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Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals

George K. Walker

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PRINCIPLES FOR COLLECTIVE HUMANITARIAN INTERVENTION TO SUCCOR OTHER COUNTRIES' IMPERILED INDIGENOUS NATIONALS

GEORGE K. WALKER*

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NATO's 1999 Operation Allied Force, organized to succor Albanian Kosovars and others (e.g., Roma) indigenous to the Kosovo province of the former Yugoslavia¹ ("SFRY") subjected to brutal actions—including murder, rape and displacement from their homes by Serbian forces under SFRY President Slobodan Milosevic's direction—was a legitimate collective action for humanitarian intervention pursuant to principles of state of necessity under circumstances known at the time.² The law of international armed

1. See Ian Fisher, *Serbia and Montenegro Sign a Plan for Yugoslavia's Demise*, N.Y. TIMES, Mar. 15, 2002, at A3 (writing that there would be no "Yugoslavia" in the future if Serbia and Montenegro, the remnants of pre-1991 Yugoslavia, approved a March 14, 2002 agreement that declared that the area of the former Yugoslavia would be known as "Serbia and Montenegro"); see also Ian Fisher, *Yugoslavia: Restructuring Plan Advances*, N.Y. TIMES, Apr. 10, 2002, at A14 (reporting that the Parliaments of Serbia and Montenegro formally approved the agreement).

2. What NATO knew, or reasonably should have known at the time of the decision to launch Allied Force, is important. See *infra* notes 114-134 and accompanying text (explaining that to be found liable for violating the rules of warfare, a decision-maker is judged on what he or she knew or should have known at the time the decision to attack was made); see also Ian Fisher & Marlise Simons, *Defiant, Milosevic Begins His Defense by Assailing NATO*, N.Y. TIMES, Feb. 15, 2002, at A1 (writing that Milosevic raised the issue of the NATO campaign's lawfulness in his opening statement in his genocide and war crimes trial in The Hague); *Milosevic, at U.N. Court, Trades Atrocity Charges with Kosovar*, N.Y. TIMES, May 7, 2002, at A5 (reporting that Milosevic accused Kosovo Albanians of committing genocide against Serbians in the province, a claim Ibrahim Rugova, the Kosovo leader, denied). Milosevic's claims may be predicates for *tu quoque* ("you also") defenses. In this case, Milosevic's defense would be that because NATO's Allied Force campaign was unlawful, he cannot be held criminally liable for humanitarian law and genocide charges against him, or that because Albanian Kosovars committed atrocities, he cannot be held criminally liable for these charges. If this is Milosevic's theory, it is unavailing as a complete defense like some defenses, e.g., not guilty by reason of insanity, might be. *Tu quoque*, like a superior orders defense, may go to mitigation of sentence or a finding of no punishment; it is not a complete defense to liability for war crimes or genocide. *Tu quoque* only applies when the offense charged and the other side's actions are the same or similar. Thus, unless Milosevic proves NATO committed genocide, he cannot rely on *tu quoque* as to those charges against him; recent cases suggest the defense might not be available even under those circumstances. See 58 W.T. MALLISON, JR., *STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARS* 88 (Naval War C. Int'l L. Stud. 1968); see also Horace B. Robertson, Jr., *Submarine Warfare*, JAG J. 3, 8 (1956) (commenting on

conflict ("LOAC") applied to NATO operations against the SFRY, and to SFRY responses to NATO during Allied Force. The law of non-international armed conflict applied to operations involving Yugoslav forces and the Kosovo Liberation Army ("KLA").

This Article analyzes the state of necessity doctrine, discussing the current theory in Part I. Part II offers conditioning factors to elaborate on International Law Commission ("ILC") *State*

Admiral Karl Doenitz's sentence in *United States v. Goering*; *United States v. Goering*, 1 Trials of Major War Crims. Before Int'l Mil. Trib. at Nuremberg 171, 310, 313 (1946) [hereinafter *Goering*, 1 I.M.T.] (finding Karl Doenitz not guilty on the indictment's Count I (common plan, conspiracy) but guilty on Counts II (crimes against peace) and III (war crimes), the latter including all war crimes of which he was charged). In *Goering*, the International Military Tribunal ("Tribunal") considered as a mitigating factor the treatment of Allied prisoners of war under Goering's jurisdiction in accordance with the Convention Relative to Treatment of Prisoners of War. *See id.* at 311-15; *see also id.*, Appendix A: Statement of Individual Responsibility for Crimes Set Out in Counts One, Two, Three, and Four 68, 78-79; Convention Relative to Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343. *Contra* H.A. SMITH, THE LAW AND CUSTOM OF THE SEA 212-13 (3d ed. 1959) ("[A] war crime ceases to be punishable if the defense can prove that similar action was taken on the victorious side."). If *tu quoque* had been a complete defense in *Goering*, the Tribunal would have so ruled, as it did on charges of attacks on armed merchantmen, which under the law of naval warfare then and now, were not immune from attack under the circumstances. *See Goering*, 1 I.M.T. at 312; *see also* In re Von Weizsaecker ("The Ministries Case"), 14 Trials of War Crims. Before the Nuremberg Mil. Tribunals Under Control Council L. No. 10, at 314, 322-23 (1949) (holding that *tu quoque* was not a complete defense). *But see* Prosecutor v. Kupre'ski'c (Int'l Crim. Trib. Yugo. App. Chamber 2001), *reprinted in part*, 41 I.L.M. 313, 322 (2002) (refraining from expressing a view on the disputed point of whether the accused individuals raised the *tu quoque* defense, because it had no bearing on their convictions and therefore was an inappropriate ground for appeal). *See generally* Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases*, 3 J. APP. PRAC. & PROC. 589, 624 (2001); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 250 (2000); *see also* Daryl A. Mundis, *Introductory Note to ICTY Appeals Chamber: Prosecutor v. Kupre'ski'c*, 41 I.L.M. 310 (2002). The fact that a crime victim has been engaged in criminal activity is no defense in municipal common law systems. *See, e.g.*, WAYNE R. LAFAYE, CRIMINAL LAW § 5.11(b) (3d ed. 2000); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW ch. 9 § 4 (3d ed. 1982); 1 WHARTON'S CRIMINAL LAW § 76 (Charles E. Torcia ed., 15th ed. 1993). This article takes the position that Allied Force was a lawful operation under state of necessity principles; therefore, *tu quoque* is not to be a defense for acquittal or to be used for mitigation.

Responsibility principles for state of necessity³ in the context of collective humanitarian intervention⁴ to succor indigenous nationals that are not of the same nationality as states acting collectively to rescue them. Humanitarian intervention for this analysis is defined as the threat or use of force by a state, group of states, or international organization primarily for protecting nationals of the affected state from widespread deprivations of human rights or rights under humanitarian law.⁵

3. See *Report of the International Law Commission, Fifty-Third Session (23 Apr.-1 June and 2 July – 10 Aug. 2001) to the General Assembly*, U.N. GAOR Supp. (No. 10) at 194-206, U.N. Doc. A/56/10 & Corr. 1 (2001) [hereinafter 2001 ILC Report] (appearing now before the General Assembly as Agenda Item 162, to be debated in the Assembly's 59th session, i.e. in 2004, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (2002); see also *Report of the International Law Commission to the General Assembly, State Responsibility*, U.N. GAOR Supp. (No. 10), U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. INT'L L. COMM'N 26, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (1981) [hereinafter *State Responsibility*]; *Report of International Law Commission to the General Assembly*, U.N. GAOR Supp. (No. 10), U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (1998). Compare Jean Raby, *The State of Necessity and the Use of Force to Protect Nationals*, [1988] 26 CAN. Y.B. INT'L L. 253-54 (1989) (arguing that state of necessity doctrine, not self-defense, should be the basis for humanitarian intervention, whether an intervening state's nationals or other persons are involved) with 2001 ILC Report, *supra*, at 205 ("The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the [U.N.] Charter . . . may be lawful under modern international law is not covered by Article 25," which states the most current version of the ILC necessity principles). This Article advocates the view that these principles, even if so limited by the ILC, may be cited as guides for humanitarian intervention. See 2001 ILC Report, *supra*, art. 41, at 277-82, 286-92 (supporting application of ILC principles in collective humanitarian intervention situations); see also *infra* notes 135-142 and accompanying text (analyzing collective humanitarian intervention situations). Using the principles is appropriate also because, among other authorities, the International Court of Justice ("ICJ") cited them in contexts different from those discussed in *State Responsibility*, for the proposition that the 1980 version represented custom. As such, the principles became a primary source of international law. See *infra* notes 6-38, 461-463 and accompanying text (discussing principles of international law).

4. See Anne Ryniker, *The ICRC's Position on "Humanitarian Intervention"*, 2001 Int'l Rev. Red Cross 482 (writing that the International Committee of the Red Cross ("ICRC") views the phrase "humanitarian intervention" as a contradiction in terms). Because the term has become common in usage, this Article employs it.

5. Cf. SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 11, 13 (1996) (suggesting that

Part III comments on two issues arising during the NATO campaign: lawfulness of ship interdiction against the SFRY and the status of prisoners of war ("PW's") in the context of state of necessity. This analysis considers these narrow issues and does not discuss other problems associated with intervention, *e.g.*, unilateral or collective intervention with an affected state's consent; unilateral intervention to rescue a state's own endangered nationals, nationals of other states, or indigenous peoples; or collective intervention under circumstances other than that presented in the NATO Kosovo campaign, *i.e.*, collective humanitarian intervention to rescue indigenous peoples when the affected state does not consent to the collective action.

I. STATE OF NECESSITY

What is state of necessity? In 2001 the ILC, a U.N. General Assembly agency of representative leading international lawyers,⁶ adopted Article 25 of its *State Responsibility* principles in its Report

intervention should be carried out by organizations other than NATO, an alliance organized pursuant to the U.N. Charter Article 51 inherent right of collective and individual self-defense by states); *see also infra* notes 135-150 and accompanying text (analyzing the right of self-defense and other aspects of collective decisionmaking). My definition substitutes "affected state," a less pejorative term, for Murphy's "target state," the country against whom humanitarian intervention is projected or mounted. *See* MURPHY, *supra*, at 11-12 (limiting the definition of target state to human rights deprivations). I expand it to include violations of humanitarian law, rules governing international or noninternational armed conflicts. *See also* NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* xiv (1985).

6. The General Assembly elects ILC members from government nominees. *See generally* HERBERT W. BRIGGS, *THE INTERNATIONAL LAW COMMISSION* (1965); SIR IAN SINCLAIR, *THE INTERNATIONAL LAW COMMISSION* (1987); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 30 (5th ed. 1998); 1 OPPENHEIM'S *INTERNATIONAL LAW* § 30 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 66-69, 71-72 (1991); 1 SIR ARTHUR WATTS, *THE INTERNATIONAL LAW COMMISSION, 1949-1998* 1-20 (1999); Herbert W. Briggs, *Reflections on the Codification of International Law by the International Law Commission and by Other Agencies*, 126 R.C.A.D.I. 233 (1969); R.Y. Jennings, *The Progressive Development of International Law and Its Codification*, 24 BRIT. Y.B. INT'L L. 301, 310-29 (1947); Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16 (1955); Shabtai Rosenne, *The International Law Commission, 1949-59*, 36 BRIT. Y.B. INT'L L. 104 (1961).

of the International Law Commission to the General Assembly, replacing a similar Article 33 in the 1980 draft. Article 25 reads:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.⁷

Article 21 of the *State Responsibility* principles state that “wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the [U.N.] Charter.”⁸ Article 26 declares that “[n]othing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”⁹

7. 2001 ILC Report, *supra* note 3, art. 25, at 194.

8. *Id.* art. 21, at 177.

9. 2001 ILC Report, *supra* note 3, art. 26, at 206. Compare *id.* at 177-83, 194-209 with *State Responsibility*, *supra* note 3, arts. 33-34, Commentary, at 34, 52. Self-defense is a norm of general international law. See U.N. CHARTER art. 51; see also LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 342-53 (3d ed. 1969); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 661-78 (Bruno Simma ed., 1995) [hereinafter SIMMA]; Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94, 100-01 (June 27) [hereinafter Nicaragua Case] (holding a customary norm for U.N. Charter Article 2(4) existed alongside the Charter rule, and that this norm approached *jus cogens* status); GOODRICH, ET AL., *supra*, at 43-55; SIMMA, *supra*, at 111-18; 74 GEORGE K. WALKER, THE TANKER WAR, 1980-88: LAW AND POLICY 111-20 (Naval War

Article 25(1)(a)'s allowance of a state action if it is the only way for a state to "safeguard an essential interest against a grave and imminent peril" is reminiscent of the principle of anticipatory self-

C. Int'l L. Stud. 2000) [hereinafter THE TANKER WAR]. Similarly, might customary or *jus cogens* principles also apply in self-defense situations? Cf. Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767, 823-27 (1997). See *State Responsibility*, *supra* note 3, art. 34, Commentary, at 52, 54 (arguing for *jus cogens* status for the inherent right of self-defense; stating that a parallel right may exist alongside the U.N. Charter Article 51 right of self-defense); see also *id.*, art. 34 (declaring that wrongfulness of a state's act is "precluded" if in self-defense; i.e., other countries cannot claim a right to act under state of necessity under that circumstance); 2001 ILC Report, *supra* note 3, at 177-83. If a state acts inconsistent with custom or a treaty but in accordance with self-defense, the result is that Article 103 of the U.N. Charter would trump the treaty but, by the explicit terms of Article 103, could not trump custom. See U.N. CHARTER art. 103. Unless Article 103 also represents a customary norm, the result is that the only way self-defense under customary law could trump another customary norm is either to say that the customary right of self-defense outweighs whatever customary norm that has been violated (with similar analysis for the treaty norm that has been violated) under the usual balancing process for sources of international law, or that the customary law of self-defense is a *jus cogens* or peremptory norm, trumping contrary treaties and custom. See *id.* *Jus cogens*, i.e., a peremptory norm that trumps inconsistent treaty, customary and general principles rules, is a vague doctrine whose contours are less than certain; it is not cited in traditional international law sources. See, e.g., Statute of the International Court of Justice, arts. 38, 59 [hereinafter I.C.J. Statute]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102-03 (1987) [hereinafter RESTATEMENT (THIRD)]. See generally Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331, 345, 347 [hereinafter Vienna Convention]; BROWNLIE, *supra* note 6, at 4, 19, 514-17; T.O. ELIAS, THE MODERN LAW OF TREATIES 177-87 (1974); 2001 ILC Report, *supra* note 6, at 279, 281-84; OPPENHEIM, *supra* note 6, §§ 2, 642, 653; RESTATEMENT (THIRD), *supra* §§ 102 r.n.6, 323 cmt. b, 331(2), 338(2); SIMMA, *supra*, at 1118-19; IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 17-18, 85-87, 94-95, 160, 184-85, 218-26, 246 (2d ed. 1984) (stating that the Vienna Convention is progressive development); GRIGORII I. TUNKIN, THEORY OF INTERNATIONAL LAW 98 (William E. Butler trans., 1974); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 R.C.A.D.I. 219, 262-63 (1981); John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENV. J. INT'L L. & POL'Y 9, 25-29 (1977); Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 1, 64-69 (1978); George K. Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 TRANSNAT'L LAW. 1, 60, 63 (1993) [hereinafter Walker, *Integration*]; A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995). For U.N. CHARTER art. 103 analysis, see GOODRICH, ET AL., *supra*, at 614-17. See also SIMMA, *supra*, at 1116-25; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993).

defense admitting of no other alternative.¹⁰ In 1980, the Commission had declined to give an opinion on whether state of necessity is a

10. See 2001 ILC Report, *supra* note 3, art. 25, ¶ 1(a), at 194; see also *id.*, at 196 (citing the *Caroline* case as “though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it now has.”). In 1980, the ILC had cited the *Caroline* case in *State Responsibility*, *supra* note 3, at 44-45, but had declined to comment on the issue. Today, many but not all states and commentators say anticipatory self-defense is lawful in the U.N. Charter (“Charter”) era. With general availability of short to long range missiles, and a possibility of information warfare through computer systems, existence of anticipatory self-defense as a continuing principle of law seems in the ascendancy. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 245 [hereinafter *Nuclear Weapons*]; see also *Nicaragua Case*, *supra* note 9, at 94; *id.* at 347 (Schwebel, J., dissenting); STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 296 (1996); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-93 (1958); OPPENHEIM, *supra* note 6, § 127; 49 HANS Kelsen, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 27 (Naval War C. Int’l L. Stud. 1957); TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 122-24, 238-39, 253-84, 302 (1996); MYRES S. MCDUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-41 (1961); SCHACHTER, *supra* note 6, at 152-55; WALTER GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE 33-48 (1999) (suggesting that the real debate is the scope of anticipatory self-defense right and that use of force responses must be proportional); JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES 3 (1974); ANN VAN WYNEN THOMAS & A.J. THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 127 (1972); Richard W. Aldrich, *How Do You Know You Are At War in the Information Age?*, 223, 231, 248 (2000); Louis Rene Beres, *After the Scud Attacks: Israel, “Palestine,” and Anticipatory Self-Defense*, 6 EMORY INT’L L. REV. 71, 75-77 (1992); George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 NAVAL WAR C. REV. 69-70 (May-June 1986); James H. Doyle, Jr., *Computer Networks, Proportionality, and Military Operations*, in 76 COMPUTER NETWORK AND INTERNATIONAL LAW 147, 151-54 (Michael N. Schmitt & Brian T. O’Donnell eds., Naval War C. Int’l L. Stud. 2002); Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U.J.L. & POL’Y 51, 68 (2001); Christopher J. Greenwood, Remarks, *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 82 PROC. AM. SOC’Y INT’L L. 158, 160-61 (1988); David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1991 DUKE J. COMP. & INT’L L. 57, 65-84, 122; A.V. Lowe, *The Commander’s Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in 64 THE LAW OF NAVAL OPERATIONS 109, 127-30 (Horace B. Robertson, Jr. ed., Naval War C. Int’l L. Stud. 1991); James McHugh, *Forcible Self-Help in International Law*, 25 NAVAL WAR C. REV. 61 (No. 2, 1972); Rein Mullerson & David J. Scheffer, *Legal Regulation of the Use of Force*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR

ERA 93, 109-14 (Lori Fisler Damrosch et al. ed., 1995); John F. Murphy, *Commentary on Intervention to Combat Terrorism and Drug Trafficking*, in LORI FISLER DAMROSCH & DAVID J. SCHEFFER, *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 241 (1991) [hereinafter *LAW AND FORCE*]; W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in *LAW AND FORCE*, *supra*, at 25, 45; Horace B. Robertson, Jr., *Self-Defense Against Computer Network Attack under International Law*, in Schmitt & O'Donnell, *supra*, at 121, 140; Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1071, 1080-83 (1998); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 95 (1989); Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, in 67 LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 43, 62-80 (Alberto R. Coll et al. eds., Naval War C. Int'l L. Stud. 1995); Claude Humphrey Meredith Waldo, *The Regulation of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 496-99 (1952) (stating that anticipatory self-defense is permissible, as long as principles of necessity, proportionality are observed); George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1122-24 (2000); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 566 (1999). But see IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 257-61, 275-78, 366-67 (1963); ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 32 (1995); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 159-85 (3d ed. 2001); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 121-22 (1995); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 166-67 (1948); D.P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 83, 171 (1979); 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* § 52aa, at 156 (Hersch Lauterpacht ed., 7th ed. 1952); AHMED M. RIFAAT, *INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT: ITS DEVELOPMENT AND DEFINITION IN INTERNATIONAL LAW* 126 (1979); RONZITTI, *supra* note 5, at 4; SIMMA, *supra* note 9, at 675-76; Tom Farer, *Law and War*, in 3 CYRIL E. BLACK & RICHARD A. FALK, *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 30, 36-37 (1971); Yuri M. Kolosov, *Limiting the Use of Force: Self-Defense, Terrorism, and Drug Trafficking*, in *LAW AND FORCE*, *supra*, at 232, 234; Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947); Rainer Lagoni, *Remarks*, in Panel, *supra*, at 161, 162; Jules Lobel, *The Use of Force to Terrorist Attacks*, 24 YALE J. INT'L L. 537, 541 (1999); Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29-30 (1951); Robert W. Tucker, *Reprisals and Self-Defense*, 66 AM. J. INT'L L. 586 (1972) (asserting that states may respond only after being attacked). See MURPHY, *supra* note 5, at 74-75 (recognizing the issue of self-defense but failing to take a position, except to say that an expansive view of self-defense to include humanitarian intervention to rectify threats to global stability and expectations might "eviscerate virtually all normative restraints on the use of force."). The former USSR generally subscribed to the restrictive view. See Kolosov, *supra*, at 234; see also Mullerson & Scheffer, *supra*, at 107. Other states hold similar views. U.S. and Israeli policy is that states

defense to a claim of a violation of a state's territorial integrity under Article 2(4) of the U.N. Charter ("Charter").¹¹ Article 26, paralleling 1980 Article 33(2)(a), recites the *jus cogens* trumping principle.¹² Article 25(2)(a) replaces Article 33(2)(b), which would have given primacy to treaty obligations negating a state of necessity claim, by declaring that necessity may not be cited if the "international obligation in question excludes the possibility of invoking necessity," equally a departure from traditional analysis equating principles with treaty obligations.¹³ Article 25(2)(b), following 1980

may respond in anticipatory self-defense, subject to necessity and proportionality principles, and admitting of no other alternative. See 73 A.R. THOMAS & JAMES C. DUNCAN, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS xxxvii-xxxviii, ¶¶ 4.3.2-4.3.2.1 (Naval War C. Int'l L. Stud. 1999) [hereinafter NWP 1-14M ANNOTATED]; see also Beres, *supra*, at 76-77. Other states hold similar views. See Nicaragua Case, *supra*, at 103 (declining to address the issue); see also Nuclear Weapons, 1996 I.C.J. at 266 (citing Article 51 of the U.N. Charter as a requisite element to the threat or use of nuclear weapons; failing to decide "whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence," where a State's very survival is at stake); Legality of Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66, 84 (declining to rule on a World Health Organization advisory opinion request on the same subject). Judge Schwebel, dissenting in Nuclear Weapons, wrote: "[F]ar from justifying the Court's inconclusiveness, contemporary events rather demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances," and citing inter alia a 1990-91 Gulf War situation). See Nuclear Weapons, 1996 I.C.J. 311, 323. For case analysis and government reactions, see VED P. NANDA & DAVID KRIEGER, NUCLEAR WEAPONS AND THE WORLD COURT chs. 6-8 (1998); see also Symposium, *Nuclear Weapons, the World Court, and Global Security*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 313 (1997); Charles J. Dunlap, Jr., *Taming Shiva: Applying International Law to Nuclear Operations*, 42 A.F.L. REV. 157, 159-64 (1997) (discussing U.S. views); Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417 (1997).

11. In 1980, the Commission stated that this was within other U.N. organs' competence. See *State Responsibility*, *supra* note 3, at 44-45. In 2001, the ILC omitted this provision but said in Article 59 that the *State Responsibility* articles are without prejudice to Charter obligations. See 2001 ILC Report, *supra* note 3, art. 59, at 365; see also *supra* note 9 and accompanying text (explaining self-defense in customary international law).

12. See Raby, *supra* note 3, at 268 (stating that the Article 33(2)(a) *jus cogens* exception "is not applicable to force used to protect nationals"); see also *supra* note 9 and accompanying text (discussing *jus cogens* principles).

13. Compare 2001 ILC Report, *supra* note 3, at 194, with *State Responsibility*, *supra* note 3, at 34. See I.C.J. Statute, art. 38(1) (listing general principles as a

Article 33(2)(c), is reminiscent of Vienna Convention on the Law of Treaties limitations on impossibility of performance or fundamental change of circumstances.¹⁴ A state causing a treaty breach cannot assert these claims.¹⁵

As of 2002, there had been one state of necessity claim during the Charter era in the U.N. Security Council.¹⁶ According to the 1980 ILC Report, Belgium invoked it in 1960 when it sent paratroops to the Congo:

[T]o protect the lives of Belgian nationals and other Europeans who, it claimed, were being held as hostages by army mutineers and by the Congolese insurgents. . . [Belgium told the Council it] had been forced

coequal source of law). Some commentators agree. *See, e.g.,* BROWNLIE, *supra* note 6, at 1-25; *see also* OPPENHEIM, *supra* note 6, §§ 9-14; U.S. DEPARTMENT OF THE AIR FORCE, AIR FORCE PAMPHLET (AFP 110-31), INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS ¶ 1-3.a (1976) [hereinafter AFP 110-31]. Others treat general principles as gap-fillers or do not seem to recognize them as a primary source. *See, e.g.,* RESTATEMENT (THIRD), *supra* note 9, § 102(4); GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 20-21 (6th ed. 1992); SCHACHTER, *supra* note 6, at 50-55; *cf.* NWP 1-14M ANNOTATED, *supra* note 10, at xxxvii-xxxviii, ¶¶ 5.4-5.4.2 (recognizing custom and treaties); Raby, *supra* note 3, at 268.

14. *See* Vienna Convention, *supra* note 9, arts. 61, 62 (stating limited grounds under which a party may invoke an impossibility of performance principle or fundamental change of circumstances principle).

15. Fundamental change under the Convention is different from the older *rebus sic stantibus* doctrine, which the Vienna Convention would supersede. *Compare* 2001 ILC Report, *supra* note 3, art. 25(2)(b), at 194, 205, and *State Responsibility*, *supra* note 3, art. 33(b)(3), at 34, with Vienna Convention, *supra* note 9, arts. 61-62, at 346-47; *see also* Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 39 (finding that Articles 61 and 62 are customary norms); Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 18 (holding that Article 62 is a customary norm); BROWNLIE, *supra* note 6, at 623-26; ARIE E. DAVID, THE STRATEGY OF TREATY TERMINATION ch. 1 (1975); ELIAS, *supra* note 9, at 119-30; OPPENHEIM, *supra* note 6, §§ 650-51; *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in [1966(2)] Y.B. INT'L L. COMM'N 169, 255-58 [hereinafter *ILC Rep.*]; RESTATEMENT (THIRD), *supra* note 9, § 336; SINCLAIR, *supra* note 9, at 190-96; Gyorgy Haraszti, *Treaties and the Fundamental Change of Circumstances*, 146 R.C.A.D.I. 1 (1975); Oliver J. Lissitzyn, *Treaties and Changed Circumstances*, 61 AM. J. INT'L L. 895 (1967); Walker, *Integration*, *supra* note 9, at 65-68; LORD MCNAIR, THE LAW OF TREATIES 685 (1961) (not recognizing a separate impossibility doctrine; but some of his examples are impossibility situations and might be cited as such).

16. *See* 2001 ILC Report, *supra* note 3, at 205 n.433 (citing the Belgian claim of necessity with respect to its military intervention in the Congo in 1960).

“by necessity” to send troops to the Congo, and that the action undertaken had been “purely humanitarian,” had been limited in scope by its objective, and had been conceived as a purely temporary action, pending an official intervention by the United Nations.¹⁷

The Congo claimed the intervention was a pretext to detach Katanga Province from the Congo and was an act of aggression. The Council was divided on the issue, but the 1980 Report states:

No one took any position of principle with regard to the possible validity of a “state of necessity” as a circumstance, which, if the conditions for its existence were fulfilled, could preclude the wrongfulness of an act not in conformity with an international obligation. Hence all that can be said is that there was no denial of the principle of a plea of necessity as such.¹⁸

In 1980, the ILC found that in other interventions the affected state had consented to intervention or that an intervening state had claimed self-defense in extracting its own nationals. The 2001 ILC Report says Belgium’s claim relating to its 1960 Congo operations was an example of citation of state of necessity in a situation involving military force.¹⁹

17. *State Responsibility*, *supra* note 3.

18. *Id.*

19. See 2001 ILC Report, *supra* note 3, at 205 n.433; see also *State Responsibility*, *supra* note 3, at 45; ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 115 (1993); RONZITTI, *supra* note 5, at 30-32; Donald W. McNemar, *The Postindependence War in the Congo*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 244, 253 (Richard A. Falk, ed., 1971); Thomas C. Wingfield, 104 *DICK. L. REV.* 439, 448 (2000); Michael Akehurst, *Humanitarian Intervention*, in *INTERVENTION IN WORLD POLITICS* 95, 99 (Hedley Bull ed., 1984) (withholding discussion of the necessity argument); Raby, *supra* note 3, at 269 (believing that “the term ‘necessity’ was used more in its ordinary meaning than as a legal concept.”). The Netherlands said that the 1976 Israeli Entebbe, Uganda raid to rescue its own nationals was “a state of emergency” but did not explain further. See *id.* at 270; see also Major Steven F. Day, *Legal Considerations in Noncombatant Evacuation Operations*, 40 *NAVAL L. REV.* 45, 49-50 (1992); Wingfield, *supra*, at 452. The 1964 Congo intervention is an example of an affected state’s consent to another state’s acting to rescue its and other states’ nationals. See generally AREND & BECK, *supra*, at 116; MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 242-43 (1980); MURPHY, *supra* note 5, at 92-94; Akehurst, *supra*, at 100; Thomas E. Behuniak, *The Law of Unilateral Intervention by Armed Force: A Legal Survey*, 79 *MIL. L. REV.* 157,

Cases support the state of necessity principle, including a recent International Court of Justice ("ICJ") decision.²⁰ Not all commentators agree that a state of necessity principle exists, however.²¹ Nevertheless, the ILC collective imprimatur and recent decisions, including the ICJ *Project* case, strongly suggest that state of necessity exists as a general principle of law²² or as custom.²³

171 (1978); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 341 (1967); McNemar, *supra*, at 256, 267, 273. Some commentators believe that intervention helped the Congo government capture the rebel capital. See, e.g., Richard A. Falk, *Introduction*, in THE INTERNATIONAL LAW OF CIVIL WAR, *supra*, at 1, 26.

20. See Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 40-44 (recognizing state of necessity as customary law); see also Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 35; M/V Saiga (St. Vincent v. Guinea), 38 I.L.M. 1323, 1351-52 (Int'l Trib. L. Sea 1999) (invoking necessity doctrine as customary international law); Russian Indem. (Russ. v. Turk.), Hague Ct. Rep. (Scott) 297 (Perm. Ct. Arb. 1912); Forests of Central Rhodope (Greece v. Bulg.), 3 R.I.A.A. 1405 (Arb.), *modified by Parties' Statements Before League of Nations Council*, 15 LEAGUE OF NATIONS O.J. 11 (Part I), at 1432 (1934); French Co. of Venez. R.R. (Fr. v. Venez.), 10 R.I.A.A. 285, 353 (Arb. 1902); Oscar Chinn (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 89, 112-14 (dictum) (Anziolotti, J., sep. opin.). But see Rainbow Warrior (N.Z. v. Fr.), 20 R.I.A.A. 217, 254 (Arb. 1990); see also 2001 ILC Report, *supra* note 3, at 197-201; *State Responsibility*, *supra* note 3, at 42-43 (discussing S.S. Wimbledon (U.K. v. Ger.)); S.S. Wimbledon (U.K. v. Ger.), 1923 P.C.I.J. No. 1, at 15.

21. Compare BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 31, 69 (1987), with D'AMATO, *supra* note 10, at 50-51, and THE TANKER WAR, *supra* note 9, at 161-63, and Roberto Ago, *Addendum to Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318 & Add. 104 (1979), 2(1) Y.B. INT'L L. COMM'N 13, 48-49 (1981), and Raby, *supra* note 3, at 269-70 (asserting the importance of the principle of necessity in international law), and Schwarzenberger, *The Fundamental Principles of International Law*, 87 R.C.A.D.I. 195, 343 (1955), and OPPENHEIM, *supra* note 6, §§ 131 n.15, 354 (stating that the necessity principle exists), with BOWETT, *supra* note 10, at 10, and BROWNLIE, *supra* note 10, at 42-48 (arguing that the necessity doctrine does not exist). But see *id.* at 376-77, 432 (approving doctrine in LOS context); see also BROWNLIE, *supra* note 6, at 247-48 (accepting the necessity doctrine in LOS context); RONZITTI, *supra* note 5, at 13-14 (asserting that if necessity has *locus standi* in contemporary international law, the principle cannot justify intervention); *State Responsibility*, *supra* note 3, at 47-48 nn. 171-72.

22. See *supra* note 13 and accompanying text (explaining the ILC's position on state of necessity doctrine).

23. See *supra* note 20 and accompanying text. No one doubts that custom is a primary source. Compare I.C.J. Statute, arts. 38, 59, with RESTATEMENT (THIRD), *supra* note 9, §§ 102-03. If Article 33 is a customary norm, does this negate the

State of necessity is a defense to actions otherwise denounced as criminal in common-law jurisprudence and municipal statutes. Not all jurisdictions within the United States recognize the defense. Modern analyses of the defense say it is available if the social advantage gained when an actor's choosing the lesser of two evils avoids the greater harm.

Elements of the defense include (1) reasonable foreseeability of degree of harm an actor seeks to avoid, compared with harm the actor imposes, which may include intentional homicide (*e.g.*, when an actor, such as a policeman, kills one person to save the lives of two or more threatened with death); (2) the actor's intention to avoid the greater harm; (3) relative value of harm avoided versus harm done, *i.e.*, proportionality, with many jurisdictions saying the threatened harm must clearly outweigh the harm invoked; (4) the possibility of the imminence of disaster, *i.e.* necessity; and (5) an actor's lack of fault in bringing about the situation calling for action under state of necessity.²⁴ If necessity is a defense common to most national legal systems, it is another argument for accepting the doctrine as a general principle of law, a primary source of international law, according to most commentators.²⁵

Article 33(2)(b) limitation, or did the ILC mean that treaties trump custom? See Raby, *supra* note 3, at 267 (believing that "[t]he considerable number of states which claim that the right of intervention is valid, as well as the numerous writers who think likewise, demonstrate that intervention to protect nationals cannot certainly be seen as a violation of a norm of *jus cogens*."); *see also supra* notes 9-10 and accompanying text.

24. U.K. and U.S. cases underscore the defense's antiquity, its narrow nature, and its relationship to self-defense. See LAFAYE, *supra* note 2, § 5.4; *see also* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 415-36 (2d ed. 1960); MODEL PENAL CODE §§ 3.01(1), 3.02(1), 3.05 (Proposed Official Draft 1962); PERKINS & BOYCE, *supra* note 2, ch. 9, § 2H-21; 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 124 (1984); 1 WHARTON'S CRIMINAL LAW § 90; George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975 (1999) (claiming that private individuals can never use the necessity defense, even if many lives are threatened, to justify intentionally taking innocent human life); John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397 (1999); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213-20 (1982); *cf.* Raby, *supra* note 3, at 258.

25. *See supra* note 13 and accompanying text (discussing prevalent views on accepting general principles of law as primary sources of international law).

State of necessity differs from necessity, a component of the law of self-defense. Necessity and proportionality, and in the case of anticipatory self-defense, admitting of no alternative, condition the inherent right of individual and collective self-defense.²⁶ State of necessity also differs from the necessity component of the LOAC, which must be observed with proportionality in conducting attacks during armed conflict.²⁷ What is necessary or proportional in a self-

26. See *supra* notes 9-11 and accompanying text (detailing the use of the doctrine of self-defense).

27. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 51, 57, 1125 U.N.T.S. 3, 26, 29 [hereinafter Protocol I] (providing rules of distinction, necessity and proportionality, with the concomitant risk of collateral damage inherent in any attack generally restate customary norms); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT 309-11 (1982); INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 39-42 & cmts. (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]; FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 99-100 (1987); MCDUGAL & FELICIANO, *supra* note 10, at 525; JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 352-53 (1954); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 125 (1982) (questioning whether proportionality is an accepted customary norm); see also Michael J. Matheson, Remarks, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419, 423, 426 (1987); *Results of the First Meeting of the Madrid Plan of Action Held in Bochum, F.R.G., November 1989*, 7 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITAREN VOLKERRECHT 170-71 (1991); Major William G. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions*, 24 A.F.L. REV. 189, 233-38 (1984); Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM U.J. INT'L L. & POL'Y 117, 131 (1986); G.J.F. van Hegelsom, *Methods and Means of Combat in Naval Warfare*, 8 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITAREN VOLKERRECHT 1, 18-19 (1992). Although the United States is likely to ratify the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II], the Reagan Administration expressed reservations on Protocol I and did not seek Senate advice and consent for it. See Protocol II, June 8, 1977, 1125 U.N.T.S. 609; see also Letter of Transmittal from President Reagan to U.S. Senate, Jan. 29, 1987; Letter of Submittal from Secretary of State George P. Schultz to President Reagan, Dec. 13, 1986, in Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, S. Treaty Doc. No. 100-2, 100th Cong.,

defense response may or may not be necessary or proportional for an attack during armed conflict, and vice versa.²⁸ State of necessity also differs from the now-outlawed military necessity (*kriegsraison*) doctrine.²⁹

State of necessity circumstances can arise in situations involving the law of the sea ("LOS"), self-defense, or the LOAC. Ocean pollution furnishes an example from the LOS. High seas pollution by ever-larger tankers or other vessels, perhaps registered under flags of convenience,³⁰ that break up or collide is an example of LOS application of state of necessity. Pollutants may drift toward coasts

1st Sess. (1987), *reprinted in* 26 I.L.M. 561 (1987). Although Protocol I is not in force for the United States, 159 states are party to it and 151 are party to Protocol II. *See* Protocol I, *supra*, 1125 U.N.T.S. 3; *see also* Protocol II, *supra*, 1125 U.N.T.S.; International Committee of the Red Cross, *Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions*, available at http://www.icrc.org/eng/party_gc (last visited Dec. 3, 2001). Many of their terms restate customary law.

28. *See* THE TANKER WAR, *supra* note 9, at 352.

29. *Cf.* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 303-07 (2d ed. 1998); *see also* NWP 1-14M ANNOTATED, *supra* note 10, ¶ 5.2 nn. 5,6; STONE, *supra* note 27, at 351-53; THE TANKER WAR, *supra* note 9, at 350, 353; Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 60-66 (1996).

30. Flag of convenience nations are also known as open registry states. *See generally* BOLESŁAW A. BOCZEK, FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY (1962); RODNEY CARLISLE, SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE (1981); SAMUEL A. LAWRENCE, UNITED STATES MERCHANT SHIPPING: POLICIES AND POLITICS 101-04, 182-89 (1966); ROBERT E. MCCLEAVE, TRANSPORTATION 19-29 (1986); CLINTON H. WHITEHURST, JR., THE U.S. MERCHANT MARINE: IN SEARCH OF AN ENDURING POLICY 59, ch. 18 (1986); Frank L. Wiswall, Jr., *Flags of Convenience*, in UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET ch. 4 (William A. Lovett ed., 1966); U.N. Convention on Law of the Sea, Dec. 10, 1982, art. 91(1), 1833 U.N.T.S. 3, 397, 433 [hereinafter LOS Convention]; Convention on the High Seas, Apr. 29, 1958, art. 5(1), 13 U.S.T. 2312, 2314, 450 U.N.T.S. 82, 86 [hereinafter High Seas Convention] (requiring a genuine link between a registry state and a ship); Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229 (1987) (not in force); 3 SATYA N. NANDAN & SHABTAI ROSENNE, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY paras 91.1- 91.9(f) (Myron H. Nordquist ed., 1982); 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 755-57 (I.A. Shearer ed. 1984); OPPENHEIM, *supra* note 6, §§ 287-88, 290; RESTATEMENT (THIRD), *supra* note 9, § 501; THE TANKER WAR, *supra* note 9, at 291-95.

of a country that is not the ship's registry state or pose a danger to shipping and other activities (*e.g.*, fishing) of many states on the high seas or in coastal waters.

The 1982 LOS Convention, echoing the 1969 Intervention Convention, allows states "to take [proportionate] measures, in accordance with international law, beyond the limits of the territorial sea" to protect their coastlines "or related interests, including fishing, from grave and imminent danger" from pollution or the threat of pollution.³¹ The ILC specifically recognized environmental protection as an occasion for invoking state of necessity.³²

State of necessity in the maritime pollution context begins with a high seas spill of oil or other substance; the threat is to coastal states' beaches or fishing grounds, perhaps in an exclusive economic zone ("EEZ"), perhaps in territorial waters. As may happen in high seas rescues, those attacking the pollution problem may board a damaged polluting vessel and perhaps destroy it to prevent or minimize pollution or the threat, but in doing so, they must see to crew safety.³³

31. See LOS Convention, *supra* note 30, art. 221, at 489; see also Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, arts. 1-3, 5, 26 U.S.T. 765, 767-69, 970 U.N.T.S. 211, 212, 214 (prohibiting intervention for warship oil pollution and stating that measures taken must be proportional), *amended by* Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil, Nov. 2, 1973, 34 U.S.T. 3407, 1313 U.N.T.S. 3; BROWNLIE, *supra* note 10, at 376-77, 432; BROWNLIE, *supra* note 6, at 247-48; D'AMATO, *supra* note 10, at 50-51; 4 MYRON H. NORDQUIST, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY paras 221.1-221.9(h) (1991); O'CONNELL, *supra* note 30, at 1006-08; OPPENHEIM, *supra* note 6, § 354; THE TANKER WAR, *supra* note 9, at 161, 494-95; Ago, *supra* note 21, at 28-29.

32. See 2001 ILC Report, *supra* note 3, at 202; see also *State Responsibility*, *supra* note 3, at 39-40.

33. A duty to rescue those in peril on the sea, so long as a succoring ship or its crew is not endangered, applies in peace and war. See LOS Convention, *supra* note 30, art. 98, at 435; see also High Seas Convention, *supra* note 30, art. 12, 13 U.S.T. at 2316, 450 U.N.T.S. at 88; Convention on Maritime Search & Rescue, Apr. 27, 1979, Annex, chs. 2.1.9-2.1.10, T.I.A.S. No. 11903, 1405 U.N.T.S. 97, 125; *id.*, T.I.A.S., chs. 3.1.2-3.1.4, 1405 U.N.T.S. 126-27 (providing for immediate entry into a state's territorial waters for rescue and transmittal of a request to that state's rescue center, giving "full details of the projected mission and the need for it," requiring coastal state "immediate acknowledgement" of request, agreements with neighboring states for SAR); Convention on Salvage, Apr. 28, 1989, arts. 4, 10, S. Treaty Doc. No. 102-12, *reprinted in* Doc. No. 4-2A, 6 Benedict on

The result, whether the polluting vessel is destroyed or boarded, is a violation, however “technical,” of registry state sovereignty.³⁴ As in the case of high seas rescues, the objective is limited and the means must be proportional. Presumably the flag state of the antipollution vessels notifies the flag state of the polluter and its owners through appropriate channels.

Separate and apart from necessity as a factor in the law of self-defense, international law recognizes situations where a state, responding in self-defense to an attack or aggression, may claim state of necessity. An example is where an aggressor uses neutral territory as a base of operations or to shelter its vessels (*e.g.*, submarines in neutral territorial waters) or aircraft, and the neutral has no knowledge of the attacking state’s intrusion or presence, or the neutral does not have means to enforce the law of neutrality and drive out the aggressor’s platforms. The state that is the target of aggression does have means to accomplish this. If so, the state that is

Admiralty (Frank L. Wiswall, Jr., ed., 7th ed. rev. 2001), to supersede Convention for Unification of Certain Rules Relating to Assistance & Salvage at Sea, Sept. 23, 1910, arts. 11, 14, 37 Stat. 1658, 1672 [hereinafter 1910 Salvage Convention] (not applicable to warships); Convention for Safety of Life at Sea, Nov. 1, 1974, Annex, ch. V, regs. 1, 10, 32 U.S.T. 47, 56, 232, 238 (not applicable to warships); Convention for Unification of Certain Rules Relating to Assistance & Salvage of Aircraft or by Aircraft at Sea, Sept. 29, 1938, art. 2, *reprinted in* 6 Benedict on Admiralty, *supra*, Doc. No. 4-5 (not in force); Convention for Adaptation to Maritime Warfare of Principles of Geneva Convention (Hague X), Oct. 18, 1907, art. 16, 36 Stat. 2371, 2388; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, arts. 12, 18, 21, 6 U.S.T. 3217, 3226, 3230, 3234, 75 U.N.T.S. at 85, 92-96 [hereinafter Second Convention]; Protocol I, *supra* note 27, arts. 1-2, 33(1), 1125 U.N.T.S. at 7, 20 (supplementing Second Convention to require search for the missing); BOTHE ET AL., *supra* note 27, at 171-75; C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA § 369 (6th rev. ed. 1967) (discussing the ancient duty of persons in charge of a vessel to save lives at sea); MCCOUBREY, *supra* note 29, at 114-18; Nandan & Rosenne, *supra* note 30, paras 98.1-98.11(g) (addressing general tradition and practice); NWP 1-14M ANNOTATED, *supra* note 10, paras 2.3.2.5, 3.2.1-3.2.1.2, 11.4; OPPENHEIM, *supra* note 6, § 298; 2 JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 84-92, 129-36, 150-53 (1960); CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 33-63, 350-54 (1987); THOMAS M. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 14-8 (3d ed. 2001).

34. See *supra* note 30 and accompanying text (describing high-seas pollution by tankers and other vessels).

the target of aggression may seek and flush out or destroy the aggressor's sheltered vessels as an incident of self-defense, even though this involves intrusion into neutral territorial waters to do so.³⁵ The right to self-defense under these circumstances, like any claim of self-defense, is subject to the conditioning factors of necessity and proportionality and, in the case of anticipatory self-defense, admitting of no other alternative.³⁶ A further caution is that besides these conditioning factors, states acting in self-defense must be aware of the extraordinary nature of intervening in a neutral's territorial sea;³⁷ state of necessity principles should be injected into the analysis.

The foregoing hypothetical involving a belligerent submarine could occur during war, governed by the LOAC -- an earlier case being the World War II *Altmark* incident. In LOAC situations similar, but not necessarily identical, necessity and proportionality principles apply.³⁸

35. See 50 ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 220-26, 256 (Naval War C. Int'l L. Stud. 1955); see also Horace B. Robertson, Jr., *The "New" Law of the Sea and the Law of Armed Conflict at Sea*, in 68 READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978-1994, at 263, 304 (Naval War C. Int'l L. Stud., John Norton Moore & Robert F. Turner eds., 1995); cf. MCDUGAL & FELICIANO, *supra* note 10, at 406-07; see also NWP 1-14M ANNOTATED, *supra* note 10, para 7.3 at 370-71; U.S. Department of the Navy, *Law of Naval Warfare: NWIP 10-2*, para 441 & n.27 (1955 through Change 6, 1974) [hereinafter NWIP 10-2].

36. See 2001 ILC Report, *supra* note 3, at 196-97 (equating anticipatory self-defense with state of necessity); see also *supra* notes 9-11 and accompanying text.

37. Cf. U.N. CHARTER art. 2, para. 4; see also *supra* note 9 and accompanying text (discussing the ILC's prohibition of a state violating a norm of international law).

38. See MCDUGAL & FELICIANO, *supra* note 10, at 406-07; see also NWIP 10-2, *supra* note 35, ¶ 441 & n.27; NWP 1-14M ANNOTATED, *supra* note 10, ¶¶ 7.3.4-7.3.4.1; SAN REMO MANUAL, *supra* note 27, ¶¶ 15, 17-18, 20-22; Tucker, *supra* note 35, at 220-26; Robertson, *supra* note 35, at 304; Dietrich Schindler, *Commentary to 1907 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War*, in *THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES* 211, 216-17 (Natalino Ronzitti ed., 1988) (stating that the issue concerning the use of territorial waters to evade capture during war and the applicability of the 24 hours rule of Article 12 of the 1907 Hague Convention is "still controversial."); O'CONNELL, *supra* note 30, at 40-44 (claiming that Germany and Great Britain violated international law in the 1940 *Altmark* incident, in which a British destroyer followed a German vessel into

II. THE PROPOSED PRINCIPLES

What about collective intervention to succor persons who are nationals of the persecuting state who have suffered, or who have been threatened with, gross and systematic human rights violations, gross and systematic violations of humanitarian law, or war crimes, where the country claiming these persons its nationals does not protect them from these violations, or may be actively or passively involved with these violations, *i.e.*, the Kosovo situation? Part II offers analysis of principles under state of necessity in this situation.

A. PRIOR SITUATIONS

NATO's Kosovo intervention was but one of those crises where states, individually or collectively, succored indigenous nationals as part of a rescue operation for their own or other nonstate nationals, or with the sole goal of protecting indigenous nationals. Some occurred during the nineteenth and twentieth centuries before the Charter era, in some cases pursuant to the Concert of Europe, which lasted in one form or another from 1815 through most of the nineteenth century.³⁹

neutral Norwegian waters to liberate British prisoners of war). *But see* O'CONNELL, *supra* note 30, at 1118-19; COLOMBOS, *supra* note 33, § 715 (arguing that Britain was justified in the *Altmark* incident in attacking the German vessel and removing prisoners). *See* Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, 135 L.N.T.S. 187 (failing to address the issue); *see also* Convention Concerning Rights & Duties of Neutral Powers in Naval War (Hague XIII), Oct. 18, 1907, 36 Stat. 2415 (failing to cover the precise point); Edwin M. Borchard, *Was Norway Delinquent in the Case of the Altmark?*, 34 AM. J. INT'L L. 289, 294 (1940) (claiming that Germany and Norway did not violate international law); Michael Bothe, *The Law of Neutrality*, in DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 485, 501-06 (1995); Arne W. Dahl, *Passage Through Neutral Territorial Waters*, in 25 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITAREN VOLKERRECHT 67 (1995) [hereinafter BOCHUMER]; Dahl, *Comment No. 2*, in BOCHUMER, *supra*, at 79; W. Heintschel von Heinegg, *Comment No. 10*, in BOCHUMER *supra*, at 111, 112-15; *supra* notes 26-28 and accompanying text.

39. *See* RONZITTI, *supra* note 5, at 90; *see also* Louis B. Sohn, *International Law and Basic Human Rights*, in 62 READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1947-1977, at 587, 590-91 (Richard B. Lillich & John Norton Moore eds., Naval War C. Int'l L. Stud. 1980). In 1827, there was a British-French-Russian intervention in the Greek revolution against Turkey. *See* MURPHY, *supra* note 5, at 52; *see also* OPPENHEIM, *supra* note 6, § 131 n.18 ("public opinion reacted with horror to the cruelties committed."); FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY

177-78 (2d ed. 1997); Behuniak, *supra* note 19, at 160; Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CALIF. W. INT'L L.J. 203, 207 (1974). In 1840 and from 1857-58 and 1877-78 there were successful U.S. protests over Jews' treatment in the Ottoman Empire without armed force intervention. See W. Michael Reisman with the Collaboration of Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 180, 181 (Richard B. Lillich ed., 1973) [hereinafter Reisman & McDougal]. In 1860-61, France intervened in Syria, with approval of other Western powers, to end atrocities there. See MURPHY, *supra* note 5, at 53; see also TESON, *supra*, at 178; Behuniak, *supra* note 19, at 160; Fonteyne, *supra*, at 208; Reisman & McDougal, *supra*, at 180. But see RONZITTI, *supra* note 5, at 90 (stating that the Ottoman Empire agreed to intervention). From 1866-68, European states' pressure on the Ottoman Empire to ameliorate the position of Christians on Crete succeeded without military intervention. See Fonteyne, *supra*, at 210; see also Reisman & McDougal, *supra*, at 18. But see RONZITTI, *supra* note 5, at 90 (arguing that this was not a case of intervention). In 1877, Russia declared war against the Ottoman Empire due to the harsh treatment of Christians in the Balkans, and the Empire's rejection of the Protocol of Conference. See Protocol of Conference, Mar. 31, 1877, 68 Brit. & For. St. Pap. 823; see also MURPHY, *supra* note 5, at 54; RONZITTI, *supra* note 5, at 91; TESON, *supra*, at 178; Behuniak, *supra*, at 161; Fonteyne, *supra*, at 211; Reisman & McDougal, *supra*, at 182. From 1898-1900, the United States staged an intervention in Cuba, resulting in the establishment of an independent Cuba. See 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW § 81 (2d rev. ed. 1945); see also MURPHY, *supra* note 5, at 55; TESON, *supra*, at 178; MICHAEL WALZER, JUST AND UNJUST WARS 102-05 (3d ed. 1977); Behuniak, *supra*, at 163; Reisman & McDougal, *supra*, at 182. From 1903-08, the Russian and Austro-Hungarian threat of intervention in Macedonia resulted in reforms to protect Macedonians. See Fonteyne, *supra*, at 212; Reisman & McDougal, *supra*, at 183. From 1904-16, the United States and other states engaged in humanitarian intercession with the Ottoman Empire on Armenians' behalf. See MCDUGAL ET AL., *supra* note 19, at 240. In 1913, Bulgaria, Greece, and Serbia intervened to respond to "Turkification" in Macedonia. See MURPHY, *supra* note 5, at 56; see also RONZITTI, *supra* note 5, at 91; TESON, *supra*, at 178; Behuniak, *supra* note 19, at 162; Fonteyne, *supra*, at 213. In 1939, the United Kingdom evacuated 450 Spanish Republicans from Minorca as part of a surrender agreement with Spanish Nationalists. See JAMES CABLE, GUNBOAT DIPLOMACY 1919-1991, at 174 (3d ed. 1994); see also Jurgen Habermas, *Bestiality and Humanity: A War on the Border between Law and Morality*, in KOSOVO: CONTENDING VOICES ON BALKAN INTERVENTIONS 306, 308 (William Joseph Buckley ed., 2000). Russia's 1877 intervention resulted in Treaty for Settlement of Affairs in the East, guaranteeing equal treatment for Christians within the Ottoman Empire. See Treaty for the Settlement of Affairs in the East, July 13, 1878, art. 62, 153 Consol. T.S. 171, 189-90. The Treaty, later modified, realigned Balkan states', the Empire's and Russia's frontiers; recognized Bulgaria and Montenegro independence; Eastern Rumelia's autonomy under the Empire with a European Commission to organize the province; and Bosnia-Herzegovina autonomy under Austria-Hungary. See *id.* arts. 1-61, 153 Consol. T.S., at 174-89. Although "nothing in the language of the Covenant [of the League of Nations] prohibited

Scholars have traced these principles to ancient times.⁴⁰ Others have arisen since 1945, *i.e.*, after the Charter became effective for interstate relations.⁴¹ Among the most important of the latter were

humanitarian intervention[.]” the Covenant era, 1920-39, was a time of egregiously unlawful interventions (Japan in China, Italy in Ethiopia, Germany in Czechoslovakia), allegedly to protect humanity, but whose primary purposes were territorial aggrandizement, *i.e.*, conquest. *See* MURPHY, *supra* note 5, at 59-62; *see also* RONZITTI, *supra* note 5, at 91; Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT’L L. 275, 284 (1973) (generally criticizing humanitarian intervention).

40. *See generally* MURPHY, *supra* note 5, at 33-49; Fonteyne, *supra* note 39, at 205-06, 214-15; Raby, *supra* note 3, at 257-60; Sohn, *supra* note 39, at 588; Wingfield, *supra* note 19, at 441-44; *cf.* James Kurth, *First War of the Global Era: Kosovo and U.S. Grand Strategy*, in *WAR OVER KOSOVO: POLITICS AND STRATEGY IN A GLOBAL AGE* 63, 79 (Andrew J. Bacevich & Eliot A. Cohen eds., 2001) (stating that the “Kosovo [War] was ostensibly the first truly humanitarian war, fought not for national interests as traditionally defined but for the furtherance of human rights alone,” but asserting that the real reason for Allied Force was “the furtherance of NATO”).

41. There are many examples of such interventions. In 1965, the United States intervened in the Dominican Republic to save U.S. and foreign nationals’ lives; the intervention was subsequently legitimated by an OAS resolution. *See* AREND & BECK, *supra* note 19, at 117; *see also* MURPHY, *supra* note 5, at 94; RONZITTI, *supra* note 5, at 32-35 (debating the lawfulness of the U.S. action); Behuniak, *supra* note 19, at 172; Major J.D. Godwin, *NATO’s Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1, 38 (1999); Lillich, *supra* note 19, at 341; Wingfield, *supra* note 19, at 449. *But see* Akehurst, *supra* note 19, at 100; Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS*, *supra* note 39, at 139, 143-44. In 1971-72, India invoked humanitarian grounds to partly support its intervention in East Pakistan, which became Bangladesh. *See* AREND & BECK, *supra* note 19, at 118; MCDUGAL ET AL., *supra* note 19, at 243-45; MURPHY, *supra* note 5, at 97; OPPENHEIM, *supra* note 6, § 131 n.18; RONZITTI, *supra* note 5, at 95-97 (considering the legality of India’s action); TESON, *supra* note 39, at 200-10; Walzer, *supra* note 39, at 105-06; NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* ch. 2 (2000); Behuniak, *supra* note 19, at 174; Stanley Hoffmann, *The Problem of Intervention*, in *INTERVENTION IN WORLD POLITICS*, *supra* note 19, at 7, 24. *But see* MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER* 73 (2001); Akehurst, *supra* note 19, at 96. From 1978-79, Tanzania supported the overthrow of Ugandan President Idi Amin. *See* AREND & BECK, *supra* note 19, at 123; *see also* MURPHY, *supra* note 5, at 105; OPPENHEIM, *supra* note 6, § 131 n.18; TESON, *supra* note 39, at 179-95; WHEELER, *supra*, ch. 4; Hoffmann, *supra*, at 24. *But see* GLENNON, *supra*, at 72; RONZITTI, *supra* note 5, at 102-06; Akehurst, *supra* note 19, at 98. In 1979, France intervened in the Central African Republic. *See* AREND & BECK, *supra* note 19, at 125; *see also* MURPHY, *supra* note 5, at 107; TESON, *supra* note 39, at 196-200. *But see* Akehurst, *supra* note 19, at 98; Dominique

NATO's bombing and sea interdiction campaigns, pursuant to Security Council decisions authorizing them, that led to the 1995 Dayton Accords for Bosnia-Herzegovina, which included protection for indigenous peoples.⁴² NATO's 1999 Allied Force ("Allied Force") action was among the most recent of this type of campaign.⁴³

Moisi, *Intervention in French Foreign Policy*, in INTERVENTION IN WORLD POLITICS, *supra* note 19, at 67, 69-71 (highlighting French intervention tied to francophone Africa policies). *But see* GLENNON, *supra*, at 73. In 1989, the Economic Community of West African States intervened in the Liberian civil war. *See* Godwin, *supra*, at 49. In 1991, a coalition was formed in northern Iraq to provide emergency aid to Kurdish refugees fleeing after a failed insurrection against the Iraqi government. *See* MURPHY, *supra* note 5, at 165; *see also* OPPENHEIM, *supra* note 6, § 131 n.18 (intervening states "emphasized that their actions were solely humanitarian, were temporary, and were not directed against Iraq's sovereignty or security."); WHEELER, *supra*, ch. 5. S.C. Res. 688, U.N. Doc. S/RES/688; KAREL C. WELLENS, RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL (1946-1992) 579 (2d ed. 1993) (condemning Iraqi repressions but only insisting on international humanitarian organizations' access and appealing to U.N. member states to contribute to humanitarian relief efforts); Behuniak, *supra*, at 177; Falk, Introduction, in THE INTERNATIONAL LAW OF CIVIL WAR *supra* note 19, at 26; Reisman & McDougal, *supra* note 39, at 167 (stating that the 1967-70 Biafra secession, civil war and humanitarian disaster in Nigeria were candidates for humanitarian intervention); MICHAEL O'HANLON, SAVING LIVES WITH FORCE: MILITARY CRITERIA FOR HUMANITARIAN INTERVENTION 80 (1997); MURPHY, *supra* note 5, at 146-65, 243-60 (nominating the Liberian civil war of the early 1990s and the 1994 Rwanda genocide as candidates for intervention); WHEELER, *supra*, ch. 7 (arguing the same for Rwanda); Day, *supra* note 19, at 45-46; Wingfield, *supra*, at 460. Other post-1945 widely criticized interventions include Indonesia's 1975 East Timor intervention, South Africa's 1975 Angola intervention, Syria's 1976 intervention in Lebanon, Vietnam's 1978 intervention in Kampuchea; U.S. actions in Grenada, 1983 and Panama, 1989-90. *See* AREND & BECK, *supra* note 19, at 119-23, 126-28; *see also* MURPHY, *supra* note 5, at 100, 102, 108-15; RONZITTI, *supra* note 5, at 98-102; WHEELER, *supra*, ch. 3; Godwin, *supra*, at 43, 82; Wingfield, *supra*, at 457-59.

42. *See* General Framework Agreement for Peace in Bosnia & Herzegovina, Dec. 14, 1995, 35 I.L.M. 75, 89 (1996); *see also* Dayton Agreement on Implementing the Federation of Bosnia & Herzegovina, Nov. 10, 1995, 35 I.L.M. 170 (1996); RICHARD HOLBROOKE, TO END A WAR chs. 16-18 (1998); VICTOR MEIER, YUGOSLAVIA: A HISTORY OF ITS DEMISE 244-45 (Sabrina P. Ramet trans., 1995); MURPHY, *supra* note 5, at 198-217; ALEKSANDAR PAVKOVIC, THE FRAGMENTATION OF YUGOSLAVIA: NATIONALISM IN A MULTINATIONAL STATE ch. 12 (1997); Nicola Butler, *NATO: From Collective Defence to Peace Enforcement*, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP 273, 275 (Albrecht Schnabel & Ramesh Thakur eds., 2000) [hereinafter KOSOVO AND THE CHALLENGE]; Marie-Janine Calic, *Kosovo in the Twentieth Century: A Historical Account*, in KOSOVO AND THE CHALLENGE, *supra*, 19, 28; Godwin, *supra* note 41,

Besides the sovereignty principle, restated in the Charter,⁴⁴ and Charter prohibitions on violating a state's territory or political

at 59-66; Jasminka Udovicki & Ejub Stitkovac, *Bosnia and Hercegovina: The Second War*, in *BURN THIS HOUSE: THE MAKING AND UNMAKING OF YUGOSLAVIA* 175, 199-202 (Jasminka Udovicki & James Ridgeway eds., 2000); Jasminka Udovicki, *Neither War Nor Peace*, in *BURN THIS HOUSE: THE MAKING AND UNMAKING OF YUGOSLAVIA* 281-314; Susan L. Woodward, *International Aspects of the Wars in Former Yugoslavia: 1990-1996*, in *BURN THIS HOUSE: THE MAKING AND UNMAKING OF YUGOSLAVIA* 217, 241-42; *infra* note 108 and accompanying text (analyzing Security Council decisions pursuant to Articles 25 and 48 of the U.N. Charter).

43. See Godwin, *supra* note 41, at 73-74 (predicting more crises like Bosnia and Kosovo); see also Habermas, *supra* note 39, at 308 (suggesting that "humanitarian interventions since 1945 have taken place only in the name of the U.N. and with the formal assent of the government involved (to the extent that a functioning state existed)"). But see *supra* note 41 and accompanying text (providing examples of intervention without the affected state's consent or U.N. approval).

44. See U.N. CHARTER art. 2, para. 1 (stating that the United Nations is "based on the principle of sovereign equality of all its Members"). National sovereignty, sometimes diminished or eroded, has been a fundamental principle of international law since the peace of Westphalia, which created the modern state system. The Peace of Westphalia is comprised of the Treaty of Peace of Munster and the Treaty of Peace of Osnabruck. See Treaty of Peace of Munster, Oct. 14(24), 1648, art. 64, 1 Consol. T.S. 271, 319, 337; Treaty of Peace of Osnabruck, Oct. 14(24), 1648, arts. 8, 9, 1 Consol. T.S. 119, 198, 241-43; see also LOS Convention, *supra* note 30, art. 157(3), at 458; Vienna Convention, *supra* note 9, preamble, 1155 P.C.I.J. 331, 332; S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 18; S.S. Wimbledon (U.K. v. F.R.G.), 1923 P.C.I.J. No. 1, at 25; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, Principle 6, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970), *reprinted in* 9 I.L.M. 1292 (1970) [hereinafter Friendly Relations Declaration]; Declaration on Inadmissibility of Intervention in Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., U.N. Doc. A/RES/2131 (1965), *reprinted in* DIETRICH RAUSCHNING ET AL., KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY 1946-1996, at 26-27 (1997) [hereinafter Res. 2131]; U.N. Secretary-General, *An Agenda for Peace: Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/49/277, S/24111 (1992), *reprinted in* 31 I.L.M. 956, 959 (1992); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 21-23 (Brian Chapman ed., 3d ed. 1977); J.B. BRIERLY, THE LAW OF NATIONS 45-49 (Humphrey Waldock ed., 6th ed. 1963); BROWNLIE, *supra* note 6, at 289-90; GOODRICH ET AL., *supra* note 9, at 36-40; HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY?: TOWARD A DIPLOMACY FOR THE 21ST CENTURY 21-22, 235-37 (2001) (stating that the future of the concept of state sovereignty is uncertain); OPPENHEIM, *supra* note 6, § 37; MCNAIR, *supra* note 15, at 754-66;

independence,⁴⁵ another factor, the domestic jurisdiction principle, has been at play where states would intervene to protect nationals of an affected state, *i.e.*, people indigenous to that state. Pre-World War II international law was thought to hold that how a state treated its own nationals was a matter within its exclusive domestic jurisdiction.⁴⁶ International agreements condemn intervention by other states.⁴⁷ One of the more recent is the 1977 Protocol II to the 1949 Geneva Conventions, whose Article 3 provides:

RESTATEMENT (THIRD), *supra* note 9, Part I, ch. 1, *Introductory Note*, 16 & 17; SIMMA, *supra* note 9, at 79-97; R.P. Anand, *Sovereign Equality of States in International Law*, 197 R.C.A.D.I. 9, 22-51 (1986); Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF., Winter 1992, at 89, 98-99; Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 539 (1993); Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 1, 49-50 (1957); Oscar Schachter, *International Law in Theory and Practice*, 178 R.C.A.D.I. 9, 32 (1982); Humphrey Waldock, *General Course on Public International Law*, 106 R.C.A.D.I. 1, 156-72 (1962) Louis Henkin, *International Law: Politics, Values and Functions*, 216 R.C.A.D.I. 9, 46, 130 (1989). *But see* HENKIN, *supra* note 10, at 8-10 (subsequently denouncing the concept of sovereignty).

45. See U.N. CHARTER art. 2, para. 4 (stating 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”); *see also supra* note 9 and accompanying text (discussing customary norms of international law).

46. *Cf.* Nationality Decrees Issued in Tunis & Morocco (French Zone), 1923 P.C.I.J. (ser. B) No. 4, at 4 (adv. op.); *see also* OPPENHEIM, *supra* note 6, §§ 118, 131, 377; U.N. CHARTER art. 2, para. 7 (barring U.N. intervention in matters of states’ domestic jurisdiction). This differs from states’ intervention. *See generally* GOODRICH ET AL., *supra* note 9, at 60-72; SIMMA, *supra* note 9, at 141-54. *But see, e.g.*, PILLOUD ET AL., *supra* note 33, at 1362 (refraining from making that distinction).

47. *See, e.g.*, Charter of Organization of African Unity, May 25, 1963, art. 3, 479 U.N.T.S. 39, 74; Charter of Organization of American States, Apr. 30, 1948, art. 15, 2 U.S.T. 2394, 2419, 119 U.N.T.S. 3, 56 [hereinafter OAS Charter], *amended by* Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324, *amended by* Protocol of Cartagena, Dec. 5, 1985, 25 I.L.M. 527, *amended by* Protocol of Washington, Dec. 14, 1992, 33 I.L.M. 1005, *amended by* Protocol of Managua, June 10, 1993, 33 I.L.M. 1009; Pact of League of Arab States, Mar. 22, 1945, art. 8, 70 U.N.T.S. 237, 254; Convention on Rights & Duties of States, Dec. 26, 1933, art. 8, 49 Stat. 2957, 3100, 165 L.N.T.S. 19, 25; U.S. Reservation, Dec. 22, 1933, 49 Stat. at 3101, 165 L.N.T.S. at 29; Additional Protocol Relative to Non-Intervention, Dec. 23, 1936, art. 1, 51 Stat. 41, 44, 188 L.N.T.S. 31, 36; Act of Chapultepec, Mar. 6, 1945, art. 2, 60 Stat. 1831, 1839 (mandating respect of every State’s individuality and independence); Resolution Relating to Scheme of Observation of Spanish Frontiers by Land & Sea, Mar. 8, 1937, 31 AM. J. INT’L L.

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatsoever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.⁴⁸

Protocol II⁴⁹ supplements the 1949 Geneva Conventions, particularly their Common Article 3 governing non-international armed conflicts.⁵⁰ The Friendly Relations Declaration, other General

SUPP. 163 (1937) (referring to the agreement on nonintervention during the Spanish civil war by twenty-seven European states' declarations); OPPENHEIM, *supra* note 6, § 128, at 429 (discussing European states' declarations regarding nonintervention); Norman J. Padelford, *The International Non-Intervention Agreement and the Spanish Civil War*, 30 AM. J. INT'L L. 578 (1937); Ann Van Wynen Thomas & A.J. Thomas, Jr., *International Legal Aspects of the Civil War in Spain, 1936-39*, in THE INTERNATIONAL LAW OF CIVIL WAR, *supra* note 19, at 111; HYDE, *supra* note 39, § 83B; THOMAS & THOMAS, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS ch. 17 (1956) (analyzing humanitarian intervention issues in the OAS system).

48. See Protocol II, *supra* note 27, art. 3, 1125 U.N.T.S. at 611; see also BOTHE ET AL., *supra* note 27, at 632-34; PILLOU ET AL., *supra* note 33, at 1362-64.

49. Protocol II, *supra* note 27, art. 1, 1125 U.N.T.S. at 611; see also BOTHE ET AL., *supra* note 27, at 623-29; PILLOU ET AL., *supra* note 33, at 1341-56.

50. See Convention for Amelioration of Condition of Wounded & Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32 [hereinafter First Convention]; see also Second Convention, *supra* note 33, art. 3, 6 U.S.T. 3220, 75 U.N.T.S. at 86; Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3319, 75 U.N.T.S. 135, 136 [hereinafter Third Convention]; Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 [hereinafter Fourth Convention]; JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949 38-61 (1952) (explaining that today 189 states are party to these treaties); INT'L COMM. OF THE RED CROSS, GENEVA CONVENTIONS OF 12 AUGUST 1949 AND ADDITIONAL PROTOCOLS OF 8 JUNE 1977: RATIFICATIONS, ACCESSIONS AND SUCCESSIONS (Dec. 3, 2001) (suggesting that many if not all of their provisions represent customary norms), available at http://www.icrc.org/eng/party_gc (last visited Sept. 12, 2002); BROWNLIE, *supra* note 6, at 5; RESTATEMENT (THIRD), *supra* note 9, § 102 cmts. f(i); OPPENHEIM, *supra* note 6, § 10, at 28, 31; George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J.

Assembly Resolutions, and the Helsinki Accords support the nonintervention principle, although many of them also support human rights.⁵¹

However, today “[i]nternational law is no longer — if it ever was — concerned solely with states. Many of its rules are directly concerned with regulating the position and activities of individuals; and many more indirectly affect them.”⁵² There are limits to how a state may treat its own nationals, among them deprivations of human rights.⁵³ “[W]hen a state commits cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of [hu]mankind, the matter ceases to be of sole concern to that state and even intervention in the interest of humanity might be legally permissible.”⁵⁴

This is one side of the matter. Commentators differ sharply over legitimacy of humanitarian intervention, individual or collective, under various circumstances.⁵⁵ The same has been true for other

321, 367-68 (1998); 72 JACK GRUNAWALT, *THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM* 365, 391-92 (Michael N. Schmitt ed., Naval War C. Int'l L. Stud. 1998).

51. See Declaration on Inadmissibility of Intervention & Interference in Internal Affairs of States, G.A. Res. 36/103, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/103 (1981), reprinted in RAUSCHNING ET AL., note 44, at 27; see also Definition of Aggression, arts. 2, 3(a), G.A. Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (1974), reprinted in RAUSCHING ET AL., *supra* note 44, at 13-14; Friendly Relations Declaration, *supra* note 44, Principles 3, 5; Res. 2131, *supra* note 44; Conference on Security & Cooperation in Europe, Final Act, Aug. 1, 1975, Principles VI, VII, 14 I.L.M. 1292, 1294 (1995); RONZITTI, *supra* note 5, at 49-52; Ralph Zacklin, *The United Nations and Humanitarian Intervention*, 41 VA. J. INT'L L. 923, 933 (2001) (joining many who say nonintervention is a *jus cogens* norm).

52. OPPENHEIM, *supra* note 6, § 374.

53. See *id.* § 118, at 384.

54. *Id.* § 131, at 442. See also Zacklin, *supra* note 51. Cf. Arnold Fraleigh, *The Algerian Revolution as a Case Study in International Law*, in *THE INTERNATIONAL LAW OF CIVIL WAR*, *supra* note 19, at 179, 181 (asserting that the same issue can arise in an internal power struggle, with innocent civilians caught in the middle).

55. Compare D'AMATO, *supra* note 10, at 226, and ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 247 (Oxford UP 1994), and MCDUGAL ET AL., *supra* note 19, at 236-47, and OPPENHEIM, *supra* note 6, §§ 118, 131, 374, and JOHN RAWLS, *THE LAW OF PEOPLES* § 10.3 (1999), and TESON, *supra* note 39, and WALZER, *supra* note 39, at 107-08, and WHEELER, *supra* note 41, at 51-52, 285-310, and Behuniak, *supra* note 19, and

Alberto R. Coll, *Kosovo and the Moral Burdens of Power*, in Bacevich & Cohen, *supra* note 40, at 124, 136, and Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 5, 172-74 (1957), and Fonteyne, *supra* note 39, and Rosalyn Higgins, *Intervention and International Law*, in INTERVENTION IN WORLD POLITICS, *supra* note 19, ch. 3, and Hoffmann, *supra* note 41, and Stanley Hoffmann, *Sovereignty and the Ethics of Intervention*, in STANLEY HOFFMAN, THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION 12, 22-23 (1996) (explaining the different unilateral and collective intervention standards), and Robert C. Johansen, *Limits and Opportunities in Humanitarian Intervention*, in Hoffmann, *supra*, ch. 4 (also noting the need to avoid mixing self-defense claims with humanitarian intervention), and Lillich, *supra* note 19, and Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD ch. 11 (John Norton Moore, ed., 1974), and Theodor Meron, *Commentary on Humanitarian Intervention*, in Zhang Yunling, *China: Whither the World After Kosovo?*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 8, *supra* note 10, ch. 19, and Reisman & McDougal, *supra* note 39, and Henry G. Schermers, *The Obligation to Intervene in the Domestic Affairs of States*, in ASTRID J.M. DELISSEN & GERARD J. TANJA, HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 583 (1991), and Zacklin, *supra* note 51 (stating that the U.N. Secretary General appears to be moving toward a view supporting humanitarian intervention under certain circumstances, thus supporting the right to intervention), with AREND & BECK, *supra* note 19, at 135-37, and BROWNLIE, *supra* note 10, at 301, and RONZITTI, *supra* note 5, at 135, and THOMAS & THOMAS, *supra* note 47, ch. 17, and Akehurst, *supra* note 19, and Derek W. Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, in Moore, *supra*, at 44, and Ian Brownlie, *Humanitarian Intervention*, in Moore, *supra*, ch. 10, and Hedley Bull, *Conclusion*, in INTERVENTION IN WORLD POLITICS, *supra* note 19, at 181, 193, and Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, in LAW AND FORCE, *supra* note 10, ch. 20, and Franck & Rodley, *supra* note 39, at 302, and Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999), and Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, in LAW AND FORCE, *supra* note 10, ch. 18, and Schachter, *supra* note 44, at 143 (opposing it). See also MURPHY, *supra* note 5, at 135-42 (summarizing views); RONZITTI, *supra* note 5, at 88 (summarizing early views); Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE, *supra* note 10, ch. 17 (reviewing debate); Edwin Brown Firmage, *Summary and Interpretation*, in INTERVENTION IN WORLD POLITICS, *supra* note 19, at 405, 406-13 (summarizing panelist views on various kinds of intervention); Jean-Pierre Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in Lillich, *supra* note 39, at 197 (claiming diminished opposition within United Nations for intervention); Evan Luard, *Collective Intervention*, in INTERVENTION IN WORLD POLITICS, *supra* note 19, at 156, 168-69 (arguing that although intervening to protect human rights is likely to increase in future, use of force for this will be infrequent); RESTATEMENT (THIRD), *supra* note 9, § 703 cmt. e, r.n.8 (taking no definitive position and noting the issue's difficulty); GLENNON, *supra* note 41, at 34-35 (declaring that although international law did not support Allied Force, there are new factors for future humanitarian interventions).

forms of intervention, *e.g.*, rescue of a state's own endangered nationals, a debate beyond this Article's scope.⁵⁶ However, some of these arguments surfaced in debate over Allied Force's legitimacy.⁵⁷

What made Allied Force unique was that it was the first time a collective self-defense organization constituted under Article 51 of the Charter⁵⁸ intervened while the Security Council was seized of a crisis the Council had said threatened international peace and security.⁵⁹ Unlike the NATO Bosnia-Herzegovina campaign leading

56. See *supra* note 19 and accompanying text (describing the use of the state of necessity doctrine to justify intervention).

57. See generally Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999) (arguing that although NATO's actions may be illegal under international law, there may be an emerging rule that would allow such exceptions when certain conditions are met). See also Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834 (1999); Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847 (1999); Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857 (1999); A.J.R. Groom & Paul Taylor, *The United Nations System and the Kosovo Crisis*, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 291, 299; CATHERINE GUICHARD, *International Law and the War in Kosovo*, 41 SURVIVAL 19 (No. 2, 1999); Dino Kritsiotis *The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L.Q. 330, 339-54 (2000); W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999); Adam Roberts, *NATO's "Humanitarian War" Over Kosovo*, 41 SURVIVAL 102 (No. 3, 1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (1999); GLENNON, *supra* note 41 (offering a new analysis for changed international conditions, saying the old *de jure* approach will not work). The article offers a new analysis within existing international law, *i.e.*, the state of necessity doctrine. *Id.*

58. See *supra* notes 9-11 and accompanying text (detailing the use of the doctrine of self-defense).

59. See S.C. Res. 1160, U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199 (1998), U.N. Doc. S/RES/1199 (1998), *reprinted in* 38 I.L.M. 249 (1999); S.C. Res. 1203 (1998), U.N. Doc. S/RES/1203 (1998); S.C. Res. 1207 (1998), U.N. Doc. S/RES/1207 (1998), *reprinted in* 38 I.L.M. 254 (1999); S.C. Res. 1239, U.N. Doc. S/RES/1239 (1999); S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999), *reprinted in* 38 I.L.M. 1451 (1999); see also U.N. CHARTER art. 12(1) (stating that when the Security Council ("Council") exercises functions the Charter assigns to it in a dispute, the General Assembly ("Assembly") may not make recommendations on that dispute unless the Council so requests); GOODRICH ET AL., *supra* note 9, at 129-31; SIMMA, *supra* note 9, at 255-62. Even here, however, the Assembly may initiate studies on human rights deprivations and might invoke the Uniting for

to the Dayton Accords,⁶⁰ no Council resolution authorized Allied Force.⁶¹ The narrow issue is whether state of necessity, now part of customary law and a general principle of law,⁶² legitimated Allied Force as a collective humanitarian intervention under circumstances prevailing in early 1999, from what NATO decision makers knew, or reasonably should have known, at the time.⁶³ If so, a second round of issues is whether attacks on selected targets once the campaign began were necessary and proportional. This Article does not address this issue, apart from analyzing a NATO projected maritime interdiction campaign in Part III. B.

What was necessary and proportional under state of necessity in Kosovo might or might not be necessary and proportional with

Peace Resolution ("UFP") to recommend action if the Council is deadlocked by a veto. *See* Uniting for Peace Resolution, G.A. Res. U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950), *reprinted in* 45 AM. J. INT'L L. SUPP. 1 (1950); *see also* SIDNEY J. BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 209, 264-65 (2d ed. 1988); JORGE CASTENEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 104-16 (Alba Amoia trans., 1969); GOODRICH ET AL., *supra* note 9, at 21, 26, 122-25; MURPHY, *supra* note 5, at 299-302; SIMMA, *supra* note 9, at 15, 231-35, 257-58 (criticizing UFP); *THE TANKER WAR*, *supra* note 9, at 175-78; NICHOLAS WHEELER, *Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo*, in *THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS* 145, 158-59 (Ken Booth ed., 2001) (explaining that NATO could not attempt the UFP resolution route; it might not have had enough votes in the Assembly). *Cf.* S.C. Res. 1366 on the Role of the Security Council in the Prevention of Armed Conflicts, U.N. Doc. S/RES/1366 (2001), pmb., para. 9, *reprinted in* 41 I.L.M. 248, 249 (2002) (reaffirming the Council's primary but not exclusive role and responsibility in maintaining international peace and security and in the peaceful settlement of disputes). Assembly or Council calls for action or recommendations passed pursuant to U.N. CHARTER arts. 10-11, 13-14 and chapters VI-VII are nonmandatory, although they may strengthen preexisting customary and treaty norms recited in them. *Id.* *See also* SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* ch. 1.5 (3d ed. 1998); BROWNLIE, *supra* note 6, at 14-15, 694; CASTENEDA, *supra*, ch. 3; GOODRICH ET AL., *supra* note 9, at 126, 144, 290-314; OPPENHEIM, *supra* note 6, § 16, at 47-49; RESTATEMENT (THIRD), *supra* note 9, § 103(2)(d), cmt. c, r.n.2; SIMMA, *supra* note 9, at 284, 407-18, 605-36, 652.

60. *See supra* note 36 and accompanying text.

61. *See supra* note 53 and accompanying text.

62. *See supra* notes 14-17 and accompanying text.

63. For further analysis of this point, see *infra* notes 114-134 and accompanying text. *See also infra* note 65 and accompanying text.

respect to attacks.⁶⁴ This Article also does not address claims in some NATO and national documents that self-defense, perhaps anticipatory in nature, justified Allied Force because of threats to and geographic proximity of NATO Members. These documents laid primary stress on humanitarian intervention, however.⁶⁵ Acting in anticipatory collective self-defense would have supported NATO intervention if there was a threat to nearby NATO Members.⁶⁶

B. STATE OF NECESSITY: OPPOSING PRINCIPLES AND POLICIES

Commentators approving state of necessity unanimously say that it, as a basis for intervention, is an extraordinary action, even when a state intervenes to protect its own nationals. It is not to be lightly cited as the reason for entering upon the affected state's territory, even with the most benevolent motives in mind.⁶⁷ This is particularly

64. See *supra* notes 27-29 and accompanying text.

65. See generally North Atlantic Council, *Statement on Kosovo*, Apr. 23, 1999, reprinted in IVO H. DAALDER & MICHAEL E. O'HANLON, *WINNING UGLY: NATO'S WAR TO SAVE KOSOVO* 262 (2000); Javier Solana, Statement by NATO Secretary General (Mar. 23, 1999) in 45 Keesing's Record of World Events 1999 [hereinafter 45 Keesing]; United States Department of Defense, Report to Congress: Kosovo/Operation Allied Force After-Action Report 10 (Jan. 31, 2000) [hereinafter After-Action Report]. Cf. Coll, *supra* note 55, at 131 (citing three reasons for intervention: humanitarian, regional security, normative, i.e., upholding norms, precedents necessary to maintain a humane, peaceful international order).

66. See generally Walker, *supra* note 50; *supra* notes 9-11 and accompanying text.

67. Debate over Kosovo among states and commentators makes this clear. Some support the state of necessity theory this Article advances; others reject it. Others support or reject the Kosovo operation on other grounds. See, e.g., William Joseph Buckley, *Introduction*, in Buckley, *supra* note 39, at 1; TED GALEN CARPENTER, *NATO'S EMPTY VICTORY: A POSTMORTEM ON THE BALKAN WAR* (2000); DAALDER & O'HANLON, *supra* note 65, at 16 ("[T]he Kosovo crisis is largely a saga of NATO and its major international partners doing the right thing but in the wrong way."); INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT* 4 (2000) (citing the Kosovo operation as unlawful but legitimate); WHEELER, *supra* note 41, at 275-84; Vladimir Baranovsky, *Russia: Reassessing National Interests*, in *KOSOVO AND THE CHALLENGE*, *supra* note 42, ch. 7; Cassesse, *supra* note 57; Charney, *supra* note 57; Chinkin, *supra* note 57; Simon Duke et al., *The Major European Allies: France, Germany, and the United Kingdom*, in *KOSOVO AND THE CHALLENGE*, *supra*, note 42, ch. 9; Falk, *supra* note 57; Franck, *supra* note 57; Groom & Taylor, *supra* note 57; GUICHARD, *supra* note 57; David G. Haglund & Allen Sens, *Kosovo and the Case of the (Not So) Free Riders: Portugal, Belgium, Canada, and Spain*, in *KOSOVO AND THE CHALLENGE*,

true if the inherent right of individual or collective self-defense, which may be a *jus cogens* norm,⁶⁸ is not a consideration, as it is when rescue of nationals of the intervening state(s) is involved. When succor of nonstate indigenous peoples is the issue, opposing policies include an affected state's sovereignty, political independence and territorial integrity, states' right to be free from aggression, which may also have *jus cogens* status,⁶⁹ versus equal rights of peoples, self-determination of peoples, and most importantly, human rights and humanitarian law, which may also have *jus cogens* status.⁷⁰ As a U.S. conflict of laws scholar said in

supra note 42, ch. 12; Henkin, *supra* note 55; G. John Ikenberry, *The Costs of Victory: American Power and the Use of Force in the Contemporary Order*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 6; Ibrahim A. Karawan, *The Muslim World: Uneasy Ambivalence*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch.14; George Khutsishvili & Albrecht Schnabel, *The Kosovo Conflict: The Balkans and the Southern Caucasus*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 5; Georges Kostakos, *The Southern Flank: Italy, Greece, Turkey*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 11; Kritsiotis, *supra* note 57; Michael Mandelbaum, *A Perfect Failure: NATO's War Against Yugoslavia*, 78 FOREIGN AFF. 2 (Sept.-Oct. 1999); Bjorn Moller, *The Nordic Countries: Whither the West's Conscience?*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 10; Satish Nambiar, *India: An Uneasy Precedent*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 17; Philip Nel, *South Africa: The Demand for Legitimate Multilateralism*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 16; Reisman, *supra* note 57; Roberts, *supra* note 57; Monica Serrano, *Latin America: The Dilemmas of Intervention*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 15; SIMMA, *supra* note 57; Peter Talas & Laszlo Valki, *The New Entrants: Hungary, Poland, and the Czech Republic*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 13; Wedgwood, *supra* note 57; Zhang Yunling, *China: Whither the World After Kosovo?*, in KOSOVO AND THE CHALLENGE, *supra* note 42, ch. 8.

68. See U.N. CHARTER art. 51; see also *supra* notes 9-11 and accompanying text.

69. See U.N. CHARTER arts. 1(1), 2(1), 2(4); see also *supra* notes 9, 44 and accompanying text.

70. See U.N. CHARTER arts. 1(2)-1(3), 55-56; see also Lori Fisler Damrosch, *The Inevitability of Selective Response?[:] Principles to Guide Urgent International Action*, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 405, 410 (citing inter alia Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); Convention on Prevention & Punishment of Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; First, Second, Third and Fourth Conventions, *supra* notes 33, 50; International Covenant on Civil & Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social & Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Groom & Taylor, *supra* note 57, at 292 (citing the Universal Declaration and "subsequent Covenants, as well as growth and development of the

relation to theories of choice of law in private international law within the United States, it is a battle between territoriality and the law a person carries with him or her from his or her sovereign. "Which of the two . . . should yield is a question not susceptible of a solution upon which all parties would agree."⁷¹ In the public international law context, the choice is between principles supporting state sovereignty, territorial integrity, and political independence, and the personal law of equal rights, self-determination, human rights, and humanitarian law that individuals possess everywhere.

Besides these opposing principles that have roots in the Charter, the Charter also argues for other policies, applicable to parties and situations, that must be thrown into the balance: international peace and security for all, use of principles of justice and international law, adjusting or settling international disputes or situations that might lead to a breach of the peace, friendly relations among nations, strengthening universal peace, international cooperation in solving international problems of an economic, social, cultural or humanitarian character, good faith fulfillment of Charter obligations, and settlement of disputes by peaceful means.⁷² The Charter contemplates Members' resolving disputes by negotiation and other,

Geneva Conventions"). There has been nearly universal acceptance, albeit with some states' reservations, to the First, Second, Third and Fourth Conventions and, the Genocide Convention and the Covenant on Civil & Political Rights. See UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE 387-88, 392, 452-53 (2002) [hereinafter TIF] see also BROWNLIE, *supra* note 6, at 573-84; GOODRICH ET AL., *supra* note 9, at 25-36, 371-82; OPPENHEIM, *supra* note 6, §§ 433-44; RESTATEMENT (THIRD), *supra* note 9, §§ 701-02; SIMMA, *supra* note 9, at 49-72, 760-95; Godwin, *supra* note 41, at 79; *supra* note 9 and accompanying text. Human rights law and humanitarian law developed separately; humanitarian law applies during armed conflict. There is a view that the two are today intertwined, although the traditional principle is that they are separate bodies of law. Often treaty terms and protections they afford are similar. See generally, MCCOUBREY, *supra* note 29, at 5-8 (explaining the evolution of humanitarian and human rights law). See also Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 1998 INT'L REV. RED CROSS 409; see also Franck & Rodley, *supra* note 39, at 276.

71. 3 Joseph H. Beale, *History and Doctrines of the Conflict of Laws*, in A TREATISE ON THE CONFLICT OF LAWS § 53, at 1929 (1935).

72. See U.N. CHARTER arts. 1(1)-1(3), 2(2)-2(3); see also Friendly Relations Declaration, *supra* note 44; GOODRICH ET AL., *supra* note 9, at 25-36, 40-43; SIMMA, *supra* note 9, at 49-72, 90-106.

similar means including adjudication,⁷³ with possible resort to regional organizations or the United Nations as options.⁷⁴ There are thus policies applying to all parties to an intervention issue and international institutions and for a dispute resolution besides parties' opposing policies and action options.

ILC state of necessity principles, today customary law according to the ICJ, and perhaps a general principle of law as well,⁷⁵ weigh competing states' (those of the intervenor(s) and the affected state) interests and those of the international community and its institutions. Restated for today's international law over twenty years after the ILC first published its principles, state of necessity might be argued to proceed along these lines at the beginning of this century: State of necessity can be invoked only if it is the only means of safeguarding an essential interest of the state(s) involved against a "grave and imminent peril;" by extension, this means today states' essential collective interest in protecting against a grave and imminent peril to persons entitled to protections of equal rights, human rights and humanitarian law, and self-determination.⁷⁶ The act under state of necessity must not impair an essential interest of the state to which an obligation of international law observance is owed, *i.e.*, the affected state. State of necessity cannot be invoked, individually or collectively, for what would otherwise be wrongful conduct if the obligation arises from *jus cogens* not opposed by another, competing *jus cogens* norm. By extension, if a competing *jus cogens* norm opposes principles in treaties, custom or general principles, the competing *jus cogens* norm must be applied.⁷⁷ State of necessity cannot be invoked if a treaty or other primary source of international law excludes the possibility of invoking the principle. If

73. See U.N. CHARTER art. 33; see also GOODRICH ET AL., *supra* note 9, at 257-65; SIMMA, *supra* note 9, at 505-14.

74. See U.N. CHARTER chs. VI-VIII; see also GOODRICH ET AL., *supra* note 9, at 257-369; MURPHY, *supra* note 5, ch. 7; SIMMA, *supra* note 9, at 505-757.

75. See *supra* notes 24-29 and accompanying text (explaining how the doctrine can be considered a general principle of law).

76. See *supra* note 10 and accompanying text (explaining how the state of necessity doctrine can be used by a state to protect against a "grave and imminent peril").

77. See *supra* note 9 and accompanying text (describing the relationship between *jus cogens* norms and the necessity doctrine).

a state or states contribute to occurrence of the state of necessity, that state or those states may not invoke state of necessity.⁷⁸

C. ANALYSIS OF PRINCIPLES AND FACTORS GOVERNING STATE OF NECESSITY INTERVENTION

Beyond the general principles and policies, are there principles and factors that might refine analysis of state of necessity in humanitarian intervention situations? Commentators on Kosovo have offered them;⁷⁹ factorial analysis based on the U.S. *Restatements* has

78. Compare 2001 ILC Report, *supra* note 3, art. 25, at 194 with *State Responsibility*, *supra* note 3, art. 33, at 34. See also *supra* notes 9-29 and accompanying text.

79. See, e.g., Buckley, *supra* note 67 at 11 (citing Falk); Damrosch, *supra* note 70, at 409-10; DAALDER & O'HANLON, *supra* note 65, at 206-16 (offering "lessons for international intervention" that have a multidisciplinary focus). These lessons are:

Intervention should occur as early as possible. Coercive diplomacy requires a credible threat of force. When force is used, military means must relate to political ends. Airpower alone usually cannot stop the killing in civil wars. The [Colin W.] Powell doctrine for the use of force remains valid; i.e., the United States should use military force only after exhausting all other alternatives and then only decisively, to achieve clearly defined political objectives. (To which I would add, with reasonably solid U.S. public support if at all possible). Humanitarian interventions need realistic goals. Exit strategies are desirable but are not always essential.

Id. They recited these "lessons for multilateral operations:"

Other countries need better, more deployable militaries. U.N. authorization for intervention is highly desirable, even if it is not required. (I would add this as a factor for unilateral intervention as well, and as discussed *infra* note 108 and accompanying text, mandatory for Security Council decisions pursuant to U.N. CHARTER arts. 25, 48.) Russia's support is valuable in these types of operation. (I would add that any interested state's support, particularly if it has significant military power or other influence, e.g. economic strength, ethnic kinship or religious commonality.) NATO works well in peace and in war but only if the United States leads.

Id. at 216-23. They also state two "lessons for U.S. policy:"

An effective foreign policy requires that the President lead with confidence. The United States is no hegemon or hyperpower; it is a superpower more prone to underachievement than to imperial ambition.

Id. at 223-25. Henry Kissinger would require four conditions

to embed humanitarian intervention as a top priority into American foreign policy . . . : [1] the principle must be universally acceptable; [2] it must lead to actions sustainable by American domestic opinion; [3] it must find

been suggested for oceans environmental law issues in self-defense and LOAC situations, and for other cases.⁸⁰ A similar analysis may be useful to flesh out state of necessity analysis for humanitarian intervention crises like Kosovo, taking into account the ILC principles and others at work in collective intervention under claim of state of necessity.

The *Restatement (Third) of Foreign Relations Law of the United States*⁸¹ (“*Restatement (Third)*” factorial analysis for jurisdiction to enforce, combined with features from the *Restatement (Second), Conflict of Laws* (“*Restatement (Second)*”),⁸² offers one method for considering legitimacy of states’ collective humanitarian intervention in public international law. The *Restatement (Third)* analysis was developed for transnational legal problems in courts of the United States; the earlier *Restatement (Second)* approach is used for private international law, *i.e.*, conflict of laws, issues in primarily civil litigation under federal or state law of the fifty states of the United States.⁸³ The *Restatement (Third)*⁸⁴ and the *Restatement (Second)*⁸⁵

resonance in the international community; and [4] it must have some relationship to the historical context. All these conditions are relevant to . . . an “exit strategy,” which determines whether one is fixing a temporary problem or plunging into a permanent bog.

KISSINGER, *supra* note 44, at 257.

80. See THE TANKER WAR, *supra* note 9, ch. 6 (proposing specific categories of principles that may affect the state of necessity in humanitarian intervention actions); see also George K. Walker, *The Interface of Criminal Jurisdiction and Actions Under the United Nations Charter with Admiralty Law*, 20 TULANE MARIT. L.J. 217, 246 (1996); George K. Walker, *Responses to Humanitarian Law Violations in Non-International Armed Conflicts: Historical Perspectives and Considerations on Conflicts of Jurisdiction*, 30 ISRAEL Y.B. HUM. RTS. 79, 95-102 (2001), reprinted in International Institute of Humanitarian Law, *Humanitarian Protection in non-International Armed Conflicts: First Reports of a Research Project* 79, 95-102 (2001).

81. RESTATEMENT (THIRD), *supra* note 9.

82. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971 & 1988 rev.) [hereinafter RESTATEMENT (SECOND)].

83. *Id.* § 2, cmt. c.

84. See, *e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airways*, 731 F.2d 909, 948-53 (D.C. Cir. 1984); see also *Reinsurance Co. of America v. Administrata Asigurarilor de Stat*, 902 F.2d 1275, 1283-84 (7th Cir. 1990) (Easterbrook, J., concurring); Robert H. Bork, *Introduction*, 18 STAN. J. INT’L L. 241, 244 (1982); Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1463-64 (1991); Eleanor J. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is*

have their detractors within the United States and elsewhere. Nevertheless, most U.S. federal courts apply *Restatement (Third)*, *Restatement (Second)* or similar factorial analyses in cases involving federal law,⁸⁶ and most U.S. state courts apply variants of a factorial

Reasonableness the Answer?, 19 N.Y.U. J. INT'L L. & POL. 565, 592-93 (1987); David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 208 (1984); James M. Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 395, 400 n.22 (1983); Steven A. Kadish, *Comity and the International Application of the Sherman Act: Encouraging Courts to Enter the Political Arena*, 4 NW. J. INT'L L. & BUS. 130, 156-66 (1982); Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 755 (1995); Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); Karl M. Meesen, *Conflicts of Jurisdiction Under the New Restatement*, 50 L. & CONTEMP. PROBS. 47, 53-69 (No. 3, 1987); James A. Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336, 362-64 (1980); Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53 (1995); Michael J. McKinnon, Comment, *Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond the Timberlane/Restatement Comity Approach*, 21 PEPP. L. REV. 1219, 1300-11 (1994); Note, *Beyond the Rhetoric of Comparative Interest Balancing: An Alternative Approach to Extraterritorial Discovery Conflicts*, 50 L. & CONTEMP. PROBS. 95, 101 (No. 3, 1987).

85. See, e.g., *Boudreau v. Baughman*, 368 S.E.2d 849, 853-56 (N.C. 1988); see also EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.14 (3d ed. 2000).

86. See, e.g., *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970) (expanding on *Lauritzen v. Larsen*, 345 U.S. 571 (1953) factors); *Neely v. Club Med Mgt. Serv., Inc.*, 63 F.3d 166, 186-98 (3d Cir. 1995) (en banc) (applying RESTATEMENT (THIRD) and *Lauritzen*); *Oil Shipping (Bunkering) B.V. v. Sonmez Denizclik VE Ticaret A.S.*, 10 F.3d 1015, 1019-20 (3d Cir. 1993) (applying RESTATEMENT (SECOND)); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976), *opin. after remand*, 747 F.2d 1378 (9th Cir. 1984) (cited with approval by RESTATEMENT (THIRD), *supra* note 9, § 403 r.n.6); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-99 (3d Cir. 1979) (same). Federal common law conflict of laws principles apply if federal substantive law governs, unless a federal statute or a treaty to which the United States is a party supplies conflicts rules. See *infra* notes 104-106 and accompanying text. The Supreme Court of the United States has never passed on the RESTATEMENT (THIRD) analysis. In *re Insurance Antitrust Litig.*, 938 F.2d 919, 933-34 (9th Cir. 1991) applied *Timberlane* factors, but the Court found no conflict between U.S. antitrust law and U.K. law and therefore saw no need to decide if a factorial test was appropriate to resolve a prescriptive jurisdiction conflict. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-99 (1993); compare *British Airways Bd. v. Laker Airways, Ltd.*, 1985 A.C. 58, 78-86, 95-96 (H.L.)'s similar analysis. See also Roger P. Alford,

approach to conflicts issues.⁸⁷ Despite early objections,⁸⁸ an increasing number of countries accept the factorial approach to decision making through treaties, courts and parliaments outside the United States at the supranational⁸⁹ and national⁹⁰ levels, particularly in Europe, but also in the Americas and Asia. Outside the courts, the U.S. government has applied similar methodologies in legislation⁹¹ and administrative regulations.⁹² The United States, and undoubtedly other countries, use a similar procedure in military planning processes.⁹³

The Extraterritorial Application of Antitrust Law: A Postscript on Hartford Fire Insurance Co. v. California, 34 VA. J. INT'L L. 213 (1991); *Case Two: Extraterritorial Application of United States Law Against United States and Alien Defendants*, in Symposium, *Conference on Jurisdiction, Justice, and Choice of Law for the Twenty-First Century*, 29 NEW ENG. L. REV. 517, 577 (1995); Kramer, *supra* note 84; Andreas F. Lowenfeld, *Conflicts, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42 (1995); *International Litigation and the Quest for Reasonableness*, 245 R.C.A.D.I. 9, 49-58 (1994); Trimble, *supra* note 84; McKinnon, *supra* note 84.

87. See SCOLES ET AL., *supra* note 85, §§ 2.15-2.25.

88. See, e.g., *British Nylon Spinners, Ltd. v. Imperial Chem. Indus.*, [1953] 1 Ch. 19, *final judgment*, [1955] 1 Ch. 37; Otto Kahn-Freund, *English Contracts and American Anti-Trust Law — The Nylon Patent Case*, 18 MOD. L. REV. 65 (1955); see also *supra* notes 84-85 and accompanying text.

89. See, e.g., *Wood Pulp*, Case 89/85, [1988] E.C.R. 5193. Nevertheless, these states' and others' blocking or clawback statutes represent contrary policy in recognizing extraterritorial effect of U.S. multiple damages awards, particularly in antitrust cases, and reach of U.S. discovery requests. See generally *British Airways Bd. v. Laker Airways, Ltd.*, 1985 A.C. 58 (Lord Diplock, J.); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] A.C. 547; RESTATEMENT (THIRD), *supra* note 9, § 442. r.n.4; A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 75 AM. J. INT'L L. 257 (1981).

90. See, e.g., SCOLES ET AL., *supra* note 85, § 2.27.

91. See, e.g., National Environmental Policy Act, 42 U.S.C. § 4332 (2000).

92. U.S. Department of Justice & Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* 10-11, 20-22 (Apr. 1995), reprinted in 34 I.L.M. 1080, 1092-94, 1102-04 (1995), *inter alia* citing North American Free Trade Agreement, Dec. 17, 1992, reprinted in 32 I.L.M. 289, 605 (1993), and treaties with the European Union and other major U.S. trading partners.

93. See, e.g., Frank M. Snyder, Introduction, in SOUND MILITARY DECISION (1992); George K. Walker, *Sea Power and the Law of the Sea: The Need for a Contextual Approach*, 7 OCEAN DEVEL. & INT'L L. 299 (1979), 30 NAV. WAR C. REV. 88 (No. 4, 1978).

Thus despite objections within the United States and abroad to the factorial approach exemplified by the *Restatements'* analytical methodology, prior employment of it and growing trends in its use in a variety of contexts recommends the factorial approach as a useful way to consider the intervention problem.

1. Restating the Restatements' Principles

Under the *Restatement (Third)*, jurisdiction to enforce, or a state's authority to use resources of government to induce or compel compliance with its law,⁹⁴ also known as enforcement jurisdiction or executive jurisdiction, allows a state to, according to § 431,

(1) employ judicial or nonjudicial measures to induce or compel compliance with its laws or regulations, provided it has jurisdiction to prescribe in accordance with [*Restatement (Third)*] §§ 402 and 403.

(2) Enforcement measures must be reasonably related to the laws or regulations to which they are directed; punishment for noncompliance must be preceded by an appropriate determination of violation and must be proportional to the gravity of the violation.

(3) A state may employ enforcement measures against a person located outside its territory

(a) if the person is given notice of the claims or charges against him in the circumstances;

(b) if the person is given an opportunity to be heard, ordinarily in advance of enforcement, whether in person or by counsel or other representative; and

(c) when enforcement is through the courts, if the state has jurisdiction to adjudicate.⁹⁵

Reading the foregoing § 431 shows that the section was intended for a relationship between a state and an individual or similar entity; however, its references to jurisdiction to prescribe (§§ 402, 403) and

94. RESTATEMENT (THIRD), *supra* note 9, § 401(c); *see also id.*, *Introductory Note*, at 231.

95. *Id.* § 431.

general concepts of reasonable relationship of enforcement to laws to which enforcement is directed, prior determination of violation, and proportionality of punishment bear on the state of necessity issue. Similarly, concepts of adequate notice under the circumstances and a chance to be heard, “ordinarily in advance of enforcement,” are relevant.⁹⁶

Section 402 recites basic principles of jurisdiction to prescribe, also known as legislative or prescriptive jurisdiction, a state’s authority to make its law applicable to persons or activities:⁹⁷

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1)(a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory; and

(d) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Section 402 thus recites traditional rules of territorial, nationality, protective and passive personality principles, including the floating territorial and the effects (objective territorial) jurisdiction principles.⁹⁸

Section 403 is a lengthy recitation of factors for exercise of jurisdiction:

(1) Even when one of the bases for jurisdiction under § 402 [and through incorporation by reference, § 431, for enforcement jurisdiction] is present,

96. Enforcement through the courts, *id.* § 431(3)(c), is not an issue for this analysis. The only public international law case involving Allied Force that has been decided were the SFRY ICJ suits. *See infra* notes 210-212 and accompanying text.

97. RESTATEMENT (THIRD), *supra* note 9, § 401(a) (providing an understanding of the different forms of jurisdiction that exist).

98. *Id.* § 402, cmts. a-h & r.n. 1-4.

a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors,

including those set out in Subsection (2); a state should defer to the other state if that state's interest is clearly greater.⁹⁹

The § 403(2) considerations are not exhaustive.¹⁰⁰ The *Restatement*, § 404 also provides for universal jurisdiction, *i.e.*, jurisdiction over certain activities that are condemned everywhere:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction in § 402 (and, through incorporation by reference, § 431) is present.¹⁰¹

The § 404 list is not exclusive, and certainly today would include crimes against humanity.¹⁰²

The *Restatement (Second)*, *Conflicts* suggests a second, more abbreviated reasonableness analysis, with an important conceptual difference; it says that a state of the United States should first apply a state statute addressing conflicts issues.¹⁰³ Both *Restatements* acknowledge that if a U.S. Constitutional provision, federal statute or treaty applies, it would trump any state law,¹⁰⁴ and the same is true for a State constitutional provision when State conflicts principles

99. *Id.* § 403.

100. *Id.* § 403 cmt. b.

101. *Id.* § 404.

102. *See id.* § 404 cmt. a (listing the broad situations in which a state has universal jurisdiction); *see also* KISSINGER, *supra* note 44, at 273-74 (stating that Black's Law Dictionary does not have an entry for the term and would include only piracy as a universal crime).

103. *Compare* RESTATEMENT (THIRD), *supra* note 9, § 403 with RESTATEMENT (SECOND), *supra* note 82, §§ 6, 9. The Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (2000), governing some act of state issues and partly superseding *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), might be considered an example from federal law. *See also* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l, 493 U.S. 400 (1990).

104. U.S. Const. art. VI; RESTATEMENT (THIRD), *supra* note 9, § 115; RESTATEMENT (SECOND), *supra* note 82, §§ 2 cmt. b, 6(1). The 1910 Salvage Convention is an example of treaty-mandated conflicts rules. *See* 1910 Salvage Convention, *supra* note 33, art. 15, 37 Stat. at 1672.

are involved,¹⁰⁵ in litigation in U.S. courts. A treaty, executive action (e.g., an executive agreement), or federal statute trumps any federal common law conflicts principles.¹⁰⁶ The *Restatement (Third)* § 403's reasonableness principles do not refer directly to supremacy of other law, e.g., *jus cogens*¹⁰⁷ or Security Council decisions¹⁰⁸ in public international law issues, although elsewhere the *Restatement* acknowledges their possible supremacy over other norms.¹⁰⁹

2. *Refining the International Law Commission and the Restatements' Analyses for Collective Humanitarian Intervention Under State of Necessity*

The ILC established basic principles for state of necessity that are now customary law. The *Restatements* offer factorial approaches to decision making. Principles from the Charter and the law of self-defense that might apply in analysis of when state of necessity may be validly invoked to justify collective humanitarian intervention. What follows is a nonexclusive list¹¹⁰ of principles and factors, some

105. See RESTATEMENT (SECOND), *supra* note 82, § 6(1).

106. See generally *The Paquete Habana*, 175 U.S. 677, 700 (1900) (dictum) (showing that a court must also apply precedent before referring to customary norms). See also *Free v. Bland*, 368 U.S. 663 (1962) (holding that state courts within the United States must also apply federal common law, whether in substantive rules or conflict of laws principles).

107. See *supra* note 7 and accompanying text.

108. See U.N. CHARTER arts. 25, 48, 103; GOODRICH ET AL., *supra* note 9, at 207-11, 334-37, 614-14; International Law Association Committee on Maritime Neutrality, *Final Report: Helsinki Principles on Maritime Neutrality*, reprinted in International Law Association, Report of the Sixty-Eighth Conference Held at Taipei, Taiwan, Republic of China 497, Principle 1.2 (1998) [hereinafter *Helsinki Principles*]; MURPHY, *supra* note 5, at 79-80 (providing background on the Security Council's view of what constitutes a "threat of peace"); Reisman, *supra* note 9, at 87 (articulating the way in which the Security Council exerts its power under the guise of the U.N. Charter); SIMMA, *supra* note 9, at 407-18, 651-55, 1117-25.

109. See generally RESTATEMENT (THIRD), *supra* note 9, §§ 102, cmts. g, k, r.n.3,6; 331(2)(b), cmt. e, r.n.4; 338, cmt. c; *supra* note 9 and accompanying text.

110. See RESTATEMENT (THIRD), *supra* note 9, § 403(2), cmt. b (providing the textual language of § 403 that lists the jurisdictional factors used to decide whether a state may or may not exercise jurisdiction).

seriatim and others considered collectively that might apply in these operations.¹¹¹

a. Reasonable Knowledge and Information About a Crisis at the Time of Decision

As under the law of self-defense and the LOAC, collective decision makers in a state of necessity situation should be bound by what they know, or reasonably should know, at the time when a decision to intervene is made.¹¹²

The LOAC predicates liability for violating the rules of warfare on what the decision maker knew, or reasonably should have known, at the time when the decision to attack is made.¹¹³ Nuremberg convictions were based on what defendants knew or should have known when the decision was taken to invade other states.¹¹⁴ Since

111. See AREND & BECK *supra* note 19, at 128, 134 (listing four basic criteria that a "humanitarian intervention" must satisfy and discussing the legality of "humanitarian intervention"); WHEELER, *supra* note 41, at 33-34; Behuniak, *supra* note 19, 186-90 (focusing on the modern criteria used to assess the legality of humanitarian intervention); Tom Farer, *Humanitarian Intervention: The View from Charlottesville*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 149, 151 (Richard B. Lillich ed., 1973); Fonteyne, *supra* note 39, at 258-68 (describing the substantive, procedural, and preferential criteria for humanitarian intervention appraisal); Lillich, *supra* note 19, at 347-51 (clarifying the criteria necessary to assess whether a state has a legitimate purpose in using forcible self-help); JOHN NORTON MOORE, *Toward an Applied Theory for the Regulation of Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 3 (1974); O'HANLON, *supra* note 41; at 17-46 (discussing the military criteria necessary for humanitarian intervention). See generally MURPHY, *supra* note 5, at 321-34 (suggesting improvement for future U.N.-led interventions, some of which are the same as those recommended for other collective interventions); TESON, *supra* note 39, ch. 6 (summarizing the moral framework for intervention); YAACOV I. VERTZBERGER, RISK TAKING AND DECISIONMAKING: FOREIGN MILITARY INTERVENTION DECISIONS 17-41 (1998) (discussing the anatomy of risk taking and the relationship that risk taking has to the decision-making process).

112. See *supra* note 2 and accompanying text (explaining why what NATO knew, or reasonably should have know at the time of the decision to launch Allied Force is important).

113. See *infra* notes 116-132 and accompanying text (explaining that to be found liable for violating the rules of warfare, a decision-maker is judged on what he or she knew or should have known at the time the decision to attack was made).

114. See Nuremberg Judgment, 1 Tr. Maj. War Crim. Before Int'l Mil. Trib. 208, 212-22 (1947); United States v. Araki, Judgment of Int'l Mil. Trib. for the Far

that time, there has been no authoritative statement on whether liability accrues based on what decision makers know or should know if a self-defense response is contemplated.¹¹⁵ Commentators have been tempted to justify opinions, at least in part, on evidence available after a decision, maybe years later.¹¹⁶

Developing LOAC rules confirm that the proper time for predicated liability is what decision makers knew or should have known when an operation was authorized. Hindsight can be 20/20; decisions at the time may be clouded with the fog of war.¹¹⁷ Declarations of understanding¹¹⁸ by countries party to Protocol I¹¹⁹ to

East, *reprinted in* 1 The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.) 29 Apr. 1946 – 12 Nov. 1948, at 382 (B.V.A. Roling & C.F. Ruter eds., 1977); *see also* MCCORMACK, *supra* note 10, at 253-56 (providing an example of the International Military Tribunal's viewpoint of the right of self-defense).

115. *See* KISSINGER, *supra* note 44, at 280, 296 n.46. (using the *General Belgrano* matter, in which families of naval personnel lost in the Argentine cruiser during the 1982 Falklands/ Malvinas War sued the United Kingdom in the European Court of Human Rights, to show the pressure for universal jurisdiction).

116. *See id.* at 280; *see also* MCCORMACK, *supra* note 10, at 98-99 (explaining that Israel had been given a necessary guarantee of security under the U.S. "Star Wars" program, which was a reason why it may not have been necessary for Israel to bomb the Iraqi nuclear reactor); *see also* ALEXANDROV, *supra* note 10, at 163 (asserting the view that the 1981 Israeli raid on the Iraqi nuclear reactor could not be supported by self-defense because of the 1994 debate on imposing sanctions on North Korea, rather than using force, because of the danger of nuclear weapons).

117. *See* CARL VON CLAUSEWITZ, ON WAR 117-21 (Michael Howard & Peter Paret eds. & trans., 1976) (discussing the thought process that a commander must undergo during combat missions).

118. *See* RESTATEMENT (THIRD), *supra* note 9, § 313 cmt. b (analyzing declarations and understandings with respect to international agreements). The *Restatement* says:

When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another . . . party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.

. . . [For] a multilateral agreement, a declaration of understanding may have complex consequences. If it is acceptable to all . . . , they need only acquiesce.

the 1949 Geneva Conventions¹²⁰ state that for civilians' protection in Article 51,¹²¹ protection of civilian objects in Article 52,¹²² and

If, however, some . . . share or accept the understanding but others do not, there may be a dispute as to what the agreement means, and whether the declaration is in effect a reservation. In the absence of an authoritative means for resolving that dispute, the declaration, even if treated as a reservation, might create an agreement at least between the declaring state and those who agree with that understanding. See [RESTATEMENT (THIRD), *supra*, § 313(2)(c), dealing with reservations] However, some . . . parties may treat it as a reservation and object to it as such, and there will remain a dispute between the two groups as to what the agreement means.

Id. § 313(2)(c); see also *ILC Rep supra* note 15, at 189-90 (discussing the membership, attendance, officers, meeting, agenda, and laws of treaties); D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L L. 67, 69 (1977).

119. Protocol I, *supra* note 27.

120. See First Convention, *supra* note 50; Second Convention, *supra* note 33; Third Convention, *supra* note 50; Fourth Convention, *supra* note 50.

121. See Protocol I, *supra* note 27, art. 51, at 26 (articulating the Article 51 prohibitions on attacks on civilians, absent other considerations such as those civilians that take up arms); see also BOTHE ET AL., *supra* note 27, at 299 n.3 (listing the protections available to citizens within the context of military attacks); SAN REMO MANUAL, *supra* note 27, para. 39 (describing the principle of distinguishing between civilians and combatants within the realm of naval warfare); NWP 1-14M ANNOTATED, *supra* note 10, paras. 6.2, 3.2, and 11.2 (noting Fourth Convention protections for noncombatants persons, prisoners of war, wounded, sick, and shipwrecked persons, and civilians with the occupied territory); PICTET, *supra* note 50, at 208-09, 224-29 (discussing the development of the International Red Cross Commission and its relationship to providing protection and relief to individuals in the armed forces); STONE, *supra* note 27, at 684-732 (articulating the goals of the Geneva Convention, the protections of civilians in enemy territory, and the concept of a "legal paradise"); Matheson, *supra* note 27, at 423, 426 (providing remarks about Protocols I and II); Solf, *supra* note 27, at 130-31 (explaining that civilians may not be used as human shields, nor may they be a subject of attacks intended to terrorize them, although otherwise legitimate attacks that happen to terrorize them are permissible); Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, 1923 *Hague Rules on Aerial Warfare*, reprinted in RONZITTI, *supra* note 38, at 381, 385 (1987) (providing authentic language regarding the adoption of the Hague warfare rules); Schmidt, *supra* note 27, at 225-32 (explaining that the rules of distinction, necessity and proportionality, combined with the concomitant risk of collateral damage inherent in any attack together restate custom). See generally Hans-Peter Gasser, *Prohibition of Terrorist Attacks in International Humanitarian Law*, 1985 INT'L REV. RED CROSS 200.

122. See Protocol I, *supra* note 27 (discussing the general customary norm exception in article 52(1), which prohibits reprisals against civilians). See generally BOTHE ET. AL., *supra* note 27, at 320-37 (discussing the drafting history

precautions to be taken in attacks, stated in Article 57,¹²³ a commander should be held liable based on that commander's assessment of information available at the relevant time, *i.e.*, when a decision is made.¹²⁴ Two 1980 Conventional Weapons Convention¹²⁵ protocols have similar terms, *i.e.*, a commander is only bound by information available when a decision to attack is made.¹²⁶ The

of articles 52 and 57); COLOMBOS, *supra* note 33, §§ 510-11, 524-25, 528-29; NWP 1-14M ANNOTATED, *supra* note 10, paras 6.2.3 & n.36, 6.2.3.2, 8.1.1 & n.9, 8.1.2 & n.12 (noting the Fourth Convention protections for some civilians from reprisals and the U.S. position that Protocol I "creates new law"); O'CONNELL, *supra* note 30, at 1105-06 (articulating the "doctrine of necessity" within the context of the Geneva Red Cross Conventions); PICTET, *supra* note 50, at 131; Matheson, *supra* note 27, at 426; Horace Robertson, *The Principle of the Military Objective in the Law of Armed Conflict*, in *THE LAW MILITARY OPERATIONS* ch.10 (Michael N. Schmitt ed., 1998) (discussing the principle of distinction within the context of Protocol I); Solf, *supra* note 27, at 131 (discussing the prohibitions against civilians reprisals in article 52); Frank Russo, *Targeting Theory in the Law of Naval Warfare*, 40 NAV. L. REV. 1, 17 n.36 (1992) (arguing against the application of Protocol I to naval warfare).

123. See Protocol I, *supra* note 27, art. 57, 1125 U.N.T.S. at 29; see also BOTHE ET AL., *supra* note 27, at 359-69 (explaining that the rules of distinction, necessity, and proportionality, along with the concomitant risk of collateral damage inherent in any attack in Article 57 generally restate customary norms); NWP 1-14M ANNOTATED, *supra* note 10, paras 8.1-8.1.2.1.

124. See DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 706-17 (3d. ed., 1988) (detailing the ratification processes of the Declaration of Belgium held on May 20, 1986, the Declaration of the Netherlands held on June 26, 1977, and the Declaration of the United Kingdom held on December 12, 1977).

125. Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter Conventional Weapons Convention].

126. See *id.*; see also Protocol on Prohibitions or Restrictions on Use of Mines, Booby Traps & Other Devices (Protocol II), Oct. 10, 1980, art. 2(4), 1342 U.N.T.S. 168, as amended, May 3, 1996, art. 2(6), 35 I.L.M. 1206, 1209 (1996) (Amended Protocol II); Protocol on Prohibitions or Restrictions on Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, art. 1(3), 1342 U.N.T.S. 171, 172. The United States has ratified the Convention and Protocols I and II *supra*; Protocol III is not in force for the United States. See TIF, *supra* note 70, at 480. Amended Protocol II, Protocol III and Protocol IV on Blinding Laser Weapons, May 3, 1995, 35 I.L.M. 1218 (1996) are now before the U.S. Senate. See Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 325 (1997) (discussing the amended versions of Protocols I, II, and III). Protocol IV and Protocol on Non-Detectable Fragments

Second Protocol to the 1954 Hague Cultural Property Convention also recites this principle.¹²⁷

Protocol I, with its understandings, and the Conventional Weapons Convention protocols are on their way to acceptance among states.¹²⁸ These treaties' common statement, in text or declarations, that commanders are held accountable based on information they have at the time for determining whether attacks are necessary and

(Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168, do not have these provisions. Protocol II and III commentators say little about these provisions; they state the obvious. See Burrus M. Carnahan, *The Law of Land Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73 (1984) (discussing the recent attention given to the proper use of conventional weapons); W.J. Fenrick, Comment, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 19 CAN. Y.B. INT'L L. 229 (1981) (explaining that the annexing of Protocols I, II, and III during the Geneva Convention was a major accomplishment because it fostered the peace settlement process); Howard S. Levie, *Prohibitions and Restrictions on the Use of Conventional Weapons*, 68 ST. JOHN'S L. REV. 643 (1994) (providing background on Protocols I and II in the Conventional Weapons Convention and focusing on the definitions of specific weapons); J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, 105 MIL. L. REV. 1 (1984) (analyzing Protocol I of the Conventional Weapons Convention); William G. Schmidt, *The Conventional Weapons Convention: Implications for the American Soldier*, 24 A.F.L. REV. 279 (1984) (discussing the implications and obligations that the Conventional Weapons Convention had on the U.S. military). The United States declared it would not sign Convention on Prohibition of Use, Stockpiling, Production & Transfer of Anti-Personnel Mines & on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997). See generally President William J. Clinton, Remarks on Landmines and an Exchange with Reporters, in 33 WEEKLY COMP. PRES. DOC. Sept. 17, 1997, at 1356-59 (outlining the need for two new provisions within the Conventional Weapons Agreement: (1) an extension of the transition period that would be used to phase-out mine-usage and (2) allowing the preservation of antibank mines).

127. See Second Protocol to Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict, Mar. 26, 1999, art. 1(f), 38 I.L.M. 769 (1999) [hereinafter Second Protocol], referring to Convention for Protection of Cultural Property in Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Cultural Property Convention]. The Second Protocol, *supra*, is not in force; 9 states are party, and 101 have ratified Hague Cultural Property Convention, *supra*. See International Committee of the Red Cross, *supra* note 27.

128. Nearly all countries, but not the United States, are party to Protocol I. See *supra* note 27 (explaining how many states are party to Protocol I); see also International Committee of the Red Cross, *supra* note 27 (listing the 88 states that are party to the Conventional Weapons Convention, the 79 states party to Protocol II, the 63 states party to Amended Protocol II, and the 81 states party to Protocol III).

proportional has become a nearly universal norm. The *San Remo Manual* recognizes it as the naval warfare standard.¹²⁹ It can be said with fair confidence that this is the *jus in bello* customary standard. It should be the standard for *jus ad bello*, and the same principle should apply for action under state of necessity. A national leader or military commander directing a self-defense response, whether reactive or anticipatory, or acting pursuant to state of necessity, should be held to the same standard as a commander in the field deciding on attacks, *i.e.*, being held accountable for what he or she, or those reporting to the leader, knew or reasonably should have known, when a decision is made to respond in self-defense or in state of necessity.¹³⁰ What is sufficient knowledge depends on each situation. What might be sufficient knowledge in an LOAC situation might not be sufficient knowledge in a self-defense situation, and vice versa. What is sufficient knowledge in either might or might not be sufficient knowledge in a state of necessity situation.

Therefore, as in any decision procedure, including the military planning process,¹³¹ before proceeding to further analysis:

Principle A. A first requirement is assembling sufficient data to inform those who must decide on collective humanitarian intervention under state of necessity of the seriousness of a situation at the time a decision to intervene on this basis is made.

This data would include information on how widely accepted and relatively uncontroversial are the human rights or humanitarian law norms that the affected state is accused of violating; violations should be widespread, clear and well documented.¹³² Principle H, discussed below, declares standards for durational time.¹³³

129. See SAN REMO MANUAL, *supra* note 27, ¶ 46(b), Commentary 46.3; see also CHENG, *supra* note 21, at 90 (1983) (analyzing the German invasion of the Netherlands); MCDUGAL & FELICIANO, *supra* note 10, at 220 (describing the factors required for self-defense to be legitimate).

130. See THE TANKER WAR, *supra* note 9, at 160-61; Walker, *supra* note 50, at 370-74 (discussing Protocol I of the Conventional Weapons Convention and anticipatory collective self-defense).

131. See *supra* note 93 and accompanying text.

132. See MURPHY, *supra* note 5, at 16-18, 322, 324-326 (acknowledging the lack of clarity in determining when a human rights violation actually occurs); see also Johansen, *supra* note 55, at 71-72 (indicating that the standard for triggering

Did NATO have sufficient data to be informed of the seriousness of the humanitarian crisis in Kosovo before it acted? There seems to be little doubt that there was a humanitarian disaster in the making.¹³⁴

b. Consensus Decision Making

NATO and many self-defense alliances operate by consultation (*i.e.*, consensus through the NATO Council) among NATO members,¹³⁵ a feature common to many of these agreements,¹³⁶ that may be a customary norm.¹³⁷ By contrast, the U.N. Security Council

humanitarian intervention requires that there be widespread human rights violations).

133. See *infra* notes 277-280 and accompanying text.

134. See generally S.C. Res. 1160, 1199, 1203, *supra* note 59. See After-Action Report, *supra* note 65, at 2-4, 10, 22, A-4, A-6, A-7 (arguing that NATO achieved its goals during the Kosovo conflict); U.S. Secretary of Defense William S. Cohen & U.S. Chairman of the Joint Chiefs of Staff Gen. Henry H. Shelton, *Message 1*, in After-Action Report, *supra* note 65 (reporting the United States and NATO intervention in Kosovo and explaining how such an intervention stabilized Eastern Europe, thwarted ethnic cleansing, and ensured NATO's credibility); Butler, *supra* note 42, at 278-79 (describing NATO's objectives in the humanitarian catastrophe in Kosovo); Calic, *supra* note 42, at 29 (setting forth the historical legacies with respect to NATO's intervention in the Kosovo matter); Agon Demjaha, *The Kosovo Conflict: A Perspective from Inside*, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 32, 34-36 (providing a historical account of the events leading up to NATO's intervention in the Kosovo ethnic conflict); Ray Funnell, *Did Air Power Win the War?*, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 437, 443 (discussing NATO's operating procedures, position of power, and casualty avoidance during the Kosovo conflict); Groom & Taylor, *supra* note 57, at 294 (comparing the role that the United States and NATO played in the Gulf War to the role they played in the Kosovo conflict); Kritsiotis, *supra* note 57, at 334-39; 45 Keesing, *supra* note 65, at 42845-42847.

135. See North Atlantic Treaty, Apr. 4, 1949, arts. 4-5, 63 Stat. 2241, 2242, 2244, 34 U.N.T.S. 243, 246; Protocol, Accession of Greece & Turkey, Oct. 17, 1951, 3 U.S.T. 43, 126 U.N.T.S. 350; Protocol, Accession of Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 5707, 243 U.N.T.S. 308; Protocol, Accession of Spain, Dec. 10, 1981, 34 U.S.T. 3510; Protocol, Accession of Czech Republic, Dec. 16, 1997, Protocol, Accession of Hungary, Dec. 16, 1997, and the Protocol, Accession of Poland, Dec. 16, 1997, reprinted in S. Treaty Doc. No. 105-36 (1997).

136. See Walker, *supra* note 50, at 362-68.

137. See BROWNLIE, *supra* note 6, at 5; see OPPENHEIM, *supra* note 6, § 10 (discussing the practical aspects of international law); Walker, *supra* note 50, at 367-68 (describing the collective self-defense treaties during the Charter Era).

operates under a supermajority, nine of fifteen, including votes of all permanent members, for all but procedural issues; the General Assembly votes by a two-thirds majority of states present and voting on "important questions," which include recommendations on maintenance of international peace and security, and a simple majority of states present and voting on all other issues; the ICJ votes by simple majority.¹³⁸ The Council and Assembly have developed a practice of passing resolutions by consensus as well.¹³⁹ Consensus decision making is also likely the case within other groups, *e.g.*, Article 52 regional organizations and formal or ad hoc coalitions,¹⁴⁰ informal groups, alliances, or other multilateral organizations.

Besides probably being a customary rule, consensus decisions have practical (or political) advantages: (1) organizational cohesion; (2) the "fail-safe" of group thinking and less of the "appearance of evil" that a unilateral decision may have; (3) the appearance to those outside the organization (states, other international organizations, people, the media, etc., and particularly the affected state) will be stronger than a babble of differing voices. A well-conducted choir of any size can sing more loudly than an unamplified solo performer.¹⁴¹ The second principle is:

138. U.N. CHARTER arts. 18, 27; I.C.J. Statute, art. 55 (explaining that the ICJ uses a majority vote method); *see also* GOODRICH ET. AL., *supra* note 9, at 168-76, 215-31; SIMMA, *supra* note 9, at 318-27, 434-69.

139. *See* SIMMA, *supra* note 9, at 324-27, 462-63.

140. *See* Damrosch, *supra* note 55, at 221 (explaining that there is no difference in legal status between regional interventions by ad hoc groups of states and unilateral intervention); GLENNON, *supra* note 41, at 199 (preferring intervention by preexisting coalitions, preferable composed of democracies that are close to an affected state to further the likelihood); *see* Godwin, *supra* note 41, at 8-11, 93-95 (arguing that NATO should declare itself a U.N. Charter ch. VIII organization, and need not seek U.N. Security Council approval to do so, as it engages in peacemaking operations like Kosovo).

141. *See* GLENNON, *supra* note 41, at 198-99; *see also* Behuniak, *supra* note 19, at 189 (discussing collectivism within the context of humanitarian intervention); Fonteyne, *supra* note 39, at 266 (mentioning that collective action is the preferential criteria for humanitarian intervention appraisal); Godwin, *supra* note 41, at 82 (discussing the process of making agreements in order to uphold democracies); Johansen, *supra* note 55, at 72-76 (placing emphasis on the U.N. humanitarian intervention and the risk taking involved in such U.N. efforts); Zacklin, *supra* note 51, at 939 (stating that states should cooperate collectively to remedy serious international law breaches, especially *jus cogens* norms).

Principle B. Any organization or group of states considering proposed collective humanitarian intervention should operate by consensus in deciding on intervention and throughout the ensuing operation.

Given the probable customary nature of consensus decision making by Article 51 organizations, this requirement should be mandatory for them, and probably so for other groups, *e.g.*, coalitions or other organizations. An exception might be situations where an organization or group has delegated decisions to one or more states, or where group or organizational rules, *e.g.*, are different.

Although there were differences within the Alliance as Allied Force proceeded, NATO operated by consensus within its treaty mandate.¹⁴²

c. Seriousness of the Situation

Commentators, including the ILC and the ICJ (which also recognizes state of necessity), agree that state of necessity is an extraordinary circumstance.¹⁴³ A state or states in effect must act in a way that would otherwise be a breach of international law by using force to relieve an immediate and egregious situation, be it high seas pollution or, in the Kosovo context, actual or risk of serious, widespread deprivations of protections under human rights and humanitarian law, including loss of life, serious bodily injury,

142. *See generally* After-Action Report, *supra* note 65, at 9 (placing emphasis on the unity that NATO maintained so that diplomacy could be achieved). *See also* WESLEY K. CLARK, *WAGING MODERN WAR; BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* 14, 446 (2001) (indicating that NATO incorporates convergence, compromise, and harmonization to merge the differing viewpoints within its organization while simultaneously sustaining its unity and ultimately its diplomacy); BENJAMIN S. LAMBETH, *NATO'S AIR WAR FOR KOSOVO* 185, 205-07 (2001) (discussing NATO's inefficiencies with respect to its leadership and approach to decisionmaking); BUTLER, *supra* note 42, at 279-81 (articulating NATO's air strike strategies in Kosovo); Duke et. al., *supra* note 67, at 135 (examining the role that Germany played during the Kosovo crisis); *Continued Air Strikes on Yugoslavia*, in 45 Keesing, *supra* note 65, at 42899, 42900, 42956.

143. *See supra* notes 10-29 and accompanying text.

outrages to men, women and children, and the like.¹⁴⁴ In this regard, state of necessity is a more serious situation than peacetime reprisals, which under the majority view cannot involve threat or use of force to compel a lawbreaking country to play by the rules, or retorsions, which are lawful but unfriendly acts.¹⁴⁵ There must be no other reasonable alternative to intervention, given the crisis' immediacy and egregious nature. In this regard, state of necessity is similar to,

144. See Raby, *supra* note 3, at 262-64 (stressing that in order for a State to "invok[e] necessity as an excuse for its violation," there must be no other available means of action); see also *supra* notes 30-34 and accompanying text.

145. Reprisals must be proportionate; a state contemplating reprisal must first call upon an offending state to mend its ways. Compare Friendly Relations Declaration, paras. 1, 3, *supra* note 44, at 1294, 1297 (1970), and Gabčíkovo-Nagymaros Project (Hung. v. Slovakia), 1997 I.C.J. 7; 54, and Military & Paramilitary Activities in & Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 127, and Air Service Agreement of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 417, 443, and 2001 ILC Report, *supra* note 3, arts. 49-54, at 324-55 (including the use of "countermeasures" instead of reprisals), and *State Responsibility*, *supra* note 3, art. 34, at 26, 52, 54, and BOWETT, *supra* note 10, at 13, and BRIERLY, *supra* note 44, at 401-02, and BROWNLIE, *supra* note 10, at 281, and D'AMATO, *supra* note 10, at 41-43, and GOODRICH ET AL., *supra* note 9, at 340-47, and ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 217 (1963), and MURPHY, *supra* note 5, at 13, and NWP 1-14M ANNOTATED, *supra* note 10, para 6.2.3.1, and OPPENHEIM, *supra* note 10, §§ 43, 52a, at 152-53, and PICTET, *supra* note 50, at 228-29, and SIMMA, *supra* note 9, at 105, and STONE, *supra* note 27, at 286-87, and THE TANKER WAR, *supra* note 9, at 158-60, and Ago, *supra* note 21, at 39, 42, and Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. L. REV. 1, 14 (1990), and Roberto Barsotti, *Armed Reprisals*, in ANTHONY CASSESE, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 79 (1986), and D.W. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 20 (1972), and Day, *supra* note 19, at 50, and ROSALYN HIGGINS, *The Attitude of Western States Toward Legal Aspects of the Use of Force*, in CASSESE, *supra*, 57 at 435, 444, and McHugh, *supra* note 10, at 144-45, and Tucker, *supra* note 10, at 586-87, with Res. 2131, *supra* note 44, at 28 (stating that economic reprisal is forbidden), and DINSTEIN, *supra* note 10, at 193-204 (stating that "defensive armed reprisals" are admissible in the Charter era), and LAWRENCE T. GREENBERG ET AL., INFORMATION WARFARE AND INTERNATIONAL LAW 26-27 (1997) (stating that reprisals using force are admissible). See also Lobel, *supra* note 10, at 540 (failing to clearly distinguish between reprisals involving force and those that do not). However, the context of his colloquy appears to make it reasonably clear that he considers only the former. *Id.* at 542 (citing W. Michael Reisman, *Defence or Reprisals? The Raid on Baghdad: Some Reflections on Its Lawfulness and Implications*, 5 EUR. J. INT'L L. 120, 125 (1994) (standing for the proposition that the 1993 U.S. attack on Baghdad, responding to threats against former President George H.W. Bush, might be better characterized as a reprisal)).

but in a given situation not necessarily the same as, the anticipatory self-defense principle of admitting of no other reasonable alternative.¹⁴⁶ For example, immediate threat of deprivation of life in clear violation of international law on a widespread basis could not in most cases be cured by resort to adjudication because of its relatively (and necessarily) deliberative process.¹⁴⁷

Similarly, if another organization, *e.g.*, the Security Council with its Article 25 and 48 authority to issue decisions binding in law, cannot act because of reasonably perceived or actual threat of veto when an intervention decision must be made,¹⁴⁸ state of necessity might be validly invoked. In cases where the Council is not seized of a matter, by analogy to Article 51's reporting rule for self-defense situations,¹⁴⁹ states may act collectively under state of necessity pursuant to these principles but should report their action to the Council, again by analogy to Article 51's rule. There is also a practical (or political) side to reporting; the affected state will undoubtedly go to the Council, and the Council should hear both sides before calling for, recommending or deciding on action under the Charter.¹⁵⁰ The third principle is:

Principle C. The situation must be so serious and so immediate, and there must be no other reasonable alternative to collective action under state of necessity, before states may undertake collective humanitarian action under state of necessity.

146. See Raby, *supra* note 3, at 262; see also *supra* notes 9-11 and accompanying text (emphasizing the scope of availability for state of necessity).

147. Cf. AREND & BECK, *supra* note 19, at 128; WHEELER, *supra* note 41, at 34 (explaining how intervention has occurred too late to protect citizens from harm); Behuniak, *supra* note 19, at 186-88; Coll, *supra* note 55, at 140 (stating that all realistic peaceful alternatives must be used before military action); Fonteyne, *supra* note 39, at 258-60; Lillich, *supra* note 19, at 347-49; MOORE, *supra* note 111, at 25; Zacklin, *supra* note 51, at 939.

148. See *supra* notes 59, 108 and accompanying text (providing an example of an organization's use of state of necessity).

149. See *supra* notes 9-11 and accompanying text (detailing the use of the doctrine of self-defense).

150. See MURPHY, *supra* note 5, at 322; Behuniak, *supra* note 19, at 188; Fonteyne, *supra* note 39, at 264-66; Godwin, *supra* note 41, at 81; MOORE, *supra* note 111, at 25; Zacklin, *supra* note 51, at 939 (discussing the primacy of the Council's role and responsibility).

As noted above, practice in anticipatory self-defense situations can be guides, but not governing rules, for standards in state of necessity situations.¹⁵¹ States adhering to the view that the law of self-defense in the Charter era does not include anticipatory self-defense¹⁵² may therefore agree to intervention as no other reasonable alternative while retaining their position on the law of self-defense. This difference in views on self-defense may enter the collective decision calculus, Principle B; the group or organization deciding on collective humanitarian intervention must be aware of this. There are also risks that a situation that is really not serious or immediate, or is not a circumstance of true deprivation of universally-held values, may be an occasion for invoking collective humanitarian intervention under state of necessity.¹⁵³

Although the Security Council, seized of the crisis, passed resolutions that recognized the increasing gravity of the situation,¹⁵⁴ it could not have passed a resolution authorizing use of force. Two permanent Council members, China and Russia,¹⁵⁵ had threatened to veto any such resolution.¹⁵⁶ NATO's choice was to stand by and do

151. See *supra* notes 9-11, 26 and accompanying text.

152. See *supra* note 10 and accompanying text.

153. Cf. KISSINGER, *supra* note 44, at 264 (“[T]he doctrine of universal interventionism may in time redound against the very concept of humanitarianism. Once the doctrine of universal interventionism spreads and competing truths begin to fight each other, we may be entering a world in which, to use G.K. Chesterton’s phrase, ‘virtue runs amok.’”).

154. See *supra* notes 57-59 and accompanying text.

155. See U.N. CHARTER arts. 23(1), 27(3); see also GOODRICH ET AL., *supra* note 9, at 192-94, 227-31; SIMMA, *supra* note 9, at 393-95, 434, 447-55 (latter noting that the Republic of China permanent member seat is now occupied by the People’s Republic of China and that the Union of Soviet Socialist Republics permanent member seat is now occupied by the Russian Federation, i.e., Russia).

156. See DAALDER & O’HANLON, *supra* note 65, at 44 (emphasizing how China and Russia stated they would not vote in support of a resolution that dealt with “purely the internal affairs of Yugoslavia”); WHEELER, *supra* note 41, at 263-67; WHEELER, *supra* note 59, at 155-58. Russia has considered the Balkans “its natural sphere of influence since at least the 1870s.” KURTH, *supra* note 40, at 89, 92. China viewed the campaign as a serious threat, given the Taiwan and Tibet situations; “the war confirmed and sharpened Chinese concerns about ‘U.S. hegemonism.’” *Id.*

nothing, or to act to alleviate the situation, which was growing worse by the day.¹⁵⁷ NATO rightly chose to act.

d. Necessity and Proportionality

Action(s) chosen must be necessary and proportional under circumstances of immediacy and admitting of no other alternative.¹⁵⁸ As in Principle C standards for immediacy and admitting of no other alternative, standards for necessity and proportionality in state of necessity situations may not be the same as those in self-defense or LOAC situations, although they can be guides. For example, there are objects under the LOAC or the law of self-defense that are ordinarily immune from attack or self-defense response, unless they are used to further an opponent's war effort during armed conflict or military activity related to its initial attack or aggression for which a self-defense response may be forthcoming. Methods of warfare, *e.g.*, weapons *per se* indiscriminate or indiscriminate under the circumstances, are forbidden under the LOAC and in self-defense situations. These rules should guide state of necessity situations. One problem, however, is Common Article 2 of the 1949 Geneva Conventions, which provides, *e.g.*, in the Fourth Convention applying to protection of civilians and civilian objects:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

[It] shall also apply to all cases of partial or total occupation of the territory of a . . . Party, even if the said occupation meets with no armed resistance.

Although one . . . Power . . . in the conflict may not be a Party to the . . . Convention, the Powers that are parties thereto shall remain bound by it in

157. See *supra* notes 30-34, *infra* notes 247-273 and accompanying text.

158. Cf. AREND & BECK, *supra* note 19, at 134; WHEELER, *supra* note 41, at 34; MURPHY, *supra* note 5, at 323; TESON, *supra* note 39, at 122; Behuniak, *supra* note 19, at 187-88; Coll, *supra* note 55, at 141-47; Fonteyne, *supra* note 39, at 260, 262; Johansen, *supra* note 55, at 76; Lillich, *supra* note 19, at 347-50; MOORE, *supra* note 111, at 25; Zacklin, *supra* note 51, at 939.

their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.¹⁵⁹

The SFRY and all NATO countries had been party to the Conventions before the SFRY's dissolution.¹⁶⁰ Although there was no official record of the SFRY's having accepted and applied the Conventions in accordance with Common Article 2 during Allied Force, its treatment of NATO soldiers in its custody seems to indicate acceptance. After Allied Force ended, the SFRY accepted the Conventions retroactive to 1992 on October 16, 2001.¹⁶¹ Moreover, treaty succession principles,¹⁶² even if the SFRY and other states only had formal acceptance of the former country's treaties

159. Fourth Convention, *supra* note 50, art. 2, *id.* at 3518, 75 U.N.T.S. at 288 (applying to protection of the civilians and civilian objects); *see also* First Convention, *supra* note 50, art. 2, *id.* at 3116, 75 U.N.T.S. at 32; Second Convention, *supra* note 33, art. 2, *id.* at 3220, 75 U.N.T.S. at 86; Third Convention, *supra* note 50, art. 2, *id.* at 3319, 75 U.N.T.S. at 136; PICTET, *supra* note 50, at 28-37.

160. *See* TIF, *supra* note 70, at 319, 452-53 (providing the list of agreements prior to dissolution).

161. *See* International Committee of the Red Cross, *supra* note 27 (explaining that "for States which have made a declaration of succession, entry into force takes place retroactively, on the day of their accession to independence."); *see also* Christopher Greenwood, *The Applicability of International Law and the Law of Neutrality to the Kosovo Campaign*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN (forthcoming). When this article was researched and delivered in June 2001 as a paper, the SFRY acceptance had not been deposited. The ensuing and sometimes convoluted discussion based on treaty succession principles and the Conventions and Protocols as restating custom or general principles of law demonstrates the importance of the Conventions and Protocols as treaty law. *See* Thomas Bruha, *The Kosovo War before the International Court of Justice—A Preliminary Appraisal*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 287, 298-300 (Christian Tomuschat ed., 2002) (perceiving similar problems for the Genocide Convention, "in which an express reservation was made to the effect that accession shall have no 'retroactive effect' as regards Article IX of the Convention").

162. *See generally* Symposium, *State Succession in the Former Soviet Union and in Eastern Europe*, 33 VA. J. INT'L L. 253 (1993) [hereinafter Symposium, *State Succession*] (defining state succession as "deal[ing] with the transmission or extinction of rights and obligations of a state that no longer exists or has lost part of its territory"); Walker, *Integration*, *supra* note 9.

under review,¹⁶³ may have bound the SFRY during Allied Force. The SFRY was also bound to the extent the Conventions restated custom or general principles of law.¹⁶⁴ The general view is that much, but not all, of the Third Convention restates customary rules.¹⁶⁵ If Allied Force would be considered a "conflict," as it assuredly was, the Third Convention, indeed all four of the 1949 Conventions, bound the SFRY and NATO to that extent. If the operation should be analogized to a self-defense response in terms of the Conventions' applying, Convention standards should be also be applied.

Whether applicable as positive law or as principles by analogy in collective humanitarian intervention under state of necessity, since the 1977 Protocol I supplements the 1949 Conventions for international armed conflicts,¹⁶⁶ its standards relating to necessity and proportionality, including objects immune from attack unless losing immunity by being employed as part of the war effort,¹⁶⁷ should be consulted as well. Not all states party in the NATO campaign, *e.g.*, the United States, were Protocol I parties, and not all states consider all of its terms to be customary law.¹⁶⁸ The former Yugoslavia was a Protocol I party;¹⁶⁹ the SFRY accepted the Conventions retroactive to 1992 on October 16, 2001.¹⁷⁰ The SFRY was also subject to treaty

163. See TIF, *supra* note 70, at 319, 452-53.

164. See *supra* note 50 and accompanying text (discussing how Common Article 3 governing noninternational armed conflicts reflects the general common law by providing a common provision to Geneva Conventions I-IV).

165. See, *e.g.*, NWP 1-14M ANNOTATED, *supra* note 10, paras 8.5.1.1, 8.5.1.4-8.5.1.5, 11.2-11.3.

166. Protocol I, *supra* note 27, arts. 1(3), 96, 1125 U.N.T.S. at 7, 46; see also BOTHE ET AL., *supra* note 27, at 44-45, 552-57; PILLOUD ET AL., *supra* note 33, at 39-40, 1084-92.

167. Protocol I, *supra* note 21, arts. 8-31, 35-42, 48-59, 61-62, 1125 U.N.T.S. at 10-19, 21-23, 25-32; see also BOTHE ET AL., *supra* note 27, at 92-167, 183-231, 274-385, 388-403; NWP 1-14M ANNOTATED, *supra* note 10, ch. 8, paras 11.1-11.7; PILLOUD ET AL., *supra* note 33, at 107-337, 381-502, 583-706, 717-44.

168. See, *e.g.*, NWP 1-14M ANNOTATED, *supra* note 10, ch. 8, paras 11.1-11.7; *supra* notes 12-15, 27, 121-123, 128 and accompanying text.

169. *Signatures, Ratifications and Accessions Concerning the Protocols I and II Additional to the Geneva Conventions, 1977*, in SCHINDLER & TOMAN, *supra* note 124, at 701, 703 (listing the former Yugoslavia's signature on December 12, 1977 and its ratification and accession on June 11, 1979).

170. See *supra* note 161 and accompanying text.

succession principles and other considerations as to whether it was bound in 1999.¹⁷¹ Moreover, to the extent the Protocol's terms relating to necessity and proportionality and immunity during attacks reflected custom,¹⁷² their terms should have been even more closely considered for application by states involved in Allied Force.

Following two 1907 Hague Conventions¹⁷³ and the 1949 Conventions,¹⁷⁴ Protocol I also has a Martens clause: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."¹⁷⁵ Principles implicit in this clause, considered by commentators to be a general principle of law¹⁷⁶ and part of the principles of humanity and chivalry applicable during warfare,¹⁷⁷ must also be considered. The fourth principle might be thus stated:

171. See Symposium, *State Succession*, *supra* note 162 (analyzing the "legal category of 'succession'"); TIF, *supra* note 70, at 319; Walker, *Integration*, *supra* note 9.

172. See MCCOUBREY, *supra* note 29, at 255 (asking whether the former Yugoslavia takes on the international obligations of its predecessor that do not relate to customary norms); see also *supra* notes 12-15, 27, 121-123, 128, 168 and accompanying text (detailing how commentators and states disagree on which Protocol I provisions reflect custom).

173. Hague Convention IV Respecting Laws & Customs of War on Land, Oct. 18, 1907, preamble, 36 Stat. 2227, 2277-80 [hereinafter Hague IV]; Hague Convention II with Respect to Laws & Customs of War on Land, July 29, 1899, preamble, 32 Stat. 1803, 1803-05 [hereinafter 1899 Hague II].

174. First Convention, *supra* note 50, art. 63; Second Convention, *supra* note 33, art. 62; Third Convention, *supra* note 50, art. 142; Fourth Convention, *supra* note 50, art. 158; see also PICTET, *supra* note 50, at 411-13.

175. Protocol I, *supra* note 27, art. 1(2), 1125 U.N.T.S. at 7; see also Conventional Weapons Convention, *supra* note 125, pmbl, 1342 U.N.T.S. at 163, 164 (including a Martens clause similar to that included in Protocol I); Protocol II, *supra* note 27, preamble, 1125 *id.* at 611; BOTHE ET AL., *supra* note 27, at 44, 620; PILLOUD ET AL., *supra* note 33, at 38, 1341.

176. See BOTHE ET AL., *supra* note 27, at 44; see also I.C.J. Statute, *supra* note 9 art. 38(1); RESTATEMENT (THIRD), *supra* note 9, §§ 102-03.

177. See generally AFP 110-31, *supra* note 13, paras 1-3a(2), 1-3a(3), 1-4d, 1-6c, 4-3c, 5-2(g), 6-3b(2), 11-1, 11-2, 11-5, 12-1, 13-8, 14-2, 15-2a, 15-3e; NWP 1-14M ANNOTATED, *supra* note 10, para 5.2; SAN REMO MANUAL, *supra* note 21, para 2.

Principle D. Collective action in state of necessity situations involving humanitarian intervention should be necessary and proportional to achieve the action's objective(s). Necessity and proportionality principles under the law of self-defense or the law of armed conflict, including rules immunizing certain objects from attack unless used by the affected state for forbidden purposes, e.g., to contribute to its warfighting, war-sustaining effort, and methods and means of warfare, e.g., weapons per se indiscriminate or indiscriminate under the circumstances, must be considered and followed in the usual situation.

As with any collective decision situation, states within the group or organization may have different views on what is necessary or proportional for a campaign, or what are forbidden objects; consensus, as Principle B notes, on this issue is important.¹⁷⁸ What is necessary or proportional for an overall (usually large) campaign may not necessarily be necessary or proportional for individual attacks within the campaign. For example, a hypothetical collective consensus decision might approve interdiction of shipping destined for the affected state as distinguished from an air campaign against the territory of the affected state or ground forces entry into that state's territory. Individual actions against ships so interdicted would be governed by the LOAC.

Whether the Allied Force air campaign, taken as a whole, satisfied Principle D criteria is difficult to assess. A combined air-ground campaign undoubtedly would have been much more destructive in terms of human lives lost on all sides as well as in terms of property damage.¹⁷⁹ From this macro perspective, Principle D was satisfied. In

178. See *supra* notes 135-142 and accompanying text.

179. See Lawrence Freedman, *The Split-Screen War: Kosovo and Changing Concepts of the Use of Force*, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 420, 422-23, 428-31 (discussing how NATO ruled out a ground campaign early in the operation, but toward the end of Allied Force it was seriously considered); see also STEPHEN T. HOSMER, WHY MILOSEVIC DECIDED TO SETTLE WHEN HE DID 109 (2001) (explaining how the threat of a ground invasion probably influenced Milosevic's capitulation). See generally After-Action Report, *supra* note 65, at 8, 10-12, 37, 102; DAALDER & O'HANLON, *supra* note 65, at 98, 132, 137-40; LAMBETH, *supra* note 142, at 11-12 (discussing how there were over 40 air attacks planned, including those using shipborne Tomahawk missiles, in 1998-99); Coral Bell, *Force, Diplomacy, and Norms*, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 448, 449-52, 454; Butler, *supra* note 42, at 279-80; *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42901; Duke et al., *supra* note 67, at 134 (stressing the German objection to the use of ground troops); Ray Funnell, *Military*

terms of individual targets, political leaders tightly controlled their selection.¹⁸⁰ NATO conducted legal reviews in the field and at higher levels to evaluate projected targets as governed by the LOAC.¹⁸¹ Official sources, media, and commentators reported complaints about many incidents, some of which involved attacks on objects, some of which were legitimate targets under the LOAC.¹⁸² Of 23,000 bombs and missiles launched, twenty reportedly went astray, according to NATO and the Pentagon.¹⁸³ “The most unfortunate of these incidents were those involving Kosovo Albanians, for whose well-being the campaign was being waged. The most damaging of these in Kosovo — at least as far as NATO’s public image was concerned — was the one in which a convoy of Albanian refugees

History Overturned: Did Air Power Win the War?, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 433, 435-37, 440; Steven Livingston, *Media Coverage of the War: An Empirical Assessment*, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 360, 376 (emphasizing the U.S. public’s objection to sending ground troops).

180. See After-Action Report, *supra* note 65, at xx; CLARK, *supra* note 142, at 175, 180, 201, 240; LAMBETH, *supra* note 142, at 22; *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42899; Funnell, *supra* note 169, at 436.

181. See After-Action Report, *supra* note 65, at 24.

182. See International Criminal Tribunal for Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, June 8, 2000, 39 I.L.M. 1257, 1259-60, 1273-82 (2000) [hereinafter Final Report] (detailing how some of these complaints involved attacks on objects, some of which were legitimate targets under the LOAC); DAALDER & O’HANLON, *supra* note 65, at 144-45, 233; LAMBETH, *supra* note 142, at 136-43; *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42899-43900, 42955-56; Kritsiotis, *supra* note 57, at 355-57 (relying on Irish, U.K., U.S. newspaper sources); Livingston, *supra* note 179, at 373-74 (relying on a computer search of CNN stories); Richard B. Miller, *Legitimation, Justification, and the Politics of Rescue*, in Buckley, *supra* note 39, at 384, 394-96 (relying on New York Times articles); Jasminka Udovicki, *Kosovo*, in Udovicki & Ridgeway, *supra* note 42, at 314, 343-44 (relying on press reports). Upon whom the media relied for reporting these incidents is not always clear. The media was again a factor (the “CNN effect”), as it had been in the 1990-91 Gulf War. See CLARK, *supra* note 142, at 8, 441; LAMBETH, *supra* note 142 at 139; Godwin, *supra* note 41, at 81; see also MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 52, 192 (2000) (explaining how the BBC and CNN continued to broadcast from inside Serbia, with Milosevic’s approval; he hoped to “destabilize and unsettle” Western opinion with stories of attacks).

183. See CLARK, *supra* note 142, at 297; Livingston, *supra* note 179, at 372 (citing John Simpson, *Kosovo: After the War: How Tito’s Training Destroyed NATO Hopes of a Clean War*, SUNDAY TELEGRAPH, June 27, 1999, at 22).

was attacked by NATO aircraft near the border with Albania on 14 April.”¹⁸⁴ NATO admitted the error five days later.¹⁸⁵

The May 7-8, 1999 attack on China’s Belgrade Embassy, intended for the SFRY Federal Directorate of Supply and Procurement, caused by faulty intelligence information due to faulty target identification by U.S. intelligence, raised the greatest international furor. Russia initially labeled the attack an act of aggression. U.S. President Clinton apologized for the incident; the United States later paid ex gratia compensation. Most commentators outside of China agree it was a case of mistaken attack.¹⁸⁶ Daalder and O’Hanlon, who do not

184. Funnell, *supra* note 179, at 439-440.

185. See CLARK, *supra* note 142, at 254-55; IGNATIEFF, *supra* note 182, at 101 (describing how pilots attacked and what they saw); LAMBETH, *supra* note 142, at 136-47; WHEELER, *supra* note 41, at 271-72; *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42899; see also *supra* notes 179-183 and accompanying text.

186. See, e.g., After-Action Report, *supra* note 65, at xx (explaining how the Directorate was “a legitimate military target”); CLARK, *supra* note 142, at 296-97, 444; DAALDER & O’HANLON, *supra* note 65, at 147; IGNATIEFF, *supra* note 182, at 103-04; LAMBETH, *supra* note 142, at 144-47 (noting claims that bombing was not accidental; the three precision-guided bombs “all too conveniently, landed squarely on that part of the embassy” housing the defense attache’s office “and the embassy’s intelligence cell, . . . widely believed . . . to be the single largest Chinese collection center in . . . Europe”); WHEELER, *supra* note 41, at 272; Bell, *supra* note 179, at 458; Ted Galen Carpenter, *Damage to Relations with Russia and China*, in CARPENTER, *supra* note 67, at 77, 82-86 (explaining that the incident worsened already poor relations); *Continued NATO Air-Strikes Against Yugoslavia*, *supra* note 142, at 42955-56; Duke et al., *supra* note 67, at 135 (stating that the German Chancellor apologized, for the European Union, to China); Funnell, *supra* note 179, at 440; Kurth, *supra* note 40, at 92 (asserting that the bombing transformed the war from a minor irritant to major issue); Livingston, *supra* note 179, at 372-73 (covering most thoroughly the bombing mistake); Nel, *supra* note 67, at 246, 257-58 (stating that South Africa publicly condemned attack); Yunling, *supra* note 67, at 118-19 (explaining that the Chinese did not believe it was an accident, but rather a premeditated plan); Memorandum of Understanding Concerning Settlement of Claims Relating to Deaths, Injuries or Losses Suffered by Chinese Personnel As a Result of U.S. Bombing of Chinese Embassy in Federal Republic of Yugoslavia, July 30, 1999, China-U.S., T.I.A.S. No. ——. The United States negotiated a similar treaty after the mistaken 1988 Airbus shootdown over the Persian Gulf during the Iran-Iraq war. See Settlement Agreement on Case Concerning Aerial Incident of July 3, 1988 Before International Court of Justice (Iran-U.S.) (Feb. 9, 1996), reprinted in 35 I.L.M. 572 (1996); see also THE TANKER WAR, *supra* note 9, at 71.

seem to have considered the rules for sanctity of embassies,¹⁸⁷ offer this comment supporting the view that it was a mistake:

The best proof . . . is that the attack's predictable damage — not only to U.S.-PRC relations but even to NATO solidarity — was far too great to justify the military benefit of silencing any Chinese military or intelligence assistance to Serbia that could theoretically have been provided from that building. Had [it] housed a Serb weapon of mass destruction being prepared for use against NATO troops, [e.g.], it is conceivable that the United States could have run the risk of hurting third-party neutrals to destroy it.¹⁸⁸

Apart from responses to the air campaign and media claims of errant or deliberate NATO bombing of civilians or civilian objects,¹⁸⁹ the SFRY filed proceedings in the ICJ in April 1999 against ten NATO members, accusing them of violating the laws of *jus ad bellum* and *jus in bello*.¹⁹⁰ In June 1999 the ICJ held it lacked jurisdiction over two states, Spain and the United States, and *prima facie* lacked jurisdiction over the others, but that the case should continue on its docket for proceedings involving them.¹⁹¹

187. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 22, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 106; see also BROWNLIE, *supra* note 6, at 356-57; OPPENHEIM, *supra* note 6, § 494.

188. DAALDER & O'HANLON, *supra* note 65, at 147.

189. See *supra* notes 169-74 and accompanying text.

190. See Kritsiotis, *supra* note 57, at 330 (citing I.C.J. Press Communiqué No.99/17 (Apr. 29, 1999)). The SFRY claimed jurisdiction over Belgium, Canada, Netherlands, Portugal, Spain and the United Kingdom under Article 36(2) of the I.C.J. Statute and Article IX of the Genocide Convention, and jurisdiction over France, Germany, Italy and the United States under Article 38(5) of the I.C.J. Statute and Article 9 of the Genocide Convention. *Id.* The SFRY requested interim measures, e.g., the application for preliminary injunctions under Fed. R. Civ. P. 65 in U.S. practice, commanding defendants to cease immediately acts or use of force and to refrain from any act or threat of use of force against the SFRY. *Id.*

191. See Kritsiotis, *supra* note 57, at 359 n.144 (describing the court's jurisdiction holdings in the ten cases); see also Case Concerning Legality of Use of Force (Yugo. v. Fr.), 1999 I.C.J. 363; Case Concerning Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. 124 (June 2); Case Concerning Legality of Use of Force (Yugo. v. Can.), 1999 I.C.J. 259 (June 2); Case Concerning Legality of Use of Force (Yugo. v. F.R.G.), 1999 I.C.J. 422 (June 2); Case Concerning Legality of Use of Force (Yugo. v. Italy), 1999 I.C.J. 481 (June 2); Case Concerning Legality of Use of Force (Yugo. v. Neth.), 1999 I.C.J. 542 (June 2); Case Concerning Legality of Use of Force (Yugo. v. Port.), 1999 I.C.J. 656 (June 2); Case

A year after Operation Allied Force ended, a Committee, established by the ICTY Special Prosecutor in response to a complaint filed by Canadian and European law professors with Amnesty International support alleging NATO had committed LOAC violations during the campaign, reported.¹⁹² It recommended that no investigation begin in relation to the bombing campaign.¹⁹³ In particular, based on documents and other evidence before it, the Committee found there was no evidence of “the necessary crime base for charges of genocide or crimes against humanity.”¹⁹⁴ The Committee’s opinion was that the Prosecutor should not begin investigating collateral environmental damage the campaign allegedly caused; use of depleted uranium projectiles during the campaign, since there was no evidence of their use; or use of cluster bombs as such.¹⁹⁵ The Committee found NATO tried to attack objects it perceived to be legitimate military objectives and that NATO’s obligation to apply the principle of distinction was carried out “in the vast majority of cases.”¹⁹⁶ The Committee also recommended that the Prosecutor should not begin investigating an April 12, 1999 attack on a train; the April 14 attack on the convoy, the facts for which were difficult to ascertain; a bombing of the SFRY central television and radio station; a May 5 Korisa village

Concerning Legality of Use of Force (Yugo. v. Spain), 1999 I.C.J. 761 (June 2); Case Concerning Legality of Use of Force (Yugo. v. U.K.), 1999 I.C.J. 826 (June 2); Case Concerning Legality of Use of Force (Yugo. v. U.S.), 1999 I.C.J. 916 (June 2). Although the ICJ expressed “profound concern” over use of force, which the Court said raised “very serious issues of international law,” it determined not to indicate provisional measures against the eight remaining states, citing the Security Council’s special responsibilities under U.N. Charter, ch. VII. See Case Concerning Legality of Use of Force (Yugo. v. Fr.), 1999 I.C.J. 363, 370; see also 45 Keesing, *supra* note 65, at 43018; Bruha *supra* note 161 (analyzing the cases and carrying the analysis forward).

192. See generally Final Report, *supra* note 182 (analyzing such issues arising from the NATO air campaign as damage to the environment, use of depleted Uranium projectiles and cluster bombs, legal issues related to target selection, casualty figures and specific incidents).

193. See *id.* at 1283 (assessing that there were not “any particular incidents as justifying the commencement of an investigation”).

194. *Id.*

195. See *id.* at 1261-65 (discussing the merits of each of these general issues).

196. *Id.* at 1273.

attack; or the Chinese embassy attack.¹⁹⁷ “On the basis of information available,” in summary, the Committee recommended “that no investigation be commenced . . . in relation to the NATO bombing campaign or incidents occurring during the campaign.”¹⁹⁸

Other commentators have assessed, or will assess, these issues in greater detail. It is safe to say, however, that there was no deliberate campaign by NATO to attack protected objects.¹⁹⁹ Based on information available to NATO at the time, the Alliance did not attack protected targets.²⁰⁰ Overall, NATO appears to have observed principles of necessity and proportionality throughout Allied Force for individual targets.²⁰¹ There is, of course, no obligation to use precision guided munitions (PGM’s, or “smart bombs”) when conventional munitions will satisfy LOAC necessity and proportionality criteria.²⁰²

e. Situations Where International Law Forbids State of Necessity Intervention

The ILC has listed three exceptions where states cannot invoke state of necessity: (1) where the international obligation with which

197. See Final Report, *supra* note 182, at 1273-82 (examining each of these specific incidents in turn).

198. *Id.* at 1283. Furthermore, in *Bankovic v. Belgium*, the European Court of Human Rights held it lacked jurisdiction over a human rights deprivation claim against European NATO Members (Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, United Kingdom) by six SFRY citizens on account of injuries and deaths incurred during a NATO attack on Radio Televizije Srbije’s Belgrade facilities April 23, 1999. 41 I.L.M. 517 (Eur. Ct. H.R. 2001) (ruling that it had no jurisdiction because the SFRY was not party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the language of which did not allow extraterritorial application of its principles, there being no jurisdictional link between claimants and the NATO States involved which were also parties to the Convention).

199. See *supra* notes 171-187 and accompanying text.

200. But see Final Report, *supra* note 182, at 1283 (relating the fact that NATO admitted making mistakes during the bombing campaign).

201. But see *id.* (concluding that the “[s]election of certain objectives for attack may be subject to legal debate”).

202. See *supra* notes 21-23, 32 and accompanying text (explaining the necessity and proportionality principles within the context of the LOAC).

the act of the affected state is not in conformity arises out of a peremptory norm of general international law (*i.e.*, *jus cogens*); (2) if the international obligation with which the act of the affected state is not in conformity is in an obligation which, explicitly or implicitly, excludes the possibility of invoking state of necessity with respect that obligation; (3) if the state(s) invoking state of necessity contribute(s) to occurrence of the state of necessity.²⁰³ As analyzed earlier, these exceptions appear defective in some respects.²⁰⁴ Exception (1) does not take into account the possibility of conflicting *jus cogens* norms, including those flowing from the U.N. Charter. Exception (2) does not take into account the Charter override in Article 103, nor does it account for conflicting customary, treaty or general principles norms, or a possibility of supervening *jus cogens* principles.²⁰⁵

Intervention prohibitions, *e.g.*, in 1977 Protocol II to the 1949 Geneva Conventions, carry strong weight.²⁰⁶ Exception (3) appears to apply one criterion negating invocation of impossibility of performance or fundamental change of circumstances in the law of treaties, but it does not account for a circumstance in collective situations where one state in a group, perhaps inadvisably, contributes to a situation which would otherwise merit action pursuant to state of necessity.²⁰⁷ A fourth situation where international law forbids intervention is where an intervention's purpose is to impair the affected state's sovereignty, territorial

203. See *supra* notes 10-12 and accompanying text (comparing the language of the I.L.C. Draft Articles concerning state responsibility found in its Report on the Work of Its Fifty-Third Session and Report of the Commission on the Work of Its Thirty-Second Session).

204. See *id* (analyzing the invocation of state of necessity).

205. See *supra* note 7 and accompanying text (contemplating the numerous structures a hierarchy of international legal norms could form).

206. See Protocol II, *supra* note 27, art. 3 ("Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State."); see also *supra* notes 39-45 and accompanying text.

207. See *supra* note 15 and accompanying text (noting that under the 2001 I.L.C. Draft Articles on State Responsibility, a nation breaching a treaty cannot claim impossibility of performance or fundamental change of circumstances).

integrity or political independence.²⁰⁸ With these comments in mind,²⁰⁹ these principles might be recited:

Principle E. Situations where international law forbids collective humanitarian intervention under state of necessity:

(1) States purporting to act collectively under state of necessity in humanitarian intervention situations may not invoke state of necessity if the affected state's international obligation to which it has not conformed arises out of *jus cogens*, so long as no conflicting *jus cogens* norms support the collective action against the affected state, or there is no other superior rule, e.g., under the U.N. Charter, supporting the collective action under state of necessity or contradictory to the *jus cogens* norm under which the affected state claims.

(2) States purporting to act collectively under state of necessity in humanitarian intervention situations may not invoke state of necessity if the international obligation with which the affected state is charged is not in conformity with a treaty, binding among the intervening states and the affected state, which explicitly or implicitly excludes the possibility of invoking state of necessity with respect to state of necessity, unless there are countervailing and superior norms expressed in custom, general principles of law, other treaties without such a clause, *jus cogens*, Article 103 of the U.N. Charter, binding U.N. resolutions, or similar binding rules of other international organizations, e.g., regional organizations under Articles 52-54 of the Charter.

(3) States purporting to act collectively under state of necessity in humanitarian intervention situations may not invoke state of necessity if they, collectively, have contributed to the occurrence of the state of necessity.

(4) States acting collectively under state of necessity in humanitarian intervention situations may not invoke state of necessity if they also

208. Cf. Protocol II, *supra* note 27, art. 3 (articulating the non-intervention scope of the protocol); see also *supra* notes 39-45, 185 and accompanying text.

209. See generally AREND & BECK, *supra* note 19, at 134; Behuniak, *supra* note 19, at 189; Farer, *supra* note 111, at 151; Fonteyne, *supra* note 39, at 261-63; Johansen, *supra* note 55, at 77; Lillich, *supra* note 19, at 350; Moore, *supra* note 55, at 25; MURPHY, *supra* note 5, at 323; O'HANLON, *supra* note 41, at 13; Zacklin, *supra* note 51, at 939.

intend to impair the affected state's sovereignty in any way not reasonably connected with the goal of intervening for humanitarian reasons, or if they intend to impair the affected state's sovereignty, territorial integrity or political independence in any way not reasonably connected with the goal of intervening for humanitarian reasons.

Exception E(3)'s allowing state of necessity where, *e.g.*, one state within an organization or group, acts to contribute to an occurrence that could otherwise be a predicate for state of necessity action but denying it if the collective group or organization contributes to the occurrence, might be subject to criticism. For example, at one end of the spectrum, egregious action by a dominant member of a group, *e.g.*, a bilateral arrangement poised for intervention under otherwise admissible state of necessity, might contribute to the occurrence. At the other extreme, there might be less than egregious action by a less than dominant member of a large organization. It would seem that in the first case the other member of a bilateral arrangement could refuse to participate under state of necessity exceptions in ILC Article 33(2), and in the latter case consensus governance (Principle B) would be available to consider the gravity of the member state's individual action for appropriate action. For example, a member state accused of the occurrence might be excluded from participation in the intervention.

There remains a risk that a military alliance, whose members concur in intervention, might act for other than generally recognized humanitarian reasons.²¹⁰ Under those circumstances we are back to Square One, with the hope of Security Council or other U.N. action, a possibility of veto, and, as the U.N. Secretary-General said after Allied Force, a risk of international anarchy.²¹¹

210. *Cf.* Habermas, *supra* note 39, at 314 (commenting on how "the U.S. pursues its interests first and foremost" and always has, even while being in such alliances as formed during World War I and II).

211. The Secretary-General said:

My regret — then and now — is that the Council was unable to unify these two equally compelling interests of the international community[, national interests and the Council's primary role]. . . . [U]nless the Security Council is restored to its preeminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy. But equally important, unless the Security Council can unite around . . . confronting massive human rights

By definition, even the least intrusive intervention, not unlike state of necessity situations under the LOS, the LOAC or self-defense, is necessarily a violation of an affected state's sovereignty, territorial integrity and political independence.²¹² Exception E(4) would allow whatever are reasonable actions to effect the goal of humanitarian intervention, but no more. In this regard it echoes the *Restatement (Third)*'s reasonableness principle.²¹³ Prudent collective intervenors should notify (see Principle G) the affected state, other states and international organizations that they do not intend to impair the affected state's sovereignty, territorial integrity or political independence in any way beyond what is strictly necessary and reasonable to effect the goal of humanitarian intervention.²¹⁴

Did NATO comply with Principle E? Even if the non-intervention principle associated with the Charter's Article 2(4) prohibitions on threats to, or use of force against, a state's territorial integrity or political independence is a *jus cogens* norm, there may be countervailing *jus cogens* norms associated with humanitarian and human rights law.²¹⁵ Even if this non-intervention principle is custom under general international law, the same can be said for humanitarian and human rights norms, some of them in treaties and

violations and crimes against humanity on the scale of Kosovo, then we will betray the very ideals that inspired the founding of the United Nations.

Kofi Annan, *The Effectiveness of the International Rule of Law in Maintaining International Peace and Security*, in Buckley, *supra* note 39, at 221, 222. Even though Annan spoke of the Charter as representing the "old orthodoxy" in his June 26, 1998 Ditchley Lecture, he states that protecting rights of "peoples" and of individual human beings are equally fundamental to the Charter's goals. David Little, *Force and Humanitarian Intervention: The Case of Kosovo*, in Buckley, *supra* note 39 at 356, 357.

212. See *supra* notes 7-23 and accompanying text.

213. See *supra* notes 73-95 and accompanying text.

214. See *supra* notes 38-39 and accompanying text (underlining the importance of the notions of state sovereignty and territorial and political independence by showing how they were first recognized in the Peace of Westphalia and continue to be recognized today by their incorporation into the U.N. Charter).

215. See Reisman, *supra* note 57, at 861-62 (labeling "threats to and breaches of the peace and acts of aggression" as "fundamental and venerable postulates" of the current international system).

others in custom that bound the SFRY.²¹⁶ The choice, as Reisman said, was (A) vindication of these norms under the unique circumstances of the Kosovo campaign, or (B) awaiting near certain disaster to befall thousands of human beings by observance of nonintervention principles.²¹⁷ He correctly said the choice should be (A).²¹⁸ Allied Force complied with Principle E(2); there were conflicting norms, *i.e.*, human rights and humanitarian law; Principle E(1)'s major premise did not apply. There is no evidence that NATO collectively contributed to the state of necessity situation, Principle E(3); Milosevic's actions against the Kosovars had already begun.²¹⁹ There is no suggestion that individual NATO members contributed to the situation (succor of the Kosovars) precipitating invocation of the state of necessity principle.²²⁰ Nor is there any suggestion that NATO intended to impair the SFRY's territorial integrity or political independence in ways not reasonably connected with its goal of intervening for humanitarian reasons.²²¹ After hostilities ended, Kosovo came under U.N. governance for civil affairs with NATO and other states, *e.g.*, Russia, serving in peacemaking roles.²²² Allied Force suspended operations June 10, 1999, when NATO received definite evidence that SFRY forces were withdrawing from northern Kosovo.²²³ After the G-8 drafted a Security Council resolution, with

216. *See id.* at 862 (asserting the recent installation of a code of human rights into international law).

217. *See id.* at 860 (claiming these two as the only feasible options available to world leaders at that time).

218. *Cf. id.* (arguing that in such circumstances it should be the Security Council's responsibility but the Council sometimes cannot or will not act). Other commentators would disagree. *See supra* notes 15, 61 and accompanying text (listing numerous authors arguing whether the state of necessity principle is legitimate or even exists).

219. *See infra* notes 247-273 and accompanying text.

220. *See id.*

221. *See* After-Action Report, *supra* note 65, at 7 (articulating NATO's strategic objectives during the air campaign, which were mostly humanitarian in nature).

222. *See* S.C. Res. 1244, *supra* note 59, at 1452 (requesting the appointment of a Special Representative "to control the implementation of the international civil presence" and "to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner").

mediation by Russia and Finland's president (the EU senior Kosovo envoy) for SFRY acceptance, the Council adopted Resolution 1244 that day.²²⁴ On June 2, 1999, Finland's president, acting for the EU, and the Russian envoy had successfully mediated an agreement, whose terms mirrored G-8 and NATO demands, except limited SFRY or Serbian security forces at designated sites with Milosevic, later approved by the SFRY Parliament.²²⁵ Then, on June 9, NATO

223. See 45 Kessing, *supra* note 65, at 43007, 43013 (noting that NATO Secretary-General Javier Solana ordered the halting of air strikes the same day that the foreign ministers of the G-8 nations convened in Cologne to discuss how to achieve long term stability in the Balkans).

224. The vote was 14-0; China abstained. See S.C. Res. 1244, *supra* note 59; see also After-Action Report, *supra* note 65, at A-10; Bell, *supra* note 179, at 460; Calic, *supra* note 42, at 30; DAALDER & O'HANLON, *supra* note 65, at 274; Demjaha, *supra* note 134, at 37; Funnell, *supra* note 169, at 441; Groom & Taylor, *supra* note 57, at 303; *Withdrawal of Yugoslav Forces from Kosovo — End of NATO Air Campaign*, in 45 Keesing, *supra* note 65, at 43006-13; see generally *Statement by G8 Foreign Ministers*, May 7, 1999, in 45 Keesing, *supra* note 65, at 42957. After-Action Report comments:

Russia worked with the [A]lliance and provided considerable diplomatic assistance in bringing the conflict to an end. Russian leaders eventually agreed with NATO that all the Serb forces should leave Kosovo, that the refugees should return, and that some form of international peacekeeping force should be deployed. Today [January 31, 2000], NATO-Russian cooperation is contributing directly to the success of the peacekeeping operation in Kosovo as well as that in Bosnia.

After-Action Report, *supra* 59 at xx; see also *id* at 4, 9, A-10 (noting efforts by NATO to work diplomatically with Russia concerning the conflict in Kosovo). Negotiations to end the conflict began in mid-April, when Russia's President Boris Yeltsin, after a call to President Clinton, "appointed former Prime Minister Chernomyrdin as a special envoy to bring peace;" U.S. Deputy Secretary of State Strobe Talbott was involved in negotiations. *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42901. Chernomyrdin and U.N. Secretary-General Annan discussed Germany's separate peace plan in Berlin in late April with German Foreign Minister Joschka Fischer. *Id.* In May the Secretary-General announced, "he had appointed two special envoys to help find settlement." *Id.*; see also DAALDER & O'HANLON, *supra* note 65 at 141-42, 167-75 (noting that even after the appointment of Chernomyrdin it took an additional seven weeks of negotiations to end the bombing campaign).

225. See Proposal Presented by Martti Ahtisaari and Victor Chernomyrdin to President Slobodan Milosevic, 2 June 1999, as Approved by the Yugoslav Parliament, *reprinted in* DAALDER & O'HANLON, *supra* note 65, at 265 (calling the document the Ahtisaari-Chernomyrdin-Milosevic Agreement); see also *id.* at 173-74 (recounting Chernomyrdin and Ahtisaari's meeting with Milosevic when he finally decided to accept the agreement).

and the SFRY military concluded a Military Technical Agreement on withdrawing SFRY troops from Kosovo to end the conflict.²²⁶ The KLA agreed to disarm and transform itself into a “national guard,” without giving up its independence aspirations.²²⁷

Given the first premise, that intervening to save lives in jeopardy through risk of massive violations of humanitarian and human rights law should outweigh territorial integrity principles, NATO complied with Principle E.

f. Self-defense and Other Actions by States in Collective Humanitarian Intervention Under State of Necessity

Article 51 of the Charter declares that states retain inherent rights of individual and collective self-defense “until the Security Council takes measures necessary to maintain international peace and security.”²²⁸ The ILC *2001 Report*, Article 21, like its predecessor, Article 34 in the 1980 *State Responsibility* report, says wrongfulness of an act of an affected state not in conformity with an international obligation of that state is precluded if the act is a lawful self-defense measure.²²⁹ Article 21 conforms to Article 103 of the Charter, which says Charter-based norms (*e.g.*, those in Article 51) are superior to treaty rules and might be considered to argue for self-defense as a jus cogens norm, superior not only to treaties but also custom and general principles.²³⁰ The ILC draft, however, does not account for the affected state’s right of self-defense, subject as always to necessity and proportionality principles, or the rights of individual

226. See *Military Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia*, reprinted in 45 Keesing, *supra* note 65, at 43008; DAALDER & O’HANLON, *supra* note 65, at 268; see also Calic, *supra* note 42, at 30. Belgrade reportedly hailed the accords “as a national triumph that finally secured the status of Kosovo within Serbia.” Demjaha, *supra* note 134, at 40.

227. See *Undertaking of Demilitarisation & Transformation by UCK, June 20, 1999*, reprinted in 45 Keesing, *supra* note 65, at 43015 (reporting that the KLA’s demilitarization had a 90-day timetable).

228. U.N. CHARTER art. 51.

229. See *supra* note 7 and accompanying text.

230. See 2001 ILC Report, *supra* note 3, art. 59, at 365 (discussing how the State Responsibility provisions are without prejudice to the U.N. Charter); *supra* notes 7-10 and accompanying text.

and collective self-defense by the intervening state(s), perhaps at a unit level but also at higher echelons of organization, in a collective humanitarian intervention under state of necessity. The ILC draft also does not contemplate other actions states might take, individually or collectively, *e.g.*, nonforce reprisals (under the majority view) and retorsions.²³¹ With these thoughts in mind, the relationship of individual and collective self-defense and other actions by states and state of necessity in collective humanitarian intervention situations might be stated thus:

Principle F. Self-defense and other actions by states in collective humanitarian intervention under state of necessity.

(1) Wrongfulness of an act of an affected state not in conformity with an international obligation is precluded if the act is a lawful measure of individual or collective self-defense taken in conformity with the Charter. In collective humanitarian intervention under state of necessity, all states involved in the intervention, the affected state and the collective intervenors, retain their inherent rights of individual and collective self-defense in conformity with the Charter and international law, *e.g.*, the principles of necessity and proportionality.

(2) Subject to other principles of international law, *e.g.*, proportionality in reprisals, states may act individually or collectively pursuant to international law standards through reprisals, retorsions or other means to compel compliance with international law during collective humanitarian intervention under state of necessity.

Principle F(1) would preserve the inherent rights of individual or collective self-defense for all countries involved in collective humanitarian intervention under state of necessity, subject to Charter limitations, *e.g.*, action by the Council under Article 51 of the Charter. With respect to the intervention, this would mean that intervenors retain rights of individual and collective self-defense from unit through national and collective levels, including rights of anticipatory self-defense against the affected state and all other comers, to the extent that states recognize anticipatory self-defense

231. *See supra* notes 112, 135 and accompanying text (discussing both non-force reprisals and reprisals in general).

as legitimate during the Charter era.²³² It would mean the same for the affected state. These principles necessarily follow from the inherent right of individual and collective self-defense. However, they also point out a risk of escalation if, *e.g.*, an affected state is part of an Article 51 collective self-defense organization, or if an affected state forms one, perhaps incident to an ongoing collective humanitarian intervention that the affected state and perhaps other states perceive, rightly or wrongly, as unlawful aggression.²³³ Even if the affected state does not respond in self-defense, other states might claim a right to aid it under claims like non-belligerency.²³⁴ At the least the intervention may raise tensions around the world for intervenors, perhaps giving rise to third-state reprisals or retorsions.²³⁵ The same kinds of risks are inherent in intervening states' acting under otherwise legitimate principles of reprisal or retorsion, which Principle F(2) would allow, subject to other principles of international law, incident to humanitarian intervention under state of necessity.²³⁶

There was no application of Principle F(1) during the Kosovo campaign, although there were NATO self-defense claims before and after the campaign.²³⁷ States, some of them NATO Members and others not part of the Alliance, could have invoked nonforce economic reprisals or retorsions against the SFRY.

232. See *supra* notes 7-9 and accompanying text (examining the legitimacy of the anticipatory self-defense principle).

233. See THE TANKER WAR, *supra* note 9, at 186 (believing that another problem with informal self defense is notice).

234. See *id.* at 181-82.

235. Cf. *id.* at 185 (stating that "[r]esponses to aggressors can include proportional reprisals not involving use of force and retorsions, and States that are not belligerents whose interests have been damaged by belligerent action can invoke these, along with state of necessity"); see also *supra* note 145 and accompanying text.

236. See *supra* notes 112, 135 and accompanying text; see also Hoffmann, *supra* note 41, at 26 (suggesting sanctions [maybe reprisals, maybe retorsions] as another option in addition to U.N. action).

237. See *supra* note 60 and accompanying text (discussing collective self-defense in the Charter era).

g. Notice to the Affected State and Others

Although the ILC formula does not require it, a state against whom collective humanitarian intervention is being considered should have notice, reasonable and timely under the circumstances, of proposed action in all but the most extraordinary circumstances where state of necessity is otherwise lawful. Peacetime reprisal principles require notice;²³⁸ the *Restatement (Third)* requires it, along with opportunity to be heard, in most cases for proper enforcement jurisdiction.²³⁹ A similar standard should apply for state of necessity-based collective humanitarian intervention. The notice might come during negotiations, or it might be a separate communique to the affected state. The notice need not “telegraph the punch,” *i.e.*, inform the miscreant state of targets, invasion route, etc. Moreover, particularly where the offending state might take advantage of time between notice and collective action, the time might be relatively short. In the worst cases, where, *e.g.*, a state is reasonably believed, under facts available to collective decision makers at the time, to be capable and willing to destroy the very object of the proposed intervention, notice simultaneous with action might be justified. A homely example from municipal law practice is the circumstance of a debtor, a judgment debtor or a person owing plaintiff, who would destroy an object to be sought by judicial process or secrete it so that there would be no reasonable chance of subjecting it to judicial process.²⁴⁰ An analogous situation in the international law context might be a state capable of and willing to commit mass executions of a minority or ethnic group against whom that state has already committed war crimes, crimes against humanity or human rights and

238. See *supra* note 145 and accompanying text (asserting that an offending state must be given notice to change its behavior before another state can intervene).

239. See RESTATEMENT (THIRD), *supra* note 7, sec. 431 (requiring notice to a person of the claims or charges against him for a state to employ enforcement measures against that person outside of its territory); see also *infra* note 246 and accompanying text (discussing the method of notice).

240. See *Connecticut v. Doehr*, 501 U.S. 1, 16-17 (1991) (asserting that “[a]lthough attachments ordinarily did not require prior notice or a hearing [in England and in the U.S.], they were usually authorized only where the defendant had taken or threatened to take some action that would place the satisfaction of the plaintiff’s potential award in jeopardy”).

humanitarian law violations. Opportunity to be heard is the usual rule, but, like exigent circumstances in civil litigation (*e.g.*, a health department's removing poisonous food from grocery shelves to prevent customers' illness or death before response from a grocery owner),²⁴¹ there may be situations, *e.g.*, immediate risk of loss of life, that may preclude a chance for the affected state to respond before action under state of necessity is taken.²⁴²

Besides notice to the affected state, treaties or custom may require notice to other states, international organizations of which the intervenors or the affected state are members, perhaps members of the collective intervenor group, international organizations of which no intervening state or an affected state are members, or other third-party states. If informal collective self-defense counsels general notice of collective action,²⁴³ the same principle should apply in collective humanitarian interventions under state of necessity. Here too there is no need to telegraph the punch so as to jeopardize a proposed collective action; in some circumstances notice may not be appropriate to some or all states or organizations, *e.g.*, an organization of which the affected state is a member, the result of which might be that the affected state would initiate the kind of mass killings referred to above.²⁴⁴ The result of appropriate notice under the circumstances to the affected state or third states, organizations, etc., might result in persuasion leading to compliance by the affected

241. *Cf.*, *e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972) (stating that these situations "must be truly unusual"); RESTATEMENT (SECOND), *supra* note 82, sec. 25 (requiring notice and opportunity to be heard in order for a state to exercise judicial jurisdiction over a person).

242. *See supra* notes 239-241 and accompanying text (detailing a situation in which a state may be compelled to act this way). In this context I recall the story of a fellow lawyer who told me of someone who possessed a Stradivarius his client claimed. The holder threatened to destroy the priceless violin rather than give it up. My friend succeeded in getting the Stradivarius for his client. States or their leaders can be capable of this kind of behavior; Nazi Germany continued, and sometimes accelerated, mass murders of Jews, even when German personnel assigned to the task were needed at the crumbling fronts.

243. *See generally* THE TANKER WAR, *supra* note 9, at 133-37 (asserting that both prior practice and Article 51 of the U.N. CHARTER uphold the right of informal self-defense).

244. *See supra* notes 239-241 and accompanying text.

state without resort to intervention.²⁴⁵ Therefore, another requirement is:

Principle G. Notice.

(1) An organization or other group of states considering collective humanitarian intervention pursuant to state of necessity should give a state, against whom the humanitarian operation is contemplated, notice of proposed action reasonable under the circumstances and an opportunity for the affected state to be heard in all but the most egregious cases, e.g., where that state would destroy the object(s) of the intervention by, e.g., mass killing of persons whom the intervention is designed to succor, or where, in the case of opportunity to be heard, e.g., the chance of loss of life is great and immediate. Notice of proposed collective action may be given during negotiations, by unilateral communique from the organization, or by other means reasonable under the circumstances. The affected state's response may be given by analogous means.

(2) An organization or other group of states considering collective humanitarian intervention pursuant to state of necessity should give other states and international organizations notice of proposed action and an opportunity for the addressed state or organization to be heard in accordance with applicable treaties or custom that is reasonable under the circumstances in all but the most egregious cases, e.g., where that state would destroy the object(s) of the intervention by, e.g., mass killing of persons whom the intervention is designed to succor, or where, in the case of opportunity to be heard, e.g., the chance of loss of life is great and immediate. Notice of proposed collective action may be given during negotiations, by unilateral communique from the organization, or by other means reasonable under the circumstances. Responses of third states or other international organizations may be given by analogous means.

The method of notice, e.g., verbal, radio or other telecommunications, facsimile, E-mail, etc., should be that or those method(s) reasonably calculated to reach the recipient(s) in a timely manner.²⁴⁶

245. See also Behuniak, *supra* note 19, at 188; Fonteyne, *supra* note 39, at 265; Moore, *supra* note 55, at 25; cf. Zacklin, *supra* note 51, at 938.

246. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (expressing that this principle is an "elementary and fundamental requirement" in order to afford interested parties "an opportunity to present their objections").

Review of events of the six months before Allied Force shows that NATO gave adequate notice of its intentions under the circumstances of a rapidly deteriorating humanitarian situation.²⁴⁷ On October 10, 1998, the NATO Council, acting on Secretary-General Javier Solana's report that "there was sufficient legal basis for moving forward with issuing a specific threat of force and, if necessary, proceeding with implementation," approved an activation order (ACTORD), establishing a date for starting air strikes.²⁴⁸ "As one NATO diplomat put it, 'the safety . . . will be removed, the gun will be pointed, and we hope this will trigger a switch in . . . Milosevic's mind.'"²⁴⁹ Although all the then-sixteen NATO members voted for the ACTORD, as they must under NATO consensus governance,²⁵⁰ "a last-ditch diplomatic effort was made to persuade Milosevic to accept the U.N. demands."²⁵¹

On October 12, Milosevic and U.S. Special Envoy Richard Holbrooke negotiated Serbian military forces' partial withdrawal and deploying a 2000-member Organization for Security and Cooperation in Europe (OSCE) unarmed verification mission.²⁵² This paved the way for October 15 and 16 SFRY-NATO and SFRY-OSCE arrangements for verification missions to ensure U.N. Security Council resolutions compliance.²⁵³ Holbrooke told Milosevic that "NATO was about to approve the ACTORD for air

247. They also demonstrate that NATO and other states tried other peaceful means of dispute resolution. *See* Behuniak, *supra* note 19, at 188; Fonteyne, *supra* note 39, at 264; Moore, *supra* note 55, at 25.

248. DAALDER & O'HANLON, *supra* note 65, at 45 (describing the events leading up to Allied Force).

249. *Id.* (quoting Roger Cohen, *NATO Nears Final Order to Approve Kosovo Strike*, N.Y. TIMES, Oct. 11, 1998, at A8).

250. *See supra* notes 125-132 and accompanying text.

251. DAALDER & O'HANLON, *supra* note 65, at 45.

252. *See* Calic, *supra* note 42, at 29 (reporting that even though an agreement was reached, there were several "serious clashes between Yugoslav forces and KLA fighters" before the ending of the informal cease-fire around Christmas).

253. *See Agreement on the OSCE Kosovo Verification Mission*, 38 I.L.M. 24 (1999); *see also* After-Action Report, *supra* note 65, at 2; *Report of the Secretary-General Prepared Pursuant to Resolution 1160 (1998) of the Security Council*, U.N. Doc. S/1998/834 & Add.1 (Sept. 4, 1998); DAALDER & O'HANLON, *supra* note 65, at 23; Demjaha, *supra* note 134, at 35; Calic, *supra* note 42, at 29; Kritsiotis, *supra* note 57, at 334-36.

strikes,” but if he [Holbrooke] “could go back to NATO and tell the allies that Serbia had accepted a ‘durable and independent’ verification system . . . , air strikes could probably be delayed.”²⁵⁴ Journeying to NATO headquarters with Milosevic’s agreement in hand, Holbrooke told the NATO Council that an ACTORD “would make the deal stick.”²⁵⁵ The Council voted October 13 for “limited air strikes and a phased air campaign,” to begin in about ninety-six hours.²⁵⁶ The KLA had announced a ceasefire October 8 but broke it October 17, when three Serbian policemen were killed.²⁵⁷ A few days later,²⁵⁸ OSCE, NATO, and SFRY authorities finalized the Holbrooke-Milosevic agreement, including a verification mission.²⁵⁹ On October 24, in Resolution 1203, the U.N. Security Council endorsed the persistence and accomplishments of diplomatic efforts, demanding that the SFRY “fully and promptly” implement the October 15-16 agreements.²⁶⁰

Although the October Holbrooke-Milosevic agreements may have bought time to get 50,000 people through the winter without exposing them to freezing temperatures and risks of starvation, the underlying conflict remained.²⁶¹ Winter’s arrival calmed the situation, but serious KLA-SFRY clashes broke down the informal

254. DAALDER & O’HANLON, *supra* note 65, at 47.

255. *Id.* at 47-48.

256. *Id.* at 48 (citing Javier Solana, Statement to the Press by the Secretary-General (Oct. 13, 1998)).

257. See Kritsiotis, *supra* note 57, at 336 n.25 (stating that the killings occurred in Orlate).

258. NATO had extended its threat of air strikes for 10 more days to give SFRY forces time to comply and to give OSCE monitors time to enter and gather data in Kosovo. See DAALDER & O’HANLON, *supra* note 65, at 229; see also Record of NATO-Serbia/Yugoslavia Meeting in Belgrade, Oct. 25, 1998, reprinted in DAALDER & O’HANLON, *supra* 59, at 256, 258 (outlining security aspects of defusing the crisis, but also committing SFRY “unconditional” compliance with S.C. Res. 1199).

259. See DAALDER & O’HANLON, *supra* note 65, at 48-59 (criticizing the agreements as “flawed”).

260. S.C. Res. 1203, *supra* note 59 at 2; DAALDER & O’HANLON, *supra* note 65, at 252.

261. DAALDER & O’HANLON, *supra* note 65, at 59-62 (discussing how the Holbrook-Milosevic were only a temporary solution to the problem and that the conflict still remain unsolved in the region).

cease-fire by Christmas.²⁶² The U.N. Secretary-General's report was ominous.²⁶³ On December 24, SFRY and Serbian forces led an assault near Podujevo, Kosovo, effectively ending the ceasefire.²⁶⁴ On January 15, 1999, forty-five Albanians were massacred at Racak, and 5500 Racak citizens fled.²⁶⁵ An observer later saw Racak as a defining moment, a major turning point because it focused world attention on the nature, methods, and magnitude of the conflict and its potential for further deterioration.²⁶⁶ The NATO Council gave full support to the Contact Group Strategy for a final round of talks.²⁶⁷ The Group then pressured negotiations at Rambouillet, France beginning February 6, 1999.²⁶⁸ The United States brought Russia on board for these talks and the U.N. Secretary-General met with the NATO Council to endorse the strategy.²⁶⁹ The Kosovo Albanians and the KLA approved but the SFRY rejected a draft interim agreement, citing foreign interference in its internal affairs; it would have given Kosovo a large degree of self-government and an international implementation force, while reducing SFRY army presence in Kosovo and disarming paramilitary units. The agreement would have

262. See *id.* (noting how the cease fire contained the crisis, but did not solve it, which lead to the breakdown).

263. See *id.* at 61-62 (noting the statement of the head of the Kosovo Verification Mission that the two sides of this situation wanted to "go after one another," regardless of what peace agreement was in place).

264. *Id.* at 61.

265. See Contact Group Statement Calling for Rambouillet Conference, Conclusions of the Contact Group, Jan. 29, 1999, *reprinted in* DAALDER & O'HANLON, *supra* 65, at 259 [hereinafter Contact Group Statement]; see also After-Action Report, *supra* note 65 at 2; DAALDER & O'HANLON, *supra* 65 at 63.

266. See After-Action Report, *supra* note 65, at 2 (explaining how the massacre at Racak renewed the international communities emphasis on the negotiating process in the Kosovo situation).

267. See *id.* at 2, 22 (noting how NATO issued a statement on January 30, 1999, giving full support to the Contact Group Strategy).

268. See Contact Group Statement, *supra* note 265 at 259 (explaining how ministers wanted both sides to end the cycle of violence and to commit themselves to negotiations leading to a peaceful settlement).

269. See DAALDER & O'HANLON, *supra* note 65 at 73-75 (discussing America's desire to involve Russia along with the Secretary General's meeting with the North Atlantic Council).

provided for SFRY sovereignty and territorial integrity and functioning of Kosovo's representative democratic government.²⁷⁰

Racak was also a turning point for NATO; the Alliance reaffirmed plans to use air strikes if parties in Kosovo did not achieve a political settlement. The threat was intended to back Contact Group efforts to reach agreement in Rambouillet. Even as the Rambouillet negotiations were ongoing, intelligence reports showed a significant buildup of SFRY forces in Kosovo.²⁷¹

Apparently the Serbian Rambouillet delegation was willing to sign, but someone in Belgrade (Milosevic?) decided to change course. The claims were that SFRY sovereignty would be compromised and that the agreement was a violation of international law and the U.N. Charter. It is possible that Belgrade thought the threatened campaign would cause disunity within the Alliance.²⁷²

270. See Ramouillet Accords, Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, U.N. Doc. S/1999/648 (June 7, 1999); see also After-Action Report, *supra* note 65, at 2, 22, A-4, A-5; Duska Anastasijevic, *The Closing of the Kosovo Cycle: Victimization Versus Responsibility*, in KOSOVO AND THE CHALLENGE, *supra* note 42, at 44, 56-57; Calic, *supra* note 42, at 29; Ted Galen Carpenter, *Introduction: A Great Victory?*, in Carpenter, *supra* note 67, at 1-2 (criticizing the actions at Rambouillet); DAALDER & O'HANLON, *supra* note 65, at 63-64, 69-84, 229-30; Groom & Taylor, *supra* note 57, at 294; James George Jatras, *NATO's Myths and Bogus Justifications for Intervention*, in Carpenter, *supra* note 67, at 21, 24; KISSINGER, *supra* note 44, at 262-63, 269-70 (criticizing the actions of Rambouillet); Kurth, *supra* note 34, at 78-79 (stating that the Agreement's use of the term "a direct threat to the sovereign independence of Serbia" in Appendix B is reminiscent of the 1914 Austro-Hungarian ultimatum that led to World War I); Godwin *supra* note 41, at 44, 56-57; Kritsotis, *supra* note 57, at 77.

271. After-Action Report, *supra* note 65, at 2, 22, A-6; Butler, *supra* note 42, at 278; DAALDER & O'HANLON, *supra* note 65, at 64, 75-77, 230; Godwin, *supra* note 41, at 77.

272. See After-Action Report, *supra* note 65, at 3, A-7; Anastasijevic, *supra* note 270, at 57; Kritsotis, *supra* note 57, at 339; Kurth, *supra* note 34, at 78; *NATO Air-Strikes on Yugoslavia*, 45 Keesing, *supra* note 65, at 42845, 42846; Godwin, *supra* note 41, at 77. Another possibility was the December 1998 Desert Fox operation in Iraq and its goals, which were much less than decisive victory. See Freedman, *supra* note 179, at 424-25. Milosevic later characterized Rambouillet as "not a negotiation. It was a Clinton Administration diktat. It wasn't take it or leave it — just take it or else." *We Are Neither Angels Nor Devils: An Interview with Slobodan Milosevic by United Press International CEO Arnaud de Borchgrave*, Apr. 30, 1999, in Buckley, *supra* note 39, at 273, 276.

Nonetheless, last-ditch shuttle diplomacy had failed. NATO's resolve had been made clear.

Two days after the Serbians refused to sign at Rambouillet, Serb forces launched a major offensive dubbed Operation Horseshoe. The Serb forces drove thousands of ethnic Albanians out of their homes and villages, summarily executed some and setting fire to many houses. Milosevic had comprehensively planned this ethnic-cleansing campaign months in advance.²⁷³

This lengthy recitation of nearly six months of attempts to resolve the Kosovo crisis and NATO's recitations of intentions, including a force buildup, gave Milosevic notice of NATO intentions. There was also notice to all states and international organizations, including the United Nations.²⁷⁴ NATO complied with Principle G.

273. See After-Action Report, *supra* note 65, at 2-3 (stating that Allied Force may have induced the SFRY to intensify the tempo of Horseshoe); see also Lambeth, *supra* note 142, at 24, 226; Alex j. Bellamy, *Human Wrongs in Kosovo: 1974-99*, in THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS, *supra* note 59, at 105, 121; Nigel Biggar, *On Giving the Devil the Benefit of Law in Kosovo*, in Buckley, *supra* note 39, at 409, 414 n.11; Chris Brown, *A Qualified Defense of the Use of Force for "Humanitarian" Reasons*, in THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS, *supra* note 59 at 286; Mark Danner, *Endgame in Kosovo: Ethnic Cleansing and American Amnesia*, in *id.* 56, 69; Godwin, *supra* note 41, at 77; Eric Herring, *From Rambouillet to the Kosovo Accords: NATO's War against Serbia and the Aftermath*, in THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS, *supra*, at 59, 229-30. WHEELER, *supra* note 41, at 269-70. The U.S. Central Intelligence Agency (CIA) had expected the SFRY would resume a more intense campaign of violence in 1999, but it did not anticipate wholesale expulsions and intensified violence against civilians. DAALDER & O'HANLON, *supra* note 65, at 107. Nevertheless, the expected upsurge persuaded President Clinton to convene the Rambouillet negotiations later in 1999 and to use force if they did not produce favorable results. *Id.* Kosovar refugee accounts say SFRY repression began before Allied Force and intensified after the Rambouillet talks collapsed. See, e.g., Sevdije Ahmeti, ed., "My Father Was Burned Alive": Testimonies from Kosovo Refugees, in Buckley, *supra* note 39 at 33; Flora Kelmendi, *A Tale from Prishtina*, in Buckley, *supra* note 39, at 27. Reportedly CIA members serving as Kosovo ceasefire monitors were in touch with and assisted the KLA leadership, including cell phone access to NATO officers and U.S. Secretary of State Madeleine Albright. Udovicki & Ridgeway, *supra* note 42, at 337.

274. See, e.g., MURPHY, *supra* note 5, at 322-23 (stating that it also complied with requirements of some commentators for negotiations).

h. Time for Completing Humanitarian Intervention Under State of Necessity

Principle A establishes the rule for collective humanitarian intervention under state of necessity, like the self-defense and LOAC rules, that those deciding to intervene are liable for what they know, or reasonably should know, at the time when a decision to intervene is taken.²⁷⁵ The time, or duration, of an intervention, is also important, given the historical background of intervention generally.²⁷⁶ Before the Charter, a principal objection to intervention generally was that what began as intervention eventually became occupation, de facto control or conquest, and absorption of states.²⁷⁷ Although the amount of time collective intervenors should have to effect humanitarian intervention under state of necessity might be considered as a factor under necessity and proportionality, Principle D, its cardinal importance in view of this history, rooted as it has been in claims of derogations of the affected state's sovereignty, territorial integrity, and political independence (see Principle E[4]), elevates it to a separate principle:²⁷⁸

Principle H. Duration of time to effect collective humanitarian intervention under state of necessity. Collective humanitarian intervention under state of necessity must be undertaken with a view to employing methods and means, commensurate with the scope and gravity of the situation and principles of necessity and proportionality (Principles A, C, D), and principles protecting the affected state's sovereignty, territorial integrity and political independence (Principle E[4]), to effect the intervention in the minimum time reasonably necessary to accomplish this goal.

275. See *supra* notes 104-124 and accompanying text.

276. Cf. AREND & BECK, *supra* note 19, at 134; MURPHY, *supra* note 5, at 323; O'HANLON, *supra* note 41, ch. 3 (discussing exit strategies); Behuniak, *supra* note 19, at 188; Farer, *supra* note 19, at 151; Fonteyne, *supra* note 39, at 263; Lillich, *supra* note 19, at 349-50; Moore, *supra* note 55, at 25; cf. Zacklin, *supra* note 51, at 939 (noting that intervention must be discontinued once its limited goal has been achieved).

277. See Lillich, *supra* note 19, at 50 (discussing the principle objection to intervention in a country).

278. See *supra* notes 203-227 and accompanying text.

Principle I advances reasonableness factors that may bear upon the durational principle.²⁷⁹ States deciding on collective humanitarian intervention under state of necessity should publish a durational time limit, *i.e.*, intervention will last only long enough to achieve its humanitarian goals. Publication of a Principle H goal does not mean that the goal be for a stated time, *e.g.*, so many days, weeks, or months, or that it give a firm termination date for ending intervention. Those options are impractical and unwise; an affected state has calendars and can take note of these kinds of announcements and act accordingly,²⁸⁰ perhaps to the detriment of its indigenous nationals or the intervenors.

i. Reasonableness Factors Counseling For or Against Collective Intervention Under State of Necessity

Principles A-H occasionally refer to reasonableness. An adaptation of *Restatement (Third)* factors, tailored to collective humanitarian intervention under state of necessity, can serve as a decision matrix for reasonableness in principles stated above.²⁸¹ Like the principles, these factors are a nonexclusive list. The *Restatement (Third)* reasonableness analysis was developed for state-to-state situations involving private parties on one or both sides.²⁸² However, considering collective groups, *e.g.*, NATO, as a single entity for this purpose, *i.e.*, NATO vs. the SFRY, a *Restatement*-style factorial analysis might be employed. The analysis may not apply in universal jurisdiction cases, *i.e.*, when, *e.g.*, war crimes, genocide, terrorism, or

279. See *infra* notes 281-312 and accompanying text.

280. This has been a criticism of stated time limits in the U.S. War Powers Resolution, 50 U.S.C. § 1554(b) (2000). See, *e.g.*, ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION* 134-46, 148-49 (1991).

281. In this regard the proposed analysis resembles the relationship between *RESTATEMENT (THIRD)*, *supra* note 9, sec. 431, referring to sec. 402, chapeau paragraph, which in turn refers to sec. 403 that recites the reasonableness factors upon which this analysis is primarily built. *RESTATEMENT (SECOND)*, *supra* note 82, sec. 7 requires characterizing the problem, *e.g.*, as a tort issue, followed by analysis for each type of case, *e.g.*, general principles for choice of law in torts in *RESTATEMENT (SECOND)*, *supra* note 82-74, sec. 145, which in turn refers principles and contacts in sec. 6, which are subject to reasonableness principles in sec. 9. See also *supra* notes 72-102 and accompanying text.

282. See *RESTATEMENT (THIRD)*, *supra* note 9, sec. 403 (explaining when it would be reasonable to exercise jurisdiction over another state).

violations of human rights or humanitarian law over which all states have potential jurisdiction.²⁸³ However, because perhaps some of these international law violations -- some acts of terrorism,²⁸⁴ some human rights violations, or some humanitarian law violations²⁸⁵ -- may not be subject to universal jurisdiction principles, the ensuing analysis treats the factors as applying when there are some serious universal jurisdiction issues and some that are not. It might be argued that as to clearly universal jurisdiction issues, collective intervenors may disregard reasonableness factors and act; any state can arrest, try and punish those accused of universal crimes,²⁸⁶ or can arrest accuseds and hand them over to a tribunal with jurisdiction, *e.g.*, the ICTY, for further proceedings. The issue for humanitarian intervention is a step removed from any criminal process; intervention issues revolve around acting to protect universal principles of human rights and humanitarian law in the face of principles of sovereignty and states' territorial integrity and political independence.²⁸⁷

283. *See id.* sec. 404 (stating that "a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern").

284. *Id.*

285. *E.g.*, rape. Only recently have there been clear statements; some states may yet claim rape is not a crime against humanity or a humanitarian law violation. *But see* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998), July 17, 1998, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), 37 I.L.M. 999, 1004-09 (1998); Annex, Statute of International Tribunal for Rwanda, S.C. Res. 955 (1994), U.N. Doc. S/RES/955 (1994), art. 3(g); Statute of International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in Territory of Former Yugoslavia Since 1991, art. 5(g), established by S.C. Res. 827, U.N. Doc. S/RES/827 (1993); Third Convention, *supra* note 50, arts. 13-14, Fourth Convention, *supra* note 50, art. 27; NWP 1-14M ANNOTATED, *supra* note 10, ¶ 6.2.5 n.55; PICTET, *supra* note 33, at 139-42; 4 PICTET., *supra* note 33, at 205-06; Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993).

286. RESTATEMENT (THIRD), *supra* note 9, § 404.

287. Reasonableness issues have a rough analogue in how rules of engagement (ROE) are developed. Behind all ROE are factors of law, policy, diplomacy, etc. ROE factors are like the ensuing reasonableness factors suggested for humanitarian intervention; *e.g.*, what is diplomatically proper for one situation may not be appropriate in another situation, and the difference may influence ROE options. Rules of engagement (ROE) state options for and perhaps limits on actions or weapons commanders may take or use in armed conflict or peacetime situations.

Based on *Restatement (Third)* sec. 403, the nonexclusive list of reasonableness factors follows, with occasional commentary on some of them. Reasonableness factors under this analysis, like those under the *Restatement* formula and cases following it or which formed the basis for it,²⁸⁸ should not be mechanically added, *e.g.*, six for, two against, three neutral or not applicable; a single strong reasonableness factor can outweigh all opposing factors. First, as a primary statement:

Even if there is an initial predicate for collective humanitarian intervention under state of necessity, intervention may not be justifiable when action to intervene is not reasonable.²⁸⁹

Following from this,

Whether collective humanitarian intervention under state of necessity is justifiable is determined by evaluating all relevant factors appropriate under the circumstances at the time of decision. These factors include:²⁹⁰

However, United States and undoubtedly other countries' ROE make clear a commander's right and duty of individual or collective self-defense. Similarly, in a particular situation the reasonableness factors advanced *infra* may not be appropriate. States prepare individual and collective ROE for peacetime, wartime and peacemaking operations, *e.g.*, humanitarian intervention. NATO observed "especially strict rules of engagement" during Allied Force. IGNATIEFF, *supra* note 182, at 161. See generally Bradd C. Hayes, NAVAL RULES OF ENGAGEMENT: MANAGEMENT TOOLS FOR CRISIS (1989); NWP 1-14M ANNOTATED, *supra* note 10, at xxxvi-xxxvii, paras. 3.11.5.1, 4.3.2.2, 5.5; Day, *supra* note 19; Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 AIR FORCE L. REV. 245 (1997); J. Ashley Roach, *Rules of Engagement*, 36 NAV. WAR C. REV. 46 (No. 1, 1983), reprinted in 14 SYRACUSE J. INT'L L. & COM. 865 (1988); Brian T. O'Donnell & James C. Kraska, *International Law of Armed Conflict and Computer Network Attack: Developing the Rules of Engagement*, in Schmitt & O'Donnell, *supra* note 10, at 399-401 (history of ROE); Stephen A. Rose, *Crafting the Rules of Engagement for Haiti*, in GRUNAWALT, *supra* note 50, ch. 11; Ivan A. Shearer, *Rules of Engagement and the Implementation of the Law of Naval Warfare*, 14 SYRACUSE J. INT'L L. & COM. 767 (1988); James P. Terry, *Responding to Attacks on Critical Computer Infrastructure: What Targets? What Rules of Engagement?*, in Schmitt & O'Donnell, *supra* note 10, ch. 20.

288. See *supra* notes 80-110 and accompanying text.

289. Compare RESTATEMENT (THIRD), *supra* note 9, § 403(1) (stating that in Foreign Relations Law, the jurisdiction may not apply its own law unless it is reasonable), with RESTATEMENT (SECOND), *supra* note 82, sec. 9 (indicating that in domestic law, the jurisdiction may not apply its own law unless it is reasonable).

This chapeau paragraph declares the ensuing factors are not exclusive; it also says that the factors must be “appropriate under the circumstances.” In some cases, factorial analysis might say that only a few enumerated factors apply besides others not listed here. In some cases, no factors might apply, or other factors not listed below might apply. “[A]t the time of decision” repeats Principle A’s admonition that the proper time to assess whether a decision to intervene was lawful is based on what the decision maker(s) knew, or reasonably should have known, at the time the decision is made.²⁹¹

i. Linkage

The first reasonableness factor might be:

- (1) Linkage of action(s) of a collective intervenor under state of necessity to its territories or jurisdiction, i.e., the extent to which the action takes place within those territories or jurisdiction, or has substantial, direct and foreseeable effect upon or within those territories or jurisdictions.²⁹²

In collective humanitarian intervention to succor indigenous peoples of the affected state, Factor (1) will often tip toward the affected state. However, in situations where the affected state’s actions may result in threats to collective intervenors’ territories or jurisdiction,²⁹³ as asserted before and after the NATO Kosovo

290. Compare RESTATEMENT (THIRD), *supra* note 9, sec. 403(2), chapeau paragraph (discussing the importance of relevant factors when choosing jurisdiction), with RESTATEMENT (SECOND), *supra* note 82, sec. 6(2), chapeau paragraph. (noting the importance of relevant factors when choosing jurisdiction or relevant law).

291. See *supra* notes 114-134 and accompanying text.

292. Compare RESTATEMENT (THIRD), *supra* note 9, sec. 403(2)(a) (noting how reasonableness factors must be determined by the link or effect the actors has with the state or territory), with RESTATEMENT (SECOND), *supra* note 82, sec. 37 (discussing how reasonableness factors must be determined by the link or effect the actors has with the state or territory in the judicial jurisdiction context). See THE TANKER WAR, *supra* note 9, at 544 (discussing the factors of reasonableness or due regard can be found in RESTATEMENT (THIRD) sec. 403(2)).

293. “Territories” refers to areas of land, sea, and airspace over which the state(s) exercise(s) sovereignty; “jurisdiction” refers to areas like the EEZ, which is not subject to sovereignty but which may be subject to coastal state sovereign rights for certain purposes, e.g., EEZ exploration and exploitation and jurisdiction over establishing artificial islands, installations and structures, marine scientific

campaign,²⁹⁴ Factor (1) may weigh in favor of intervention, be found in equipoise, or be tipped toward the affected state with a notation of some weight in the collective intervenors' favor. In the circumstance of Kosovo, moreover, if the factor of the Kosovars' rights to their homes, and not to be driven from them by ethnic cleansing, is considered, this factor tips strongly in favor of NATO intervention. (In intervention to protect diplomats in an embassy, the embassy grounds, although subject to the underlying sovereignty of a state in which they are situate, are inviolate and in that sense have a very strong connection to the state whose representatives use these facilities.²⁹⁵) Collective intervenors' action(s) on their territories to prepare for and conduct an intervention are not part of this territory/jurisdiction factor, except insofar as these actions relate to individual or collective self-defense. Otherwise, collective intervenors could easily claim that Factor (1) always weighs in their favor.

ii. *Connectivity*

Connectivity might be a second factor:

(2) Connections, e.g., nationality, residence or economic activity, (a) between a collective intervenor and the state principally responsible for the activity to be regulated, curtailed, eliminated, or protected, i.e., the affected state, or (b) between a collective intervenor and those whom international law norms that collective humanitarian intervention under state of necessity seeks to protect.²⁹⁶

research and protecting and preserving the marine environment. *See generally* LOS Convention, *supra* note 30, arts. 55-75, Delimitation of Maritime Boundary of Gulf of Maine (Can. v. U.S.), 1984 I.C.J. 246, 294; NWP 1-14M ANNOTATED, *supra* note 10, paras. 1.5.2, 2.4.2-2.4.2.2; O'CONNELL, *supra* note 30, ch. 15; 1 OPPENHEIM, *supra* note 6, sec. 329; RESTATEMENT (THIRD), *supra* note 9, § 514; THE TANKER WAR, *supra* note 9, at 251-52.

294. *See supra* note 65 and accompanying text (discussing how the documents presented stress humanitarian intervention).

295. *See supra* notes 186-188 and accompanying text.

296. *Compare* RESTATEMENT (THIRD), *supra* note 9, sec. 403(2)(b) (listing factors to be considered for reasonableness); THE TANKER WAR, *supra* note 9, at 544 (using the Restatement (Third)'s factors for reasonableness). RESTATEMENT (SECOND), *supra* note 82, sec. 145(2)(c) (torts) applies similar principles in sections for different kinds of claims.

In Factor (2)(a) the balance would seem to usually tip in an affected state's favor; collective intervenors may have few nationality, residence, etc., connections between them and an affected state. However, as in the case of the SFRY and Kosovo, this might have been the situation if Slavic countries had intervened collectively, at least insofar as Serbians were concerned.²⁹⁷ If Muslim states had intervened collectively to protect the Kosovars,²⁹⁸ Factor (2)(b) would have come into play. To do so in either case, however, would almost assuredly have exacerbated ethnic or religious-based animosities in Kosovo or elsewhere if a reason for collective humanitarian intervention would have been based partly on claims to alleviate deprivations grounded in religious or ethnic relationships. On the other hand, collective intervenors under state of necessity could rely on Factor (2)(b) if they rely on generally accepted and

297. There was at least the potential for this kind of relationship during Allied Force. On April 12, 1999 the SFRY parliament voted overwhelmingly to join a pan-Slav union with Belarus and Russia, seen as a largely symbolic step. *See Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42903. In April a Russia-Belarus 73-vehicle convoy carrying relief cargo but including five armored vehicles and eight fuel tankers arrived at Hungary's border, bound for Yugoslavia. *See* S.C. Res. 1160, *supra* note 59, that imposed an embargo, Hungary denied entry. Later, in compromise after Russia recalled its ambassador, the tankers stopped at the border and the armored vehicles did not enter; the rest of the convoy reached Belgrade without further problems. *See* DAALDER & O'HANLON, *supra* note 65, at 130; Talas & Valki, *supra* note 67, at 206. As Allied Force wound down, Russian forces moved to occupy the Pristina airport; disputes over this incursion were eventually resolved. *See* CLARK, *supra* note 142, ch. 15; DAALDER & O'HANLON, *supra* note 65 at 176; Baranovsky, *supra* note 67, at 112; *Withdrawal*, *supra* note 224, at 43014. Although this appeared to be a dangerous time for otherwise bad Russia-U.S. relations, this may not have been true. *See* Bell, *supra* note 179, at 457-58.

298. Countries with large Muslim populations divided in views on Allied Force. NATO Member Turkey supported the campaign and later accepted 20,000 Kosovar refugees for temporary resettlement. *See* Kostakos, *supra* note 10, at 168-69. Other states, while approving succor of fellow Muslims, were concerned about the sovereignty issue. Some Islamic countries, e.g., Saudi Arabia and the United Arab Emirates, established refugee camps for fleeing Kosovars and encouraged non-governmental organization fund-raising. *See* Karawan, *supra* note 67; *see also* John Kelsay, *Islamist Response to the War in Kosovo/a: Materials for an Ironic Narrative*, in Buckley, *supra* note 39, at 419. Only Iran outspokenly supported the SFRY. *See* Kritsiotis, *supra* note 57, at 347. Muslim leaders never proclaimed a jihad (holy war). *See* Stanley Samuel Harakas, *Kosovo Crisis Contexts: Nationalism, Milosevic, and the Serbian Orthodox Church*, in Buckley, *supra* note 39 at 378, 383.

universal rules prohibiting certain conduct of the affected state, *e.g.*, those in human rights and humanitarian law, which was NATO's rationale for the campaign.²⁹⁹ A collective intervenor acting to protect these principles has a connection of humanity between it and peoples suffering these deprivations. This was the case for the Kosovo intervention.

iii. Character, Importance, and Acceptance

What is the character, importance and projected acceptance of the activity to be curtailed, regulated, eliminated or protected might be a third factor:

(3) The character of the activity to be curtailed, regulated, eliminated or protected; the importance of curtailing, regulating, eliminating, or protecting that activity to collective intervenors in collective humanitarian intervention under state of necessity; the extent to which other states have curtailed, regulated, eliminated or protected this activity in the past; and the degree to which desirability of such curtailment, regulation, elimination or protection is generally accepted by other states or the international community, in situations of collective intervention under state of necessity.³⁰⁰

In Factor (3), emphasis shifts to the nature of the activity involved, in positive and negative terms, and concern of collective intervenors and other states and the international community. For example, collective intervenors act to protect positive principles, *e.g.*, those in human rights and humanitarian law; at the same time they act to curtail or eliminate violations of that law. Complete analysis of Factor (3) would include determining which principles are universal, *i.e.*, those that states most widely accept and whether they are restated in custom and general principles as well as multilateral

299. See *supra* note 65 and accompanying text (discussing the reasons why NATO intervened in Kosovo, particularly stressing the humanitarian aspect); see also *Bankovic*, 41 I.L.M. 517 (noting how connectivity did not prevail as a factor in this case). The European Court of Human Rights held there was no jurisdictional connectivity between SFRY claimants and NATO Members also party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, refusing to apply extraterritorial jurisdiction principles because of the Convention's language.

300. Compare RESTATEMENT (THIRD), *supra* note 9, ¶ 403(2)(c) (explaining the importance of the character of the activity which is regulated).

treaties or have *jus cogens* status.³⁰¹ How the collective intervenors, other states and the general international community view these principles is important. Besides human rights and humanitarian law principles, relative strengths of principles like sovereignty, territorial integrity of states and their political independence under the particular circumstances must be considered.³⁰² Factor (3) would demand a difficult, and perhaps the crucial, weighing process for collective humanitarian intervention under state of necessity. Due regard, analogous to due regard in the LOS, the LOAC, and international environmental matters,³⁰³ for others' interests, including those of the affected state, must be given.

As NATO began and conducted Allied Force operations, it qualified its aims to succor the Kosovar Albanians with explicit declarations of respect for SFRY territorial integrity and political independence and its people.³⁰⁴ These actions illustrate NATO's recognition of the sensitivity of entering a sovereign state's territory while acting to prevent further massive human rights and humanitarian law violations and, therefore, the balancing of considerations Factor (3) would require.

301. See U.N. CHARTER arts. 1(2), 1(3) (noting that two of the U.N. principles are to develop friendly relations among nations based on equal rights and self-determination and to achieve international cooperation in solving international problems, including those with a humanitarian character); see also *supra* note 70 and accompanying text (discussing how humanitarian law may have *jus cogens* status).

302. See U.N. CHARTER arts. 2(1), 2(4) (stating that the organization is based on the sovereignty of the states and that members cannot use threat against another member to gain territory); see also *supra* notes 9, 44 and accompanying text (noting that nothing in international law allows one state to take the territory of another state).

303. See, e.g., THE TANKER WAR, *supra* note 9, at 246, 536-37, citing inter alia LOS Convention, *supra* note 30, art. 87(2); High Seas Convention, *supra* note 30, art. 2; SAN REMO MANUAL, *supra* note 27, paras. 12, 34, 36, 88, 106(c); Robertson, *supra* note 35, at 302-03.

304. See North Atlantic Council, *Statement*, *supra* note 65, at 262; Solana, *Statement by NATO Secretary General*, *supra* note 65, at 42847; DAALDER & O'HANLON, *supra* note 65, at 101-02; Butler, *supra* note 42, at 279; Calic, *supra* note 42, at 29; Funnell, *supra* note 169, at 437.

iv. Justified Expectations

Justified expectations of all concerned, including third states and international organizations, might be a fourth factor:

- (4) The existence of justified expectations that might be protected or hurt by collective humanitarian intervention under state of necessity.³⁰⁵

A principal question is whether there was a justified expectation that NATO could not act because the U.N. Security Council, seized of the crisis, could not act because of a threatened veto.³⁰⁶ Although the Charter, Chapter VII, says the Council “shall” determine what are threats to the peace, etc., and “shall” recommend or decide on action, there is nothing in the Charter governing a situation if the Council, seized of a matter, does not act because of a threatened veto.³⁰⁷ The U.N. General Assembly is barred from acting when the Council is seized of a matter, unless the Council requests such.³⁰⁸ The Council, given “primary responsibility” to maintain international peace and security,³⁰⁹ is not the only agency for this.³¹⁰ Article 51 declares that

305. Compare RESTATEMENT (THIRD), *supra* note 9, sec. 403(2)(d); RESTATEMENT (SECOND), *supra* note 82, sec. 6(2)(d); THE TANKER WAR, *supra* note 9, at 545 (discussing how in some cases a justified exception will affects many factors including: the exercise of jurisdiction, the choice of laws, and shipping interests).

306. China and Russia threatened a veto of a resolution to authorize action in Kosovo. See U.N. CHARTER arts. 23(1), 27; *supra* notes 59, 155-156 and accompanying text.

307. U.N. CHARTER, art. 39 (stating that the Security Council determines the existence of a threat to peace, breach of peace, or act of aggression and makes recommendation and determines what the course of action will be); see also GOODRICH ET AL., *supra* note 9, at 290-309 (discussing the history of the U.N. CHARTER and why the Security Council has so much power); SIMMA, *supra* note 9, at 606-16 (explaining the historical origins of the United Nations).

308. See U.N. CHARTER art. 12 (explaining how the General Assembly cannot act or recommend a course of action on any dispute unless the Security Council so requests); see also *supra* note 59 and accompanying text (discussing how the Security Council is in charge of matters that threaten peace and security).

309. U.N. CHARTER art. 24; see also GOODRICH ET AL., *supra* note 9, at 202-07 (giving commentary on the functions and powers of the Security Council); SIMMA, *supra* note 9, at 398-407 (noting the importance and origins of the Security Council and why they are in charge of maintaining peace and security).

states subject to attack, assuredly a threat to international peace and security, may respond individually or collectively in self-defense until the Council acts.³¹¹ However, Article 51 says nothing about other lawful actions states may take, individually or collectively, *e.g.*, retorsions or reprisals,³¹² in these situations. Moreover, if a state encounters a situation that a Council decision does not cover, that state may act in individual or collective self-defense to respond to that situation. If this is true, although there might be a belief among some that if the Council is seized of a matter, no other action may be taken when the Council has not decided on or recommended³¹³ a course of action and would be paralyzed by a veto if it did, international law does not condemn states to individual or collective inaction, particularly in the face of widespread human rights and humanitarian law violations.³¹⁴ No one would have argued that states had no right to respond individually or collectively through retorsion(s) or reprisal(s) in the Kosovo crisis. NATO chose another path, however, and decided instead to pursue collective humanitarian intervention under state of necessity, which is another option under international law and fully supported in custom.³¹⁵ The sovereignty principle³¹⁶ underscored NATO's freedom of action to act collectively under state of necessity principles.

310. *Cf. supra* note 59 and accompanying text (explaining other ways in which the United Nations can use other bodies to make recommendations on peace and security).

311. *See supra* note 9 and accompanying text (discussing when it is appropriate for a state to use self defense).

312. *See supra* note 145 and accompanying text (noting how reprisals must always be in a proportionate and before using a reprisal, a state must give the law breaking state a chance to mend its ways).

313. U.N. CHARTER arts. 25, 48, 103 (outlining the vital and binding nature of Security Council decisions to all members of the United Nations); *see also supra* notes 9, 108 and accompanying text.

314. *See supra* notes 6-9 and accompanying text (describing the state of necessity doctrine generally).

315. *See* U.N. CHARTER art. 2(1) (establishing the principle of sovereignty in the U.N. Charter); *see also supra* note 44 and accompanying text.

316. U.N. CHARTER art. 2(1); *see also supra* note 44 and accompanying text (discussing the sovereignty principle).

To a certain extent, insofar as states, particularly the affected state, and a collective intervenor are concerned, Factor (4) may overlap Factor (3) analysis. However, there may be other participants at different levels that may have advisory, persuasive, recommendatory, or other functions that may be brought to bear on a situation, *e.g.*, individual human beings, governmental organizations within states (*e.g.*, the U.S. Congress within the United States), opposition parties within parliamentary democracies, third states, intergovernmental organizations like the United Nations or the European Union, nongovernmental organizations like the ICRC,³¹⁷ business interests (insurance, etc.), religious organizations, the media (the “CNN effect”),³¹⁸ and Internet communications, whose voices may be raised in concerns, if not always in concert, over resolving a crisis through collective humanitarian intervention under state of necessity. Although decision makers under principles and factorial analysis make law-oriented choices, these choices are never made in a vacuum. As someone in a previous generation said, judges read the newspapers.³¹⁹ Due regard, analogous to due regard in the LOS, the LOAC, and international environmental matters,³²⁰ for others’ interests must be given.

NATO was undoubtedly aware of these factors and planned and executed Allied Force accordingly. It is very clear that NATO had authority to act under state of necessity when the Security Council was seized of the crisis but would have been impotent to act because

317. See generally David Weissbrodt, *The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, 21 VAND. J. TRANSNAT’L L. 313, 345-55 (1988) (detailing the role and purpose of the ICRC in humanitarian law); Rynker, *supra* note 4, at 529 (noting the objections of the ICRC to the use of the term “humanitarian intervention” when the means used to intercede include military action).

318. See CLARK, *supra* note 142, at 14-15, 441-42 (detailing the ways instantaneous cable news changed war strategy during the 1980’s and 90’s).

319. See, *e.g.*, James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037, 1039-1143 (1993) (offering a discussion of the ways in which public opinion has affected judicial opinions by focusing on the U.S. Supreme Court).

320. See *supra* note 303 and accompanying text (discussing due regard in the context of character, importance and acceptance).

of a threatened veto.³²¹ How other expectations coming from other sources should be assessed in the Kosovo context is difficult, given the multiplicity of these sources. A book, rather than an article, would be necessary to assess them. It is relatively safe to say, however, that NATO took these into consideration.

v. Importance to the International Community

The importance of the intervention to the international community might be a fifth factor:

- (5) The importance of the collective humanitarian intervention under state of necessity to the international political, legal, economic or other systems.³²²

Factor (5)'s legal aspects overlap, to a certain extent, those of Factors (3) and (4). The question here, however, is not the conflict or concurrence of principles but their relative importance, *e.g.*, human rights or humanitarian law versus sovereignty and a state's territorial integrity and political independence. Put more succinctly, in a given situation where collective humanitarian intervention under state of necessity is considered: What is more important, protection of human life and the like from the almost certain loss of it through human rights or humanitarian law deprivations, or temporary, partial deprivations of sovereignty, territorial integrity or political independence, coupled with the damage accruing in a military intervention like Allied Force?³²³ Factor (5) also requires considering the political and economic importance of a collective intervention like Allied Force. What is the likely political "fallout"? What is the

321. See *supra* notes 6-9 and accompanying text (noting the conditions under which intervention based on necessity is acceptable).

322. Compare RESTATEMENT (THIRD), *supra* note 9, sec. 403(2)(e) (noting that the economic, political, and legal aspects of a conflict are factors in determining the reasonability of the exercise of jurisdiction), and THE TANKER WAR, *supra* note 9, at 545 (incorporating the analysis of the RESTATEMENT (THIRD) with regard to political, legal, and economic factors to assessing whether humanitarian intervention by a third party is reasonable). Cf. RESTATEMENT (SECOND), *supra* note 82, sec. 6(2)(a) (noting that interstate and international needs are also relevant to deciding which law to follow when an express directive is lacking).

323. Cf. U.N. CHARTER arts. 1(2), 1(3), 2(1), 2(4); see also *supra* notes 11, 44, 55, 70 and accompanying text.

economic cost of rebuilding from projected military (and perhaps other) initiatives? Are there other “costs,” *e.g.*, to other facets of the global system, *e.g.*, religion, ethics, morality? How important are each of these?³²⁴ Due regard, analogous to due regard in the LOS, the LOAC, and international environmental matters, for others’ interests, must be given.³²⁵

Again, as in assessing Factors (3) and (4), a concrete answer is difficult to give. However, the record seems clear that NATO carefully weighed the important policy of protecting the Kosovars’ rights under humanitarian and human rights law against policies against interfering in a state’s sovereignty, political independence and territorial integrity.³²⁶

vi. Consistency With Traditions of the International System

How collective humanitarian intervention under state of necessity is consistent with traditions of the international system might be a sixth factor:

- (6) The extent to which action through collective humanitarian intervention under state of necessity is consistent with the traditions of the international system.³²⁷

324. See RESTATEMENT (THIRD), *supra* note 9, § 403(2)(e) (listing only the political, legal or economic system) There are many others, hence addition of “other” in Factor (5). See also *supra* 99-100 and accompanying text (noting that the considerations highlighted by § 403(2) of the restatement are not comprehensive).

325. See *supra* note 303 and accompanying text (discussing due regard in the context of character, importance and acceptance).

326. See *supra* note 65 and accompanying text (discussing the humanitarian nature, as opposed to self-defense, of Allied Force).

327. Compare RESTATEMENT (THIRD), *supra* note 9, sec. 403(2)(f) (stating that reasonableness in asserting jurisdiction should be determined in part by the “traditions of the international system”), and THE TANKER WAR, *supra* note 9, at 545 (extending the analysis of the RESTATEMENT (THIRD) to the assertion that the reasonableness of humanitarian intervention should also look at the traditions of the international system). Cf. RESTATEMENT (SECOND), *supra* note 82, sec. 6(2)(a) (showing that choice of law principles are also informed by interstate and international needs and traditions).

As noted earlier, the traditional rule has been that states have exclusive competence within their territories to deal with their nationals.³²⁸ Today that rule has been partly eviscerated through worldwide human rights law standards, which have come to the fore since World War II with recognition in the Charter, and humanitarian law, which has centuries of historical antecedents.³²⁹ Another longstanding tradition has been the national sovereignty principle, which the Charter recognizes. This principle exists alongside other Charter principles, now in place for over half a century but representing even older policies, of respect for states' territorial integrity and political independence.³³⁰

Collective humanitarian intervention under state of necessity, in situations where the equally longstanding rule of the inherent right to individual and self-defense is not at issue, pits the relatively new (fifty plus years) trend of human rights law and the more venerable humanitarian law against the longstanding trends of sovereignty and respect for states' territorial integrity and political independence.³³¹ It is no wonder that commentators accepting the principle of state of necessity say its invocation is limited to extraordinary situations.³³² This is not to say that three traditions (sovereignty, territorial integrity, political independence) defeat two traditions (human rights, humanitarian law), three to two, but that the decision on traditions is close. Due regard, analogous to due regard in the LOS, the LOAC, and international environmental matters, for others' interests, must be given.³³³

NATO was aware of this sharp division between competing policies and gave due regard to SFRY sovereignty, territorial

328. See *supra* notes 44-51 and accompanying text.

329. See U.N. CHARTER art. 1(3) (encouraging respect for human rights and equality); see also *supra* note 70 and accompanying text.

330. U.N. CHARTER arts. 2(1), 2(4) (denoting respect for the sovereignty of other nations and discouraging the use of force); see also *supra* notes 9, 44 and accompanying text.

331. See *supra* notes 21-25 and accompanying text.

332. See *supra* notes 21-25 and accompanying text.

333. See *supra* note 303 and accompanying text (discussing due regard in the context of character, importance and acceptance).

integrity and political independence in the campaign to vindicate the Kosovars' human rights and rights under humanitarian law.³³⁴

vii. Interests of Other States and International Organizations

Other states' and international organizations' interests might be a seventh factor:

(7) The interest that other states, or international organizations, may have in curtailing, regulating, eliminating or protecting the activity that is the object of a collective humanitarian intervention under state of necessity.³³⁵

Factor (7) insists that those considering collective humanitarian intervention under state of necessity must consider whether other states, or international organizations, have a genuine interest in the situation. For example, if the U.N. Security Council, seized of a matter it deems is a risk to international peace and security, decides on action, that virtually forecloses U.N. Members' individual or collective separate action that is inconsistent with the decision, unless they claim the inherent right to self-defense as to matters not covered by the decision.³³⁶ On the other hand, if the Council is not seized of a matter, states are freer to act collectively for intervention under state of necessity.³³⁷

If the Council is seized of a matter, and there is no possibility of a controlling decision because of threat of veto or veto, states must examine the Council's position on the projected reason for intervention. If the Council has said nothing, *e.g.*, when the first resolution on the matter is vetoed, those contemplating collective

334. See *supra* note 70 and accompanying text (discussing the factors that went into the consideration to launch Allied Force).

335. Compare RESTATEMENT (THIRD), *supra* note 9, sec. 403(2)(g) (stating that the exercise of jurisdiction may depend in part on the interest another state has on its regulation), with RESTATEMENT (SECOND), *supra* note 82, sec. 6(2)(c) (noting that the policies of interested states also have a bearing in choice of law situations), and THE TANKER WAR, *supra* note 9, at 545 (extending the analysis of the RESTATEMENT (THIRD) to situations of possible humanitarian intervention).

336. U.N. CHARTER art. 51 (preserving a right to self-defense among U.N. members); see also *supra* notes 9-11 and accompanying text.

337. See *supra* notes 6-9 and accompanying text.

intervention must look to other sources relating to firm facts (see Principle A) and how they relate to international law in deciding on intervention. On the other hand, if the Council would seem to speak, through prior resolutions, against practices that are the rationale for collective intervention, that factor plus what international law says on the matter may be considered for the decision.³³⁸ Due regard, analogous to due regard in the LOS, the LOAC, and international environmental matters, for others' interests must be given.³³⁹

The same kind of evaluation is appropriate with respect to other international organizations. If, *e.g.*, the U.N. General Assembly passes a resolution on a matter, that resolution, although nonmandatory, is entitled to great respect, particularly if it articulates customary or conventional international law.³⁴⁰ If the ICJ in a case before it issues a judgment on a similar issue between different parties, that decision, although not precedent, is also entitled to great respect, particularly if it restates customary law.³⁴¹ The same might be said about regional organizations constituted under Articles 52-54 of the Charter³⁴², and other organizations, *e.g.*, the EU.³⁴³

Other states' views should also be considered. For example, pursuant to Article 33³⁴⁴ of the Charter, a third state or an international organization might initiate mediation to resolve a crisis in addition to collective intervenor-affected state negotiations; this

338. *See supra* note 59 and accompanying text (describing the seized Council before Allied Force).

339. *See supra* note 303 and accompanying text (discussing due regard in the context of character, importance, and acceptance).

340. *See* U.N. CHARTER arts. 10-11, 13-14 (setting forth the advisory role of the U.N. General Assembly); *see also supra* note 59 and accompanying text

341. *See* I.C.J. STATUTE, arts. 38(1), 59 (delineating the standards to be applied by the I.C.J. in adjudicating cases as well as the reach of its decisions); RESTATEMENT (THIRD), *supra* note 9, secs. 102-03 (noting the traditional sources of international law and the criteria for determining whether certain evidence qualifies as such); *see also supra* notes 13, 23 and accompanying text.

342. U.N. CHARTER arts. 52-54 (recognizing other regional international organizations).

343. If these organizations' resolutions are mandatory and binding on states concerned, they must be followed like Council decisions. *See supra* note 59 and accompanying text.

344. U.N. CHARTER, art. 33 (establishing a process for third party mediation).

happened before Allied Force began.³⁴⁵ Although these are not direct interests like those of states' asserting jurisdiction over transnational litigation, or the Council's decision process, these inputs should be part of the decision process.³⁴⁶

(8) Likelihood of conflict

Likelihood of conflict with another state's or an international organization's actions might be an eighth factor:

*(8) The likelihood of conflict with another state's or an international organization's action(s) to curtail, regulate, eliminate or protect the object of a collective humanitarian intervention under state of necessity.*³⁴⁷

Factor (7) analysis discusses possible conflicts in law between certain international organizations' actions that could conflict with action under a collective intervention under state of necessity. Factor (8) counsels assessing the risk of action that might come from other states or international organizations. An example of this from Allied Force was Russian arrival at Pristina airport, independent of decisions to end Allied Force and establish civil government for Kosovo, that could have caused conflict between that force and organizations being established under the United Nations and NATO.³⁴⁸ The mini-crisis was resolved by negotiation.³⁴⁹

345. See *supra* note 247 and accompanying text (describing attempts at peaceful resolutions by other states prior to Allied Force).

346. See *supra* note 73 and accompanying text (discussing various dispute resolution mechanisms contemplated by the Charter).

347. Compare RESTATEMENT (THIRD), *supra* note 9, sec. 403(2)(h) (stating the importance of evaluating whether exercising jurisdiction will conflict with regulation by another state), with THE TANKER WAR, *supra* note 9, at 545 (extending the analysis of the RESTATEMENT (THIRD) to situations of humanitarian intervention, advising that it must be evaluated whether action will conflict with that of another state). Cf. RESTATEMENT (SECOND), *supra* note 82, sec. 6(2)(f) (noting that "uniformity of result" is important to choice of law situations).

348. See Michael Dobbs, *Kosovo in Crisis: NATO Occupies Tense Kosovo Capital; British Troops Confront Russians at Pristina Airport*, WASH. POST, June 13, 1999, at A1 (describing the conflict between Russia and NATO troops).

349. See *supra* notes 224-226, 296 and accompanying text.

Due regard, analogous to due regard in the LOS, the LOAC, and international environmental matters, for others' interests must be given.³⁵⁰

viii. An Obligation to Evaluate

As a final consideration,

When it would not be unreasonable for two or more states or international organizations or groups, including the intervenor organization or group, to act in a situation of collective humanitarian intervention under state of necessity, but the actions of the states or international organizations or groups are in conflict or are duplicative in action, each state, international organization or international group has an obligation to evaluate its own, as well as the others' interests in acting in light of all relevant factors, including but not limited to those in Factors (1)-(8). A state or international organization or group should defer to the collective intervenor, or other state or international organization or group if the latter's interest is clearly greater.³⁵¹

This admonition adapted from the *Restatement (Third)* does not account for what a state, international organization or international group (e.g., a coalition) should do if it has the greater interest and other states, etc., unreasonably disagree. Nor does it account for a situation where there is a "tie," in terms of law and policies behind it, in a humanitarian intervention situation to be claimed under state of necessity between acting and not acting.³⁵² Under these

350. See *supra* note 303 and accompanying text (discussing due regard in the context of character, importance and acceptance).

351. See RESTATEMENT (THIRD), *supra* note 9, sec. 403(3) (encouraging deference to the state with a greater interest in exercising jurisdiction).

352. Under these circumstances, some commentators have advocate choosing "the better rule of law" when a competing rule is "anachronistic, behind the times." See ROBERT A. LEFLAR, LUTHER L. MCDUGAL, & ROBERT L. FELIX, *AMERICAN CONFLICTS LAW* sec. 107 (4th. ed. 1986) (suggesting that judges should not hesitate to choose a better rule of law when one is "anachronistic" or "behind the times"); FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 192-94 (Martinus Nijhoff ed., 1993) (encouraging judges to apply superior foreign law norms when appropriate). Several U.S. courts have applied this formula, which passed U.S. constitutional muster, although not without strong criticism, in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320-32 (1981) (Stevens, J. concurring). See SCOLES ET AL., *supra* note 85, sec. 2.25. Applying "the better rule of law" in international humanitarian intervention under state of necessity cases, although

circumstances the state, organization, or group may act if it chooses to do so under the circumstances, taking into consideration the position of the unreasonably disagreeing state or states, etc.³⁵³ This would be an exercise of collective or individual sovereign action³⁵⁴ and might occur if an international organization decides on collective humanitarian intervention under state of necessity in the face of unreasonable objections by third states or other international organizations or groups whose objections the intervening state(s) is or are not bound to follow.³⁵⁵

Acting under these circumstances invites the same kind of accusations of self-judging, protection of home-turf values, and result-oriented decision making that courts and commentators have made when there is a decision to apply forum law in the face of some events' occurring elsewhere, or some parties' allegiance elsewhere.³⁵⁶ Of course, given the extraordinary nature of humanitarian intervention under state of necessity, if an international organization considering collective intervention on this basis is confronted by (an)other actor(s) with clearly greater interests, the intervening international organization should defer.³⁵⁷ In any of these situations due regard, analogous to due regard in the LOS, the

appealing to human rights and humanitarian law advocates or those espousing sovereignty, territorial integrity, etc. principles, invites the same kind of harsh rhetoric that this and other modern conflict of laws theories have generated. *See id.* sec. 2.26; *supra* notes 84-85, 88 and accompanying text. Earlier conflicts theories, abandoned in all but a few states of the United States, also generated criticism that led to their being discarded in favor of newer theories, with most adopting the RESTATEMENT (SECOND), *supra* note 82. *See supra* notes 86-87, 89-92 and accompanying text.

353. This approximates the *lex fori* approach in conflict of laws decisionmaking some U.S. courts and commentators adopt. *See generally* SCOLES ET AL., *supra* note 85, secs. 2.10-2.11; *cf.* RESTATEMENT (SECOND), *supra* note 82, sec. 6(2)(b) (counseling examining relevant forum policies).

354. *See* U.N. CHARTER, art. 2(1) (establishing the sovereignty principle); *see also supra* note 44 and accompanying text (discussing the origins of the sovereignty principle).

355. *E.g.*, where there is no U.N. Security Council decision. *See* U.N. CHARTER arts. 25, 48, 103; *supra* notes 9, 108 and accompanying text.

356. *See supra* note 352 and accompanying text (discussing various arguments for and against the application of a particular rule).

357. *See supra* notes 351-356 and accompanying text.

LOAC, and international environmental matters, for others' interests must be given.³⁵⁸

D. EVALUATION

Principles A-H attempt to distill the law as it stands in cases of collective humanitarian intervention under state of necessity.

Principle A requires states considering this action to marshal facts about a situation so that they will be reasonably well informed about the situation before deciding to act.³⁵⁹ The Principle reflects standards in the law of self-defense and the LOAC, which predicate liability of decision makers on what they know, or reasonably should know, at the time of decision. The record suggests that NATO observed Principle A before Allied Force.³⁶⁰

Principle B would require consensus decision making if treaty or customary practice governing procedure within an international organization requires it, or if a customary rule would require it of all such organizations or groups.³⁶¹ The record suggests that NATO followed Principle B before and during Allied Force.³⁶²

Principle C is particularly critical: The situation must be so serious and so immediate, and there must be no other reasonable alternative to collective action under state of necessity, before states may undertake collective humanitarian action under state of necessity.³⁶³ Drawn from the law of anticipatory self-defense, Principle C reflects the relatively narrow availability of collective humanitarian intervention under state of necessity, where fundamental policies behind human rights and humanitarian law collide with policies favoring states' sovereignty, territorial integrity and political independence, all of which have Charter roots. Anticipatory self-defense standards and Principle C standards use virtually the same

358. *See supra* note 303 and accompanying text (discussing due regard in the context of character, importance and acceptance).

359. *See supra*, notes 114-134 and accompanying text

360. *See id.*

361. *See supra* notes 135-142 and accompanying text.

362. *See id.*

363. *See supra* notes 143-157 and accompanying text.

language, but situations when each can be invoked are different, *i.e.*, a state or states in a collective self-defense alliance might be able to invoke anticipatory self-defense, but not collective humanitarian intervention under state of necessity, in a given situation, or vice versa. States that do not admit of a right of anticipatory self-defense in the Charter era can subscribe to the view Principle C advocates, since the situations are different. To be sure, relative immediacy, etc., cited in anticipatory self-defense cases can be used as a guide in collective humanitarian intervention under state of necessity, but they are not precedents requiring decision makers to allow or bar action in humanitarian cases. The record is relatively clear that the situation in Kosovo before the NATO campaign began was serious and critical, and it would appear that there was no other reasonable alternative to Allied Force.³⁶⁴

Principle D requires states to use necessary and proportional methods and means, terms also used in the law of self-defense and the LOAC, to effect such a collective intervention.³⁶⁵ What is necessary or proportional in collective humanitarian intervention under state of necessity may or may not be necessary or proportional in self-defense or LOAC situations, and vice versa. Self-defense and LOAC rules on necessity and proportionality, including rules involving objects forbidden as targets under the LOAC unless the enemy uses them, *e.g.*, for warfighting or war-sustaining efforts, are guides for action and must usually be followed. Collective intervention decision makers should have extraordinarily strong reasons for departing from self-defense or LOAC rules on protected objects. Although there were instances of errant bombing during the air campaign, the overall record is that NATO employed proportional methods and means to achieve its limited objective during Allied Force.³⁶⁶

Principle E recites four situations barring collective humanitarian intervention under state of necessity.³⁶⁷ Principle E(1), partly derived from ILC *State Responsibility* principles, forbids collective

364. *See id.*

365. *See supra* notes 158-202 and accompanying text.

366. *See id.*

367. *See supra* notes 203-227 and accompanying text.

intervention when there is an opposing jus cogens norm, as long as there is no opposing and conflicting jus cogens norm or other superior rule, e.g., a Council decision under Articles 25 and 48 of the Charter.³⁶⁸ Principle E(2), partly derived from ILC *State Responsibility* principles, would forbid intervention if there is a treaty binding the collective intervenors to the contrary, unless there are countervailing and superior norms grounded in custom, general principles, jus cogens, Article 103 of the Charter, binding U.N. resolutions, or binding rules of other international organizations.³⁶⁹ The first exception elevates a treaty barring intervention to superior status, presumably in the absence of former custom; the other exceptions follow the usual rules of construction in the multifactoral analysis of public international law. Principle E(3), following ILC *State Responsibility* principles, bars collective intervention if the collective intervenors, or their organization, has contributed to occurrence of the state of necessity.³⁷⁰ As comments to Principle E(3) say, this would not necessarily bar collective intervention if, e.g., one state within an organization has contributed to the occurrence, although the organization might choose to take special measures in those situations.³⁷¹

Principle E(4), not in the ILC *State Responsibility* principles, is another critical rule, owing to intervention's prior history:

States acting collectively under state of necessity in humanitarian intervention situations may not invoke state of necessity if they also intend to impair the affected state's sovereignty in any way not reasonably connected with the goal of intervening for humanitarian reasons, or if they intend to impair the affected state's territorial integrity or political independence in any way not reasonably connected with the goal of intervening for humanitarian reasons.³⁷²

Any intervention involves some derogation on the affected state's sovereignty, territorial integrity and independence. Principle E(4) allows these derogations, but only to the extent necessary to achieve

368. *See id.*

369. *See id.*

370. *See id.*

371. *See id.*

372. *See supra* notes 203-227 and accompanying text.

the goal of collective humanitarian intervention. As stated in the Principle E(4) analysis, collective intervenors would be well advised to state these goals when they intervene. NATO appears to have complied with Principle E, insofar as it applied to Allied Force operations.³⁷³

Principle F(1), also taken from the ILC *State Responsibility* principles, validates an affected state's otherwise wrongful act if that state acts in individual or collective self-defense.³⁷⁴ Principle F(1) adds that all countries involved in the intervention, the affected state and the intervenors, retain rights of individual and collective self-defense, subject, *e.g.*, to principles of necessity and proportionality.³⁷⁵ For collective intervenors, this means that the affected state is not obliged to, but may choose to, remain passive. Principle F(2) recites truisms that states involved in a collective humanitarian intervention, or other states, may act individually or collectively through legitimate reprisals, retorsions or other lawful means to compel compliance with international law, *e.g.*, humanitarian or human rights law that is the subject of the collective intervention. Apart from after-action claims of actions in self-defense, Principle F did not come into play during the NATO campaign.³⁷⁶

Principle G recites notice standards.³⁷⁷ Principle G(1) says that in the usual case collective intervenors should give an affected state notice of proposed action reasonable under the circumstances, and a chance to be heard, in all but egregious cases, *e.g.*, where that state would destroy the object of the proposed intervention, or the need to act is great and immediate.³⁷⁸ Notice can be given through negotiations as well as, *e.g.*, unilateral communiques. Principle G(2) recites similar standards for notice to international organizations or other states.³⁷⁹ There is no question that all affected participants,

373. *See id.*

374. *See supra* notes 228-237 and accompanying text.

375. *See id.*

376. *See id.*

377. *See supra* notes 238-274 and accompanying text.

378. *See id.*

379. *See id.*

particularly the SFRY, had adequate notice under the circumstances.³⁸⁰

Principle H is important in establishing durational time standards:

[I]ntervention . . . must be undertaken with a view to employing methods and means . . . commensurate with the scope and gravity of the situation and principles of necessity and proportionality, and principles protecting the affected state's sovereignty, territorial integrity and political independence . . . to effect the intervention in the minimum time reasonably necessary to accomplish this goal.³⁸¹

Observing Principle H will eliminate the problem of intervention for entirely worthy goals, *e.g.*, protection against humanitarian or human rights law violations, that ripens into long term occupation and claim of sovereignty over time. States considering collective humanitarian intervention should announce this as a standard. Although there was no explicit statement of minimum time, NATO observed Principle H. As soon as SFRY forces departed and civil government for Kosovo was in place, NATO became a guarantor of internal security pursuant to the Council's resolution.³⁸²

Principle I suggests discretionary factors taken from U.S. conflict of laws (private international law) analysis that can serve as cross-checks on, *e.g.*, what is reasonable under Principles A-H.³⁸³ This method of analysis has been criticized; it can be laborious in operation but perhaps no more so than the military decision process necessary for successful operations. Like the analogous thought process behind ROE drafting³⁸⁴ or the McDougal-Lasswell law-science-policy ("LSP") analysis,³⁸⁵ at the least they may be useful for

380. *See id.*

381. *See supra* notes 275-280 and accompanying text.

382. *See id.*

383. *See supra* notes 281-358 and accompanying text.

384. *See supra* note 287 (elaborating on the influence of reasonableness factors on ROE development).

385. *See generally* Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); John N. Moore, *Prolegomenon to the Jurisprudence of Myres S. McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968); Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1

thinking through all factors that may affect an informed decision to collectively intervene on humanitarian law grounds under state of necessity. In general, the factors recited under Principle I support NATO's Allied Force operations.³⁸⁶

Given the extraordinary and much-criticized status of intervention generally, it behooves the most careful thought, not only as to military means (*e.g.*, air power versus sea power or ground troops) to effect the goal, but also as to all factors that impact, or may impact, legal aspects of a collective decision to intervene for humanitarian reasons under state of necessity.

Did NATO follow the foregoing principles before and during Allied Force in intervening for humanitarian reasons under state of necessity? The general conclusion is that it did. We now turn to several specific issues related to these principles.

III. APPLICATION OF THE LOAC DURING ALLIED FORCE

State of necessity,³⁸⁷ with conditioning factors of reasonable information about the crisis, consensus decision making, seriousness and immediacy of the situation, necessity and proportionality, limitations such as *jus cogens*, self-defense, reasonable notice under the circumstances, and estimated time for the intervention, and perhaps reasonableness conditioning factors,³⁸⁸ determines whether a decision to intervene collectively on humanitarian and human rights grounds is legitimate under international law. Allied Force was a lawful collective humanitarian intervention under these circumstances. The further questions are whether the LOAC and the law of neutrality would have applied to a ship interdiction program proposed during Allied Force operations against the SFRY, and whether humanitarian law governing prisoners of war, applied during

YALE J. WORLD PUB. ORD. 1 (1974); George K. Walker, *Sea Power and the Law of the Sea: The Need for a Contextual Approach*, 7 OCEAN DEV. & INT'L L. 299 (1979); see also MCDUGAL ET AL., *supra* note 19, (employing LSP in a more recent analysis), MCDUGAL & FELICIANO, *supra* note 10, (employing LSP in an earlier analysis).

386. See *supra* notes 281-358 and accompanying text.

387. See generally *supra* Part I.

388. See generally *supra* Part II.

Allied Force as among participating and opposing states. Part III addresses these issues.

A. RELEVANCE OF GENERAL LOAC AND NEUTRALITY LAW TO ALLIED FORCE

Looking behind the lawfulness of particular NATO attacks, a more fundamental question is whether the LOAC and the law of neutrality, which apply during war in the traditional sense, govern during operations like Allied Force.

A developing view is that military operations pursuant to U.N. Security Council decisions pursuant to Articles 25 and 48 of the Charter do not necessarily follow the LOAC. When a Council decision is contrary to LOAC principles, particularly those in a treaty, the decision must be followed.³⁸⁹ This rule, rooted in Article 103 of the Charter and the obligatory nature of Council decisions, does not account for contrary customary or general principles norms, nor does it consider the possibility of a *jus cogens* norm in the LOAC.³⁹⁰ If a Council decision does not specify rules of conduct for conducting military operations that would appear to contradict the LOAC, and this is the usual case, the LOAC should be followed. If nonmandatory U.N. resolutions³⁹¹ are contrary to LOAC rules, the only established body of law for standards is the LOAC, and it should be followed. The same is true for Council decisions authorizing force with unspecified standards; the LOAC should be followed. Thus, although the LOAC, strictly speaking, does not govern because a U.N. resolution-authorized operation is not a conflict between states in the traditional sense of war, the LOAC should govern in these situations. If U.N. resolution-governed operations grow in number and complexity and intensity of conflict,

389. See U.N. CHARTER art. 103 (stating the prevailing nature of Charter obligations on member states).

390. See U.N. CHARTER arts. 25, 48, 103; see also *supra* notes 9-108 and accompanying text.

391. Nonmandatory U.N. resolutions include General Assembly resolutions and Council resolutions recommending action. See *supra* note 59 and accompanying text (providing some nonmandatory U.N. resolutions including General Assembly resolutions and Council resolutions recommending action). In some cases these resolutions restate customary, treaty or general principles standards and therefore strengthen these norms. See *id.*

an ultimate result may be a parallel body of law that should be, and hopefully will be, the same as the LOAC for war.

Humanitarian intervention under Allied Force stood on footing similar to the latter situations. The campaign was not war in the classical sense, although there are reports the U.K. prime minister and maybe others characterized later phases of the NATO campaign as war.³⁹² Participants, whether the collectively intervening states or the affected state, should have applied the LOAC as in the case of U.N. resolution-authorized actions.³⁹³ No Council decision governed the Allied Force situation with respect to humanitarian intervention.³⁹⁴ Humanitarian law issues covered by, *e.g.*, the 1949 Geneva Conventions, stand in a special place.³⁹⁵

The same principles of applying the LOAC and neutrality law should govern during collective humanitarian interventions operating under state of necessity principles discussed in Parts I and II.

Standards of necessity and proportionality in self-defense situations may be different from LOAC standards of necessity and proportionality for attacks during traditional armed conflict. What is necessary or proportional for a self-defense response may not be necessary or proportional in an armed conflict situation. The reverse is also true; what is necessary or proportional under the LOAC for attacks may not be necessary or proportional in a self-defense context. The same is true for humanitarian intervention pursuant to state of necessity. What is necessary or proportional for humanitarian intervention may not be necessary or proportional in a self-defense or LOAC situation, and what is necessary or proportional in a self-defense or LOAC situation may not be necessary or proportional in attacks incident to a particular humanitarian intervention. Depending on the scope of the intervention and the timing of attacks (immediate after a decision to intervene is made as distinguished from attacks

392. See generally *supra* notes 58-61 (discussing the unusual nature behind the Allied Force operation).

393. See *supra* note 59 and accompanying text (discussing U.N. resolution-authorized actions).

394. U.N. CHARTER arts. 25, 48, 103; see also *supra* notes 9, 59, 108 and accompanying text.

395. See *infra* Part III. C (analyzing captured armed forces members' entitlement to prisoner of war status).

made well into a campaign), the law of self-defense or the LOAC may be examined as guides.³⁹⁶

There are some per se forbidden targets, *e.g.*, cultural property unless used for military purposes.³⁹⁷ Under the LOAC, there are some methods of warfare, *e.g.*, no first use of poison gas,³⁹⁸ that are per se indiscriminate under the LOAC. These targets or methods and means of warfare, forbidden under the LOAC, should also be followed in humanitarian intervention operations under state of necessity.

As in self-defense cases or LOAC situations, the decision maker(s) should only be held accountable for what is known, or reasonably should have been known, at the time a decision to attack is made.³⁹⁹

Collective action after a decision to intervene raises problems of consensus on action within a campaign. Even as collective self-defense situations may raise scope and definitional problems (*i.e.*, whether anticipatory self-defense is admissible in the Charter era, what are proportional and necessary responses), and the same kinds of issues can surface in the LOAC under collective action situations, analogous problems will arise during collective humanitarian intervention under state of necessity. What are proper targets? Is the proposed attack necessary and proportional? These issues arose with respect to Phase 3 targets during Allied Force and were resolved, like the decision to mount the campaign, by consensus.⁴⁰⁰

396. *See supra* notes 27-29, 158-202 and accompanying text.

397. *See generally* Hague Cultural Property Convention, *supra* note 127; Protocol for Protection of Cultural Property in Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358; Second Protocol, *supra* note 127; Treaty on Protection of Artistic & Scientific Institutions & Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 290; JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1996); THE TANKER WAR, *supra* note 9, at 507-11.

398. *See* Protocol for Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, & of Bacteriological Methods of Warfare, June 17, 1925, & U.S. Reservation, June 17, 1965, 26 U.S.T. 571, 94 L.N.T.S. 651965 (prohibiting the use of certain gases, liquids, materials, devices, and methods in war); *see also* NWP 1-14M ANNOTATED, *supra* note 10, paras. 10.3-10.4.2 (addressing the use of poison gas in war).

399. *See supra* notes 114-134 and accompanying text.

400. *See supra* notes 135-142 and accompanying text.

One issue, perhaps for Allied Force and certainly for the future, is how far consensus decision making should penetrate into operational matters. To take an extreme example from a hypothetical ground campaign, must a NATO squad leader seek a necessity and proportionality determination all the way up the line to take a particular building, with almost assured damage to it? U.S. commentators and military commanders have decried the “rudder orders” approach to military command and control; is there a collective consensus decision version of it? Should there be one? How does a rudder orders policy, or the opposite of letting field and at sea commanders and perhaps lower echelon commanders decide, affect accountability under international law if things go wrong?

B. NATO’S RIGHT TO CONDUCT MARITIME INTERDICTION AS PART OF ALLIED FORCE

Although the air war for Kosovo has been the principal focus of analysis elsewhere, it should be noted that NATO deployed significant naval forces in connection with Allied Force. Their activities included missile launches against land targets, communications and electronic warfare support, and patrolling the Adriatic Sea off the SFRY. NATO also considered but did not implement visit and search of ships that may have carried goods to the SFRY through Adriatic ports. Nothing in the law of state of necessity or the LOAC forbade interdiction operations if NATO had ordered them.

1. NATO Naval Assets Available; Naval Operations During Allied Force

There were no naval engagements at or under the sea connected with Allied Force, although some apparently had been projected.⁴⁰¹

NATO forces provided defense and logistics support (undoubtedly including sealift after the campaign) for the alliance forces deployed in

401. Gen. Wesley Clark, while SACEUR (Supreme Allied Commander, Europe), spoke to the Yugoslav Chief of Staff [by telephone] at least once during the campaign, warning him that if he sent any of his navy out into the Adriatic, it would be sunk. See CLARK, *supra* note 142, at 184 (describing his phone conversation with General Ojdanic); IGNATIEFF, *supra* note 182, at 137 (discussing Gen. Clark’s communications with the Yugoslav Chief of Staff).

Italy, Albania, and . . . Yugoslavia; . . . and carried out naval operations in the Adriatic Sea. The latter included, at one time, aircraft carriers, submarines, and surface ships from four nations, all operating within the same confined sea space.⁴⁰²

These vessels included the U.S. Navy *Kitty Hawk* and *Theodore Roosevelt* battle groups and U.K. Navy units, including a missile-launching submarine.⁴⁰³ When Allied Force began, the U.S.S. *Enterprise* battle group was in the Persian Gulf; there was no other battle group within bombing range of Serbia.⁴⁰⁴ In late March 1999, incident to sponsoring a Security Council resolution condemning Allied Force and conversations with Yugoslavia, Russia sent several naval vessels to the Mediterranean where they could enter the Adriatic.⁴⁰⁵ This caused tension between NATO and Russia, leading to worries that the SFRY might get information on NATO flight operations from these ships.⁴⁰⁶ The *Roosevelt* battle group arrived

402. After-Action Report, *supra* note 65, at xiv; see Lambeth, *supra* note 142, at 30 (discussing the role of the U.S.S. *Theodore Roosevelt* in the air war). But see After-Action Report, *supra* note 65 at 41 (showing little reliance on sealift).

403. See After-Action Report, *supra* note 65, at 92 (noting that the missiles included the Tomahawk and Conventional Air Launched Cruise Missile); DAALDER & O'HANLON, *supra* note 65, at 104 (discussing the deployment of the *Kitty Hawk* and the *Theodore Roosevelt*). The *Roosevelt* battlegroup was in the Adriatic and was sent to the Persian Gulf in March 1999 when the Kosovo crisis deepened. The *Roosevelt* battlegroup had been in the Adriatic; it had been sent to the Persian Gulf in March 1999 as the Kosovo crisis deepened. CLARK, *supra* note 142, at 240, 421.

404. See DAALDER & O'HANLON, *supra* note 65, at 103 (stating that the *Enterprise* was briefly sent to the Persian Gulf on March 14 and then sent back home). General Clark asked for the *Enterprise* battle group, which the Navy opposed because of its six-month deployment rule. "In the end, the *Enterprise* was made available . . . for diversion to the Adriatic . . . , but its air wing was never tasked . . . , and it never participated in Allied Force. LAMBETH, *supra* note 142, at 34.

405. See CLARK, *supra* note 142, at 212 (indicating that Russians ships were going to be deployed to the Mediterranean); DAALDER & O'HANLON, *supra* note 65, at 127, 231 (describing Russia's introduction of a draft resolution on March 26, 1999, that called for the end of NATO's attacks on Yugoslavia).

406. See CLARK, *supra* note 142, at 212 (describing the threats the Russian naval presence in the Adriatic would pose on NATO's operations); DAALDER & O'HANLON, *supra* note 65, at 127 (highlighting the increasing unease in the relationship between NATO and Russia and NATO's fears that Serb forces might receive information on its flight operations).

April 5, the first in the area since mid-March.⁴⁰⁷ There is no record of NATO-Russian maritime confrontations. There is also no report of blue-water NATO-SFRY naval confrontations.⁴⁰⁸

Although NATO land-based aircraft (for the United States, U.S. Air Force and U.S. Marines shore-based aircraft) predominantly conducted strike operations, "Navy carrier-based aircraft, Marine . . . sea-based strike aircraft and cruise-missile equipped ships and submarines played a significant role."⁴⁰⁹ Navy electronic warfare aircraft, operating off the carriers, protected NATO aircraft from attack by Yugoslav air defenses. These aircraft were the only U.S. platforms able to use electronic jamming to suppress enemy air defenses. Naval aircraft also launched air defense suppression support for strike aircraft.⁴¹⁰ The Navy flew unmanned aerial vehicles ("UAV"s) to identify Yugoslav naval vessels, survey potential landing areas for Marines if amphibious landings were ordered, and to target coastal defense radar sites.⁴¹¹ Navy F-14 aircraft with the Tactical Air Reconnaissance Pod System identified targets; Navy maritime patrol aircraft made significant intelligence, surveillance and reconnaissance (ISR) collection contributions.⁴¹² Although never used for at-sea interdiction, these assets were available to contribute to that effort, besides warships in the Adriatic.

There were differences of opinion at NATO headquarters after the 1999 NATO summit on "the possibility of boarding ships in the

407. See DAALDER & O'HANLON, *supra* note 65, at 231 (providing a time line of events including the *Roosevelt's* arrival in the Adriatic).

408. The SFRY had been warned of the risks. See *supra* note 401 (referencing a telephone interview with General Clark).

409. After-Action Report, *supra* note 65, at 55, 79, 92-93; see LAMBETH, *supra* note 142, at 20 (commenting on the commitment of U.S. aircraft in NATO's air war); William M. Arkin, *Operation Allied Force: "The Most Precise Application of Air Power in History,"* in Bacevich & Cohen, *supra* note 40, at 1, 21 (discussing the hardware used to execute Allied Force).

410. See After-Action Report, *supra* note 65, at 66-67 (specifying the types of support assets employed to protect NATO strike aircraft).

411. See After-Action Report, *supra* note 65, at 57-58 (describing the use of UAVs during Operation Allied Force).

412. See After-Action Report, *supra* note 65, at 58 (elaborating on the target production process); LAMBETH, *supra* note 142, at 30-31, 94-96 (describing the functions of F-14s in U.S. naval operations).

Adriatic to enforce the maritime blockade of Yugoslavia”⁴¹³ Oil reached Serbia through Montenegro’s port of Bar; the “stop and search” regime would have aimed to halt this. However, there was concern over provoking Russia, Serbia’s principal oil supplier.⁴¹⁴ This was reflected at national levels. In the Danish parliament, *e.g.*,

[a] minor controversy arose over the possible contribution to a naval blockade and the modes of its implementation. Not only was this blockade probably a violation of international law; it also [was seen to entail] risks of a direct confrontation with the Russian Navy. As a compromise it was decided (by NATO) to enforce the blockade only with . . . countries . . . parties to the [prior] sanctions regime, on which basis Denmark decided . . . to participate.⁴¹⁵

Denmark promised a corvette from July 1999 onwards, but the conflict ended first. Later its navy contributed a mine-clearing vessel and a minelayer to clear NATO munitions dumped in the Adriatic.⁴¹⁶ Poland was not “asked to participate in the maritime blockade against Yugoslavia.”⁴¹⁷

After the Alliance pledged to impose a binding naval embargo in its April statement, EU foreign ministers met April 26 and proposed an embargo, to begin April 30, to cut off oil shipments to the SFRY, coming primarily from Italy and Greece. The EU ministers also approved economic measures targeting Milosevic and his family and closing loopholes halting export credits and investment flows to the SFRY previously agreed in 1998. A statement offered support to Montenegro and pledged EU upgrade of EU relations with Albania and Macedonia through association agreements.⁴¹⁸ The naval embargo

413. Butler, *supra* note 42, at 279; *see also Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42901 (discussing maritime interdiction possibilities).

414. *See Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42901 (reporting NATO’s concern over upsetting Russia through an oil stoppage).

415. Moller, *supra* note 67, at 156.

416. *Id.*

417. Talas & Valki, *supra* note 67, at 207.

418. They encouraged EU members not to organize sports events with SFRY participation. DAALDER & O’HANLON, *supra* note 65, at 146 (describing NATO’s losses in the war and its views on imposing embargos against Yugoslavia);

became a somewhat hollow promise . . . when NATO decided it would not physically enforce [it] through a blockade at Montenegro's two main ports, Bar and Kotor Bay. But all was not lost. It did go into effect and was joined by a number of non-EU and non-NATO countries. . . . [T]he voluntary "visit and search" scheme at least had the benefit of preventing profiteers using ships flagged in cooperating countries from shipping oil into Montenegro.⁴¹⁹

NATO also used its influence and NATO SFOR troops in Bosnia-Herzegovina to cut off oil coming from there to the SFRY.⁴²⁰

2. Proposed NATO Naval Interdiction During Allied Force: A Lawful Option

There were two principles concerning any projected naval interdiction during Allied Force. First, would vessel interdiction, considered with other aspects of Allied Force, *i.e.*, the aerial bombing campaign, have been a necessary and proportional part of the campaign when Allied Force's overall goal of collective humanitarian intervention under state of necessity was taken into account?⁴²¹ If the response is Yes (and the record suggests this⁴²²), the second principle is that under the view that parties to a humanitarian intervention should follow the LOAC for these operations,⁴²³ NATO could have imposed vessel interdiction, visit and search, and capture or diversion, subject to the usual LOAC rules and limitations.⁴²⁴

Continued NATO Air-Strikes on Yugoslavia, supra note 142, at 42901 (discussing the EU's pledge).

419. DAALDER & O'HANLON, *supra* note 65, at 146.

420. *See id.*

421. *See supra* notes 26-29, 158-202, 399 and accompanying text.

422. *See supra* notes 158-202 and accompanying text.

423. *See supra* notes 389-400 and accompanying text.

424. *See generally* Second Convention, *supra* note 33, art. 31; Convention Concerning Rights & Duties of Neutral Powers in Naval War (Hague XIII), Oct. 18, 1907, 36 Stat. 2415; Convention Relative to Certain Restrictions with Regard to Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396 [hereinafter Hague XI]; Convention for Adaptation to Maritime Warfare of Principles of the Geneva Convention [hereinafter Hague X], Oct. 18, 1907, art. 4, 36 Stat. 2371, 2384; Hague Cultural Property Convention, *supra* note 127, art. 14(2); Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, 135

If NATO wanted to establish a blockade, an option discussed outside NATO circles⁴²⁵ and probably reflecting confusion between blockade and interdiction, traditional rules -- notice of start and end, grace period, area, impartiality, effectiveness, limitation to belligerents' coasts and ports and other requirements or limitations⁴²⁶ -- would have been required under LOAC standards after an affirmative answer to the first question on blockade's place in necessity and proportionality, etc., for Allied Force's overall goals for intervention.⁴²⁷ Any blockade imposed during Allied Force would not have been a "pacific blockade," *i.e.*, a blockade imposed on an adversary's coasts during time of peace, generally thought to be unlawful under the Charter.⁴²⁸

L.N.T.S. 187; Commission of Jurists, Hague Rules of Air Warfare, Dec. 1922 - Feb. 1923, arts. 49-50, *reprinted in* Schindler & Toman, *supra* note 124, at 207, 215 [hereinafter Hague Air Rules]; Helsinki Principles, *supra* note 108, Principles 1.4, 2.1-2.4, 5.2.1-5.2.9; Institute of International Law, The Laws of Naval Warfare Concerning the Relations Between Belligerents, Aug. 9, 1913, art. 41, *reprinted in* International Law Association, Report of the Sixty-Eighth Conference Held at Taipei, Taiwan, Republic of China 857, 864 (1998). [hereinafter Oxford Naval Manual]; NWP 1-14M ANNOTATED, *supra* note 10, paras. 7.6-7.6.2, 7.10-7.10.2; PICTET, *supra* note 33, at 181-84; SAN REMO MANUAL, *supra* note 9, paras. 112-34; THE TANKER WAR, *supra* note 9, at 357-64.

425. See *supra* notes 410-413 and accompanying text.

426. See generally Fourth Convention, *supra* note 50, arts. 55, 58-60; Protocol I, *supra* note 27, arts. 69-71; Protocol II, *supra* note 27, art. 18; Hague XI, *supra* note 424, art. 1, 36; Declaration Concerning Maritime Law, Apr. 16, 1856, para 4; Declaration Concerning Laws of Naval War, Feb. 26, 1909, Annex, arts. 1-21, 208 Consol. T.S. 338, 341, 343-44 [hereinafter Declaration of London], *reprinted in* Schindler & Toman, *supra* note 124, at 843, 846-47 (never in force); Hague Air Rules, *supra* note 424, art. 53(i); Helsinki Principles, *supra* note 108, Principles 5.2.10, 5.3; BOTHE ET AL., *supra* note 27, at 432-39, 694-97; NWP 1-14M ANNOTATED, *supra* note 10, paras. 7.7-7.7.5; Oxford Naval Manual, *supra* note 424, arts. 30, 53, 92; 4 PICTET, *supra* note 33, at 309-12, 318-24; PILLOUD ET AL., *supra* note 33, at 812-36, 1476-81; SAN REMO MANUAL, *supra* note 27, paras. 93-104; THE TANKER WAR, *supra* note 9, at 389-94.

427. See *supra* note 65 and accompanying text (describing Allied Force's reasons for intervention and NATO's war on Kosovo).

428. See O'CONNELL, *supra* note 30, at 1157-58, *citing* U.N. CHARTER art. 2(4); D'AMATO, *supra* note 10, at 43-46 (listing rules for permissible blockades); THE TANKER WAR, *supra* note 9, at 389; *but see* COLOMBOS, *supra* note 33, secs. 484-88B; 2 OPPENHEIM, *supra* note 6, secs. 44-49, 52b-52e, 52l; NWIP 10-2, *supra* note 35, ¶ 632a n.26; *see also* GOODRICH ET AL., *supra* note 9, at 314-17; SIMMA, *supra* note 9, at 629-36; NWP 1-14M ANNOTATED, *supra* note 10, paras. 7.7.2.1 n.131 (stating correctly that "It is not possible to say whether, or to what extent, a

C. CAPTURED ARMED FORCES MEMBERS' ENTITLEMENT TO PRISONER OF WAR (PW) STATUS

SFRY forces took three NATO ground service personnel into custody during Allied Force, perhaps kidnapping them across the Macedonia border. The three suffered beatings at the hands of their captors.⁴²⁹ Two downed NATO pilots risked capture before NATO rescued them.⁴³⁰ NATO forces later took SFRY army personnel into custody after moving into Kosovo. On May 16, 1999, President Clinton authorized releasing two SFRY force members the KLA captured in April.⁴³¹ Although the record is not clear, it is likely that the SFRY captured members of the KLA and that the KLA captured other SFRY armed forces members.

These personnel were entitled to those parts of the 1949 Geneva Conventions, other applicable humanitarian law treaties, and customary law or general principles of law governing them, absent a Security Council decision to the contrary.⁴³² (There was none.)

1. NATO-SFRY Aspects of Allied Force

First, as between NATO and the SFRY, the 1949 Conventions applied. Although Allied Force was not a war in the traditional sense, common Article 2 declares their provisions apply to "other" international armed conflicts. For example, the Third Convention, establishing PW treatment standards, provides in part in Article 2:

U.N. blockade would be governed by the traditional rules"); SIMMA, *supra* note 9 at 632 (providing an example of how a Council decision can trump LOAC treaty rules); U.N. CHARTER arts. 25, 48, 103; *supra* notes 9-108 and accompanying text.

429. Rev. Jesse Jackson, President Clinton's friend, was involved in negotiating their release, amongst fears that the detainees would be held hostage. See CLARK, *supra* note 142, at 229, 286-87; DAALDER & O'HANLON, *supra* note 65, at 119, 146; *Continued NATO Air-Strikes Against Yugoslavia*, *supra* note 142, at 42957, 42900; *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 142, at 42900.

430. See CLARK, *supra* note 142, at 214-18, 274 (reporting fears that a NATO pilot was lost); LAMBETH, *supra* note 142, at 116-20 (describing the downing of an F-117).

431. See DAALDER & O'HANLON, *supra* note 65, at 146, 233 (remarking on the release of the U.S. soldiers and the authorization of the release of the Serbian soldiers).

432. U.N. CHARTER arts. 25, 48, 103; see *supra* notes 9, 108 and accompanying text.

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

[It] shall also apply to all cases of partial or total occupation of the territory of a . . . Party, even if the said occupation meets with no armed resistance.

Although one . . . Power . . . in the conflict may not be a Party to the . . . Convention, the Powers that are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.⁴³³

The SFRY and all NATO states were parties to the Conventions before the former Yugoslavia's dissolution.⁴³⁴ Although there was no official record of the SFRY's having accepted and applied the Conventions in accordance with Common Article 2 before or during the NATO campaign, after Allied Force ended, the SFRY accepted them retroactive to 1992 on October 16, 2001.⁴³⁵ Nevertheless, treaty succession principles,⁴³⁶ even if the SFRY and other states had formal acceptance of the former country's treaties under review,⁴³⁷ may have bound the SFRY during Allied Force. The SFRY was also bound to the extent the Conventions restated custom or general

433. Third Convention, *supra* note 50, art. 2; *see also* First Convention, *supra* note 50, art. 2; Second Convention, *supra* note 33, art. 2; Fourth Convention, *supra* note 50, art. 2; *supra* note 159 and accompanying text.

434. *See* TIF, *supra* note 70, at 319, 452-53 (listing the parties to the Conventions and describing the former Yugoslavia's involvement after the dissolution).; *see also supra* note 160 and accompanying text.

435. *See supra* note 161 and accompanying text (discussing the SFRY's retroactive acceptance of the Conventions).

436. *See* Symposium, *State Succession*, *supra* note 162 at 255-58 (discussing the development of the law of succession); Walker, *Integration*, *supra* note 9 at 43-54 (addressing how principles of the law of treaty succession applied to newly independent European states).

437. *See* TIF, *supra* note 70, at 319, 452-53 (listing the states that had accepted the Red Cross Conventions, including Yugoslavia).

principles of law.⁴³⁸ The general view is that much, but maybe not all, of the Third Convention restates customary rules or general principles of law.⁴³⁹ Therefore, it bound the SFRY and NATO to that extent as custom or general principles. The Third Convention also has a Martens clause; even denunciation of the Convention “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”⁴⁴⁰ The clause may reflect a general principle of law or custom.⁴⁴¹ If so, the SFRY was bound to apply principles of humanity for detainees’ treatment, even if not bound by the Conventions as treaty law.

Not all states party to NATO-SFRY aspects of Allied Force, *e.g.*, the United States, were parties to 1977 Protocol I to the 1949 Conventions. The former Yugoslavia was,⁴⁴² and the SFRY accepted the Protocol retroactive to 1992.⁴⁴³ Treaty succession principles and other considerations may have also bound the SFRY to Protocol I.⁴⁴⁴ To the extent the Protocol’s terms relating to PW’s⁴⁴⁵ reflected

438. See *supra* notes 164-165 and accompanying text.

439. See NWP 1-14M ANNOTATED, *supra* note 10, paras. 11.4, 11.7-11.7.4 (restating the customary rules of law as evidence that these principles, which are addressed in the Third Convention, reiterate customary rules of law); see also *supra* note 50 and accompanying text.

440. Third Convention, *supra* note 50, art. 142, see also *supra* note 174 and accompanying text (addressing the presence of a Martens Clause in the two 1907 Hague Conventions, the 1949 Conventions, and Protocol I).

441. See *supra* note 176 and accompanying text (discussing how general principles of law or custom bind Parties under international law).

442. See *Signatures*, *supra* note 169, at 703 (listing Yugoslavia as an original party to the signing and ratification of Protocol I before its dissolution).

443. See *supra* note 435 and accompanying text (acknowledging that after Allied Force ended, the SFRY accepted the Conventions retroactive to 1992 on October 16, 2001).

444. See TIF, *supra* note 70, at 319 (declaring that the former Yugoslavia has dissolved and explaining the result on multilateral treaties); see also *supra* note 436 (discussing treaty succession principles as they apply to the SFRY).

445. See Protocol I, *supra* note 27, arts. 8-11, 40-45; see also BOTHE ET AL., *supra* note 27, at 82-116, 216-62; see also NWP 1-14M ANNOTATED, *supra* note 10, paras. 11.4, 11.7; see also PILLOUD ET AL., *supra* note 33, at 107-63, 473-559.

custom or general principles,⁴⁴⁶ they bound states involved in Allied Force, including NATO countries and the SFRY. Protocol I also has a Martens clause: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."⁴⁴⁷ The clause may reflect a general principle of law or custom;⁴⁴⁸ if so, like the analysis applied to its Third Convention counterpart,⁴⁴⁹ the SFRY was required to treat its PW's with humanity even if Protocol I did not apply as treaty law.

The same principles apply to the 1907 Hague IV Regulations relating to prisoners of war, insofar as they reflected custom.⁴⁵⁰ Yugoslavia was not a formal party to them, but, *e.g.*, the Regulations' provision forbidding killing or wounding those who have laid down arms, or who no longer have means of defense,⁴⁵¹ bound the SFRY and NATO states as a customary norm.⁴⁵² The

446. *See supra* notes 12-14, 27, 121-123, 168, 172, 176 and accompanying text (addressing the treatment of PWs in various contexts).

447. Protocol I, *supra* note 27, art. 1(2); *see also supra* note 440 and accompanying text (describing the Martens Clause in the Third Convention).

448. *See supra* note 176 and accompanying text (citing to descriptions of what general principles of international law entail).

449. *See supra* notes 439-440 and accompanying text (providing the description of the Martens Clause in the Third Convention).

450. BROWNLIE, *supra* note 6, at 5; RESTATEMENT (THIRD), *supra* note 9, sec. 102 cmts. f, i; I OPPENHEIM, *supra* note 6, sec. 10, at 28, 31; Walker, *Anticipatory*, *supra* note 50; GRUNAWALT, *supra* note 50 at 391-92.

451. *See* Hague IV, art. 23(c), (specifying that in addition to the prohibitions provided by special Conventions, it is especially forbidden to kill or wound an enemy under these circumstances).

452. *See* NWP 1-14M ANNOTATED, *supra* note 10, ¶ 11.4, at 485; *see also* Protocol I, *supra* note 27, arts. 40-41, BOTHE ET AL., *supra* note 27, at 216-24; PILLOUD ET AL, *supra* note 33, at 473-91; SAN REMO MANUAL, *supra* note 27, para 47(i), cmt. 47.56; Horace B. Robertson, Jr., *The Obligation to Accept Surrender*, in READINGS, *supra* note 35, ch. 40; *supra* note 35 and accompanying text. Serbia was a party, but the Ottoman Empire, predecessor state to modern Turkey, a NATO member, and some areas within the SFRY, only signed 1899 Hague II, *supra* note 173, Regulations, art. 23(c), identical with Hague IV, *supra* note 173, Regulations, art. 23(c); which Montenegro, Serbia and the Empire signed but did not ratify. Austria-Hungary, a predecessor state to parts of the SFRY and its successor states and Hungary, a NATO member, were parties to the 1899 and 1907

Third 1949 Convention and Protocol I are complementary to the extent that they do not supersede the 1907 Hague IV Regulations.⁴⁵³ Moreover, Hague IV's preamble, and its 1899 predecessor's preamble include Martens clauses.⁴⁵⁴ To the extent these clauses reflect a general principle of law,⁴⁵⁵ the SFRY was bound to apply principles of humanity in its custody of PW's whether the Hague treaties were binding or not.

2. The SFRY-KLA Aspects of Allied Force

Common Article 3 to the 1949 Geneva Conventions establishes minimum criteria for armed conflicts that are not of an international nature; e.g., the Second Convention relating to prisoners of war says:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

Conventions. Turkey, also a NATO member but a successor state to part of the Ottoman Empire, is a party to the 1899 but not the 1907 Convention. See *Convention of 1899, Convention of 1907: Signatures, Ratifications and Accessions*, in Schindler & Toman, *supra* note 114, at 94-98; TIF, *supra* note 70, at 455-57. There is a circuitous argument that the SFRY, constituted as it was in 1999, was bound by treaty succession principles as well as custom and general principles reflected in these treaties. See generally Symposium, *State Succession*, *supra* note 162; Walker, *Integration*, *supra* note 9. The same kind of issues might affect analysis within NATO because of, e.g., Canada's, the Czech Republic's, or Iceland's status as NATO members; they are not parties to either Convention. Canada had dominion status a century ago within the British Empire. The Czech Republic, part of the former Czechoslovakia created after World War I, has territory that was part of the pre-World War I Austro-Hungarian empire, and thus might be considered, like Canada, as subject to treaty succession principles. See TIF, *supra* note 70, at 429 (listing Belgium, Denmark, France, Germany, Greece, Hungary, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, United Kingdom, United States as 1899 Hague II or 1907 Hague IV parties). The list does not include Canada, Czech Republic, Iceland, Montenegro or Serbia as parties to either Convention but includes Turkey and other NATO members. *Id.*

453. Third Convention, *supra* note 50, art. 135; Protocol I, *supra* note 27, art. 96; PICTET, *supra* note 33, at 636-40; PILLOUD ET AL, *supra* note 33, at 1084-92.

454. Hague IV, *supra* note 173, preamble; 1899 Hague II, *supra* note 173, preamble; see also *supra* notes 204, 450 and accompanying text.

455. See *supra* notes 176-177 and accompanying text (discussing how general principles of law are established and who is bound by them).

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place . . . with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity; in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

. . . Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of [this] . . . Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.⁴⁵⁶

If Allied Force was not an international armed conflict with respect to KLA-SFRY confrontations but would be within the Article 3 definition, its standards applied to those taken into custody, *e.g.*,

456. Third Convention, *supra* note 50, art. 3; *see also* First Convention, *supra* note 50, art. 3; Second Convention, *supra* note 33, art. 3; Fourth Convention, *supra* note 50, art. 3.

KLA members the SFRY captured, or SFRY armed forces members the KLA captured.

It is doubtful whether the SFRY and the KLA negotiated Article 3 special arrangements. Article 3 recites minimum standards; other provisions of the Third Convention reciting customary law may also have applied to these persons. Protocol II, applying to non-international conflicts as a supplement to the Third Convention,⁴⁵⁷ lists additional protections.⁴⁵⁸ The former Yugoslavia was a Protocol II party subject to a declaration,⁴⁵⁹ and the SFRY accepted its principles retroactive to 1992.⁴⁶⁰ The SFRY may also have been bound under treaty succession principles and other considerations.⁴⁶¹ To the extent Protocol II standards recited custom,⁴⁶² the SFRY and the KLA were bound. The SFRY and the KLA were also bound by the Martens clause principle (“in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”) stated in Protocol II,⁴⁶³ even if they were not bound under Protocol II or other formal treaty rules.

457. Protocol II, *supra* note 27, art. 1; *see also* BOTHE ET AL., *supra* note 27, at 604-08, 623-29; PILLOUD ET AL., *supra* note 33, at 1319-36, 1343-46.

458. Protocol II, *supra* note 27, arts. 4-11; *see also* BOTHE ET AL., *supra* note 27, at 640-64; PILLOUD ET AL., *supra* note 33, at 1368-1436.

459. *See Signatures*, *supra* note 169, at 703, 718 (identifying Yugoslavia as a Protocol II signatory).

460. *See supra* note 435 and accompanying text (discussing the SFRY's retroactive acceptance of the Conventions).

461. *See* TIF, *supra* note 70, at 319; *see generally* Symposium, *State Succession*, *supra* note 162; Walker, *Integration*, *supra* note 9.

462. *See supra* notes 175-177 and accompanying text (declaring that international law binds states to general principles or customs of international law).

463. *See* Protocol II, *supra* note 27, pmbl. (containing no “established custom,” as in other Martens clauses). The absence of this clause is due to the relative newness of law applying to noninternational armed conflicts, some, although, may argued that since 1977 it is time for including that norm as well; *see also* BOTHE ET AL., *supra* note 27, at 44, 620; PILLOUD ET AL., *supra* note 33, at 1341-42; *supra* notes 175-177 and accompanying text.

IV. CONCLUSIONS

Allied Force's legitimacy under international law is, as U.S. sports commentators would say, a close call. Because of its history, intervention, like war, is a loaded word for many states or commentators and in many contexts. Today, in the Charter era, intervention in some contexts may be less lawful than it was before 1945, given Charter provisions on sovereignty, territorial integrity and political independence of states. On the other hand, the growing body of the law of human rights, also recognized in the Charter, and humanitarian law, recognized by U.N. organizations' resolutions, within the world arena must be considered. Under the perhaps (and hopefully) unique circumstances of Kosovo, the NATO campaign was legitimate under principles of collective humanitarian intervention under state of necessity. Principles and factors advanced in Parts I and II for collective humanitarian intervention under state of necessity, based on ILC *State Responsibility* principles that restate customary and general principles norms, demonstrate that NATO acted within the bounds of international law in conducting Allied Force.⁴⁶⁴ To be sure, commentary in the 2001 version of the International Law Commission *State Responsibility* principles says that "The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter . . . , may be lawful under modern international law is not covered by article 25[, which declares state of necessity principles]."⁴⁶⁵ However, the Commission principles also afford an opportunity for states to act collectively to end, though lawful means, serious breaches of a state's obligations under peremptory norms of international law,⁴⁶⁶ which is precisely what NATO attempted to do in acting to end SFRY repressions in Kosovo. Moreover, whether the ILC chose to cover this situation or not, this Article's Parts I and II demonstrate that the general principle of state of necessity is a customary norm, and that application of this norm in the Allied Force context demonstrates that NATO acted within the principles of

464. See *supra* Parts I-II.

465. See 2001 ILC Report, *supra* note 3, at 205.

466. *Id.* arts. 40-41, at 277-92; see also *supra* notes 3, 135-142 and accompanying text.

international law in conducting a collective humanitarian intervention campaign in Kosovo in 1999. Parts I and II offer a more detailed, refined analysis than the ILC standards. NATO appears to have met these criteria as well.

Part III demonstrates that NATO could have conducted a ship interdiction campaign as part of Allied Force; NATO would have been obliged to follow state of necessity principles for the general operation and LOAC rules for interdiction operations.⁴⁶⁷

Part III also says that as an operation involving use of force and armed conflict conducted under state of necessity principles and factors, NATO force personnel, SFRY force personnel, and KLA fighters were entitled to PW status. These detained personnel were subject to slightly different rules, owing to the NATO-SFRY conflict's international nature and the SFRY-KLA conflict's non-international nature.⁴⁶⁸

Part II's principle and factor analysis is not the final chapter for collective humanitarian intervention under state of necessity. Commentators suggest other principles, *e.g.*, a reasonable chance of success for the mission,⁴⁶⁹ negotiation before intervention,⁴⁷⁰ or that indigenous peoples in an affected state must welcome the collective action.⁴⁷¹ My analysis subsumes success under necessity and proportionality principles,⁴⁷² and negotiation under the notice requirement, which would not require negotiation in egregious situations.⁴⁷³ Requiring a welcome from indigenous peoples involves problems of those peoples' knowledge of their rights, perhaps concealed from them by an oppressive affected state, and, more importantly, those peoples' ability to communicate their desires effectively, if an affected state has total control of communications. Future collective interventions under state of necessity may establish

467. *See supra* Parts I-III.B.

468. *See supra* Part III.C.

469. Brown, *supra* note 55, at 286; Coll, *supra* note 55, at 138.

470. MURPHY, *supra* note 5, at 322-23.

471. TESON, *supra* note 39, at 126-29.

472. *See* Coll, *supra* note 55, at 141-47 (listing necessity and proportionality as a separate criterion); *supra* notes 158-202 and accompanying text.

473. *See supra* notes 238-274 and accompanying text.

emerging custom or general principles, to support these or other principles and factors, and modifying those advanced in this Article.

There are other species within the genus of humanitarian intervention: intervention with an affected state's consent; intervention pursuant to Security Council or General Assembly resolution; intervention by a regional organization organized under Article 52 of the Charter; collective intervention by an ad hoc coalition; unilateral intervention; intervention under all of the foregoing circumstances where the intervenor(s) seek(s) to succor same-state nationals, same-state nationals and an affected state's indigenous nationals, same-state nationals and nationals of other states that may or may not have asked the intervenor(s) to act in their behalf, or same-state nationals and nationals of other states that may or may not have asked the intervenor(s) to act in their behalf, and indigenous nationals of the affected state. These may invoke other principles and factors with results that are different, in terms of international law, from the relatively narrow issue this Article analyzes.