *Id.* art. 10.

52. *Id.* art. 25.

actions generally welcomed. Moreover, ECOWAS has concluded that humanitarian emergencies in member States invariably spill over into neighboring States and jeopardize regional security generally. ECOWAS has also concluded that it cannot rely on the U.N. to intervene effectively in such cases, and so it must be prepared to shoulder much of the burden itself.

Unfortunately, ECOWAS lacks the financial, political, and logistical resources necessary for effective interventions. In both Liberia and Sierra Leone, the ECOWAS Cease-fire Monitoring Group ("ECOMOG"), ran into serious problems and was itself responsible for grave human rights abuses.<sup>53</sup> But other States could, at least in theory, provide much of the assistance needed to render ECOMOG into a more effective and disciplined force, which might then play a very positive role in resolving humanitarian emergencies in the region. In that event, the Security Council might be much more willing to authorize ECOWAS military intervention in the first place.

But strengthening institutional capacity, though it may increase the probability of securing Security Council authorization in cases of marginal interest to the permanent members of the Council, will not resolve the dilemma posed by future Kosovos, where Council members have important but divergent interests. To the extent that such cases arise in the future, the normative tensions created by the Kosovo intervention will either deepen, or come to some kind of eventual resolution as yet unforeseeable.

What is clear now is that the restraints on the use of force have lessened. NATO's intervention in Kosovo would have been unthinkable during the Cold War. But the danger that competing interventions might escalate to a superpower nuclear confrontation has receded. Accordingly, NATO had space to act that did not exist before. Within limits, that freedom extends to other uses of force. The vigorous military response of the United States and its allies to the attacks on the World Trade Center and the Pentagon reflect a broad interpretation of the right of self-defense. The U.S. view of self-defense in this context has been accepted by most States, though it would have generated vigorous controversy if the assault on Afghanistan had taken place a dozen years ago. This loosening of the constraints on

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53. See Levitt, *supra* note 27; Wippman, *supra* note 27.

the use of force may, within limits, represent an inevitable and even desirable response to the changed conditions following the Cold War. But we should be wary that the core principles of the U.N. Charter's approach to the use of force are not too rapidly and extensively eroded.

## II. *HUMANITARIAN LAW IN HUMANITARIAN INTERVENTION*

The manner in which NATO used force in Kosovo has attracted almost as much scrutiny as the decision to use force in the first place. NATO fought an extraordinary "zero-casualty" war. "Force protection" dominated NATO military planning. The goal was to force Belgrade to accept NATO's terms while minimizing NATO casualties.

To accomplish this goal, NATO engaged in week after week of high-altitude aerial bombardment, concentrating first on the suppression of FRY air defenses, and then on FRY military capabilities within Kosovo.<sup>54</sup> Much of the assault was conducted using precision-guided munitions, which limit the unavoidable risk of "collateral damage." In general, NATO went to great lengths to ascertain that its targets constituted legitimate military objectives, using a complex process requiring the assent of multiple decision makers from different States. Military lawyers able to pull up the Geneva Conventions on their computer screens participated in the target selection process.

Unfortunately, Milosevic did not back down after a few days of air attacks, as he was expected to do. Instead, his forces intensified the "ethnic cleansing" of Kosovo, killing many civilians in the process. High-altitude air strikes, while shielding NATO pilots from anti-aircraft fire, were of little utility in stopping the ethnic cleansers on the ground. Only ground troops supported by low-flying planes and helicopters could have fulfilled that role, and NATO was unwilling to expose its forces in that way. Moreover, NATO's air raids killed hundreds of civilians in the FRY, including some of the Kosovars that NATO had intervened to protect.<sup>55</sup> And as the campaign wore on and Milosevic showed no signs of yielding, NATO increasingly opted to "go

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54. See THE KOSOVO REPORT, *supra* note 2.

55. See HUM. RTS. WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN, Feb. 2000, available at <http://www.hrw.org/reports/2000/nato/>.

downtown,” that is, to attack “dual-use” facilities serving both military and civilian needs. Such facilities included FRY electrical power, telecommunications, and transportation infrastructure.<sup>56</sup> The result was considerable hardship for the civilian population of the FRY.<sup>57</sup>

Many human rights groups, most notably Amnesty International, were sharply critical of the NATO military campaign.<sup>58</sup> Mary Robinson, U.N. High Commissioner for Human Rights, suggested that all sides to the conflict in Kosovo, including NATO, should be subject to investigation for violations of international humanitarian law.<sup>59</sup> A special committee from the Prosecutor’s office of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) conducted a review of NATO operations, and ultimately concluded that the facts did not justify proceeding with any prosecution.<sup>60</sup> The ICTY’s conclusion was not an endorsement of NATO tactics. Instead, the committee decided that there was insufficient evidence of intentional criminal acts to justify further investigation. From the standpoint of the committee, it was evident that NATO’s actions were not comparable to the kinds of large-scale, deliberate crimes that the ICTY was set up to prosecute.

Whether every dual-use facility attacked by NATO constituted a legitimate military target is a more difficult issue. The law in this area is relatively vague, and different actors can in

56. See *Kosovo Report*, *supra* note 2.

57. *Id.*

58. See AMNESTY INT’L, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA, “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE, available at <http://www.amnesty.org/ailib/intcam/kosovo/>; HUM. RTS. WATCH, *supra* note 55.

59. See *Robinson Attacks NATO Campaign*, BBC NEWS, May 9, 1999, available at [http://news.bbc.co.uk/hi/english/world/europe/newsid\\_339000/339562.stm](http://news.bbc.co.uk/hi/english/world/europe/newsid_339000/339562.stm).

60. See FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, available at <http://www.un.org/icty/pressreal/nato061300.htm>. According to the Committee,

“[o]n the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.”

*Id.* para. 90.

good faith reach different conclusions about the military value of a particular target and therefore the legitimacy of attacking it.<sup>61</sup> But allowing for differences of interpretation, it seems clear that the ICTY Committee's decision to forego further investigation was the correct one.

The more interesting theoretical question is whether, as a number of scholars have suggested, NATO should be held to a higher standard in its conduct of military operations than international humanitarian law ordinarily requires.<sup>62</sup> From the standpoint of humanitarian law, the suggestion seems misplaced. Humanitarian law applies to all cases of armed conflict, without regard to the motivations of the combatants or the legality of their decision to resort to force. It would be peculiar, even perverse, to conclude that the rules of humanitarian law should apply more stringently to those forces intervening for humanitarian ends than to those engaged in ethnic cleansing and similar atrocities. Doing so would handicap the wrong side, the forces intervening to assist a beleaguered population.

Instead, the possibility of injuries to civilians should be factored into the decision to use force in the first place. The ultimate justification for humanitarian intervention is the protection of innocents from grave harm. No intervention should be undertaken in the first place if the intervenors cannot be reasonably confident that they can achieve that objective at an acceptable cost, and harm to civilians must be a major component of that calculus.

NATO almost certainly could have lessened civilian casualties and perhaps prevented or at least moderated the mass expulsion of Kosovars that followed the onset of the bombing cam-

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61. As the Independent International Commission on Kosovo observed, some of NATO's targeting decisions were

"questionable under the Geneva Conventions and Protocol I, but it must be acknowledged that State practice in wartime since World War II has consistently selected targets on the basis of an open-ended approach to 'military necessity,' rather than by observing the customary and conventional norm that disallows deliberate attacks on non-military targets. It must also be noted that the NATO campaign was more careful, in relation to its targeting, than was any previous occasion of major warfare conducted from the air."

See THE KOSOVO REPORT, *supra* note 2.

62. See, e.g., *id.* (arguing that in humanitarian interventions, "[t]here must be even stricter adherence to the laws of war and international humanitarian law than in standard military operations. This applies to all aspects of the military operation, including any post cease-fire occupation.").

paign, if NATO had been prepared and willing to use ground troops at the outset. But NATO was neither logistically nor politically prepared to use ground troops, and publicly said so. NATO leaders had decided that public opinion in key member States would not support a sustained intervention unless NATO could keep coalition casualties to an absolute minimum. As a result, NATO did not seriously consider a ground assault until well into the bombing campaign.<sup>63</sup> Thus, political imperatives drove military decision-making. It is easy to criticize this result, but one has to ask whether the alternative—no intervention or breaking off the intervention before it achieved its aims—would have been preferable. It is unlikely NATO would have started any military action if it had thought ground troops would be necessary.

Looking at Kosovo after the fact, it is possible to criticize the conduct of the operation for failing to maximize its humanitarian potential, and for doing so in ways that placed such a comparatively high value on the lives of coalition forces as opposed to the lives of civilians on the ground. But it does not follow that the laws of war should apply more strictly to humanitarian intervenors. Doing so would only render interventions in places like Kosovo less likely. Governments in developed democratic States are accountable to their citizens, and find it hard to maintain support for any military action entailing casualties unless clear national interests are at stake. It follows that such States will refuse to engage in humanitarian intervention unless they can do so at little risk to their own personnel. This may be unfortunate, but it is a fact that characterizes Western involvement in humanitarian endeavors from Somalia to Bosnia to Kosovo. We should be careful to ensure that the best does not become the enemy of the good. If on balance interventions such as NATO's in Kosovo further important human rights objectives, then tightening the rules of war for humanitarian intervenors would be counter-productive.

### CONCLUSION

Any judgment regarding the success or desirability of

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63. FOREIGN AFFAIRS COMMITTEE REPORT, *supra* note 34, paras. 112-15 (noting the prospect that NATO might in the end be forced into a ground assault may have contributed significantly to Milosevic's decision to yield).

NATO's intervention in Kosovo necessarily rests on unprovable assumptions. We can only speculate on what would have happened had NATO refrained from intervening. It seems probable, though, that the violence in Kosovo would have escalated, with potentially grave repercussions for the entire region. It may be that the intervention had its own destabilizing influence, prompting ethnic Albanians in Macedonia to pursue their own demands for independence. But as a result of its intervention in Kosovo, NATO has been forced to work towards stabilizing not only Kosovo, but also Macedonia, and now, with the fall of Milosevic, the FRY itself. NATO's efforts appear to have yielded considerable benefits, and there is reason to hope that the situation in the region will continue to improve. On balance, then, it seems likely that both Kosovo and the region are better off than they would otherwise have been.

Unfortunately, NATO's objectives could only be pursued by circumventing the U.N. Charter's framework for the use of force, and by adopting a zero-casualty approach that lessened significantly the potential humanitarian benefits of the operation. Moreover, as noted, the long-term costs and benefits of the intervention are necessarily speculative. From an international law standpoint, Kosovo therefore remains an ambiguous precedent; given the extraordinary circumstances that generated NATO's use of force, Kosovo may also be an anomalous event. But NATO's willingness to use force outside the framework of the U.N. Charter already has contributed to a political climate in which States are unlikely to interpret the Charter's restrictions on the use of force as narrowly in the future as they have in the past.