

THE LEGACY OF OPERATION ALLIED FORCE: A REFLECTION ON ITS LEGALITY UNDER UNITED STATES AND INTERNATIONAL LAW

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INTRODUCTION	293
I. THE CONFLICT IN KOSOVO	294
A. A Brief History of Kosovo.....	294
B. Key Events and Decisions Leading Up to the Initiation of Operation Allied Force	297
C. Operation Allied Force.....	299
II. AUTHORITY TO MAKE WAR.....	301
A. The Constitutional War Powers of the Executive and Legislative Branches	301
B. Executive and Legislative War Powers Under the War Powers Resolution	303
III. OPERATION ALLIED FORCE WAS UNCONSTITUTIONAL AND VIOLATED THE WAR POWERS RESOLUTION	307
A. President Clinton Lacked the Constitutional Authority to Commit United States Armed Forces to Operation Allied Force	307
B. President Clinton Violated the War Powers Resolution.....	310
IV. OPERATION ALLIED FORCE CANNOT BE LEGALLY JUSTIFIED UNDER INTERNATIONAL LAW AS A HUMANITARIAN INTERVENTION.....	313
CONCLUSION.....	325

INTRODUCTION

This paper argues that Operation Allied Force—the United States led, NATO military operation against the Federal Republic of Yugoslavia during the Kosovo War aimed at ensuring full compliance with UN Security Council Resolution 1199—violated both United States and international law. Part I of this paper provides a brief history of Kosovo in order to place the conflict in the proper context. It continues with a blow-by-blow account

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of the events and decisions leading up to the initiation of Operation Allied Force and ends with a detailed description of the operation, which was the second major combat operation in NATO's history, following the September 1995 Operation Deliberate Force in Bosnia and Herzegovina.

Part II explores how the war powers are allocated between the Executive and Legislative branches of the United States federal government under the Constitution. In addition, the President and Congress's authority over the United States Armed Forces under the War Powers Resolution is explained.

Part III argues not only that President Clinton lacked the constitutional authority to commit United States Armed Forces to NATO's Operation Allied Force, but also that continuing the operation until June 10, 1999 violated the War Powers Resolution.

Part IV explores whether Operation Allied Force was illegal under international law. Through an examination of key events, originating with Operation Allied Force and leading up to Kosovo's 2008 unilateral declaration of independence and the July 22, 2010 International Court of Justice ("ICJ") Advisory Opinion, the authors analyze whether Operation Allied Force violated the U.N. Charter's prohibition against the use of force and conclude that the Operation cannot be legally justified under the doctrine of humanitarian intervention.

I. THE CONFLICT IN KOSOVO

A. A Brief History of Kosovo

The Kosovo conflict is complicated. One must know its deep historical background in order to properly understand it. Kosovo lies in southern Serbia. Albanian and Slavic peoples have coexisted in Kosovo since the eighth century.¹ With the establishment of the Kingdom of Serbia by Stephen Nemanya in 1168 A.D., Serb national identity started to grow.² By that time, Kosovo had become the administrative and cultural center of the medieval Serbian State.³ Kosovo remained part of the Serbian Empire until it became part of the Ottoman Empire in 1389 after the famous Battle of Kosovo Polje in which the Serbs and their allies were defeated by the Ottoman Turks.⁴ To this day, Serbs consider the Battle the primary reason

1. MICHAEL BYERS, *WAR LAW 100* (2005).

2. MOHAMMAD TAGHI KAROUBI, *JUST OR UNJUST WAR? INTERNATIONAL LAW AND UNILATERAL USE OF ARMED FORCE BY STATES AT THE TURN OF THE 20TH CENTURY* 171 (2004).

3. *Id.*

4. *Id.* at 172.

for the collapse of the medieval Serbian State,⁵ and they hold the battleground sacred as a critical piece of their national pride.⁶

After they were defeated by the Ottoman Turks, Serbs abandoned the region while Albanians started to move back into Kosovo in large numbers.⁷ During the 17th and 18th centuries, the population of Kosovo gradually became dominated by ethnic Albanians.⁸

In the second half of the 19th century, Serbs began seeking to regain their lost lands.⁹ In response to this, the Ottoman Turks encouraged more Albanians to settle in Kosovo.¹⁰ After the Ottoman Turks were defeated in the Russo-Ottoman War in 1878, Serbs regained control of Pristina—the modern day capitol of Kosovo.¹¹ When the Serbs won the first Balkan War in 1912, the entire region of Kosovo came under Serbian authority, and Serbs started to migrate back.¹²

Following World War I, Serbs implemented a policy that attempted to shift the demographics of Kosovo.¹³ Serbs encouraged settlers from other regions to move to Kosovo while forcing the Albanians to leave by illegally taking their land.¹⁴ Furthermore, the Yugoslav government gave Serbs and Montenegrins preferential treatment.¹⁵ Despite the unfavorable conditions in Kosovo, the population remained 63% Albanian.¹⁶

During World War II, Italy controlled most of Kosovo.¹⁷ In an attempt to recruit Albanian soldiers, the Yugoslav Partisan, Josip Broz Tito, promised Kosovo Albanians the right to unite with Albania after the war.¹⁸ In 1945, Tito's promise was revealed as a lie.¹⁹ Albanians rose up in protest against Tito's deception.²⁰ In order to quiet the uprising, Tito declared Kosovo an autonomous province of Serbia within the Socialist Federal Republic of

5. *Id.*; Gerald G. Howard, Comment, *Combat in Kosovo: Ignoring the War Powers Resolution*, 38 HOUS. L. REV. 261, 264 (2001).

6. Howard, *supra* note 5, at 264; *see also* MIRANDA VICKERS, BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO 12-16 (1998).

7. KAROUBI, *supra* note 2, at 172.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 175.

13. KAROUBI, *supra* note 2, at 175.

14. *Id.* at 176.

15. *Id.*

16. *Id.*; *see also* G. Richard Jansen, *Albanians and Serbs in Kosovo: An Abbreviated History*, COLO. ST. UNIV., <http://lamar.colostate.edu/~grjan/kosovohistory.html> (last updated July 22, 2008).

17. KAROUBI, *supra* note 2, at 176.

18. *Id.*

19. *Id.*

20. *Id.*

Yugoslavia.²¹ In reality, however, the policy-making capabilities of the province remained very limited.²² Ethnic Albanians suffered acts of violence, terror, and harassment at the hands of the Yugoslav Secret Police.²³ As the Yugoslav government implemented a policy to change the cultural demographics of Kosovo,²⁴ many Albanians left the region; that trend continued until 1967.²⁵

In 1974, Yugoslavia adopted a new constitution.²⁶ The most important point in the Yugoslav Constitution was the equal constitutional element.²⁷ According to the Constitution, Kosovo was an equal constitutional element of the Yugoslav Federation as one of eight federal units.²⁸ Although not a republic, Kosovo's authority within the Federation was now equal to that of Serbia.²⁹

Following the change in Kosovo's status there was a high Albanian birth rate within the province while Serbs migrated out due to lack of economic opportunities.³⁰ As a result, the Serbs became a clear minority within Kosovo.³¹ Today, the majority of Kosovars are ethnic Albanians.³²

During the 1970s and 1980s, Kosovo enjoyed a high degree of autonomy within Yugoslavia.³³ In 1989, Serbian President Slobodan Milosevic altered the status of Kosovo by removing its autonomy and bringing it under the direct control of Belgrade, the Serbian capital.³⁴ The Kosovar Albanians strenuously opposed Milosevic's decision to eliminate the autonomy of Kosovo.³⁵ In 1990, amid a growing movement among Kosovars for complete autonomy, the Milosevic regime began a routine of strict control over the region.³⁶

21. *Id.* The autonomy of Kosovo has been accepted since 1946 even though the 1946 Yugoslav constitution in did not grant territorial autonomy to Kosovo. *Id.* See CONSTITUTION OF THE FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA 1946. Kosovo was defined as an autonomous region under federal, not Serbian, jurisdiction. KAROUBI, *supra* note 2, at 176 n.162.

22. KAROUBI, *supra* note 2, at 176.

23. *Id.*

24. *Id.* at 176-77.

25. *Id.* at 177.

26. *Id.*; see also USTAV SOCIJALISTIČKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE [CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA] 1974.

27. KAROUBI, *supra* note 2, at 177.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. NATO & Kosovo: Historical Overview, NATO, <http://www.nato.int/kosovo/history.htm> (last updated July 15, 1999) [hereinafter *NATO & Kosovo*].

33. *Id.*

34. *Id.*

35. *Id.*

36. Howard, *supra* note 5, at 264-65; VICKERS *supra* note 6, at 244-54.

At first, the ethnic Albanian majority resisted non-violently.³⁷ “By the mid-1990’s ethnic Albanian resistance came in the form of violent retaliatory attacks conducted by several underground groups against ethnic Serbs living in Kosovo.”³⁸ In 1998, open conflict erupted³⁹ as “ethnic Albanian guerillas calling themselves the Kosovo Liberation Army (KLA) began attacks on Serbian police and Yugoslav army troops.”⁴⁰ The conflict resulted in the deaths of over 1500 Kosovar Albanians and forced 400,000 people from their homes.⁴¹

B. Key Events and Decisions Leading Up to the Initiation of Operation Allied Force

“The international community became gravely concerned about the escalating conflict, its humanitarian consequences, and the risk of it spreading to other countries.”⁴² The United States, in partnership with NATO member countries and other allies, sought a diplomatic resolution to the conflict and began to pressure Milosevic to cease repression and restore autonomy to Kosovo.⁴³

On May 28, 1998, the North Atlantic Council . . . set out NATO’s two major objectives with respect to the crisis in Kosovo[: (1)] to help to achieve a peaceful resolution of the crisis by contributing to the response of the international community; [and (2)] to promote stability and security in neighboring countries with particular emphasis on Albania and the former Yugoslav Republic of Macedonia.⁴⁴

In June, NATO began to consider a large number of military options.⁴⁵

On June 9, 1998, President Clinton issued an Executive Order that declared a “national emergency” to deal with the threat of regional destabilization posed by the conflict in Kosovo.⁴⁶ President Clinton ordered economic sanctions against Republic of Yugoslavia leaders after finding that “the actions and policies of the government of the Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Serbia with respect to Kosovo . . . constitute[d] an unusual and extraordinary threat to

37. STEVEN WOEHREL & JULIE KIM, CONG. RESEARCH SERV., RL 31053, KOSOVO AND U.S. POLICY 2 (2006).

38. Howard, *supra* note 5, at 265; VICKERS *supra* note 6, at 290-91.

39. *NATO & Kosovo*, *supra* note 32.

40. WOEHREL & KIM, *supra* note 37.

41. Ved P. Nanda, *NATO’s Armed Intervention in Kosovo and International Law*, 10 U.S. AIR FORCE ACAD. J. LEGAL STUD. 1, 4 (2000); *see also NATO & Kosovo*, *supra* note 32.

42. *See NATO & Kosovo*, *supra* note 32.

43. WOEHREL & KIM, *supra* note 37, at 3.

44. *See NATO & Kosovo*, *supra* note 32.

45. *Id.*

46. Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (June 9, 1998).

the national security and foreign policy of the United States.”⁴⁷ The Executive Order blocked the governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro property and property interests that were either within the United States or in the “possession or control of United States persons.”⁴⁸

On September 23, 1998, the United Nations Security Council adopted UN Security Council Resolution 1199.⁴⁹ The Resolution expressed deep concern about the excessive use of force by Serbian security forces and the Yugoslav army and called for a cease-fire.⁵⁰

“On October 13, 1998 . . . the NATO Council authorised Activation Orders for air-strikes.”⁵¹ “This move was designed to support diplomatic efforts to make the Milosevic regime withdraw forces from Kosovo, cooperate in bringing an end to the violence, and facilitate the return of refugees to their homes.”⁵² “At the last moment . . . President Milosevic agreed to comply and the air-strikes were called off.”⁵³

In January 1999, the situation in Kosovo flared up again when forty-five ethnic Albanian civilians were massacred.⁵⁴ Diplomatic efforts intensified. The Contact Group—comprised of the United States, Britain, France, Germany, Italy and Russia—agreed on a draft peace plan for Kosovo.⁵⁵ In February 1999, the Contact Group invited an ethnic Albanian delegation and representatives of the Serbian government to participate in peace negotiations in Rambouillet, France.⁵⁶ As an incentive for the Serbian government to comply, the North Atlantic Council had already agreed to authorize NATO air-strikes against targets in Serbia if it rejected the peace plan.⁵⁷

“As the rhetoric of possible United States use of force against the Federal Republic of Yugoslavia began to reach a crescendo, Congressman Tom Campbell and thirty-eight other members of Congress sent a letter to President Clinton.”⁵⁸ The letter opened by reminding President Clinton “that the Constitution requires [him] to obtain authority from Congress before

47. *Id.*

48. *Id.*

49. S.C. Res. 1199, U.N. SCOR, U.N. Doc. S/RES/1199, at 1 (Sept. 23, 1998), available at <http://www.un.org/Docs/scres/1998/scres98.htm>.

50. *Id.*

51. *NATO & Kosovo*, *supra* note 32.

52. *Id.*

53. *Id.*

54. *Id.*; *Campbell v. Clinton*, 52 F. Supp. 2d 34, 37 (D.C.C. 1999).

55. *WOEHREL & KIM*, *supra* note 37, at 3.

56. *Id.* at 3-4.

57. *Id.* at 4.

58. Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149 (2001).

taking military action against Yugoslavia.”⁵⁹ The letter emphasized that the military action in Kosovo “falls within the exclusive powers and responsibilities of Congress under Article I, Section 8, of the Constitution—the war powers clause.”⁶⁰

It went on to say:

No provision of the United Nations Charter or the North Atlantic Treaty can override the requirement of United States domestic law as set forth in the Constitution. In fact, Congress conditioned U.S. participation in both the U.N. and NATO on the requirement that Congress retain its constitutional prerogatives. The Constitution compels you to obtain authority from Congress before taking military action against Yugoslavia.⁶¹

The letter closed sternly by flatly stating, “past violations of constitutional duty form no justification for additional violations. Nor does consulting with a few Members of Congress satisfy the constitutional obligation to obtain the approval of Congress.”⁶²

On March 18, 1999, the ethnic Albanian delegation signed the peace plan; the Serbian representatives rejected it.⁶³ “Although the numbers of Kosovo-Albanians killed, raped or expelled up to this point were low, the credibility of NATO’s threats was at issue.”⁶⁴ Immediately after rejecting the peace plan, “Serbian military and police forces stepped up the intensity of their operations against the ethnic Albanians in Kosovo.”⁶⁵

On March 23, 1999, NATO issued an order to commence air-strikes under the name Operation Allied Force.⁶⁶ On March 24, 1999, the United States Armed Forces in coalition with NATO allies began air-strikes on Serbian forces in Kosovo and government targets in Serbia and Montenegro.⁶⁷

C. Operation Allied Force

Operation Allied Force was the largest military operation in Europe since World War II.⁶⁸ Over the 78-day air campaign, thirteen NATO countries

59. *Id.* at 1150 (quoting Letter from Representative Tom Campbell and other Members of Congress to President Clinton (Feb. 19, 1999)).

60. *Id.*

61. *Id.*

62. *Id.*

63. WOEHLER & KIM, *supra* note 37, at 3.

64. BYERS, *supra* note 1, at 101.

65. *NATO & Kosovo*, *supra* note 32.

66. *Id.*

67. BYERS, *supra* note 1, at 101; WOEHLER & KIM, *supra* note 37, at 3.

68. Nanda, *supra* note 41, at 9.

deployed over 1,000 aircraft and flew 38,400 sorties.⁶⁹ Of those, 10,484 were strike sorties that released 26,614 air munitions over the Federal Republic of Yugoslavia.⁷⁰ A 15,000 feet minimum altitude was adopted in order for attacking aircraft to avoid enemy air defenses.⁷¹ NATO usually conducted the air campaign from a safe altitude of 20,000 feet.⁷²

The purpose of Operation Allied Force “was to disrupt and degrade Serbian forces”⁷³ and to prevent a humanitarian crisis.⁷⁴ This was to be accomplished by using precision bombing—“smart bombs”—in order to prevent hurting innocent civilians.⁷⁵ However, civilian casualties occurred because of human error and other forces beyond NATO’s control.⁷⁶ For example, “because of bad weather, a NATO pilot [who was] engaged in mounting a remotely directed attack on a bridge struck a passing train, killing many passengers.”⁷⁷ Also, NATO accidentally hit the Chinese Embassy with precision-guided bombs;⁷⁸ they had mistaken the embassy for a legitimate military target.⁷⁹ As the Operation progressed and the air-strikes intensified, the means of attack were broadened to include cluster bombs and depleted uranium ordnance, both of which caused civilian casualties.⁸⁰

The number of civilian casualties caused by Operation Allied Force is open to debate. One estimate approximates five hundred civilian deaths—which, if true, would represent the largest number of deaths inflicted on another state in a military operation overseen by President Clinton.⁸¹ By

69. INDEP. COMM’N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 92 (2000).

70. *Id.*

71. JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND USE OF FORCE BY STATES* 120 (2004).

72. Nanda, *supra* note 41, at 18.

73. *Id.* at 9.

74. KAROUBI, *supra* note 2, at 188.

75. Nanda, *supra* note 41, at 9; Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT’L L. 847, 851 (1999).

76. Nanda, *supra* note 41, at 9.

77. *Id.*

78. *Chinese Anger at Embassy Bombing* (BBC News broadcast May 9, 1999), available at http://news.bbc.co.uk/onthisday/hi/dates/stories/may/9/newsid_2519000/2519271.stm.

79. *Id.*

80. Falk, *supra* note 75, at 851-52.

81. Elizabeth Becker, Rights Group Says NATO Killed 500 Civilians in Kosovo War, N. Y. TIMES, Feb. 7, 2000 at A10. See also RYAN C. HENDRICKSON, *THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS* 117 (2002). “Human Rights Watch concludes that as few as 489 and as many as 528 Yugoslav civilians were killed in the ninety separate incidents in Operation Allied Force.” Refugees were among the victims. Almost two thirds (303 to 352) of the total registered civilian deaths occurred in twelve incidents where ten or more civilian deaths were confirmed. HUMAN RIGHTS WATCH, *THE CRISIS IN KOSOVO* (2000), <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm>.

Serbian estimates, two thousand civilians were killed.⁸² In comparison to the number of civilian casualties, NATO forces incurred none.⁸³

Operation Allied Force ended on June 10, 1999, seventy-nine days after it began.⁸⁴ “NATO and Yugoslav military officers concluded a Military Technical Agreement governing the withdrawal of all Yugoslav forces from Kosovo.”⁸⁵ By the time the operation had ended, it had 912 aircraft and 35 ships at its disposal—almost triple the forces it started with.⁸⁶ And NATO forces had destroyed “Serbian planes, helicopters, anti-aircraft guns, missiles, and infrastructure including bridges, [and] communication towers.”⁸⁷

II. AUTHORITY TO MAKE WAR

A. The Constitutional War Powers of the Executive and Legislative Branches

The United States Constitution divides authority over military forces and their employment between the Legislative and Executive branches of the federal government. However, it does not clearly vest the power to initiate hostilities in either branch.⁸⁸

Arguably, the Constitution provides Congress with many more duties and responsibilities pertaining to war than it does the President.⁸⁹ Under Article I, Section 8 of the United States Constitution, Congress is allocated the power to “provide for the common Defence and general Welfare of the United States,”⁹⁰ “declare War,”⁹¹ “grant Letters of Marque and Reprisal,”⁹² “make Rules concerning Captures on Land and Water,”⁹³ “raise and support Armies”⁹⁴ and a navy,⁹⁵ make rules regulating the armed forces,⁹⁶ “provide

82. Kevin Cullen, *Amid the Rubble and Death, Few Find Elation in Milosevic's "Victory,"* BOS. GLOBE, June 11, 1999, at A22; see also HENDRICKSON, *supra* note 81, at 117.

83. GARDAM, *supra* note 71, at 117.

84. WOEHLER & KIM, *supra* note 37, at 3-4.

85. *Id.* at 3.

86. Adam Roberts, *NATO's "Humanitarian War" Over Kosovo*, 41 SURVIVAL 102, 109 (1999).

87. Nanda, *supra* note 41, at 9.

88. John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1676 (2000).

89. Andrew D. LeMar, Note, *War Powers: What Are They Good For? Congressional Disapproval of the President's Military Actions and the Merits of a Congressional Suit Against the President*, 78 IND. L.J. 1045, 1046 (2003).

90. U.S. CONST. art I, § 8, cl. 1.

91. *Id.* at cl. 11.

92. *Id.*

93. *Id.*

94. *Id.* at cl. 12.

95. *Id.* at cl. 13.

for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”⁹⁷ provide for “organizing, arming, and disciplining, the Militia,”⁹⁸ and govern the parts of the militia that “may be employed in the Service of the United States.”⁹⁹ Additionally, Congress has the authority to make laws necessary to exercise its powers.¹⁰⁰

In order for there to be a constitutionally valid declaration of war, a measure calling for such declaration must be passed by both Houses of Congress and then presented to the President for signature.¹⁰¹ Separate and substantially different actions by the Senate and House, short of enactment, cannot have legal effect.¹⁰²

The President’s war powers are stated much more concisely. Under Article II of the Constitution, “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”¹⁰³ The President may also have military powers as a result of other provisions of Article II, such as the “vesting clause” or the Take Care Clause.¹⁰⁴

96. U.S. CONST. art. 1, § 8, cl. 14.

97. *Id.* at cl. 15.

98. *Id.* at cl. 16.

99. *Id.*

100. *Id.* at 18.

101. Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 4 (1999); Michael Hahn, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351, 2367 (2001). See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *id.* § 7 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”); *id.* § 8 (“The Congress shall have the power To . . . declare War. . . .”). Cf. *INS v. Chadha*, 462 U.S. 919 (1983) (holding the legislative veto unconstitutional).

102. Tiefer, *supra* note 101, at 2; *Chadha*, 462 U.S. 919. Even though the language of *Chadha* only deals with attempts by the Senate and House to take part in statutorily delegated powers—rather than shared constitutional powers—it is informed by the Formalist approach and teaches that almost all legislation must go through the full enactment process of bicameralism and presentment. Tiefer, *supra* note 101, at 16; *Chadha*, 462 U.S. at 953 n.16, 954-55. The Formalist approach holds that Congress must follow the normal legislative process when affirmatively approving a military action. Hahn, *supra* note 101, at 2367. The alternative approach is the Functionalist approach. Under the Functionalist approach, both Houses of Congress must affirmatively demonstrate approval for the commencement of war prior to the President’s orders to launch the first attack. *Id.* at 2370. Congress’s approval for military action may be inferred from its treatment of resolutions, bills, and appropriations—even those that do not pass through bicameralism and presentment. *Id.* at 2367. Applying the Functionalist approach to the Kosovo conflict produces the conclusion that the conflict in Kosovo was unconstitutional because not only did both Houses of Congress not approve the military action in Kosovo before it began but both Houses never agreed on approval after the conflict ended. See Hahn, *supra* note 101.

103. U.S. CONST. art II, § 2, cl. 1.

104. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW CASES AND MATERIALS* 220 (2d ed. 2006).

The President has no power to initiate or declare war¹⁰⁵ either against a foreign nation or a domestic State.¹⁰⁶ As Commander in Chief, the President has the legal authority to direct military forces and deploy them in any appropriate manner after a declaration of war is made by Congress.¹⁰⁷ In essence, “the President carries into effect all laws passed by Congress to conduct war once it is declared, to regulate the armed forces, and to define and punish all offenses against the rights that exist between nations.”¹⁰⁸

Yet “the President does have the power to recognize the existence of a state of war¹⁰⁹ forced upon the United States, and to determine whether war has been initiated by invasion of a foreign entity into the United States.”¹¹⁰ In those particular cases, “the President is permitted to resist by force and respond to the challenge without waiting for special legislative authorization.”¹¹¹

B. Executive and Legislative War Powers Under the War Powers Resolution

After years of unsuccessful military operations in Vietnam, and President Nixon’s continued disregard of congressional pleas to obey the war powers structure set forth in the Constitution, Congress passed the War Powers Resolution¹¹² over President Nixon’s veto in 1973.¹¹³

Congress specifically relied on its powers enumerated under Article I, Section 8 of the Constitution when it enacted the War Powers Resolution.¹¹⁴ By enacting the War Powers Resolution, Congress attempted to restore the constitutional balance of war powers so as to “fulfill the intent of the

105. See U.S. CONST. art. I, § 8, cl. 11. Congress has the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” *Id.*

106. *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635 (1863).

107. Kelly L. Cowan, Comment, *Rethinking the War Powers Resolution: A Strengthened Check on Unfettered Presidential Decision Making Abroad*, 45 SANTA CLARA L. REV. 99, 102 (2004). See *Fleming v. Page*, 50 U.S. (9 How.) 603, 614-15 (1850).

108. *Id.* at 101; see *Fleming*, 50 U.S. (9 How.) at 614-15.

109. *Id.*; *Matthews v. McStea*, 91 U.S. 7, 12-13 (1875).

110. Cowan, *supra* note 107 at 102; *The Prize Cases*, 67 U.S. at 698-99.

111. Cowan, *supra* note 107, at 102 (citing *The Prize Cases*, 67 U.S. at 698-99); *The Prize Cases*, 67 U.S. at 668.

112. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2000)). It is important to note that since 1973 every President has taken the view that the War Powers Resolution “is an unconstitutional infringement by Congress on the President’s authority as Commander in Chief.” RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 81050, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 2 (2004). “The courts have not directly addressed this question.” *Id.*

113. MESSAGE FROM THE PRESIDENT VETOING H.J. RES. 542, A JOINT RESOLUTION CONCERNING THE WAR POWERS OF CONGRESS AND THE PRESIDENT, H. DOC. NO. 93, 93d Cong., 1st Sess. (1973).

114. War Powers Resolution § 1541(b).

framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities.”¹¹⁵

The War Powers Resolution is laid out in nine sections.¹¹⁶ On its face the War Powers Resolution “envisions congressional approval and close monitoring of military involvement in all but time sensitive situations.”¹¹⁷ Its “core purpose is to prevent the President from ordering the initiation of combat operations absent the express consent of Congress.”¹¹⁸

Under § 1541(c) of the War Powers Resolution, Congress expressly limited the President’s Executive power as Commander in Chief of the United States Armed Forces. The sections states:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.¹¹⁹

In subsequent sections the statute prescribes specific duties and procedures to be followed by the President and Congress in exercising their constitutional powers to commit American forces into hostilities.

Section 1542 requires the President “in every possible instance [to] consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”¹²⁰ This consultation requirement is obligatory.¹²¹ The President is “obliged by law to consult [with Congress] before the introduction of forces into hostilities and to continue consultations so long as the troops are engaged.”¹²² After the Resolution was passed, the House committee explained that the word “hostilities” includes combat and any dispute where there is a “clear and present danger of armed conflict.”¹²³

115. *Id.* § 1541(a).

116. *Id.* §§ 1541-1548.

117. Howard, *supra* note 5, at 275.

118. Corn, *supra* note 58, at 1173.

119. War Powers Resolution § 1541(c) (entitled “Presidential executive power as Commander-in-Chief; limitation”).

120. *Id.* § 1542. The White House has attempted to construe the “hostilities” requirement very narrowly to avoid congressional control. Martin Wald, Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1417 (1984).

121. The section uses the phrase “shall consult.” War Powers Resolution § 1542.

122. 119 CONG. REC. 33,550 (1973) (statement of Sen. Jacob Javits).

123. Wald, *supra* note 120, at 1418; H.R. REP. NO. 93-287, at 1, 5 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2346.

Under § 1543, when there is no congressional declaration of war, the President is required to submit a report¹²⁴ “within forty-eight hours to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate” after introducing United States Armed Forces equipped for combat “into the territory, airspace, or waters of . . . foreign nation[s].”¹²⁵ “[S]o long as such armed forces continue to be engaged in such hostilities . . .,” the President must make periodic reports to Congress on the status of the hostilities.¹²⁶ The periodic reports must be made at least once every six months.¹²⁷

Pursuant to § 1544, once the President’s report is submitted to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate, the President must end any use of the United States Armed Forces within sixty calendar days unless “Congress [has] (1) declared war or has enacted specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.”¹²⁸ The President may extend the sixty-day deadline by an additional thirty days if he “determines and certifies to . . . Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”¹²⁹

The next three sections of the War Powers Resolution detail procedures for consideration of resolutions and bills to declare war,¹³⁰ provide authorization for a deployment,¹³¹ and allow for the recall of troops.¹³²

Section 1547, the penultimate section of the War Powers Resolution, addresses the inference to be drawn from previously signed laws and treaties.¹³³ The section provides:

124. The reporting requirements are specifically detailed in § 1543 of the War Powers Resolution.

125. War Powers Resolution § 1543(a).

126. *Id.* § 1543(c).

127. *Id.*

128. *Id.* § 1544(b). The section essentially functions as a burden-shifting device. As Judge Joyce Hens Green has observed:

[T]he automatic cutoff after 60 days was intended to place the burden on the President to seek positive approval from the Congress, rather than to require the Congress positively to disapprove the action, which had proven so politically difficult during the Vietnam war. To give force to congressional power to declare war, Presidential warmaking would not be justified by congressional silence, but only by a congressional initiative . . .

Crockett v. Reagan, 558 F. Supp 893, 899 (D.D.C. 1982), *aff’d* 720 F.2d 1355 (D.C. Cir. 1983).

129. *Id.* § 1544(b).

130. *Id.* § 1545.

131. War Powers Resolution § 1546a.

132. *Id.* §§ 1545-46.

133. *Id.* § 1547(a) (emphasis added).

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall *not* be inferred--

(1) from any provision of law . . . including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.

In other words, the authority to introduce United States Armed Forces into hostilities shall not be inferred from any provision of law or from any treaty,¹³⁴ whether or not those laws or treaties were in effect prior to the passage of the War Powers Resolution.¹³⁵ For congressional approval to be established for the introduction of United States Armed Forces into hostilities, Congress must explicitly state in law “that [the provision] is

134. *Id.* § 1547(a)(1-2).

135. *Id.* Section 1547 may negate any authority the President might potentially assume under the North Atlantic Treaty. *See* Howard, *supra* note 5, at 277. The constitutionality of § 1547(a)(1-2) has been questioned. Howard, *supra* note 5, at 277 n.93. Some argue that the provision is constitutional because ratification of treaties only requires Senate action—“advice and consent”—while the exercise of war powers is a function of Congress, implying participation by both the House and the Senate. G. Sidney Buchanan, *A Proposed Model for Determining the Validity of the Use of Force Against Foreign Adversaries Under the United States Constitution*, 29 HOUS. L. REV. 379, 419-21 (1992). Alternatively, others argue that “[i]f by treaty the President and the Senate have an independent constitutional power to initiate military action without the approval of both houses of Congress, then the [provision is] unconstitutional [because] Congress by statute [cannot] destroy a power granted independently by the constitution to the President and the Senate.” *Id.*

Section 1547(a)(1)-2) is probably constitutional. In the hierarchy of United States domestic law, the constitution is the highest legal authority. U.S. CONST. art. VI (Supremacy Clause). Yet the Constitution does not specify the relationship between treaties and statutes. As a general rule, if there is a conflict between a treaty and a statute, the last one in time controls. *Whitney v. Robertson*, 124 U.S. 190 (1888). Additionally, the Second Circuit Court of Appeals has held “that the constitutional delegation of the war-declaring power to the Congress . . . [imposes on it] a duty of mutual participation in the prosecution of war.” *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971). “By definition, Congress cannot ‘mutually participate’ in a use of force decision unless both of its houses are involved in that decision.” Buchanan, *supra*, at 420. Therefore, it appears constitutional to mandate that the President cannot rely on a previously signed treaty as authorization to commence military action and use force against another nation-state.

intended to constitute specific statutory authorization” under the War Powers Resolution.¹³⁶

The last section describes the severability of the Resolution.¹³⁷ If one provision of the statute is held invalid, such invalidity will not affect the other remaining provisions.¹³⁸

III. OPERATION ALLIED FORCE WAS UNCONSTITUTIONAL AND VIOLATED THE WAR POWERS RESOLUTION

A. President Clinton Lacked the Constitutional Authority to Commit United States Armed Forces to Operation Allied Force

On March 24, 1999, in a nationally televised address to the nation, President Clinton argued that air-strikes by United States Armed Forces acting in coalition with NATO forces were necessary to protect innocent Albanians, to prevent the conflict from spreading to the rest of Europe, and to act with our European allies in maintaining peace.¹³⁹ That same day, Operation Allied Force began bombing targets in Kosovo and Serbia proper.¹⁴⁰

Over the next two months, President Clinton defended his unilateral decision to send United States Armed Forces to Kosovo to carry out air-strikes. Two days after Operation Allied Force began, President Clinton sent identical letters to J. Dennis Hastert, Speaker of the House of Representatives, and to Strom Thurmond, President Pro Tempore of the Senate.¹⁴¹ The letter opened:

At approximately 1:30 p.m. eastern standard time, on March 24, 1999, U.S. military forces, at my direction and in coalition with our NATO allies, began a series of air strikes in the Federal Republic of Yugoslavia (FRY) in response to the FRY government’s continued campaign of violence and repression against the ethnic Albanian population in Kosovo.¹⁴²

The letter goes on to detail the circumstances that led to the decision to begin air strikes in the Federal Republic of Yugoslavia, including the atrocities committed by the Milosevic government and the Milosevic

136. War Powers Resolution § 1547(a)(1)-(2).

137. *Id.* § 1548.

138. *Id.*

139. Address to Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 PUB. PAPERS 451, 451 (Mar. 24, 1999).

140. *Id.*

141. *Clinton v. Campbell*, 52 F. Supp. 2d 34, 37 (D.C.C. 1999).

142. *Id.* at 37-38 (quoting Pls.’ Mot. Summ. J., Ex. 19).

government's history of noncompliance with resolutions of the United Nations Security Council and NATO.¹⁴³ The letter concludes:

"We cannot predict with certainty how long these operations will need to continue Milosevic must stop his offensive, stop the repression and agree to a peace accord based on the framework from Rambouillet. . . . *I have taken these actions pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive.* In doing so, I have taken into account the views and support expressed by the Congress I am providing this Report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution. I appreciate the support of the Congress in this action."¹⁴⁴

President Clinton was relying upon the independent authority of the President as the Commander in Chief of the United States Armed Forces under Article II of the United States Constitution as the legal basis for his unilateral decision to send American forces into hostilities in Kosovo. President Clinton made it clear from the beginning that he did not need congressional authorization.¹⁴⁵ However, President Clinton was mistaken.

It is necessary to classify the eleven-week, United States-led military campaign in Kosovo as either a war or something less in order to assess the constitutionality of President Clinton's initiation of military action.¹⁴⁶ "If a conflict is a . . . perfect war, then the Constitution requires that Congress authorize it through a formal declaration of war."¹⁴⁷ If a conflict is an imperfect war, then either a formal declaration of war or some other type of congressional authorization is required before the United States enters the conflict.¹⁴⁸ "If a military conflict does not exist, but a dangerous situation does, then the President's Commander in Chief power instills him with full authority to position United States troops."¹⁴⁹

The Constitution does not define war. Consequently, it is difficult to classify conflicts for constitutional purposes. Fortunately, the United States Supreme Court has provided some definitional clarity. In *Bas v. Tingy* the Court described perfect and imperfect war.¹⁵⁰ With regard to perfect war, the Court said:

143. *Id.* at 38 (citing Pls.' Mot. Summ. J., Ex. 38).

144. *Id.* (citing Pls.' Mot. Summ. J., Ex. 19) (emphasis added).

145. Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 PUB. PAPERS 459 (Mar. 26, 1999) [hereinafter Clinton's Letter of Mar. 1999].

146. Hahn, *supra* note 101, at 2359.

147. *Id.*; *see also*. *See* *Bas v. Tingy*, 4 U.S. 37, 40 (1800) (opinion of Washington, J.); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 33 (1991).

148. *Id.*; *see also* *Bas*, 4 U.S. at 40-41.

149. *Id.* at 2359-60; *see also* U.S. CONST. art. II, § 2, cl. 1.

150. *Bas*, 4 U.S. at 40.

If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.¹⁵¹

With respect to imperfect war, the Court said:

[H]ostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of two nations, authorized by the legitimate powers. It is a war between the two nations, though all members are not authorized to commit hostilities such as in solemn war, where the government restrains the general power.¹⁵²

The Kosovo conflict was an imperfect war for reasons beyond the absence of a formal declaration of war.¹⁵³ The Kosovo conflict was an imperfect war because not all members of the United States Armed Forces were “authorized to conduct hostilities”—United States ground forces were not engaged in the conflict.¹⁵⁴

Furthermore, “[t]he ‘nature and extent’ of the Kosovo operation indicates that it was an imperfect war.”¹⁵⁵ The operation attempted to achieve specific, limited political objectives.¹⁵⁶ During the air campaign, United States and NATO leaders repeatedly declared that the goals of Operation Allied Force were to (1) cease all combat activities and killings; (2) ensure the withdrawal of Serb Military, police and paramilitary forces from Kosovo; (3) allow the deployment of an international military force; (4) allow the return of all refugees and the access of international humanitarian aid; and (5) “create a framework for establishing a political solution to Kosovo’s status based on the grounds set forth at Rambouillet.”¹⁵⁷

Additionally, “the risks associated with the [Kosovo] conflict indicate that the United States fought an imperfect war.”¹⁵⁸ “First, there was no risk that United States sovereignty might be lost or even that its power would

151. *Id.*

152. *Id.*

153. Hahn, *supra* note 101, at 2361.

154. *Id.* at 2362.

155. *Id.*

156. *Id.*

157. *Id.* See Roberts, *supra* note 86, at 2362 (citing Prime Minister Tony Blair, Address at the Chicago Economic Club (Apr. 22, 1999)).

158. Hahn, *supra* note 101, at 2363.

substantially decline from a loss in the war.¹⁵⁹ Second, the risk to American forces was different from that in a perfect war.”¹⁶⁰ NATO fought from the air because it was not willing to risk lives during Operation Allied Force.¹⁶¹ As a result, there was a much smaller chance of United States troops sustaining casualties.¹⁶² Finally, “NATO strategists lacked a clear conception of when victory was achieved—a state of affairs common to imperfect wars.”¹⁶³

Since the conflict in Kosovo constituted an “imperfect war,” President Clinton could not act unilaterally—solely relying on the Commander in Chief power enumerated in the Constitution. Before introducing American troops into the Kosovo conflict, President Clinton needed congressional consent through either a formal declaration of war or statutory authorization.¹⁶⁴ President Clinton also had to comply with the War Powers Resolution after introducing troops into hostilities.

B. President Clinton Violated the War Powers Resolution

President Clinton had to fulfill three requirements in order to comply with the War Powers Resolution. First, he had to consult with Congress before introducing United States Armed Forces into hostilities.¹⁶⁵ Second, he had to present a written report on the situation within forty-eight hours to the Speaker of the House and President Pro Tempore of the Senate¹⁶⁶ and then provide periodic reports not less than every six months.¹⁶⁷ Third, he had to remove the United States Armed Forces from the hostilities within sixty calendar days after submitting the initial report unless Congress had declared war or had enacted specific authorization for the use of United States Armed Forces.¹⁶⁸ President Clinton failed to meet the last requirement.¹⁶⁹

159. *Id.*

160. *Id.*

161. Roberts, *supra* note 86, at 110.

162. Hahn, *supra* note 101, at 2363.

163. *Id.*

164. *Id.* at 2362.

165. War Powers Resolution § 1542.

166. *Id.* § 1543(a).

167. *Id.* § 1543(c).

168. *Id.* § 1544(b).

169. Howard, *supra* note 5, at 283-84.

It is important to mention that no court has ever upheld a challenge to the War Powers Resolution. All challenges have been dismissed under limiting doctrines such as standing, ripeness, equitable discretion, and the political question doctrine. *Campbell*, 52 F. Supp. 2d 34 (D.C.C. 1999); *see also* *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990) (dismissing challenge to Gulf War on political question, equitable discretion, and ripeness grounds); *Lowery v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (dismissing challenge to reflagging operations in the Persian Gulf on equitable discretion and political question grounds); *Sanchez-Espinoza v. Reagan*, 568 F.

President Clinton met the first requirement. There was ongoing consultation between President Clinton's administration and Congress concerning the situation in Kosovo that was highlighted by significant testimony before congressional committees by the President's cabinet members.¹⁷⁰

President Clinton also met the second requirement. He submitted a report "consistent with the war Powers Resolution" within forty-eight hours to the Speaker of the House and the President Pro Tempore of the Senate.¹⁷¹

Furthermore, he provided periodic reports to Congress. On April 7, 1999, President Clinton sent letters to Speaker Hastert and Senator Thurmond reporting on the situation in Kosovo as part of his "efforts to keep the Congress fully informed, consistent with the War Powers Resolution."¹⁷² "The letter states that '[w]e will continue to intensify our actions to achieve the objectives I set forth in my report to the Congress of March 26 and to support the international relief efforts being conducted in the region.'"¹⁷³ "The letter reemphasizes that it is 'not possible to predict how long [the] operations will continue.'"¹⁷⁴ On May 25, 1999, President Clinton again reported to Congress.¹⁷⁵ He informed members of Congress that he deployed more aircraft and combat ground troops to the region to support deep strike operations.¹⁷⁶

Yet President Clinton failed to meet the third requirement. Unless Congress had declared war or enacted specific legislation approving the use of United States Armed Forces, President Clinton had to terminate any use

Supp. 596 (D.D.C. 1983) (dismissing challenge to covert assistance to Nicaragua contras on political question grounds); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982) (dismissing challenge to military aid to El Salvador on political question grounds).

Consequently, those who seek remedies for Presidential violations of the War Powers Resolution will likely be left empty-handed. Apparently, those who feel the President has violated the War Powers Resolution, or the Constitution for that matter, are relegated to protest demonstrations and letter-writing campaigns to their Congressional representatives.

170. Howard, *supra* note 5, at 284; *see also id.* at 284 n.141 ("*Situation in Kosovo: Hearing Before the House Comm. on Int'l Relations*, 106th Cong. 4 (1999) . . . (statement of Madeleine K. Albright, Secretary of State, updating the committee on the impact of NATO operations on Yugoslavian President Milosevic); *Supplemental Appropriations for Kosovo Operations, Refugee Relief, and Other Requirements: Hearing Before the Subcomm. on Defense of the House Comm. on Appropriations*, 1999 WL 16946755 (1999) . . . (statement of William S. Cohen, Secretary of Defense, updating the committee on military operations and their effect in Kosovo)").

171. Clinton's Letter of Mar. 1999, *supra* note 145.

172. *Campbell*, 52 F. Supp. 2d at 38 (quoting Pls.' Mot. Summ. J., Ex. 38).

173. *Id.*

174. *Id.*

175. Letter to Congressional Leaders Reporting on Airstrikes Against the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 Weekly Comp. Pres. Doc. 898 (May 25, 1999).

176. *Id.*

of the armed forces within sixty calendar days from submitting his initial report.¹⁷⁷

Congress never declared war. After President Clinton issued an executive order designating the Federal Republic of Yugoslavia as a “combat zone,”¹⁷⁸ the House of Representatives voted on four measures. By a vote of 427 to 2, the House rejected a joint resolution declaring a state of war between the United States and the government of the Federal Republic of Yugoslavia.¹⁷⁹

The House then rejected, by a tie vote, the concurrent resolution that had been passed by the Senate on March 23, 1999, authorizing the President to conduct military air operations and missile strikes against the Federal Republic of Yugoslavia.¹⁸⁰

In an odd twist of events, the House also rejected a concurrent resolution that would have directed the President, “pursuant to section [1544(c)] of the War Powers Resolution, to remove United States Armed Forces from their positions in connection with the present operations against the Federal Republic of Yugoslavia.”¹⁸¹

Despite this inconsistent decision, one thing is clear: Congress did not declare war. Consequently, President Clinton needed congressional approval to introduce United States Armed Forces, as part of Operation Allied Force, into hostilities in Kosovo.

Under the War Powers Resolution, “only express legislative support for combat operations may be regarded as constitutionally sufficient.”¹⁸² On May 20, 1999, Congress passed Pub. L. No. 106-31, an Emergency Supplemental Appropriations Act that, *inter alia*, provided supplemental emergency appropriations in the amount of \$11.8 billion for the conflict in Yugoslavia.¹⁸³ The Appropriations Act required the President to transmit to Congress “a report, in both classified and unclassified form, on current United States participation in Operation Allied Force,” defined as “operations of the North Atlantic Treaty Organization (NATO) conducted against the Federal Republic of Yugoslavia (Serbia and Montenegro) during

177. See War Powers Resolution § 1544(b).

178. Exec. Order No. 13,119, 64 Fed. Reg. 18,797 (Apr. 13, 1999).

179. *Campbell*, 52 F. Supp. 2d 34,38 (D.C.C. 1999) (citing H.R.J. Res. 44, 106th Cong. (1999)).

180. *Id.* (citing S. Con. Res. 21, 106th Cong. (1999)).

181. *Id.* (citing H.R. Con. Res. 82, 106th Cong. (1999)). “The House passed a bill that prohibit[ed] the use of Department of Defense funds for deployment of United States ground forces to the Federal Republic of Yugoslavia without specific congressional authorization.” *Id.* (quoting H.R. 1569, 106th Cong. (1999)).

182. Corn, *supra* note 58, at 1174.

183. John C. Yoo, *UN War, US War Powers*, 1 CHI. J. INT’L L. 355, 357 (2000) (referring to the \$11.8 billion funding request); see also, Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, 113 Stat. 57 (1999); *Campbell*, 52 F. Supp. 2d at 38.

the period beginning on March 24, 1999, and ending on such date as NATO may designate, to resolve the conflict with respect to Kosovo.”¹⁸⁴

Although Pub. L. No. 106-31 specifically appropriated over \$5 billion to fund continuing hostilities in Kosovo, it did not make specific reference to the War Powers Resolution.¹⁸⁵ Therefore, Congress never authorized the use of United States Armed Forces in Kosovo as part of Operation Allied Force under the War Powers Resolution.

Since Congress neither declared war nor issued specific statutory authorization for the use of United States Armed Forces in Kosovo, President Clinton was required to remove the armed forces from hostilities within sixty days. He did not. Therefore, one can easily prove, through simple addition, that President Clinton violated the War Powers Resolution.

President Clinton issued an Executive Order designating the Kosovo region a United States combat zone and March 24, 1999 as “the date of commencement of combat activities in such zone.”¹⁸⁶ Bombing attacks against Serbian targets both in Kosovo and Serbia proper did not end until June 10, 1999—seventy-nine days after the war first began and nineteen days after the War Powers Resolution’s sixty-day clock had ended.¹⁸⁷

In sum, President Clinton lacked the constitutional authority to unilaterally commit United States Armed Forces to Operation Allied Force and the Kosovo conflict. Even though Congress provided funding for the Kosovo conflict and the House of Representatives expressed its support for the American troops involved, those actions were not sufficient legislative authorization for military hostilities.¹⁸⁸ Accordingly, President Clinton violated not only the War Powers Resolution because he failed to stop an air war that lasted nineteen days after the Resolution’s sixty-day clock had ended,¹⁸⁹ but also the Constitution because he introduced United States Armed Forces into hostilities without congressional approval.

IV. OPERATION ALLIED FORCE CANNOT BE LEGALLY JUSTIFIED UNDER INTERNATIONAL LAW AS A HUMANITARIAN INTERVENTION

There is little doubt that the intervention in Kosovo had, at its base, a concern for human rights. But, “there is no clear law permitting humanitarian intervention in cases short of genocide.”¹⁹⁰ Humanitarian

184. *Campbell*, 52 F. Supp. 2d at 38 (citing Emergency Supplemental Appropriations Act, Pub.L. No. 106-31, 113 Stat. 57, 76-77 (1999)).

185. *Id.*

186. Exec. Order No. 13,119, 64 Fed. Reg. 18797 (Apr. 13, 1999).

187. Address to the Nation on the Military Technical Agreement on Kosovo, 1 PUB. PAPERS 913, 913 (June 10, 1999).

188. Yoo, *supra* note 88, at 1681-82.

189. *Id.* at 1674, 1687.

190. KATHARINA PICHLER COLEMAN, INTERNATIONAL ORGANISATIONS AND PEACE ENFORCEMENT: THE POLITICS OF INTERNATIONAL LEGITIMACY 200 (2007) (noting that Article

intervention is not an exception to the United Nations Charter's prohibitions on the use of force.¹⁹¹ Under the Charter, cross-border military force may be used in self-defense¹⁹² or with the authorization of the Security Council of the United Nations.¹⁹³ NATO military actions during Operation Allied Force do not meet either condition.¹⁹⁴

The military actions in Kosovo do not fit within the traditional norm of self-defense.¹⁹⁵ As a result, the intervention in Kosovo would be lawful only if authorized by the Security Council of the United Nations.¹⁹⁶ However, NATO bypassed the UN Security Council and acted unilaterally.¹⁹⁷ Therefore, since NATO's military action in Kosovo was neither in self-defense nor authorized by the UN Security Council, NATO's use of force in Kosovo violated the UN Charter. If NATO's use of force violated the UN Charter's prohibition against the use of force, then it was illegal under customary international law.¹⁹⁸

There exists dissension among jurists as to the justification of humanitarian intervention under customary international law. Kathrina

8 of the 1951 International Convention on the Prevention and Punishment of the Crime of Genocide arguably enjoins international military action against genocide).

191. Jonathan I. Charney, Editorial Comments, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 836 (1999).

192. U.N. Charter art. 51; see Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 488 (2006).

193. U.N. Charter art. 42; see Posner, *supra* note 192, at 488.

194. Charney, *supra* note 191, at 834-35.

195. Paul W. Kahn, *War Powers and the Millennium*, 34 Loy. L.A. L. REV. 11, 51 (2000). Kahn also posits that "[t]he military action in Kosovo was not an enforcement action . . . [nor was it] a police action under Chapter Seven of the [UN] Charter." *Id.* It is clear that NATO's intervention in Kosovo was not a response to an armed attack on any NATO member country and therefore cannot be justified as an act of collective self-defense. See COLEMAN, *supra* note 190, at 197.

196. See Posner, *supra* note 192, at 492.

197. Nanda, *supra* note 41, at 1. In the months before the NATO bombing in Kosovo, China and Russia appeared ready to veto any call for UN intervention, as well as any mandate that conferred upon NATO such a right. Falk, *supra* note 75, at 850.

198. Serbia challenged the legality under international law of the use of force by various NATO countries during the Kosovo conflict. Unfortunately, the ICJ never resolved the issue because the court unanimously decided that it had no jurisdiction to hear the cases. *Legality of Use of Force (Serb. & Montenegro v. Belg.)*, 2004 I.C.J. 279 (Dec. 15), available at <http://www.icj-cij.org>.

However, the Independent International Commission on Kosovo concluded "that the NATO military intervention was illegal but legitimate." INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 1, 4 (2000), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf> [hereinafter Kosovo Report]. The Commission applied three threshold principles and eight contextual principles to NATO's military intervention in order to evaluate its humanitarian legitimacy. *Id.* at 193-94. The Commission reasoned that NATO's military action "was illegal because it did not receive prior approval from the United Nations Security Council . . . [but] justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule." *Id.* at 4.

Pichler-Coleman citing Mary-Ellen O'Connell notes, "[T]here is no real evidence of a practice followed out of legal obligation to support a right of humanitarian intervention under customary international law."¹⁹⁹ However, Jean-Pierre L. Fonteyne finds that jurists have noted through state practice, mainly in Eastern Europe, that a particular State's violation of the norms of international law in regard to war and humanity against its own subjects or a particular subgroup of subjects could not be ignored, for it not only was to the detriment of those subjects but against all civilized States.²⁰⁰ Fonteyne contended that jurists feared inaction would be seen as justification of those violations and concluded that humanitarian intervention is legally permissible under customary international law.²⁰¹

In recognition of this division among jurists, the following five criteria will be employed to evaluate the legitimacy under customary international law of the unilateral humanitarian intervention taken in Kosovo by NATO forces during Operation Allied Force: (1) necessity, (2) proportionality, (3) purpose, (4) nature of the actors, and (5) maximization of the best outcomes.²⁰² If a majority of the criteria are met, then arguably NATO's bombing of Kosovo was *legally* justified under the doctrine of humanitarian intervention.²⁰³

199. COLEMAN, *supra* note 190, at 200 (citing Mary Ellen O'Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 70 (2000)).

200. Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 214-32 (1974). Fonteyne supported his argument by looking as far back as the Crusades and including State practice via Russian intervention in Greece in 1827, "invoking, for the first time in history, humanitarian concern as justification for intervention," *id.* at 207-08; France intervention in Syria in 1860 following massacre of thousands of Christians by local Moslem population, *id.* at 208-09; Serbian and Russian intervention in Bosnia, Herzegovina and Bulgaria in support of oppressed Christian populations in those areas, *id.* at 211-12; Bulgarian, Greece and Serbian intervention against Turkish control programs in Macedonia, *id.* at 213.

201. *Id.* at 269 ("As long as the world community appears to be unable or unwilling to promptly respond in a collective manner to those dramatic situations where the very nature and existence of man are threatened, individual initiatives by concerned States will have to be relied upon if a viable world order is to be maintained.").

202. These criteria were developed by Ved P. Nanda over two separate, yet related, articles. Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law*, 20 DENV. J. INT'L L. & POL'Y 305 (1992) [hereinafter Nanda Part I]; Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law*, 26 DENV. J. INT'L L. & POL'Y 827 (1998) [hereinafter Nanda Part II]. See also Fonteyne, *supra* note 200, at 258-67 (employing a three prong analysis of the substantive, procedural and preferential criteria of humanitarian intervention under customary international law).

203. Part IV of this paper does not explore whether NATO's military action was *morally* justified. Rather, it explores the *legality* under international law of NATO's use of force during Operation Allied Force. The Independent International Commission on Kosovo concluded that Operation Allied Force was *morally* justified because it was a humanitarian

The necessity criterion assesses “whether there was genocide or gross, persistent, and systematic violations of basic human rights.”²⁰⁴ If there was, then arguably the intervention was necessary. The necessity criterion can be detailed as including two, and depending upon the jurist possibly three, elements: the fundamental character of the human rights violations, the exceptionally large scale of those violations, and possibly the potential immediacy of those violations.²⁰⁵

It is indisputable that the Albanian Kosovars had suffered deprivation of human rights and widespread repression under the Milosevic regime.²⁰⁶ Thus, the fundamental character of the human rights involved is satisfied under the first element of the necessity criterion. The human rights discussed include, but are not limited to, the right to life and the prevention of torture.²⁰⁷

However, there exists debate upon the scale and thus the immediate threat of human rights violations. “The extent of the human rights violations in Kosovo *prior* to the withdrawal of the [Organization for Security and Cooperation in Europe’s (OSCE)] observer force was *not* massive and widespread.”²⁰⁸ “In fact, the Security Council had authorized the deployment of the verification mission, which had effectively *prevented* the commission of widespread atrocities.”²⁰⁹ The Federal Republic of Yugoslavia’s behavior toward the Albanian Kosovars “changed only after NATO forced the withdrawal of the OSCE observers.”²¹⁰

This is clear from the indictment of Milosevic by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia.²¹¹ The specific charges against Milosevic document only one incident involving a significant number of deaths caused by Federal Republic of Yugoslavia forces in the months prior to the start of the NATO bombing campaign.²¹² That incident, in which forty-five civilians were killed, took place at Racak on January 15, 1999, more than two months before Operation Allied Force.²¹³ All the remaining counts concern incidents that occurred *after* the

intervention that had at its base human rights concerns. *See generally*, Independent International Commission on Kosovo, **Kosovo Report**, *supra* note 198.

204. Nanda Part II, *supra* note 202, at 827.

205. Fonteyne, *supra* note 200, at 258-60.

206. Nanda, *supra* note 41, at 18. *See generally* LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION (1997).

207. Fonteyne, *supra* note 200, at 258-59.

208. Charney, *supra* note 191, at 839.

209. *Id.* at 839-40 (emphasis added).

210. *Id.* at 840.

211. *Id.*; *see* Prosecutor v. Milosevic, Case No. IT-99-37, Indictment (Int’l Crim. Trib. for the Former Yugoslavia May 22, 1999) [hereinafter Milosevic Indictment].

212. Charney, *supra* note 191, at 840; Milosevic Indictment, *supra* note 211, at pp 7-10 ¶¶ 28, 36-37, 39, and at pp 21-28 ¶¶ 97-98.

213. Charney, *supra* note 191, at 840; Milosevic Indictment, *supra* note 211, at 26 ¶ 96a.

bombing commenced; therefore, those incidents cannot be used to justify Operation Allied Force.²¹⁴

There were also reports of incidents involving the displacement of Albanian Kosovars within the Federal Republic of Yugoslavia.²¹⁵ German Foreign Minister Joschka Fischer claimed the refugee crisis was produced by a Serbian ethnic cleansing plan codenamed “Operation Horseshoe.”²¹⁶ “NATO’s leaders . . . used the existence of the plan to illustrate Milosevic’s character, and to prove that the ethnic cleansing of Kosovo was not triggered by the NATO bombing, thereby justifying the NATO campaign.”²¹⁷

However, a retired German brigadier-general questioned the legitimacy of Operation Horseshoe and alleged that the German Defense Ministry turned a vague report from Bulgarian intelligence into a “plan.”²¹⁸ The brigadier-general contended that German politicians misquoted the Bulgarian report, which noted the Serbian military goal was focused on destroying the Kosovo Liberation Army rather than the expulsion of the entire Kosovo Albanian population.²¹⁹ German reporter Franz Josef Hutsch “got the impression in Kosovo in 1998 and 1999 that ‘a lot of things were staged’ or ‘orchestrated’ and that the Kosovo Liberation Army had very good ‘PR advisers.’”²²⁰ There rests, then, an issue as to whether NATO conducted its due diligence prior to the commencement of Operation Allied Force.²²¹

A postwar statistical analysis of the patterns of displacement, conducted by Patrick Ball of the American Association for the Advancement of Science, found a direct correlation between Serbian security force operations and refugee outflows, with NATO operations having little effect on the displacements.²²²

214. Charney, *supra* note 191, at 840 (emphasis added); Milosevic Indictment, *supra* note 211, at pp 21-28 ¶¶ 97-98.

215. Charney, *supra* note 191, at 840; Milosevic Indictment, *supra* note 211, at 10 ¶ 39.

216. SELECT COMMITTEE ON FOREIGN AFFAIRS, FOURTH REPORT, KOSOVO: THE MILITARY CAMPAIGN, 1999-2000, H.C. 28-II, ¶ 93 (U.K.) (citing 345 PARL. DEB., H.C. (6th ser.) (2000) 686W (U.K.)).

217. *Id.*

218. *Id.*

219. *Id.* (citing THE TIMES, Apr. 2000).

220. *Testimony About the War That was “Staged” in Kosovo*, SENSE NEWS AGENCY (Oct. 12, 2004), http://www.sense-agency.com/icty/testimony-about-the-war-that-was-staged-in-kosovo.29.html?cat_id=1&news_id=8781.

221. Fonteyne, *supra* note 200, at 260 (“[A] good faith determination by the prospective intervenor that human rights violations are in fact imminently threatening.”) It is illogical to have to wait until an actual violation occurs; therefore, reasonableness must be applied.

222. ABA Cent. & E. Eur. Law Initiative & Am. Ass’n for Advancement of Sci., Political Killings in Kosova/Kosovo, MAR.-JUNE 1999, at 11 (2000), available at <http://shr.aaas.org/kosovo/pk/politicalkillings.pdf>.

By comparing the estimated numbers of people who left each municipality over time to the times when NATO airstrikes occurred, the AAAS study concludes that only a small fraction of Kosovar Albanians fled Kosova/Kosovo as a direct result of NATO bombing raids. It also concludes that the mass exodus of refugees from Kosova/Kosovo occurred in patterns so regular that they must have been coordinated. In the context of descriptive accounts given by refugees, the most likely explanation for the migration is the implementation of a centrally-organized campaign to clear at least certain regions of ethnic Albanians.²²³

NATO relied upon the impression that Operation Horseshoe would go into effect in Kosovo in an attempt to bolster the scale and immediacy of the human rights violations. Yet there existed questionable evidence of Operation Horseshoe and its goals and a lack of large scale violations prior to NATO operations. Because there were not widespread incidents of gross, persistent, and systematic violations of basic human rights in Kosovo before NATO's bombing campaign began,²²⁴ Operation Allied Force may not be justified as necessary.²²⁵

In correlation with the necessity criterion there exists what Fonteyne describes as the "procedural"²²⁶ criteria or what can be domestically termed as exhaustion of all administrative remedies. These procedural elements include the exhaustion of all peaceful means of settlement²²⁷ and the absence of any reasonable prospect of timely action by international organizations.²²⁸

Even though the Albanian Kosovars' suffering could not have been addressed effectively by the UN Security Council because of the probable veto of any resolution by Russia or China, the NATO intervention was still unnecessary.²²⁹ One must still ask hard questions such as, were all diplomatic efforts and non-forcible remedies exhausted before Operation Allied Force began?

Certainly not all diplomatic efforts were exhausted. In fact, there were questionable efforts made to negotiate with the Federal Republic of

223. *Id.*

224. *See id.* In fact, on the 10-year anniversary of NATO's bombing, Serbia's Prime Minister Mirko Cvetkovic said NATO air strikes on Kosovo "resulted in ethnic cleansing and gross violations of human rights . . ." *NATO Strikes Over Kosovo Continue to Divide, 10 Years On*, DEUTSCHE WELLE (Mar. 24, 2009), <http://www.dw-world.de/dw/article/0,,4121076,00.html> (emphasis added).

225. If the authors apply Fonteyne's immediacy element to the equation, NATO's intervention may have been considered necessary if NATO did in fact reasonably believe Operation Horseshoe was in effect. This appears to be an element not required in Nanda's categorical approach to humanitarian intervention.

226. Fonteyne, *supra* note 200, at 264-66.

227. *Id.* at 264.

228. *Id.* at 264-65.

229. Nanda, *supra* note 41, at 18.

Yugoslavia.²³⁰ “The Rambouillet accords were tilted against the Serbs, who were provided no opportunity to negotiate revisions to the draft agreement.”²³¹ Similarly, in meetings that NATO and U.S. officials held with Milosevic, they pitched take-it-or-leave-it propositions.²³² Moreover, using non-forcible remedies, such as an oil embargo or other economic sanctions, was considered only after the bombing campaign began.²³³ Clearly, there was more that could have been done before resorting to the use of force. Therefore, under a procedural analysis, Operation Allied Force was unnecessary.

The proportionality criterion examines “the duration and propriety of the force applied.”²³⁴ The elements of proportionality include no unnecessary force,²³⁵ no unnecessary affectation of the authority structures of the States intervened,²³⁶ and no unnecessary duration.²³⁷

Operation Allied Force was the largest allied military operation in Europe since World War II and lasted seventy-nine days.²³⁸ During the Operation, allied pilots flew over 14,006 strike missions²³⁹ from a safe altitude of 20,000 feet.²⁴⁰ The means of attack included “B-52s, cluster bombs, and depleted uranium ordnance”—a weapon of questionable lawfulness.²⁴¹ NATO intended to continue the air campaign on an “intensifying scale” until Milosevic “‘submitted’ without conditions.”²⁴²

230. Charney, *supra* note 191, at 840.

231. Nanda, *supra* note 41, at 18.

232. *Id.*

233. Charney, *supra* note 191, at 840.

234. Nanda Part II, *supra* note 202, at 827.

235. Fonteyne, *supra* note 200, at 262. (“[E]mploy only the amount of troops reasonably necessary to accomplish the objective, so as to reduce to a minimum infringement upon the territorial integrity and political independence of the State intervened.”) (citing Richard B. Lillich, *Forcible Self-Help to Protect Human Rights*, 53 IOWA L. REV. 325, 349-50 (1967)).

236. *Id.* at 262-63. Seek “to limit the lawfulness of extensive alteration by the intervenor of the internal authority structures of that State.” *Id.* (citing John Norton Moore, *The Control of Foreign Intervention in Internal Conflicts*, 9 VA. J. INT’L L. 205, 264 (1969), “If the protection of human rights requires the overthrow of authority structures, it would seem best to require U.N. authorization as a prerequisite for action. To allow unilateral action in such cases would be to permit all manner of self-serving claims for the overthrow of authority structures.” T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1, 47 (citing John Norton Moore, *The Control of Foreign Intervention in Internal Conflicts*, 9 VA. J. INT’L L. 205, 264 (1969)).

237. *Id.* at 263-64. The removal of troops upon completion of objective.

238. Nanda, *supra* note 41, at 9; Roberts, *supra* note 86, at 109.

239. Roberts, *supra* note 86, at 109.

240. Nanda, *supra* note 41, at 18.

241. Falk, *supra* note 75, at 851.

242. *Id.* at 855.

The bombing caused severe damage to Serbia's infrastructure and destroyed many cities and towns.²⁴³ The bombing targeted key components of the civilian infrastructure and resulted in heavy damage to the water supply and electricity systems.²⁴⁴ Furthermore, the bombing "caused severe pollution through the destruction of chemical factories and oil refineries."²⁴⁵ The bombing caused the deaths of hundreds, if not thousands, of civilians²⁴⁶ and induced a flow of refugees that approached one million.²⁴⁷ Finally, NATO miscalculated that Milosevic would capitulate after a few days of bombing.²⁴⁸ This miscalculation caused NATO to intensify its efforts, which ultimately led to a disproportionate use of force by NATO.²⁴⁹

"The magnitude and effects of [the] bombing are difficult to reconcile with the humanitarian claims made by NATO."²⁵⁰ This difficulty is compounded by NATO's reliance on tactics of warfare that minimized the risk of harm to its forces, while shifting that risk to the civilians of Kosovo.²⁵¹ The absence of casualties among NATO forces and the killing of innocent Kosovars seriously damages NATO's humanitarian rationale for Operation Allied Force.²⁵² Although the duration of the bombing may have been relatively short, the impropriety of NATO's force in terms of magnitude and effect supports the view that NATO's force was disproportional.

The purpose criterion explores "whether the intervention was motivated by humanitarian considerations, self interest, or mixed motivations."²⁵³ The

243. *Id.* at 851; Nanda, *supra* note 41, at 18. In the years that followed Operation Allied Force there grew rising concern from some in the international community of not only the Operation itself, but also the derivative effects of the overall campaign; see Press Release, Office of the Prosecutor for the Int'l Criminal Tribunal for the Former Yugo., Prosecutor's Report on the NATO Bombing Campaign, U.N. Doc. PR/P.I.S./510-e (June 13, 2000), available at <http://www.icty.org/sid/7846>; see also Marjorie Cohn, *No "Victor's Justice" in Yugoslavia: NATO Must be Held Accountable for Its War Crimes*, *Jurist* (Mar. 27, 2000), <http://jurist.law.pitt.edu/forum/forumnew4.HTM> (discussing how U.N. High Commissioner Mary Robinson had warned NATO it might be held accountable for war crimes after two buses in Kosovo were bombed killing more than fifty citizens); see also Roberts, *supra* note 86, at 123 (citing Commissioner Robinson, "In the NATO bombing of the Federal Republic of Yugoslavia, large numbers of civilians have incontestably been killed."); see also INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (June 2000), reprinted in 39 I.L.M. 1257, 1282 (2000) [hereinafter FINAL REPORT OF NATO BOMBING CAMPAIGN].

244. Falk, *supra* note 75, at 851.

245. *Id.*

246. *Id.*; Nanda, *supra* note 41, at 18.

247. Falk, *supra* note 75, at 851-52.

248. Nanda, *supra* note 41, at 18.

249. *Id.*

250. Falk, *supra* note 75, at 855-56.

251. *Id.* at 856.

252. *Id.*

253. Nanda Part II, *supra* note 202, at 827.

NATO initiative was not a war in the conventional sense. Rather, it was based on a claim of humanitarian intervention. NATO's Secretary-General stated the objectives of the air-strikes were "[t]o prevent more human suffering, more repression, more violence against the civilian population of Kosovo" ²⁵⁴ Similarly, President Clinton justified the NATO action in the following words:

Today we and our 18 NATO allies agreed to do what we said we would do, what we must do, to restore the peace. Our mission is clear: to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course; to deter an even bloodier offensive against innocent civilians in Kosovo; and, if necessary, to seriously damage Serbian military's capacity to harm the people of Kosovo. In short, if President Milosevic will not make peace, we will limit his ability to make war. ²⁵⁵

Notwithstanding these statements, there is evidence that other considerations were involved. Six days before Operation Allied Force, Walter Slocombe, United States Under Secretary of Defense for Policy, stated that "[t]he conflict in Kosovo threatens our calculated, cold-blooded national interests" ²⁵⁶ Essentially, the conflict in Kosovo implicated national security concerns of the United States. ²⁵⁷ In addition, Operation Allied Force was not tailored to protect ethnic Albanians in Kosovo, but rather had the broader objective of undermining the Federal Republic of Yugoslavia's government in order to force its acceptance of the Rambouillet peace agreement. ²⁵⁸ Despite the possible mixed-motives of the United States, it is fair to say that Operation Allied Force was a humanitarian intervention by NATO acting under the leadership of the United States. At bottom, Operation Allied Force's purpose was grounded in humanitarian concerns. ²⁵⁹

254. Nanda, *supra* note 41, at 8 (citing Javier Solana, *Statement by NATO Secretary-General on Air Strikes*, Mar. 23, 1999, <http://abcnews.go.com/sections/world/dailynews/solanatranscript.html>).

255. *Id.* (citing *CONFLICT IN THE BALKANS; In the President's Words: 'We Act to Prevent a Wider War'*, N.Y. TIMES, Mar. 25, 1999, at A15, available at <http://www.nytimes.com/1999/03/25/world/conflict-in-the-balkans-in-the-president-s-words-we-act-to-prevent-a-wider-war.html?pagewanted=all&src=pm>).

256. Howard, *supra* note 5, at 266 n.23 (citing Fiscal Year 2000 National Defense Authorization Act-United States Policy in the Balkans: Hearings on Authorization and Oversight Before the House Armed Servs. Comm., 106th Cong. 722 (1999)).

257. Howard, *supra* note 5, at 266.

258. See Charney, *supra* note 191, at 840.

259. See, Fonteyne, *supra* note 200, at 261 ("[It is] 'naive' . . . to require that 'where the decision to intervene falls to a single state, it should be safeguarded by a requirement that the state be totally disinterested.' The presence, among the . . . intervenor, of some considerations of national interest should not be taken to necessarily 'invalidate the resort to [force] if the overriding motive is the protection of human rights.'") (citing Richard B.

The nature of the actors' criterion appraises whether the humanitarian intervention was "collective or unilateral."²⁶⁰ It is clear that NATO's humanitarian intervention was unilateral. NATO acted unilaterally because it lacked a mandate from the United Nations Security Council. Furthermore, although NATO is a collective, regional organization, the countries comprising NATO are a small part of the total number of United Nations members. Since only NATO members planned and implemented Operation Allied Force, they acted unilaterally from the United Nations as a whole.

Lastly, the maximization of best outcomes criterion assesses "whether the intervention maximized the best outcome."²⁶¹ Operation Allied Force failed to optimize the best outcome.²⁶² Operation Allied Force's purpose was to protect Kosovar Albanians from the excessive use of force by Serbs.²⁶³ However, the operation resulted in Milosevic intensifying his efforts to ethnically cleanse Kosovo.²⁶⁴ As a result, almost a million ethnic Albanians either were displaced within Kosovo or fled to neighboring countries.²⁶⁵

A year after Operation Allied Force ended, Kosovo was still beset with ethnic hatred, violence, crime, and revenge killings.²⁶⁶ The UN Secretary-General's June 6, 2000 report on the United Nations Interim Mission in Kosovo is revealing.²⁶⁷ The report notes that "Some aspects of Kosovo society have not changed. Kosovo Serbs and other minority communities continue to be murdered, attacked and threatened. [United Nations Interim Administration Mission in Kosovo] staff members have also been murdered by extremists motivated by ethnic hatred."²⁶⁸

Furthermore, the report states:

Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 350 (1967)). See *Id.* citing Lillich, *supra* note 235, at 350 "naïve to require that where the decision to intervene falls to a single state, it should be safeguarded by a requirement that the state be totally disinterested. The presence among the intervenor of some considerations of national interest should not be taken to necessarily invalidate the resort to force if the overriding motive is the protection of human rights."

260. Nanda Part II, *supra* note 202, at 827; see also Fonteyne, *supra* note 200, at 266-67 (stating that "collective operations should be preferred over individual measures. While it is true that 'intervention does not gain in legality . . . by being collective rather than individual,' there is nevertheless a presumption that collective action is more likely to ensure the relative purity of the intentions required from the intervenors.") (citation omitted).

261. Nanda Part II, *supra* note 202, at 827-28.

262. Nanda, *supra* note 41, at 18.

263. *Id.*

264. *Id.* at 18-19.

265. *Id.* at 19.

266. *Id.*

267. *Id.* at 15.

268. Nanda, *supra* note 41, at 15. See also U.N. Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 22, U.N. Doc. S/2000/538 (June 6, 2000), available at <http://www.un.org/Docs/sc/reports/2000/sgrep00.htm> [hereinafter *Report of Security-General*].

As a result of the continued violence and harassment, the freedom of movement of minority communities remains restricted. This in turn affects their ability to fully exercise a range of basic rights, such as health care, education, social welfare, access to public utilities and other public services. [Furthermore, [d]iscrimination in the employment sector, particularly against ethnic minorities . . . is increasingly apparent.²⁶⁹

In addition, there is strong evidence that the only real winners in Kosovo were the members of the Albanian mafia engaged in organized crime.²⁷⁰

As time progressed, numerous talks amongst the parties between 2003 and 2007 yielded few results as protests and rallies often interrupted into violence.²⁷¹ The freedom of movement of minority communities still remained restricted.²⁷² Ethnic violence still plagued Kosovo as the ethnic Albanian majority continued to push for independence from Serbia.²⁷³ The end result of the violence and breakdown of negotiations was the unilateral declaration of independence issued by Kosovo's elected parliament in February 2008.

The parliamentary declaration quickly aroused international reaction on both ends of the spectrum as nations sought to recognize or declare invalid the Kosovo independence.²⁷⁴ On October 8, 2008, the UN General Assembly adopted resolution 63/3 (A/63/L.2) in which it requested the ICJ to render an Advisory Opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-

269. *Report of Security-General, supra* note 268, at ¶¶ 41, 51.

270. *See generally* Frank Cilluffo & George Salmoiraghi, *And the Winner Is . . . the Albanian Mafia*, 22 WASH. Q. 21 (1999); *see also* Nanda, *supra* note 41, at 19.

271. *From Racak to the ICJ Ruling: Kosovo Timeline Since 1999*, BALKANINSIGHT.COM (last visited Jan. 11, 2012), <http://old.balkaninsight.com/en/main/info/29604/>; *Key Dates in Kosovo's Drive for Independence*, ASSOCIATED PRESS, available at <http://www.msnbc.msn.com/id/23292262/> (2008). Instances of violence include March 2004 riots across Kosovo, after three ethnic Albanian children drown in the Ibar River, alleged involvement of Serbs leads to nineteen deaths, and the February 2007 nationalist movement, Vetevendosje, protests lead to two deaths.

272. *Grenade Explodes in Serb Classroom in Kosovo*, REUTERS, Nov. 21, 2006, available at <http://uk.reuters.com/article/2006/11/21/us-kosovo-school-grenade-idUKL2179137820061121>.

273. *Id.*

274. *Kosovo MPs Proclaim Independence*, BBC NEWS (Feb. 17, 2008), <http://news.bbc.co.uk/2/hi/europe/7249034.stm> (reporting that demonstrators, numbering around 1000, threw stones and broke the windows of the U.S. Embassy in Belgrade along with attacking a nearby McDonald's restaurant. Russia, in particular, questioned the validity of the declaration under both international law and UN Security Council resolution 1244, (1999). Journalists believe the Russian stance was based upon its own issues with the Georgian breakaway provinces of Abkhazia and South Ossetia).

Government of Kosovo in accordance with International Law.”²⁷⁵ In other words, the ICJ was asked to render an opinion on whether the declaration of independence violated general international law and/or Security Council resolution 1244(1999).

When discussing any violation of general principles of international law, the ICJ divested the issue of a unilateral declaration of independence from that of territorial integrity.²⁷⁶ The Advisory Opinion goes on to note, “several participants have invoked resolutions of the Security Council condemning particular declarations of independence.”²⁷⁷ The ICJ found no applicable prohibition in general international law against Kosovo’s unilateral declaration of independence.²⁷⁸

The Court then looked to any violation of the *lex specialis* created by Security Council resolution 1244 (1999).²⁷⁹ The resolution sought to provide an interim administration for Kosovo, which would provide a transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.²⁸⁰ Since the authors of the declaration were elected officials acting in their capacity as

275. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 4-5 (July 22) [hereinafter Accordance].

276. *Id.* at 30-31. The Court notes Article 2, paragraph 4 of the Charter of the United Nations which holds: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” *Id.* The ICJ determined that Article 2 paragraph 4 concerns the relations between States, the Court found a unilateral declaration by a particular population of a State to be outside the principal of territorial integrity. The 2010 ICJ Advisory Opinion seems to brush past Operation Allied Force. In the forty-four page opinion there is not a single mention of the operation itself. The conclusion by the ICJ that this issue did not involve territorial integrity can be considered a correct determination if Operation Allied Force is ignored.

277. *Id.* at 30. Those resolutions include declarations by Southern Rhodesia, Northern Cyprus and the Republika Srpska. The ICJ found, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; “the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law... in the context of Kosovo, the Security Council has never taken this position.” *Id.* at 30-31.

278. *Id.* at 32.

279. Accordance, *supra* note 275, at 32-33. In adopting resolution 1244 (1999), after the completion of Operation Allied Force, the Security Council was determined to resolve the grave humanitarian situation in the region and to put to an end the armed conflict in Kosovo.

280. *Id.* at 22. The Court found that the resolution contained three main aspects, (1) establishing an international civil and security presence in Kosovo with full civil and political authority, (2) the implementation of an interim international territorial administration for humanitarian purposes and (3) establishing an interim regime, not a permanent institutional framework.

representatives of the people of Kosovo and not members of the international interim regime, the Court found no violation.²⁸¹

Operation Allied Force precipitated the current situation in Kosovo. Arguably, the only success one can speak of is the end of Serb violations against Albanian Kosovars initiated after the bombing began and the de facto partition of the Federal Republic of Yugoslavia.²⁸² Thus, it is fair to say that Operation Allied Force set into motion a series of events that resulted in the unilateral declaration of independence by Kosovo as opposed to joint proceedings between Kosovo and Serbia.

The nature of Operation Allied Force, its legality issues, the resulting turmoil in the region and overall dismissal of any NATO violations only served to widen the divide between the parties as the years moved forward and thus ran counter to the maximization of the best outcome, which in the opinion of the authors would have been joint proceedings between the parties.

In summation, because Operation Allied Force was unnecessary, disproportional, and failed to maximize the best outcome, it cannot be legally justified under customary international law as a humanitarian intervention.

CONCLUSION

Operation Allied Force was “the most aggressive and sustained use of military force during the Clinton presidency.”²⁸³ However, President Clinton lacked the constitutional authority to authorize United States Armed Forces to participate in Operation Allied Force. Furthermore, President Clinton violated the War Powers Resolution by allowing United States Armed Forces to participate in Operation Allied Force beyond sixty days without express statutory authorization from Congress.²⁸⁴ Finally, NATO sought to justify Operation Allied Force as a humanitarian intervention. However, Operation Allied Force cannot be legally justified as a humanitarian intervention. Operation Allied Force was unnecessary. It failed to meet its purpose and to maximize the best outcome and the force used during the Operation was disproportionate. Thus, Operation Allied Force cannot be justified as a humanitarian intervention under general principles of customary international law—which means there is even less of an argument that President Clinton had the power to commit United States Armed Forces without congressional approval.²⁸⁵

281. *Id.* at 22, 28. The ICJ determined that the declaration of independence would have been invalid if it had come out of the interim regime.

282. This can also be seen as a failure to satisfy Fonteyne’s criteria and Moore’s contention that the invention not interfere with the authority structures of the State.

283. HENDRICKSON, *supra* note 81, at 117.

284. Corn, *supra* note 58, at 1154.

285. Kahn, *supra* note 195, at 52.

