

Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosova

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SPECIAL FEATURE

OPERATION ALLIED FORCE: REVIEWING THE LAWFULNESS OF NATO'S USE OF MILITARY FORCE TO DEFEND KOSOVO

WALTER GARY SHARP, SR.*

TABLE OF CONTENTS

I. INTRODUCTION	296
A. Ethnic Cleansing at the End of the 20 th Century	296
B. A Short History of the Former Socialist Federal Republic of Yugoslavia.....	297
C. The Kosovo Crisis.....	301
D. Framing the Issues	308
II. LAWFULNESS OF THE USE OF FORCE	309
A. A Primer on Contemporary Use of Force Norms Under International Law	310
1. Self-defense and the Use of Force by States	311
a. Necessity and Proportionality	312
b. Collateral Damage and Injury to Civilians	313

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c.	Humanitarian Intervention	313
2.	Security Council Authority to Use Force	316
B.	A Legal Analysis of NATO's Use of Military Force to Defend Kosovo	318
1.	International Legal Perspectives	318
2.	Self-defense	319
3.	Security Council Authority	322
III.	CONCLUSION: NEW THINKING ABOUT THE USE OF MILITARY FORCE.....	324

I. INTRODUCTION

We learned some of the same lessons in Bosnia just a few years ago. The world did not act early enough to stop that war, either. And let's not forget what happened . . . This was genocide in the heart of Europe, not in 1945 but in 1995.

President William Jefferson Clinton¹

A. *Ethnic Cleansing at the End of the 20th Century*

It is reprehensible and appalling to even imagine the horrors of ethnic cleansing that we are now witnessing in the Balkans at the end of the 20th century – inhumane carnage that can be attributed not to the peoples of the former Yugoslavia but to a few irresponsible leaders. Although ancestral hatreds and ethnic divisions of the peoples of the former Socialist Federal Republic of Yugoslavia have existed for centuries, an International Commission on the Balkans established in 1994 by the Carnegie Endowment for International Peace concluded that the 1992-1995 Balkan civil war

was launched with deliberation and calculation by certain political figures from the old Communist Yugoslavia – Slobodan Milosevic and Franjo Tudjman chief among them – who believed they could expand their power . . . by awakening and exploiting the nationalism of Serbs, Croats, Slovenes, and Moslems. . . .²

1. Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 516, 517 (Mar. 29, 1999).

2. William Pfaff, *The Balkans: A Political Mess with Political Solutions*, BALTIMORE SUN, Oct. 7, 1996, at 9.

One political figure, Jovan Raskovic, who had a prominent role in launching the war announced on television on January 24, 1992 that

I feel responsible because I made the preparations for this war, even if not the military preparations. If I hadn't created this emotional strain in the Serbian people, nothing would have happened. My party and I lit the fuse of Serbian nationalism not only in Croatia but everywhere else in Bosnia-Herzegovina. It's impossible to imagine an SDP (Serbian Democratic Party) in Bosnia-Herzegovina or a Mr. [Radovan] Karadzic in power without our influence.³

The Director of the Citizens Commission on Human Rights in France later observed that Jovan Raskovic, with fellow psychiatrist Radovan Karadzic, "had whipped the Serbs into a frenzy and set the stage for the Balkans' biggest bloodbath since the area was occupied by the Nazis in World War II."⁴

The determination that the cause of this 1992-1995 Balkan war was so dependent upon the intentional actions of a few men strongly demands their arrest and prosecution. Indeed, it has been reported that the International Criminal Tribunal for the Former Yugoslavia (ICTY) has accused Yugoslav President Slobodan Milosevic in a sealed indictment of the execution of several thousand men in July 1995 during the civil war in Bosnia and Herzegovina.⁵ Yet, he remains free to kill again – and kill again he has. Milosevic is now responsible for the savagery and ethnic cleansing of Albanians in the Serb province of Kosovo. The international community cannot and must not stand idly by or continue to pursue military options that are feared from the outset to be unworkable. It must stop the slaughter in Kosovo, and it must punish those senior Yugoslavian officials who are responsible for the crimes that have marred the entire 20th century with virtual impunity. It is very questionable whether an air war will stop Milosevic or if it will simply punish the peoples of Serbia for the crimes of their political leaders.

B. *A Short History of the Former Socialist Federal Republic of Yugoslavia*

Intense political strife, civil war, and conflict seem to have always

3. Patricia Forestier, *Psychiatric Genocide! How the Barbarities of 'Ethnic Cleansing' Were Spawned by Psychiatry*, FREEDOM, May 1993, at 6, 6.

4. *Id.* at 6, 35.

5. See *Report: Milosevic Wanted for Crimes*, ASSOCIATED PRESS electronic news release, Apr. 4, 1999 (visited Apr. 4, 1999) <<http://wire.ap.org/gotoap.cgi>>.

dominated the Serb, Croat, Slovene, and Montenegrin peoples.⁶ Known collectively as the South Slavs (or Yugoslavs), these peoples merged four independent Balkan states on December 1, 1918 to form the Kingdom of Serbs, Croats, and Slovenes.⁷ The Kingdom, however, was politically dominated by the Serbs who denied any autonomy to the Croats, Slovenes, and other minority ethnic groups.⁸ After a decade of internal struggle, the king suspended the Constitution and assumed dictatorial control of the government in an effort to avoid a civil war.⁹ The king also changed the name of the state to the Kingdom of Yugoslavia in hopes of imposing a sense of national unity.¹⁰

The oppression continued, however, and the king was assassinated in 1934.¹¹ A more conciliatory federalist form of government was adopted, but the oppression and civil strife still continued.¹² The Kingdom of Yugoslavia declared its neutrality when World War II first began, but it succumbed in March 1941 to German pressure to join the Tripartite Pact of Germany, Italy, and Japan.¹³ Popular dissatisfaction with this new alliance within the Kingdom of Yugoslavia caused a successful *coup d'état*, and a new government was formed which was dedicated to neutrality.¹⁴ In response to this new declaration of neutrality, German, Italian, Hungarian, and Bulgarian forces swiftly invaded and dismembered Yugoslavia in April 1941.¹⁵ Guerrilla warfare and political turmoil prevailed in the Kingdom until World War II ended and a Croatian Communist guerrilla, Marshal Josip Broz Tito, formed a new government which was proclaimed in November 1945 as the Federal People's Republic of Yugoslavia.¹⁶ This state was recognized by the United States, Britain, and the Soviet Union,¹⁷ and it became a Member State of the United Nations on October 24, 1945.¹⁸ Tito became President under a 1953 constitution, and the country was renamed under a 1963 constitution as the Socialist Fed-

6. See *Yugoslavia*, MICROSOFT ENCARTA '95 (CD-ROM Multimedia Encyclopedia, 1994).

7. See *id.*

8. See *id.*

9. See *id.*

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See United Nations Member States, (last modified Dec. 9, 1998) <<http://www.un.org/overview/unmember.html>>.

eral Republic of Yugoslavia.¹⁹

When Tito died in May 1980, he left the country with a weak economy and government leadership that was saddled with a foreign debt in excess of fifteen billion U.S. dollars.²⁰ Ethnic conflict and separatist movements in the individual republics and provinces threatened the existence of the country.²¹ In January 1990, the League of Communists surrendered its monopoly on political power, and the Socialist Federal Republic of Yugoslavia enjoyed its first free multiparty elections since World War II.²² In December 1990, a Communist leader and outspoken nationalist named Slobodan Milosevic was elected President by the Yugoslavs.²³

Milosevic believed that he could expand his power by exploiting the nationalism of the Serbs, Croats, Slovenes, and Moslems.²⁴ One of Milosevic's first official actions, for example, was to initiate a harsh program of oppression in the Serb province of Kosovo.²⁵ As a direct result of Milosevic's oppressive and racist policies,²⁶ a series of violent and bloody civil wars erupted and the Socialist Federal Republic of Yugoslavia splintered into five states. The parliaments of Croatia and Slovenia passed declarations of independence on June 25, 1991.²⁷ Slovenia won its independence after a ten-day war, and Croatia won its independence in a cease-fire that ended a seven-month war during which it lost control of more than one-third of its provincial territory.²⁸ The Republic of Slovenia and the Republic of Croatia became Member States of the United Nations on May 22, 1992.²⁹ The Yugoslav republic of Macedonia declared its independence in September 1991,³⁰ and the Former Yugoslav Republic of Macedonia became a Member State of the United Nations on April 8, 1993.³¹

The declaration of independence by the provinces of Bosnia and Herzegovina in March 1992 caused a very bloody and protracted civil

19. See *Yugoslavia*, *supra* note 6.

20. See *id.*

21. See *id.*

22. See *id.*

23. See *id.*

24. See Pfaff, *supra* note 2, at 9.

25. See *Yugoslavia*, *supra* note 6.

26. See Pfaff, *supra* note 2, at 9.

27. See *Yugoslavia*, *supra* note 6.

28. See *id.*

29. See United Nations Member States, *supra* note 18.

30. See *Yugoslavia*, *supra* note 6.

31. See United Nations Member States, *supra* note 18.

war.³² During this war, the Serbs were responsible for massive human rights atrocities and ethnic cleansing that left over four million people homeless or in poverty by the end of 1993.³³ Serb death platoons reportedly marched to cadences that glorified the murder and rape of innocent women and children.³⁴ Serb soldiers burned families alive in their homes, crushed the heads of young children, and raped pregnant mothers in front of their families.³⁵ As many as one hundred thousand women were taken hostage and systematically raped in an effort to defile and impregnate them so they would not be accepted back into their community.³⁶ Non-combatants were taken to concentration camps where they were savagely interrogated and beaten to death.³⁷ The most widely accepted estimate of war deaths in the former Yugoslavia exceeds two hundred thousand civilians and soldiers.³⁸ Early in the war, however, the international community recognized Bosnia-Herzegovina as an independent state,³⁹ and it became a Member State of the United Nations on May 22, 1992.⁴⁰ Nevertheless, it took nearly four years and the loss of some three hundred thousand lives before the North Atlantic Treaty Organisation⁴¹ [hereinafter NATO] intervened with its military in 1995 to prevent the slaughter in Bosnia-Herzegovina.⁴²

Serbia and Montenegro, the remaining provinces, united and declared themselves the Federal Republic of Yugoslavia on April 27, 1992.⁴³ With the exception of China, the international community did not

32. See *Yugoslavia*, *supra* note 6.

33. See *id.*

34. See Rod Nordland, 'Let's Kill the Muslims!', *NEWSWEEK*, Nov. 8, 1993, at 48, 48.

35. See *id.* at 48-49.

36. See Forestier, *supra* note 3, at 6, 9.

37. See Robin Knight, et al., *The Hunt for the Killers of Bosnia*, *U.S. NEWS & WORLD REP.*, Apr. 10, 1995, at 52, 52.

38. See Peter Cary, *War Casualties: Bosnia by the Numbers*, *U.S. NEWS & WORLD REP.*, Apr. 10, 1995, at 53, 53.

39. See *Yugoslavia*, *supra* note 6.

40. See United Nations Member States, *supra* note 18. To distinguish the provinces of Bosnia and Herzegovina from the newly formed state of Bosnia and Herzegovina, this article will refer to the latter as Bosnia-Herzegovina.

41. The North Atlantic Treaty Organisation is "an inter-governmental organization in which member countries retain their full sovereignty and independence." NATO Office of Information and Press, *NATO HANDBOOK 17* (1995). NATO also "provides the forum in which they consult together on any issues they may choose to raise and take decisions on political and military matters affecting their security." *Id.*

42. See John F. Harris, *Despite 'Lessons,' Clinton Still Seen Lacking Strategy*, *WASH. POST*, Mar. 27, 1999, at A15.

43. See *Yugoslavia*, *supra* note 6.

recognize Serbia-Montenegro as the new Yugoslavia.⁴⁴ Serbia-Montenegro has not been formally recognized as a state by the United States; the U.S. view is that the Socialist Federal Republic of Yugoslavia has dissolved and that none of the five successor republics represent its continuation.⁴⁵

C. *The Kosovo Crisis*

The international community has supported and embraced the separatist movements that led to the creation of four new Balkan states. The Republic of Slovenia, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, and Bosnia-Herzegovina have all declared and won their independence from the Socialist Federal Republic of Yugoslavia. The remaining territory of Serbia-Montenegro is now facing one final separatist movement by the ethnic Albanians who reside in Kosovo and are citizens of Serbia-Montenegro.

Kosovo is a province of Serbia.⁴⁶ It currently has a population of approximately 1.8 million ethnic Albanians and two hundred thousand ethnic Serbs.⁴⁷ Kosovo was given self-rule when Yugoslavia was established in 1945,⁴⁸ but tensions remained high because of continuing Serbian control.⁴⁹ Rioting ensued and peaked in 1968,⁵⁰ and then Kosovo attained autonomy under the 1974 constitution.⁵¹ The Serbian government continued, however, to impose its authority over Kosovo and the ethnic Albanians of Kosovo continued to riot.⁵² After a decade of strife, Serbia reasserted its control over Kosovo, ending its autonomy in 1989.⁵³ Immediately after he became President of Serbia, Milosevic placed Kosovo under martial law and severely restricted the province's privileges and rights.⁵⁴ The Albanian separatists responded to the imposition of martial law with oc-

44. *See id.* To distinguish the provinces of Serbia and Montenegro from the newly formed state of Serbia and Montenegro, this article will refer to the latter as either Serbia-Montenegro or the Federal Republic of Yugoslavia.

45. *See Serbia and Montenegro*, THE WORLD FACTBOOK (Central Intelligence Agency ed., 1998) [Internet version (visited Apr. 3, 1999) <<http://www.cia.gov/cia/publications/factbook/sr.html>>].

46. *See Background on The Kosovo Crisis*, WASH. POST, Mar. 23, 1999, at A13.

47. *See id.*

48. *See id.*

49. *See Yugoslavia*, *supra* note 6.

50. *See id.*

51. *See Background on The Kosovo Crisis*, *supra* note 46, at A13.

52. *See Yugoslavia*, *supra* note 6.

53. *See id.*

54. *See id.*

casional bombings.⁵⁵ In 1991, the Albanian separatists proclaimed Kosovo an independent republic, but it was only recognized as such by the neighboring state of Albania.⁵⁶ In 1996, a few hundred Albanian separatists formed the Kosovo Liberation Army (KLA).⁵⁷

Starting in 1996, the KLA and militant Albanian separatists increased their attacks on Serb policemen, leading to harsh reprisals by the Yugoslav army.⁵⁸ In two short years the KLA grew to an estimated ten thousand soldiers.⁵⁹ As it grew, the KLA increased the frequency of its attacks on the Serbian police, causing a crackdown in February 1998 when Yugoslav army and special police units attacked dozens of villages.⁶⁰ During this crackdown, the Yugoslavs killed more than fifteen hundred civilians and displaced more than 250,000 civilians.⁶¹ On March 31, 1998, the United Nations Security Council [hereinafter Security Council] adopted a Chapter VII resolution that condemned the "use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army."⁶² In September 1998, Serb forces attacked central Kosovo and twenty-two Albanians were found massacred.⁶³ The Security Council responded by adopting another Chapter VII resolution on September 23, 1998 that demanded "all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo."⁶⁴

In October 1998, NATO conducted airstrikes against Serb military targets, and Milosevic agreed to withdraw Serb troops and allow two thousand unarmed monitors to verify compliance.⁶⁵ On October 24, 1998, the Security Council adopted a third Chapter VII resolution⁶⁶ which endorsed the cease-fire agreement and further condemned all acts of violence and terrorism.⁶⁷ The Serbs, however, failed to live up to the terms

55. See *Background on The Kosovo Crisis*, *supra* note 46, at A13.

56. See *Chronology of Kosovo Conflict*, ASSOCIATED PRESS electronic news release, Apr. 2, 1999 (visited Apr. 4, 1999) <<http://wire.ap.org/gotoap.cgi>>.

57. See *Background on The Kosovo Crisis*, *supra* note 46, at A13.

58. See *Chronology of Kosovo Conflict*, *supra* note 56.

59. See *Background on The Kosovo Crisis*, *supra* note 46, at A13.

60. See *id.*

61. See *id.*

62. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg. at pmb., U.N. Doc. S/RES/1160 (1998).

63. *Chronology of Kosovo Conflict*, *supra* note 56.

64. S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg. ¶ 1, U.N. Doc. S/RES/1199 (1998).

65. See *Chronology of Kosovo Conflict*, *supra* note 56.

66. S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998).

67. *Id.*, ¶ 1.

of the cease-fire agreement.⁶⁸ Scattered violence continued to endanger the truce, and on January 15, 1999, forty-five ethnic Albanians were slain by the Serbs.⁶⁹ International efforts attempted to bring the Albanian separatists and the Serbs together in Rambouillet, France for peace talks in February 1999 – but hostilities continued.⁷⁰

On March 18, 1999 the Kosovar Albanians signed a peace agreement calling for interim autonomy of Kosovo and twenty-eight thousand NATO troops to implement the agreement, but Milosevic refused to sign⁷¹ because he objected to the deployment of NATO forces in Serbia.⁷² The United States warned Milosevic on March 22, 1999 of NATO airstrikes if he did not sign the Rambouillet Accords.⁷³ In defiance, Milosevic launched a massive new offensive in central Kosovo⁷⁴ in an apparent attempt to crush the Albanian guerrillas during peace negotiations so he could then call off the Serb offensive to avoid NATO airstrikes.⁷⁵ In the face of over 240,000 refugees fleeing from Kosovo, all of NATO's nineteen member countries fully supported military action.⁷⁶ On March 23, 1999, NATO authorized airstrikes against Yugoslavia.⁷⁷

NATO member countries do not recognize the province of Kosovo as an independent state, and they specifically oppose the formation of an independent Kosovar state; they only desire to see the bloodbath and humanitarian disaster caused by the civil war to come to an end.⁷⁸ Ironically, Milosevic's failure to compromise and accept some measure of political autonomy for the Serb province of Kosovo finally forced NATO to take military action that may likely set the stage for an independent Kosovar state.⁷⁹ Milosevic called the two rounds of talks at Rambouillet a fraud, complaining that the agreement was dictated by NATO before the start of the negotiations and without consulting Yugoslavia.⁸⁰

68. See *Background on The Kosovo Crisis*, *supra* note 46, at A13.

69. See *Chronology of Kosovo Conflict*, *supra* note 56.

70. See *id.*

71. See *id.*

72. See R. Jeffrey Smith, *Belgrade Rebuffs Final U.S. Warning: NATO Aerial Assault Could Begin This Week*, WASH. POST, Mar. 23, 1999, at A1.

73. See *Chronology of Kosovo Conflict*, *supra* note 56.

74. See *Background on The Kosovo Crisis*, *supra* note 46, at A13.

75. See Smith, *supra* note 72, at A1.

76. See *id.*

77. See *Chronology of Kosovo Conflict*, *supra* note 56.

78. See Barton Gellman, *In the End, Allies See No Credible Alternative*, WASH. POST, Mar. 23, 1999, at A12.

79. See *id.*

80. See Katarina Kratovac, *'On the Brink:' NATO Poised to Attack Serb Forces*, FREE LANCE-STAR Fredericksburg, VA), Mar. 23, 1999, at A1.

Milosevic also believes that Albanian separatism is nothing more than centuries-old terrorism aimed at forming a "Great Albania" that is an ethnically-cleansed state for all Albanians.⁸¹ He alleges that the Albanian peoples have murdered, persecuted, and ill-treated the Serbian and Montenegrin peoples since the Ottoman Empire.⁸² In 1992, Milosevic documents that the Albanian separatists of Kosovo revived their use of terrorism, which increased in intensity from 12 acts of terrorism against the Serbs in 1992 to 1,885 acts of terrorism in 1998.⁸³ Milosevic reports that these 1,885 acts included the brutal murder of 115 Serb police officers and 142 civilians.⁸⁴ Milosevic also alleges that NATO has previously supported acts of aggression against the Socialist Federal Republic of Yugoslavia that caused it to splinter into five states, and charges that NATO is now supporting Albania's aggression against Serbia-Montenegro by supporting the Albanian separatists in Kosovo.⁸⁵ The Yugoslav government has a number of other perspectives and equities that has not been fairly reported in the press.⁸⁶

Perhaps when the truth of both sides is revealed, the international community will see that some of the Albanian separatists are not completely blameless for the plight of the ethnic Albanians in Kosovo. However, even the legitimacy of some of Milosevic's claims does not justify his widespread and systematic slaughter of the ethnic Albanian population in Kosovo. The U.S. Department of State reports that over three hundred thousand people were displaced by the fighting during the summer of 1998.⁸⁷ During Milosevic's defiant offensive in late March 1999, the Serbs forcibly displaced over seventy thousand ethnic Albanians in one weekend.⁸⁸ The Serbs have also been reported to have looted and burned thirteen towns and countless villages throughout Kosovo, detained as many as thirty thousand Albanian men, and summarily executed thousands of Albanian men, women, and children in at least twenty towns and villages throughout Kosovo.⁸⁹ The United States position is

81. See The Federal Republic of Yugoslavia Ministry of Foreign Affairs, *The Albanian Separatists' Terrorism in Kosovo and Metohija*, Feb. 1999 (visited Apr. 3, 1999) <<http://ourworld.compuserve.com/homepages/yuembassy/terror.htm>>.

82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.*

86. See generally The Federal Republic of Yugoslavia Website (visited Apr. 3, 1999) <<http://ourworld.compuserve.com/homepages/yuembassy/>>.

87. See Bureau of European Affairs, U.S. Department of State, *Ethnic Cleansing in Kosovo*, Mar. 31, 1999 (visited Apr. 4, 1999) <<http://www.state.gov/www/regions/eur/>>.

88. See *id.*

89. See *id.*

that Milosevic's forces are clearly engaging in crimes against humanity in Kosovo and are likely engaged in genocide, and it publicly warns the Yugoslav commanding officers and political leaders that they will be held responsible for their crimes and the crimes of their military forces.⁹⁰ One of the Yugoslav warlords has already been indicted by the International Criminal Tribunal for the Former Yugoslavia for war crimes committed in Kosovo, and the senior Tribunal prosecutor is investigating other reports of atrocities in Kosovo.⁹¹

NATO airstrikes in Serbia-Montenegro began on March 24, 1999.⁹² NATO forces targeted the Yugoslav "government's integrated air defense system, military and security police command and control elements, and military and security police facilities and infrastructure."⁹³ President Clinton announced that the NATO airstrikes have three objectives:

First, to demonstrate the seriousness of NATO's opposition to aggression and its support for peace; second, to deter President Milosevic from continuing and escalating his attacks on helpless civilians by imposing a price for those attacks; and third, if necessary, to damage Serbia's capacity to wage war against Kosovo in the future by seriously diminishing its military capabilities.⁹⁴

90. *See id.*

91. *See id.*

92. *See Chronology of Kosovo Conflict, supra* note 56. A detailed summary of the NATO forces involved in OPERATION ALLIED FORCE and the enemy Yugoslav forces can be found at the U.S. Department of Defense website at (visited Apr. 4, 1999) <<http://www.defenselink.mil/specials/kosovo/>>. THE ECONOMIST has reported that NATO's use of military force in Serbia-Montenegro "seems to be a clear breach of NATO's own founding document, the 1949 North Atlantic Treaty." Specifically, it reports that "Articles 1 and 7 of the treaty explicitly bind NATO countries to act within the UN Charter, and Article 5 endorses the use of force only to repel an armed attack against a NATO member." *Law and Right, When They Don't Fit Together*, THE ECONOMIST, Apr. 3, 1999, at 19, 20. To conclude, however, that NATO's actions violates the North Atlantic Treaty because it requires NATO to act lawfully under the Charter presumes that its acts are unlawful under the Charter. This is not very helpful in an analysis of the lawfulness of NATO's actions. Furthermore, Article 5 of the North Atlantic Treaty does not limit NATO's use of force to repel an armed attack. Article 5 simply is a recognition that an armed attack on one or more NATO members is deemed an armed attack against them all. There is no limitation in Article 5 on other uses of military force by NATO. The complete text of the North Atlantic Treaty can be found at: NATO Office of Information and Press, *supra* note 41, at 231-34.

93. Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 527 (Mar. 29, 1999).

In response to the NATO airstrikes, Yugoslav security forces "have intensified their attacks, burning down Kosovar Albanian villages and murdering civilians."⁹⁵

Nevertheless, NATO airstrikes did not initially target the Yugoslav ground forces responsible for the continuing attacks on civilians in Kosovo out of a fear that pilot casualties would weaken NATO's will to continue in the airstrikes against Yugoslavia, thus jeopardizing the entire NATO operation.⁹⁶ At the end of the first two weeks of bombing, no ground forces have been deployed.⁹⁷ President Clinton vows that the air campaign will be "unceasing and unrelenting" and that NATO will "persist until we prevail."⁹⁸ U.S. and NATO authorities, however, are at a "loss for much evidence that the air strikes were having their intended effect of slowing, let alone stopping, the Yugoslav crackdown."⁹⁹

On April 6, 1999, it was reported that over four hundred thousand ethnic Albanians have fled Kosovo and at least two thousand have been killed over the last thirteen months.¹⁰⁰ United Nations officials estimate that 1.1 million of the 1.8 million ethnic Albanians of prewar Kosovo are now displaced to neighboring Balkan countries.¹⁰¹ Milosevic has defied the NATO offensive and has almost achieved the ethnic cleansing of Kosovo. He has now offered a unilateral cease-fire, to mark Orthodox Easter, which is to begin on April 6, 1999 at 2 p.m. (EDT).¹⁰² Milosevic also pledged to work with the United Nations for the return of ethnic Albanian refugees and offered to forge an agreement that would serve as the basis for a Kosovo province within Serbia and Yugoslavia.¹⁰³ NATO quickly rejected the offer as a move clearly aimed at staving off further

94. President's Remarks Announcing Airstrikes Against Serbian Targets In the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 513, 514 (Mar. 29, 1999).

95. Thomas W. Lippman, *New Serbian Backlash Feared*, WASH. POST, Mar. 25, 1999, at A32.

96. See Dana Priest, *NATO Delays Action to Protect Kosovars*, WASH. POST, Mar. 26, 1999, at A1.

97. See, e.g., Dan Balz, *U.S. Consensus Grows to Send Ground Troops*, WASH. POST, Apr. 6, 1999, at A1.

98. Bradley Graham, *Yugoslav Troops Elude Aerial Scan, Allies Report*, WASH. POST, Apr. 6, 1999, at A1.

99. *Id.*

100. See Dimitri Messinis, *Allied Planes Target Yugoslav Sites*, ASSOCIATED PRESS electronic news release, Apr. 6, 1999 (visited Apr. 6, 1999) <<http://wire.ap.org/gotoap.cgi>>.

101. See *id.*

102. See George Jahn, *Yugoslavia Declares Kosovo Truce*, ASSOCIATED PRESS electronic news release, Apr. 6, 1999 (visited Apr. 6, 1999) <<http://wire.ap.org/gotoap.cgi>>.

103. See *id.*

NATO attacks and a ploy to present Milosevic as interested in resolving the crisis without capitulating.¹⁰⁴ It was also unclear whether the unilateral cease-fire was permanent, or just intended to last through the Easter holiday.¹⁰⁵

President Clinton dismissed the Serb's cease-fire offer by saying that half-measures are not enough, that Milosevic must withdraw his military police and paramilitary forces, allow the displaced Kosovar Albanians to return to their homes, and accept the deployment of an international security force.¹⁰⁶ The U.S. Secretary of Defense called Milosevic's offer "absurd," and other analysts saw Milosevic's announcement "as a sign he has accomplished his main goal in Kosovo despite the NATO bombing campaign."¹⁰⁷ The United States has announced that "NATO operations will continue until these conditions are met."¹⁰⁸ A subsequent press release by the U.S. Department of State identified the following five questions unanswered by Milosevic's proposal:

- _ Is Milosevic prepared for verifiable cessation of all combat activities and killings?
- _ Is Milosevic prepared to withdraw military, police, and paramilitary forces from Kosovo?
- _ Is Milosevic prepared to agree to the deployment of an international security force?
- _ Is Milosevic prepared to permit the unconditional return of all refugees and unimpeded access for humanitarian aid?
- _ And, finally, is Milosevic prepared to join in putting in place a political framework for Kosovo on the basis of the Rambouillet accords?¹⁰⁹

The United States position is that Belgrade's proposal for a cease-fire will be without significance unless it is accompanied by positive answers to the above questions.¹¹⁰

104. *See id.*

105. *See id.*

106. *See id.*

107. Charles Babington & Dana Priest, *Truce Rejected as Allies Press Bombing Effort*, WASH. POST, Apr. 7, 1999, at A1.

108. Barry Schweid, *US Won't Match Yugoslav Truce*, ASSOCIATED PRESS electronic news release, Apr. 6, 1999 (visited Apr. 6, 1999) <<http://wire.ap.org/gotoap.cgi>>.

109. Office of the Spokesman, U.S. Department of State, *Statement by James P. Rubin, Spokesman: Belgrade's Cease-fire Insufficient*, Apr. 6, 1999 (visited Apr. 7, 1999) <<http://secretary.state.gov/www/briefings/statements/1999/ps990406.html>>.

110. *See id.*

As a conciliatory gesture aimed primarily to sway international public opinion,¹¹¹ the Yugoslav government abruptly halted the expulsion of the ethnic Albanians from Kosovo on April 7, 1999.¹¹² The NATO Secretary-General believes that a more likely motive is to exploit the refugees by using them as "human shields" to discourage NATO attacks against Yugoslav ground forces.¹¹³ This policy pushed the refugees "back into a wasteland where there is no food, very little water or medical supplies, where everything has been looted."¹¹⁴ Interviews of refugees have confirmed that Yugoslav forces continue to commit atrocities with impunity despite the NATO attacks.¹¹⁵ With no political or military solution in sight, NATO reported on April 9, 1999 that it has stepped up its attacks on Yugoslav ground forces.¹¹⁶ NATO has reported that its airstrikes have "almost completely cut off Kosovo from the rest of Serbia, the dominant republic of Yugoslavia, by destroying all rail lines into the province from the north and damaging most of the roads and bridges."¹¹⁷ NATO's bombing of bridges in Belgrade has blocked the 1,750-mile long Danube, stranding vessels and interrupting all of the shipping along the Danube for nine European countries.¹¹⁸ NATO's bombing has also unified the Yugoslav peoples' support for Milosevic and has completely alienated them against NATO and the United States.¹¹⁹ Milosevic announced on April 9, 1999 that the Yugoslav "14-month crackdown in Kosovo is over."¹²⁰

D. *Framing the Issues*

A number of critics have challenged the legality of NATO's use of military force against the Former Republic of Yugoslavia under interna-

111. See Michael Dobbs, *Milosevic Shifts to Softer Strategy*, WASH. POST, Apr. 8, 1999, at A1.

112. See R. Jeffrey Smith & Daniel Williams, *Serbs Cease Expulsions From Kosovo*, WASH. POST, Apr. 8, 1999, at A1.

113. See William Drozdiak, *NATO Chief Fears More Exploitation of Kosovo Albanians*, WASH. POST, Apr. 9, 1999, at A32.

114. Smith & Williams, *supra* note 112, at A1.

115. See Daniel Williams, *Refugees Tell of Use as Human Shields*, WASH. POST, Apr. 8, 1999, at A1.

116. See Thomas W. Lippman & Dana Priest, *Attacks Largely Cut Kosovo From Rest of Serbia, U.S. Says*, WASH. POST, Apr. 9, 1999, at A1.

117. *Id.*

118. See Anne Thompson, *NATO-Bombed Bridges Clutter Danube*, ASSOCIATED PRESS electronic news release, Apr. 8, 1999 (visited Apr. 9, 1999) <<http://wire.ap.org/gotoap.cgi>>.

119. See generally Michael Dobbs, *Serb's Bull's-Eyes Defy, Mock NATO*, WASH. POST, Apr. 9, 1999, at A1.

120. Alex Efty, *Yugoslavia Says Crackdown Over*, ASSOCIATED PRESS electronic news release, Apr. 9, 1999 (visited Apr. 9, 1999) <<http://wire.ap.org/gotoap.cgi>>.

tional law.¹²¹ Their principal arguments focus on the lack of Security Council authority to use force and the absence of any threat to a nation state that invokes NATO's ability to use armed force in collective self-defense. This article will analyze the lawfulness of NATO's use of military force against the Yugoslavs under international law. This analysis will begin with a primer on contemporary use of force norms under the Charter of the United Nations, and will include an evaluation of the effectiveness of NATO's actions. It concludes with a few thoughts on how to more effectively use military force to avoid humanitarian disasters when diplomacy fails.

II. LAWFULNESS OF THE USE OF FORCE

[T]he people of Rwanda were forgotten. . . . This three-month delay cost the lives of hundreds of thousands of innocent Rwandans I remain mystified that human life, the security of noncombatants, and the prevention of such horrors as the genocide in Rwanda are, sadly, not sufficient to act as a catalyst for a swift and determined response from the international community. . . . It would be immoral if not outright criminal to allow another tragedy to occur by failing in our collective responsibility to humanity at large. . . . The killings could have been prevented [with 5,000 troops and a Chapter VII mandate] if there had been the international will to accept the costs of doing so. . . . We, as the international community, must be prepared to come to the aid of humanity in a swift yet effective manner. What remains lacking, what is absent, is the will to implement such solutions.

Lieutenant General Romeo A. Dallaire
Force Commander, UNAMIR¹²²

121. See, e.g., William Branigin & John M. Goshko, *Legality of Airstrikes Disputed in U.S., U.N.*, WASH. POST, Mar. 27, 1999, at A10.

122. Romeo A. Dallaire, *Foreword* to SCOTT R. FEIL, *PREVENTING GENOCIDE: HOW THE EARLY USE OF FORCE MIGHT HAVE SUCCEEDED IN RWANDA*, v-vi (A Report to the Carnegie Commission on Preventing Deadly Conflict, Apr. 1998). Canadian General Romeo A. Dallaire served as the Force Commander of the United Nations Assistance Mission for Rwanda (UNAMIR). *Id.* at 1.

A. *A Primer on Contemporary Use of Force Norms Under International Law*¹²³

Articles 2(4), 39, and 51 of the Charter of the United Nations [hereinafter Charter] codify contemporary international law that governs the use of force between states.¹²⁴ The Charter clearly outlaws the aggressive¹²⁵ use of force while recognizing a state's inherent right of individual and collective self-defense in Article 51 and the Security Council's obligation under Article 39 to maintain or restore international peace and security. If a state uses force against another state within the meaning of Article 2(4), it is unlawful unless it is an exercise of that state's inherent right of self-defense or unless it is authorized by the Security Council under its coercive Chapter VII authority.

Articles 2(4), 39, and 51 must be read together to determine the scope and content of the Charter's prohibition on the aggressive use of force, the responsibility of the Security Council to enforce this prohibition, and the right of all states to use force in self-defense. Article 2(4) of the Charter prohibits the threat or use of force by any state against the territorial integrity or political independence of another state except in individual or collective self-defense as authorized by international law and recognized by Article 51 of the Charter.¹²⁶ Articles 2(4) and 51 provide:

123. For more details on the international law of conflict management, see generally Walter Gary Sharp, Sr., *CYBERSPACE AND THE USE OF FORCE* (1999).

124. See *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 111 (Bruno Simma ed., 1994).

125. Generally, "aggressive" refers to beginning a dispute by being the first to either threaten or use force. See *BLACK'S LAW DICTIONARY* 60 (5th ed. 1979). However, an aggressive use of force, *i.e.*, aggression, is not defined by the Charter, and despite fifty-four years of efforts, the international community has failed to formulate a generally acceptable definition of aggression. See generally, *e.g.*, ANN VAN WYNEN THOMAS AND A.J. THOMAS, JR., *THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW* (1972). Accordingly, an aggressive use of force can best be identified by studying state practice. For the purposes of this article, an 'aggressive use of force' is a shorthand term used to refer to any use of force within the meaning of Article 2(4) that is not justified by a state's right of self-defense or authorized by the Security Council under its coercive Chapter VII powers. While this definition is somewhat circular in its reasoning, it is useful shorthand to facilitate a discussion of the basic principles of international law necessary for a more detailed discussion of what constitutes a lawful and an unlawful use of force under international law.

126. See *NATIONAL SECURITY LAW* 87 (John Norton Moore et al. eds., 1990).

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: . . .

(4) 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, or in any other manner inconsistent with the Purposes of the United Nations.

. . . .

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹²⁷

Both Articles 2(4) and 51 are customary international law and therefore binding on all states.¹²⁸

1. *Self-defense and the Use of Force by States*

It is a fundamental principle of contemporary international law that states may only use force lawfully in individual or collective self-defense. States recognize this principle, and have invoked their right of self-defense as justification for almost every use of force since the Charter has been in effect.¹²⁹ It is generally accepted that the Article 51 right of self-defense is coextensive with a state's right under customary international law.¹³⁰

127. U.N. CHARTER arts. 2(4), 51.

128. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 124, at 126-27, 666-67.

129. See *id.* at 663.

130. See JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 151 (1992). But see THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 124, at 666, which concludes that Article 51 excludes any right of self-defense "other

a. *Necessity and Proportionality*

Customary international law requires that all uses of force be necessary and proportional,¹³¹ and it prohibits the use of force for retaliatory or punitive actions.¹³² International law requires that a state's use of force be necessary for either individual or collective self-defense.¹³³ For example, the requirement of necessity for the international community to use force in collective self-defense was clearly met when Iraq invaded and brutally occupied Kuwait in 1990.¹³⁴ If Iraq had simply entered Kuwait, destroyed a number of its oil fields, and then quickly left, the principle of necessity would very likely not have justified the use of force in the absence of a continuing threat.

Similarly, international law requires that a state's use of force be proportional in intensity and magnitude to what is reasonably necessary to promptly secure the permissible objectives of self-defense.¹³⁵ The principle of proportionality is frequently misunderstood as limiting the use of force that can be used to destroy a military objective to the strength or firepower of that objective—or in some other way limiting the use of force between combatants. It does not, however, require any such parity of force. Proportionality is a limitation on the use of force against a military objective only to the extent that such a use of force may cause unnecessary collateral destruction of civilian property or unnecessary human suffering of civilians. The principle of proportionality is a balancing of the need to attack a military objective with the collateral damage and human suffering that will be caused to civilian property and civilians by the attack. Proportionality categorically imposes *no* limitations on the use of force between combatants in the absence of any potential effect on civilians or civilian property.¹³⁶

than that in response to an armed attack.”

131. See MOORE, *supra* note 130, at 156.

132. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 124, at 677.

133. See MOORE, *supra* note 130, at 156-57.

134. See *id.* at 157.

135. See *id.* at 158.

136. Indeed, one of the four strategic concepts of the national military strategy of the United States is to use decisive force to overwhelm an adversary. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 3 (1997). Even more notably, in December, 1990, U.S. Secretary of Defense Dick Cheney threatened Saddam Hussein that the U.S. response to an Iraqi use of weapons of mass destruction would be “absolutely overwhelming and . . . devastating.” U.S. DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS PURSUANT TO TITLE V OF THE PERSIAN GULF CONFLICT SUPPLEMENTAL AUTHORIZATION

b. *Collateral Damage and Injury to Civilians*

Proportionality limits the use of force that can be used to destroy a military objective to that which does not cause unnecessary collateral destruction of civilian property or unnecessary human suffering of civilians, but it does not prohibit any damage to civilian property or injury to civilians. If civilian property and civilians support a war effort, they are subject to attack, and they are subject to incidental damage during an attack on a lawful military objective. These two corollaries to the principles of necessity and proportionality are very important to highlight in the context of the impact of state activities on civilian property and civilians.

While civilian property and civilians may not be the *object* of an attack as such, states may use force against civilian property and activities that support or sustain an enemy state's warfighting capability during armed conflict.¹³⁷ States may use force during armed conflict, for example, against economic targets such as enemy lines of communication, rail yards, bridges, rolling stock, barges, industrial installations producing warfighting products, and power generation plants.¹³⁸ In today's modern society, much of a state's civilian infrastructure is used for military purposes, and is thus subject to lawful attack during armed conflict if there is a military advantage to be gained by such an attack.¹³⁹

Furthermore, it is not unlawful to cause *incidental* injury to civilians, or collateral damage to civilian property, during an attack on a legitimate military objective.¹⁴⁰ The balancing of proportionality does require, however, that such incidental injury or collateral damage not be excessive in light of the advantage anticipated by the attack.¹⁴¹ The law of armed conflict requires a military commander to take all reasonable precautions, based upon all the facts known or reasonably available at the time, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of his or her personnel.¹⁴²

c. *Humanitarian Intervention*

There is a continuing controversy concerning the permissibility of

AND PERSONNEL BENEFITS ACT OF 1991 (PUB. L. 102-25), app. Q, at 2 (Apr., 1992) [hereinafter CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT.

137. See U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.1.2 (1995) [hereinafter COMMANDER'S HANDBOOK].

138. See *id.* ¶ 8.1.1.

139. See CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT, *supra* note 136, app. O, at 10, 11.

140. See COMMANDER'S HANDBOOK, *supra* note 137, ¶ 8.1.2.1.

141. See *id.*

142. See *id.*

unilateral armed force by states for humanitarian intervention.¹⁴³ THE ECONOMIST has recently reported, for example, that most legal experts “have reluctantly come to the conclusion that, at any rate in terms of international law as it stands at the moment, the Americans and the British are wrong [to claim the right of humanitarian intervention].”¹⁴⁴ The optimists among those legal experts note, however, that state practice will make humanitarian intervention lawful one day, and that NATO’s intervention to protect the ethnic Albanians in Kosovo will be “a big step in that direction.”¹⁴⁵ Accordingly, the controversy over the lawfulness of humanitarian intervention is not whether it is *malum in se*, but whether state practice which condones humanitarian intervention has yet developed into customary international law.

The consensus of most of the international scholars who are recognized as experts in this field, however, specifically accepts that customary international law permits unilateral humanitarian intervention to prevent widespread human rights violations under carefully limited circumstances. Professor John Norton Moore, for example, defines a comprehensive standard that

permits unilateral action only in response to threats of genocide or other widespread arbitrary deprivation of human life in violation of international law, only if diplomatic and other peaceful techniques are unavailable, and only if international agencies . . . regional organizations, or the United Nations are unable to take effective action.¹⁴⁶

Similarly, Professor Richard Lillich concludes that humanitarian intervention is consistent with post-Charter state practice and the two main purposes of the Charter (the maintenance of peace and the protection of human rights).¹⁴⁷ Professor Lillich concludes that humanitarian intervention is justified even though it may interfere with the sovereignty of the state where the intervention takes place.¹⁴⁸ He recommends that during *in extremis* violations of human rights, states can unilaterally use proportional armed force when the intervention has a limited purpose and duration.¹⁴⁹ He also notes that it certainly helps justify intervention if there is

143. See NATIONAL SECURITY LAW, *supra* note 126, at 142.

144. *Law and Right, When They Don't Fit Together*, *supra* note 92, at 19.

145. *Id.* at 20.

146. NATIONAL SECURITY LAW, *supra* note 126, at 142.

147. See *id.* 147-48, 152.

148. See *id.*

149. See *id.* at 150.

a request from at least some authority other than the recognized government (such as a provincial government or regional organization) that appears to have a reasonable basis for making the request.¹⁵⁰

Professor Christopher Greenwood concludes that there are "enough precedents to justify the claim that armed humanitarian intervention is now accepted by most states as legal."¹⁵¹ He refers to India's intervention in Bangladesh in the 1970's to halt appalling atrocities; Tanzania's intervention in Uganda to put an end to Idi Amin's barbaric rule; the 1990 intervention by West African countries to stop mass killings in Liberia; the 1991 allied intervention in northern Iraq to save the Kurds; and the allied imposition of a no-fly zone in southern Iraq to save the Shia Muslims as precedents that were widely accepted by the international community as lawful.¹⁵² Professor Greenwood concludes that unilateral humanitarian intervention is lawful under customary international law if there is an impartial determination of three facts: that a catastrophe was occurring; that it was a threat to international peace, and who was responsible.¹⁵³

In contrast to these scholars, others such as Professor Ian Brownlie assert that it is extremely doubtful if the customary international law right of unilateral humanitarian intervention survived the prohibitions of the Charter, notwithstanding that the right has not been expressly condemned by the Charter.¹⁵⁴ The better view, however, of the effect of the Charter on the customary international law right of humanitarian intervention is that the Charter was in fact the point of departure from the pre-Charter regime that allowed states to summarily violate fundamental human rights of its citizens.¹⁵⁵ This position is very eloquently described by Professor Farer in the following excerpt:

Before the Second World War, scholars and diplomats assumed that international law allowed each equal sovereign an equal right to be monstrous to his subjects. Summary execution, torture, conviction without due process (or any process, for that matter) were legally significant events only if the victim of such official eccentricities were the citizen of another state. . . . For the first

150. See *id.* Humanitarian intervention, by definition, is conducted without the consent of the recognized government of the target state and without Chapter VII authority. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW & THE USE OF FORCE* 113 (1993).

151. *Law and Right, When They Don't Fit Together*, *supra* note 92, at 20.

152. See *id.*

153. See *id.*

154. See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338, 342 (1963).

155. See NATIONAL SECURITY LAW, *supra* note 126, at 674-75.

time in history, states assumed obligations to their own citizens as precisely and formally defined in many cases as the legal obligations they had hitherto owed to each other under international law. . . . Both through formal treaties and informal practice, they bound themselves not to torture or summarily execute their citizens, or to convict them without due process of law or to dissolve their trade unions or to discriminate among them on the basis of race or religion or to do a great number of other things that in earlier ages were matters entirely at the discretion of sovereigns. . . . The Charter of the United Nations was the point of departure for this unique legal development.¹⁵⁶

Although not expressly permitted by the Charter or other international convention, there is a very strong and convincing argument that contemporary state practice and customary international law permits a state to unilaterally use armed force in collective self-defense to prevent genocide and other widespread arbitrary deprivation of human life in violation of international law.

2. *Security Council Authority to Use Force*

As an exercise of the international community's inherent right of collective self-defense, Article 39 of the Charter imposes an *obligation* on the Security Council to maintain international peace and security. Article 39 provides that

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.¹⁵⁷

Decisions taken by the Security Council under Article 39 are binding on all Member States.¹⁵⁸ Every threat or use of force proscribed by Article 2(4) is, *per se*, a threat to international peace and security within the meaning of Article 39.¹⁵⁹ Accordingly, the Security Council has the coercive authority to authorize the use of force in response to any viola-

156. *Id.*

157. U.N. CHARTER art. 39.

158. See U.N. CHARTER art. 25; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 124, at 407-18.

159. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 124, at 119.

tion of Article 2(4).¹⁶⁰

The authority of the Security Council to use force, however, extends beyond violations of Article 2(4). Indeed, the Article 39 threshold extends considerably below the Article 2(4) threshold,¹⁶¹ giving the Security Council the power to authorize states to use force under circumstances where states do not independently have the right to use force in self-defense. For example, scholars have concluded that threats to the peace within the meaning of Article 39 include extreme intrastate violence or human rights violations, the failure of a state to surrender terrorists in accordance with the order of the Security Council, an illegal racist regime, cross-frontier expulsion of refugees, diversion of a river by an up-stream state, and serious violations of international law that may provoke an armed response.¹⁶²

Article 41 authorizes the Security Council to shape an international community response to a threat to international peace and security that falls short of deploying military forces under Article 42. This article provides that

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.¹⁶³

Article 41 is an explicit recognition that the Security Council has the authority to *require* Member States to cease any or all forms of economic relations, communications, or diplomatic relations with a state to coerce that state to conform to internationally accepted standards of behavior. Its authority is directed toward Member States, not the state that has created a threat to international peace and security.

Article 42 authorizes the Security Council to conduct or authorize belligerent military operations against an aggressor state when such actions are necessary to maintain or restore international peace and security. This article provides that

160. *See id.*

161. *See id.*

162. *See id.* at 113, 611-12.

163. U.N. CHARTER, art. 41.

should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.¹⁶⁴

Although Article 41 explicitly authorizes the Security Council to *require* Member States to enforce economic and political sanctions against an aggressor state, Article 42 only permits the Security Council to *authorize* Member States to use armed military force against an aggressor state.¹⁶⁵

B. *A Legal Analysis of NATO's Use of Military Force to Defend Kosovo*

1. *International Legal Perspectives*

President Clinton's public justifications focused on "moral imperative[s]" and the political interests of America and NATO,¹⁶⁶ and his War Powers Report did not refer to any international legal authority for the airstrikes against Serbia-Montenegro.¹⁶⁷ The White House argues, however, that the NATO bombing campaign is backed internationally by Security Council Resolutions 1199 and 1203 because they "affirm that the deterioration of the situation in Kosovo constitutes a threat to the peace and security of the region."¹⁶⁸ Specifically, the United States contends that Resolution 1199 authorizes the use of armed force by United Nations members to compel compliance with its terms because it is a Chapter VII resolution, even though the resolution does not explicitly authorize the use of force.¹⁶⁹ The United States also contends that Resolution 1203 authorizes the use of armed force to protect personnel monitoring the cease-fire, even though the monitors were withdrawn before the

164. U.N. CHARTER art. 42.

165. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 124, at 633.

166. See, e.g., Charles Babington, *Clinton: Goal is to Contain Milosevic*, WASH. POST, Mar. 25, 1999, at A1.

167. See Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), *supra* note 93, at 527.

168. Branigin & Goshko, *supra* note 121, at A10.

169. See *id.*

NATO airstrikes began.¹⁷⁰ Similarly, NATO has generally claimed to be safeguarding international peace and security, as permitted under the Charter of the United Nations.¹⁷¹

The United States and the other eighteen member states of NATO have gotten "some scattered support" from the rest of the international community, but most members of the United Nations view that any implied authorization in Resolutions 1199 and 1203 to intervene was not open-ended and that the NATO attacks are therefore not authorized by the Security Council.¹⁷² Russia and China have been the most vocal and have denounced the NATO airstrikes as "blatantly illegal."¹⁷³ They object to NATO's claim, noting that regional alliances cannot use military force without specific authority from the Security Council.¹⁷⁴ China has specifically called the airstrikes "a blatant aggression and act of vandalism" and said "the international community has a moral imperative to rise up against this barbarity."¹⁷⁵ The Secretary-General of the United Nations sidestepped the legal issue in his statement that it "is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace."¹⁷⁶

2. *Self-defense*

The United States and NATO do not recognize the province of Kosovo as an independent state,¹⁷⁷ and they have made no assertions that the armed forces of the state of Serbia-Montenegro has attacked another state. President Clinton has declared, however, that the Kosovo crisis is a "conflict with no natural boundaries" that will "push refugees across borders" and draw neighboring countries into the conflict.¹⁷⁸ Specifically, he is concerned that such a flood of refugees "will likely reignite the historical animosities [of neighboring states], including those that can embrace Albania, Macedonia, Greece, [and] even Turkey."¹⁷⁹ Based upon the fear of the Kosovo conflict spreading into NATO and other European states, it is patently rational for NATO to use reasonable and proportional

170. *See id.*

171. *See* Barton Gellman, *Two MiGs Reported Shot Down*, WASH. POST, Mar. 25, 1999, at A1.

172. *See* Branigin & Goshko, *supra* note 121, at A10.

173. *Id.*

174. *See* Gellman, *supra* note 171, at A1.

175. Branigin & Goshko, *supra* note 121, at A10.

176. Gellman, *supra* note 171, at A1.

177. *See* Gellman, *supra* note 78, at A12.

178. The President's News Conference, 35 WEEKLY COMP. PRES. DOC. 471 (Mar. 29, 1999).

179. *Id.*

force in collective self-defense which is necessary to prevent the civil war from spreading beyond Serbia-Montenegro into NATO states.

Although such a claim has not been asserted by NATO,¹⁸⁰ a fear that ethnic conflict is a threat to neighboring states is very supportable, legally and factually. It is generally accepted, as a matter of law and Security Council practice, that threats to international peace and security within the meaning of Article 39 of the Charter include extreme intra-state violence or human rights violations and the cross-frontier expulsion of refugees.¹⁸¹ Indeed, the United Nations estimates that 1.1 million of the 1.8 million ethnic Albanians of prewar Kosovo have been displaced to neighboring Balkan countries since March 1998.¹⁸² Furthermore, Yugoslav forces are clearly engaging in ethnic cleansing and other crimes against humanity, and are likely engaged in genocide.¹⁸³ One Yugoslav warlord has already been indicted by the International Criminal Tribunal for the former Yugoslavia for war crimes committed in Kosovo.¹⁸⁴ Perhaps more importantly from a legal perspective, Security Council Resolutions 1199 and 1203 both specifically affirmed that the "deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region."¹⁸⁵ As permanent members of the Security Council, even Russia and China – the most vocal critics of NATO's use of force – have agreed by voting for Resolutions 1199 and 1203 that the Kosovo crisis is a threat to regional peace and security, and therefore a threat to member states of NATO.

NATO airstrikes have targeted civilian and military infrastructures such as bridges, factories, government buildings, and military barracks.¹⁸⁶ Some of the most extensive airstrikes occurred on day thirteen of the bombings when NATO warplanes attacked the Yugoslav air force headquarters, Yugoslav and Serb interior ministry buildings, Belgrade's international airport, a railway tunnel, bridges, fuel depots, ammunition stor-

180. See *Law and Right, When They Don't Fit Together*, *supra* note 92, at 20.

181. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 124, at 113, 611-12.

182. See Messinis, *supra* note 100.

183. See Bureau of European Affairs, *supra* note 87. See also Alexander G. Higgins, *Signs of Genocide Seen in Kosovo*, ASSOCIATED PRESS electronic news release, Apr. 8, 1999 (visited Apr. 9, 1999) <<http://wire.ap.org/gotoap.cgi>> ("U.N. Secretary-General Kofi Annan said he sees signs that Serbian authorities are committing genocide in Kosovo").

184. See Bureau of European Affairs, *supra* note 87.

185. S.C. Res. 1199, *supra* note 64, at pmb1.; S.C. Res. 1203, *supra* note 66, at pmb1.

186. See Graham, *supra* note 98, at A1.

age areas, army barracks, and a television relay tower.¹⁸⁷ Two weeks of bombings are beginning to take a toll on the Yugoslav economy and affect the daily lives of the country's largest cities.¹⁸⁸

Undoubtedly, all of NATO's targets have been very carefully reviewed by military commanders and their legal advisers to ensure that military attacks against them comply with the international law requirements of necessity and proportionality as well as the law of armed conflict. Even without access to sensitive targeting deliberations, the nature of each of the reported targets either clearly identifies it as a lawful military objective or indicates that it is likely being used to support Milosevic's military offensive in Kosovo. Although there have been no allegations that NATO has intentionally targeted civilian property or civilians in violation of the laws of armed conflict, NATO bombings have caused collateral damage and incidental injuries.¹⁸⁹ In the worse single report of civilian casualties since NATO airstrikes began, at "least three NATO bombs missed their targets and struck this central Serbian town [Aleksinac] Monday night [April 5, 1999], killing at least 11 civilians, injuring more than 30 others and destroying homes, an ice cream factory and an animal feed plant."¹⁹⁰ While these deaths are very unfortunate, they are a consequence of NATO's lawful attacks on legitimate military objectives.

NATO's use of armed force to defend Kosovo is also a lawful act of humanitarian intervention that squarely meets the requirements of Professor Moore's criteria. First, NATO's use of armed force is in response to threats of genocide and other widespread arbitrary deprivation of human life of a magnitude that has not been seen in Europe since World War II. Second, NATO exhausted months of diplomatic measures and Security Council sanctions while the Yugoslavs continued the ethnic cleansing and summary executions of the ethnic Albanians in Kosovo. Third, NATO is the cognizant defense alliance responsible for southern Europe and it has only resorted to the regional use of armed force after the United Nations proved it was unable to take effective action.

NATO's air campaign also squarely meets the requirements of Professor Lillich's criteria. The sharply increasing tempo of the exodus of 1.1 million of the 1.8 million ethnic Albanians of prewar Kosovo is certainly an *in extremis* condition, and the terms of the Rambouillet Accords

187. *See id.*

188. *See* Guy Dinmore, *Daily Life in Belgrade Teeters Under Strikes*, WASH. POST, Apr. 5, 1999, at A1.

189. *See* Guy Dinmore, *11 Civilians Are Killed in NATO Attack*, WASH. POST, Apr. 7, 1999, at A16.

190. *Id.*

define a very limited purpose and duration that respects the continuing sovereignty of Serbia-Montenegro. The intervention is also justified on the grounds that the authorities who represent the ethnic Albanians of Kosovo have signed the Rambouillet Accords and requested NATO's help.

NATO's use of military force against Serbia-Montenegro also meets Professor Greenwood's criteria. He specifically concludes that Security Council resolutions have determined that a catastrophe is occurring in Serbia-Montenegro, that it is a threat to international peace and security, and that the Yugoslavs are responsible.¹⁹¹ Furthermore, Professor Greenwood notes that the votes of twelve members of the Security Council has recently implied their view of the lawfulness of NATO's use of force against Serbia-Montenegro.¹⁹² On March 26, 1999, the Security Council specifically defeated (by twelve votes to three) a resolution that condemned the NATO bombing in Serbia-Montenegro as unlawful.¹⁹³ Only China, Russia, and Namibia voted in favor of the resolution.¹⁹⁴ The remaining twelve members of the Security Council which voted against the resolution¹⁹⁵ are Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United Kingdom, Argentina, Bahrain, and United States.¹⁹⁶

3. Security Council Authority

The United States and NATO contention that Security Council Resolutions 1199 and 1203 *implicitly* authorize the use of armed force by United Nations members to compel compliance with its terms simply because they are Chapter VII resolutions is unsupportable either in law or Security Council practice. Chapter VII of the Charter sets forth certain jurisdiction prerequisites that must be determined by the Security Council before it can authorize the use of armed force. First, Article 39 requires that the Security Council determine the "existence of any threat to the peace, breach of the peace, or act of aggression" before it can lawfully invoke its Chapter VII coercive authority. This prerequisite has been met by Resolutions 1199 and 1203. They are both Chapter VII resolutions

191. See *Law and Right, When They Don't Fit Together*, *supra* note 92, at 20.

192. See *id.*

193. See *Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia*, S.C. Press Release SC/6659, Mar 26, 1999 (visited Apr. 9, 1999) <<http://www.un.org>>.

194. See *id.*

195. See *id.*

196. See *Membership and Presidency of the Security Council in 1999* (visited Apr. 9, 1999) <<http://www.un.org>>.

that have determined that a threat to international peace and security exists.

Second, Article 42 requires that the Security Council consider whether “measures provided for in Article 41 would be inadequate or have proved to be inadequate” before it can lawfully invoke its authority to authorize the use of armed force. Resolutions 1199 and 1203 are the Security Council’s Chapter VII efforts to address the Kosovo crisis with diplomatic means and Article 41 sanctions. A state that infers it has authority to enforce a Chapter VII resolution *merely because it is a Chapter VII resolution* usurps the Security Council’s responsibility and authority to maintain international peace and security.

The United States and NATO position creates a very dangerous precedent. Consider, for example, the provision of Chapter VII Resolution 1160 that:

Decides that all States shall, for the purposes of fostering peace and stability in Kosovo, prevent the sale or supply to the Federal Republic of Yugoslavia, including Kosovo, by their nationals or from their territories or using their flag vessels and aircraft, of arms and related materiel of all types, such as weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, and shall prevent arming and training for terrorist activities there.¹⁹⁷

This resolution does not provide for any enforcement measures or blockades. It is simply an Article 41 measure that requires all states to prevent certain specified sales to the Federal Republic of Yugoslavia. Now assume that the United States decides to slow the ethnic cleansing by supplying prohibited arms and ammunition to the KLA in clear violation of Resolution 1160. Should international law permit Russia, China, or any other country, to *infer* that Resolution 1160 authorizes them to use armed force against the United States? The United States would very likely be the first to strenuously object to such an interpretation. While there must be some flexibility in the interpretation of Security Council resolutions, states must not be allowed to infer they have Chapter VII authority to use armed force to enforce all Chapter VII resolutions. To do so gives all states the *carte blanche* authority to use armed force to enforce all Chapter VII resolutions simply because they are Chapter VII resolutions.

197. S.C. Res. 1160, *supra* note 62, ¶ 8.

III. CONCLUSION: NEW THINKING ABOUT THE USE OF MILITARY FORCE

Make no mistake, if we and our allies do not have the will to act, there will be more massacres. In dealing with aggressors . . . hesitation is a license to kill. But action and resolve can stop armies and save lives.

President William Jefferson Clinton¹⁹⁸

WHAT HAPPENS WHEN THE INTERNATIONAL COMMUNITY HESITATES TO ACT QUICKLY AND DECISIVELY AGAINST ETHNIC CLEANSING AND GENOCIDE? *Innocent people die.* President Clinton's words in this epigraph ring very true, but the air war has been described as a "limp military effort" that "failed to deter the rape of Kosovo."¹⁹⁹ Indeed, some believe that NATO's efforts even appear to be speeding the Serb's murderous offensive in Kosovo.²⁰⁰ One senior State Department official urged for a tougher assault and does not believe that the first week of the NATO air war accomplished anything.²⁰¹ Contingency planners and intelligence officials advised the political advisers that airstrikes would accelerate the ethnic cleansing of Kosovo, but the conventional wisdom of the White House and NATO decision makers predicted Milosevic would cave after a few days of bombing.²⁰² It is reported that senior U.S. military officials warned President Clinton and his top advisers that air power has its limits and would not deter Milosevic.²⁰³ Even the Joint Chiefs of Staff warned President Clinton that his approach of a NATO air campaign would likely not achieve its political aims.²⁰⁴ Despite ten days of NATO airstrikes, Yugoslavia's army has stormed through Kosovo virtually untouched.²⁰⁵ Even the Pentagon's spokesman admitted that it "is difficult to say that we have prevented one act of brutality."²⁰⁶

IS THE NATO AIR CAMPAIGN AGAINST SERBIA-MONTENEGRO LAWFUL? *Unequivocally yes.* However late and inadequate NATO's airstrikes and subsequent use of military force may be in the prevention of the massa-

198. The President's News Conference, *supra* note 178, at 471.

199. Johanna McGeary, *The Road to Hell . . . Was Paved with Good Intentions - But Muddled Planning. Now What?*, TIME, Apr. 12, 1999, at 36, 39.

200. *See id.* at 39.

201. *See id.*

202. *See id.* at 42-43.

203. *See* Dana Priest, *U.S., Allies Weigh Use of Ground Forces: Commanders Fear Bombing Won't Stop Serb Offensive*, WASH. POST, Mar. 27, 1999, at A1.

204. *See* Bradley Graham, *Joint Chiefs Doubted Air Strategy*, WASH. POST, Apr. 5, 1999, at A1.

205. *See* McGeary, *supra* note 199, at 42-44.

206. *Id.* at 43.

cre of the ethnic Albanians in Kosovo, they are clearly lawful under international law and consistent with the purposes and principles of the Charter of the United Nations. NATO's air campaign to prevent the ethnic cleansing and expulsion of an entire population has not been authorized by the Security Council, but it is a lawful act of collective self-defense and a lawful humanitarian intervention. It is patently rational for NATO to use reasonable and proportional force in collective self-defense which is necessary to prevent the civil war from spreading beyond Serbia-Montenegro into NATO states. Furthermore, contemporary state practice and customary international law permit a state to unilaterally use armed force in collective self-defense to prevent genocide and other widespread arbitrary deprivation of human life in violation of international law.

HAS THE NATO AIR CAMPAIGN AGAINST SERBIA-MONTENEGRO BEEN TIMELY OR EFFECTIVE? *Unequivocally no.* NATO did not begin its air campaign until after thousands died and hundreds of thousands were expelled from Kosovo. The first two weeks of the NATO air campaign gave Milosevic the time to virtually complete the ethnic cleansing of the Albanians in Kosovo. Milosevic's half-hearted, unilateral cease-fire declaration in honor of Orthodox Easter was very likely just a political ruse to gain time and undermine the political resolve of NATO. A continued air campaign may eventually force Milosevic to capitulate; however, the damage will have been done. Thousands of ethnic Albanians will have already been tortured or murdered and hundreds of thousands of ethnic Albanians will have already been forced out of Kosovo into neighboring states. Many of the towns and villages will have been burned and destroyed, leaving nothing for the refugees to return to should Milosevic eventually capitulate.

IS THE UNITED STATES COMPLETELY TO BLAME FOR ANY SHORTCOMINGS OR FAILURES OF THE NATO AIR CAMPAIGN? *Absolutely not.* Unfortunately, this article may appear to criticize the United States for its Kosovo policy – but the United States should be commended for taking the initiative to shape an international strategy to prevent the ethnic cleansing and humanitarian tragedy in Kosovo. Such a strategy is very difficult to shape without the cooperation of other members of the international community. The leadership and initiative of Europe has been very obviously missing. Once again, the European community seems to look to the United States for the moral commitment and resolve to solve their ethnic differences. The commitment of the international community has also been lacking, especially from some of the members of the Security Council, such as Russia and China, who also have the responsibility and obligation under Article 39 of the Charter as a permanent member of the

Security Council to take effective action to restore and maintain international peace and security.

CAN NATO NOW DEAL WITH PRESIDENT SLOBODAN MILOSEVIC AS A HEAD OF STATE? *Absolutely not.* Milosevic and many senior Yugoslav government leaders and military commanders are accused of some of the most heinous crimes against peace and humanity imaginable. Milosevic and others have already been indicted by the International Criminal Tribunal for the Former Yugoslavia. They cannot be granted amnesty and negotiated with; they must be prosecuted, and they must not be allowed to profit from their crimes. The international community has boxed itself into a very tough corner. It must now bow to Milosevic and let him win, negotiate a peaceful settlement with him that includes his surrender and the surrender of others accused of war crimes, or it must remove him from power and then negotiate a peaceful settlement with his political successors. These options certainly make early and decisive intervention far more palatable and desirable.

WHAT SHOULD THE INTERNATIONAL COMMUNITY HAVE DONE TO PREVENT THE SLAUGHTER IN KOSOVO? *Milosevic should have been arrested and prosecuted based on the ICTY's sealed indictment. Absent his arrest and prosecution, an overwhelming ground force should have been deployed in Kosovo early and decisively.* Long before the crisis in Kosovo erupted, Milosevic was indicted by the ICTY for the murder of over two thousand men during the civil war in Bosnia-Herzegovina. The Kosovo crisis is a direct result of Milosevic's control over the Yugoslav army and police forces. Had Milosevic been arrested and prosecuted, it is very likely that the Kosovo crisis would never have occurred. However, since the international community failed to arrest and prosecute Milosevic, it should have responded to the ethnic cleansing of Albanians in Kosovo much earlier and decisively. If the international community had decisively deployed an overwhelming ground force when the first reports of ethnic cleansing were verified, the *status quo* could have been maintained until an arrangement could have been brokered between Serbia-Montenegro and the ethnic Albanians of Kosovo. A multinational military force that was overwhelming in size and well-equipped could have prevented further hostilities and ethnic cleansing by serving as an inter-positional force. Instead, the international community waited until thousands were killed and hundreds of thousands were expelled from their own country before it began an air war that most senior advisors and analysts predicted would fail.

SHOULD THE INTERNATIONAL COMMUNITY NOW DEPLOY A GROUND FORCE TO STOP THE ETHNIC CLEANSING IF MILOSEVIC DOES NOT CAPITULATE? *Absolutely not.* While the White House refuses to publicly discuss the deployment of NATO ground troops, several senior officials from

previous administrations suggest that ground troops are the only successful way to prevent the slaughter in Kosovo.²⁰⁷ Senior NATO and U.S. military commanders who doubt that the ongoing air war will stop the Yugoslav offensive have begun discussing contingency plans for introducing allied ground troops.²⁰⁸ Recognizing the inability of the air war to prevent the slaughter, the United States agreed on April 4, 1999 to send 24 Apache helicopter gunships to neighboring Albania, giving NATO the ability to attack Serb troops and tanks from the air in the province of Kosovo.²⁰⁹ Now, however, a deployment of ground troops would very likely be a bloody failure.²¹⁰ The Yugoslav army has nearly accomplished the ethnic cleansing of Kosovo, and would have a significant tactical advantage over NATO troops deploying into the Kosovar province.²¹¹ To introduce a NATO ground force now without a peace agreement would be disastrous.

SINCE THE INTERNATIONAL COMMUNITY DID NOT TAKE MORE DECISIVE ACTION EARLIER ON AND NOW THAT NATO HAS STARTED AN AIR CAMPAIGN, WHAT SHOULD NATO'S EXIT STRATEGY BE? *NATO should intensify its air campaign on the Yugoslav army and immediately stop the bombing of the Yugoslav commercial infrastructures, remove Milosevic from power, arrest and transfer all of the Yugoslavs accused of war crimes to the ICTY, and broker a peace agreement between a new Yugoslav government and the ethnic Albanians in Kosovo.* NATO should intensify its air campaign on the Yugoslav army to either force its capitulation or destroy it. These attacks should also specifically target Milosevic, senior military commanders, and the Yugoslav command and control structure. Focusing deterrence on regime elites such as Milosevic who is responsible for the atrocities in Kosovo is far more effective than traditional, broad-spectrum economic or military sanctions against the entire people of Serbia-Montenegro.²¹² NATO should, however, immediately stop its at-

207. See *id.* at 44.

208. See Priest, *supra* note 203, at A1.

209. See Laura Myers, *U.S. to Send Helicopters to Albania*, ASSOCIATED PRESS electronic news release, Apr. 4, 1999 (visited Apr. 4, 1999) <<http://wire.ap.org/gotoap.cgi>>.

210. See McGeary, *supra* note 199, at 44.

211. See *id.* at 44, 46.

212. For a more in-depth discussion of the legal, moral, and political ramifications of targeting Milosevic, see Thomas C. Wingfield, *Targeting Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287 (1999). The German Defense Minister has already suggested that NATO target Milosevic's palace because he should not feel immune from NATO's attacks. See *Meet The Press* (NBC television broadcast, Apr. 4, 1999) (relevant portions of transcript are available at (visited on Apr. 6, 1999) <<http://secretary.state.gov/www/statements/1999/990404.html>>). NATO has con-

tacks on the Yugoslav commercial infrastructures, notwithstanding that they may be lawful targets to the extent they support the war effort. NATO attacks on the commercial infrastructures of Yugoslavia have already been costly in human life, and they have been self-defeating and counterproductive. These attacks have exacerbated the visceral hatred between the Yugoslavs and the ethnic Albanians and will make a peace accord very difficult to reach, implement, monitor, and enforce. The NATO air campaign has also alienated the international community from the peoples of Yugoslavia. NATO has reported that its airstrikes have almost completely cut off Kosovo from the rest of Serbia. This kind of damage to the transportation infrastructure will make resettlement of the refugees very difficult and costly. It will also adversely affect the economic reconstitution of Kosovo in the years to come. The NATO bombings along the Danube have also adversely affected the economies of many European nations. Any further attacks on commercial infrastructures will seriously compromise NATO's ability to restore peace in the Balkans. As discussed above, NATO cannot deal with Milosevic as a head of state. He is an indicted war criminal, and he must be removed from power. Milosevic and other Yugoslavs who are accused of war crimes must be arrested and transferred to the ICTY for prosecution. Finally, a peace agreement must be brokered between a new Yugoslav government and the ethnic Albanians in Kosovo.

WHAT LESSONS SHOULD THE INTERNATIONAL COMMUNITY LEARN FROM ITS MISSTEPS IN KOSOVO? *Indecision and timidity kills innocent people.* International law requires that we first consider diplomacy and other peaceful mechanisms to resolve threats to international peace and security, but international law does not require timidity in the face of slaughter, ethnic cleansing, and genocide. The Member States of the United Nations have imposed an obligation upon the Security Council to "make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security."²¹³ All Member States have also accepted the responsibility and obligation to "give the United Nations every assistance in any action it takes"²¹⁴ and to "accept and

cluded, however, that Milosevic's palace cannot be bombed because it is a prized historical treasure – and its destruction would alienate the peoples of Yugoslavia. George F. Will, *Stepping Into a Dark Room*, NEWSWEEK, Apr. 12, 1999, at 84, 84. The palace is, however, a lawful target. International law protects cultural buildings such as the palace "provided they are not used for military purposes." COMMANDER'S HANDBOOK, *supra* note 137, ¶ 8.5.1.6.

213. U.N. CHARTER, art. 39.

214. U.N. CHARTER, art. 2(5).

carry out the decisions of the Security Council.”²¹⁵ When diplomacy fails and the international community must resort to military action, intervention must be early and decisive. To juxtapose the three epigraphs to this article, the international community is relearning the same lessons in Kosovo as it did in Bosnia and as it did in Rwanda – when dealing with aggressors, hesitation is a license to kill. Even when it had the legal and moral authority to act, the international community hesitated in Rwanda and again in Bosnia and again in Kosovo, and it failed to act early enough to stop the killings and genocide that could have been prevented if the international community had the will to act. NATO should have learned from the shameful errors of the past and deployed its allied forces early and decisively to stop the slaughter of the ethnic Albanians in Kosovo and to have removed, justly and decisively, the threat to international peace and security in the person of Slobodan Milosevic.

215. U.N. CHARTER, art. 25.

