THE LAWS OF WAR: AN EXAMINATION OF THE LEGALITY OF NATO'S INTERVENTION IN THE FORMER YUGOSLAVIA AND THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN REDRESSING CLAIMS FOR CIVILIAN CASUALTIES IN WAR

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I. INTRODUCTION

On April 23, 1999, North Atlantic Treaty Organization (NATO) forces bombed the headquarters of the Serbian state radio and television station killing sixteen civilians and injuring many more.¹ The bombing was part of a seventy-eight day bombing campaign that began when Yugoslav President Slobodan Milosevic refused to comply with NATO demands to withdraw forces from Kosovo and cease the ongoing persecution of Albanians.² The attack on Belgrade was part of an allied intervention that cost NATO over four billion U.S. dollars.³ NATO forces dropped more than 23,000 bombs, killed over 5,000 Yugoslav military personnel and 1,500 civilians, and caused roughly 100 billion U.S. dollars worth of damage to Yugoslav factories, refineries, bridges, and roads.⁴ NATO has been strongly criticized for launching indiscriminate attacks resulting in unnecessary civilian casualties.⁵ NATO has been criticized specifically for the targets of their attacks, the weapons used, and the means for carrying out the bombings.⁶

The region of the former Yugoslavia is not a stranger to war.⁷ Its strategic location has made it susceptible to invasion and rule by several empires as far back as history is recorded.⁸ As a result, the people of the former Yugoslavia,

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¹ See Serb TV Bomb Victims to Sue NATO, BIRMINGHAM POST, July 17, 2000 at 9, available at LEXIS, News Group File.
² See Nicholas Rufford & Emily Milich, Families to Sue Britain Over Belgrade Blitz, LONDON TIMES, July 16, 2000, available at LEXIS, News Group File.
⁴ Id.
⁶ Id. at 3.
⁸ See id.
because of their diverse religious and historic backgrounds, have lived in a perpetual state of ethnic tension.9

Though one might expect this deeply-rooted ethnic tension inevitably to result in the war that began in 1991, more immediate factors led to the conflict.10 There was a measurable rise of Serb nationalism in the 1980s that directly contributed to the rising tensions in the area.11 Leading this Serbian nationalism was the eventual Communist Party chief, Slobodan Milosevic.12 Milosevic’s use of federal troops against Albanians in Kosovo began his campaign to acquire power over all of Yugoslavia.13 This quest to increase Serbian power sparked heated resistance from the Yugoslav republics of Croatia and Slovenia, who were concerned with the increasing power of the Serbs.

In 1991, after failed attempts to negotiate with Milosevic over a new Yugoslav constitution, Croatia and Slovenia declared their independence.14 Milosevic then ordered the Yugoslav National Army into Slovenia to protect Serbs living in the area, and the fighting began.15 As early as 1992, Bosnian President Alija Izetbegovic asked for NATO airstrikes, but all requests were denied.16 NATO’s refusal to send forces earlier has been criticized as the gravest mistake of the Yugoslav crisis, as some feel that early intervention would likely have led to a more peaceful result and avoided many of the atrocities that ensued.17

Nevertheless, criticism and scrutiny followed when NATO forces did finally intervene, particularly after the raid that destroyed the radio television station and took the lives of unsuspecting civilians.18 The arguably civilian nature of the radio television station made its bombing one of the most controversial of the seventy-eight day campaign. The victims’ families are now suing the British Government and seventeen of the nineteen members of

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9 See id.
10 See id. at 25.
11 See id.
12 Id.
13 See id.
14 See id. at 26.
15 See id.
16 The United States said that no military resolution from outside was possible. See id. at 30.
17 See id. at 30-31.
18 See Amnesty International, supra note 5, at 2.8-2.9.
NATO\textsuperscript{19} pursuant to article two\textsuperscript{20} and article ten\textsuperscript{21} of the European Convention on Human Rights.

It has been stated that this war was waged, not "in the name of national interests, but rather in the name of principles and values . . . It is fighting because no decent person can stand by and watch the systematic, state-directed murder of other people."\textsuperscript{22} This humanitarian rationale provided a basis for NATO and the leaders of the Member States to vigorously defend the bombing campaign. This defense may be inadequate, however, if NATO's actions violated the laws of war. The success of the claims brought by the victims' families depends largely on the legal principles governing the waging of war and methods of attack.

Amnesty International is one of many groups that has publicly accused NATO forces of committing "serious violations of the laws of war leading in a number of cases to the unlawful killings of civilians."\textsuperscript{23} While one may expect civilian casualties in war, laws exist that are designed to prevent unnecessary civilian deaths. These laws prohibit both direct and indiscriminate attacks on civilians. They further proscribe the bombing of military targets that could have a "disproportionate impact on civilians or civilian objects."\textsuperscript{24} These laws of war and other guidelines are set out in Protocol I Additional to the Geneva Conventions of 1949.\textsuperscript{25} Though ratified by over 150 states, three of NATO's members are not parties to the Protocol: France, Turkey, and the United States.\textsuperscript{26} Many Protocol I articles specifically provide for the protection of civilians and demand that armed forces distinguish civilian targets from those that are military in nature. Such measures extend to protecting civilians even when used to shield military targets by parties to a conflict.\textsuperscript{27} It is the articles in this Protocol and others that Amnesty International has accused NATO and its member states of violating.

Also relevant to the legality of NATO's use of force in Yugoslavia is the U.N. Charter, particularly articles two and fifty-one. Article 2 states, "All

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\item See Rufford & Milich, \textit{supra} note 2, at 32.
\item European Convention on Human Rights, Europ. T.S. No. 005 at article 2, \textit{available at} http://conventions.coe.int/treaty/EN/Treaties/html/005.htm (guaranteeing the right to life).
\item Id. at art. 10 (protecting freedom of expression).
\item Amnesty International, \textit{supra} note 5 at summary preceding report, para 3.
\item Id. at 6.
\item See id. at 6-7.
\item See id. at 8.
\end{itemize}

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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 [p]urposes of the United Nations."

Because the attack on Yugoslavia commenced without the consent of the Security Council, it would appear that the bombing was in direct violation of Article 2 of the U.N. Charter.

Article 51 allows the use of force for self-defense. It states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." Here, there may be more room for argument that the NATO forces acted collectively in self-defense. However, as no NATO members were actually attacked by Yugoslavia, this too proves problematic. It has also been suggested that NATO's actions constitute "anticipatory collective self-defense." This right has been recognized under customary international law and requires that the anticipatory self-defense be "necessary, instant, overwhelming, and admitting of no other alternative with no moment for deliberation." It is questionable, however, whether such a standard is in force in the U.N. Charter.

This note examines all of these issues with respect to the ongoing suit against NATO member states for the bombing of the radio television station in Belgrade. The legal issues associated with Great Britain's sinking of the Argentine ship Belgrano offers insight for predicting the outcome of the suit by these Yugoslav families. First, this note discusses the mechanics of how these families are actually able to bring the suit. Then it explores the substantive merits of the case. Finally the work concludes with assertions regarding the legitimacy and prudence of the families' claim and any problems associated with allowing a suit of this sort to be commenced.

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28 U.N. CHARTER art. 2.
29 Id. at art. 51.
31 Id. (quoting R.Y. Jennings, The Caroline and McLeod Cases, 32 AM. J. INT'L L. 89 (1938)).
32 Relatives of 323 sailors that were killed on the cruiser General Belgrano in the 1982 Falklands conflict attempted to sue Great Britain for alleged violations in the attack. The Belgrano was sunk by a British torpedo when it was outside the 200-mile total exclusion zone that was declared around the Falkland Islands after Argentineans seized the colony in 1982.
II. FILING A CLAIM IN THE EUROPEAN COURT OF HUMAN RIGHTS

The ability of individuals to act in international law, specifically to bring suit in the European Court of Human Rights, has undergone a great deal of change in the past several years. Historically, it was the responsibility of states to take action on behalf of their citizens. Today, individuals may file suits against states in the European Court of Human Rights. States may also bring actions against each other, though this rarely occurs.

The European Court of Human Rights was created to enforce the European Convention on Human Rights. The Convention is a series of articles expounding upon fundamental human rights not to be violated by the High Contracting Parties to the Convention. While the Convention has existed since 1950 and entered into force in 1953, the procedures for bringing claims has evolved over time, and the number of claims has substantially increased as a result.

In 1981, a total of 404 applications for suit were filed with the Court. In 1994, this number increased to 2944. Since then, the number of applications has skyrocketed. The workload of the Court increased by forty percent in 1999, and as of September 1, 2000, there were 15,107 applications pending, with an additional 6835 applications that were newly registered between January 1, and August 31, 2000. President of the European Court of Human Rights, Luzius Wildhaber, in urging the parties to the convention to support more vigorously, noted that the Court is now receiving some 170 phone calls and over 720 letters per day. The number of claims are likely related to increased awareness of the court, the high level of conflict in Eastern Europe, and the ease with which an individual with little or no legal background may make an application to the court.

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33 See FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 478 (2d ed. 1996).
34 See id. at 479.
35 See id. at 19.
36 See id.
37 Id. at 479.
38 Id.
39 See Press Release, infra note 40.
41 Id.
42 See id.
originally, the application process was set up with three separate branches to handle applications. a commission on human rights first looked at the application to determine admissibility. this first stage was largely a screening process that encouraged settlement and made preliminary decisions on possible violations based on the facts of the case. based on their judgment, the commission referred cases either to a committee of ministers or the european court, where final decisions were made on cases. today, seeking redress in the court may begin by simply logging on to the internet. any person wishing to apply can access an application that is created to be easily understood by most literate adults seeking redress for potential violations. while written in plain language, ambiguities and questions arise in the application process that one may look to case law to try and resolve.

the notes for persons wishing to apply to the european court of human rights lay out two important limits to those wishing to apply to the court. first, the european court of human rights can only hear cases that arise from violations of the articles and protocols to the european convention on human rights. secondly, the court does not act as a court of appeals from national courts and "cannot annul or alter their decisions." the instructions to potential applicants give rise to certain questions regarding redress for victims of violations. if a national court awards a very small or nominal judgment, does that preclude further action by the plaintiff in the european court of human rights? would a larger award by the court of human rights constitute a modification of a nominal award by the national court, and therefore be impermissible?

one of the most troubling areas of the application gives rise to a particularly important issue regarding the procedure for selection of cases to be admitted to the court. the notes state, "the court can only deal with an

43 see newman & weissbrodt, supra note 33, at 479.
44 see id.
45 see id.
46 see id.
47 see application to the european court of human rights, available at http://www.echr.coe.int/BilingualDocuments/ApplicationInformation.htm#Information%20For%20Applications%20Concernant%20Les%20Requests (last visited Feb. 6, 2002).
48 see id.
49 see notes for the guidance of persons wishing to apply to the european court of human rights, at para. 6, available at http://www.echr.coe.int/Eng/EDOCS/InfodocRevised2.htm (last visited Feb. 6, 2002).
50 id.
application after all domestic remedies have been exhausted." Here, one must wonder what constitutes "domestic remedies" and which state is able to redress one's complaint. The case at issue here allows for two possible interpretations.

First, as Serbia is not a Contracting Party to the European Convention on Human Rights, it is not bound by the Convention or the European Court of Human Rights. Therefore, it would seem that the Plaintiffs in Belgrade would be forced to seek redress in the highest British Courts before being allowed to apply to the Court of Human Rights. This conclusion is strengthened when one considers the difficulties involved in sending heads of state to represent their governments in forums that may be hostile or unstable.

Conversely, it seems unduly burdensome to force victims to go to considerable trouble and expense to travel to the state of the alleged wrongdoer and try to navigate a legal system with which they may well be unfamiliar. As of yet, one of the few indications that Great Britain is the state which is "concerned" and able to redress the complaint is that the attorneys representing the families in Belgrade are from a firm in Colchester, England. This presumption is not conclusive since the British solicitors are only part of an international legal team representing the families for no fee. To date, there has been no mention of the case coming before the High Courts in Great Britain.

The situation is further complicated by a six month time limit from the date of the judgment of a state's highest court to apply to the European Court of Human Rights. If the time limit is not complied with, the Court will not allow the case to proceed. Recent cases shed some light on both the requirements of seeking redress in the highest court in the concerned state and the mandatory six month filing period. In July 2000, the European Court of Human Rights dismissed the Belgrano case because it did not fall within the

51 Id. (Paragraph 6 used to read "one must exhaust all remedies in the State concerned which could redress the complaint." Though the wording has changed, the ambiguity regarding the state in which one must seek redress remains. The language of the application has changed since October 2000 when this was written).

52 Great Britain has been a party to the Convention on Human Rights since 1951.

53 It would not seem prudent, for example, to send the foreign minister from Britain to Belgrade to stand trial for the wrongful bombing of the radio television station. Not only would one fear for his life in an area plagued by war, but it would be difficult to have an impartial trial in a state that is so unstable.

54 See Rufford & Milich, supra note 2, at 1.

55 See id.

56 See Notes for the guidance of persons wishing to apply to the European Court of Human Rights, supra note 49, at para. 6.
six months required for application.\textsuperscript{57} The facts of that case are substantially similar to those presented in the Belgrade bombings: 323 sailors on the cruiser General Belgrano were killed when the British nuclear submarine Conqueror torpedoed the vessel outside a 200 mile "exclusion zone."\textsuperscript{58} As a result, families of the victims sued Great Britain pursuant to Article 2 of the Convention on Human Rights.\textsuperscript{59} Former Prime Minister Margaret Thatcher was heavily criticized for the decision to bomb the Belgrano, and all efforts to litigate the case in Argentina or have Thatcher extradited were unsuccessful.\textsuperscript{60}

Because there was no action taken in the British Courts, the six month statute of limitations was deemed to have begun on the day of the sinking of the Belgrano in 1982.\textsuperscript{61} Therefore, the panel of judges at the European Court of Human Rights rejected the Argentine attorneys' argument that the time period should run from the final attempt to seek redress in the Argentine Courts in March 2000.\textsuperscript{62}

Why is it that the judges at the Court of Human Rights require the legal action to take place in Great Britain? It seems particularly harsh in the Belgrano case because it would have been next to impossible for the families to bring the case within the six month time limit. The sinking of the Belgrano sparked the Falklands War, surely making legal action by families of victims particularly difficult at the time. Nevertheless, the case was rejected.

Another case explains relevant provisions of the application regarding exhausting domestic remedies. In \textit{Rehbock v. Slovenia},\textsuperscript{63} Ernst Rehbock, a German national, was arrested in September 1995 by Slovenian police and accused of smuggling and dealing narcotics. During his detention in Slovenia, he was severely maltreated and was refused medical attention.\textsuperscript{64}

\textsuperscript{58} Andy McSmith \textit{Belgrano Families to sue Britain}, ELECTRONIC TELEGRAPH (June 30, 2000), available at http://www.spaceship-earth.de/Letters/Editor/Belgrano_families_to_sue_Britain.htm.
\textsuperscript{59} See id.
\textsuperscript{60} See Christopher Lockwood, \textit{Thatcher shrugs off call for prosecution over Belgrano Sinking}, THE TELEGRAPH (July 7, 2000) at http://www.seprin.com/gralbelgrano.htm. See also Thompson, supra note 57, at 1.
\textsuperscript{61} See Thompson, supra note 57, at 1.
\textsuperscript{62} See id.
\textsuperscript{64} See id.
In September 1995, an application was submitted to the European Commission of Human Rights. The application alleged violations of articles three, five, and eight of the European Convention on Human Rights. In arguing against Rehbock, the government of Slovenia objected because Rehbock had not exhausted the domestic remedies available as required by Article 35 of the convention. Here, the court rejected the government’s argument not because Rehbock had in fact exhausted such remedies, but because Slovenia had not raised the objection prior to the Commission’s decision to admit the application.

It is difficult not to be troubled by the apparent inconsistency between Rehbock and the Belgrano dispute. If Rehbock was correctly decided, and the case was admitted because of a procedural error on Slovenia’s part, why does it not specify in Article 35 that an objection must be raised prior to the decision by the Commission on whether to hear the case? Article 35, section 1 states that “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.” Nowhere does it state that objections must be filed based on a violation of this article before the Commission’s decision, and to presume such a requirement would be an unlikely conclusion to be extracted from “generally recognized rules of international law.” Further, there is no provision requiring notice to opposing parties that an application is being submitted, so there is no way of guaranteeing that Slovenia knew of the application before it was too late to register an objection.

These inconsistencies appear to put the Belgrano decision on even more unstable ground. There is no indication that objections were or were not filed before the Court decided not to accept the application. However, efforts were made at a judicial resolution to the conflict, even if they were tried in Argentina rather than Great Britain. The Belgrano case warrants at least as much attention as was given Rehbock, particularly as the case involved the death of over 300 sailors. Despite its importance and similarity, the Belgrano

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65 Article three is a prohibition of torture and article five guarantees the right to liberty and security. Article eight guarantees the right to respect for private and family life.
66 See Rehbock, supra note 63.
67 See id.
69 Id.
70 The Court of Human Rights has indicated that deprivation of life is subject to particular scrutiny. “The Court recalled its constant caselaw that it must subject deprivations of life to the
case was thrown out on the very procedural grounds that the Commission found permissible in *Rehbock*.

In trying to resolve the apparent discrepancy, one may look to the Convention’s language and the application. Unfortunately the language of the application offers little help. The pertinent part of paragraph seven extracts some of the same language from the Convention: “It is... absolutely essential that before applying to the Court, you should have tried *all judicial remedies in the State concerned*... You must accordingly have first applied to the domestic courts, up to and including the highest court with jurisdiction in the matter.” On its face, this provision indicates that exhausting domestic remedies is a measure which must be complied with and cannot be waived. Moreover, it does not seem to leave any room for judicial discretion. Again, if judicial discretion were appropriate with reference to such requirements, why is it not utilized in situations where bringing suit within a six month period would be unduly burdensome?

One final question that arises with respect to these cases and possible implications for the suit for the Belgrade bombing arises from the explanation given by the European Court of Human Rights regarding the Belgrano suit. In rejecting the suit because it was filed after the legal time limit, the Court of Human Rights said that because there were no proceedings filed in the British courts, the six months began from the date the Belgrano was sunk on May 2, 1982. This implies that if the suit had been filed within six months of the incident, the case would have been able to proceed. However, if the suit was able to proceed if filed within six months of the incident despite the fact that there were no proceedings in British Courts, would this not imply that the requirement of exhausting domestic remedies is able to be waived? If so, the effect would be that the suit can be filed within six months of the possible violation or within six months of exhausting domestic remedies, assuming that one seeks those remedies in the courts of the correct state. These conclusions contradict the language of both Article 35 to the European Convention on Human Rights, and the Notice and Information to potential applicants.

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71 Notes for the guidance of persons wishing to apply to the European Court of Human Rights, supra note 49, at para. 7 (emphasis added).


73 The language of the Convention and the Notice to Applicants is substantially similar. The Convention states that “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within
Despite competing precedent, the Belgrade families' suit was accepted by the Court of Human Rights, which indicates at least their initial success.\(^7\) Now the Court must decide whether the case is well-founded.\(^7\) If the Court decides that the complaint is well-founded, it will then consult with the accused governments. As noted earlier, this can be a very lengthy process. Given the Court's heavy and increasing workload, it is difficult to predict when the case will be resolved.\(^7\)


In looking to the merits of the case, one is guided by Articles 2 and 10 of the Convention. Particularly important is Article 2(a), which states, "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a. in defense of any person from unlawful violence."\(^7\) Here one encounters difficulty in applying the Article to the facts of the case. In and of itself, bombing a broadcasting station, particularly one that employs civilians, is a violation of the article. After all, it is an intentional deprivation of life and is illegal.\(^7\)

Article 2(a) may offer a defense to the bombing as legal action in response to unlawful violence. Here, one looks to the criminal accusations and justifications for the NATO bombing. As was previously stated, since the U.N. Security Council did not authorize the NATO bombing it technically violated the U.N. Charter.\(^7\) Thus, if the bombing is to be successfully defended, it must be done on different grounds. Here, one may examine a few
possibilities for the defense of the bombing, and further look at whether it is necessary for the bombing campaign to be legal under the U.N. Charter for it to be allowed under Article 2 of the Convention.

One possibility for defending the bombing is that it was a part of a military campaign justifiable under Article 51 of the U.N. Charter on self defense.\textsuperscript{80} That Article refers to the "inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations."\textsuperscript{81} The problem here is that Yugoslavia has taken action against Croatia, Bosnia, and Slovenia, none of which is a NATO member.\textsuperscript{82} Neither are they Members of the United Nations and as such do not fall within Article 51 of the U.N. Charter on individual or collective self defense. Also, the NATO action probably would not constitute self defense because Yugoslavia did not represent a significant threat. The International Court of Justice has said that a state needs to be more than a threatening presence in order to justify self defense under Article 51.\textsuperscript{83}

While reactive collective self defense may be unauthorized here, the bombing can arguably be justified under the doctrine of anticipatory self defense. While it is unclear whether such a right exists under the U.N. Charter, it is generally recognized under customary international law.\textsuperscript{84} There was likely sufficient threatening behavior by Yugoslavia to justify anticipatory self defense, though it is important to ascertain who was threatened by Yugoslav action. Since 1991, Yugoslavia has taken military action against Bosnia, Croatia, and Slovenia, and its action has been aimed at enlarging Yugoslav borders, particularly in those areas which are populated by Serbs.\textsuperscript{85}

Given the threatening presence, one must look to which one of the NATO member States borders Yugoslavia or is immediately threatened by Yugoslavia in order to justify the bombing.\textsuperscript{86} There is probably not a sufficient threat to a NATO member to justify the action. None of the States attacked by Yugoslavia has been a NATO member, and the only Member State that

\textsuperscript{80} See U.N. CHARTER art. 51.
\textsuperscript{81} Id.
\textsuperscript{82} See Schwabach, supra note 30, at 410.
\textsuperscript{83} See Military and Paramilitary Activities (Nicar v. U.S.), 1986 I.C.J. 14 (June 27).
\textsuperscript{84} See Schwabach, supra note 30, at 409.
\textsuperscript{85} See id. at 410.
\textsuperscript{86} The Caroline case, decided in 1842, formulated a test to justify a response which requires anticipatory self-defense to be proportional: the need must be instant, necessary, and overwhelming, allowing for no alternative or "moment for deliberation." See supra note 31 and accompanying text.
borders Yugoslavia is Hungary.\(^7\) Hungary, like all bordering states, has been warned by Yugoslavia not to participate in NATO objectives. As a NATO member, Hungary has an indirect role in the activities of NATO, but the Yugoslav warning seems too tenuous to justify bombing campaigns.\(^8\) Even if NATO was acting pursuant to a customary law right of collective anticipatory self defense, it is a stretch to claim that its action was in response to the anticipated threat to Hungary, the only Member state bordering Yugoslavia. This is especially true because Yugoslav warnings to Hungary not to participate in the NATO actions came after the first NATO attacks.\(^9\)

The West has justified NATO’s actions as humanitarian acts to prevent the ethnic cleansing and genocide taking place in Yugoslavia.\(^9\) Is this a legitimate justification for the bombing? Even if it is morally justifiable, does it overcome the existing illegality as it is in violation of the U.N. Charter and possibly the European Convention? These considerations create a troubling dilemma: Should nations capable of intervention refrain from military action despite awareness of atrocities committed by Slobodan Milosevic, or get involved despite its illegality? The fact that there has been neither a Security Council Resolution authorizing the use of force nor an immediate threat to a NATO Member sufficient to trigger an action of anticipatory collective self defense does not justify inaction. The tension between these possibilities has been considered by many:

This war has marked out with awkward clarity the irresistible tension between two distinct forms of international law. The first, and most familiar, of these is that of the United Nations Charter designed to preserve the territorial integrity of sovereign states. The second, born at Nuremberg and developed subsequently in international conventions against genocide and torture, holds that there are some crimes that transcend the inviolability of nation states.\(^9\)

Though not conclusive, an increasingly recognized right of humanitarian intervention may help to resolve the dilemma between illegal intervention and the need to stop acts that violate fundamental human rights.

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\(^7\) See Schwabach, supra note 30, at 410.

\(^8\) See id.; see also The West Versus Serbia, THE ECONOMIST, Mar. 27, 1999, at 49.

\(^9\) See id. at 410-11.

\(^90\) See Bilder, supra note 3, at 155.

\(^91\) Philip Stephens, Fighting a Just War, FIN. TIMES, Apr. 16, 1999, at 12.
IV. POSSIBILITY FOR A CUSTOMARY INTERNATIONAL LAW RIGHT OF HUMANITARIAN INTERVENTION

A third possibility for defending the NATO bombing is by asserting a customary international law right of humanitarian intervention, though this may be naively hopeful. The idea is that humanitarian intervention, or the use of force to prevent genocidal acts such as those in the former Yugoslavia, has evolved into a legal right based on similar armed intervention in the past.92 “The allied intervention in northern Iraq in 1991 to save the Kurds, and the imposition of a no-fly zone in southern Iraq to save the Shia Muslims there, were undertaken without explicit authorization by a Security Council resolution, but were also widely accepted as legitimate.”93 One may also point to India’s invasion of Bangladesh in the 1970s or the intervention in 1990 of West African countries to cease the killings in Liberia.94 While these actions arguably fail to provide a sufficient historical precedent for armed humanitarian intervention, the idea increasingly merits consideration.

Speaking strictly within the law, it is unlikely that NATO’s bombing campaign could be justified through customary international law. The U.N. Charter’s prohibition on the use of force without Security Council authorization is an established tenet in international law, and it is unlikely that this can be circumvented by putting forth a customary international law right that is tenuous and does not have more historical precedent. Interestingly, the U.N. Security Council, while never authorizing force, did recognize the need to prevent the ethnic cleansing and has not at any point directly condemned the NATO bombings.95 It should, however, be pointed out that three of the Security Council members representing almost half of the world’s population did vote to condemn the NATO bombings. Efforts by China, India, and Russia on March 26, 1999 were unsuccessful in this attempt.96 Unless the bombings can be justified as fitting within a right of anticipatory collective self defense or armed humanitarian intervention, they would likely be illegal.

Article 2 of the European Convention provides a final justification option. This Article allows the use of force when it is no more than absolutely necessary to defend any person from unlawful violence.97 The judges at the European Court of Human Rights presumably could base their decision as to

93 Id. at 20.
94 Id.
96 See Schwabach, supra note 30, at 417.
97 European Convention on Human Rights, supra note 20, at art. 2.
the necessity of the bombing on the defense of the innocent victims of Milosevic’s unlawful violence. The Court will likely be faced with the same difficulty as anyone viewing the unfolding of events. One must weigh the legitimacy of the bombing campaign waged to stop the genocide with the civilian casualties that resulted from bombing targets that were arguably nonmilitary in nature. In doing this, one must consider the bombing campaign generally as well as the lethal attack at the station. For example, it is unclear why NATO used “cluster bombs,” many of which lie undetonated and continue to harm and kill civilians.\textsuperscript{98} Also questionable is NATO pilots dropping bombs from 15,000 feet, beyond Yugoslav anti-aircraft defenses.\textsuperscript{99} While this practice helped to ensure that there was not a single Allied Force casualty, bombing from such a high altitude may have sacrificed accuracy, thereby resulting in more civilian deaths. If the bomb that destroyed the radio television station was one of many targets that had to be hit in order to adequately protect innocent lives, then the court should side with Great Britain and other NATO members. However, if much of the criticism of the bombing is well-founded, that this bombing was an abuse of discretion and power resulting in many deaths, then it is only right that these families be compensated.

V. FACTORS DETERMINING THE OUTCOME

Predicting the outcome of the suit against the British government is very difficult given all of the variables. It is impossible not to take political considerations into account, such as whether any of the British government officials will be indicted for war crimes, though this appears very improbable. Also, it seems that there is no consensus on the success or legality of the NATO bombing campaign. It is hard to know how such variables may impact any judgment by the Court of Human Rights.

If the panel at the Court of Human Rights is able to examine the bombing of the radio television station unclouded by political considerations, even taking into account the purported humanitarian justification for the bombing campaign, it seems that the NATO members should be held liable. It simply does not appear that there is enough of a connection between the need to defend innocent lives and the destruction of a television station to that end. The justification for the bombing was the desperate need to stop the propa-

\textsuperscript{98} See Amnesty International, supra note 5, at 10.
\textsuperscript{99} See id. at 9.
ganda that was being broadcast from Belgrade. Even if NATO was successful in shutting down Milosevic's means for spreading his delusional ideas, is there any assurance that it would have saved lives? Given the fact that the destruction of the target did not accomplish the goal of limiting Milosevic's message, what good did it do?

While preventing the further spread of Milosevic's propaganda appears to be a weak justification for the bombing, the power of the media under Milosevic should not be underestimated. "Through a barrage of propaganda via the state-owned media, Milosevic played on Serb fears and feelings of victimization, going back to their defeat by the Ottomans at Kosovo in 1389..." The virus of television spread ethnic hatred like an epidemic." Propaganda included such things as "a Nato symbol turning into a swastika and a montage of Madeleine Albright growing Dracula teeth in front of a burning building." The television programming never included any mention of the ethnic cleansing of thousands of Albanian refugees, or the horrors continuing in other areas of a disintegrating Yugoslavia. Rather, there were films that glorified Yugoslav soldiers and played "soporific tapes of President Slobodan Milosevic meeting patriachs, Cossacks, Russian envoys and the Kosovo Albanian leader Ibrahim Rugova." Many are not convinced that propaganda was the true reason for the bombing. Rather, they think there was simply a disagreement over the subject matter of what was being broadcast. Weeks before the bombing, NATO stated that the Radio Television Station should be carrying six hours of Western television a day. When this requirement was not met, American satellite workers in Belgrade were instructed to leave the radio television station offices. Shortly thereafter, the station was bombed, killing innocent civilians working inside.

100 See Amnesty International, supra note 5, at 23.
102 See Scharf, supra note 7, at 25.
104 Fisk, supra note 101.
105 Id.
106 Id.
107 Id.
108 Id.
If the destruction of the radio television station was considered a necessary objective in the bombing campaign, it is more difficult to determine whether it might be considered successful in protecting innocent lives. Despite a tendency to look at the success of the NATO action collectively, it is imperative that acts of war be viewed individually so that responsible parties are held accountable for human rights violations.

Another question that arises when considering the outcome of a suit is how to enforce a judgment. For a system that sometimes lacks teeth when it comes to enforcement, the European Court of Human Rights has been successful in the realm of international law and ensuring that liable parties satisfy judgments. For the most part, states have adhered to the Article 46 mandate that all of the High Contracting Parties agree to abide by final judgments handed down.\textsuperscript{109} It is in a state’s best interest to pay judgments handed down against it because failure to do so may result in the state losing its status as a member of the Convention.

VI. ASSERTIONS AND SUGGESTIONS

Finally, it is worth reviewing the process that one must endure in seeking redress in the European Court of Human Rights from the perspective of one of the families who lost their children in the attack. It is easy to forget how horrific it must be to have been there or lost loved ones in the attack on the radio television station. An attorney in Belgrade summed it up well:

\begin{quote}
The worst consequences of this attack are, however, those people who died or are wounded. Those were mostly young technicians, who were simply working there, not the part of any propaganda machinery, and not the people who are creating news in RTS. The girl, 26 years old, who was doing the make-up, the guy 30 years old, sound technician, those guys who worked as security for the building . . . they died, their families are destroyed.\textsuperscript{110}
\end{quote}

In the aftermath of this bombing, when the families want to know who should answer for what must appear as a senseless killing, what are they to do? According to the “Notice to Applicants” on how to apply to the European Court of Human Rights, anyone seeking redress from the court has to act

\textsuperscript{109} See European Convention on Human Rights, \textit{supra} note 20, at art. 46.
\textsuperscript{110} Fisk, \textit{supra} note 101.
quickly. They have six months to seek a remedy in British Courts or perhaps to make a direct application to the Court. This seems both unfair and unrealistic. While it may have been accomplished in this case, it is unduly burdensome to expect applicants who are living in a state of war to be able to seek redress in a foreign nation or to act within such a stringent time limit. Further, the instructions on how one is to seek redress is unclear. There must be further explanation on which State and which courts must be tried before applying to the European Court of Human Rights.

The discretion that the Court has exercised in granting or denying applications is well placed, but it makes it very difficult to predict the success of potential applicants. There should be an explicit set of rules to ensure a potential applicant that he or she is doing all that is necessary to preserve the possible future success of an application to the Court of Human Rights.

In this case, one may assume that the families would have to exhaust the remedies available in the United Kingdom. Serbia is not a High Contracting Member to the Convention, while the United Kingdom is. However, if it was a French citizen suing the British government, the application does not clarify whether one would have to exhaust remedies available in the British or French courts. Moreover, one must question the prudence of requiring domestic remedies to be exhausted in all situations. How is one to expect a surviving family member in a warring Yugoslavia or Argentina to have the resources and capabilities to bring suit in another country? In this case, a team of international lawyers is representing the families for free, but surely this cannot be an expectation. Once the case reaches the Court of Human Rights, one may be eligible for free legal aid, but what should one do until then? There must be more accessible, receptive means for registering a complaint with the court. This, of course, would be made much easier if the court had the resources it required, but it is a need that cannot be ignored.

It is unclear what is actually required. While the application seems to give little alternative but to (1) Exhaust domestic remedies, and (2) Apply to the Court of Human Rights, there are indications that this may not be necessary. Recall from the Belgrano news stories, the time period in that case began from the sinking of the Belgrano, so there is at least a possibility that the families could successfully apply by October 23, 1999, six months from the bombing.

Both France and Great Britain are members of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Paragraph 22 in “Notice for the attention of persons wishing to apply to the European Court of Human Rights” reads, “At a later stage in the proceedings, if you have insufficient means to pay a lawyer’s fees, you may be eligible for free legal aid. But legal aid cannot be granted at the time when you lodge your application.” See Notes for the guidance of persons wishing to apply to the European Court of Human Rights, supra note 49, at para. 22.
Perhaps some of the burden can be put on the countries that are accused of the violation. If applicants were able to lodge complaints with the European Court of Human Rights before exhausting domestic remedies, it may encourage violating states to aid the petitioner in trying the case in their state before having to take the time and expense of defending in Strasbourg. If this alternative were available to the families in Belgrade, for example, the European Court of Human Rights could hear the case if Great Britain was too slow in trying the case or the judgment rendered in the United Kingdom was unsatisfactory. Conversely, if the case resulted in a fair outcome in Great Britain, it could conclude with approval by the court in Strasbourg. This would have the further desired effect of bringing the legal systems in the States of the High Contracting Members into line with the European Convention on Human Rights.

It is important to note that while there are accessibility problems and burdensome delays associated with applying to the European Court of Human Rights, its importance and necessity in the prevention of Human Rights violations is unquestionable. Since its creation, the number of cases filed has steadily increased, and the ability of the Court to curb the sovereign power of a State is crucial. In fact, the difficulties it is experiencing now with a backbreaking case load and lack of funding, while difficult to handle, may be signs that the court is effective. It is essential that the Belgrade families be able to register a complaint against strong Western governments and perhaps hold them accountable if they in fact violated the European Convention.

Finally, one should look to the future of international law and humanitarian intervention. While it is arguably nonexistent now, there seems to be a sound basis for supporting a customary international law right of humanitarian intervention. In this case, had Great Britain and other NATO members complied strictly with the law, there would have been no bombing campaign. In the absence of a Security Council Resolution to intervene, people outside the former Yugoslavia would presumably sit and watch the killings continue without making any forceful attempt to stop the actions of Milosevic. Western leaders could doubtfully do that for long in the wake of the genocide from World War II. It is often said that nations cannot sit by and let history repeat itself, and the law says something very different. Under the law, it is okay to watch.\footnote{See \textsc{The Economist}, supra note 92, at 20.}

At the same time, it is imprudent to encourage a legalized humanitarian response that is free from restrictions or investigation after the fact. There must be violations of human rights sufficient to justify an armed response. If
such justification exists, the response must be proportional and intended to stop the violations, rather than simply to spread Western ideals. 115 Christopher Greenwood, a law professor at the London School of Economics, proposed the legalizing of such action. In restricting the doctrine of armed humanitarian intervention, Greenwood argues that "there would have to be impartial determinations of three facts: that a catastrophe was occurring; that it was a threat to international peace; and who was responsible." 116 Greenwood further proposes that because these factors were satisfied by Security Council resolutions, the NATO bombing was legal, despite the absence of a resolution on the use of force. 117

There is substantial merit in a doctrine such as this. It is important to respect the power and voice of the dissenting members of the Security Council and the U.N. Charter's prohibition on the unauthorized use of force. However, should political alliances and ideological differences prevent the use of force to combat blatant human rights violations? Are the ideological differences so stark that it is impossible for the permanent members of the Security Council to agree that thousands of people are being wrongfully killed? A legally acceptable method of armed humanitarian intervention is a necessary alternative to ensure that abuses do not recur unchecked.

However, humanitarian intervention must be heavily scrutinized and appropriately punished when used unnecessarily or disproportionately. A right under customary international law cannot be the means by which Western nations spread their ideals or keep potential threats benign. Armed intervention must be scrutinized at every step, and adequate enforcement measures are needed.

It is perhaps unrealistic and naïve to suggest measures that combine the best of both worlds. One simply cannot sit by and watch human rights atrocities go unchecked in another country, yet there must be a system in place to ensure that intervention conforms to rules designed to avoid violations that one is trying to protect against. How history views the success of the NATO bombings will likely have an effect on the development of a customary international law norm allowing the use of force to prevent widespread human rights violations. Regardless of the legality of intervention, efforts must continue to ensure that victims of war such as those in Belgrade have sufficient

115 Here, one may think of NATO members trying to force six hours of CNN broadcasts a day through the radio television station. While it may be important to secure an outsider's perspective on the conflict, failure to comply with such demands should not warrant forceful military action.

116 See THE ECONOMIST, supra note 92, at 20.

117 See id.
means to have their complaints heard and hold violators accountable for their actions.