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KOSOVO and NATO: MORALITY and the LAW

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Introduction

On the 24th of March 1999, military aircraft from Canada and a variety of NATO nations launched the first of a series of air to ground attacks on the Serbs. This operation was preceded by intensive UN and NATO diplomatic efforts to resolve a growing humanitarian and human rights crisis, brought about by the ethnic cleansing of the Kosovar Albanians from their ancestral homelands. Despite the active interest and concern expressed by the United Nations Security Council, permanent members of that body would not authorise the use of force to ensure compliance with a variety of relevant Security Council Resolutions.[1] Under the leadership of President Slobodan Milosevic, the Serbs accelerated their campaign of repression and brutality, and the United Nations remained deadlocked. NATO, acting outside the authority of a Security Council Resolution, initiated offensive combat action to ensure "that mass murder and acts of moral repugnance are no longer the prerogative of a sovereign state. An important step was taken towards a world in which certain fundamental rights are not the privileges of citizenship but the birthright of humanity."[2] NATO and Canada embarked on an undeclared war.

Throughout the majority of history, the natural condition among states has tended to be one of war rather than peace. To quote Telfor Taylor in his essay on Just and Unjust Wars, "warfare has shown a remarkable and, to most of us, distressing vitality as a staple ingredient of intercourse among families and tribes at first, then peoples, religions and nations."[3] But war has only rarely been seen as a blessing, and as societies evolved and grew so to did their appreciation that war is evil, an insult to human dignity and

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[1] Major JD Godwin. "NATO's Role in Peace Operations: Re-examining the Treaty after Bosnia and Kosovo," Military Law Review, Vol. 160. (June 1999), pp 76 - 78.
[2] The Honourable Art Eggelton, Minister of National Defence. "Canadian Lessons from the Kosovo Crisis". Speech presented at Harvard University, 30 September 1999. http://www.dnd.ca/eng/archive/speeches/30SepHarvard_s_e.htm
[3] Telford Taylor, "Just and Unjust Wars" in War, Morality, and the Military Profession, ed. by Malham M Wakin (Boulder and London: Westview Press, 1986), p 226.

something to be avoided unless absolutely necessary.[4] So as to try and limit the effects and justify those occasions when waging war is acceptable, Western civilization developed the just war tradition. Though there is always a danger in trying to define the exact meaning of traditions when they cross cultural boundaries, the contemporary description of a just cause for war tends to be put in terms of outlawing aggression and defining a limited right of self-defence.[5] The early writings on the laws of nations focused on describing the laws of war, the relations between States during such periods, and the duties of the combatants.[6] Like most laws, these probably had their roots in the age-old principle of enlightened self-interest in that some advantage had to accrue to those that originated, respected, or followed them.[7] The laws of war have been developed mainly by the men who fought them - military men. The principles concerning the moral or legal legitimacy of war itself have largely been the work of jurists, theologians, or diplomats.[8] Laws tend to reflect societal behavior and norms, and though very unpopular or unjust laws can be proclaimed or issued by the sovereign authorities they do not tend to last the ultimate test of any law, the test of time. Laws, like the societies that promulgate them, are evolutionary in nature. Bad or unjust laws usually disappear with the demise, natural or otherwise, of the sovereign authority who issued them. A good law can last for centuries.

NATO' decision to launch offensive action against the Serbs is worthy of review within the context of the law. There is very little doubt that acts of moral repugnance were being inflicted on the Kosovar Albanians by their sovereign authority. Something had to be done, and the democratic traditions of NATO and the Western World has placed a great deal of faith and legitimacy on the importance of waging a just war. To most citizens of democratic cultures the cause for armed intervention in Kosovo was morally sound. Yet, what does this just war tradition mean and were the actions of NATO in conformity to the rule of law? What tensions exist between doing what is right as

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[4] Taylor, p 227.
[5] James Turner Johnson. Just War Tradition and the Restraint of War: A Moral and Historical Inquiry. (Princeton: Princeton University Press, 1984), p xxii.
[6] Leslie C Green, The contemporary law of armed conflict. (Manchester and New York: Manchester University Press, 1993), p 26.
[7] Johnson, pp 86 - 87.

compared to that which is lawful? This essay will briefly explore the importance of the just war tradition to democratic governments and link this tradition to the rule of law, within the context of the Kosovo crisis. The friction between doing what is right, as compared to the dictates of acting legally, will be examined and will lead to some conclusions as to how respect for the rule of law can be maintained.

The Rule of Law and The Just War Tradition

The earliest modern writer on the laws of war is Hugo Grotius, who in 1652 explored the conditions for a just war within the context the law.[9] His advocacy of universal natural laws and customs that impose legal, as well as moral, obligations on states has not yet won global acceptance.[10] Sovereign states were loath to recognise any external authority concerning their citizens.[11] Since the Treaty of Westphalia in 1684, respect for national sovereignty has been an essential part of the law by which European countries have conducted their relations with each other.[12] This principle lasted for over 300 years. Though there have been countless violations, it could be argued that this made it harder for countries to justify invading their neighbors: but it also allowed the government authorities to do essentially what they wished within national boundaries.[13] As societies evolved from city-states or the equivalent into larger entities, absolute and immediate control of the sovereign authority became more problematic with the rise of democratic principles. This led to restraints, in the form of laws, being placed on national leaders as part of this evolutionary process - the law was starting to apply more or less equally to all, both sovereign and subject. Arguably, those that failed to evolve suffered the natural results of any collective, be it stagnation, revolution or extinction.[14]

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[8] Taylor, p 227.
[9] Green, pp 1-3.
[10] Paul Christopher. The Ethics of War and Peace: An Introduction to Legal and Moral Issues. (New Jersey: Prentice-Hall,1994). p 114.
[11] Christopher, p 115.
[12] Eggelton, p 3.
[13] "The Last Ideology". The Economist. (London: 31 July – 6 August 1999). pp 12 - 13.
[14] "A Fading Hell". The Economist. (London: 31 July – 6 August 1999). pp 11- 12

Within this evolutionary context there have been many instances when laws have occasionally lagged behind that which societal values deem as just, right, logical or morally binding. During these instances, the old laws are either struck down or amended, be they national (within the state) or international (between states). National laws are very reflective of the specific character and social values of the state. International laws are much more universal in nature and first grew out of a desire to observe some restraints during armed conflict,[15] tracing their roots to various codes of chivalry, common practice and the customs of war.[16] In effect, international laws arose out of a desire to limit the scope and results of war,[17] as "the consequences of unlimited wars are hell."[18] As societal bonds (both political and commercial) evolved, not only within the nation but also between states, a variety of attempts have been made to draw up a binding code for the conduct of war. Arguably, one of the first such attempts was made by the United States during its Civil War in 1863, with limited success.[19] Most are familiar with the Law of the Hague and the Geneva Conventions, which apply to any international armed conflict, whether a declared war or not, and even if one of the parties does not recognise the existence of a state of war. These attempts try to minimize war's horrors and are founded on the principle of a collective understanding and expression of just societal values, both national and international.[20]Determining if a war is just involves applying judgement not only to why it is we fight, but how. In effect, we have to determine it's moral reality.

As pointed out by Michael Walzer in his book Just and Unjust Wars, "for as long as men and women have talked about war, they have talked about it in terms of right and wrong.[21]He then makes the very astute point that the moral reality of wars are judged twice. Once with regards to the reason why the state is fighting (the justice of war, or jus ad belum), and the second time with reference to the way in which they fought the war

[15] Green, p 18.
[16] Ibid, p 26.
[17] Johnson, p 327.
[18] Michael Walzer. Just and Unjust Wars: A Moral Argument with Historical Illustrations. (USA: Basic Books, Second Edition, 1992), p 28.
[19] Green, p 27.
[20] Johnson, p 69.
[21] Walzer, p 3.

(justice in war, or jus in bello). The justice of war requires us to make judgements about aggression and self-defence; justice in war about the observance or violation of the treaties, conventions or customary rules that govern war's conduct. These two sorts of judgements are logically independent and each is a complete though complimentary field of study.[22]It is, therefore, the independence between these two judgements which allows the case of a just war being fought illegally, or an illegal war being fought justly. In the case of Kosovo this may well be of some importance, as are the linkages between legality (the law) and morality in determining if a conflict meets the criterion of the just war tradition. Of note is the stringent 'jus in bello' mechanisms set up by NATO during the air campaign, during which members of the Judge Advocate General's Office would individually assess proposed targets in Kosovo and Serbia in terms of the Geneva Conventions governing the laws in war. This legal officer "would rule whether it was a justifiable military objective, and whether its value outweighed the potential costs in collateral damage…applying the reasonable person standard to the fine line separating military and civilian targets."[23] As the focus of this paper is more concerned with 'jus ad bellum' as it concerns the just war tradition, and not the justice by which NATO fought it, perhaps we could accept as given that NATO did all that they could to ensure that the laws in war were respected. But what is meant by the 'just war tradition' as it applies to Canada?

A strong case for linking the underlying societal justification for war to our Western religious heritage has been made by James Turner Johnson. In his book Can Modern War Be Just he traces the evolution of our principles of justice and morality within what he calls a Christian tradition of war, and makes the argument that "to protect the highest values of the civilization, war may become necessary. Yet, in the protection of those values there must be a pervasive effort to limit and restrain the harm that may be done. Some actions may never be allowable; others must be subjected to the test of whether the evil they cause may be greater than the good they do.[24]Paul Christopher is

[22] Walzer, p 21.
[23] Michael Ignatieff. "The Virtual Commander: NATO's high-tech bid to wage a risk free war". The New Yorker (New York: August 2, 1999), p 33.
[24] Johnson, Can Modern War Be Just, pp 68 - 69.

one of those who has argued that Saint Augustine is the father of the modern Just War theory, and his philosophy of history articulates a world society of mankind that transcends national and political boundaries. While this idea was not new, even in the early years of the fourth century A.D. (having its origins in the Book of Genesis), Augustine was the first to articulate it to an audience that transcended national and political boundaries, namely Christians.[25] According to Augustine, it is what one holds in his heart (intentions) that determines normative worth rather than consequences. War was more than a legal remedy for injustice – it became a moral imperative if it avenged the moral order injured by the sins of the guilty, or even fought for the benefit of the vanquished who has been done an evil deed or act.[26] Definitions of good and evil are very much subject to interpretation, but at the heart of justifying war is the idea of a fault. The just cause for war must be based on redressing a wrong done by an enemy, either real or perceived.[27] But who defines what is meant by a fault, especially in wars that cross cultural boundaries that have different interpretations of what constitutes right or wrong? What makes a war just? The "just" societal reasons for waging international war have already been reviewed (and include responding to aggression and the right of limited self-defense), but the specifics are embodied in a variety of treaties and conventions that have grown over time. Perhaps it is easiest to try and explain the justice of a cause within the context of the faults the 'just war' seeks to redress.

As Serbia's aggression against the Kosovar Albanians was a national tragedy and not the result of an international act of aggression, we are concerned with a case study concerning the law and non-international conflict. To this end there are a variety of specific sources that can be use to determine 'faults'. One of these is commonly referred to as the Common Article 3, which originated with the demise of the colonial empires at the end of World War II. Because of the clash of ideologies inherent in such conflicts, these struggles for self-determination and sovereignty were accompanied by extreme cruelty. As a result, it was decided in 1949 "to include in each of the Geneva Conventions a provision introducing the minimum standards of humanity that it was hoped would be

[25] Christopher, p 35.
[26] Ibid, p 41.

observed in future non-international conflicts."[28]The minimum conditions to be met include a series of prohibitions outlining what must not be done to non-combatants. These forbid violence to life and person, taking of hostages, outrages upon personal dignity including humiliating and degrading treatment, the passing of sentences and the implementation of executions outside of normal civil courts.[29] There have been a variety of attempts to introduce international legal control of non-international conflicts, such as the 1948Genocide Convention and the 1997 Protocol II, both of which are now entering into customary law.[30]

Another source is the 1945 London Charter, which established the Nuremberg Tribunal to try war criminals. Before one can be found guilty of breaking the law, the law must be defined. Accordingly, the London Charter has defined war crimes as "murder, ill-treatment, deportation for any purpose…killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity…"[31]. Interestingly enough, this Charter defined the law, and then applied it retroactively against the Nazis. It also articulated the concept of an order of precedence for laws. According to Leslie Green in The contemporary law of armed conflict, "local legality was irrelevant…compliance with local or municipal law cannot be pleaded as an excuse for disregarding international law".[32]Many scholars have made the argument that the UN Charter represents the 'highest law' of all, taking precedence ahead of such treaty commitments stemming from NATO membership.[33] Of further interest is the introduction of the term 'crimes against humanity', a frequently used nomenclature vis-a- vis NATO's air strikes against Serbia. Article 6 c of the London Charter describes them as murder, extermination, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on

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[27] Ibid, p 20.
[28] Green, p 304.
[29] Ibid, p 305.
[30] Ibid, p 306.
[31] Ibid, p 285.
[32] Ibid, p 285.
[33] "The Threat or Use of Force in International Law", p 4. http://www.ejil.org/journal/Vol10/No1/ab1-1.html

political, racial or religious grounds.[34]The Serbs have committed many of these crimes in the course of the ethnic cleansing of Kosovo, but NATO's response should be examined within the context of the overarching principles that define just wars.

James Turner Johnson has analyzed a considerable number of theorists who have tried to define the paradigm underlying contemporary laws of armed conflict. There are almost as many opinions as there are theorists. But a relatively common thread is that which recognizes the resort to war as being legitimate if it is just, used by the political authority to protect the community from outside threats, and lawful.[35]Achieving a common understanding of acceptable behavior between nations is subject to negotiation, trial and error, as well as common practice based on that which has worked in the past. Eventually, these understandings may come to be accepted as laws.

It could be argued that in the twentieth century the rule of law has become more absolute than ever before, brought about by the effects of the increasing globalization of societies. Though there are still vast differences between nations, the power of an idea can be communicated to most regions of the globe using modern technologies which are beyond the ability of even the most repressive of sovereign authorities to control or censure. Some of the barriers between nations are now starting to disappear. Guy Phillips points out that contemporary democracies rarely, if ever, engage in war against other democratic nations.[36]Various scholars have pointed out that "democracies fight wars about as frequently as other classes of states",[37] but it is worth exploring this idea as to why democracies do not usually fight each other. One facet of this argument is that democracies have a variety of internal constraints in the form of public opinion (if the voters did not like the idea of fighting a war, they will vote the government out of office). Another is that foreign policy is made out in the open (secretive wars are very hard to hide if they start consuming people and resources), with the third being the internal

[34] Ibid, pp 285 - 286.
[35] Johnson, Just War Tradition and the Restraint of War, p 365.
[36] Guy Phillips, "The Statistical Study of War: The Relationship Between Democracy and War". The Changing Face of War. ed. by Allan D. English (Montreal and Kingston: McGill-Queens University Press, 1998), p 239.
[37] Ibid, p 243.

system of checks and balances (to prevent the irrational act). Perhaps the most interesting is the theory that democratic states share common values embodied in their democratic traditions.[38]Underlying all these ideas, however, is recognition of the importance of human rights and the primacy of the rule of law.[39]

Canada and the Rule of Law

Some nations with firmly established democratic principles treat laws a great deal more seriously than others. In Canada, the rule of law is essentially absolute for both individuals and the sovereign. As outlined by the Supreme Court of Canada, "the rule of law provides that the law is supreme over the acts of both governments and private persons. There is, in short, one law for all…the rule of law requires that all government action must comply with the law, including the Constitution".[40] The recently published Ethos of the Canadian Forces accords the issue a special mention: "The men and women who make up the Forces… understand and respect the same values which their fellow Canadians hold dear - fairness, integrity and respect for the rule of law."[41] It may be significant that this statement makes no distinction between Canadian national laws and the laws of armed conflict. Within the Canadian context the contemporary laws of armed conflict are based on treaties and customary international law. Treaties, which include protocols and conventions, are agreements concluded by states, whereby they accept a legal obligation to do, or not to do, something. Customary international law is a uniform, consistent and general repetition of acts by nations and recognition that such practice is legally binding.[42]Canada's military has a long history of support to and compliance with both national and international law and has taken strong measures against those who have transgressed. As witnessed by the tragedies that occurred during Canada's peace keeping/peace making operation in Somalia, Canadians have a low tolerance level for

[38] Ibid, p 245. Note: the comments in parentheses are mine.
[39] Ibid, p 250.
[40] Supreme Court of Canada File no. 25506. "In the Matter Concerning Certain Questions Relating to the Succession of Quebec from Canada." (Canada: February 1998.) ftp://www.quicklaw.com/pub/law_net/english/98SCJ061.TXT , p 29.
[41] Seminal Statement of Canadian Defence Ethos. CFP A-PD-055-002/PP-001, 1999, p1.
[42] Canada. The Law of Armed Conflict at the Operational and Tactical Level. CF B-GG005-027/AF-020. (Friday, January 8, 1999). p 1-3.

those who violate the common standards of behavior expected of its soldiers.[43]The illegitimate act is more than just frowned upon. Indeed, within the Canadian Forces the issue of legitimacy, in terms of how and why armed forces are committed to operations and the manner in which they conduct their affairs, has become a governing and much debated theme of the 1990's. In examining legitimacy, several key points are worth remembering. The first of these is that laws exist to regulate the affairs of society, or to provide a structure around which societies can grow and flourish. The second is that the law acts as a standard of conduct and morality.[44]

An interesting question, then, is a soldier (the term soldier is used herein to describe any uniformed member of the Canadian Forces) or member of the political authority ever legally entitled to disobey the rule of law? The obvious and easy answer is no. There might well be conditions under which lawful orders are illogical because of changing local circumstances, but interpreting such nuances is one of the principle functions of commanders. Legally issued orders can be overtaken by events (for example, a battalion is ordered to seize an objective just off the beach, such as occurred at Dieppe on 19 August, 1942. Chaos and confusion abound, and the battalion commander has not been able to contact his superior to verify if the original order still stands. In the face of the slaughter of his soldiers taking place all around him, and the apparent absurdity of carrying on with the assigned mission, he might be justified in ordering his troops to re-embark on the landing craft and withdraw. But it is possible that his original mission was critical to the overall success of the military operation, and his withdrawal resulted in a much larger failure. The commander would have to be prepared to take responsibility for what may have been an error in judgement).[45]

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[43] David Bercuson. Significant Incident: Canada's Army, the Airborne and the Murder in Somalia. (Toronto: McClelland and Stewart, 1996).
[44] Canadian Forces College Lecture/Discussion Paper "Law of Armed Conflict". (Toronto:1999). A/AS/JCO/DOC/S-2. p 1.
[45] C.P. Stacey, The Canadian Army 1939-1945: An Official Historical Summary. (Ottawa: King's Printer, 1948), p 78. {As a matter of interest, the Commanding Officer, Lt.Col Phillipps, was killed by enemy fire while signalling some of his soldiers to abandon the attempt to land on the beach. His decision was most definitely not an error in judgement}

This example is very different from a legal entitlement to disobey the law. If the order issued is unlawful or unjust, the soldier has a duty not to obey it. The fact that he or she believes they are disobeying an unjust law for ethical reasons does not make it legally permissible, but the circumstances under which the law was broken might well serve to mitigate the sentence and even the findings. In the best of instances it may well result in a change to the laws to allow future generations the benefit of their experiences, and make society a better place. But the simple fact of the matter is that the law has been broken. Something must be done to maintain the principle of the rule of law, and for the very real reason that if soldiers and representatives of the sovereign authority are allowed to decide on their own which laws they will and will not follow, chaos is not very far away. To this end, armed forces are subject to an internal disciplinary system, one purpose of which is to enforce compliance with the laws of armed conflict.[46] With regards to the political authority, the Nuremberg and Tokyo tribunals established the now accepted precedents that the official status of an individual, be they a head of state or government official, does not excuse them from liability if the act for which they are responsible was contrary to international law.[47]

The Kosovo Crisis

Having reviewed the importance of law in a just war, and the common threads which link the importance of the rule of law to Canadians in particular, let us apply a recent example of war to the paradigm and examine it's implications for possible lessons. In the recent case of Kosovo, large-scale violence between the Serbs and Kosovar Albanians flared up in late 1997 and early 1998. Reacting with a commendable degree of swiftness, elements of the international community took some initial steps to involving themselves, as expressed in UN Security Council Resolution (UNSCR) 1160 of March 1998. This resolution called for the Federal Republic of Yugoslavia and the Kosovar

[46] Canada, p 3-1.
[47] Leslie C. Green, "War Crimes, Crimes Against Humanity, and Command Responsibility", Naval War College Review, Vol. 50, No. 2 (Spring 1997), p 38.

Albanians to work towards a political solution,[48] with the cn,

During subsequent weeks it became quite clear that Russia would veto any resolution containing a mandate to threaten force or the actual use of force against the Former Yugoslavia. It was also clear to some that UNSCR 1199 was not sufficient in and of itself to provide the legal basis for the threat or use of force by any UN member state or international organizations,[55] such as NATO. When the violence in Kosovo continued, and with the UN appeared to be paralysed, NATO was not deterred from issuing an action order on 13 October 1998 which authorized air strikes within ninety-six hours, unless the warring parties reached a diplomatic agreement as per UNSCR 1199. The legal basis for air strikes was the concept of "humanitarian intervention" linked to the UN Charter, namely that NATO was acting to implement the will of the international community as represented by the relevant UNSCRs.[56] NATO's threat certainly got the attention of the Serbs. Thanks to intense diplomatic efforts by US envoy Richard Holbrooke and others, Milosevic agreed to comply with several demands. These included a NATO air verification regime and a ground based verification mission run by the OSCE to ensure compliance with the applicable UN Resolutions. Reacting to success, the UN Security Council endorsed the agreements in their UNSCR 1203 of 24 October 1998. But this resolution also included the fairly pointed reminder that "under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council."[57]

After a brief hiatus, the downward spiral of ethnic violence continued and reached such alarming depths that NATO deployed a ground-based extraction force in neighboring Macedonia, whose aim was to rescue the OSCE mission in Kosovo should it need assistance. By the end of January 1999, both NATO and most members of the international community were seriously concerned and frustrated at the intransigence of the warring factions.[58] But not all. Some UN members were probably delighted and may have seen this crisis as the possible demise of NATO and a great embarrassment to the

[55] Kosovo: “A Thin Red Line”, p 1
[56] Ibid, p 2.
[57] Godwin, p 76.
[58] Kosovo: “A Thin Red Line”, pp 2 -3.

Western powers. Accordingly, the Secretary General of NATO issued a stern "invitation" to attend a peace conference in Rambouillet, France. Non-attendees would be bombed.[59] Not surprisingly, both the Serbs and Kosovar Albanians sent representatives, but agreement to all the proposals therein remained elusive. The Serbs would not agree to let NATO deploy ground troops within its' borders in Kosovo to enforce the accord, viewing this as a complete abrogation of sovereignty. Still, a partial solution was negotiated with the attending representatives on 23 February 1999, with the Kosovar Albanians actually signing the agreement on 18 March. Milosevic did not attend the meetings, and despite repeated threats of NATO air strikes, he refused to either endorse his representatives efforts or to sign the document.[60]

Within Kosovo, Yugoslav efforts to implement their program of ethnic cleansing of all non-Serbs were accelerated, using the repressive and brutal methods that have essentially become the standard operating procedures throughout the Balkans since 1991. These methods include selective murder to cause terror, forced eviction, destruction of civilian residences so they have nowhere to go back to, and carefully selected routes out of the disputed areas left open down which the displaced and desperate could flee.[61] This repression precipitated a massive flood of people into nearby nations such as Macedonia and Albania, which threatened to overwhelm them both economically and socially. During the latter half of March, NATO issued almost daily threats of air strikes against the FRY, with a view to "preventing more human suffering and more repression and violence against the civilian population of Kosovo." On 23 March 1999, the NATO Secretary General highlighted the refusal of Milosevic to accept the proposals negotiated in Rambouillet and to abide by previously agreed limits on Serb Army and Special Police forces in Kosovo.[62] Throughout this period, the FRY was energetically reminding its associates, and any who would listen, that the UN Charter specifically prohibits the threat

[59] Godwin, p 77.
[60] Ibid,, p 77.
[61] Michael Ignatieff. Blood & Belonging. (Toronto: Viking/Penguin Group, 1993), pp 25-29.
[62] Dr. Javier Solana, Secretary General of NATO. (NATO Press Release 1999-040, http://www.nato.int/docu/pr/1999/p99-040e.htm). (23 March 1999).

or use of armed forces between states, unless authorised by the Security Council under Chapters VII or VIII.[63]

On 24 March 1999, four Canadian fighter-bombers participated in the first of a series of air strikes against the Federal Republic of Yugoslavia.[64] This concerted and orchestrated campaign eventually peaked with over a thousand aircraft involved from thirteen NATO nations and was to last seventy-eight days. More than thirty-six thousand sorties were initiated against a variety of targets within both Kosovo and Serbia, at the conclusion of which Milosevic essentially accepted the conditions outlined in the failed Rambouillet accords.[65] The targets engaged by NATO aircraft were varied and initially focused on those forces which NATO believed were largely responsible for implementing the ethnic cleansing campaign in Kosovo, the Serbian 3rd Army.[66]As pointed out by General Clarke, the senior NATO commander involved, it was generally believed that the first series of air strikes would get Milosevic back to the bargaining table. Shortly after the first attacks, Yugoslavia declared war on NATO and its member states. Once it became clear that this limited attack policy would not succeed, the NATO military commanders wanted to strike targets deep inside Serbia, and a second phase started on or about the 29 March.[67]These deep targets now included communications and civilian infrastructure. In the words of Lieutenant- General Short, the senior NATO air commander, "towards the end of the campaign… Milosevic hadn't had power in his capitol for a number of days and wasn't going to have it for a number of days more…there was no fuel for his automobiles and his military…and communications infrastructure was being systematically destroyed. Most of the bridges over the Danube had been dropped…the threat of destroying everything that kept the Serb leadership in power and comfort did the job, not random bombing of military targets in Serbia that held little importance to Serb leaders."[68]

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[63] Kosovo: "A Thin Red Line", p 7.
[64] The Honourable Art Eggleton, Minister of National Defence. Media Scrum Transcript "NATO Airstrikes Against Yugoslavia", 25 March 1999. http:/www.dnd.ca /eng/archive/mar99/25mar_w_e.htm
[65] Ignatieff: "The Virtual Commander", pp 30 - 31.
[66] John A. Tirpak, "Short's View of the Air Campaign." Air Force Magazine, September 1999, p 43.
[67] Ignatieff: "The Virtual Commander", p 32.

Why did Canada participate in this war? Paul Buteux argues that Canada will retain a strategic interest in European security because developments in European security are seen as having strategic consequences for North America. Though a circular argument, the overall links between North America and Europe in terms of trade, societal values, the rule of law, resource sharing, and even heritage are not likely to change much over the next decade or so. According to Buteux, "given the limitations of the Conference on Security Cooperation in Europe as a collective security organization, and the amorphous quality and uncertain future of any European defence and security identity, NATO remains the most effective institution for the service of Canadian security interests in Europe".[69] Certain demographic shifts are currently underway which will result in closer Canadian ties with the Asia Pacific Rim, but Canada's allies and interests as a nation have been South (the USA) and East (Western Europe). So an argument for Canada's participation is that it was well within our security policy to assist our allies in maintaining the peace and security of Europe. We are members of NATO; NATO believed war was required to resolve the issue; and Canada went to war. This simplistic explanation may well have been a contributing factor but, arguably, Canada's foreign policy is not so immature and a variety of other factors were probably hard at work prior to Canadian fighter bombers launching from bases in Italy on 24 March 1999.

Canada's Minister of Foreign Affairs outlined some of these factors in a speech presented on 7 April 1999: "NATO is engaged in Kosovo to restore human security to the Kosovars. It was and is the human imperative that has galvanized the alliance to act. To be sure strategic considerations played a role. The risk of the conflict spilling over into the rest of the Balkans, in particular Albania and the Former Yugoslav Republic of Macedonia, was and is a concern. However, NATO's actions are guided primarily by concern for the human rights and welfare of Kosovo's people. NATO's recourse to air strikes was precipitated by evidence that the regime of repression by the Serb government was on the rise and accelerating...all efforts to reach a negotiated agreement had been

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[68] Tirpak, p 43.
[69] Paul Buteux, "NATO and the Evolution of Canadian Defence and Security Policy". David B. Dewitt and David Leyton-Brown, ed. Canada's International Security Policy. (Scarborough, Ontario: Prentice Hall Canada Inc. 1995), p 169.

exhausted, in the face of the Federal Republic of Yugoslavia's intransigence."[70]Of particular note is the emphasis given to humanitarian considerations of people that were not part of either Canada's national collective, or citizens of a NATO state. Strategic considerations played a part, but it appears that it was the moral imperative that drove Canada into bombing the Serbs. The moral justice of the cause was paramount, in that the actions of the Serbs violated our sensibilities and respect for human dignity and indeed lives. The human rights of the Kosovar Albanians were being violated. But what of the rights of the larger political community in which they lived? There is no doubt that within the eyes of the law, Kosovo was not an independent state. It was and remains a province of the Republic of Yugoslavia, and though one could debate whether this entity is a republic, or even if it can claim the title of Yugoslavia, this debate bears little relevance to the issue within the law. The rights of political communities have been well defined by Michael Walzer, in that "they are summed up in the law books as territorial integrity and political sovereignty."[71] But he makes the very telling point that the duties and rights of states derive from the duties and rights of the men who compose them; in other words, the rights of states derive from the rights and consent of the individuals who are members of that state.[72]Within the context of a just war, then, which has priority? The rights of the individuals, or is it the rights of the state? And what happens when it is the state, as with the Serbs in the case of Kosovo, which has violated the rights of a minority group using the full weight of its' military forces as the instrument of violation? Is forceful intervention by an outside element justified, and if so, can it be legal?

When is the Use of Force Lawful

The use of force in resolving inter-state disputes is governed in international law by the United Nations Charter, which since 1945 has been the foundation of whatever international order the world currently enjoys. At the root of international law are the principles of sovereignty and the integrity of national boundaries. NATO is an alliance of

[70] The Honourable Lloyd Axworthy, Minister of Foreign Affairs. "Axworthy: Why Canada is in Kosovo". The Globe and Mail. (9 April 1999).
[71] Walzer, p 53.
[72] Ibid, pp 53 - 54.

democratic nations, and the importance of the rule of law to such states is self-evident. Despite certain criticisms of the United Nations as an organization, the countries of NATO have stood by it and assisted in resolving challenges when 'rogue' states have threatened this order.[73] The United Nations Charter sets very clear prohibitions on the threat or the use of force against the territorial integrity or political independence of any state. Under the Charter, there are only two exceptions for armed intervention, both of which have their antecedents as part of the just war tradition. The first is individual or collective self-defence. Individual self-defence is very much part of the just war tradition and is self-explanatory. But a form of armed intervention is also allowed through the acceptance of multinational agreements providing for mutual defence (such as the NATO charter), in which it is lawful to conduct war to defend an ally. Note that the concept of defence is elastic; it means not only the repelling of an injury in progress, but reaction to aggressive action already taken and completed, such as occurred with the Iraqi invasion of Kuwait.[74]

The second exception to the prohibition on using force is when, acting under Chapter VII, the United Nations Security Council 'determines the existence of any threat to the peace, breach of the peace or act of aggression and decides on coercive measures to bring an end to the situation.'[75]As we have seen, UNSCR 1199 identified a breach of the peace as having occurred, but due to political infighting on the Security Council no coercive measures involving or authorising the use of force were approved. As NATO is not a sovereign state, each nation within NATO had to subscribe to supporting the decision to take unilateral action outside of the legal foundation provided by the United Nations Charter. As pointed out by Catherine Guicherd, a NATO legal expert, "by Summer 1998, the members of the Alliance were apparently in agreement that there was a moral and political imperative to act. But they could not easily and unanimously find a legal ground for military action against Serbia…. Six countries – Belgium, France, Germany, Greece, Italy and Spain had political and legal misgivings reflecting the

[73] Catherine Guicherd. "International Law and the War in Kosovo". Survival, Vol. 41, No. 2 (London: Summer 1999). pp 20 - 21.
[74] Johnston, Can Modern War be Just? p 178.
[75] Guicherd, p 21.

'unfinished' state of international law concerning humanitarian intervention."[76]And a review of what is meant by this 'unfinished' state will allow us to address the issue of which has precedence, individual rights or those of the state.

As of the 1948, the UN Declaration of Human Rights, a parallel trend to the inviolability of sovereignty and territorial integrity, has evolved. Some jurists claim that the priority rests now with human or basic individual rights, and certain states such as Canada have undertaken legal commitments to uphold them. Their argument is that the prevention of massive human rights violations or humanitarian catastrophes has become the basis for humanitarian intervention. According to the well established rules of jus ad bellum, (which you will recall is the justice of war, a principle of the tradition of just war) intervention would have to be the solution of last resort. And was it? Interestingly enough the first NATO commander in Kosovo, Lieutenant-General Sir Michael Jackson, claims that the single most significant event which led to Milosevic's acceptance to withdraw his forces from Kosovo was Russia urging him to accept NATO's terms, and not the bombing.[77] This position is supported by a number of other experts of the region, and certainly raises a degree of doubt into the contention that all diplomatic avenues had been exhausted.[78] NATO bombs dropping on the Serbs offered no immediate threat to Russian interests, and was unlikely to change Russia's position vis-a-vis the legality of the issue. Though it is only speculation, perhaps US pressure or promises with regards to financial support played a large part in negating Russian support to Milosevic. It is possible that the full story as to why Milosevic acceded to NATO will never be known, but it is unlikely that he was overly concerned for the lives of his soldiers, or the fragility of Serbia's infrastructure being destroyed by NATO's bombs. His public outrage over the supposed illegality of NATO initiating combat action against his forces must be tempered with his less than perfect respect for the lives of tens of thousands in Croatia, Bosnia, and elsewhere within the Former Yugoslavia.

[76] Guicherd, p 28.
[77] Andrew Gilligan, "Russia, not bombs, brought end to war in Kosovo, says Jackson", The Telegraph, (London: 1 August 1999)
[78] Ignatieff, pp 31 - 36.

And was Milosevic's complaint accurate? The Supreme Court of Canada has pointed out that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order."[79] Some of those who support armed intervention on the grounds of humanitarian or human rights issues admit that these practices have not yet been codified into law,[80] but the paralysis of the Security Council resulted, arguably, in a situation where the maintenance of order became impossible. Debate centers on the linkages between the just causes for war and the rule of law, and which has precedence. To those who subscribe to the primacy of human rights over sovereignty, individual rights have precedence over those of the state. To those who are concerned with the value of precedence and the absolute rule of law, the rights of the state remain supreme. Somewhere in the middle is the natural compromise on which significant portions of the international community may well settle, in accordance with the evolutionary nature of laws.

But there remains the opposing point of view. As articulated by Guicherd "the overwhelming majority of international lawyers considers that…humanitarian intervention with military means…outside of the UN Charter cannot be recognised."[81]The reason for this is simple. In the opinion of most legal experts it is against the law and may lead to others viewing the law as negotiable. In preparing a recent background paper for the United Nations Association of the USA, Jeffrey Laurenti has voiced current fears among jurists: "that abandonment of the Security Council's asserted monopoly on determining the lawful use of force against others, except in self-defence, could put the world community on a slippery slope of competing claims of 'rights' to intervene-with the potential consequence of escalating hostilities rather than resolving them… Some warn that that such fragmentation of lawful authority on the use of force could prompt the emergence of counter-alliances among those fearful of high-handed interventionism by an overweening Western Alliance. If the UN has too many inhibitions about the use of force, these worry, NATO under US pressure may have too

[79] Supreme Court of Canada, p 29.
[80] Guicherd, p 24.
[81] Guicherd, p 24.

few."[82]Indeed, a recent article by the Chairman of Russia's Commission on Human Rights makes Laurenti's concerns appear all too real. Concerning sensitivities to Russia's ongoing war in Chechnya, he defended his nation's actions by writing "each state has the right to use armed forces in an internal conflict to protect law and order, national unity and territorial integrity…the NATO attack on Yugoslavia was a gross violation of the UN Charter and all norms of international law"… Today, those guilty of the Balkans tragedy are accusing Russia of committing illegal actions…the political bias is obvious."[83]Kofi Annan has written that "The genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But this year's conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority…is there not a danger of such interventions undermining the imperfect, yet resilient, security system created…and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and under what circumstances."[84]

Perhaps the issue of NATO's armed intervention in Kosovo is best summed up by a Presiding Judge at the International Criminal Tribunal for the former Yugoslavia, Antonio Cassese: "From an ethical viewpoint [NATO's] resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is contrary to international law."[85]And let us recall the principles of the just war tradition, namely that making war falls within this definition if it is just (seeks to correct a fault which violates certain moral criteria), used by the political authority to protect the community from outside threats and lawful. NATO's actions against Serbia was certainly launched for the best of moral reasons; by recent common practice with

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[82] Jeffrey Laurenti, as quoted in "NATO's Future Strategic Concept: From Out of Area to Out of Treaty?". European Journal of International Law. Vol. 10, No. 1, 1999. http://www.ejil.org /journal/Vol10?No1/ab1-3.html

[83] Vladimir Kartashkin, Chairman of Russia's Human Rights Commission. "Moscow's actions logical, legal". USA Today. (18 November, 1999). p 16A.

[84] Koffi Annan, "Two Concepts of Sovereignty". The Economist. (London:18 September 1999). http://www.un.org/Overview/SG?kaecon.htm ,pp 1-3.

[85] His Honour Presiding Justice Antonio Cassese. "Ex iniura ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Intervention Countermeasures in the World Community?." European Journal Of International Law. Vol. 10, No. 1. http://www.ejil.org/journal/Vol10/No1/com.html , p 3.

regards to the emerging international importance of human rights, it is clear that NATO's actions were aimed at helping the community of Kosovar Albanians by protecting them from ethnic cleansing and other horrible abuses. But, according to a wide variety of experts NATO's actions were not lawful, and thus not completely in the just war tradition. This concept of illegality may be important, as arguably, the UN Charter was established to institute the rule of law in an attempt to prevent millions dying, due to local or regional claims and interpretations as to what constitutes acceptable grounds for the use of force between nations[86].

Conclusion

The member states of NATO and the vast majority of their citizens honestly believed they had to intervene with military force so as to maintain the rule of law for the rights of the individual Kosovars being mistreated and murdered by the Serbs. Yet, the authority which grants' legal status to this type of action was paralysed. The United Nations Security Council was deadlocked. The member states of NATO acted nonetheless, motivated by moral reasons and a perhaps a degree of frustration that their Alliance was in danger of lapsing into irrelevancy.[87] Since the creation of the United Nations Charter in 1945, the rule of law has been the building block on which inter-state affairs have been conducted, with varying degrees of success. Countless millions have died over the last half-century in a variety of relatively limited wars, but perhaps many more are still alive because the international community is moving together towards acceptance of the rule of law.[88]

Laws are evolutionary in nature and reflect societal trends, values and beliefs. There is little doubt that we in North America and Europe are on the cusp of a transformation of Western inter-state law, in which respect for certain human rights will be seen as paramount,[89] but the rest of the World is not necessarily like the West. Given

[86] Annan, p 2.
[87] Godwin: p 87.
[88] Annan, p 2.
[89] Guicherd, pp 29 - 31.

the importance of a just cause for war as a basic principle for initiating combat action, the problems of transporting or imposing Western values on the rest of the World becomes apparent in the case of Russia's efforts in Chechnya, or the human rights abuses within China. If large numbers of people are suffering and their basic human rights are being violated by the state, does this mean that combat action by an outside party is automatically within the law. Does it become a moral imperative? Those who make Western national and international policy are usually pragmatic and experienced realists', and the idea of NATO, or a coalition of the willing, attacking a major nuclear power to redress humanitarian abuses would not be considered without thinking through the possible consequences. Though it may sound trite, Western democratic values and respect for human rights are worth fighting for, if one is a Western democrat and respect's human rights. But at what cost? If the answer is that the potential cost must be minimal, as in the case of Kosovo, then perhaps a value judgment has been applied to the relative worth of human lives. Are Western lives worth more than those of others, if one is from the West? The realist might counter that NATO's bombing campaign in Kosovo was based on a careful analysis of the moral requirement to achieve the art of the possible. NATO was not facing the likelihood of a high casualty rate, the cause was just, and the resources to stop horrible and unlawful acts against the helpless were available. In the best traditions of Saint Augustine, NATO's decision to attack was based on the concept of a righteous war, fought in the name of universal rights and a belief in the sanctity of the weak and helpless. The urge to act outweighed the urge to cling to outdated laws and procedures.

But breaking the rule of law to enforce the rule of law is a dangerous path to tread, and where does it stop? The rule of law must be maintained, or else let slip the dogs of war and chaos unfolds. So now that the attack by NATO is over, the states which participated in the NATO bombing attacks should consider facing the consequences of breaking the law. Their outstanding ethical and moral considerations that led to the decision to attack Serbia, as well as the tens of thousands of lives they saved, will bear them well when it comes time to consider any possible mitigation. But the law appears to have been broken. It should not be for the transgressor of a law to determine if he or she

is guilty. That is the duty, in the democratic tradition, of a responsible jurist(s). Nor is it the right of the party breaking a law to determine that the law has been overtaken by events, be they evolutionary or revolutionary in nature.[90]So as to maintain respect for the rule of law, those nations who fought with honor to prevent murder and ethnic cleansing should consider submitting to lawful adjudication. It is possible that such submission will re-establish respect for the rule of law, with a view to changing the current international system that allowed situations, such as NATO's actions during the Kosovo crisis, to arise. NATO acted correctly, morally and justly. The laws must be changed to allow future actions of this nature to be lawful, and this change will be yet another stage in the evolutionary trend of the Just War tradition.[91]

[90] Green, "War Crimes, Crimes against Humanity, and Command Responsibility", pp 49 - 50.
[91] Annan, p 2.

BIBLIOGRAPHY

Books

Bercuson, David. Significant Incident: Canada's Army, the Airborne and the Murder in Somalia. Toronto, McClelland and Stewart, 1996.

Bellamy, Christopher. The Evolution of Modern Land Warfare: Theory and Practice. London: Routledge, 1990.

Canada. Department of National Defence. The Law of Armed Conflict at the Operational or Tactical Level. Ottawa: Office of the Judge Advocate General. Printed Friday, January 08, 1999. (B-GG-005-027/AF-020).

Christopher, Paul. The Ethics of War and Peace: An Introduction to Legal and Moral Issues. New Jersey: Prentice-Hall, 1994.

Dewitt, David B and Leyton-Brown, David. ed. Canada' International Security Policy. Scarborough, Ontario: Prentice Hall Canada inc., 1995.

English, Allan D. ed. The Changing Face of War. Montreal and Kingston, RMC: McGill-Queens University Press, 1998.

Green, Leslie C. The contemporary law of armed conflict. Manchester University Press: Manchester, 1993.

Ignatieff, Michael. Blood & Belonging. Toronto: Viking/Penguin Group, 1993.

Johnson, James Turner. Just War Tradition and the Restraint of War: A Moral and Historical Inquiry. Princeton: Princeton University Press, 1984.

Johnson, James Turner. Can Modern War Be Just ? . Princeton: Princeton University Press,

Johnson, James Turner. Ideology, Reason and the Limitation of War. Princeton: Princeton University Press, 1975.

Karsten, Peter. Law, Soldiers and Combat. Westport, Conn: Greenwood Press, 1978.

Lider, Julian. Military Theory: Concepts, Structure , Problems. New York: St. Martins Press, 1983.

Osiel, Mark. Obeying Orders: Atrocity, Military Discipline, and the Law of War. New Brunswick, NJ: Transaction Publishers, 1998.

Rogers, AP. Law on the Battlefield. Manchester: Manchester University Press, 1996.

Stacey, Colonel C. P. The Canadian Army 1939-1945: An Official Historical Summary. Ottawa: King's Printer, 1948.

Wakin, Malham M. ed. War, Morality and the Military Profession. Boulder and London: Westview Press, 1986.

Walzer, Michael. Just and Unjust Wars: A Moral Argument with Historical Illustrations. Second Edition. USA: Basic Books, 1992.

Articles

Annan, Kofi. "Two concepts of sovereignty". The Economist. London, (18 September 1999). http://www.un.org/Overview/SG/kaecon.htm

Anonymous. "Other People's Wars". The Economist. London, (31 July –6 August1999). p13.

Anonymous. "Kosovo's Corpse Count: How Many Bodies Makes a Genocide". The Times. London (2 November 1999).

Anonymous. "Kosovo: A Thin Red Line". European Journal of International Law, Vol 10, No. 1. (1999). http://www.ejil.org/journal /Vol10/No1/ab1-2.html

Anonymous. "NATO, the UN and the Use of Force: Legal Aspects: The Threat or Use of Force in International Law". European Journal of International Law. Vol. 10, No. 1. (1999). http://www.ejil.org/journal/Vol10/No1/ab-1.html.

Axworthy, Lloyd. "Axworthy: Why Canada is in Kosovo". The Globe and Mail. Toronto, (9 April 1999).

Barnes, Frederick. "Washington Looks at Kosovo's Lessons". Defense and Foreign Affairs Strategic Policy. (July 1999).

Cassese, Antonio. Presiding Judge. "Ex Iniuria ius oritor: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community". European Journal of International Law. Vol. 10, No. 1. (1999). http://www.ejil.org/journal/Vol10/No1com.html

Canada. Canadian Forces College, Advanced Military Studies Course. Lecture/ Discussion papers on Law of Armed Conflict. A/AS/JCO/DOC/S-2, (1999).

Canada. The Supreme Court of Canada File No. 25506. “Concerning the Matter of Certain Questions Relating to the Succession of Quebec from Canada”. Canada, 20 August 1998.

Despretz, Patrice. “Le droit international et les menaces d’intervention de l’OTAN au Kosovo”. Actualite et droit international, (1998). http://www.ridi.org/adi/1998/199811 a4.html 30.

Eggleton, Art, Minister of National Defence. “NATO Airstrikes Against Kosovo”. Media scrum transcripts, (25 March 1999).

Eggelton, Art. Minister of National Defence. “Canadian Lessons from the Kosovo Crisis”. Speech presented at Harvard University. (30 September 1999). http://www.dnd.ca/eng/archive/speeches/30SepHarvard_s_e.htm

Eggelton, Art, Minister of National Defence. “House of Commons Debate on Kosovo, 27 April 1999”. http://www.dnd.ca/eng/archives/speeches/mndhc_s_e.htm

Elliot, Michael. “The Lessons of a War of Values”. Newsweek, New York. (28 June 1999).

Gilligan, Andrew. “Russia, not bombs, brought end to war in Kosovo, says Jackson”. Electronic Telegraph, (1 August 1999). http://www.telegraph.co.uk: 8…atmo=00000Osb&pg=/et/99/8/1wkos101.html

Giucherd, Catherine. “International Law and the War in Kosovo”. Survival, Vol. 41, No. 2, (Summer 1999). (London: International Institute of Strategic Studies). pp 19 - 34.

Godwin, Major JD. “NATO’s Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo”. Military Law Review. Vol. 160, (June 1999). pp 1 - 95.

Green, Leslie C. “War Crimes, Crimes Against Humanity and Command Responsibility”. Naval War College Review, Vol 50, No. 2 (Spring 1997). pp 26 – 69.

Ignatieff, Michael. “The Virtual Commander: NATO’s high-tech bid to wage a risk-free war”. The New Yorker. New York, (2 August 1999). pp 30 - 36.

Kartashkin, Vladimir. Chairman, Russia’s Commission on Human Rights. “Moscow’s actions logical, legal”. USA Today. (18 November 1999).

Simma, Bruno. “NATO, the UN and the Use of Force: Legal Aspects”. European Journal of International Law. Vol.10, No 1. (1999). http://www.ejil.org/journal/Vol10/No1/ab1.html

Tirpak, John A. “Short’s View of the Air Campaign”. Air Force Magazine, (September 1999). pp 43 - 47