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Volume 23 | Number 3

Article 1

5-1-2001

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Olivera Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality*, 23 Loy. L.A. Int'l & Comp. L. Rev. 329 (2001).

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LOYOLA OF LOS ANGELES
INTERNATIONAL AND COMPARATIVE
LAW REVIEW

VOLUME 23

MAY 2001

NUMBER 3

Protocol I and Operation Allied Force:
Did NATO Abide by Principles of
Proportionality?

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I. INTRODUCTION

The North Atlantic Treaty Organization's (NATO) intervention in Kosovo sets a unique precedent under international law. Hailed as a humanitarian intervention, the Alliance's military puissance epitomized justice to a world inundated by the innumerable images of desperate ethnic Albanians fleeing the ravages of war. Kosovo, torn by ethnic conflict, became a vivid public reminder of the Holocaust. As the fog of war lifts from the mountainous region, the legality of Operation Allied Force comes into question. As the intervention lacked formal Security Council authorization, it was essentially based solely on naked calls for humanitarian relief—an act amounting to a brazen bypass of the U.N. Charter, principles of

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international law, and the laws of war.¹ Although international law recognizes a limited set of circumstances where humanitarian interventions do not require Security Council authorization, such interventions are invariably subjugated to the laws of war, namely the principle of proportionality.²

Protocol I to the Geneva Conventions³ sets out the basis of the proportionality doctrine. This doctrine asserts that any military intervention must balance the military advantage sought with the expected civilian injury and damage that would result from an attack.⁴ In light of this principle, Operation Allied Force appears to be an intervention of questionable nature. The notion that a balance was achieved is undermined by several facts. First and foremost, the air strikes inflicted devastating damage upon the civilian population throughout the Federal Republic of Yugoslavia (FRY), destroying numerous civilian structures and resulting in the deaths of many civilians.⁵ The aftereffects of the air strikes continue to represent an omnipresent threat to the population, as thousands of undetonated bombs remain peppered throughout the FRY.⁶ Additionally, environmental damage resulting from air strikes continues to pose grave threats of contamination to civilians.⁷

In Part I of this Article, the events surrounding the Kosovo conflict are summarized by describing the leading political and social causes that led to its development. Part II delineates the established legal structures that govern the use of force under international law, humanitarian interventions, and the doctrine of proportionality. Part III applies these legal principles to the Kosovo conflict and Part IV concludes that while a humanitarian intervention sans Security Council authorization may have been initially warranted by the rampant conditions within Kosovo, ultimately, the degree of force utilized by NATO forces was

1. See discussion *infra* Part II.A.

2. See discussion *infra* Part II.B.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I].

4. See discussion *infra* Part II.A.2.c.iv.

5. See discussion *infra* Part II.A.2, Part III.A.

6. *Id.*

7. *Id.*

excessive and in violation of Protocol I to the Geneva Conventions.

II. HISTORY AND THE KOSOVO CIVIL WAR

A civil war rarely develops from purely contemporaneous events; rather, it matures over time until it is ripe for an explosion of dissension. The events surrounding the breakdown of Yugoslavia and the subsequent civil wars of the past decade have been the result of centuries of dramatic events, which have torn the people of the former Yugoslavia into various parcels claiming inherent rights to nationalism.⁸ The conflict in Kosovo is the result of separatism, tinged with religious, cultural, and political overtones, surfacing at the start of the 1990s and developing into a violent international conflict at the close of the century.⁹ A deeper understanding of Kosovo and its conflict may be achieved by examining the events leading up to the development of the Kosovo Civil War, and then analyzing the international community's manner of intervention, its envisioned goals, and its justifications for the use of force.

A. *The Kosovo Civil War*

1. Events Leading up to Civil War

The conflict in Kosovo ignited as a result of two opposing forces: the Kosovar Albanians' demands for an independent Kosovo and Slobodan Milosevic's refusal to bestow independence upon a land deeply regarded by the Serbian community as a symbol of Serbian history and religion.¹⁰ Although the events of

8. See Fred Singleton, *A Short History of the Yugoslav Peoples* 250 (1985).

9. *Id.*

10. The modern Federal Republic of Yugoslavia (FRY) is composed of Serbia and Montenegro, with Serbia comprising Serbia proper and the two provinces of Vojvodina and Kosovo-Metohija (most often referred to as Kosovo). See *id.* These two provinces were created in 1974 by Josip Broz Tito, the Croat communist leader of Yugoslavia after World War II (WWII). *Id.* Tito gave both provinces the right to veto any decision of the Serbian Parliament as well as the right to enact their own laws while remaining subject to the laws of Serbia. *Id.* Although the provinces enjoyed extensive autonomy, they were nevertheless part of the Republic of Serbia and did not have the right to secede from Serbia, as opposed to every other republic within Yugoslavia that enjoyed such a right (Slovenia, Macedonia, Croatia, Bosnia-Herzegovina, Serbia, and Montenegro). See *id.* The provinces' right to veto was removed in 1989 by Slobodan Milosevic and the right to

the past decade ultimately led to the Alliance's intervention on March 24, 1999, the underlying causes of the Kosovo civil war stem from many years ago.¹¹ Initial dissatisfaction and sentiments of nationalism by Kosovar Albanians were evident after World War II (WWII).¹² Nationalism, however, was kept in check under Tito, the Croat Communist leader of Yugoslavia from the end of WWII until 1980.¹³ Under Josip Broz Tito, Albanians were able to fully develop their own culture, as did any ethnic group inhabiting the region of Yugoslavia.¹⁴ Enacted measures were directed at providing greater economic and social stability to Kosovo.¹⁵ Ultimately, it was the death of Tito, the growth of nationalism, and the rise of Slobodan Milosevic that precipitated Yugoslavia to its extinction.¹⁶

After widespread protest in 1981¹⁷ and an increase in violence and harassment against Kosovar Serbs,¹⁸ the Serbs

enact their own laws was restricted. *See id.*

Because Albanians in Kosovo constitute over two-thirds of the Kosovar population, they claim the right to independence from Serbia. *See id.* Serbs claim that Kosovo has been the cradle of Serbian culture and religion for centuries and that the Albanian population reached the majority in Kosovo only gradually after the end of WWII. *See id.* While it is certain that Albanians constitute the majority in Kosovo, Serbs have lived in the region since the 7th century when their first kingdom was formed. *See id.* The Serbs lost their independence to the Turks after the defeat of the battle of Kosovo in 1389. *See id.* Until then, Kosovo was the seed of Serbian culture, history, and heritage. *See id.* The region is considered to be the "Serbian Jerusalem" because Kosovo has over 1,000 Serbian-Christian orthodox churches and monasteries, and the Serbian Orthodox Church currently owns one-third of the land within Kosovo. *See id.*

11. *See id.*

12. *See id.*

13. *Id.* at 258-60, 271.

14. *See id.*

15. *See id.* at 250. In the 1960s, the Yugoslav government provided that the Albanian emblem would represent Kosovo and that the University of Pristina employ strictly Albanian professors in order to develop an awareness of the national culture of the Albanian people. *See id.* There was also a revision of statutes, creating an "ethnic key" principle that effectively provided that in all important committees, each republic was adequately represented. *Id.* After the promulgation of the 1974 Constitution under Tito, Yugoslavia attempted to improve the economic situation and disparity within its republics by providing new methods to encourage development of poorer areas (such as Kosovo). *Id.* at 269. Such methods included the use of administrative allocations through the federal budget; the establishment of a fund into which each republic contributed a fixed percentage of its gross national product; and special amounts added to assist Kosovo, the least developed region. *Id.* at 269-70.

16. *Id.* at 271-75.

17. Tito died on May 4, 1980. *Id.* at 271. As explained by Professor Singleton, without the control of Tito, the frustrations and sentiments of nationalism within Kosovo eventually grew into a full-blown protest in 1981. *Id.* at 271-75. The unemployment rate

sought protection from the government through various petitions and demands.¹⁹ In 1983, Kosovar Serbs demanded the protection of Serbian and federal authorities from Albanians who, the Serbs alleged, were violating their human rights.²⁰ As explained by Professor Julie Mertus and according to Serbian sources, the number of Serbs and Montenegrins leaving Kosovo rose to 30,000

had been rising among Albanians; the social and economic rift between privileged and underprivileged (whether Albanian or Serb) increased; and Serbs continued to hold, for historical reasons, relatively privileged positions. *Id.* at 273. Militant Albanians harassed Serb students, and Serbian villages, churches, and graveyards were desecrated. *Id.* Finally, the storm broke in March 1981. *Id.* at 274. Students from the University of Pristina began demonstrating against poor food and housing conditions as well as the declining opportunities for graduates. *Id.* The disturbances spread and by April 3, 1981, the demonstrators had drawn in workers, and the demonstrations took an openly nationalist character. *Id.*

Violence was shown to Serbs and Montenegrins living in the province. Demands were made for full republican status for Kosovo. More extreme elements demanded the inclusion of the Albanian-speaking areas of Macedonia in the proposed republic, and even the attachment of an enlarged Kosovo to the neighbouring state of Albania.

Id. Fearing the disintegration of the state, the federal authorities reacted. *See id.* It is estimated that the violence between the police and demonstrators resulted in eleven persons killed and fifty-seven injured. *Id.* Martial law was declared, students were sent home, and the province was isolated from the rest of Yugoslavia. *Id.* In an attempt to remedy the situation, the federal government promised increased economic aid and implemented a drive against corruption (there were claims that federal aid had been misappropriated). *Id.*

18. *See id.* at 273.

However, it is important to point out here that all these events [demonstrations in 1968 and 1981] were accompanied and marked by increasing persecution of the Serbs living in Kosovo and Metohija. The same methods were applied as were recorded in 19th century documents and spoken tradition: murder, rape, beatings, psychological and moral pressure, illegal possessions, land-stealing, destruction of crops, livestock and forests, social and legal discrimination, outvoting and abuse of privilege, attacks on churches, and desecration of graves, monuments and any other symbol of the national identity of the Serbian people. Organized Albanian terror produced an unbearable atmosphere of vulnerability and fear and compelled growing numbers of Serbs and Montenegrins to leave. Thus in [one] part of its own republic the Serbian people was [sic] reduced to the status of a minority (but without minority rights), while its percentage in the ethnic structure of Kosovo rapidly dwindled—from 27.4 percent in the 1948 population census to 14.9 percent in 1981, the greatest fall occurring between 1961 (still 27.4 percent) and 1981 (14.9 percent).

Dimitrije Bogdanovic, *The Kosovo Question—Past and Present*, in Kosovo 153 (Basil W. R. Jenkins ed., 1992).

19. *See id.*

20. JULIE A. MERTUS, *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR* 293 (1999).

number of Serbs and Montenegrins leaving Kosovo rose to 30,000 during the 1980s.²¹ In 1985, Kosovo Serbs took a petition signed by 2,000 people to the Assemblies of Serbia and Yugoslavia.²² In 1986, 200 Belgrade intellectuals submitted a petition on Kosovo to the Assemblies in Serbia and Yugoslavia in order to demand immediate action from the authorities, seeking protection from ethnic Albanians.²³ The Committee of Serbs and Montenegrins also collected 50,000 signatures on another petition demanding greater rights for Serbs and Montenegrins in Kosovo.²⁴ Finally, in 1986, Slobodan Milosevic made his entrance as the newly appointed leader of the League of Communists of Serbia.²⁵

After adopting a comfortable niche in Yugoslav politics by advocating the rights of Kosovar Serbs, Milosevic loftily declared that Serbs would no longer be harmed in Kosovo.²⁶ According to David Fromkin, Milosevic proposed measures and constitutional amendments that would revoke the autonomous status of Vojvodina and Kosovo as Albanians increased their demands for secession and central ethnic Albanian leaders were dismissed.²⁷ In 1989, Serbia's National Assembly passed amendments to Serbia's Constitution that centralized Belgrade's control.²⁸ Additionally, the federal government imposed emergency measures of curfews, riot police, administrative detentions in Kosovo, and the deployment of a large numbers of federal troops within Kosovo.²⁹ Shortly after the arrest of some Albanian political leaders, the Kosovo Assembly voted to accept the constitutional amendments.³⁰

By 1990, a full-fledged state of emergency was declared as demonstrations increased.³¹ Yugoslavia sent troops, tanks, warplanes and an additional 2,000 police officers into Kosovo in

21. *Id.* at 294.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. DAVID FROMKIN, *KOSOVO CROSSING: AMERICAN IDEALS MEET REALITY ON THE BALKAN BATTLEFIELDS* 154-55 (1999).

27. MERTUS, *supra* note 20, at 295.

28. *Id.*

29. *Id.* at 296.

30. *Id.*

31. *Id.*

February, but removed them in April.³² Finally, the Serbian legislature extended the emergency measures, and closed the Kosovo Academy of Arts and Sciences.³³

In an act of defiance toward the Yugoslav authorities, the Albanian members of the Assembly of Kosovo passed the Constitution of the Republic of Kosovo, effectively establishing a parallel government.³⁴ The Assembly of Serbia passed the new Constitution of Serbia,³⁵ depriving Vojvodina and Kosovo of their autonomy, and elected Slobodan Milosevic President in 1990.³⁶ By 1992, in elections later deemed illegal by the Serbian authorities, Ibrahim Rugova was elected president of the Republic of Kosovo.³⁷

As armed fighting ignited in Bosnia-Herzegovina, Western attention focused on Bosnia, and little attention was directed to Kosovo.³⁸ Yet the armed fighting in Bosnia was a direct result of the growing nationalism from Kosovo and Croatia spreading to various Muslim and Croat groups within Yugoslavia.³⁹ In 1995, after extensive fighting in Bosnia-Herzegovina, the Dayton Peace Accord was signed, but Kosovo was not included in the agreement.⁴⁰

Even by 1996, there was no peace in the Kosovo region as the Kosovo Liberation Army (KLA), a guerilla unit, emerged for the first time.⁴¹ Kosovar Albanians began to grow restless due to the alleged passivity of the militant ethnic Albanians and started to question Rugova's strategies.⁴² This frustration over the lack of advancement in the rights of Kosovar Albanians propelled civilians to unite in forming the KLA to wage sporadic attacks on the Yugoslav army.⁴³

32. *Id.* at 297.

33. *Id.*

34. *Id.*

35. SERB. CONST. (adopted Sept. 28, 1990), available at http://www.smip.sv.gov.yu/facts/laws/const_sr_e.html (on file with author).

36. MERTUS, *supra* note 20, at 297.

37. *Id.* at 301.

38. *Id.* at 304.

39. *Id.*

40. *Id.* at 306.

41. *Id.* at 307.

42. *Id.*

43. *Id.*

2. Developments in Fighting

As violence increased, the conflict in Kosovo began to draw substantial attention from the international community.⁴⁴ By February 1998, KLA guerrilla operations were gradually increasing.⁴⁵ The attacks, initially directed at the Serbian army, went on to include civilians, including Serbian mail carriers and others associated with Belgrade.⁴⁶ The guerrilla attacks ignited an inflamed response from the Serbian military and police, who brutally retaliated against civilians regarded as supporters of the KLA.⁴⁷

In February 1998, the United States sent Robert Gelbard as a Special Envoy to the Balkans.⁴⁸ Gelbard announced in Pristina that without question, the United States regarded the KLA as a terrorist group, and that the United States strongly condemned terrorist activities in Kosovo.⁴⁹ Two weeks after this announcement, the Serb forces waged a brutal attack on a small town considered the headquarters of a KLA clan.⁵⁰ The attack killed almost 100 people and left only ruins behind.⁵¹ The KLA reacted by occupying large areas of the province, leaving the Serbs unable or unwilling to respond to this occupation.⁵²

In light of the increase in violence, and based on past experience in the Balkans, the international community attempted to solve the situation quickly. The Security Council adopted Resolution 1160 in March 1998, calling upon the FRY and the Kosovar Albanians to work toward a political solution.⁵³ In addition, this resolution imposed a mandatory arms embargo on both parties to the conflict.⁵⁴ The resolution avowed that failure to make constructive progress toward the peaceful resolution of

44. See NOAM CHOMSKY, *THE NEW MILITARY HUMANISM: LESSONS FROM KOSOVO* 31 (1999).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. S.C. Res 1160, U.N. SCOR, 53rd Sess., 3868th mtg. at 2, U.N. Doc. S/RES/1160 (1998).

54. *Id.*

the situation in Kosovo would lead to the consideration of additional measures.⁵⁵

Despite the arms embargo, the situation continued to deteriorate. During the summer of 1998, the Serb forces reacted to the KLA occupation of large areas within Kosovo by burning villages and driving out the residents.⁵⁶ At the same time, the KLA had effectively taken control of forty percent of Kosovo, and Milosevic responded with a major offensive.⁵⁷

In September 1998, the Security Council again acted by adopting Resolution 1199, determining that the situation in Kosovo had deteriorated and constituted "a threat to peace and security in the region."⁵⁸ The Security Council demanded concrete improvements, asking for a cessation of hostilities, a cease-fire, and further action to alleviate the situation as well as promote negotiation involvement by both parties.⁵⁹ In addition, the Council decided that "should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region."⁶⁰

Then it became clear that Russia would veto any Security Council resolution, including an express authorization to use force against the FRY.⁶¹ The United Nations was unable to sanction the use of force within Resolution 1199, and this effectively blocked further U.N. action to deploy any military force within the FRY.⁶² In light of this paralysis, NATO decided to take over.⁶³

Members of the regional organization agreed to authorize and participate in military operations if the FRY failed to comply with the Security Council resolutions.⁶⁴ As the Alliance prepared

55. *Id.*

56. Tim Judah, *KLA Is Still a Force to Be Reckoned With*, WALL ST. J., Apr. 7, 1999, at A22.

57. CHOMSKY, *supra* note 44, at 31.

58. S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg. at 2, U.N. Doc. S/RES/1199 (1998).

59. *Id.*

60. *Id.* at 5.

61. Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, EURO. J. INT'L L., at 2 *Kosovo: A Thin Red Line*, available at <http://www.ejil.org/journal/Vol10/No1/abl-2.html> (last modified Apr. 26, 1999).

62. *Id.*

63. *Id.*

64. *Id.*

itself for armed attacks, it publicly announced its impending military operation as a "humanitarian intervention" closely linked to the principles and legal basis of the U.N. Charter.⁶⁵ Secretary-General Solana clearly enunciated the NATO objectives in a letter addressed to the permanent representatives of NATO on October 9, 1998:

The relevant main points that have been raised in our discussion yesterday and today are as follows:

The FRY has not yet complied with the urgent demands of the International Community, despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC 1199 of 23 September 1998, both acting under Chapter VII of the U.N. Charter.

The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned *inter alia* of the danger of an humanitarian disaster in Kosovo.

The continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY.

The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future.

The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199.

On the basis of this discussion, I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten and if necessary, to use force.⁶⁶

In the course of the next few days following Solana's letter, U.S. intelligence reported that the Kosovo rebels intended to draw NATO into its fight for independence by provoking Serbian forces into further atrocities.⁶⁷ At the same time, the situation seemed to

65. *Id.*

66. *Id.*

67. CHOMSKY, *supra* note 44, at 33. As described by Professor Chomsky, this may be explained by the fact that deplorable human rights violations carried out by the Serbs would result in considerable attention from the international community and the potential

improve with the help of U.S. Special Envoy Richard Holbrooke.⁶⁸ The deal reached between Holbrooke and Milosevic included a cease-fire and two separate agreements.⁶⁹ The first agreement was entered into on October 16, 1998, between the FRY and the Organization for Security and Cooperation in Europe (OSCE). This agreement authorized the OSCE to establish a verification mission in Kosovo, and asked the FRY to comply with Resolutions 1160 and 1199.⁷⁰ The second agreement was entered into on October 15, 1998, between the FRY and NATO. The second agreement established an air verification mission over Kosovo.⁷¹ The U.N. Security Council approval of these diplomatic efforts was embodied in Resolution 1203,⁷² in which the Council, acting under Chapter VII, formally endorsed the two agreements and demanded full and prompt implementation of the agreements by the FRY.⁷³ In addition, the

for the re-creation of a separate territory for the Kosovar Albanians with internationally recognized borders. See *id.* If human rights violations were solved internally, the situation for the Kosovar Serbs could be ameliorated but the old borders would retain their status quo. See *id.* According to journalist/historian Tim Judah, the Kosovar Albanian leadership never supported the Croat and Bosnian Muslims, as “they did not want the international community to uphold the principle that Yugoslavia’s old republican borders could turn into new inviolable international ones” effectively retaining Kosovo as a province “trapped inside Serbia” instead of a Republic with a right of secession. *Id.* at 28. Moreover Kosovo Albanians abstained in the 1992 Yugoslav election, the LDK denouncing any participants as traitors. *Id.* This refusal is of momentous importance. According to Miranda Vickers:

the million Albanian votes would undoubtedly have ousted Milosevic, but as the Kosovar leadership admitted at the time, they did not want him to go. Unless Serbia continued to be labelled as profoundly evil—and they themselves, by virtue of being anti-Serb, as the good guys—they were unlikely to achieve their goals. It would have been a disaster for them if a peacemonger like [opposition candidate Milan] Panic had restored human rights, since this would have left them with nothing but a bare political agenda to change borders.

Id. This was even more clearly evident in 1992 through 1993 when Dobrica Cosic, the Serbian President of Yugoslavia, “proposed ‘discreet contacts with Kosovo Albanian leaders’ that the territory be partitioned, separating itself from Serbia apart from ‘a number of Serbian enclaves.’” *Id.* The proposition was rejected by Albanian leaders. *Id.*

68. *Id.* at 33.

69. Simma, *supra* note 61.

70. *Id.*; S.C. Res. 1160, *supra* note 53, at 1; S.C. Res. 1199, *supra* note 58, at 1.

71. Simma, *supra* note 61.

72. S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg. at1, U.N. Doc. S/RES/1203 (1998).

73. *Id.* at 2.

Council reiterated its stance that the Kosovo conflict constituted a continuing threat to peace and security in the region.⁷⁴

In spite of these diplomatic efforts, the situation deteriorated and the violence increased.⁷⁵ On January 15, 1999, Serb forces waged an attack on Racak, a village in Kosovo, killing forty-five civilians.⁷⁶ This event received extensive media coverage and may have been the decisive factor that moved NATO to resume threats of air strikes and initiate preparations for war.⁷⁷ The threats increased, and on February 1, 1999, the FRY representative denounced NATO's actions in a letter. He demanded a meeting of the Security Council "following the NATO threats to the sovereignty of [his] country."⁷⁸ He further added that "[t]he decision by NATO, as a regional agency, to have its Secretary-General authorize air strikes against targets on the FRY territory . . . represent[ed] an open and clear threat of aggression against the FRY as a sovereign and independent Member State [sic] of the United Nations."⁷⁹ The letter concluded that explicit U.N. authorization would be necessary prior to a military strike against the FRY.⁸⁰

In an effort to provide a final diplomatic solution to the conflict, Serbs and KLA members met in Rambouillet on February 6, 1999, under the direction of the Alliance.⁸¹ Although

74. *Id.*

75. Simma, *supra* note 61. Clashes between the rebels and the police were repeatedly reported as both sides continued fighting regardless of the cease-fire agreements. Mike O'Connor, *Attack by Serbs Shatters a Cease-Fire in Kosovo*, N.Y. TIMES, Dec. 24, 1998, at A1. On December 24, 1998, Serbian forces waged a sustained assault on separatist guerrillas as more than forty armored vehicles and tanks fought throughout the day. *Id.* On December 27, 1998, "rebels came down from the hills . . . and attacked a large police post . . . between the Serbian capital of Belgrade and Pristina, the provincial capital." Mike O'Connor, *Rebels Attack Serb Police Post in Kosovo*, N.Y. TIMES, Dec. 28, 1998, at A16. The attack reportedly included the use of 120-millimeter mortars by the rebels as well as heavy machine gun fire by the police. *Id.* Although both sides engaged in fighting, it was mainly the rebels who ignited these violent clashes. *Id.* According to the French Defense Minister Alain Richard, the "renewed fighting" is to be "blamed . . . mainly on ethnic Albanian guerrillas of the Kosovo Liberation Army." *France Talks of Possible Pullout in Kosovo*, N.Y. TIMES, Jan. 3, 1999, at 9. Similarly, Richard Holbrooke stated that, "[t]he main destabilizing factor today is the rebels, not the Serbs." *Id.*

76. CHOMSKY, *supra* note 44, at 33.

77. *Id.*

78. Simma, *supra* note 61.

79. *Id.*

80. *Id.* (emphasis in original).

81. CHOMSKY, *supra* note 44, at 106. The terms of the Rambouillet agreement can be found at *Rambouillet Accord—Interim Agreement for Peace and Self-Government in*

the terms of the Rambouillet agreement were accepted by the KLA delegates, they were rejected by Serbs.⁸² Upon this rejection, the threats of air strikes became a reality.⁸³ On March 19, 1999, the Kosovo Verification Army withdrew from the FRY in preparation for bombings.⁸⁴ Finally, on March 23, 1999, NATO began its air strikes directed at the territory of the FRY.⁸⁵ These actions were deemed legally justified as a humanitarian intervention closely linked to Security Council Resolution 1199, necessary to prevent further loss of civilian life in Kosovo by Serbian military forces.⁸⁶

3. Goals Meant to Be Achieved by NATO and the United States

The decision to conduct air strikes on March 23, 1999, was based on various humanitarian reasons illustrated in U.S. President William Jefferson Clinton's article in the *New York Times* entitled, "A Just and Necessary War."⁸⁷ According to Clinton, air strikes were meant to restore refugee Kosovars to their homes (presumably by stopping further refugee flow and providing safe conditions for the return of refugees); to expel Serb forces out of Kosovo; to enable the deployment of an international security force with NATO at its core; to reverse ethnic cleansing; and to establish respect for minority rights within Kosovo.⁸⁸

One of the most prominent motivations underlying the "humanitarian intervention" by NATO forces was concern for the refugees.⁸⁹ According to NATO sources, in the year before the bombing, several hundred thousand people had become internal

Kosovo, <http://www.jurist.law.pitt.edu/ramb.htm> (last visited Nov. 6, 2000) [hereinafter *Rambouillet Accord*].

82. CHOMSKY, *supra* note 44, at 108.

83. *Id.* at 109.

84. *Id.* at 17.

85. *Id.* at 3.

86. Simma, *supra* note 61.

87. William Jefferson Clinton, *A Just and Necessary War*, N.Y.TIMES, May 23, 1999, at A17.

88. *Id.*

89. CHOMSKY, *supra* note 44, at 16. As indicated by Professor Chomsky, however, an examination of refugee data quickly demonstrates that the NATO intervention actually caused an increase in the number of refugees. *Id.*

refugees.⁹⁰ The situation differed for refugees living beyond the borders of the FRY.⁹¹ According to the U.N. High Commissioner for Refugees (UNHCR), prior to the bombing and two days after the first air strikes no data was reported on refugees.⁹² After three days of bombing, on March 27, 1999, the UNHCR reported 4,000 refugees from Kosovo in Albania and Macedonia.⁹³ By April 5, 1999, approximately 350,000 had left Kosovo since the beginning of air strikes.⁹⁴ In addition, an unknown number of Serbs had fled to Serbia to seek safety from violence.⁹⁵ Approximately half the Serb population has reportedly fled since the NATO bombing began.⁹⁶

Varying estimates are available for the number of internally displaced refugees within Kosovo.⁹⁷ On March 11, 1999, the UNHCR reported that more than 230,000 people were displaced within Kosovo.⁹⁸ According to Cambridge University Law Professor, Marc Weller, the Legal Advisor to the Kosovar Delegation at the 1999 Rambouillet Conference on Kosovo, the number of displaced refugees had "risen to over 200,000" after March 19, 1999.⁹⁹

All totaled, the final number of refugees is staggering. On June 3, after the peace accord had been reached, the UNHCR reported that there were 671,000 refugees beyond the borders of the FRY (70,000 in Montenegro and 75,000 who fled to other countries).¹⁰⁰ Additionally, the number of internally displaced

90. *Id.* Internal refugees are refugees displaced within the borders of Kosovo rather than outside of the province's borders. *Id.* These figures are the result of Yugoslav police actions and the victims are predominantly Albanian due to the high percentage of Albanians within Kosovo. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Carlotta Gall, *Misery and Disease Sweep Macedonian Camp*, N.Y. TIMES, Apr. 5, 1999, at A7.

95. CHOMSKY, *supra* note 44, at 16.

96. *Id.* at 17.

97. *See id.* at 16-17.

98. *Id.*; Gall, *supra* note 94, at A7; Guy Dinmore, *Thousands Flee Kosovo's Cities as Fear Spreads*, FIN. TIMES, Apr. 1, 1999, at 1; Kevin Cullen, *Wary Serbs Join Soldiers' Retreat*, BOSTON GLOBE, June 12 1999, at A9; United Nations High Commissioner for Refugees (UNHCR), *Ogata Says Situation Deteriorating in Kosovo, Urges Action to Avert Disaster*, Mar. 11, 1999 (on file with the Loyola of Los Angeles International and Comparative Law Review).

99. CHOMSKY, *supra* note 44, at 17.

100. *Id.*; see John Yemma, *Daunting Task Ahead in Province*, BOSTON GLOBE, June 6,

refugees is estimated to be two to three hundred-thousand.¹⁰¹ According to the Yugoslav Red Cross, over a million were displaced within Serbia after the bombing.¹⁰²

Another humanitarian concern that presumably resulted in NATO air strikes was the level of Serb atrocities committed in Kosovo.¹⁰³ According to NATO, approximately 2,000 people had been killed in Kosovo in the year before the bombing.¹⁰⁴ This number increased considerably after the onset of air strikes.¹⁰⁵ According to a U.S. State Department report issued in May 1999, "reports of atrocities increased significantly" on March 24, 1999.¹⁰⁶ Data as to the number of atrocities committed was obtained from refugees and could not be precisely verified.¹⁰⁷ Nevertheless, it is clear from the State Department report that atrocities sharply increased from the onset of air strikes.¹⁰⁸

1999, at A30 (citing UNHCR refugee figures).

101. CHOMSKY, *supra* note 44, at 17.

102. Yugoslav Red Cross, *Report on the Humanitarian Situation*, available at <http://www.bhhrg.org/serbia/serbia1999/humanitariansituation.htm> (last modified Jan. 26, 2001).

103. See U.S. Dep't of State, *Erasing History: Ethnic Cleansing in Kosovo* (May 1999), at http://www.state.gov/www/regions/eur/rpt_9905_ethnic_ksvo_toc.html (last visited Nov. 6, 2000) [hereinafter *Erasing History*].

104. CHOMSKY, *supra* note 44, at 16.

105. *Id.* at 16-17.

106. *Erasing History*, *supra* note 103.

107. *Id.* At the time, all of the members of the Kosovo Verification Mission (KVM) had left the region and could not have been the source of the information. *Id.*

108. *Id.* Although the air strikes were conducted in order to prevent the escalation in the number of refugees and to prevent further atrocities, the increase in refugees and atrocities committed appears to have been entirely predictable according to Commanding General Wesley Clark and U.S. intelligence resources. CHOMSKY, *supra* note 44, at 20. On March 27, General Clark announced that it was entirely predictable that Serb terror and violence would intensify after the NATO bombing. *Id.* In addition, General Clark stated that he was not surprised by the sharp escalation of Serb terror after the bombing: "[t]he military authorities fully anticipated the vicious approach that Milosevic would adopt, as well as the terrible efficiency with which he would carry it out." *Id.* at 21. House Intelligence Committee Chair Porter Goss stated to the press that "[o]ur intelligence community warned us months and days before [the bombing] that we would have a virtual explosion of refugees over the 250,000 that was expected as of last year [pre-bombing], that the Serb resolve would increase, that the conflict would spread, and that there would be ethnic cleansing." *Id.* Despite these assertions, on the same day as General Clark's statement, U.S. State Department spokesperson James Rubin stated that "[t]he United States is extremely alarmed by reports of an escalating pattern of Serbian attacks on Kosovar Albanian civilians." *Id.* at 20-21. Finally, even in 1992, European monitors in Macedonia predicted large amounts of Albanian refugees if a conflict reached Kosovo. *Id.* at 21. The removal of the KVM had presumably, in light of Serb opposition to the

By examining refugee data and through investigations of Serb atrocities, it appears the onset of air strikes caused a dramatic increase in both the refugee flow and atrocities committed.¹⁰⁹

III. THE BASIS AND MEANS OF THE INTERVENTION

In ascertaining the legitimacy of NATO's air strikes in the territory of the former Yugoslavia, it is necessary to examine the legal basis for the intervention as well as the legality of methods used to achieve the desired military objectives.¹¹⁰ Consequently, an examination of the legitimacy of NATO's intervention must entail two independent determinations: first, the circumstances under which a regional organization may legitimately intervene with the use of force¹¹¹ and second, the range of force that such an intervention may apply in achieving military objectives.¹¹²

A. *The Legitimacy of NATO Intervention*

International law recognizes limited circumstances for the use of military force.¹¹³ As the terms of the U.N. Charter are a primary source of international law, the Charter's provisions dictate legitimate uses of force within the international arena.¹¹⁴

withdrawal of the KVM a few days before the onset of air strikes, the same consequences of increasing refugee flow and atrocities by Serb troops. *Id.* at 22.

109. As Professor Chomsky argues, the logical conclusion is that preparations for air strikes and the onset of air strikes dramatically exacerbated the precise humanitarian conditions that compelled NATO intervention. See CHOMSKY, *supra* note 44, at 16-22.

110. Use of force is generally recognized under the U.N. Charter in self-defense situations; it is also acceptable where the United Nations is acting to protect international peace and security under Chapter VII of the Charter. See discussion *infra* Part II.A.1. In the past ten years, however, the United Nations has intervened for humanitarian reasons in purely internal conflicts thereby creating a new means of intervention under Chapter VII. See discussion *infra* Part II.A.2.

111. This will include an examination of the U.N. Charter as well as the humanitarian intervention doctrine.

112. This range of legitimate uses of force is to be determined under Protocol I, *supra* note 3.

113. See Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031; T.S. No. 993.

114. Article 38(1) of the Statute of the International Court of Justice provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the

Although a plain reading of the Charter provides for legitimate use of force under limited circumstances, the Security Council has previously condoned use of force for strictly humanitarian interventions.¹¹⁵ Whether such interventions may occur without Security Council approval is questionable.

1. Use of Force Under the U.N. Charter

The U.N. Charter provides a central procedure applicable to all member states through which decisions regarding military interventions are to be determined.¹¹⁶ This centrality is clearly evidenced in Article 103 of the Charter, which states that in the event of a conflict between the Charter and any other international agreement, the terms of the Charter are to prevail.¹¹⁷

According to the Charter, necessary force is to be used only in the event of explicit Security Council authorization or for the self-defense of a member state.¹¹⁸ Article 2(4) of the Charter states that “[a]ll 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.”¹¹⁹ Two exceptions are available to this broad prohibition on use of force: Article 51 and an enforcement action under Chapter VII.¹²⁰ Article 51 states that members have an “inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the United Nations” even where there is no Security Council authorization for the use of force.¹²¹ Chapter VII grants the United Nations power to intervene militarily in the affairs of another state only if two conditions are met: (1) the

determination of rules of law.

Id. Because the United Nations has reached almost global membership, and U.N. recognitions and conventions are the first listed sources of international law, the terms of the U.N. Charter are of primary importance in determining the legitimacy of international action. *See id.*

115. Byron F. Burmester, Comment, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 314–15 (1994).

116. U.N. CHARTER arts. 51, 27; *id.* ch. VII.

117. *Id.* art. 103.

118. *Id.* arts. 2(4), 5; *see also id.* ch. VII; Simma, *supra* note 61.

119. U.N. CHARTER art. 2(4).

120. *Id.* art. 51.

121. *Id.*

Security Council must determine the existence of any threat to the peace, breach of the peace, or act of aggression, and (2) the Security Council must take all peaceful alternative steps to resolve the dispute or determine that none will be adequate.¹²² The primacy of these provisions is emphasized in Article 53(1), which states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."¹²³ Article 51 and Chapter VII interventions are therefore applicable internationally, supersede conflicting treaties, and articulate the only legitimate uses of forces recognized under the U.N. Charter.

These exceptions, although explicitly permitted by the Charter, should be interpreted in light of the Charter's emphasis on minimizing violence in the international community.¹²⁴ The Preamble of the Charter states that the Charter is designated "to save succeeding generations from the scourge of war."¹²⁵ Article 1 sets forth a preeminent purpose of the Charter "to bring about by peaceful means . . . [the] settlement of international disputes . . . which might lead to a breach of the peace."¹²⁶ Article 1 further articulates that one of the purposes of the United Nations is "to take effective collective measures for the prevention and removal

122. *Id.* arts. 39–51. In assessing the necessity of enforcement actions under Chapter VII of the Charter, the Security Council must follow specific steps to issue an explicit authorization for the use of force as evidenced by Articles 33, 41, and 42. *Id.* arts. 33, 41–42. Article 42 states that the Security Council may authorize force only after determining that non-lethal sanctions under Article 41 would be or are inadequate. *Id.* art. 42. In other words, Article 42 sets forth the principle that force should be used as a last resort. Article 33 similarly states that parties to a dispute are to seek peaceful resolutions to conflicts. *Id.* art. 33. Consequently, only after an examination as to the failure of non-lethal sanctions in ameliorating a particular conflict, can the United Nations issue an authorization for the use of military force under Article 42. Explicit authorization must come from the Security Council addressing the necessity of intervention in light of the failure of peaceful remedies. *Id.* art. 53. This principle is further emphasized in Article 53(1), which states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." *Id.* Although a clear intent is necessary by the Security Council, it is not necessary to include the language "military force" to constitute an explicit authorization; the language most commonly used is "all necessary means." *Id.*

123. *Id.* art. 53.

124. Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 128 (1999); Richard A. Falk, *The United Nations and the Rule of Law*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 611, 634 (1994).

125. U.N. CHARTER pmb1.

126. *Id.* art. 1.

of threats to the peace, and for the suppression of acts of aggression.”¹²⁷ This, however, must be read in conjunction with the establishing principle “that the UN was founded to be attentive first and foremost to peaceful settlement of international disputes and to rely on the military instrument of policy only as an extreme last resort.”¹²⁸ This principle is further embodied in Article 33, which states that the parties to any dispute must first seek a resolution by peaceful means.¹²⁹ Therefore, any authorization of military intervention must be weighed against the U.N. purpose of resolving conflicts peacefully and diplomatically.

The terms of the U.N. Charter have gained worldwide acceptance and entered the realm of higher international law.¹³⁰ This is well recognized by member states as evidenced in Article 103 of the Charter.¹³¹ An abandonment of the Charter principles could result in competing claims to the right of intervention and eventually lead to an escalation of violence.¹³² Consequently, as an embodiment of higher law, the text of the U.N. Charter recognizes only two explicit situations warranting the use of force.¹³³

2. Humanitarian Intervention

Although the Charter’s text provides for forceful intervention in enumerated instances, the Security Council has, in the past,

127. *Id.*

128. *Id.*

129. *Id.* at art. 33.

130. See Simma, *supra* note 61.

131. *Id.*

132. *Id.* Questions arise as to the ability of the Security Council to act where it is “paralyzed” by a veto. The Security Council’s decisions are governed by Article 27(3), which provides that its action requires “the concurring votes of the permanent members.” U.N. CHARTER art. 27(3). For an intervention to occur, all permanent members must agree as to whether the intervention should take place. See *id.* During the Cold War, the Security Council was often paralyzed by vetoes where a particular action was to be undertaken—this is no longer the case. In the past eight years, the Security Council has authorized the use of force to address threats to peace and security. See discussion *infra* Part II.A.2.b. The argument that a veto may paralyze the Council and call for intervention by member states or regional organizations to address the problem without the sanction of the Security Council is unwarranted. The fact that the Council’s vetoes are still present is an illustration of the Council’s vitality in addressing issues rather than a stubborn impediment in furtherance of preferred policies.

133. Simma, *supra* note 61.

called for intervention for reasons falling beyond these explicit instances.¹³⁴ As grave human rights violations offending basic notions of justice occur within a particular state, the international community finds itself faced with the decision of whether to intervene in order to alleviate the prevalent human suffering inflicted upon an often innocent population. While a humanitarian intervention may provide relief to distressing conditions, it may also provide an opportunity for self-interested parties to intervene under the guise of an allegedly humanitarian and benevolent gesture.¹³⁵ For these reasons, international law and the international community have often recognized and supported humanitarian interventions that are authorized by the Security Council.¹³⁶ While interventions lacking such authorizations may have found some recognition, it is clear they are to be undertaken under a narrow set of circumstances in order to protect against the self-interest of the intervening states.¹³⁷

a. Pre-Charter Custom

Humanitarian intervention is the doctrine of using force against one state in favor of the citizens of that state without the consent of its government.¹³⁸ Most scholars appear to agree that the humanitarian intervention justification for the use of force was first recognized by Hugo Grotius during the course of the seventeenth century.¹³⁹ Grotius argued that a nation may justifiably rely on the use of such force because the intervening state's bond with the mistreated citizens and their common humanity supersede the relationship between sovereigns.¹⁴⁰

134. *Id.*

135. *See id.*

136. *See id.*

137. Commentators have advocated the legitimacy of forceful intervention without Security Council authorization for humanitarian reasons under enumerated circumstances. These circumstances are discussed in greater detail *infra*, but mainly include: (1) the existence of gross human rights violations; (2) paralysis of the Security Council; (3) exhaustion of diplomatic means; and (4) proportionality in the use of force.

138. See 1 OPPENHEIM'S INTERNATIONAL LAW 442 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

139. Burmester, *supra* note 115 at 272; 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, 209 n.17.

140. Burmester, *supra* note 115, at 272-73.

During the nineteenth century, with the rise of the nation state, the doctrine fell into disfavor due to the prevalent emphasis on each nation's right to sovereignty.¹⁴¹ With the formation of the United Nations and the drafting of the U.N. Charter, the doctrine appeared to have been entirely discarded in light of Articles 2(4) and 2(7) of the Charter prohibiting the unilateral use of force with the exception of self-defense.¹⁴²

b. Humanitarian Intervention Authorized by the Security Council

The Charter's drafters placed great emphasis on international peace and security, principles of sovereignty, and prohibitions on the use of force.¹⁴³ Nevertheless, the use of force for humanitarian interventions, when endorsed by the Security Council to remedy serious human rights violations, has found widespread recognition throughout the international community.¹⁴⁴ The doctrine relies on the text of the Charter, principles of morality, and past history, as well as practice subsequent to the Charter's enactment.¹⁴⁵

The Preamble of the Charter reads that the people of the United Nations "reaffirm [their] faith in fundamental human rights, in the dignity and worth of the human person . . ."¹⁴⁶ In addition, the Preamble states that armed forces should not be used "save in the common interest," an interest which would certainly include "faith in fundamental human rights."¹⁴⁷ The Preamble further underscores the Charter's emphasis on respect for human rights and states the United Nations' goal "to establish conditions under which justice . . . can be maintained."¹⁴⁸ Therefore, considerations of fundamental human rights are essential to

141. *Id.* at 273; Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 396 (1993).

142. Burmester, *supra* note 115, at 274.

143. For general background information, see Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323 (1996); Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992); Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117 (1991).

144. See generally Tesón, *supra* note 143, at 340.

145. *Id.*

146. U.N. CHARTER pmbl.

147. *Id.*

148. *Id.*

interpreting the Charter. This conclusion is supported by Article 31(2) of the Vienna Convention on Treaties, which states that preambles are to be considered in interpreting the meaning of treaties.¹⁴⁹

An examination of history serves as a further guide in interpreting the extent to which the United Nations was destined to protect fundamental human rights. The organization was formed as a result of the devastating effects of war and its accompanying human rights violations.¹⁵⁰ In addition, an analysis of subsequent humanitarian interventions, particularly in the post Cold War Era, determines the scope and circumstances eliciting Security Council intervention.¹⁵¹ The Vienna Convention on the Law of Treaties recognized and incorporated the international principle that when interpreting a treaty, one should take into account subsequent practice.¹⁵² Consequently, the interventions in Yugoslavia, Somalia, and Iraq provide guidance as to the extent and scope of a U.N. intervention.¹⁵³ These notions of morality, history, practice, and a plain reading of the Charter's text furnish a firm basis for the recognition of humanitarian interventions under the U.N. Charter.¹⁵⁴

149. BARRY CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 103-04 (1991).

150. Tesón, *supra* note 143, at 342. The drafters' intent was to prevent the reoccurrence of the two cataclysms that occurred in the first half of the twentieth century; this intent is evidenced in one of the first four purposes and principles of the United Nations that places emphasis on the maintenance of international peace and security. Burmester, *supra* note 115, at 274.

151. Tesón, *supra* note 143, at 340.

152. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(b)(3), 1155 U.N.T.S. 331.

153. Tesón, *supra* note 143, at 340.

154. Although gross human rights violations resulting in Security Council intervention often result in threats to international peace and security, questions arise as to the Security Council's authority to act in situations where the human rights violations are of a purely domestic nature. *Id.*; ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 76 (1963). Chapter VII grants the United Nations the power to militarily intervene in the affairs of another state only if the Security Council determines the existence of "any threat to the peace, breach of peace, or act of aggression," and the Security Council has taken all peaceful steps to resolve the dispute and none of these alternative steps have proven successful. U.N. CHARTER ch. VII. Under Article 39, such threat to the peace or act of aggression must disturb international peace and security before the Council may act under Articles 41 and 42. *Id.* art. 39. In addition, Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any state—in other words, a state's sovereignty. *Id.* art. 2(4). The legitimacy of intervention in a purely domestic human rights violation situation is based on reasons of political philosophy as illustrated by

The Security Council is the ultimate decision-maker with regard to humanitarian interventions. It must determine whether the human rights violation at issue causes a threat to international peace and security, or whether it should remain a purely domestic issue.

c. Humanitarian Intervention Lacking Security Council Authorization

The use of force in humanitarian interventions without explicit Security Council approval has led to considerable debate over whether such interventions violate international law.¹⁵⁵ Situations may arise where the Security Council is unable to react to certain human rights violations due to disagreement between permanent members or because of financial difficulties. The Charter's emphasis on the protection of human rights by individual member states, and the works of various commentators expounding the legitimacy of humanitarian intervention without the Security Council's approval lend support to the notion that such interventions are legitimate under enumerated circumstances.¹⁵⁶ Nevertheless, in order to determine the strength of the doctrine, the Charter and the works of these commentators must be interpreted in light of the prevalent state practice.

i. The Charter's Inherent Tensions

It is undeniable that the Charter contains inherent tensions between the principle of promoting human rights and the notion of maintaining peace and security.¹⁵⁷ Article 2(4) prohibits the

Professor Tesón, who argues that the purpose of a state is to protect the human rights of its citizens. Tesón, *supra* note 143, at 342. A state derives its legitimacy and sovereignty from popular consent and the subsequent protection of human rights. *Id.* Therefore, governments "forfeit their legitimacy in the international arena when they turn against their citizens and betray the ethical end that justifies their existence." *Id.* In addition, as stated by Professor Tesón, the human rights issue is no longer a matter of exclusive domestic jurisdiction. *Id.* The U.N. General Assembly has adopted numerous resolutions regarding human rights, some directly applicable to particular states. *Id.* Consequently, even in the event of purely domestic human rights violations, the Security Council retains jurisdiction to address the matter because humanitarian intervention will not infringe upon a state's sovereignty. *Id.*

155. See Burmester, *supra* note 115, at 269.

156. *Id.*

157. *Id.* at 300. Although promoting human rights may ultimately achieve peace and

use of force against "the territorial integrity or political independence" of a state.¹⁵⁸ Article 55, on the other hand, states that the United Nations shall promote "universal respect . . . for human rights."¹⁵⁹ In addition, Article 56 calls on member states to "take joint and separate action . . . for the achievement of the purposes set forth in Article 55."¹⁶⁰ If the United Nations is unable to act when serious human rights violations are occurring, some scholars argue that sufficient basis exists for the use of force even without Security Council authorization.¹⁶¹ A state committing gross human rights violations forfeits the benefit it derives as a sovereign under Article 2(4).¹⁶² Thus, the promotion of human rights prevails and a state may intervene under Article 56 without violating the ban on use of force contained in Article 2(4).¹⁶³

ii. Commentators

Some commentators agree with the legitimacy of humanitarian intervention, emphasizing the importance of striking a balance between the need to prevent human rights violations and the danger of interventions for non-humanitarian motives.¹⁶⁴ Several commentators have even advanced various rules to justify humanitarian intervention lacking Security Council approval. Professor W. D. Verwey posited an inherent right of humanitarian intervention under particular conditions.¹⁶⁵ Emergency situations, such as where right to life violations are occurring on a massive scale, would be an example.¹⁶⁶ All peaceful efforts must have

security, states are nevertheless forbidden under Article 2(4) from infringing upon a state's sovereignty. U.N. CHARTER art. 2(4). Article 2(4) is meant to maintain peace and security by prohibiting attacking forces from infringing upon a state's sovereignty. *See id.* The inherent tension arises from the need to maintain peace and security through preservation of a state's sovereignty and member states' obligations to promote human rights. Burmester, *supra* note 115, at 300.

158. U.N. CHARTER art. 2(4).

159. U.N. CHARTER art. 55.

160. Burmester, *supra* note 115, at 299-300.

161. *See infra* Part III.A.2.

162. Burmester, *supra* note 115, at 300.

163. *Id.*

164. *Id.*

165. *See* W. D. Verwey, *Humanitarian Intervention Under International Law*, 32 NETH. INT'L L. REV. 357, 418 (1985); Captain Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 272 (1997).

166. Verwey, *supra* note 165, at 400.

been exhausted, and an intervention must be the last resort to save the lives of potential victims.¹⁶⁷ The intervening state must be disinterested, the United Nations must be unable to act, and the force used must be proportional to the objective.¹⁶⁸

Professor Ved Nanda similarly enumerated five criteria for humanitarian interventions: (1) there must be a necessity for intervention, such as in the case of genocide or gross violations of human rights; (2) the force used must be proportional to the objective, the duration and force applied must not exceed the level required for achievement of the objective; (3) the intervention must be motivated by humanitarian conditions; (4) whether the action was collective or unilateral; and (5) whether the intervention maximized the best outcome.¹⁶⁹

Another commentator who endorses humanitarian intervention is Judge Antonio Cassese of the International Criminal Tribunal for the former Yugoslavia.¹⁷⁰ He set out strict conditions when the use of armed forces may be justified absent Security Council authorization.¹⁷¹ According to Judge Cassese, the following conditions must be present: (1) there must be gross and egregious violations of human rights “involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, . . . carried out on the territory of the sovereign state . . . [;]” (2) these crimes result from anarchy in a sovereign state or result from the acts of the authorities; (3) the Security Council is unable to act because of disagreement between permanent members; (4) all peaceful means have been exhausted; (5) a group of states, as opposed to one state, decides to halt the atrocities; and (6)

armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights . . . the use of force must be discontinued as soon as this purpose

167. *Id.*

168. *Id.* at 418.

169. Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law (Part I)*, 20 *DENV. J. INT'L L. & POL'Y* 305, 310 (1992).

170. Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?*, *EURO. J. INT'L L.*, available at <http://www.ejil.org/journal/Vol10/No1/com.html> (last modified May 11, 1999).

171. *Id.*

is attained . . . force should be commensurate with and proportionate to the human rights exigencies on the ground . . . military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed confrontation.¹⁷²

In examining these theories, the similarities between the conditions calling for humanitarian intervention are clear. These commentators are attempting to evade legitimizing excessive use of force as well as interventions for non-humanitarian purposes. Nevertheless, the particular motives underlying an intervention are often difficult or even impossible to ascertain. Therefore, it becomes crucial to narrow the scope of permissible interventions to situations dealing with egregious human rights violations and to legitimize use of force only for the limited purpose of stopping human rights violations and improving the victims' living conditions. Moreover, in order to maximize the most positive outcome in a particular conflict, it becomes crucial to exhaust all possible avenues for diplomatic negotiations before resorting to force.¹⁷³ Consequently, where an intervention is undertaken for humanitarian purposes by a state or a group of states, these factors would impact the legitimacy of the particular intervention.

iii. Customary Law

The justification and theories advancing the legitimacy of humanitarian intervention without Security Council approval must be judged in light of current practice.¹⁷⁴ History is certainly replete with examples of humanitarian interventions; a brief examination of state practice, however, evidences a revival of U.N.

172. *Id.*

173. *Id.*

174. Customary law is an essential element in determining international law as stated in Article 38(1)(b) of the Statute of the International Court of Justice, which provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted by law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031; T.S. No. 993.

involvement in humanitarian interventions since the end of the Cold War.

During the Cold War, prevailing political disagreements and the distrust between East and West resulted in frequent inaction or paralysis within the Security Council.¹⁷⁵ Conflicts, such as in Pakistan and Uganda, calling for immediate Security Council action, were often neglected by a lethargic and inactive United Nations.¹⁷⁶ In 1971, the Pakistan army descended upon the civilian population in East Pakistan.¹⁷⁷ Between one and three million civilians were killed, while a million others fled to neighboring India.¹⁷⁸ When Pakistan launched a preemptive air strike against India, India invaded both East and West Pakistan.¹⁷⁹ The war ended ten days later when Pakistan surrendered.¹⁸⁰ Throughout the entire episode, the United Nations remained silent and impotent.¹⁸¹ The Security Council failed to respond to India's attack because the Soviet Union vetoed resolutions calling for a cease-fire.¹⁸²

Similar inaction occurred in the Ugandan-Tanzanian conflict.¹⁸³ From 1971 to 1979, during the reign of Idi Amin, approximately 300,000 people were executed.¹⁸⁴ Some claim that Amin's regime parallels Hitler's Germany and Stalin's Russia.¹⁸⁵ In 1978, Ugandan forces attacked Tanzania.¹⁸⁶ Amin annexed the territory after causing complete destruction of the land.¹⁸⁷ About 40,000 Tanzanians became refugees and between 5,000 and 10,000

175. Brown, *supra* note 165, at 236.

176. Burmester, *supra* note 115, at 286.

177. *Id.*

178. *Id.*

179. *Id.*

180. Although the attack on Pakistan was claimed to be an act of self-defense, a Commission of Inquiry into Events concluded that if India had based its invasion on the doctrine of humanitarian intervention, its actions would have been justified. *Id.*

181. *Id.*

182. *Id.* at 287.

183. *Id.* at 290.

184. *Id.* at 289.

185. Farooq Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 867-81 (1981).

186. *Id.* at 869.

187. *Id.* at 870.

were missing or feared dead.¹⁸⁸ After two months of occupation, Tanzanians, supported by Ugandan insurgents, fought back causing the collapse of the Ugandan army and capturing the Ugandan capital of Kampala.¹⁸⁹ During Amin's rule of Uganda, the United Nations never addressed the matter,¹⁹⁰ nor did the United Nations respond to the Tanzanian invasion of Uganda.¹⁹¹

The events in Pakistan and Uganda clearly illustrated the United Nations' inability to react during the Cold War when egregious human rights violations were being committed.¹⁹² This risk of inaction, in light of the paralysis of permanent members, strengthened the need for legitimizing humanitarian intervention by states to put an end to gross human rights violations even without explicit Security Council authorization.

Following the end of the Cold War, the Security Council experienced a newfound spirit of cooperation.¹⁹³ As East-West tensions dissipated, new humanitarian operations were created in Iraq, Somalia, the former Yugoslavia, Haiti, and Rwanda.¹⁹⁴ Although these operations were sometimes not as successful and efficient as initially envisioned, a precedent for the Security Council's involvement in humanitarian interventions has undeniably been established.¹⁹⁵

Following the Iraqi invasion of Kuwait, the Security Council mandated that member states "use all necessary means . . . to restore international peace and security[.]" effectively drawing forces from several countries to enforce the resolution.¹⁹⁶ This

188. *Id.* at 872.

189. Burmester, *supra* note 115, at 290.

190. See *Uganda: The Human Rights Situation; Assessment of the Current Political, Economic, and Religious Policies; and Recommendations for U.S. Policies Before the Subcomm. on Foreign Econ. Policy of the Comm. on Foreign Relations, 95th Cong., 2d Sess. 113 (1978)* (statement of Hon. Edward Mezvinsky, U.S. Representative to the U.N. Human Rights Commission). Mr. Mezvinsky noted that the Human Rights Commission excluded action toward Uganda; explained that a U.K. resolution that would have addressed situation was defeated; and stated that "[t]he UN is glacier-like, it is slow, it is frustrating." *Id.*; see also Burmester, *supra* note 115, at 290.

191. Burmester, *supra* note 115, at 290.

192. *Id.*

193. *Id.*

194. Nanda, *supra* note 169, at 306.

195. *Id.* Professor Nanda argues that although the Security Council is more active now in addressing humanitarian interventions than during the Cold War, it is still unsuccessful in resolving these conflicts. *Id.* at 334.

196. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., (1991).

was the first time after the Cold War that the Security Council evidenced such a united front.¹⁹⁷

With this newly discovered spirit of cooperation, the Security Council turned its attention to the situation in Somalia.¹⁹⁸ In 1991, due to widespread discontent at Siad Barre's government, a civil war erupted in Somalia, which eventually led to a governmental collapse.¹⁹⁹ The presence of gangs became prevalent throughout the country, and a severe drought caused the deaths of approximately 300,000 people.²⁰⁰ The United Nations' involvement included the enactment of various resolutions that eventually led to the Council's explicit authorization for humanitarian intervention.²⁰¹ Resolution 794 stated that the conflict in Somalia constituted a threat to international peace and security, and recommended action under Chapter VII in order to establish a more secure environment for humanitarian relief operations in Somalia.²⁰²

The Security Council's involvement was also illustrated in the conflict between Serbs and Bosnians in a series of resolutions. Resolution 757, adopted on May 30, 1992, imposed trade sanctions on the FRY for supporting aggression.²⁰³ Resolution 787, adopted in November 1992, called upon states, acting unilaterally or through regional organizations, to enforce the embargoes.²⁰⁴ Resolution 781, adopted a month earlier, called upon states to help the peacekeepers enforce the ban on military flights in

197. Nanda, *supra* note 169, at 333.

198. *Id.*

199. *Id.*

200. Keith B. Richburg, *Aideed: Warlord in a Famished Land*, WASH. POST, Sept. 8 1992, at A1; Robert G. Patman, *The UN Operation in Somalia*, in *A CRISIS OF EXPECTATIONS: UN PEACEKEEPING IN THE 1990s* 85 (Ramesh Thakur & Carlyle A. Thayer eds., 1995).

201. S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. (1992) (stating that the situation in Somalia has become a threat to international peace and security; imposing a complete arms embargo; and calling for increased humanitarian aid); S.C. Res. 746, U.N. SCOR, 47th Sess., 3060th mtg. (1992) (sending a technical team to observe the administration of humanitarian aid and establishing a peace agreement between the warring parties); S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg. (1992) (establishing a security force in Somalia); S.C. Res. 775, U.N. SCOR, 47th Sess., 3110th mtg. (1992) (authorizing an airlift of humanitarian aid).

202. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. (1992).

203. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg. (1992).

204. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. (1992).

Bosnian air space.²⁰⁵ Resolution 816, adopted in March 1993, called on states to take "all necessary measures" to enforce the no fly zone, extending to all aircraft.²⁰⁶ The Security Council adopted several resolutions establishing safe areas and authorized air power in Resolution 836 to assist the peacekeeping force in guarding such safe areas.²⁰⁷ Finally, after the Bosnian Peace Agreement, the Security Council authorized its member states, under Resolution 1031, to establish a multinational implementation force (IFOR) and to take "all necessary measures . . . in defense of IFOR or to assist the force in carrying out its mission."²⁰⁸

Active participation by the Security Council likewise occurred in the Haitian conflict.²⁰⁹ When newly-elected President Jean-Bertrand Aristide was ousted from office in September 1991, widespread human rights abuses began to take place.²¹⁰ Amnesty International reported that over 3,000 Haitians were murdered, raped, arrested, and tortured.²¹¹ The unbearable conditions caused a massive flight of Haitian citizens towards the United States.²¹² The Security Council reacted with Resolution 940, authorizing the use of "all necessary means" by a multinational coalition to restore the Aristide government in Haiti.²¹³

Finally, humanitarian concerns prompted the Security Council intervention in Rwanda for humanitarian reasons.²¹⁴ During the summer of 1994, between 500,000 and 800,000 Rwandans died tragically in a genocidal campaign led by the Hutu dominated Presidential Guard against Tutsis and Hutu opposition members.²¹⁵ Acting under Chapter VII, the Security Council

205. S.C. Res. 781, U.N. SCOR, 47th Sess., 3122d mtg. (1992).

206. S.C. Res. 816, U.N. SCOR, 48th Sess., 3191st mtg. (1993).

207. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg. (1993).

208. S.C. Res. 1031, U.N. SCOR, 50th Sess., 3604th mtg. (1995).

209. *Id.*

210. Nanda, *supra* note 169, at 305-06; see also Margaret Daly Hayes & Gary F. Wheatley, INTERAGENCY AND POLITICAL-MILITARY DIMENSIONS OF PEACE OPERATIONS: HAITI—A CASE STUDY 10 (1996).

211. AMNESTY INTERNATIONAL; HAITI: THE HUMAN RIGHTS TRAGEDY, HUMAN RIGHTS VIOLATIONS SINCE THE COUP 7 (Jan. 1992) (on file with the Loyola of Los Angeles International and Comparative Law Review).

212. *Id.* at 6.

213. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. (1994).

214. S.C. Res. 929, U.N. SCOR, 49th Sess., 3392d mtg. para. 10 (1994).

215. See Tesón, *supra* note 143, at 362-63.

imposed an arms embargo upon Rwanda.²¹⁶ Eventually, Resolution 929 authorized France to use "all necessary means" to achieve humanitarian objectives in Rwanda.²¹⁷

The extent to which the Security Council decided to turn its attention to humanitarian crises throughout the world demonstrates the United Nations' post Cold War focus in addressing humanitarian conflicts. Questions may arise as to the United Nations' effectiveness in dealing with such conflicts. Such considerations, however, should not undermine the basis of the Security Council's primary jurisdiction over humanitarian conflicts, but rather encourage the financing and support of the United Nations to find the most effective solution to be applied to a particular humanitarian crisis.

iv. Strength of the Humanitarian Intervention Doctrine Without Security Council Approval

Although the legitimacy of humanitarian intervention stands on tenuous grounds, its remaining vitality applies to situations where truly egregious violations of human rights occur and the Security Council is absolutely unable or unwilling to act.²¹⁸ This paralysis results from the exercise of veto powers by permanent Security Council members or from the Security Council's financial inability to support an intervention.²¹⁹ It is clear that under such circumstances the tactics employed by intervening states would come under great scrutiny.²²⁰ In analyzing the legitimacy of the intervention, two separate examinations would be necessary. First, the conditions of the humanitarian conflict would need to demonstrate adequate basis for the intervention.²²¹ These conditions must include gross human rights violations, exhaustion of diplomatic efforts, and paralysis of the Security Council.²²² The second determination would be to decide whether the force used

216. *See id.*

217. S.C. Res. 929, *supra* note 214.

218. Cassese, *supra* note 170; *see also* Burmester, *supra* note 115, at 272.

219. *Id.* at 271-72.

220. *Id.* at 272.

221. Cassese, *supra* note 170.

222. S.C. Res. 929, *supra* note 214.

by the intervening forces was proportional to the harm sought to be prevented.²²³

The doctrine of proportionality is an element of the laws of war and is defined within Protocol I of the Geneva Conventions of 1949.²²⁴ Any conclusions as to the legitimacy of force used, whether for humanitarian purposes or otherwise, would therefore require respect for the principles included within the Protocol.²²⁵

A legitimate intervention under this standard must include egregious human rights violations, the exhaustion of peaceful alternatives, and the paralysis of the Security Council in addressing the matter.²²⁶ The force used must be proportional to the limited objective of ending the atrocities and improving the prevalent conditions.²²⁷ Interventions falling outside of this standard would not only establish a risky precedent for subsequent competing allegations of the right to intervention, but would also have the potential to jeopardize the safety of citizens receiving the "beneficial" intervention through an escalation of violence.²²⁸

B. Proportionality

The second pertinent legal issue—the range of force that intervening forces may apply in achieving military objectives—must be judged in light of the doctrine of proportionality.²²⁹ The doctrine of proportionality is an essential component of any armed conflict, particularly in the case of aerial bombardments.²³⁰ Proportionality requires military forces to balance the expected civilian injury and damage with the military advantages of the operation prior to an attack.²³¹ Although essentially embodied within customary law since the Middle Ages,²³² it was not until

223. *Id.*

224. Protocol I, *supra* note 3.

225. *Id.*

226. *Id.*

229. *Id.*

228. *See id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* 308 (1975). This was part of the "Just War" theory. *See also* ROLAND H. BAINTON, *CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 14 (1960); JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE*

1977 that the doctrine was finally incorporated as a treaty in Protocol I of the Geneva Conventions.²³³

1. Foundations of the Doctrine

The Christian theory of the Just War evidenced some of the founding principles of the proportionality doctrine.²³⁴ It was not until the emergence of modern methods of warfare, however, that the doctrine of proportionality gained primary importance in the protection of civilians.²³⁵ The Christian theory of the Just War emphasized the justness of the cause of war rather than proportionality.²³⁶ The justness of the cause largely determined the extent to which resort to war could be limited.²³⁷ Consequently, where one party to a conflict determined that the cause was just, any methods of warfare were permissible to achieve war objectives.²³⁸ It was not until the secular law of the Middle Ages, and some of the works of later canonists, that notions of proportionality and civilian immunity became discernible.²³⁹

Writers, such as Grotius and Vattel, played a key role in the development of the Just War theories of the Middle Ages.²⁴⁰ They formulated purely secular theories including the principle of proportionality.²⁴¹ Their stories involved a belligerent's response to a grievance.²⁴² Grotius recommended that a ruler balance the good and the evil that may result from a just war when making decisions related to war.²⁴³ According to Grotius, resort to force must only occur where the resulting consequences would lead to more good than evil, although a ruler should also consider the

RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY xxiii (1981).

233. See Protocol I, *supra* note 3.

234. Gardam, *supra* note 141, at 394; see also BAINTON, *supra* note 232, at 15.

238. Gardam, *supra* note 141, at 394.

236. *Id.* at 395.

237. *Id.*

238. *Id.*

239. *Id.*

242. *Id.* at 394-95.

241. *Id.* at 396.

242. *Id.* at 395. Specifically, Grotius "developed the theory of the equal application of the *ius ad bellum* irrespective of the justice of a party's resort to force." *Id.* at 396.

243. See HUGO GROTIUS, *DE JURE BELLII AC PACIS LIBRI TRES*, bk. II, ch. XXIV, pts. V-VI (Francis W. Kelsey trans., Oceana Publications, Inc. 1964) (1646).

effectiveness of the means to achieve the good.²⁴⁴ Grotius is credited with having developed a theory advocating the balancing of military goals and the cost in terms of lives.²⁴⁵

While the nineteenth century brought the development of nation states, it also brought the dissolution of the Just War theory and the emergence of war as a mechanism for implementing national policy.²⁴⁶ This period also saw the development of a principle balancing between military goals and the humanitarian cost as a completely separate body of rules from the justness of war or a belligerent's response to a grievance.²⁴⁷ It is from the development of the nation state to the adoption of the Geneva Conventions of 1949 that the modern law of armed conflict developed.²⁴⁸ The notion that a belligerent does not have the unlimited choice of means to inflict damage on the enemy began to emerge and became the foundation of the modern doctrine of proportionality.²⁴⁹ This notion is related to another principle of the law of armed conflict, which states "[t]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."²⁵⁰ This principle was first found in the St. Petersburg Declaration of 1868 and supports the notion that weapons causing unnecessary suffering are prohibited.²⁵¹

As methods of warfare reached higher levels of sophistication, concerns about the safety and protection of citizens emerged, and proportionality became a focal point of the laws of armed conflict.²⁵² The notion that a belligerent's right to use force is limited had the effect of continuing the prohibition on the use of

244. *Id.*

245. Gardam, *supra* note 141, at 396; see also G.I.A.D. Draper, *The Development of International Humanitarian Law*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 67 (1988); Geoffrey Best, *The Place Of Grotius in the Development of International Humanitarian Law*, in *GROTIUS ET L'ORDRE JURIDIQUE INTERNATIONAL* 101, 105 (1985).

246. See Gardam, *supra* note 141, at 396.

247. See *id.*; Draper, *supra* note 245, at 67.

248. See Draper, *supra* note 245, at 67.

249. See Gardam, *supra* note 141, at 397.

250. *Id.*

251. See Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 [hereinafter *St. Petersburg Declaration*].

252. See Gardam, *supra* note 141, at 397.

specific means of warfare.²⁵³ It further restricted the use of non-prohibited means of warfare to the extent that the means were deemed proportional to the achievement of a military objective.²⁵⁴ As the beginning of the twentieth century witnessed the emergence of aerial bombardment, the protection of non-combatants became of considerable importance.²⁵⁵ Even though the Hague Convention advocated the prohibition on bombing undefended places and imposed the duty to warn inhabitants of places of imminent bombardment, the issue of civilian protection remained unaddressed.²⁵⁶ Although the First World War caused agitation in the international community regarding the issue of civilian protection, the Second World War made it imperative for the issue to be addressed.²⁵⁷ Finally, in 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts completed the drafting of two additional Protocols to the Geneva Conventions.²⁵⁸ Protocol I, addressing the protection of civilians in international conflicts, and Protocol II, addressing the protection of civilians in non-international conflicts, were adopted by consensus by the international community.²⁵⁹

Several principles predate the development of the doctrine of proportionality and pervade any analysis of proportionality. Proportionality is the concept of balancing the need to achieve military objectives and protecting human rights principles.²⁶⁰ An analysis of proportionality therefore begins with the recognition of particular principles as a basis for weighing the extent and means of the attack. The most important concepts that underlie the law

253. See *id.*

254. See *id.* at 399.

255. See *id.*

256. See The Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

257. See Gardam, *supra* note 141, at 401; CHARLES G. FENWICK, *INTERNATIONAL LAW* 550-51 (4th ed. 1965); see also Lester Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 AM. J. INT'L L. 680 (1945).

258. Protocol I, *supra* note 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, reprinted in 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

259. See *id.*

260. See Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 94 (1982).

of armed conflicts are military necessity, humanity, and chivalry.²⁶¹ Military necessity is the concept of a belligerent's right to use any means of force in order to achieve the purpose of the conflict.²⁶² According to military necessity, a belligerent is permitted to use any kind of force in order to achieve military objectives in the least amount of time possible and with the least amount of resources and lives lost.²⁶³ Humanity provides for the prohibition of destruction and suffering not actually necessary for the attainment of military objectives.²⁶⁴ Finally, the concept of chivalry, although retaining limited vitality in modern laws of war, advocates the recognition of formalities and courtesies in war.²⁶⁵ This concept is illustrated in the prohibition against the misuse of enemy uniforms or flags of truce.²⁶⁶

In examining these principles, the doctrine of proportionality includes them in performing a balancing function between the competing needs advocated.²⁶⁷ In short, force may not cause injury to noncombatants or cause damage to civilian objects if the force used is disproportionate to the military advantage of the operation.²⁶⁸ This notion is the basis for Protocol I of the Geneva Conventions.

2. International Treaties and Rules Prior to the Adoption of Protocol I

Although Protocol I was the first international treaty embodying the doctrine of proportionality, other documents predating Protocol I address some of the underlying principles of the doctrine.²⁶⁹

Proportionality was implicitly recognized in Article 15 of the Lieber Instructions, a document that is most likely one of the first attempts at codifying the rules of war.²⁷⁰ The doctrine asserts that

261. See *id.* at 93.

262. See *id.*

263. See *id.*

264. See *id.*

265. See *id.* at 94.

266. See *id.*

267. See *id.*

268. See *id.*

269. See *id.* at 95.

270. The Lieber Instructions were rules for the Union Forces during the American Civil War in 1863. See *id.*; THE LAWS OF ARMED CONFLICT 6 (Dietrich Schindler & Jiri Toman eds., 2d ed. 1981).

military necessity permits human suffering and death of the enemy, but permits such a fate for other persons only if it is incidentally unavoidable.²⁷¹ Another document that includes provisions to minimize civilian harm is the St. Petersburg Declaration of 1868, which states “that the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy.”²⁷²

Following the First World War, a commission of jurists at the Hague drafted a set of Rules of Air Warfare.²⁷³ Although the rules were never formally adopted by the international community, they illustrate the jurists’ response to the experience of aerial bombardments.²⁷⁴ These rules state that “[t]he bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited.”²⁷⁵ The rules also ban indiscriminate bombings by stating that if the objectives are military objectives, and “they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.”²⁷⁶ In addition, the rules include an element of proportionality by stating that

[i]n the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.²⁷⁷

Although they addressed civilian protection, the Rules of Air Warfare were never formally adopted and consequently there is scarcely any explicit mention of the concept of proportionality prior to the advent of WWII.²⁷⁸

It is clear from the events of WWII that very little attention to proportionality was given in light of the military tactics. The

271. Fenrick, *supra* note 260, at 95.

272. St. Petersburg Declaration, *supra* note 251.

273. See THE LAWS OF ARMED CONFLICT, *supra* note 270, at 150.

274. Fenrick, *supra* note 260, at 95.

275. THE LAWS OF ARMED CONFLICT, *supra* note 270, at 150.

276. *Id.*

277. *Id.*

278. See Fenrick, *supra* note 260, at 96.

sheer scope of civilian damage and numbers of injuries were so extensive, however, that the international community began to pay heed to the establishment of laws of war addressing civilian protection.²⁷⁹ In 1956, the International Conference of the Red Cross adopted a set of Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.²⁸⁰ These rules required military forces to assess whether an attack would be disproportionate to the military advantage anticipated, and imposed the requirement that no excessive damage result to the surrounding areas of the point of attack.²⁸¹ Although the rules were largely ignored by the international community, they formed the basis of Protocol I.²⁸²

International treaties or rules squarely addressing proportionality were not widely recognized by the international community.²⁸³ Although proportionality was not explicitly included in these treaties or any other international agreements prior to the enactment of Protocol I, the doctrine of proportionality has always been regarded as an essential element of customary law that seeks to strike a balance between military objectives and protection of human rights.²⁸⁴

3. Protocol I

Civilian protection under Protocol I²⁸⁵ of the Geneva Conventions is addressed under Part IV of the Protocol, which in

279. See *id.* at 97.

280. See *id.*

281. See *id.*

282. See THE LAWS OF ARMED CONFLICT, *supra* note 270, at 187-93.

283. See *id.*

284. See Fenrick, *supra* note 260, at 93.

285. The states that have ratifications, accessions and successions to Protocol I are as follows:

(1) Ratifications: Australia; Austria; Belarus; Belgium; Bulgaria; Burkina Faso; Canada; Chile; Cote d'Ivoire; Cyprus; Denmark; Ecuador; Egypt; El Salvador; Finland; Germany; Ghana; Greece; Guatemala; Holy See; Honduras; Hungary; Iceland; Ireland; Italy; Jordan; Republic of Korea; Lao People's Dem. Rep.; Liechtenstein; Luxembourg; Madagascar; Mongolia; Netherlands; New Zealand; Nicaragua; Niger; Norway; Panama; Peru; Poland; Portugal; Romania; Russian Federation; San Mario; Senegal; Spain; Sweden; Switzerland; Togo; Tunisia; Ukraine; United Kingdom; Vietnam; Yemen; Yugoslavia; (2) Accessions: Albania; Algeria; Angola; Antigua and Barbuda; Argentina; Armenia; Bahamas; Bahrain; Bangladesh; Barbados; Belize; Benin; Bolivia; Botswana; Brazil; Brunei Darussalam; Burundi; Cambodia; Cameroon; Cape Verde; Central African Republic; Chad; China; Columbia; Comoros; Congo; Democratic Republic of Congo; Costa Rica; Cuba; Djibouti; Dominica; Dominican Republic; Equatorial Guinea; Estonia; Ethiopia; Gabon; Gambia;

turn is divided into separate Chapters individually addressing various aspects of civilian protection.²⁸⁶ Of particular importance are: Chapter I, stating the basic rule of civilian protection and defining various terms used throughout the text; Chapter II, setting out the basic parameters of protection of the civilian population; Chapter III, providing for the protection of civilian objects; and Chapter IV, determining the precautionary measures that parties are obligated to undertake in order to spare the civilian population from attack.²⁸⁷

Some of the primary principles and definitions underlying Protocol I are stated within Chapter I.²⁸⁸ A basic notion of the laws of armed conflict, which had already been implicitly enunciated in the St. Petersburg Declaration, is included in Article 48.²⁸⁹ It states that “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”²⁹⁰ Article 49 provides that the Protocol applies “to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land” and that “[a]ttacks means acts of violence against the adversary, whether in offence or defence.”²⁹¹ Consequently, the protection of civilians under the Protocol applies equally to a

Georgia; Grenada; Guinea; Guinea-Bissau; Guyana; Jamaica; Kenya; Dem. People's Rep. Of Korea; Kuwait; Latvia; Lebanon; Lesotho; Liberia; Libyan Arab Jamahiriya; Malawi; Maldives; Mali; Malta; Mauritania; Mauritius; Mexico; Micronesia; Republic of Moldova; Mozambique; Namibia; Nigeria; Oman; Palau; Paraguay; Qatar; Rwanda; Saint Kitts and Nevis; Saint Lucia; Saint Vincent Grenadines; Samoa; Sao Tome and Principe; Saudi Arabia; Seychelles; Sierra Leone; Solomon Islands; South Africa; Suriname; Swaziland; Syrian Arab Republic; Tanzania; Uganda; United Arab Emirates; Uruguay; Uzbekistan; Vanuatu; Venezuela; Zambia; Zimbabwe; (3) Successions: Bosnia-Herzegovina; Croatia; Czech Republic; Kazakhstan; Kyrgyzstan; Macedonia; Slovakia; Slovenia; Tajikistan; Turkmenistan.

286. See Protocol I, *supra* note 3, pt. IV.

287. See *id.* chs. II–IV.

288. See *id.* arts. 1–2.

289. See *id.* art. 48.

290. *Id.*

291. *Id.* art. 49.

military force acting in defense of an attack or acting strategically to weaken the military forces of its opponent.²⁹²

Chapter II determines the extent of the civilian population's protection and delineates the permissible scope of military attacks.²⁹³ According to Article 50, the presence of military personnel within the civilian population does not deprive the civilian population protection as civilians.²⁹⁴ The fundamental principle of civilian protection is set out in Article 51, which states that "[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations" and "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."²⁹⁵ Article 51 also defines the limits of permissible military attacks by stating that "[i]ndiscriminate attacks are prohibited."²⁹⁶ Indiscriminate attacks are:

(a) [t]hose which are not directed at a specific military objective; (b) [t]hose which employ a method or means of combat which cannot be directed at a specific military objective;" or (c) [t]hose which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.²⁹⁷

In other words, if an attack is unlikely to be limited to military objectives and the means of the attack are likely to lead to the targeting of civilians and non-civilians alike, whether voluntarily or involuntarily, then the attack is considered impermissible.²⁹⁸

In addition, Article 51 provides two examples of attacks that are considered indiscriminate:

(a) [a]n attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) [a]n attack which may be

292. *See id.*

293. *See id.* ch. II.

294. *See id.* art. 50.

295. *Id.* art. 51.

296. *Id.*

297. *Id.*

298. *Id.*

expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²⁹⁹

The second example illustrates the doctrine of proportionality.³⁰⁰ These examples provide illustrations of indiscriminate attacks and require military forces to assess whether an attack would cause excessive damage to civilian lives and/or objects in comparison to the objectives sought by the military. This weighing procedure may not be satisfied by the mere subjective assessment of the military, but rather by an objective standard in light of the overall goal of the military’s involvement in the conflict.³⁰¹ Chapter II therefore limits military necessity by the requirement of an objective assessment of proportionality.³⁰²

Chapter III addresses the protection of civilian objects and may be crucial in protecting civilians in the post-conflict period.³⁰³ Article 52 opens the chapter by stating general rules regarding the protection of civilian objects: “[c]ivilian objects shall not be the object of attack or of reprisals.”³⁰⁴ Article 52 further emphasizes the importance of identifying military objectives by stating:

[a]ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.³⁰⁵

In other words, Article 52 imposes three requirements: (1) the objectives must be military; (2) such objects must make an effective contribution to the opposing party; (3) and the attack must provide a definite military advantage in light of the circumstances as they seemed at the time of the attack.³⁰⁶ In

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* arts. 50–51.

303. *Id.* arts. 52–56.

304. *Id.* art. 52.

305. *Id.* art. 52.

306. *Id.*

addition, this definite advantage may not be viewed in isolation of the total goal of the military intervention.

The third paragraph of Article 52 provides an important protection for civilian objects that may possess dual purposes. "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."³⁰⁷ This paragraph imposes a subjective standard on attacking forces and prohibits any attacks on civilian objects where the military is not certain that the object is being used for an "effective contribution" to the opponent's military action.³⁰⁸ Even if the military does determine that the object provides an "effective contribution" to the opponent's military action, the military is still prohibited from attacking unless it finds that its "destruction, capture or neutralization" will offer "a definite military advantage."³⁰⁹

Article 54 addresses important considerations regarding objects that are indispensable to the survival of the civilian population.³¹⁰ The second paragraph states:

[i]t is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population . . . for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.³¹¹

Examples are given of indispensable objects such as "foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works . . ."³¹² In other words, even if such military objectives are used as sustenance for the adverse party, they may not be attacked to deny the adverse party sustenance if such objects also serve as sustenance to the civilian population.³¹³ In addition, the attack is still prohibited even if the military did not have any motives of

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* art. 54.

311. *Id.*

312. *Id.*

313. *Id.*

starving out the civilians or causing them to move away.³¹⁴ There is an exception to this prohibition where the objects are used “as sustenance solely for the members” of the opponent’s armed forces or if the objects are not used as sustenance but “in direct support of military actions.”³¹⁵ Under no circumstances, however, may such objects come under attack if it “may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.”³¹⁶ The attacking party would therefore bear the burden of showing that the objects were being used solely for the use of the adverse party.³¹⁷ Alternatively, if the objects were not used for sustenance by the adverse party, the attacking party would have to show that they were used in direct support of the military action.³¹⁸ The attack would, however, remain prohibited if it would result in inadequate food and water supply to the civilian population.³¹⁹

The importance of preserving the natural environment is embodied in Article 55, which states:

[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the nature environment and thereby to prejudice the health or survival of the population.³²⁰

Article 55 discourages the military’s selection of chemical plants containing poisonous elements as targets, and could diminish the use of warfare tactics that pose threats to the civilian population via chemicals.³²¹

Finally, Article 57 delineates a procedure through which those responsible for the attack are to assess the legitimacy of the attack.³²² It is incumbent upon such individuals to “[d]o everything feasible to verify that the objectives to be attacked are

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* art. 55.

321. *Id.*

322. *Id.* art. 57.

neither civilians nor civilian objects . . . ;"³²³ to "[t]ake all feasible precautions in the choice of means and methods of attack . . . ;"³²⁴ to minimize "injury to civilians and damage to civilian objects,"³²⁵ and to "[r]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete military advantage anticipated."³²⁶ Any attacks are subject to cancellation or suspension if these requirements are not satisfied.³²⁷ In addition, if a choice exists between several military objectives, the objective to be selected is the one with the least amount of potential danger to civilian lives and objects.³²⁸ Article 57 basically summarizes the principal points of Protocol I and reiterates the doctrine of proportionality as previously mentioned in Article 51 by placing the responsibility of proportionality upon those planning or deciding the strategy for the attack.³²⁹

4. Proportionality and State Practice

A brief and chronological overview of state practice during the past decade illustrates the scope of force employed by military troops for purposes of humanitarian interventions or Chapter VII enforcement actions. Although considerable military strength was utilized during the Gulf War, subsequent interventions evidence a significant reluctance to resort to force.³³⁰ An assessment of the doctrine of proportionality, therefore, leads to an examination of the extent of reluctance or eagerness exhibited by states for the commitment and use of armed forces.

Iraq's invasion of Kuwait drew an impressive response from the international community.³³¹ In riposte to the Iraqi production of force, the United Nations adopted Resolution 678, mandating that member states "use all necessary means . . . to restore international peace and security in the area."³³² The resolution

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. See Burmester, *supra* note 115, at 269.

331. See Nanda, *supra* note 169, at 330-31.

332. S.C. Res. 678, *supra* note 196.

led to a cooperative marshaling of forces by member states in order to conduct extensive air strikes upon the territories of Iraq and Kuwait.³³³ The choice in targets was mainly dictated by two considerations: diminishing the strength of Saddam Hussein's military and demoralizing the Iraqi troops.³³⁴ Throughout the conflict, air strikes were directed mainly at military equipment such as ground weapons, aircraft, helicopters, ground forces, tanks, and artillery sites.³³⁵ Other targets included four of Baghdad's twelve bridges, several gasoline stations and two ministries.³³⁶ Some of the air raids resulted in extensive damage to Baghdad's sewer systems, causing potential health hazards.³³⁷ Iraqi officials reported numerous civilian deaths and extensive damage to various mosques.³³⁸

Although the air strikes struck mostly military targets, the targets included a giant bunker containing hundreds of civilians who were killed as a result of the attack.³³⁹ Other civilian targets included a manufacturing plant that Western visitors have claimed only fabricated infant formulas.³⁴⁰ According to news reports, out of the ninety-seven direct hits conducted in the region, twenty-eight were in civilian areas.³⁴¹ The force used resulted in extensive damage to Iraq's military forces³⁴² and eventually led to the withdrawal of Iraqi troops from Kuwait.³⁴³

333. Nanda, *supra* note 169, at 333.

334. R. W. Apple, Jr., *Elite Iraqi Forces Hurt by Bombings, Allied Aides Insist*, N.Y. TIMES, Feb. 7, 1991, at A1; Michael R. Gordon, *U.S. Officials Link Iraqi Offer to Rising Losses in the Field*, N.Y. TIMES, Feb. 16, 1991, at A1.

335. Apple, *supra* note 334, at A17.

336. *Two Government Ministries Hit in Raids on Baghdad*, N.Y. TIMES, Feb. 13, 1991, at A14; *Iraqi Lifts Estimate of Civilian Loss to Thousands*, N.Y. TIMES, Feb. 12, 1991, at A13.

337. *Two Government Ministries Hit in Raids on Baghdad*, *supra* note 336, at A14.

338. *Iraqi Lifts Estimate of Civilian Loss to Thousands*, *supra* note 336, at A13.

339. *Damage Control—and Real Damage*, N.Y. TIMES, Feb. 14, 1991, at A26.

340. *Id.*

341. *Two Government Ministries Hit in Raids on Baghdad*, *supra* note 336, at A13.

342. *Id.* Although the aims of the operations may have been accomplished, some commentators question the validity of the attacks under Protocol I while others discuss the illegitimacy of the attacks under international environmental standards. Gardam, *supra* note 141, at 391–92. It is clear that the conflict resulted in a disturbing precedent for civilian protection, the strength of which can only be ascertained in light of subsequent military interventions. *Id.*

343. Gardam, *supra* note 141, at 391–92.

The end of the Gulf War brought the Somali conflict to the forefront of international focus.³⁴⁴ The overthrow of Siad Barre's brutal and repressive government³⁴⁵ left the country in a bitter civil war between various rebel groups, most of them under General Mohammed Farah Aideed.³⁴⁶ As more than 1,500 people were found slain in Mogadishu,³⁴⁷ the country began to descend into anarchy while starvation and disease began to raise the death toll in some cities to an average of 300 per day.³⁴⁸ The United Nations exhibited grave concern for the deteriorating situation through the adoption of a general and complete arms embargo and the establishment of peacekeeping operations.³⁴⁹ Because the violence did not abate, the United Nations, acting under its Chapter VII powers, authorized use of "all necessary means to establish as soon as possible a secure environment for humanitarian relief."³⁵⁰

The United States intervened by sending 2,000 marines for the purpose of protecting food and medical supply deliveries.³⁵¹ Acting beyond their respective duties, the marines attempted to arrange negotiations between the warring groups and began disarming the clans.³⁵² The situation gradually deteriorated and rebel troops began to fight against the intervening forces by ambushing U.N. peacekeeping units, killing Pakistani peacekeepers, and wounding U.S. soldiers.³⁵³ In response to the increase in violence, the United Nations seized the rebel leader's headquarters and conducted air strikes against the leader's arms

344. This is evidenced by attention received by the press and the United Nations' adoption of a general and complete arms embargo and the establishment of peacekeeping operations pursuant to S.C. Res. 733, *supra* note 201, and S.C. Res. 775, U.N. SCOR, 47th Sess., 3110th mtg. (1992).

345. Neil Henry, *Evacuees Tell of Somalia's Chaos, Carnage*, WASH. POST, Jan 7, 1991, at A17, A20.

346. Burmester, *supra* note 115, at 314.

347. Henry, *supra* note 345, at A17.

348. Keith B. Richburg, *Diseases Sweep Somalis, Kill More Than Famine*, WASH. POST, Oct. 2, 1992, at A1, A46.

349. S.C. Res. 733, *supra* note 201; S.C. Res. 775, *supra* note 344.

350. S.C. Res. 794, *supra* note 202.

351. Burmester, *supra* note 115, at 315.

352. *Id.* at 316.

353. Keith B. Richburg, *U.N. Troops Battle Somalis; Dozens Killed in Fierce Fighting; Aideed's Arrest Ordered*, WASH. POST, June 18, 1993, at A1; Keith B. Richburg, *Aid Staffs Pull Out of Mogadishu*, WASH. POST, June 7, 1993, at A1.

depos and radio stations for three days.³⁵⁴ When the air strikes failed to abate the fighting and snipers began directing their attacks upon U.N. troops, the U.N. troops fought back with the help of machine guns from U.S. Cobra helicopters.³⁵⁵ The United States gradually began to question the utility of U.S. troops in the region and eventually announced that it would leave Somalia within a period of six months.³⁵⁶ By January 1995, all troops had left, including U.N. peacekeepers.³⁵⁷

Another conflict that brought extensive international involvement was the conflict between Bosnians and Serbs in the former republic of Yugoslavia. Air strikes conducted by NATO were a direct result of a U.N. mandate for the protection of safe areas.³⁵⁸ Having already provided for the establishment of peacekeeping operations under the U.N. Protection Force (UNPROFOR),³⁵⁹ the Security Council adopted additional resolutions creating U.N. safe areas "free from armed attacks and from other hostile act[s]."³⁶⁰ The resolution empowered UNPROFOR to protect the safe areas and to remove Serbian military forces using force.³⁶¹ In addition, the Security Council authorized air strikes to assist UNPROFOR and to protect the safe areas.³⁶² The resulting air strikes by NATO were a close collaboration between NATO and the United Nations.³⁶³ Aircrafts took military action against Serbian fighter-bombers, artillery command posts, Serbian military vehicles, ground troops, missile sites, and tanks.³⁶⁴ The meticulousness of the choice in

354. *Id.*

355. *Id.*

356. Burmester, *supra* note 115, at 317.

357. *Id.*

358. Roger Cohen, *NATO Shatters Old Limits in the Name of Preventing Evil*, N.Y. TIMES, Oct. 18, 1998, at 3.

359. S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg. (1992).

360. S.C. Res. 824, U.N. SCOR, 48th Sess., 3208th mtg. (1993).

361. *Id.*

362. S.C. Res. 836, *supra* note 207.

363. The United Nations' input on the air strikes was so strong that Bob Dole, in the ABC News program, *This Week*, stated: "[T]he UN ought to get off of NATO's back, and let NATO take care of the Serbian aggression in Bosnia." Michael R. Gordon, *NATO Set to Bomb Serbs in Croatia*, N.Y. TIMES, Nov. 21, 1994, at A1.

364. *Id.*; Roger Cohen, *NATO, Expanding Bosnia Role, Strikes a Serbian Base in Croatia*, N.Y. TIMES, Nov. 22, 1994, at A1 [hereinafter Cohen, *NATO Expanding Bosnia Role*]; Roger Cohen, *NATO Jets Hit Missiles as Serbs Gain in Bosnia*, N.Y. TIMES, Nov.

targets was exemplified in an attack upon a Serbian controlled air base.³⁶⁵ The target was important because air raids had been conducted from this air base against safe areas.³⁶⁶ Although NATO and the United Nations had chosen to conduct air strikes against the air base, the strikes only destroyed the runway, leaving the planes intact.³⁶⁷ In August 1995, NATO began an intensified bombardment of Serb targets by focusing on areas around Sarajevo, a region crippled with extensive fighting.³⁶⁸ In addition, the warplanes targeted air defense radar and communication sites, ammunition depots, and command posts throughout Bosnia.³⁶⁹ Ground fighting included British, French, and Dutch artillery near Sarajevo.³⁷⁰ As NATO strikes intensified, firepower shifted to air defense networks in northwest Bosnia while attacks were waged on bridges, ammunition dumps, and command posts in the southeast.³⁷¹

A final instance of a conflict entailing the use of force for humanitarian purposes is the conflict in Rwanda between the Hutus and the Tutsis.³⁷² The genocidal campaign led by the Presidential Guard of the Hutu-led government against Tutsis and Hutu opposition members resulted in the death of approximately 500,000 to 800,000 people and eventually led to the Security Council's authorization for France to use "all necessary means" to achieve humanitarian objectives in Rwanda.³⁷³ Operation Turquoise, as France named it, was meant to be a humanitarian intervention to save lives.³⁷⁴ Although the Security Council authorized the use of force, the French troops used none, concentrating only on saving the lives of refugees and maintaining the peaceful nature of the operation until their departure.³⁷⁵

24, 1994, at A1; Eric Schmitt, *NATO Shifts Focus of Its Air Attacks on Bosnian Serbs*, N.Y. TIMES, Sept. 11, 1995, at A1.

365. *Id.*

366. *Id.*

367. Cohen, *NATO Expanding Bosnia Role*, *supra* note 364, at A1.

368. Roger Cohen, *NATO Presses Bosnia Bombing, Vowing to Make Sarajevo Safe*, N.Y. TIMES, Aug., 31, 1995, at A1.

369. *Id.*

370. *Id.*

371. Schmitt, *supra* note 364, at A1.

372. *Id.*

373. Cohen, *supra* note 368, at A1.

374. Charles Bremner, *France Prepares Pullout After Hailing Rebel Victory*, TIMES (London), July 20, 1994, at 10.

375. *Id.*; Sam Kiley, *Paris Tells Troops To Woo Rebels In Rwanda*, TIMES (London),

5. Strength of Proportionality

To determine state practice with regard to proportionality, an examination must be made of the extent of force used throughout these military interventions. Attention must be given to the selection of military targets, the amount of force exerted, and the extent of civilian damage and injury resulting from the conflict. Although the doctrine of proportionality addresses civilian protection, the use of force inevitably entails damage or injury to the civilian population.³⁷⁶ It is therefore important to recognize that civilian harm will not necessarily lead to the conclusion that the doctrine of proportionality is violated.³⁷⁷ Rather, it is disproportionate civilian harm in comparison to military advantages that results in violation of the doctrine of proportionality.³⁷⁸

The Persian Gulf conflict air strikes may have established a balancing standard, with an emphasis on the attainment of military objectives, at the cost of civilian harm. The authorization for the use of force was a Security Council resolution representing a Chapter VII enforcement action.³⁷⁹ Although unintended, considerable civilian harm resulted from Operation Desert Storm, which left the legitimacy of the attack under Protocol I highly questionable.³⁸⁰

This precedent must, however, be interpreted in light of subsequent conflicts. The Somali conflict involved exigent circumstances calling for immediate international reaction.³⁸¹ The authorization for use of force similarly emanated from a Security Council resolution to restore sufficiently peaceful conditions for the establishment of humanitarian relief operations.³⁸² Despite the requirement for intervention, the force used by U.N. peacekeepers and the United States was only apparent when the intervening forces fell under attack.³⁸³ Although such forces were

June 25, 1994, at 12.

376. Gardam, *supra* note 141, at 398.

377. *Id.* at 400.

378. *Id.* at 404-05.

379. S.C. Res. 678, *supra* note 196.

380. Gardam, *supra* note 141, at 405.

381. S.C. Res. 794, *supra* note 202.

382. *Id.*

383. See Tesón, *supra* note 143, at 350.

certainly meant to establish humanitarian conditions, they were first and foremost a reaction to direct attacks. The Somali conflict therefore illustrated the international community's reluctance to resort to force even where explicitly permitted by Security Council mandate under Chapter VII.³⁸⁴

While the attacks on Yugoslavia were of an even greater scope than in Somalia, the international community was also reluctant to use force. Authorization for the use of force came from direct Security Council approval for the enforcement of resolutions establishing safe areas.³⁸⁵ A tight relationship between the United Nations and NATO led to careful selection of targets and resulted in frequent U.N. denial for directing air strikes on particular targets.³⁸⁶ Although the air strikes resulted in some civilian harm and injury, the firepower was limited to strictly military targets within the Bosnian region where most of the conflict was contained.³⁸⁷ The Yugoslavian conflict, therefore, illustrates an additional instance where the international community and the United Nations cooperation resulted in carefully selected bombardments in order to prevent excessive violence.

The Rwandan conflict further illustrates the international community's misgivings about the commitment of force. The genocidal campaign and extreme violence certainly called for international attention.³⁸⁸ It would be difficult to say that the Iraqi conflict exhibited more exigent circumstances than the horrific fighting that was occurring in Rwanda.³⁸⁹ The international community, however, did not respond with air strikes.³⁹⁰ Alarmed at the fighting, the Security Council authorized the use of force to restore humanitarian conditions.³⁹¹ The resulting intervention was the French "Operation Turquoise" which remained entirely pacific and humanitarian.³⁹²

384. S.C. Res. 929, *supra* note 214, para. 10.

385. *Id.*

386. Gordon, *supra* note 363, at A1.

387. See Schmitt, *supra* note 364, at A1.

388. Kiley, *supra* note 375, at 12.

389. For additional information on the fighting in Rwanda, see Tesón, *supra* note 143, at 362-63.

390. See S.C. Res. 929, *supra* note 214.

391. *Id.*

392. Kiley, *supra* note 375, at 12.

Although the Gulf War evidenced considerable use of force, subsequent interventions, with full authorization for the use of force, indicate a preference for a restrained and selective application of firepower.³⁹³ Thus, state practice appears to value the doctrine of proportionality by demonstrating a willingness to use force to the extent of ameliorating the prevalent situation while minimizing collateral damage and protecting the civilian population from further harm.

IV. THE KOSOVO CRISIS

The legitimacy of Operation Allied Force must be examined under two distinct perspectives: whether NATO legitimately could intervene in the FRY and whether such intervention was undertaken by a legitimate use of force. Although these two issues are inherently connected by the notion of proportionality,³⁹⁴ two separate analyses will be undertaken, as each issue raises independent violations of international law.

A. *The Lawfulness of NATO's Humanitarian Intervention*

In light of the Security Council's lack of authorization for the use of force and NATO's subsequent humanitarian intervention in Kosovo, an examination of the intervention's legality is warranted. Operation Allied Force must consequently be judged according to a legal standard legitimizing humanitarian interventions lacking Security Council support. As previously discussed, such a criterion would include an examination of several considerations, namely: (1) the magnitude of human rights violations (reaching genocidal proportions or the death of thousands); (2) the exhaustion of diplomatic remedies; (3) a paralysis of the Security Council; and (4) a conformity to rules of proportionality by the intervening forces.

393. See *supra* text accompanying notes 376–91.

394. Humanitarian interventions lacking Security Council authorization are legitimate where: (1) egregious human rights violations are occurred on a large scale; (2) there is a paralysis of the Security Council; (3) diplomatic avenues have been exhausted; and (4) the intervention abides by the notion of proportionality. A finding of these four factors will legitimize such an intervention; where the fourth factor is violated, however, it will result in illegitimate humanitarian intervention and constitute a violation of Protocol I to the Geneva Conventions. Protocol I, *supra* note 3.

1. Serbian Atrocities

NATO's humanitarian intervention in Serbia was based on the need to prevent the progression of Serb tactics implementing genocidal policies.³⁹⁵ Consequently, the prevalent warring climate prior to NATO's intervention must be examined because it formed the basis for NATO's humanitarian intervention. It is therefore necessary to focus on the human rights violations that occurred prior to March 24, 1999, in order to fully determine whether the situation had degenerated to such an extent as to exhibit qualities of mass human rights violations. While this examination leads to the conclusion that an alarming number of human rights violations were in fact committed, the methods and tactics utilized by the Serb military and paramilitary forces failed to exhibit an implementation of "ethnic cleansing" or "genocidal" policies.³⁹⁶ Nevertheless, the fact that genocidal policies were not implemented does not negate the considerable brutality apparent in both warring parties' assaults and that the conflict's severity was sufficient to warrant appropriate action by the international community.³⁹⁷

As previously discussed, the conflict between Serbs and ethnic Albanians originally arose from widespread discontent as to the political and economic status of Kosovar Albanians in the Yugoslav society.³⁹⁸ While Kosovar Albanians had shown considerable anti-governmental reactions through the enactment of a parallel government and the election of an independent president (both deemed illegal by the Yugoslav government),³⁹⁹ the KLA emerged from prevalent frustrations regarding the inefficiency of non-violent means.⁴⁰⁰ While the KLA may appear

395. See Human Rights Watch, *Federal Republic of Yugoslavia: Human Rights Developments*, <http://www.hrw.org/hrw/wr2k/Eca-26.htm> (last visited Nov. 13, 2000).

396. The conflict emerged as a Civil War between guerrilla factions and Yugoslav authorities rather than a coordinated plan for the eradication and expulsion of the Kosovar Albanian population as a whole. See Michel Chossudovsky, *NATO's War of Aggression Against Yugoslavia: An Overview*, at <http://www.jacksonprogressive.com/issues/kosovo/chossudovskynato.html> (last visited Nov. 9, 2000).

397. See *id.*

398. The original conflict between ethnic Albanians and Serbs arose due to their discontent as Kosovars within Serbia; the Kosovo Civil War, however, emerged due to the clash between Serb forces and the KLA. See *id.*

399. MERTUS, *supra* note 20, at 297-301.

400. Non-violent means were advocated by Rugova and supporters who established the

to symbolize the political views of ethnic Albanians in Kosovo, this fails to take into account the large number of ethnic Albanians who prefer non-violent methods as a means to social change within Kosovo.⁴⁰¹ The conflict consequently ignited because of the differences between the ideologies of a radical guerrilla group, advocating principles often not recognized by ethnic Albanians, and the Serb authorities' intent on eliminating an organization it considered to be of a terrorist nature.⁴⁰²

The events that induced the onset of air strikes largely occurred between 1998 and 1999.⁴⁰³ The early months of 1998 brought increased attention from the international community as the intensity in fighting between the KLA and the Serb military appeared to escalate.⁴⁰⁴ The Serb military offensive in early 1998 was a direct result of regular and sustained assaults by KLA guerrilla forces on authorities.⁴⁰⁵ Although the KLA carried out its first attack in 1993, it was not until the middle of 1997 that the assaults increased in regularity and effectiveness.⁴⁰⁶ In the few months preceding March 1998, the rebel forces took over more than a dozen police stations, and appropriated an abundant array of automatic weapons.⁴⁰⁷ They had also attacked numerous police patrols and checkpoints and claimed responsibility for "the assassinations of more than [fifty] Serbian policemen and officials, as well as of ethnic Albanians suspected of collaborating with the Serbian authorities."⁴⁰⁸

In response to these attacks, the Serbian government gathered police and paramilitary units from the Ministry of the Interior to organize a counterinsurgency campaign against the rebel forces.⁴⁰⁹ The disposition of Serbs in Kosovo changed to

parallel government. *Id.* at 307. The KLA emerged due to discontent with the alleged inefficiency of Rugova's non-violent means of seeking independence for Kosovo. *Id.*

401. Chris Hedges, *In New Balkan Tinderbox, Ethnic Albanians Rebel Against Serbs*, N.Y. TIMES, Mar. 2, 1998, at A1 [hereinafter Hedges, *Tinderbox*]; Chris Hedges, *Ravaged Kosovo Village Tells of a Nightmare of Death*, N.Y. TIMES, Mar. 9, 1998, at A3 [hereinafter Hedges, *Nightmare*].

402. Hedges, *Nightmare*, *supra* note 401, at A3.

403. *Id.*

404. *See supra* Part I.A.2.

405. *See* Chossudovsky, *supra* note 396.

406. Hedges, *Tinderbox*, *supra* note 401, at A8.

407. *Id.*

408. *Id.*

409. *Id.*

face the increased threats of rebel assaults.⁴¹⁰ Chris Hedges of the *New York Times* vividly depicted the prevalent conditions:

Many Serbs have begun to send their families out of the region. The postal authorities have halted services to [thirty-three] towns where the rebels operate. Serbian enclaves and towns have set up barricades with armed guards at night. Police checkpoints are now placed behind sandbags and protected by snipers on the roofs of nearby buildings. Nearly all police officers carry assault rifles and wear bulletproof vests.⁴¹¹

In the next few weeks, hundreds of Serbian police and paramilitary units began a sweep in central Kosovo in search of ethnic Albanian rebels operating in the area.⁴¹² Surrounding rebel enclaves, the police embarked in violent combat against rebel forces, often causing the deaths of innocent civilians caught in the line of fire.⁴¹³ Those who fled stated that police were firing indiscriminately, while those unable to escape were found dead, often bearing signs of torture and mutilation.⁴¹⁴ The intensity of the conflict augmented throughout the following months as larger numbers of Serb forces continued their habitual tactic of encircling rebel enclaves and firing at rebel forces.⁴¹⁵ By October 1998, with the help of Holbrooke, the parties reached an agreement for a cease-fire and the violence abated.⁴¹⁶ Despite the cease-fire, however, the conflict renewed soon thereafter.⁴¹⁷ By the end of 1998, an estimated 2,000 ethnic Albanians had been killed.⁴¹⁸

410. *Id.*

411. *Id.*

412. Chris Hedges, *Serbs Claim Victory over a Separatist Militia*, N.Y. TIMES, Mar. 8, 1998, at A6. As with most terrorist groups, the KLA is solely based on civilian recruits. Hedges, *Tinderbox*, *supra* note 401, at A1. It draws its strength by using various villages as bases and relies on guerrilla attacks to further its cause for independence. *Id.*; Hedges, *Nightmare*, *supra* note 401, at A3.

413. Chris Hedges, *Serbs Renew Crackdown on Albanian Villages in Kosovo*, N.Y. TIMES, Mar. 25, 1998, at A3.

414. *Id.* Although at some of these sights, ethnic Albanian leaders asserted that the people were unarmed, numerous shell casings on the floors of the houses were found where these unarmed people had been stationed leading to the conclusion that they were, in fact, armed. Chris Hedges, *Nightmare*, *supra* note 401, at A3.

415. *See id.*

416. Chris Hedges, *New Serb Assault on Albania Rebels*, N.Y. TIMES, June 2, 1998, at A1.

417. *Id.*

418. CHOMSKY, *supra* note 44, at 16; Human Rights Watch, *supra* note 395. Amnesty International's figures amount to "more than 1,500." Amnesty International, *Annual Report 1999*, 365 (1999). Not an extraordinary number since the conflict had been waged

While these tactical methods certainly engendered the deaths of numerous civilians, it is doubtful that the Serbs intended to eliminate the Kosovar Albanian population as a whole through genocide or ethnic cleansing.⁴¹⁹ The 1948 Convention on the Prevention and Punishment of Genocide defines the term "genocide."⁴²⁰ Article II states:

[i]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.⁴²¹

"Generally speaking, genocide does not mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation."⁴²² While Article II of the Convention appears quite ambiguous, Raphael Lemkin, the scholar who coined the term "genocide," provides further insight on its meaning. According to Lemkin, genocide "is a hybrid consisting of the Greek *genos* meaning race, nation or tribe; and the Latin suffix *-cide* meaning killing. The realities of European life in the years 1933–45, Lemkin said, called for the formulation of a legal concept of destruction of human groups."⁴²³

Genocide is intended to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the goal of annihilating the groups themselves.⁴²⁴ The objectives of such a plan tend to be disintegration of the political and social institutions, of culture,

since 1993. James Bissett, *The Tragic Blunder in Kosovo*, GLOBE & MAIL (Can.), Jan. 10, 2000.

419. See Bissett, *supra* note 418.

420. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

421. Lori Lyman Bruun, Comment, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. & TRADE 193, 197 (1993).

422. *Id.* at 196–97.

423. ENCYCLOPEDIA BRITANNICA 108 (1972).

424. LEO KUPER, THE PREVENTION OF GENOCIDE 9 (1985).

language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.⁴²⁵ Genocide is directed against national groups as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.⁴²⁶

Genocide, or ethnic cleansing, therefore represents a coordinated plan to destroy members of a particular group through the intentional implementation of a policy necessitating the eradication of the group as an "entity."⁴²⁷ The events in Kosovo prior to the commencement of air strikes fail to exhibit such qualities. Although the conflict between Serbs and the KLA guerrilla forces certainly resulted in brutal human rights violations, the conflict seems to have been waged by the Serb forces in order to cease guerrilla attacks, eliminate rebel forces, and retain Kosovo as a province within Serbia.⁴²⁸ The prevailing policies of the Serbs prior to NATO's intervention did not include a systematic destruction of Kosovar Albanian culture, religion, language, or even economic existence.⁴²⁹ Rather, the Serb forces

425. *Id.*

426. *Id.*

427. *Id.*

428. Serb forces, enraged by the KLA guerrilla operations, reacted by waging numerous attacks on villages it considered basis of KLA operations. Hedges, *supra* note 413, at A3. The resulting victims of these attacks included KLA members, its alleged supporters, and a large number of civilians residing in the rebel enclaves. *Id.* These attacks were often situated in the Drenica region of Kosovo, one of the KLA's strongholds, as well as near the border of Albania because KLA recruits often crossed borders to join the ranks of rebel forces. *Id.* One may conclude that the flow of refugees that resulted from the assaults may similarly not be labeled as "ethnic cleansing" as it is doubtful that the displacement of civilians would fail to occur in any civil war where combating forces are fiercely resorting to the use of shelling, snipers, and mortars. *See id.*

429. Certainly this view is not shared by members of the Alliance: "We must act to save thousands of innocent men, women and children from humanitarian catastrophe—from death, barbarism and ethnic cleansing by a brutal dictatorship . . ." British Prime Minister Tony Blair, House of Commons debate (Mar. 23, 1999). "It's time for action, time to make a decision. And I hope it's done very quickly. Otherwise, [Milosevic's] going to amass more troops and you're going to have another massacre. What we have in Kosovo and what [we] had in Bosnia was genocide, and that's why I think we should intervene." U.S. Senator Bob Dole, *Meet the Press* (NBC television broadcast, Mar. 21, 1999) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review). U.S. President Bill Clinton stated:

What we are trying to do is to limit [Milosevic's] ability to win a military victory and engage in ethnic cleansing and slaughter innocent people and to do

concentrated on waging a civil war by eradicating the KLA guerrilla forces from Kosovo.⁴³⁰ The international community's lack of knowledge prior to the onset of air strikes as to the Serb policies is surprising in light of an official intelligence report of the German Foreign Ministry which confirmed that no "ethnic cleansing" was occurring within Kosovo.⁴³¹ The report stated:

Even in Kosovo an explicit political persecution linked to Albanian ethnicity is not verifiable. The East of Kosovo is still not involved in armed conflict. Public life in cities like Pristina, Urosevac, Gnjilan, etc. has, in the entire conflict period, continued on a relatively normal basis. The actions of the security forces [were] not directed against the Kosovo-Albanians as an ethnically defined group, but against the military opponent [KLA] and its actual or alleged supporters [W]ith an agreement made with the Serbian leadership at the end of 1998 . . . both the security situation and the conditions of life of the Albanian-derived population have noticeably improved Specifically in the larger cities public life has since returned to relative normality.⁴³²

The magnitude of violence within Kosovo was similarly documented in an independent assessment of the Kosovo conflict.⁴³³ Roland Keith, an office director of the OSCE Kosovo Verification Mission who left Kosovo on March 20, 1999, reported that most of the violence in Kosovo was instigated by the KLA.⁴³⁴

Upon my arrival the war increasingly evolved into a mid intensity conflict as ambushes, the encroachment of critical lines of communication and the [KLA] kidnapping of security

everything we can to induce him to take this peace agreement, which is the only way in the wide world over the long run he's going to be able to keep Kosovo as an independent part of this country—or an autonomous part of this country.

Remarks at the Legislative Convention of the American Federation of State, County, and Municipal Employees, 35 WEEKLY COMP. PRES. DOC. 495 (Mar. 23, 1999). "[The rounding up of Kosovar Albanians] suggests that an ethnic cleansing operation is under way . . . let's register indications that dark things are happening, even if we are not able to quantify those for the time being." Press Conference of NATO Spokesman Jamie Shea and Air Commodore David Wilby (Mar. 27, 1999) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review) [hereinafter Shea & Wilby].

430. See generally Human Rights Watch, *supra* note 395.

431. See Chossudovsky, *supra* note 396.

432. *Id.*

433. *Id.*

434. *Id.*

forces resulted in a significant increase in government casualties which in turn led to major Yugoslavian reprisal security operations By the beginning of March these terror and counter-terror operations led to the inhabitants of numerous villages fleeing, or being dispersed to either other villages, cities or the hills to seek refuge The situation was clearly that KLA provocations, as personally witnessed in ambushes of security patrols which inflicted fatal and other casualties, were clear violations of the previous October's agreement [and United Nations Security Council Resolution 1199]. The security forces responded and the consequent security harassment and counter-operations led to an intensified insurrectionary war, but as I have stated elsewhere, *I did not witness, nor did I have knowledge of any incidents of so-called 'ethnic cleansing' and there certainly were no occurrences of 'genocidal policies' while I was with the KVM in Kosovo.* What has transpired since the OSCE monitors were evacuated on March 20, in order to deliver the penultimate warning to force Yugoslavian compliance with the Rambouillet and subsequent Paris documents and the commencement of the NATO air bombardment of March 24, obviously has resulted in human rights abuses and a very significant humanitarian disaster as some 600,000 Albanian Kosovars have fled or been expelled from the province. This did not occur, though, before March 20, so I would attribute the humanitarian disaster directly or indirectly to the NATO air bombardment and resulting anti-terrorist campaign.⁴³⁵

While the Serb forces did not resort to genocidal policies in addressing the guerrilla operations prior to the onset of air strikes, the resulting civilian death toll raises serious questions under international human rights and the laws of war. A large number of civilians, including women and children, succumbed to the violence.⁴³⁶ In light of the recent events in Bosnia-Herzegovina and the wide range of demographics within the former Yugoslavia, an ethnic conflict in Kosovo presented and continues to present substantial hazards for the spread of violence.⁴³⁷ While these

435. *Id.* at n.30 (emphasis added) (citing Roland Keith, *Failure of Diplomacy, Returning OSCE Human Rights Monitor Offers a View from the Ground in Kosovo*, DEMOCRAT, May 1999).

436. *Id.*

437. This is particularly true in Macedonia, where there is a large Albanian minority. *See id.*

reasons may provide sufficiently egregious circumstances that warrant action by the international community, it is clear that fervent calls for intervention may not automatically legitimize any intervention. The international community must seek the appropriate solution in each particular case where humanitarian intervention is deemed necessary, while subjugating any military action under principles of international law.

2. The Exhaustion of Diplomatic Solutions

Diplomatic negotiations between NATO, the Serbs, and the KLA were attempted in order to prevent the escalation of violence.⁴³⁸ A brief examination of the diplomatic record, however, raises questions as to whether further negotiations could have resulted in the suspension of air strikes.

The first significant attempt at reaching a peaceful resolution to the conflict was made in Rambouillet, France.⁴³⁹ On February 6, 1999, Serb delegates met with major KLA leaders in Rambouillet under Western leadership to prevent an escalation of the violence.⁴⁴⁰ The Rambouillet agreement was tendered by the Western leadership, accepted by the KLA, and rejected by the Serbs.⁴⁴¹ According to Professor Chomsky, Slobodan Milosevic's categorical refusal to accept the terms of the agreement was not surprising.⁴⁴² The proposal called for a complete military occupation of Kosovo and the FRY, as well as substantial political control of Kosovo by NATO.⁴⁴³ Slobodan Milosevic was further

438. See *id.*

439. See *id.*

440. CHOMSKY, *supra* note 44, at 106. The terms of the Rambouillet agreement can be found at *Rambouillet Accord*, *supra* note 81.

441. CHOMSKY, *supra* note 44, at 106.

442. *Id.*

443. *Id.* The agreement provided that

NATO is to 'constitute and lead a military force' (KFOR), which 'NATO will establish and deploy' in and around Kosovo, 'operating under the authority and subject to the direction and political control of the North Atlantic Council (NAC) through the NATO chain of command'; 'the KFOR commander is the final authority within theater regarding interpretation of this chapter [Implementation of the Military Agreement] and his interpretations are binding on all Parties and persons.' Civil affairs are to be monitored and supervised by the (NATO-dominated) OSCE and its Chief of Implementation Mission, along with KFOR, the NATO force occupying Kosovo

Id. The independence of Kosovo is to be determined three years after entry into

informed by the Western leadership that should talks fail or should he fail to agree to a NATO-led ground force, NATO planes would bomb Serbia.⁴⁴⁴ Under these circumstances, it is questionable whether incorporating an ultimatum for complete military occupation into the Rambouillet negotiations proved to be the most productive resolution for achieving the cessation of violence.

Subsequent to the Rambouillet fiasco, several diplomatic, albeit unsuccessful, efforts were attempted by the Serbian government.⁴⁴⁵ On March 23, 1999, the Serbian National Assembly issued a resolution calling for the facilitation of peaceful diplomatic settlements while rejecting a NATO occupation as proposed in the Rambouillet agreement.⁴⁴⁶ Additionally, the resolution exhibited a willingness to accept some form of an international presence.⁴⁴⁷ On April 22, 1999, after meeting with

force of the agreement and the status of the rest of the FRY is subject to the following paragraph:

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. This shall include, but not be limited to, the right of bivouac, maneuver, billet, and utilization of any areas or facilities as required for support, training, and operations.

Id. at 107. In addition, NATO forces would have free access to the FRY without any obligations under the laws of the country or to its authorities, while such authorities are required to follow NATO orders. *See id.*

444. Jane Perlez, *U.S. Running Out of Time to Decide on Kosovo Force*, N.Y. TIMES, Feb. 12, 1999, at A12; Jane Perlez, *Albright Brings Foes Face to Face at Kosovo Talks*, N.Y. TIMES, Feb. 15, 1999, at A1; Jane Perlez, *U.S. Negotiator at the Kosovo Talks Visits Milosevic*, N.Y. TIMES, Feb. 17, 1999, at A3.

445. *See* CHOMSKY, *supra* note 44, at 108–14.

446. *Id.* at 108. The resolution called on the OSCE and the United Nations to facilitate a peaceful diplomatic settlement while rejecting NATO military occupation. *Id.* The resolution also condemned the removal of the KVM and called for negotiations leading toward the reaching of a political agreement on a wide-ranging autonomy for Kosovo and Metohija [the official FRY name for the province], with the securing of a full equality of all citizens and ethnic communities and with respect for the sovereignty and territorial integrity of the Republic of Serbia and the Federal Republic of Yugoslavia.

Id. at 109. Though “[t]he Serbian Parliament does not accept presence of foreign military troops in Kosovo and Metohija,”

[t]he Serbian Parliament is ready to review the size and character of the international presence in Kosmet [Kosovo/Metohija] for carrying out the reached accord, immediately upon signing the political accord on the self-rule agreed and accepted by the representatives of all national communities living in Kosovo and Metohija.

Id. at 108.

447. *Id.* at 109.

Russian representative Viktor Chernomyrdin, Milosevic agreed to an international presence in Kosovo under U.N. auspices.⁴⁴⁸ On April 30, 1999, Milosevic publicly declared that: the United Nations could have a peacekeeping force with self-defense weapons in Kosovo; Yugoslav forces would be reduced; all refugees of all ethnic and religious affiliations could return; and that he was willing to discuss the widest possible autonomy for Kosovo.⁴⁴⁹

On May 8, 1999, the Group of Eight (G-8), consisting of the major Western countries and Russia, agreed to specific terms regarding the Kosovo conflict—terms that were accepted soon thereafter by Milosevic.⁴⁵⁰ The G-8 agreement essentially provided for withdrawal of military forces, an international security presence, self-government for Kosovo, and the demilitarization of the KLA.⁴⁵¹ All of these diplomatic efforts, starting with the Serbian Resolution to the G-8 agreement, were nevertheless rejected by NATO.⁴⁵² As a result, the air strikes

448. *Id.* at 111. The meeting was positive and Chernomyrdin publicly declared “that Milosevic had agreed to an ‘international presence in Kosovo under United Nations auspices’” in order to achieve a political settlement and further agreed, in principle, to “the possibility of an international presence led by the UN” if the air strikes were called off by NATO. *Id.*

449. *Id.* at 111; Jane Perlez, *Milosevic Defiant But Offers a Pact*, N.Y. TIMES, May 1, 1999, at A1. Milosevic called for a “political process” and stated that “the United Nations ‘can have a huge mission in Kosovo if it wishes’”—a U.N. peacekeeping force with self-defense weapons, but not “an occupation” of the sort demanded in the Rambouillet agreement. *Id.* In addition, he stated that he would reduce Yugoslav forces to their pre-bombing level; that there would be “the return of all refugees, regardless of their ethnic or religious affiliation[;]” “free access for United Nations High Commissioner for Refugees and International Red Cross[;]” and further negotiations for “the widest possible autonomy for Kosovo within Serbia.” *Id.* at A8; CHOMSKY, *supra* note 44, at 112. Milosevic was “borrowing language from the proposed Rambouillet accords.” CHOMSKY, *supra* note 44, at 112.

450. CHOMSKY, *supra* note 44, at 112.

451. *Id.* The terms demanded

an ‘immediate and verifiable end of violence and repression,’ withdrawal of (unspecified) ‘military, police and paramilitary forces,’ ‘[d]eployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations,’ ‘a political process toward the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region,’ and the demilitarization of the KLA.

Id. at 112.

452. *See id.* at 110, 112.

continued until early June when the Kosovo Peace Accord was accepted by NATO and Serbia.⁴⁵³

In analyzing the diplomatic efforts undertaken between the FRY government and the Allied forces, it appears that on four occasions Milosevic exhibited a willingness to compromise by conceding to an international presence and substantial autonomy for Kosovo.⁴⁵⁴ Although NATO legitimately could have deemed Milosevic's terms unsatisfactory, the Alliance's refusal to even consider further negotiations might have resulted in the unwarranted neglect of valuable opportunities for the achievement of a successful diplomatic resolution to the Kosovo conflict.

3. Paralysis of the Security Council

As the Alliance's intervention in Kosovo was undertaken without explicit Security Council authorization for the use of force,⁴⁵⁵ questions arise as to whether the United Nations' inaction constituted a paralysis, thereby warranting preemption through the intervention of non-U.N. forces.⁴⁵⁶ A brief examination of the Security Council's exhibited willingness to

453. *Id.* at 114. According to the Kosovo Peace Accord, Serbia agreed to an international security presence with substantial NATO participation (this is the only mention of NATO). *Rambouillet Accord*, *supra* note 81. Kosovo is to be in the hands of the U.N. Security Council (not NATO) which will establish "an interim administration of Kosovo." *Id.* Military control similarly falls under U.N. control. *Id.* The changes between the Rambouillet agreement and the Kosovo peace accord are significant. The following NATO demands were not included in the KPA: full military occupation and political control of Kosovo by NATO; free NATO access to the rest of the FRY; and a three year time period after which the independence of Kosovo is to be decided. Interestingly, the Security Council resolution embodying the Kosovo Peace Accords does not even mention NATO. *Id.*

454. The Alliance viewed Milosevic's diplomatic efforts as propaganda or a stalling method as any Serb resistance, deliberation, or suggested alteration of the Alliance's terms has been labeled as such before, during, and after the conflict. See William Drozdiak, *West Vows New Sanctions on Yugoslavia*, WASH. POST, Mar. 26, 1998, at A26; William Drozdiak, *B-52 Strike Devastates Field Force in Kosovo*, WASH. POST, June 9, 1999, at A19; R. Jeffrey Smith & Molly Moore, *Kosovo Pullout Set to Start Today: NATO-Led Contingent to Enter Province*, WASH. POST, June 10, 1999, at A1; Kevin Cullen, *Serbs, NATO Resume Talk on a Pullout*, BOSTON GLOBE, June 9, 1999, at A1; Perlez, *supra* note 449, at A1.

455. No resolution was enacted permitting the use of "all necessary means" to restore international peace and security in Kosovo. "All necessary means" is the standard language for the use of force as exhibited in conflicts such as in Iraq, Somalia, Rwanda, and Yugoslavia. See Lobel & Ratner, *supra* note 124, at 128.

456. See Tesón, *supra* note 143, at 367-69.

enact resolutions leads to the conclusion that characterizing the United Nations' inaction in the Kosovo conflict as a "paralysis" is unwarranted. Instead, the resulting lack of authorization illustrates the precise function for which the veto powers were meant to exist: to ensure unanimity of action while preserving plurality of opinion.

As previously discussed,⁴⁵⁷ unanimity of votes is an essential requirement for the enactment of Security Council resolutions.⁴⁵⁸ This requirement may not be forthcoming where permanent members possess differing political opinions.⁴⁵⁹ Such disagreements, while representative of the importance of the veto power, can result in effective paralysis.⁴⁶⁰ Despite this, a brief examination of Security Council practice since the end of the Cold War appears to evidence a disposition for unanimous action, and consequently the absence of a bipolar handicap.⁴⁶¹ The Security Council clearly has authorized, on numerous occasions, the use of force in previous conflicts such as in Iraq, Somalia, Rwanda, and Yugoslavia.⁴⁶² It is in this light that the lack of Security Council action in Kosovo must be addressed.

While the events in Kosovo exhibited the alarming qualities of a bitter ethnic conflict, it is essential for intervening states to respect the significance of the Security Council's decision not to take action.⁴⁶³ The fact that Russia and China clearly voiced refusal to support an authorization for the use of force illustrates the vitality of the Security Council's ability to represent the differences of political views harbored by the leading powers of

457. See *supra* Part III.A.3.

458. See Burmester, *supra* note 115, at 271-72. The Council's decisions are governed by Article 27(3) of the U.N. Charter, which provides that Security Council action requires "the concurring votes of the permanent members". U.N. CHARTER art. 27. Consequently, for an intervention to occur, all permanent members (United States, the United Kingdom, France, Russia, and China) must agree as to whether the intervention should take place. See *generally id.*

459. See Burmester, *supra* note 115, at 271-72.

460. This was evidenced throughout the Cold War. See Brown, *supra* note 165, at 236; see also Nanda, *supra* note 169, at 310.

461. Nanda, *supra* note 169, at 310.

462. See *supra* Part II.A.2.iii.c.; Nanda, *supra* note 169, at 310.

463. "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

this world.⁴⁶⁴ As the two countries were aware of NATO's predisposition to conduct air strikes, they refused to vote for a resolution permitting the use of "all necessary" means to restore international peace and security because it would have authorized a bombardment of the FRY.⁴⁶⁵ These countries would have deemed such a result unacceptable and illegal.⁴⁶⁶

Regardless of the grounds for these refusals, it is the prerogative of the Security Council to refrain from intervening where permanent members deem it inappropriate.⁴⁶⁷ To deny this right by subjugating this decision to a regional organization's conclusion that air strikes are warranted would lead to the dangerous eventuality of competing claims to the right of forceful intervention.⁴⁶⁸ It is consequently incumbent upon the

464. See Youssef M. Ibrahim, *U.N. Measure Skirts Outright Threat of Force Against Milosevic*, N.Y. TIMES, Oct. 25, 1998, at A6.

465. By October 18, 1998, NATO declared that it was ready to bomb Serbia because of human rights abuses. Cohen, *supra* note 358, at 3. In reaction to this statement, Russia and China threatened to veto any resolution that would permit military action by NATO. *Id.*; Ibrahim, *supra* note 464, at A6. China and Russia's reluctance to grant the authorization for air strikes is clearly understandable. If a resolution would permit the use of force in the FRY and NATO would begin the air strikes, China and Russia would be unable to stop the bombardments via a resolution calling for the cessation of air strikes. Such a resolution would be vetoed because three of the permanent members of the Security Council (United States, France, and the United Kingdom) are members of NATO. This scenario precisely occurred in the Kosovo crisis even though no Security Council resolution permitted the use of force in the first place. See Press Release SC/6659, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia (Mar. 26, 1999) (on file with the Loyola of Los Angeles International and Comparative Law Review). Moreover, it is also quite doubtful that Russia and China would have vetoed an intervention where the military arsenal would be restricted to a limited number of armed ground troops. The prospect of a resolution authorizing the deployment of ground troops would similarly face the additional hurdle of a veto within the Security Council due to the fact that three members of the Security Council are NATO members who were clearly advocating the benefits of air strikes. Furthermore, it is also quite doubtful whether any U.N. members would have been willing to commit any ground troops within Kosovo. Likewise, Russia and China might have refused to authorize "all necessary" means in the belief that bombing could be averted, as further diplomatic efforts could prove successful in proving a resolution to the conflict.

466. Judith Miller, *The Secretary General Offers Implicit Endorsement of Raids*, N.Y. TIMES, Mar. 25, 1999, at A13.

467. *Id.*

468. There is fear

that abandonment of the Security Council's asserted monopoly on determining the lawful use of force against others, except in self-defense, could put the world community on a slippery slope of competing claims of 'rights' to intervene—with the potential consequence of escalating hostilities rather than resolving them. Some see a disquieting historical precedent for alliance self-authorization for use

international community to respect the centrality of the United Nations in addressing conflicts that involve extensive international repercussions. In such instances, the international community must defer to the Security Council's decisions addressing the use of force.⁴⁶⁹

4. Proportionality

Although the damages inflicted upon the FRY will be discussed in greater detail below, it is highly questionable whether such damages were proportional to the military advantages anticipated. The air strikes were largely conducted for the protection of human rights in Kosovo, but the bombardments left disastrous consequences upon the infrastructure and civilian population of the FRY.⁴⁷⁰ Bombs damaged and destroyed water supplies, chemical plants, and caused the deaths of well over 2,000 Yugoslavian civilians located hundreds of kilometers from Kosovo.⁴⁷¹ The repercussions include the discharge of dangerous chemicals, while the destruction of water supplies effectively restricted civilians' essential access to potable water.⁴⁷² Whether these results were necessary to achieve the cessation of violence in Kosovo is debatable.

5. Summary

In examining the various considerations for a legitimate humanitarian intervention lacking Security Council authorization, although NATO's intervention had some moral justification for its publicized humanitarian motives, there is scarce legal support for its legitimacy.

of force in the Warsaw Pact's intervention in Czechoslovakia in 1968 (an intervention that was, to be sure, directed within its own membership). Some warn that such fragmentation of lawful authority on use of force could prompt the emergence of counter-alliances among those fearful of high-handed interventionism by an overweening Western alliance. If the U.N. has too many inhibitions about the use of force, these worry, NATO under U.S. pressure may have too few.

Simma, *supra* note 61.

469. In the case of the Kosovo conflict, it is the need to respect the refusal of the Security Council to enact resolutions permitting the use of force.

470. See *supra* Part III.A.

471. *Id.*

472. *Id.*

Human rights violations were certainly occurring within Kosovo, presenting alarming conditions for the spread of violence. The conflict, however, never reached the genocidal proportions suggested by NATO officials. In attempting to alleviate the severity of the conflict, NATO directed the Serbs to abide by the Rambouillet agreements, effectively establishing an ultimatum and subsequently ignoring any diplomatic efforts undertaken by the Serbian government. These diplomatic efforts were arguably irrelevant as the Serbs could not be trusted in light of their history of breaking the cease fire agreements established by Holbrooke in October 1998. This argument, however, is based on a considerable fallacy. It has been repeatedly declared that it was not the Serbs, but rather, the KLA guerrillas that caused the renewed fighting. Consequently, overlooking the Serbs' diplomatic efforts might have resulted in the loss of considerable opportunities for the cessation of violence. One might also find that the Security Council was not, in fact, paralyzed by the Kosovo conflict. Categorizing the inaction of the Security Council as a paralysis simply mischaracterizes the inherent nature of the Council and overlooks a noticeable period of concerted action as a remedy for violence. Finally, it is the methods of remedying a particular conflict that will bear considerable scrutiny under the laws of war. As will be discussed in greater detail below, any intervention must abide by the doctrine of proportionality, a notion that has apparently been eroded by NATO's intervention in Kosovo.

In analyzing these considerations in totality, the strength and importance of human rights violations tends to overshadow other relevant issues. The importance of other issues, however, must not be disregarded, such as recognizing the centrality of the Security Council's role and decisions, the usefulness and necessity of diplomatic avenues, and the need to abide by rules of proportionality where an intervention is undertaken. An examination of these seemingly non-humanitarian considerations, particularly the proportionality doctrine, reveals that international law does not recognize NATO's intervention.

B. The Lawfulness of NATO's Air Strikes Under Protocol I

Although NATO used some of the most accurate bombs and missiles in the American arsenal, the extent of civilian deaths and the scope of resulting damages in the FRY raise significant

questions as to the legitimacy of the Alliance's tactics.⁴⁷³ Under Protocol I, it remains the responsibility of the intervening forces to achieve military effectiveness while minimizing civilian injury and damage.⁴⁷⁴ Intervening forces consequently must decide the appropriateness of military action by considering the prevalent characteristics of the military conflict in order to broaden the scope of civilian safety. According to this standard, the Alliance's targets, as well as its methods, may have run afoul of international law.

1. Methods and Means of Warfare

In examining the Alliance's methods and means of warfare, NATO appears to have placed considerations of military necessity and the accomplishment of military objectives above civilian safety. During most of the humanitarian operation, NATO aircraft flew at high altitudes, a factor that led to disastrous misidentification of military targets and the deaths of numerous civilians.⁴⁷⁵ Moreover, NATO's arsenal included weapons such as cluster bombs and depleted uranium (DU) ammunitions that present considerable dangers to the civilian population even well after the conclusion of the conflict.⁴⁷⁶ Consequently, the decision to resort to these methods and means of warfare for the accomplishment of military objectives considerably diminished NATO's capacity to control excessive and unnecessary damage to the civilian population and may have constituted indiscriminate use of military force.

a. Cluster Bombs

Despite the large number of precision-guided weapons utilized throughout Operation Allied Force, NATO forces also resorted to "area weapons," such as cluster bombs, in a multitude of aerial attacks.⁴⁷⁷ As explained by William Arkin in *Human Rights Watch Report*, although cluster bombs are highly effective

473. William M. Arkin, *Ticking Time Bombs*, 11 HUM. RTS. WATCH 4, 6 (June 1999).

474. See generally, Protocol I, *supra* note 3, art. 51.

475. *Civilian Deaths in the NATO Air Campaign*, HUM. RTS. WATCH 2 (Feb. 2000).

476. Arkin, *supra* note 473, at 4.

477. William Arkin, *NATO's Use of Cluster Munitions in Yugoslavia*, 11 HUM. RTS. WATCH 3 (May 1999). Both British and U.S. forces acknowledged the use of CBU-87 and RBL 755 cluster bombs in the Kosovo conflict. Arkin, *supra* note 473, at 2.

in targeting a large area, they are also largely unpredictable due to the high failure rate of the submunitions contained inside the cluster bombs.⁴⁷⁸ Additionally, cluster bombs present singular dangers when released at higher altitudes because high altitudes lead to a greater range of dispersion and the increased potential for technical malfunction.⁴⁷⁹ Once these bombs land, the submunitions turn into landmines, incapable of distinguishing between combatants and innocent civilians, and the slightest touch causes them to detonate.⁴⁸⁰ This indiscriminate effect renders NATO's use of these area weapons highly questionable under international law.

The nature of cluster bomb weapons enables the attacking forces to cover a wide area, inflicting considerable damage to ground troops dispersed throughout a particular region.⁴⁸¹ There exist two types of cluster bombs—those delivered by surface artillery or rockets, and those delivered by air.⁴⁸² Operation Allied Force used air-delivery cluster bombs, which are essentially dispensers containing a number of submunitions commonly called bomblets.⁴⁸³ Once these dispensers are released into the air, the cluster bomb falls for a specified distance before opening and releasing the bomblets over a large target area.⁴⁸⁴ The diameter of impact for each individual bomblet can vary from 250 to 500 feet.⁴⁸⁵ The resulting damage is substantial, as the charge has the ability to penetrate five inches of armor on contact.⁴⁸⁶ In addition, "the tiny steel case fragments are powerful enough to damage light armor and trucks at fifty feet, and to cause human injury at 500 feet" while "the incendiary ring can start fires in any combustible environment."⁴⁸⁷

Although cluster bombs appear effective in attacking ground elements, they harbor a significant failure rate.⁴⁸⁸ It is generally

478. Arkin, *supra* note 473, at 3.

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. Estimates of overall dud rates vary. According to the conservative estimates of manufacturers, two to five percent of bomblets remain unexploded. *Id.* at 5. This estimate

estimated that for every single CBU-87 (containing a total of 202 bomblets) used, there will be an average of ten unexploded bomblets, and for every RBL755 (containing a total of 147 bomblets) used, there will be an average of five unexploded bomblets.⁴⁸⁹ These undetonated bomblets settle wherever they land and form a grave lingering danger to the noncombatant civilian population, as well as to the friendly ground force operations.⁴⁹⁰

In light of the uncontrollable nature of the bomblets' explosions, cluster bombs represent an excessive civilian hazard, and may violate Article 51 of Protocol I, which forbids indiscriminate attacks on the civilian population.⁴⁹¹ Indiscriminate attacks are "[t]hose which employ a method or means of combat the effects of which cannot be limited as required by this Protocol . . . and consequently . . . are of a nature to strike military objectives and civilians or civilian objects without distinction."⁴⁹² In addition, Article 51 further describes an indiscriminate attack as "[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁴⁹³ Thus, Protocol I forbids an attack where the weapons utilized are unable to distinguish between military objectives and civilians. Because cluster bombs cannot distinguish between these two entities, their use violates Protocol I.

The use of cluster bombs during the air strikes led to considerable civilian casualties.⁴⁹⁴ In one incident, cluster bombs originally designed to hit an airfield went astray, and landed in three centrally located urban areas.⁴⁹⁵ The attack killed fourteen civilians and wounded twenty-eight.⁴⁹⁶ Although NATO officials

rises to twenty-three percent observed in acceptance and operational testing, and ten to thirty percent in ground observations in areas of Iraq after the Gulf War. *Id.*

489. *Id.*

490. *Id.* at 2.

491. Protocol I, *supra* note 3, art. 51(4).

492. *Id.*

493. *Id.* art. 51(5)(b).

494. *Civilian Deaths in the NATO Campaign*, *supra* note 475, at 3.

495. *Id.*; see also *id.* app. A (describing incidents involving civilian deaths in Operation Allied Force).

496. See *id.* app. A.

claimed the intended target was an airfield and that the resulting damage might have been due to an inadvertent release or technical malfunction, the White House, following the incident, issued a directive to the Pentagon to restrict cluster bomb use.⁴⁹⁷ According to U.S. Air Force sources, the cluster bomb container opened immediately after its release, projecting submunitions at a greater distance.⁴⁹⁸ It is possible that these consequences could have been averted.⁴⁹⁹ In his *Human Rights Watch Report*, William Arkin describes the deleterious effect of dropping cluster bombs at high altitudes:

[t]he higher the altitude at which cluster bombs are dropped, the wider will be the dispersal radius of the submunitions, and the greater, therefore, the potential risk to nonmilitary targets. Moreover, at higher altitudes, pilots have a reduced capability to make sighting corrections. Finally, at greater altitudes, the bomblets do not necessarily have the opportunity to fuse properly, and the dud rate is therefore likely to be higher.⁵⁰⁰

In light of the fact that aerial attacks were undertaken almost exclusively at altitudes of 15,000 feet, the technical malfunctions appear more negligent than accidental.⁵⁰¹ Moreover, because they were dropped in a densely populated area, the unexploded bomblets continue to present a grave risk to civilians.⁵⁰²

The total number of civilian casualties from NATO attacks between April 10 and May 13, 1999, ranges from ninety to one-hundred-and-fifty.⁵⁰³ It is estimated that about 11,000 unexploded bomblets from American cluster bombs are currently within the territory of the FRY.⁵⁰⁴ Because the bomblets are not particularly large, they pose grave threats, especially in rural areas where they might be concealed by vegetation.⁵⁰⁵ In addition, the submunitions' shape resembles a bright yellow soda can that appears particularly attractive to children who could mistake it for

497. *Id.*

498. *Id.*

499. *Id.*

500. Arkin, *supra* note 473, at 6 n.15.

501. Civilian Deaths in the NATO Air Campaign, *supra* note 475, at 20.

502. Arkin, *supra* note 473, at 3.

503. See *Civilian Deaths in the NATO Campaign*, *supra* note 475, at 2.

504. See *generally id.*

505. See Arkin, *supra* note 473, at 3.

a toy.⁵⁰⁶ For all of these reasons, the use of cluster bombs should have been reconsidered.

b. Depleted Uranium

On March 30, 1999, NATO announced that U.S. A-10 assault aircraft were available for use in the Kosovo conflict.⁵⁰⁷ These aircraft adopted the deceptively playful nickname of "tankbusters."⁵⁰⁸ Their ammunition consists of depleted uranium (DU), a weapon of fearsome efficiency in targeting the previously unattainable tanks of opposing military forces.⁵⁰⁹ On April 21, 1999, NATO spokesman Giuseppe Marani confirmed that DU weapons were being used in Yugoslavia.⁵¹⁰ Although the military capabilities of DU weapons can be advantageous, but their radioactive and toxic characteristics bear alarming health consequences for civilian populations and military personnel who come in contact with the released DU particles.⁵¹¹ These consequences, although emphatically denied by NATO, make DU munitions indiscriminate weapons, capable of harming civilians and combatants alike.⁵¹²

506. See *id.* at 2. These dangers are certainly not foreign to American troops, as similar hazards were evidenced in Iraq subsequent to the Gulf War, a conflict that entailed the widespread use of cluster bombs. *Id.* at 3. It is estimated that at least twenty-five U.S. military personnel were killed and others injured by unexploded bomblets fired by their own forces, while approximately 1,600 civilians were killed and over 2,500 injured in the first two years after the end of the Gulf War from accidents involving unexploded submunitions. *Id.* at 10–11. Kuwaiti doctors stated that approximately sixty percent of these civilian victims are children aged fifteen and under. *Id.* at 11. In light of the events in Iraq, it is likely that the remaining unexploded bomblets within the territory of the FRY will result in similarly injurious consequences for the civilian population. See *id.* at 3.

507. Christine Abdelkrim-Delanne, *Conflict in the Balkans—Not Such Conventional Weapons*, LE MONDE DIPLOMATIQUE, June 1999, <http://www.monde-diplomatique.fr/en/1999/06/08duarms> (last visited Nov. 7, 2000).

508. *Id.*

509. *Id.*

510. *Id.*

511. See Alex Kirby, *Pentagon Confirms Depleted Uranium Use*, BBC NEWS (May 7, 1999), at http://news.bbc.co.uk/hi/english/sci/tech/newsid_337000/337855.stm.

512. *Id.* The military use of depleted uranium (DU) is mainly based on the metal's low cost and unusual effectiveness. Abdelkrim-Delanne, *supra* note 507. A thirty-three millimeter DU round from U.S. A-10 Warthog aircraft can pierce steel armor up to nine centimeters (3.5 inches) thick as well as a block of concrete three meters underground. Vladimir S. Zajic, *Review of Radioactivity, Military Use, and Health Effects of Depleted Uranium* (July 1999) <http://members.tripod.com/vzajic/>, at 3.4; Abdelkrim-Delanne, *supra* note 534. It was in the early 1970s that the U.S. Army began to explore the use of DU for

Depleted uranium carries the greatest peril to human health when it is inhaled or ingested.⁵¹³ As it is released in the air, it can be internalized by “breathing smoke containing DU particles, hand-to-mouth transfer as a result of contact with contaminated vehicles, inhalation or ingestion of resuspended particles, ingestion of food or water contaminated by DU, contamination of wounds by DU dust, or from wounds caused by DU shrapnel.”⁵¹⁴

penetrators and tank armor. See *id.* At first, DU was considered in tandem with tungsten, but the latter was eventually discarded as DU is highly available and exhibits pyrophoric qualities, while tungsten has a higher melting point (3410° C) than uranium (1132° C) and lacks pyrophoricity. *Id.* As a result, when a tungsten projectile hits its target, it becomes blunt on impact and is consequently less effective in piercing armor. *Id.*

The hardened density of DU is obtained through a reduction of its carbon content and by alloying it with a particular amount of titanium. *Id.* The resulting DU penetrator is subsequently encased in an aluminum sabot and a combustible cartridge case. *Id.* As the projectile is fired, the aluminum sabot of the DU round “drops off within the first 100m of the trajectory and the bare DU projectile then moves with velocity 1.5 km/sec.” *Id.* Once the projectile comes in contact with the intended target, the “[s]urface of a DU penetrator ignites on impact (especially with steel), partially liquefies due to the high temperature generated by the impact and relatively low melting point of uranium (1132° C), and the projectile sharpens as it melts and pierces the heavy armor.” *Id.*

The effect of the penetrator’s impact bears important consequences for the civilian population and military personnel. Upon impact, approximately eighteen to seventy percent of the penetrator rod will burn and oxidize into dust. *Id.*; see also BERNARD ROSTKER, ENVIRONMENTAL EXPOSURE REPORT: DEPLETED URANIUM IN THE GULF 12 (Dep’t of Def., July 1998) (on file with the Loyola of Los Angeles International and Comparative Law Review). This DU oxide is deadly due to its radioactive character and will kill everyone inside a tank, armored vehicle, or other selected target. E-mail from Dr. Rosalie Bertell to *Geocities.com* via e-mail contact Catherine Euler (Mar. 31, 1999, 20:56 PM), available at <http://www.geocities.com/z1997z/du/depluran.html>.

The solubility and respirability of the DU aerosol’s qualities will determine its subsequent effect on the target’s surroundings. Zajic, *supra*, at 6.6. Two types of DU oxides are formed—one is soluble in water while the other is not. *Id.* In addition, it is estimated that of the DU oxide aerosol formed at the impact, fifty to ninety-six percent are respirable particles, some which are soluble in water. *Id.* The non-respirable particles will settle down rapidly, while “the respirable DU aerosol remains airborne for hours.” *Id.*; ROSTKER, *supra*, at 12. The solubility of respirable particles will determine the rate at which the particles will enter the blood stream where a human comes upon DU particles subsequent to impact. Zajic, *supra*, at 6.6. Approximately seventy percent of the soluble uranium that enters the blood stream will be excreted in urine within twenty-four hours, while the remainder will be deposited in the kidneys and bones. *Id.* About twenty-five percent of the respirable DU particles will be trapped in the lungs, where insoluble particles can remain for years, while about twenty-five percent will be exhaled, and the remaining 50% swallowed. *Id.* For a comprehensive discussion of the long term effects of DU upon humans, see SCI. APPLICATIONS INT’L CORP. (SAIC), KINETIC ENERGY PENETRATOR ENVIRONMENTAL AND HEALTH CONSIDERATIONS App. D (July 1990).

513. Zajic, *supra* note 512, at 6.6.

514. *Id.*; Dan Fahey, *Depleted Uranium—The Stone Unturned: A Report on*

It can remain in the liver, kidney, bones or other tissues, irradiating these tissues for years.⁵¹⁵ It can damage the renal system, cause genetic deformities, and initiate cancer.⁵¹⁶ Professor Siegwart Horst-Gunther categorized the following consequences from contact with DU munitions:

- 1) A considerable increase in infectious diseases caused by severe immuno-deficiencies in a great part of the population.
- 2) Frequent occurrence of massive herpes and zoster afflictions, also in children.
- 3) AIDS-like syndromes.
- 4) A hitherto unknown syndrome caused by renal and hepatic dysfunctions . . .
- 5) Leukemia, aplastic anaemia and malignant neoplasm.
- 6) Congenital deformities caused by genetic defects; also partly diagnosed in animals.⁵¹⁷

Although NATO member states deny the dangerous effects of DU to civilian populations,⁵¹⁸ leading scientists advocate the cessation of DU use.⁵¹⁹

The use of DU also appears to violate various Articles of Protocol I. Article 51 states that indiscriminate attacks are prohibited.⁵²⁰ These include “those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol . . . and consequently . . . are of a nature to strike military objectives and civilians or civilian objects without distinction.”⁵²¹ Article 51 further provides an example of an attack deemed indiscriminate: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage

Exposures of Persian Gulf War Veterans and Others to Depleted Uranium Contamination, SWORDS TO PLOWSHARES, Mar. 28, 1997, <http://www.rama-usa.org/du01.htm> (last modified Dec. 1997).

515. Zajic, *supra* note 512, at 6.6.

516. *Id.*

517. Professor Siegwart Horst-Gunther, *The Gulf War Syndrome—A Parallel to Chernobyl: Documentation of the Aftermath of the Gulf War*, <http://www.wakefieldcam.freereserve.co.uk/gulfwarsyndrome.htm> (last visited Feb. 26, 2001).

518. See Robert Fisk, *I'd Like to Believe NATO that Depleted Uranium Is Harmless. But I Don't. And This Is Why . . .*, INDEP. (London), Oct. 4, 1999, at 3.

519. See Felicity Arbuthnot, *Poisoned Legacy*, NEW INTERNATIONALIST, Sept. 1999, at 13.

520. Protocol I, *supra* note 3, art. 51(4).

521. *Id.* art. 51(4)(c).

anticipated.”⁵²² Additionally, Article 57 imposes similar requirements when deciding to attack.⁵²³ Protocol I therefore requires military commanders to assess whether the methods and means of combat can adequately be undertaken without excessive harm to the civilian population. Considering the consequences that DU radioactive particles may engender among non-combatants, the decision to use such weapons appears excessive.

Whereas NATO has confirmed the use of DU weapons in Yugoslavia,⁵²⁴ it has not released information regarding the quantity of DU shells used or the whereabouts of military targets.⁵²⁵ Nevertheless, a brief examination of the use and effect of DU weapons in the Gulf War may illustrate the extent of damage that such ammunitions may generate. It is estimated by U.S. armed forces that more than 14,000 rounds were used by U.S. troops.⁵²⁶ Of the 14,000 rounds, 7,000 were used for training in the Saudi Arabian desert prior to the Gulf War, and 3,000 were lost in a fire at a U.S. Army arms dump in Kuwait.⁵²⁷ Depleted uranium rounds were also used by the British, and probably other armed forces, increasing the total amount of DU rounds used in the Gulf War.⁵²⁸ The consequences are that it is now estimated that DU was the leading cause of the Gulf War Syndrome and triggered the extraordinary rise in cancer rates and birth deformities in Gulf War veterans.⁵²⁹ In a survey of 10,000 Gulf War veterans who complained of mysterious illnesses, eighty-two percent entered Iraqi vehicles contaminated with DU.⁵³⁰ In another study undertaken by Dr. Hari Sharma of the University of Waterloo, veterans suffering from various symptoms showed traces of DU in their urine samples.⁵³¹ Some veterans had one hundred times the safe limit in their bodies.⁵³² Additionally, it is

522. *Id.* art. 51(5)(b).

523. *Id.* art. 57(2)(a)(iii).

524. Kirby, *supra* note 511.

525. UNEP/UNCHS BALKANS TASK FORCE, THE POTENTIAL EFFECTS ON HUMAN HEALTH AND THE ENVIRONMENT ARISING FROM POSSIBLE USE OF DEPLETED URANIUM DURING THE 1999 KOSOVO CONFLICT—A PRELIMINARY ASSESSMENT 24 (Oct. 1999).

526. Abdelkrim-Delanne, *supra* note 507.

527. *Id.*

528. *Id.*

529. *Id.*

530. Zajic, *supra* note 512, at 9.2.

531. Arbuthnot, *supra* note 519, at 13.

532. *Id.*

estimated that sixty-seven percent of children born to U.S. Gulf Veterans have severe illnesses or birth defects.⁵³³

These disturbing trends are mirrored in Iraq. A study of cancer and leukemia in Iraqi soldiers from heavily bombed areas showed extraordinary increases in lymphoma (from ten cases in 1991 to 106 cases in 1996) and brain cancer (from one case in 1991 to forty cases in 1996).⁵³⁴ Depleted uranium is also suspected as the direct cause of a large increase in stillbirth and birth defects.⁵³⁵ Dr. Jenan Ali at Basra General Hospital in Iraq “has a photographic record of all the babies born with no eyes, brains, limbs, genitalia; internal organs on the outside; grotesquely deformed little heads and bodies.”⁵³⁶ In an informal survey of 160 houses, twenty malformed babies were counted.⁵³⁷ The spread of contamination may consequently be explained by the fact that radiation levels in flora and fauna reached eighty-four times the World Health Organization’s recommended safe limit.⁵³⁸ The surprising similarities and timing between diseases and deformities in Gulf War veterans, their families and the Iraqi population, in tandem with the strong residue of DU in the studies undertaken for Gulf War Syndrome, tends to show that DU presents considerable repercussions for civilian populations.

Although NATO may reject these scientific findings, its refusal to acknowledge the dangers of DU is extraordinary in light of the numerous reports over the past ten years.⁵³⁹ These reports warn of harms associated with DU.⁵⁴⁰ For example, an unpublished report for the European Commission prepared by the Regional Centre for Central and Eastern Europe effectively warns of DU’s harmful consequences.⁵⁴¹ It correlates the radioactive air pollution detected in Yugoslavia to DU shells used by U.S. war planes in the Kosovo War, and states that DU is perhaps “the most dangerous of the cancer-causing and toxic

533. Abdelkrim-Delanne, *supra* note 507.

534. Arbuthnot, *supra* note 519, at 12.

535. *Id.* at 14.

536. *Id.*

537. *Id.*

538. *Id.*

539. *See, e.g.*, Fahey, *supra* note 514.

540. *Id.*

541. Graham N. Greene, *Kosovo Fallout: Canadian Personnel May Be Exposed to Radiation Contamination*, NAT’L POST, July 26, 1999, at A14.

substances released during the bombing.”⁵⁴² An earlier report prepared for the U.S. Army in 1990 seems to reiterate this warning, stating that DU has effectively been linked to cancer and chemical toxicity causing kidney damage.⁵⁴³ In addition, this report states that a charred shell is approximately three times more radioactive than what is safe for the general public.⁵⁴⁴ In 1995, the U.S. Army’s Environmental Policy Institute similarly declared that if DU enters the body, it has potential to generate significant medical consequences, both chemical and radiological.⁵⁴⁵ According to the Institute, radioactivity only begins to diminish after 4,500 million years.⁵⁴⁶ Finally, an alarming report from Britain’s Atomic Energy Authority in 1991 states that at least forty tons of DU were left on the ground in the Gulf War—an amount sufficient to cause 500,000 potential deaths.⁵⁴⁷

In addition to these reports, guidelines prepared by the U.S. Army evidence considerable anxiety regarding DU contamination.⁵⁴⁸ In a technical dossier published by the U.S. Army in 1990, detailed advice is given in the event of an accident involving DU.⁵⁴⁹ It provides that “[n]o equipment or materials involved in the accident/incident are to be removed from the site for unrestricted use until the item(s) have been monitored by radiation protection personnel and decontaminated as required.”⁵⁵⁰ This guide further states that:

... as they burn, high explosives melt, flow, drip, spread, and mix with surrounding ground or wreckage. After the fire is extinguished, the explosives are safe only if they are completely burned. High explosives which have not completely burned remain an extreme explosive hazard. After these explosives have cooled below ignition temperature they will, like metal, take on curious shapes. They may have picked up impurities

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. Arbuthnot, *supra* note 519, at 12.

547. See Abdelkrim-Delanne, *supra* note 507.

548. *Id.*

549. *Id.*

550. *Id.*

while molten or burning, which will make them actually more dangerous than they were before melting.⁵⁵¹

Similar guidelines were given by the U.S. Army's Environmental Policy Institute, emphasizing that low level radioactive waste must be deposited in a licensed repository, and that if DU insoluble particles are inhaled, they will stay in the lungs and create a potential cancer risk.⁵⁵² Likewise, U.K. Armed Forces Minister Douglas Henderson also gave instructions stating that no troops were to approach any target that might have been hit by DU unless wearing protective clothing against radiation.⁵⁵³ These guidelines were conveyed to peacekeeping officers in the Kosovo region who were urged to stay 150 feet away from targets of DU munition explosions.⁵⁵⁴

The dangers that DU weapons consequently represent for civilian populations are quite extraordinary. These hazards were effectively acknowledged by the U.N. Human Rights Tribunal in August 1996.⁵⁵⁵ In a session of the U.N. Commission of Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities passed a resolution in which it "urged all States to be guided in their national policies by the need to curb production and spread of weapons of mass destruction or with indiscriminate inflicts injury upon combatants and non-combatants alike. This is precisely forbidden under Protocol I."⁵⁵⁶

c. High Aircraft Altitude

Throughout most of Operation Allied Force, NATO aircraft flew at the minimum altitude of 15,000 feet.⁵⁵⁷ Although military commanders advocated the technical abilities of NATO's arsenal, visual perception remains a crucial element when particular weapons require adequate identification of ground military targets.⁵⁵⁸ This tactical decision to maintain a high altitude

551. *Id.*

552. Arbuthnot, *supra* note 519, at 12.

553. *Id.*

554. Robert Fisk, *Exposed: The Deadly Legacy of NATO Strikes in Kosovo*, INDEP. (London), Oct. 4, 1999, at 1.

555. *See id.*

556. *See* Protocol I, *supra* note 3, art. 51 para. 4(a)-(c), para. 4(a)(i)(6).

557. *Civilian Deaths in the NATO Air Campaign*, *supra* note 475, at 20.

558. Press Conference Given by Mr. Jamie Shea and Major General Walter Jertz in

consequently diminished pilots' abilities to adequately identify the presence of civilians when attacking convoys or mobile targets, and to properly take sufficient measures to verify that military targets did not have concentrations of civilians.⁵⁵⁹

NATO's decision to fly its aircraft at the high altitude of 15,000 feet mainly rested on two rationales.⁵⁶⁰ First, according to military commanders, flying low would prove dangerous from a technical standpoint.⁵⁶¹ It would place NATO air crews into the range of tactical surface to air missiles, anti-aircraft artillery, and small arms fire.⁵⁶² This danger would be further exacerbated by the fact that flying at a low altitude would highlight aircraft against the clouds, making it easier for opposing ground troops to target them from the ground.⁵⁶³ Second, because air crews must have adequate space to maneuver in combat, the mountainous terrain presented threat of a collision.⁵⁶⁴ If at all distracted, the pilots' unfamiliarity with the geographical terrain would place them at risk of collision with the mountainous region when flying at low altitudes.⁵⁶⁵ For these reasons, NATO commanders concluded that flying at a higher altitude would prevent or at least lower the number of casualties among its pilots.⁵⁶⁶

Although some of NATO's weapons require laser guidance, other weapons require that pilots see the target throughout the attack in order to ensure precision and to prevent civilian casualties and damages.⁵⁶⁷ It is questionable whether the latter category of weapons could function at optimum capacity in light of the high altitude of the planes.⁵⁶⁸ Such shortcomings are illustrated in the various incidents involving civilian refugees confused as military forces. In one particular incident, a dozen NATO planes attacked what appeared to be a military convoy,

Brussels 2 (May 10, 1999) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review) [hereinafter *Shea & Jertz*].

559. *Civilian Deaths in the NATO Air Campaign*, *supra* note 475, at 2.

560. *Shea & Jertz*, *supra* note 560, at 2.

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. *See id.*

567. *Id.*

568. *Civilian Deaths in the NATO Air Campaign*, *supra* note 475, at 2.

dropping a total of nine bombs.⁵⁶⁹ The attacks resulted in the deaths of seventy-three refugees as the pilots had mistaken the tractors in the convoy for military tanks.⁵⁷⁰ In subsequent NATO press conferences covering the event, senior officials conceded the difficulty in correctly identifying ground elements at such an altitude.⁵⁷¹ In another incident involving the deaths of innocent civilians, NATO planes mistakenly identified a refugee camp as a military camp and command post.⁵⁷² The attack resulted in the deaths of eighty-seven civilians.⁵⁷³ Although there were unconfirmed reports that Serb forces forced these refugees into the area in order to serve as human shields, it is uncertain whether sufficient measures were taken to verify that the target had no such concentration of civilians.⁵⁷⁴

Although NATO's regard for the safety of its own pilots was certainly legitimate, questions arise as to what extent military commanders are obligated to expose their own forces to danger in order to limit civilian casualties and damages. The legal responsibility of ensuring civilian safety and properly identifying military targets rests upon the military forces waging the attack.⁵⁷⁵ Article 57 of Protocol I imposes the requirement on "[t]hose who plan or decide upon an attack" to "[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects[;]"⁵⁷⁶ to "[t]ake all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects[;]"⁵⁷⁷ and to "[r]efrain from deciding to launch any attack which may be expected to cause . . . [such consequences that] would be excessive in relation to the concrete and direct military advantage

569. *Id.* app. A.

570. *Id.*

571. *Id.* at 20. Officials similarly admitted in response to a question regarding the accuracy of high altitude bombing that effectiveness is better achieved where pilots move closer to the intended target. Shea & Jertz, *supra* note 560, at .2

572. *Civilian Deaths in the NATO Air Campaign*, *supra* note 475, app. A.

573. *Id.*

574. *Id.*

575. *Id.*

576. Protocol I, *supra* note 3, art. 57(2)(a)(i).

577. *Id.* art. 57(2)(a)(ii).

anticipated.”⁵⁷⁸ In its authoritative *Commentary on the Protocols*, the International Committee of the Red Cross describes what is meant by “feasible”—“[w]hat is required . . . is to take the necessary identification measures in good time in order to spare the population as far as possible.”⁵⁷⁹ Moreover, Article 57 similarly imposes the general requirement that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”⁵⁸⁰ It is consequently of utmost importance for military forces to implement effective procedures ensuring adequate protection of civilians and civilian objects.⁵⁸¹

In examining the incidents mentioned above, a careful investigation of the intended targets would have prevented the excessive number of civilian casualties. NATO had to be aware of the close proximity of refugees to the Serb military because refugees poured out of Kosovo while Serb forces advanced. Because Kosovo is highly agricultural and many civilians were known to have tractors, NATO also should have anticipated identifying camps and moving objects as civilian. NATO’s decision to keep its planes at a minimum altitude of 15,000 feet impeded pilots’ ability to correctly assess the nature of the ground elements. It is doubtful that high altitudes might directly affect attacks where the military target is predetermined and the weapons laser-guided. In situations where the pilot’s visual perception is a considerable factor in assessing the appropriateness of the attack, however, maintaining an altitude permitting adequate identification of targets is crucial.⁵⁸² Consequently, NATO’s deliberate choice to maintain an altitude of 15,000 feet makes it doubtful that NATO did everything feasible to verify that the objectives were not civilians or civilian objects, nor did it take all necessary precautions in its methods of attack to minimize such consequences. NATO’s subsequent review of its own tactical methods seems to support this

578. *Id.* art. 57(2)(a)(iii).

579. CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 681–82 para. 2198 (Yves Sandoz et al. eds., 1987).

580. Protocol I, *supra* note 3, art. 57(1).

581. *Id.*

582. See *Civilian Deaths in the NATO Air Campaign*, *supra* note 475, app. A.

conclusion.⁵⁸³ While it is unequivocal that military forces have an interest in the safety of their pilots, it is nevertheless the legal responsibility of such forces to balance military necessity with civilian safety. In this case, NATO seems to have subjugated civilian safety for the protection of its own pilots.

2. The Legitimacy of Targets

In its humanitarian mission, NATO claims to have selected only adversarial military operations to diminish the strength of the FRY military.⁵⁸⁴ Although military operations obviously serve the furtherance of the opposing forces' military campaign, their destruction could lead to significant consequences for civilian populations.⁵⁸⁵ According to Protocol I, when selecting a target, it is insufficient to merely examine whether a target serves a considerable military purpose.⁵⁸⁶ Attacking forces must consider a number of factors in making a decision to bomb an intended target.⁵⁸⁷ These considerations must include the extent of civilian presence within the intended target,⁵⁸⁸ the nature of the target's civilian use,⁵⁸⁹ and the extent of damage expected from the target's explosion.⁵⁹⁰ Specifically, NATO should analyze eventual collateral damage, potential release of noxious chemicals, and the possibility of the resulting damage obstructing civilian access to objects necessary to survival.⁵⁹¹ Such considerations must subsequently be included in a balancing equation between civilian protection and military necessity.⁵⁹² Where military necessity overrides the importance of these civilian damages and injuries, the attack will be deemed legitimate under Protocol I.⁵⁹³ It is

583. *See id.*

584. *See* Press Conference Given By Mr. Peter Daniel and Major General Walter Jertz, Mr. Isa Zymberi, in Brussels and Mr. Fatmir Gashi in Kukes (May 24, 1999) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review) [hereinafter Daniel].

585. *See, e.g.,* Chossudovsky, *supra* note 396.

586. *See* Protocol I, *supra* note 3.

587. *See generally id.*

588. *See id.*

589. *See id.*

590. *See id.*

591. *See id.*

592. Protocol I, *supra* note 3, arts. 51(5), 57(2).

593. *Id.*

evident that military necessity must be substantial in order to eclipse civilian harm.

Operation Allied Force targeted power plants, electric plants, water facilities, various factories, refineries and warehouses, bridges, railways, hospitals, public buildings, embassies, and agricultural resources.⁵⁹⁴ Although NATO forces advocated targeting these operations because of their military purposes, the prevalent damage to civilian populations and infrastructure raises doubts as to the legitimacy of such targets under the standards of Protocol I.

a. Water

Throughout the Alliance's intervention, NATO objectives focused on diminishing the strength of Slobodan Milosevic's military forces by targeting various military operations within the territory of the FRY.⁵⁹⁵ In furthering these tactics, the Alliance's air force targeted power generators and electricity supplies, attacks that directly resulted in the obstruction of civilian access to potable water.⁵⁹⁶ In light of water's indispensable nature for civilian populations, the destruction or damage of water supplies certainly appears questionable under Protocol I.⁵⁹⁷

Although NATO claims not to have targeted water supplies, it did target power generators and electricity supplies that directly provided for civilian access to potable water.⁵⁹⁸ Justification for these attacks was based on the fact that such operations were used in furtherance of Serb military objectives and were therefore

594. See Ministry of Foreign Affairs of the Federal Republic of Yugoslavia, *White Book 1*, <http://www.mfa.gov.yu/bela.htm>; Ministry of Foreign Affairs of the Federal Republic of Yugoslavia, *White Book 2*, <http://www.mfa.gov.yu/bela2.htm> (on file with the Loyola of Los Angeles International and Comparative Law Review).

595. See Daniel, *supra* note 586.

596. See *White Book 1*, *supra* note 596; *White Book 2*, *supra* note 596; ICRC, *Crisis in the Balkans—Situation report No. 35*, May 26, 1999; ICRC, *Update No 99/03 on the Red Cross/Red Crescent Response to the Crisis in the Balkans*, June 4, 1999; ICRC, *Yugoslavia: Clean Water for Novi Sad and Vojvodina*, ICRC News 99/25 [hereinafter ICRC News 99/25], June 24, 1999; *Serbia Without Electricity and Water*, SERBIA-INFO.COM, May 22, 1999, <http://www.serbia-info.com/news/1999-05/22/12029.html> (last visited Nov. 6, 2000); *Protests Against Destruction of Electric Power System*, SERBIA-INFO.COM, May 25, 1999, <http://www.serbia-info.com/news/1999-05/25/12105.html> (last visited Nov. 6, 2000).

597. Protocol I, *supra* note 3, art. 54.

598. *Serbia Without Electricity and Water*, *supra* note 598; *Protests Against Destruction of Electric Power System*, *supra* note 598.

legitimate military targets.⁵⁹⁹ Water pumping stations run on electricity and are a fundamental factor in providing potable water to civilians. Therefore, the destruction of these electrical supplies and power generators resulted in the obstruction of civilian access to potable water.⁶⁰⁰ By May 25, 1999, NATO effectively cut off the water supply to seventy percent of civilians in Serbia; it is estimated that Belgrade water supplies were running at ten percent of their capacity.⁶⁰¹

Operations that service both the military and civilians, particularly where such operations are indispensable to survival, are afforded particular protection under Protocol I. According to Article 54:

[i]t is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as . . . drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.⁶⁰²

This ban, however, does not apply where these objects are used “solely for the members of the armed forces” or “in direct support of military action.”⁶⁰³ Additionally, any target selected by the attacking forces must be “limited strictly to military objectives.”⁶⁰⁴ Article 52 provides that “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁶⁰⁵ Furthermore, under Article 57, “[t]hose who plan or decide upon an attack” must “[r]efrain from deciding to launch

599. See Daniel, *supra* note 586.

600. *Id.*

601. *NATO Denies Targeting Water Supplies*, BBC NEWS (May 24, 1999), at http://www.news.bbc.co.uk/hi/english/world/europe/newsid_351000/351780.stm [hereinafter *Water Supplies*].

602. Protocol I, *supra* note 3, art. 54(2).

603. *Id.* art. 54(3).

604. *Id.* art. 52(2).

605. *Id.*

any attack which may be expected to cause . . . damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated."⁶⁰⁶ In other words, an attack must specifically target military objectives that provide a definite military advantage. The intentional targeting of objects indispensable to the civilian population is absolutely forbidden unless the particular objects are directly or solely supporting the opposing military's forces.⁶⁰⁷ Moreover, any attack undertaken must not lead to any excessive civilian damage in comparison to the military objective sought to be achieved.

In examining NATO's decision to strike power generators and electrical facilities, the legitimacy and underlying logic of striking such military targets is debatable. The Alliance's decision to target such objects was based on its objective "to cause difficulties to the military complex in the Federal Republic of Yugoslavia."⁶⁰⁸ Cutting off electricity would deny the Serb military access to all modern commodities, and cut off the use of all facilities and equipment requiring the use of electricity. This would deprive the FRY military of electrical lighting, computers, heating or air conditioning, and indeed, water. Although NATO maintains that it never intended to target water supplies, NATO apparently did not consider hydraulic engineering.⁶⁰⁹ Shutting off electricity to water supplies will automatically result in the obstruction of access to water because water is distributed with the aid of a pumping station running on electricity.⁶¹⁰ NATO, by targeting electricity to cut off water supplies to the military, similarly cut off water supply to approximately seventy percent of the civilian population.⁶¹¹ According to Article 54 of Protocol I, denying civilian access to indispensable objects is forbidden where the purpose of the attack is to deny the civilian population or the opposing military forces access to such indispensable objects.⁶¹²

Indispensable objects are legitimate targets under certain circumstances. Although Article 54 forbids the destruction of indispensable objects, it permits such destruction where these

606. *Id.* art. 57(2).

607. *Id.*

608. Daniel, *supra* note 586.

609. *Id.*

610. *Id.*

611. *Water Supplies, supra* note 601.

612. Protocol I, *supra* note 3, art. 54.

objects are used “solely” or “in direct support” of the military forces of the adverse party.⁶¹³ Article 52 permits attacks only where such attacks would provide “a definite military advantage.”⁶¹⁴ In examining the tactical advantages of targeting these electrical supplies and power generators, it is doubtful that such targets were crucial to Milosevic’s army. The FRY military possessed “plenty of back-up generators” that “[Milosevic] can use . . . to supply his military” (a fact apparently well known by NATO military commanders).⁶¹⁵ Because Milosevic’s army would suffer minimal harm, and could continue generating power through available back up generators, Article 52’s requirement that attacks are only permissible to provide a definite military advantage is not met. Article 54’s requirement that the targets attacked be “solely” or “in direct support” of the opposing military forces also fails because the bombing of such targets would result in the civilian population sustaining a complete obstruction to water consumption.⁶¹⁶

The Alliance chose to carry out air strikes against facilities supplying indispensable objects to the civilian population, with full knowledge that such air strikes would only minimally harm its adversary’s military troops. These military strategies raise important questions under Articles 52 and 54, and should cause NATO to rethink its decision to label such targets “military objectives” in the first place. Protocol I permits attacks *only* upon military targets, and NATO’s decision to deem power and electrical facilities “military objectives” must be questioned.

b. Environmental Damage

As NATO airplanes persevered in their collective effort to diminish the strength of Milosevic’s troops, the Alliance began targeting diverse military targets such as commercial industries, fuel storages, oil refineries, and chemical industries.⁶¹⁷ These attacks resulted in the release of a considerable amount of noxious

613. *Id.*

614. *Id.* art. 52.

615. Press Conference Given by Mr. Jamie Shea and Major General Walter Jertz (May 25, 1999) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review).

616. *Id.*

617. Protocol I, *supra* note 3, art. 54.

materials due to the nature of the intended targets, particularly in Pancevo, Kragujevac, Novi Sad, and Bor.⁶¹⁸ Despite the fact that these objectives might have constituted legitimate military targets, the resulting environmental damage and potential threat to the civilian population in those areas may prove excessive given the military advantages anticipated by NATO forces.

In light of the highly populated areas where these industrial complexes are located, any environmental damage resulting from targeting such operations could lead to the contamination of a considerable percentage of the population.⁶¹⁹ Article 55 of Protocol I provides that

[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.⁶²⁰

In addition, Article 51 of Protocol I forbids indiscriminate attacks.⁶²¹ This prohibition is emphasized again in Article 57, imposing a requirement on "those who plan or decide upon an attack" to refrain from launching an attack where civilian harm would be excessive in light of the military advantages anticipated.⁶²² It is thus incumbent upon the attacking forces to prevent severe environmental damages by selecting the appropriate methods of warfare to prevent excessive environmental pollution and contamination of the civilian population.

According to a report undertaken by a Balkan Task Force (BTF) under the U.N. Environment Programme (UNEP) and the U.N. Centre for Human Settlements (UNCHS), there are four areas—Pancevo, Kragujevac, Novi Sad, and Bor—or "hot spots" that have been identified as bearing special environmental

618. See U.N. Env't Programme & U.N. Ctr. for Human Settlement; *The Kosovo Conflict—Consequences for the Environment & Human Settlements* 9 (1999) [hereinafter BTF Report].

619. *Id.* Contamination could result from inhaling or consuming toxic pollutants. *Id.* at 92.

620. Protocol I, *supra* note 3, art. 55.

621. *Id.* art. 51.

622. *Id.* art. 57.

concern.⁶²³ After visiting many key areas, the BTF concluded that the “pollution detected at some sites is serious and poses a threat to human health.”⁶²⁴ In addition, it concluded “at all of these sites, environmental contamination due to the consequences of the Kosovo conflict was identified” and that “the problems identified require immediate attention.”⁶²⁵

These findings were mirrored in the discoveries of other organizations. According to a World Wide Fund for Nature (WWFN) team, toxic pollutants released near the places hit by NATO bombing began to spread to surrounding areas.⁶²⁶ The WWFN team similarly concluded that “there was considerable atmospheric pollution, probably affecting the environment and public health,” and that these contaminants could threaten groundwater drinking supplies as well as natural resources in several countries in the area.⁶²⁷ In addition, the Regional Environmental Center for Central and Eastern Europe (REC) similarly issued a report on June 30, 1999, covering the main types of environmental damages that occurred or may eventually occur within the territory of the FRY.⁶²⁸

The report includes the following conclusions with regard to the level of pollution exhibited within the FRY: high levels of pollution around main military targets, in particular chemical industry; ecosystems threatened, in particular river ecosystems; food contamination resulting from soil pollution and air pollution; drinking water contamination; human health (long term effects of toxic/carcinogenic substances, radiation).⁶²⁹ One can then infer that the BTF, WWFN, and the REC came to identical conclusions,

623. BTF Report, *supra* note 618, at 9.

624. This was a key conclusion in the report, although the report did state that the Kosovo conflict did not result as an environmental catastrophe for the Balkans as a whole. *Id.* at 11.

625. *Id.*

626. Alex Kirby, *Danube Pollution Warning*, BBC NEWS (Sept. 14, 1999), at http://news.bbc.co.uk/hi/english/sci/tech/newsid_446000/446226.stm.

627. *Id.*

628. Environmental Center for Central and Eastern Europe, *Assessment of the Environmental Impact of Military Activities During the Yugoslavia Conflict*, June 1999, <http://www.rec.org/REC/Publications/YugoConflictAssessment/contents.html>.

629. *Id.*

Although the BTF effectively found four environmental hot spots within the territory of the FRY, only three present sufficiently egregious circumstances to require discussion under Protocol I: Pancevo, Novi Sad, and Bor.⁶³⁰ In examining these military targets, particular attention must be given to their locale and proximity to the civilian population, the quantity of toxic pollutants released into the atmosphere and the danger of potential contamination for surrounding areas.

The industrial complex of Pancevo received some of the most extensive press coverage during Operation Allied Force due to its substantial environmental damages.⁶³¹ This industrial zone was heavily targeted during the Kosovo conflict between the months of April and June 1999.⁶³² Although NATO strongly advocated the military advantages of targeting such an industrial area,⁶³³ the Alliance's strike of Pancevo's industrial complex raises serious questions under the standards of Protocol I. Pancevo is a heavily populated town of about 80,000, and is located approximately twenty kilometers north of Belgrade, the capital of the FRY.⁶³⁴ The targeted area included a petrochemical plant, a fertilizer plant, and a major oil refinery at the southern edge of the town.⁶³⁵ During a three-month period between April and June, NATO conducted two air strikes on the petrochemical plant and fertilizer plant, and seven attacks on the oil refinery.⁶³⁶ The BTF reported that "[a]s a result of the air strikes, various hazardous substances were released into the environment, either directly from damaged

630. The consequences of Kragujevac's bombardment, although resulting in considerable environmental pollution, seemingly failed to exhibit an immediate threat to the civilian population as most of the pollution appears to have remained within the compounds of the particular industrial site. See BTF report, *supra* note 618, at 39. Other "hot spots" do seem to exhibit alarming capabilities for the spread of contamination. See *id.* at 9.

631. See Alex Kirby, *Balkans Environment 'Seriously Damaged,'* BBC NEWS (Oct. 14, 1999), at http://news.bbc.co.uk/hi/english/sci/tech/newsid_475000/475015.stm; Alex Kirby, *Bombing Threatens Serbs' Environment,* BBC NEWS (Apr. 19, 1999), at http://news.bbc.co.uk/hi/english/sci/tech/newsid_323000/323113.stm [hereinafter Kirby, *Bombing Threatens*]; *Serbian Toxic Fumes Fear,* BBC NEWS (Apr. 18, 1999), at http://news.bbc.co.uk/hi/english/world/monitoring/newsid_322000/322483.stm; Alex Kirby, *UN Team Sifts Serb Pollution,* BBC NEWS (July 23, 1999), at http://news.bbc.co.uk/hi/english/sci/tech/newsid_401000/401981.stm.

632. BTF Report, *supra* note 620, at 33.

633. *Id.*

634. *Id.* at 32.

635. *Id.*

636. *Id.* at 33.

storage facilities, or as a result of fires, with the most obvious visual impact being the dense clouds of black smoke which poured from burning installations.”⁶³⁷ Following the formation of these black clouds, a “black rain” fell on the area around Pancevo, “heightening concerns about human health and long-term damage to crops, soil and groundwater.”⁶³⁸ This cloud reportedly contained the toxic gas phosgene, chlorine, and hydrochloric acid.⁶³⁹

The BTF report came to several conclusions about the extent of environmental damage caused by these air strikes. It is estimated that approximately 2,100 tons of ethylene dichloride (EDC) leaked into the soil and into the wastewater canal.⁶⁴⁰ The report further indicated that about eight tons of metallic mercury leaked, 200 kilograms of which reached an adjoining canal.⁶⁴¹ The subsequent release of mercury into the adjoining canal exposed the civilian population to contamination through ingestion of contaminated food.⁶⁴² According to the WWFN, soil samples taken at Pancevo were two-and-a-half times above the level of mercury deemed acceptable by other countries’ environmental standards, such as the Netherlands.⁶⁴³ The report also points out that 460 tons of vinyl chloride monomer (VCM) burned at the petrochemical plant.⁶⁴⁴ Such a fire “would have released dioxins, which are highly toxic, hydrochloric acid, carbon monoxide, PAHs [polycyclic aromatic hydrocarbons] and possibly phosgene into the air.”⁶⁴⁵

637. *Id.*

638. *Id.*

639. Kirby, *Bombing Threatens*, *supra* note 633.

640. BTF Report, *supra* note 618, at 32–33. EDC is deemed toxic to both terrestrial and aquatic life. *Id.* As it is highly volatile, human inhalation of the chemical in high concentrations can disturb the nervous system and gastrointestinal system “causing dizziness, nausea and vomiting.” *Id.* at 92. In addition, EDC can damage the liver, kidney, and adrenal gland. *Id.*

641. *Id.* at 34. According to the report, “[o]nce released into the environment, metallic mercury can be converted into an organic form, methyl mercury, which is toxic and builds up in the food chain.” *Id.*

642. *See id.* at 33.

643. Kirby, *supra* note 628.

644. BTF Report, *supra* note 620, at 34.

645. *Id.* at 34–35. Dioxins are considered one of the world’s most toxic organic pollutants. *Id.* at 92. They are quite persistent in the environment and may build up in the bodies of humans and animals, remaining for many years. *Id.* Dioxins have been proven

According to the WWFN, water in the canal exhibited PAHs fifteen times above the U.S. Environmental Protection Agency's limit for drinking water, while soil samples from Pancevo "contained PAHs [ten] to [eleven] times higher than Dutch action levels."⁶⁴⁶ Finally, in addition to the release of dioxins, it is estimated that 80,000 tons of oil and oil products burned due to the air strikes on the oil refinery, resulting in the release of noxious substances such as sulphur dioxide, nitrogen dioxide, and carbon monoxide.⁶⁴⁷ In light of the quantity of toxic pollutants released, the environmental damage could spread to surrounding areas around Pancevo and potentially Belgrade.

Another military target that resulted in considerable threat to the environment was the bombing of the Novi Sad oil refinery.⁶⁴⁸ The oil refinery is located in a heavily populated area of about 180,000 inhabitants and Novi Sad is the second largest city in the FRY.⁶⁴⁹ The refinery sits three kilometers north of the city center and only two kilometers upstream of bank filtration wells used for the city's water supply providing for sixty percent of Novi Sad's drinking water.⁶⁵⁰ In addition, a groundwater table is located only one to two meters beneath the surface of the oil refinery, without any protective barriers preventing the flow of contaminated groundwater into the bank filtration wells.⁶⁵¹ It is estimated that more than two-thirds of the oil tanks leaked or were seriously damaged during at least twelve NATO air strikes between April 5 and June 9.⁶⁵² Approximately 73,000 tons of crude oil and oil products were reported to have burned or leaked.⁶⁵³ Due to these fires, Novi Sad, and some surrounding districts, experienced concentrations of sulphur dioxide for a couple of hours.⁶⁵⁴ The

to cause cancer while animal studies have shown that dioxins may cause "damage to the nervous system, the immune system, the reproductive system and malformations in the unborn." *Id.*

646. Kirby, *supra* note 628.

647. BTF Report, *supra* note 620, at 35.

648. *Id.* at 43.

649. *Id.*

650. *Id.* at 44.

651. *Id.*

652. *Id.*

653. *Id.* at 47.

654. *Id.* Sulphur dioxide is a gas bearing the potential to affect lung function in humans, particularly in asthmatic individuals, while "[r]ises in levels of sulphur dioxide have been associated with increases in hospital admissions and in mortality." BTF Report, *supra* note 620, at 99.

BTF estimates that these concentrations “exceeded recommended air quality standards.”⁶⁵⁵

In addition, it also found that in the month following the air strikes, refinery waste water channels were filled with crude oil and oil products, creating potential danger of release into the Danube.⁶⁵⁶ Although the BTF concluded that there was no evidence that the air strikes resulted in significant adverse impacts on the Danube aquatic environment, it emphasized the risk of contamination for drinking water wells of the Novi Sad population.⁶⁵⁷ A WWFN team that examined the risk of contamination in drinking water wells during the month of July confirmed these findings.⁶⁵⁸ The WWFN team concluded that “it’s clear that the immediate clean-up and stopping of the current pollution coming from . . . Novi Sad [is] vital.”⁶⁵⁹ The air strikes on Novi Sad consequently resulted in considerable damage to oil refineries, leading to potentially dangerous contamination of drinking water wells for the civilian population of Novi Sad.

Lastly, the bombing of a copper mine and smelting plant outside of Bor, a town of about 40,000 inhabitants in eastern Serbia, resulted in significant threats to the environment.⁶⁶⁰ The NATO air strikes targeted these facilities on May 15 and 17.⁶⁶¹ As a result of these air strikes, a transformer station providing electricity to Bor was damaged.⁶⁶² According to the BTF report, the stations housed three transformers and 160 capacitors.⁶⁶³ Although one of the transformers was removed prior to the air strikes, the remaining two contained twenty-five tons of oil each.⁶⁶⁴ It is estimated that eighty to one hundred transformers, each containing one liter of oil, were destroyed.⁶⁶⁵

have been associated with increases in hospital admissions and in mortality.” BTF Report, *supra* note 620, at 99.

655. *Id.*

656. *Id.* at 47.

657. *Id.* at 43, 48–49.

658. *Id.*

659. Kirby, *supra* note 626.

660. BTF Report, *supra* note 620, at 48–49.

661. *Id.*

662. *Id.*

663. *Id.*

664. *Id.*

665. *Id.*

The air strikes also damaged the power plant within the copper industry.⁶⁶⁶ This damage, in tandem with the consequent reduction of electricity supply, interrupted the production of sulphuric acid and resulted in the chronic release of sulphur dioxide gas.⁶⁶⁷ This gaseous release reached such egregious levels that the BTF team, on its way to the industrial site, could “already smell sulphur dioxide several [kilometers] from the plant.”⁶⁶⁸ After only fifteen minutes at the site, the whole group started coughing.⁶⁶⁹ The BTF team estimates that “emissions could be in the order of 100,000 [tons] of sulphur dioxide per year.”⁶⁷⁰ This situation presents significant concern to Bulgaria, as Bor sits close to its border.⁶⁷¹ Environmental pollution in Bor has considerable potential to harm not only the civilian population in Yugoslavia, but also in Bulgaria.

In examining the legitimacy of the air strikes on Pancevo, Novi Sad, and Bor, NATO should have considered the extent of environmental damages and the scope of military advantages sought to be achieved through the damage or destruction of such targets.⁶⁷² Although targeting industrial complexes might have hindered Milosevic's troops, it remains incumbent upon attacking forces to determine whether the destruction of these targets might lead to excessive environmental damages and excessive harm to the civilian population. An adequate analysis prior to carrying out air strikes upon these targets might have led to the conclusion that these targets were inadequate under Protocol I.

It is undisputed that all three objectives were situated in densely populated areas: (1) the industrial complex in Pancevo is located in a town of 80,000 inhabitants, only twenty kilometers away from Belgrade, the capital and largest city in Serbia; (2) Novi Sad's refinery is only three kilometers north of Novi Sad's 180,000 inhabitants; (3) Bor's copper mine and smelting plant are just outside the residences of Bor's 40,000 inhabitants.⁶⁷³ Because these targets were chemical plants, fertilizer plants, oil refineries,

666. *Id.* at 50.

667. *Id.*

668. *Id.* at 51.

669. *Id.*

670. *Id.*

671. *Id.*

672. See Protocol I, *supra* note 3, arts. 52, 55.

673. BTF Report, *supra* note 620, at 31, 42, 49.

copper mines, and smelting plants, it is highly probable that there would be a significant release of chemicals from explosions resulting from air strikes or repeated bombardments. Additionally, such explosions would be aggravated by the flammable nature of these chemicals. The ensuing leakage of hazardous pollutants could contaminate air, soil and water, resulting in substantial danger to the closely adjoining civilian population. Such dangers should have been foreseeable by NATO forces.⁶⁷⁴ Consequently, the Alliance's election to classify industrial complexes as military objectives not only resulted in substantial environmental damage, but also appears to have constituted excessive use of force as expressly prohibited under Protocol I.

c. Bridges

In a strategic attempt to weaken Milosevic's military force, the Alliance claims to have targeted select bridges through which vital supplies for Serbian forces in Kosovo were transported.⁶⁷⁵ By May 23, 1999, NATO air strikes had destroyed all the bridges over the Danube with the exception of Belgrade.⁶⁷⁶ The

674. These consequences appear even more egregious as one remembers that Operation Allied Force constituted a humanitarian intervention. NATO's objectives encompassed weakening Milosevic's military forces in order to deter further harm to ethnic Albanians. The Kosovo situation, however, never dictated an absolute need for aerial bombardments as opposed to military ground forces. As NATO chose to target these industrial complexes, thereby potentially threatening the health and lives of a large percentage of the population, NATO sought to weaken Yugoslav military forces, an objective that conceivably could have been more properly and efficiently achieved through the use of ground troops. One might therefore view the targeting of Pancevo, Novi Sad, and Bor as a remedial measure for aerial bombardments' incompetence to achieve the results that ground troops might have been able to achieve more effectively and with less peril to the civilian population throughout the FRY.

675. Press Conference of NATO Spokesman Jamie Shea and Air Commodore David Wilby, SHAPE (Apr. 6, 1999) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review) [hereinafter Wilby Conference]; NATO Backgrounder Given by Jamie Shea in Brussels (May 11, 1999) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review) [hereinafter Shea, May 11, 1999]; Backgrounder Given by Peter Daniel in Brussels (May 1, 1999) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review) [hereinafter Daniel, May 1, 1999].

676. Press Conference Given by Mr. Jamie Shea and Major General Walter Jertz in Brussels (May 23, 1999) (transcript on file with the Loyola of Los Angeles International Law Review).

legitimacy of these targets, however, is questionable. Some of these bridges were not on major transportation routes nor did they serve other military functions.⁶⁷⁷ In fact, some served as water distributors in densely populated urban areas.⁶⁷⁸ Moreover, it is doubtful that NATO took the necessary precautionary measures in targeting the bridges. The air strikes were carried out in broad daylight resulting in severe incidents of civilian casualties, most notably the destruction of several buses and trains, as well as a group of civilians gathered for market day.⁶⁷⁹ Although select bridges clearly might have served military purposes, to allow a majority of bridges within the territory of the FRY to be targeted is likely unwarranted.

Under Protocol I, attacking forces must adequately determine whether an objective is of a military nature and take appropriate precautionary measures to ensure that civilian casualties or injuries will be minimized.⁶⁸⁰ Article 52 of Protocol I provides that attacks shall be limited strictly to military objectives.⁶⁸¹ Insofar as objects are concerned, military objectives are limited to those objects "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁶⁸² Article 57 also imposes on "[t]hose who plan or decide upon an attack" to "take all feasible precautions in the choice of means or methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damages to civilian objects."⁶⁸³ Article 57 additionally requires "[t]hose who plan or decide upon an attack" to cancel or suspend an attack "if it becomes apparent that the . . . attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination

677. *See id.*

678. *Civilian Deaths in the NATO Campaign*, *supra* note 475, at 21; *see also White Book 1*, *supra* note 596.

679. *Civilian Deaths in the NATO Campaign*, *supra* note 475, at 21.

680. *Id.*

681. Protocol I, *supra* note 3, art. 52(2).

682. *Id.*

683. *Id.* art. 57(2).

therefore, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁶⁸⁴

According to NATO spokesmen, bridges were carefully selected targets based on their services as major lines of communication and supply routes.⁶⁸⁵ A closer examination of these targets, however, brings such conclusions into doubt. Attacks on seven bridges within the FRY were undertaken on road bridges, mostly urban or town bridges, which were not major routes of communication.⁶⁸⁶ Moreover, one such targeted bridge contained a drinking pipe, the destruction of which disrupted water supplies in several parts of a major city.⁶⁸⁷ Undertaking air strikes on targets located beyond main roads and serving mostly local citizens renders their legitimacy questionable. United States military sources have, in fact, declared “that bridges were often selected for attack for reasons other than their role in transportation” but were selected for their role as “conduits for communications cables, or because they were symbolic and psychologically lucrative”⁶⁸⁸

According to NATO Generals, “[j]ust focusing on fielded forces is not enough The people have to get to the point that their lights are turned off, their bridges are blocked so they can’t get to work.”⁶⁸⁹ Targeting bridges that have a purely psychological importance or do not serve the transport of military supplies fails to satisfy the standards of Protocol I.⁶⁹⁰ Article 52 requires that targets be limited to those that make an effective contribution to military action and whose destruction offers a definite military advantage.⁶⁹¹ It is therefore doubtful that the targeting of bridges serving mostly local citizens and bearing great psychological significance for the civilian population would constitute a legitimate military object. Moreover, such attacks

684. *Id.*

685. Wilby Conference, *supra* note 677; Shea, May 11, 1999, *supra* note 677; Daniel, May 1, 1999, *supra* note 677.

686. See Human Rights Watch, *supra* note 395, at 21.

687. *White Book 1*, *supra* note 598; ICRC News 99/25, *supra* note 596.

688. Human Rights Watch, *supra* note 395, at 21.

689. Robert Hayden, *Humanitarian Hypocrisy*, JURIST (1999), at <http://jurist.law.pitt.edu/hayden.htm> (last visited Nov. 13, 2000).

690. *Id.*

691. Protocol I, *supra* note 3, art. 52(2).

seem excessive in light of the military advantage anticipated by these bridges' destruction.

NATO did not appear to have taken all necessary precautions to prevent excessive harm to the civilian population. Most of the attacks on bridges were undertaken during daylight hours when civilians would be prone to travel upon such bridges.⁶⁹² In one particular incident, a mid-day attack on a bridge in the town of Varvarin on May 30, 1999, resulted in the deaths of nine civilians, while forty others were wounded.⁶⁹³ The attack was undertaken at one o'clock in the afternoon on market day, where a crowd had amassed for the town's market.⁶⁹⁴ Although NATO spokesman Jamie Shea announced that NATO "bombed a legitimate designated military target[.]" according to Lieutenant General Michael Short, subsequent to the incident, the air pilots were ordered not to attack bridges during daylight hours, on weekends, on market days, or on holidays.⁶⁹⁵

Other daylight attacks on bridges resulted in the deaths of numerous civilians traveling in public transportation vehicles.⁶⁹⁶ In one particular incident, a bomb designated for a railway bridge struck a passenger train traveling upon the bridge when the bomb hit its target.⁶⁹⁷ Two carriages were completely destroyed, while other carriages were heavily damaged.⁶⁹⁸ The attack was undertaken around noon, on April 12, and resulted in the deaths of twenty civilians.⁶⁹⁹ In another particular incident, a bomb

692. Human Rights Watch, *supra* note 395, at 21; see also *White Book 1*, *supra* note 598; *White Book 2*, *supra* note 598.

693. Human Rights Watch, *supra* note 395, app. A (discussing incidents of civilian deaths in Operation Allied Force).

694. *Id.*

695. *Id.*

696. These include: the "old bridge" over the Zapadna Morava river in the center of Trstenik (3:15 p.m.), killing two civilians and wounding fifteen; the "12 February" bridge over the Nisava river in downtown Nis (4 p.m.), killing two civilians; the Cekavicki bridge over the Jablanica river near Pertate (1:25 p.m.), killing two civilians, wounding one; the Varvarin bridge over the Velika Morava (1 p.m.), killing nine civilians and wounding forty; the bridge in the Grdelica gorge (11:40 a.m.), killing twenty civilians; the bridge near the village of Luzane (1:40 p.m.), killing thirty-nine civilians, wounding thirteen. Human Rights Watch, *supra* note 395, app. A; *White Book 1*, *supra* note 598; *White Book 2*, *supra* note 598.

697. This incident occurred at the bridge over the Grdelica Klisura gorge. Human Rights Watch, *supra* note 395, at 34.

698. *Id.*

699. *Id.*

designated for a bridge landed on a bus, full of passengers.⁷⁰⁰ The attack was undertaken at 1:40 p.m., on May 1, and resulted in the deaths of thirty-nine civilians, while thirteen others sustained severe injuries.⁷⁰¹

Even if these bridges had constituted legitimate military targets, it is doubtful that adequate precautionary measures were undertaken to prevent excessive civilian casualties, particularly in light of NATO's concession that it needed to change its tactics subsequent to the Varvarin incident. It is indisputable that more civilians travel during daylight hours than at one or two in the morning. Moreover, these incidents occurred when military forces were not traveling upon the bridges at the time of the attacks. Therefore, one might conclude that undertaking such air strikes during daylight hours effectively bore no strategic military purpose.⁷⁰² Thus, it appears that NATO failed to take all adequate precautions to prevent excessive civilian casualties and injuries in accordance with Article 57 when it chose to conduct air strikes in broad daylight.

In examining all these targets, the Alliance's strategy appears to resemble a psychological warfare of attrition. Although it is certain that the destruction of some bridges served tangible military purposes, it is also certain that the destruction of a large percentage of such bridges resulted solely in civilian damage, while inflicting little harm to Serbian military forces. It is the responsibility of attacking forces to adequately gauge the efficiency of air strikes and to properly determine the most effective course of action. In the case of Operation Allied Force, the Alliance seems to have fallen short of this standard.

V. CONCLUSION

Operation Allied Force in Kosovo raised two main principles of law: whether the intervention was per se legitimate and whether the degree of force utilized by NATO forces was legitimate. As the discussion above points out, it is gravely doubtful that the events surrounding Operation Allied Force support the conclusion

700. The incident occurred at the bridge near the village of Luzani. Human Rights Watch, *supra* note 395, at 43; *White Book 2*, *supra* note 598.

701. Human Rights Watch, *supra* note 395, at 43.

702. See *id.* app. A.

that NATO emerged from this conflict as a modern model for future methods of warfare. The intervention was undertaken without Security Council sanction at a time when the Security Council exhibited a noticeable ability for concerted action. It was also undertaken with considerable disregard for extended and alternative diplomatic avenues. But most disturbing of all, Operation Allied Force exhibited methods of warfare of devastating consequences to the civilian population, causing immediate damage to the civilian population as well as lasting deleterious consequences for future generations within the territory of the FRY.

It remains highly questionable whether the destruction of allegedly quasi-military targets hundreds of miles from Kosovo, bearing considerable nefarious consequences for civilians, and in some cases causing the deaths of numerous civilians, directly bore a relation to the welfare of ethnic Albanians in Kosovo. Equally troubling is whether the Alliance's goals centered on ameliorating the prevalent conditions within Kosovo—"genocide" prevention—or whether the goals were to cause devastating damages to the Serb population as an "entity," thereby negating once and for all the possibility of any future Serb insurgencies. This latter objective is well beyond the immediate needs of humanitarian interventions and the confines of Protocol I.

Whatever NATO's motives or objectives, Kosovo remains an unsettled region of the Balkans, a ticking time bomb of unsettled hate. Weapons are routinely seized by American troops from Albanian guerrillas, while Serbs and Albanians remain sequestered to their respective cities or towns, unable or unwilling to travel, fearing the possibility of brutal reprisal by either party. So the question remains: what has NATO accomplished? Conditions within Serbia will improve. Kosovo, however, will remain a warring and dangerous province requiring the strict and continuous surveillance of peacekeeping forces. As one looks back at the highly developed methods of warfare exhibited during Operation Allied Force, one can only hope that the self-proclaimed "humanitarian intervention" in the Kosovo conflict will not serve as the model for future internal conflicts in some Western state.