Why is humanitarian intervention so divisive? Revisiting the debate over the 1999 Kosovo intervention

Sean Richmond∗

This article revisits the debate over the North Atlantic Treaty Organization’s unilateral use of force in Kosovo in 1999 to help better understand why scholars and policymakers continue to disagree about the issue of humanitarian intervention. Employing a method of comparative literature review, the article focuses on legal, constructivist, neo-Marxist, and liberal accounts of the Kosovo action. It is argued that the intervention proved divisive because it speaks to substantive differences in the meta-views of scholars regarding the source and nature of legitimacy and sovereignty, and the values that they ascribe to the international community. Many of the disagreements turned on whether a scholar prioritizes justice and freedom or fairness and equality, and whether they emphasize the natural and universal moral foundations of international law and legitimacy or base these foundations more procedurally on state consent and sovereign equality. Finally, intellectual polarization about the Kosovo intervention stemmed from differing views on the existence and desirability of larger global trends, such as US hegemony or ‘Empire’, in international law and world politics following the Cold War. The policy and theoretical implications of these findings are briefly considered in the conclusion, including some reflections on what the irreconcilable arguments over the Kosovo action mean for the legality and legitimacy of future humanitarian interventions.

Keywords: Humanitarian intervention; Kosovo intervention; use of force; NATO; just war; legitimacy; international law and international relations.

I. Introduction

In the spring of 1999, the North Atlantic Treaty Organization (NATO) used missile and air strikes against the Federal Republic of Yugoslavia (FRY) without express authorization from the United Nations Security Council, but with the stated aim of protecting local Kosovar Albanians from ethnic cleansing. For 78 days, 13 NATO members deployed over 1,000 aircraft and flew 38,400 sorties, releasing more than 26,000 munitions over the region.↑ Seventeen years after NATO’s action, the issue of humanitarian intervention continues to divide scholars and policymakers.↓ Recent initiatives, such as the 2005 UN World Summit

* Assistant Professor of International Law, University of Western Australia, Perth, Australia. Email: sean.richmond@uwa.edu.au. ORCID iD: 0000-0002-2472-1836. A previous version of this article was presented as a paper at the 2013 annual conference of the International Studies Association in San Francisco, USA. For helpful comments on earlier drafts and research findings, the author would like to thank Michael Byers; Katharina Coleman; Alan M Jacobs; Melodie Mayson; Richard Price; Ruben Reike; Ted Richmond; Adriana Sinclair; John Tessitore; Jennifer Welsh; and the two anonymous reviewers for this journal. All websites accessed 15 March 2016.

↑ NATO’s campaign started on 24 March 1999 and was codenamed ‘Operation Allied Force’. On 10 June, a peace agreement was reached and UN Security Council Resolution 1244 established the framework for an international military and civilian presence in the area. See Independent International Commission on Kosovo (IICK), Kosovo Report: Conflict, International Response, Lessons Learned (Oxford University Press, 2000).

↓ See, for example, Jennifer Trahan, ‘Defining the “Grey Area” Where Humanitarian Intervention May Not be Fully Legal, but is Not the Crime of Aggression’ (2015) 2(1) Journal on the Use of Force and International Law 42; Serena K Sharma and Jennifer M Welsh (eds), The Responsibility to Prevent: Overcoming the Challenges of
and the 2009 UN Secretary General’s Report, have perhaps shown that disagreement about this issue has narrowed, particularly regarding the idea that there is an international responsibility to help protect people from mass atrocity. However, insofar as these initiatives emphasized the role of the Security Council and peaceful measures in fulfilling this responsibility, the most controversial aspect of humanitarian intervention – i.e. the potential unilateral use of non-defensive force – has arguably not been resolved. Further, as the debates over the conflicts in Darfur, Libya and Syria indicate, scholars and policymakers continue to disagree about when, how, and by whom military action can or should be used to protect people from ‘conscience shocking’ situations. To help us better understand the reasons for these continued disagreements, and to advance the discussion forward, this article revisits the academic and policy debate that occurred over NATO’s use of force against the FRY in 1999.

There are good theoretical and empirical reasons for revisiting this debate. First, despite the passage of time, the Kosovo action remains the paradigmatic case for understanding the topic of unilateral humanitarian intervention. Moreover, the action was somewhat puzzling at the time and continues to defy easy explanation. As many readers will recall, with the end of the Cold War, the world witnessed an increase in military interventions aimed at protecting people from humanitarian disasters. Two of the main characteristics that defined these operations were consent from the state in question and legal authorization from the UN Security Council. This latter element of multilateralism is of such importance that Martha Finnemore has argued it is the norm by which ‘humanitarian’ interventions are deemed to be acceptable and legitimate. NATO’s military action in Kosovo, however, had neither the consent of the FRY nor the express authorization of the Security Council. Deviation from such norms is a challenge to constructivist perspectives in the fields of international relations and international law that stress the constitutive and regulative effects of norms and rules on state identity and behaviour. Equally intriguing, though, is why NATO members intervened in Kosovo when the situation posed little threat to their national interest, narrowly defined, and offered limited material gains. Why should powerful states care what happens within the borders of peripheral states that pose no significant threat to the balance of power? Relatedly, if international norms are invoked mainly to provide domestic justification for interest-based actions, why were humanitarian concerns cited for Kosovo if such interests

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3 See the Outcome Document of the 2005 UN World Summit, 24 October 2005, UN Doc A/RES/60/1; and the 2009 Report of the UN Secretary-General on Implementing the Responsibility to Protect, UN Doc A/63/677. For further analysis, see Jennifer M Welsh and Maria Banda, ‘International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?’ (2010) 2(3) Global Responsibility to Protect 213; and Alex J Bellamy, Responsibility to Protect – The Global Effort to End Mass Atrocities (Polity Press, 2009).

4 For a similar view, see Anders Henriksen and Marc Schack, ‘The Crisis in Syria and Humanitarian Intervention’ (2014) 1(1) Journal on the Use of Force and International Law 132, 133. As Henriksen and Schack note, while paragraph 139 of the 2005 Outcome Document states that UN members are prepared to take ‘action, in a timely and decisive manner’, it also provides that such action is ‘collective’ and will thus be taken ‘through the Security Council, in accordance with the [UN] Charter, including Chapter VII’. Similarly, paragraph 3 of the 2009 Secretary-General Report states that actions under paragraphs 138 and 139 of the Outcome Document ‘are to be undertaken only in conformity with the provisions, purposes and principles of the Charter’. Therefore, the Report continues, ‘the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter’.


were not clearly at stake? Realist views thus also provide a limited explanation of the event. We are left with an intriguing theoretical puzzle.

In addition, when the situation in Kosovo is compared with other humanitarian crises that were occurring at the time, we encounter an interesting empirical puzzle. In 1998 and 1999, other states with large numbers of refugees and internally displaced persons (IDPs) included: Angola (300,000 – 500,000); Congo-Brazzaville (250,000); Sierra Leone (550,000); and Colombia (300,000). These situations were either similar to or worse than the one in Kosovo, where IDP figures numbered around 200,000 – 300,000, and refugees around 25,000, prior to the bombing campaign. Regarding mortality figures, around 2,000 people had been killed in Kosovo. In Colombia, around 2,000 – 3,000 people had been killed and most of these deaths were also attributable to paramilitary and military forces. Granted, when comparing the number and types of victims of different humanitarian crises, the severity of the situation in Kosovo was often assessed in light of the prior conflicts in the area, particularly the large numbers of people who were killed and displaced in Bosnia beforehand. Nonetheless, in light of the empirical details above, we are still left wondering why the situation in Kosovo was thought to require military intervention but others were not. It seems that numbers alone will not tell the whole story. If states intervene based on interest, why was the peripheral Kosovo crisis seen as so important? If states intervene based on identity, why do we see such inconsistent application of humanitarian concern across time and space?

The theoretical and empirical puzzle that is the Kosovo intervention led to heated legal, ethical, and political disagreement. As multiple observers noted at the time, the action ‘divided both Left and Right’, and it also ‘split the Left’. Why did the Kosovo intervention divide so many international law and international relations scholars? In this article, it is argued that the intervention proved divisive because it speaks to substantive differences in the meta-views of scholars regarding the source and nature of legitimacy and sovereignty, and the values they ascribe to the international community. Many of the disagreements turn on whether a scholar emphasizes the natural and universal moral foundations of international law and legitimacy, or bases these foundations more procedurally on state consent and sovereign equality. The divisions also reflect whether a scholar prioritizes justice and freedom, or fairness and equality. Finally, intellectual polarization about the Kosovo intervention stems from differing views on the existence and desirability of larger global trends, such as US hegemony or ‘Empire’, in international law and international politics following the Cold War.

In terms of theoretical orientation, this article examines a broad group of scholars who do not necessarily share political views but who are committed to some form of universalism or internationalism, broadly defined. Adopting a method of comparative literature review, the investigation critically examines liberal, constructivist, neo-Marxist, and international legal accounts of the Kosovo intervention. Much of the analysis focuses on the debate over the justness of the action within and between these perspectives, and how scholars with

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11 Accordingly, neo-realist perspectives are deemphasized, as are those that question the role of international law and morality in international relations, or posit that military intervention is only justified if a state’s strict national interest is threatened.
12 As will be discussed below, particularly in section II, although these accounts differ in their views of the Kosovo action, they nonetheless are committed to some broad form of universalism (i.e. the concerns of all human beings and states are relevant) or internationalism (i.e. greater cooperation between these people and countries can help address said concerns).
different views understand the notion of ‘justness’. In turn, the study provides an insight into why these scholars espouse their position and what theoretical assumptions, ontological commitments, and empirical and normative interpretations inform their argument.

This article aims to have theoretical and policy relevance. Regarding theory, studying the Kosovo action is significant because it speaks to larger questions, such as what the biggest threat to human welfare is in the 21st century; what the ultimate sources of authority and legitimacy are in international law and world politics; and what the relationship is between legality and legitimacy in these fields. Moreover, while the intervention has been examined by many scholars, this article assesses a subject that has not been adequately addressed in the literature, namely the fact that many accounts of the action lack empirical substantiation and coherent normative theorizing. Whether they denounced or exonerated NATO’s conduct at the time, numerous scholars took analytical ‘shortcuts’ in both areas. Therefore, a contribution to the literature can be made by identifying where, and theorizing why, some of these shortcomings exist. Regarding policy, a more comprehensive account of why scholars were divided over the Kosovo intervention helps us to better understand why, more generally, those who claim to support international human rights often disagree when humanitarian crises arise. Such divisions may obstruct the articulation of coherent alternatives to recent foreign policies such as ‘pre-emptive self-defence’ and the ‘war on terror’.

The article is organized as follows. Section II briefly outlines some key perspectives of the Kosovo intervention, in order to provide conceptual context for the subsequent analysis. With this context in mind, sections III-VI critically examine four of the main issues that tended to divide supporters and critics of the intervention. As we will see, disagreement over these issues is linked to broader divisions about the justness of the Kosovo action, and – as readers of this journal will note – to ongoing debates about the legality of humanitarian intervention in the international law on the use of force (jus ad bellum). Therefore, section III starts by examining whether NATO had right authority for its response. Next, section IV looks at the Alliance’s intentions in Kosovo. Section V then investigates whether the intervention should be understood in light of larger global trends, such as US hegemony or Empire. The final issue, considered in section VI, is the importance of justice versus fairness in the debate over whether NATO had just cause for its use of force. The article concludes by briefly considering some policy and theoretical implications of its findings, including some reflections on what the irreconcilable arguments over the Kosovo action mean for the legality and legitimacy of future humanitarian interventions.

II. Some key perspectives of the Kosovo intervention

Many accounts of the Kosovo intervention are differentiated by the ontological primacy that they grant to either ideational or material factors. Generally speaking, liberal scholars argued that both contributed to the intervention. In a widely cited article, Adam Roberts contended that the main factors involved were a sense of shame from inaction in Bosnia beforehand; humanitarian concern; and a desire to maintain NATO’s credibility. Similarly, Ivo Daalder and Michael O’Hanlon said that the root cause of the Kosovo conflict was former President Slobodan Milošević and his oppression of the Kosovar Albanians. Accordingly, one of the

14 The author thanks Richard Price for this idea.
15 See Daalder and O’Hanlon (n 7); Michael Ignatieff, Virtual War: Kosovo and Beyond (Penguin Books, 2000); and Adam Roberts, ‘NATO’s ‘Humanitarian War’ over Kosovo’ (Autumn 1999) 41(3) Survival 102.
16 See Roberts (n 15) 104-109.
17 Daalder and O’Hanlon (n 7) 6.
main policy objectives of NATO’s action was to protect the human rights of this minority population. Thus, from a liberal perspective, the Kosovo crisis and subsequent NATO intervention are seen primarily as human rights issues.

Constructivists also posited that a normative belief in human rights is fundamental to understanding the Kosovo action. According to this view, the growth of concern for human rights among domestic populations in the West after the Cold War is a condition of possibility that helps to explain humanitarian interventions like the one in Kosovo. Although constructivists acknowledged that the Kosovo action involved humanitarian and security imperatives, they tended to prioritize ideational factors over material concerns. Moreover, they tended to assume that NATO’s humanitarian objectives were sincere and ‘not simply a disguise for the projection of American power in the Balkans’. Therefore, from a constructivist viewpoint, there is an important relationship between the public justifications offered for the Kosovo intervention and the private motivations of the actors involved.

In contrast to liberal and constructivist accounts, neo-realists argued that NATO’s involvement in the Balkans is best understood as delusional moral crusading and dangerous American expansionism, primarily due to the disappearance of a balancing superpower post-Cold War. For example, Kenneth Waltz argued that the Kosovo action was an opportunity for the United States to use NATO to serve its ‘national interests’ and extend its power and influence into Europe. Interestingly, in advancing this view, Waltz has to cite domestic politics in America, arguing that ‘[former US President Bill] Clinton needed to show himself to be an effective leader in foreign policy,’ and admitting that ‘the motivations of the artificers of expansion … were to nurture democracy in young, fragile, long-suffering countries’. However, the inclusion of these internal, non-material factors seems to deviate from neo-realism’s systemic-level commitment, and – as noted previously – to detract from its ability to fully explain the Kosovo intervention.

While similar to neo-realists in that they prioritize material factors, neo-Marxists sought to offer a more comprehensive account of NATO’s action, grounded in the logic of US-led global capitalism and American military dominance. These scholars tended to argue that, far from representing a collective expression of humanitarian concern, the action was better seen as an aggressive and illegal intervention aimed at extending US hegemony into Europe. For instance, Noam Chomsky asserted that, after the Cold War ended, the United States adopted a new discourse of ‘military humanism’ in order to legitimize its absolute power and pursue familiar interests under the cloak of good intentions. Notwithstanding such criticism of the US, though, Chomsky and other neo-Marxists often profess a commitment to universal human rights, the United Nations, and an international order ruled

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18 See Wheeler (n 5); Finnemore (n 6); Reus-Smit and Christoff (n 10); Chris Reus-Smit (ed), The Politics of International Law (Cambridge University Press, 2004); and Nicholas Wheeler, Saving Strangers: Humanitarian Intervention in International Society (Oxford University Press, 2000).
19 See Wheeler (n 5 and 18); and Finnemore (n 6).
20 See Wheeler (n 5) 48.
22 See Waltz (n 21) 33-34.
23 Ibid.
24 See discussion in section I.
26 See Chomsky (n 9) 11.
by law and not by force. Because liberal and constructivist accounts often make similar commitments, the question arises as to why neo-Marxists thought the Kosovo intervention deviated from such commitments. The following sections explore why this is so.

III. Right authority and legitimacy

One significant source of division for many scholars was whether NATO had right authority for the Kosovo intervention. Critics of the intervention often argued that NATO lacked formal approval from the UN Security Council, the sole body authorized by the UN Charter to threaten and use non-defensive force. As a result, critics contended, the intervention was contrary to international law. In response, proponents of NATO’s action often argued that, by denouncing the action as illegal, critics confused legality with legitimacy. Because this concept of ‘legitimacy’ was often cited as a justification for NATO’s response, much turns on how it is defined and where it is located. In this way, the debate over whether NATO had right authority for the Kosovo intervention reflected broader scholarly disagreement about the source and nature of legitimacy and authority in international law and international politics.

i. Illegal but legitimate

Proponents often argued that, while the Kosovo intervention lacked express authorization from the Security Council, it was still legitimate for other reasons. There are at least four sources proposed for this legitimacy: 1) a purportedly shared understanding among international actors that the action was appropriate; 2) NATO’s effective and democratic nature; 3) the consequences of the intervention; and 4) morality. Each will be examined briefly below.

Generally speaking, the idea of legitimacy implies that an action was conformable to or sanctioned by law or principle, or conformed to a recognized standard. Expanding on this formal definition, constructivists argue that legitimacy is a social relation among actors whose source and nature stems from a shared understanding of appropriate behaviour. Accordingly, they and other scholars interpreted the Security Council’s 12-3 vote against a Russian draft resolution that sought to condemn the Kosovo intervention in March 1999 as evidence that the actors involved recognized the appropriateness of NATO’s actions. Nicholas Wheeler argued that, while different members voted for different reasons, ‘The majority of Council members (excluding the five NATO states and Slovenia) rejected the Russian resolution because they accepted that NATO’s action was justifiable on humanitarian grounds’. Similarly, Thomas Franck argued that the action’s legitimacy was increased because the degree of its unlawfulness and the facts of the case were debated and judged in the political organs of the international community. Like Wheeler, Franck stressed that the

28 See, for example, Reus-Smit and Christoff (n 10); and Thomas Franck, ‘Interpretation and Change in the Law of Humanitarian Intervention’ in J L Holzgrefe and Robert O Keohane (eds), Humanitarian Intervention: Ethical, Legal and Political Dilemmas (Cambridge University Press, 2003) 204-231.
30 See Wheeler (n 5); and Reus-Smit (n 18) 14-44.
31 See Wheeler (n 5) 45.
UN Security Council voted overwhelmingly not to condemn NATO’s use of force is of procedural significance.\(^{33}\)

A second source of legitimacy advanced by some proponents was that NATO is an effective and democratic defensive-security organization that can unilaterally determine when to threaten and use force in extreme circumstances. Equating legitimacy with effectiveness, Alan Henrikson argued that:

NATO, as the most effective instrument in the Atlantic world for taking forcible military action, is the *enabler* of the participation of others, including the United Nations Organization. This surely is a basis of the legitimacy of the action it took over Kosovo. NATO does not legitimize power. But it does give power to legitimacy.\(^{34}\)

Moreover, Henrikson argued, not only is NATO effective, it is comprised of democratic states that share a collective understanding of appropriate behaviour. Highlighting the struggle for a NATO mandate to threaten and use force in Kosovo, Henrikson emphasized that many of the Organization’s allies had a tremendous desire for proper authorization and were extremely uncomfortable not having the approval of the UN Security Council.\(^{35}\)

In addition to NATO’s effective and democratic nature, some observers argued that the Kosovo intervention was legitimized retroactively by its consequences. Concluding that the intervention was ‘illegal but legitimate’, the UN-sponsored Independent International Commission on Kosovo said the action was justified because ‘all diplomatic avenues had been exhausted’, and it liberated the majority population of Kosovo from Serbian oppression.\(^{36}\) Similarly, Thomas Franck argued that, although the intervention was technically illegal, it was still justified insofar as ‘no undesirable consequences followed’, and ‘the illegal act produced a result more in keeping with the intent of the law (i.e. “more legitimate”) – and more moral – than would have ensued had no action been taken to prevent another Balkan genocide’.\(^{37}\)

As Franck’s argument suggests, a fourth source of legitimacy advanced by some scholars was the morality of NATO’s intervention. Chris Reus-Smit and Peter Christoff argued that, by focusing on NATO’s lack of legal authorization, critics sidestepped the difficult debate of whether, overall, the response was still justified.\(^{38}\) Historically speaking, Reus-Smit and Christoff noted, the absence or presence of authorization from the Security Council has not necessarily determined whether a coercive intervention was ethical or legitimate. For example, the economic sanctions imposed on Iraq after the first Gulf War were authorized by the Council, yet many left-wing critics still denounce these actions. Moreover, there are historical examples of military actions that lacked Council authorization at the time yet are now often supported on humanitarian grounds, such as Vietnam’s


\(^{35}\) See ibid, 49-51.

\(^{36}\) See IICK report (n 1) 4.

\(^{37}\) See Franck (n 28) 226.

\(^{38}\) See Reus-Smit and Christoff (n 10) 4-5.
intervention in Cambodia in 1978.\textsuperscript{39} Therefore, Reus-Smit and Christoff argued, critics need to better explain why the Kosovo intervention specifically was unethical or illegitimate.\textsuperscript{40}

\section*{ii. Legitimate according to whom?}

By arguing that NATO’s use of force was legitimate even though it was not formally approved by the UN Security Council, proponents were essentially suggesting that there are alternative sources of authority and legitimacy in international affairs. Critics were eager to point out some of the potential limitations and dangers of this argument.

The idea that the legitimacy of the Kosovo intervention was increased because there was a shared understanding that it was ‘appropriate’ depends on why a scholar believed an actor supported the intervention, and which actors they prioritized. Nicholas Wheeler’s conclusion above, that the majority of Security Council members voted against the Russian draft resolution because they believed the intervention was legitimate, follows less by demonstrating each member’s private motivations and more by assuming that they saw the humanitarian crisis in a similar manner. As Wheeler himself acknowledged, the degree to which one thinks that the Council is dominated by the US will affect whether one explains the voting behaviour of non-NATO members with reference to coercion, self-interest, or perceptions of legitimacy.\textsuperscript{41}

Furthermore, even if most Council members voted against the Russian draft resolution because they believed the Kosovo action was legitimate, a negative Council vote is a questionable indicator of approval. As Michael Byers and Simon Chesterman argued, official endorsement required a positive authorization, not a negative vote on the Russian draft.\textsuperscript{42}

A negative Council vote is also a questionable indicator of international support. Contrary to the idea that most states saw NATO’s use of force as appropriate, Byers and Chesterman argued that ‘international reaction to the intervention was at best mixed’.\textsuperscript{43} As they noted, numerous countries – such as China, India, Russia, Indonesia and the 133 developing states of the G77 – all reaffirmed at the time that unilateral humanitarian intervention is illegal and unacceptable under international law.\textsuperscript{44} Moreover, at its annual meeting in 1999, the UN General Assembly voted 107 to 7 (with 48 abstentions) for a resolution emphasizing a similar conclusion.\textsuperscript{45}

With regard to the General Assembly, proponents were unable to cite this institution as an alternative source of legitimacy for the Kosovo intervention, and were often silent about its role in the matter. Critics sometimes highlighted that, not only did NATO fail to receive authorization from the Security Council, it also failed to seek alternative UN support, such as the General Assembly’s ‘Uniting for Peace’ mechanism.\textsuperscript{46} Brad Roth argued that the refusal

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  \item\textsuperscript{39} For analysis of this and other historical cases of ‘humanitarian’ uses of force, see Simon Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law} (Oxford University Press, 2001) 71-80.
  \item\textsuperscript{40} See Reus-Smit and Christoff (n 10) 4-5.
  \item\textsuperscript{41} See Wheeler (n 5) 38.
  \item\textsuperscript{43} See ibid, 184.
  \item\textsuperscript{44} Ibid.
  \item\textsuperscript{45} See GA Res 54/172, UNGAOR, 54th session, UN Doc A/RES/54/172 (1999) (the General Assembly ‘Deeply concerned’ that … contrary to general international law and the Charter of the United Nations, unilateral coercive measures continue to be promulgated and implemented … Rejects unilateral coercive measures … because of their negative effects on the realization of … human rights’).
  \item\textsuperscript{46} The ‘Uniting for Peace’ mechanism is associated with the precedent and procedure of UN General Assembly Resolution 377 of November 1950. This US-led resolution was passed during the Korean War, when the Security Council was deadlocked by the nascent Cold War. It has been invoked more than ten times to refer
to pursue this mechanism during the Kosovo crisis ‘is surely a strike against the effort to reconcile the NATO action with the demands of international normativity’.  

In light of the above, it is apparent that scholars disagreed on the extent to which the international community accepted the Kosovo action as legitimate, let alone as legal, and they prioritized different sources for this legitimacy. Reflecting on these debates, Robert Keohane noted that, by emphasizing the absence of positive authorization from the Security Council and General Assembly, and the presence of extensive dissent among non-Western actors, commentators such as Byers and Chesterman prioritize the principles of state consent and formal equality. On the other hand, Keohane observed, by arguing that NATO’s illegal act produced consequences more consistent with the intent of the law, scholars such as Thomas Franck imply that ‘legitimacy depends on law not being so strongly at odds with the ethical views of influential people that powerful states find it easy to discard’.  

Franck’s argument – that NATO’s illegal act was nonetheless legitimate because it produced a result more consistent with the intent of the law – is contestable for two reasons. First, it begs the question of what the intent of international law is. Although the original purpose of the UN Charter was arguably to prevent aggression and unilateral determinations of just war, Franck implies that the Charter’s purpose can now be interpreted to address other sources of insecurity. Consistent with this idea, it is true that, with the end of the Cold War, internal conflicts and displaced populations have been increasingly recognized as threats to international peace. In some ways, the Security Council’s response to the situation in Kosovo before NATO’s strikes reflects this trend. In 1998, the Council passed two resolutions that a) recognized the severity of the humanitarian situation in Kosovo, b) affirmed that the deterioration of this situation was a threat to international peace, and c) demanded, under Chapter VII of the UN Charter, that the FRY implement its agreements with NATO and the Organization for Security and Cooperation in Europe. However, these resolutions did not authorize the threat or use of force, and the Council instead decided to remain seized of the matter and to consider further action if its demands were not met. Franck’s argument is also contestable because it begs the questions of whether NATO members have the authority to enforce their interpretation of the intent of the Charter, and whether other countries agree that they have such authority. Generally speaking, having the authority to do something means having both the power and the right to do it. The combined military strength of NATO’s member states likely fulfils the ‘power’ criterion. However, it is less clear that these countries possess the ‘right’ to act unilaterally, insofar as questions of international peace and security to the General Assembly. See Dominik Zaum, ‘The Security Council, the General Assembly, and War: the Uniting for Peace Resolution’ in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945 (Oxford University Press, 2008) 154-174; and Christina Binder, ‘Uniting for Peace Resolution (1950)’ in Max Planck Encyclopedia of Public International Law online (Oxford University Press, 2013).

47 Brad R Roth, ‘Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the post-Cold War Era’ in Michael Byers and Georg Nolte (eds), United States Hegemony and the Foundations of International Law (Cambridge University Press, 2003) 259.


49 See ibid, 7.

50 See Byers and Chesteman (n 42) 181.


54 See Shorter Oxford English Dictionary (n 29).
such a right is based on socio-legal recognition granted willingly by other international actors, and NATO members have not yet attained such recognition.

It is this latter socio-legal element of authority that Alan Henrikson overlooks when he states, as previously noted, that the Kosovo intervention was legitimate because NATO is an ‘effective instrument’. Arguing, as Henrikson did, that NATO gives ‘power to legitimacy’ only sidesteps the difficult questions of what comprises legitimacy, and why this might be important for the practice of humanitarian intervention. In the same way that some critics focused on the illegality of the Kosovo intervention at the expense of other issues, some proponents also adopted a narrow viewpoint. By seeking to find alternative sources of legitimacy, these scholars did not adequately address, for instance, what might be lost if we endorse the use of non-defensive force in the absence of UN authorization. We will return to this issue in the conclusion.

IV. Right intentions

In addition to being divided over whether NATO had right authority for its use of force, scholars also disagreed about what its intentions were in the FRY. Proponents often argued that, although the intervention involved a mix of ideational and material objectives, NATO’s desire to avert a humanitarian catastrophe in the area was genuine. Critics often contended that NATO’s purportedly noble intentions acted as a ‘cover’ for less commendable objectives. As will be demonstrated below, these disagreements stem from methodological, ontological, and theoretical differences in the perspectives of scholars. The question of what NATO’s real intentions were was less a social-scientific query amenable to empirical validation and more an ethical argument over whether NATO had the right intentions. The idea of ‘right intent’, readers may recall, stipulates that in order for a humanitarian intervention to be just, its primary purpose must be to stop human suffering. Thus, much was at stake in the debate over whether NATO had right intent for its air strikes in Kosovo.

i. Public justifications and private motivations

Publicly, NATO and its member states claimed to have had right intent. On 24 March 1999, the day the bombing began, then NATO Secretary General Javier Solana explained that NATO’s actions were ‘directed against the repressive policy of the Yugoslav leadership’, and aimed to ‘stop the violence and bring an end to the humanitarian catastrophe’ in Kosovo. Similarly, the US State Department stressed at the time that ‘averting a humanitarian catastrophe’ was one of the three strong interests at stake in the Kosovo crisis.

Privately, though, some commentators argued that less noble motivations – such as the perceived need for threat-diplomacy, and a desire to show NATO’s continued relevance post-Cold War – were also relevant. Tim Judah, a respected journalist who covered the Balkan conflicts, argued that NATO’s objectives were, at best, mixed. As he noted, the humanitarian motives were aimed more at providing legal cover for the intervention, and the primary goal

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55 See n 34 and accompanying text.
56 See, for example, the IICK report (n 1) 10; and International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect (International Development Research Corporation, 2001) 35.
58 United States Department of State, ‘US and NATO Objectives and Interests in Kosovo’ (26 March 1999).
of the air strikes was to force then President Milošević to agree to the demands that NATO articulated at the diplomatic negotiations in Rambouillet, France, in February 1999.  

Much turned on a scholar’s view of NATO’s reasons for acting, and the extent to which they believed that its public justifications were related to its private motivations. This was particularly relevant to constructivists, who often assess the reasons why actors do what they do. Regarding the Kosovo intervention, Chris Reus-Smit argued that ‘[a] reason is both an individual or collective motive (the reason why NATO bombed Serbia) and a justificatory claim (the reason NATO gave for bombing Serbia)’. Like many proponents, Reus-Smit believed there was a link between NATO’s private motives and its public justifications. As he argued, ‘European norms governing how “civilized” states treat their inhabitants and ideas about the interdependence of security, democracy, and regional stability informed NATO’s decision, while international humanitarian norms concerning obligations to prevent genocide and egregious crimes against humanity provided the justificatory framework that NATO used to license the bombing.’

One potential challenge to Reus-Smit’s conclusion is that it is methodologically difficult to substantiate. Insofar as constructivist arguments about the Kosovo intervention were cultural claims about NATO’s beliefs and identity, the private intentions of the actors involved were often inferred through retroactive proxy sources, such as behaviour and discourse. It is difficult to empirically demonstrate that a collectively held norm, whether European or international, was the dominating factor in a complex international political outcome such as the Kosovo intervention.

ii. NATO’s ‘sordid’ intent – the neo-Marxist and Serbian view

Irrespective of the potential methodological challenge above, theoretical and ontological differences seem to have prevented neo-Marxist scholars from even considering the idea that NATO’s private motives were related to its public justifications, and that it had right intent for its use of force. Neo-Marxists often argued that NATO’s purportedly noble intentions were ‘fraudulent’ or ‘sordid’. As Edward Said contended, the humanitarian concerns expressed were ‘the merest hypocrisy since what really counts is the expression of US power’. Similarly, Tariq Ali posited that ‘the need to protect the Kosovars served as the pretext for NATO’s bombardment, but its real aim was to secure its control of this strategic region’. Therefore, these scholars believed that, ethically speaking, NATO’s claim to right intent was discredited because the Organization’s primary objective was not human protection but the expression of power and the consolidation of strategic control.

While this interpretation may seem unreasonable to proponents, it resonated with many Serbians during the conflict. As Tim Judah noted, Milošević was uncooperative about the Rambouillet talks in part because he thought NATO’s real goals were to separate Kosovo from Serbia, and remove him from power. Similarly, Milisav Pajic, a Foreign Ministry official for the FRY, argued that NATO’s ‘real goal’ was not Kosovo but ‘to oppose the leadership of this country and introduce NATO here. It was a sort of ideological jihad.’

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59 See Judah (n 13) 233.
60 See Reus-Smit (n 18) 22.
61 Ibid, 23.
62 The author thanks Alan M Jacobs for this point.
63 See Said (n 25) 2; and Ali (n 10) 63.
64 Edward Said, ‘Protecting the Kosovars?’ (Spring 1999) 234 New Left Review 74, 75.
65 See Ali (n 10) 64. For a similar critique of NATO’s military intervention in Libya in 2011, see Maximillian Forte, Slouching Towards Sirte: NATO’s War on Libya and Africa (Baraka Books, 2012).
66 See Judah (n 13) 220.
67 Cited in ibid, 231.
Again, although some might dismiss these views as inaccurate, there were three elements of truth in them. First, by early 1999, many Western leaders had become dissatisfied with Milošević. Second, the Kosovo intervention was, in numerous ways, an ideological battle over the values that would comprise the international community, and the primacy that would be granted to state sovereignty and order, on the one hand, and human rights, justice and freedom on the other. As Marc Weller, legal advisor to the Kosovar Albanian delegation during the Rambouillet negotiations, observed, these talks were less about ‘the fate of the people of Kosovo’ and more about ‘meta-questions’ concerning the post-Cold War order. The points of disagreement, he recalls, were over fundamental issues, such as changes ‘in the roles of international actors’; the ‘core values of the international system’; and ‘the legitimacy of the threat or use of force in international relations’.

Third, from the perspective of Milošević’s government in early 1999, one can see why the proposed diplomatic solutions to the conflict may have seemed unfair, or designed to help justify NATO’s bombing and the occupation of the FRY. As evidence of the unreasonable diplomacy employed by NATO in early 1999, critics noted that the peace settlement to which Milošević eventually agreed in June contained three concessions from the original demands made at Rambouillet: 1) the UN was given a stronger role in the post-conflict administration of Kosovo; 2) Russia’s presence in the diplomatic process and international peacekeeping force was increased; and 3) NATO abandoned a ‘status-of-force’ demand that would have given it unimpeded military access to the entire geographical area of the FRY.

This last issue was a source of particular scholarly disagreement. Chris Reus-Smit and Peter Christoff argued that NATO’s status-of-force demand in February 1999 was for ‘reasons of military effectiveness’ and ‘sheer practicality’. By contrast, Michael Byers argued that Milošević baulked at the demand because it was ‘patently unreasonable’. This disagreement arguably reflects a more fundamental difference in the degree to which these and other scholars prioritized the territorial sovereignty of the FRY, and whether they thought the country was being treated fairly in the negotiations at Rambouillet. Further reflecting this difference in perspective, Richard Falk argued that it is in part because NATO’s actions in Kosovo failed to provide a parallel response to the Serbian position that the intervention was, overall, not justified. Again, like the disagreement between Reus-Smit, Christoff and Byers, Falk’s conclusion turns on the extent to which he prioritized the value of equal treatment among competing human rights and territorial claims, and the degree to which he saw Serbian interests in Kosovo as legitimate and worthy of Western recognition.

The issue of whether NATO’s status-of-force demand was reasonable also matters because it affects whether the Kosovo action should be considered just. In a legitimate humanitarian intervention, the occupation of territory may be necessary, but it should not be an objective as such. Regarding the status-of-force demand, neo-Marxist scholars and Serbian leaders often thought that either NATO intended to occupy the FRY, or its members knew that Milošević would have to reject any peace proposal that contained this provision, thereby absolving NATO for any future military action.

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68 See ibid, 272 (noting that disdain for Milošević was so prevalent by early 1999 that there were even Russian officials who did not trust him, because he ‘humiliated them, just as he did Western officials, by making promises to them and signing agreements which he had no intention of keeping’).
69 Marc Weller, ‘The Rambouillet Conference on Kosovo’ (April 1999) 75(2) International Affairs 211, 212.
70 Ibid.
71 See Reus-Smit and Christoff (n 10) 4.
74 See ICISS report (n 56) 35.
75 See, for example, Johnstone (n 25) 11; and Judah (n 13) 231.
iii. Limits of the neo-Marxist and Serbian view

While there is merit to the neo-Marxist argument that NATO did not have right intent for the Kosovo intervention, there are also limits to this position. From the Alliance’s perspective, the status-of-force demand was part of a larger effort to ensure that a peaceful resolution to the conflict was backed by credible force. For numerous reasons – such as the perceived failure of the United Nations in Bosnia in the mid-1990s, and US insistence on American command of peacekeeping forces following the Somalia intervention of 1993 – the United States wanted any political agreement in Kosovo to be enforced by a foreign military presence led by NATO.\(^\text{76}\) Furthermore, because of the memory of Srebrenica\(^\text{77}\) – where more than 8,000 Muslim men and boys were killed by Bosnian Serb forces in 1995 – NATO countries wanted to show that they had learned from their mistakes, and were prepared to uphold their principles with military force.

Contrary to the idea that the Rambouillet agreement was designed to be unacceptable to Milošević, one can argue that it sought to protect the territorial integrity of the FRY while ensuring autonomy for the Kosovar Albanians. For example, critics rarely mentioned that the Kosovar Albanians also opposed the agreement, at least initially, because it did not guarantee a referendum on separating from the FRY. Moreover, by arguing that the West abandoned peaceful negotiation, neo-Marxists implied that Milošević was more committed to diplomacy and peace. Many analysts of the conflict would find this to be an inaccurate interpretation of Milošević’s negotiating strategy and political intentions regarding Kosovo.\(^\text{78}\)

Finally, like the constructivist view that links NATO’s public justifications with its private motivations, the neo-Marxist critique of NATO’s intent in Kosovo also suffers from potential methodological and empirical obstacles. Neo-Marxists often have to simplify and homogenize complex phenomena such as ‘NATO’ and the ‘United States’, and infer the ‘real’ intentions of individual actors (such as former US President Bill Clinton) from the larger objectives inherent in US hegemony or global capitalism (such as the expression of power or the expansion of markets). This is a somewhat teleological argument based on the contestable logic that the goals of an actor or group of actors are the cause of their behaviour. Nonetheless, many neo-Marxists still believed that the Kosovo action should be understood within a larger theory of US hegemony or Empire post-Cold War, as will be discussed in the next section.

V. The Kosovo intervention as US hegemony or Empire

As we have seen, critics often thought that NATO’s use of force in Kosovo should be assessed within a broader theory of US dominance or hegemony. From this perspective, the action was portrayed as an extension of American interests into Europe, and NATO was depicted as an instrument of the United States. In response, proponents often argued that, far from being a unilateral expression of US power, the intervention was an example of Western intent and NATO a representation of collective will. As other studies have shown, both of

\(^{76}\) Judah (n 13) 211-212.

\(^{77}\) For a summary of these events, see the judgment of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T, UN, 2 Aug 2001, www.icty.org/x/cases/krstic/tjug/en/krst-tj010802e.pdf

\(^{78}\) See, for example, Judah (n 13) 272.
these positions could empirically substantiate their arguments. While NATO’s member states and institutional structures did limit and influence some US behaviour, decisions over the most controversial elements of the military response, such as targeting policies, revealed extensive power asymmetries and American dominance. It is probably the case that the intervention was neither simply an expression of US unilaterism and control, nor was it a true manifestation of collective identity and multilateral support. Accordingly, there was room for varying interpretations among scholars. These disagreements, however, tended to represent substantive differences in their perspectives and values more than the empirical details of the situation itself. Most notably, these disagreements reflected diverging views on the existence and desirability of larger global trends, such as US hegemony or Empire, in contemporary international law and international politics.

i. The Kosovo intervention and US hegemony

Although they may disagree on its meaning and extent, most neo-Marxists agree that US hegemony is alive and well. Some even equate it with the larger process of globalization. Placing America at the centre of a neo-imperialist agenda, Diane Johnstone defines globalization as the ‘uncontested hegemony of the US model’ and the ‘elimination of any viable alternative model of economic development’. She and other critics, such as Tariq Ali, argued that the Kosovo action was a way for America to secure both of these elements. They viewed things this way in part because, up until the conflicts and dissolution of the 1990s, Yugoslavia had been a socialist country that could be seen as pursuing a ‘third way’ alternative to the capitalist and communist blocs that developed during the Cold War.

In contrast, other scholars contended that critics downplayed the role of NATO’s collective identity and institutional structures, ignored the support that existed among its numerous members, and discounted the heterogeneous aspects of the ‘American position’ regarding Kosovo. For example, Chris Reus-Smit and Peter Christoff argued that, while ‘Washington has always sought to shape NATO to its own ends’, its European allies still strongly influence the alliance. Likewise, David Haglund argued that NATO helps codetermine America’s national interest, so that the latter ‘resembles a collective (Western) interest’ constituted from shared values. Thus, from these viewpoints, NATO’s action in Kosovo was seen not as American unilateralism but as a cooperative Western initiative.

Supporters often saw things this way in part because they are less convinced by the idea of US hegemony. For example, Reus-Smit and Christoff did not think the Kosovo intervention should be understood within a larger theory of American hegemony because they do not believe that it exists. As they argued, ‘[d]espite its global reach, the United States is

79 See, for example, Pierre Martin and Mark R Brawley (eds), Alliance Politics, Kosovo, and NATO’s War: Allied Force or Forced Allies? (Palgrave Macmillan, 2001); and Daalder and O’Hanlon (n 7).
80 As the air campaign dragged on and pressure increased for NATO to ‘win’ the war, the US bombed controversial ‘dual-use’ civilian-military targets such as television stations, bridges, and power plants. See Nicola Butler, ‘NATO: From Collective Defence to Peace Enforcement’ in Albrecht Schnabel and Ramesh Thakur (eds), Kosovo and the Challenges of Humanitarian Intervention (United Nations University Press, 2000) 279-80; and Nicholas J Wheeler, ‘The Kosovo Bombing Campaign’ in Chris Reus-Smit (ed), The Politics of International Law (Cambridge University Press, 2004) 189-216.
81 See Johnstone (n 25) 6, 8.
82 See Ali (n 10) 66.
83 See, for example, David G Haglund, ‘Allied Force or Forced Allies?’ in Pierre Martin and Mark R Brawley (eds), Alliance Politics, Kosovo, and NATO’s War (Palgrave Macmillan, 2001) 88-112; and Daalder and O’Hanlon (n 7) 121.
84 See Reus-Smit and Christoff (n 10) 4.
85 See Haglund (n 83) 92.
not a hegemon and hasn’t been since the late 1960s’. 86 These scholars do not think that America has the military, political, or economic resources required to define unilaterally and uphold the rules of the international, let alone global, order. From this perspective, the current international environment is multilateral in character, and even the US is constrained by it. America, Reus-Smit and Christoff argued, must work within this order, in a process of negotiation among the major powers, ‘within a multi-layered complex of multilateral organizations and international legal institutions’. 87

One potential challenge to the above argument is that, by equating hegemony primarily with material resources and unilateral domination, this view may miss the significance of a world order based on consent rather than coercion, and downplay the ideational aspects of hegemony theory. Putting aside the simple fact that America still wields immense military, economic and political power, there are additional non-material factors that lead many neo-Marxist scholars to conclude that it does lead an emerging hegemonic order, and that NATO’s use of force in Kosovo can be understood within this reality.

Robert Cox’s analysis of Antonio Gramsci’s theory of hegemony offers insights about whether events like those in Kosovo represent an emerging hegemonic order. According to Cox, Gramsci thought that hegemons propagate a common culture and identity. 88 It is these cultural elements which legitimate hegemonic rule. Given this, it is worth recalling that during NATO’s intervention, the FRY was often criticized as deviating from common moral standards, and the action was often justified with reference to shared norms and identity.

Hegemony only prevails, Cox argues, when ‘the consensual aspect of power is in the forefront’. 89 While coercion is always latent, it is only applied in deviant cases and only aimed at enemy classes. 90 Critics often thought that the bombing of the FRY was one such deviant case. As Martti Koskenniemi argued, ‘the bombing of Serbia was the exception that revealed … the nature of the international order which lay not in the Charter of the United Nations nor in principles of humanitarianism but in the will and power of a handful of Western civilian and military leaders’. 91 Proponents, recall, argued that this coercion, and the authority under which it was exercised, had international support. Thus, by emphasizing the prevalence of consent and arguing that America did not unilaterally dominate the Kosovo action, proponents offer evidence that the event demonstrated an emerging hegemonic order.

Importantly, Cox notes that hegemony should not be equated simply with order among states. Hegemonic order, he posits, is order ‘within a world economy with a dominant mode of production which penetrates into all countries’. 92 Insofar as there is now only one economic order in the world and the Kosovo intervention helped to expand this mode of production, then – even if the action also affected other phenomena – it arguably represents a form of hegemony.

On this point, note that there is no inherent normative content to a hegemonic order. Hegemony is not ‘good’ or ‘bad’ in and of itself, but it does enforce and legitimize a status quo. Neo-Marxists are arguably right that the Kosovo intervention helped protect the current status quo. One of the reasons scholars were divided about the action is because they disagree about the values and objectives that animate this status quo. Neo-Marxists believe that it is dominated by an inherently unfair capitalist economy. Thus, insofar as NATO’s use of force

86 See Reus-Smit and Christoff (n 10) 4.
87 Ibid.
89 Ibid, 1209.
90 Ibid.
92 See Cox (n 88) 1217.
helped enforce or legitimize this economic order, it is guilty by association. As Koskenniemi argued, ‘[i]f international law is [now] centrally about the informal management of security crises by diplomatic and military experts, then of course it is not about global redistribution: it is about upholding the status quo and about directing moral sensibility and political engagement to waging that battle’. This is, however, more a meta-argument about the normative desirability and substantive content of world order and less a specific moral critique of why the events of the Kosovo intervention were unjust or unfair. Proponents of the intervention, even those who may agree with neo-Marxist critiques of the capitalist world economy, are not convinced that the only thing that NATO was doing was protecting the global market for US-led capitalist expansion.

It is precisely because the reality of the Kosovo intervention entails important non-economic elements that the concept of hegemony seems so appropriate. As Cox argues, hegemony is a ‘complex of international social relationships which connect the social classes of the different countries’. Readers should note the similarity here between Cox’s description and Reus-Smit and Christoff’s earlier argument that even America must work within a complex of multilateral bodies and international legal institutions. Both views see these socio-legal institutions as important. However, while Reus-Smit and Christoff think these institutions extend deep into global society and reflect the values of much of the world’s population, scholars like Cox believe they tend to represent the interests of a minority ruling class.

ii. The Kosovo intervention and Empire

We saw in the previous subsection that scholars disagree about what the Kosovo action represents regarding larger global trends post-Cold War. This reflects related disagreements about the intervention’s relationship to globalization, sovereignty, and international law. In their book, Empire, Michael Hardt and Antonio Negri offer an interdisciplinary account of these three phenomena. Their work differs from other neo-Marxists, like Diane Johnstone, who adopt a largely materialist perspective, prioritize traditional state sovereignty, and emphasize America’s negative and dominating role in world affairs. Hardt and Negri problematize these premises. In doing so, they advance a powerful, albeit somewhat teleological, framework to assess the Kosovo intervention and what it means about the source and nature of legitimacy, sovereignty, and hegemony in today’s increasingly globalized world.

Hardt and Negri argue that sovereignty has not declined ‘but taken a new form, composed of a series of national and supranational organisms united under a single logic of rule’. They call this new global form of imperial sovereignty ‘Empire’. Moreover, while scholars like Johnstone view the US as ruling over globalization, Hardt and Negri posit that no country, including America, ‘can today form the centre of an imperialist project’. Through the concept of Empire, Hardt and Negri seek to redefine the significance of purportedly humanitarian interventions like the one in Kosovo. These ‘just wars’, they argue, are indicative of the new global sovereignty. This is because just wars are portrayed as exceptions and, in many respects, whoever defines and enforces the exception defines and enforces the law.

93 See Koskenniemi (n 91) 172 (emphasis in original).
94 See Cox (n 88) 1217.
96 Ibid, xiv.
97 Ibid, 17.
Hardt and Negri are correct that most NATO members defended their intervention as an exception.\(^98\) The question of whether to articulate the action as a formal and generalizable doctrine of humanitarian intervention divided legal scholars. For example, Thomas Franck criticized Brad Roth for supporting a codified humanitarian exception to the non-intervention norm. Instead, Franck argued, humanitarian crises should be evaluated on a case by case basis in the political organs of the international community, ‘based primarily on extenuating facts rather than on legal exceptions’.\(^99\) This is because, Franck posited, the world is simply not ready to let states unilaterally interpret a non-defensive legal exception to the principle of non-intervention. ‘It is primarily for that reason’, he argued, ‘not because, as Roth suggests, the United States wanted to keep a free hand for itself, that the United States chose not to follow the Belgian or Dutch examples by arguing that the Kosovo action was lawful humanitarian intervention’.\(^100\)

Franck’s argument implies that by avoiding a legal justification for the Kosovo action, the US was actually acting in the greater interest of the international community. However, while Franck’s legal analysis is sophisticated, his empirical conclusion – that the US did not argue that NATO’s action was lawful humanitarian intervention because the world is not ready to let states unilaterally interpret such a doctrine – still turns on Franck’s personal view of American intentions and the relationship between US power and international law. Like Michael Ignatieff and other proponents, Franck does not seem to view US hegemony with the concern that other scholars such as Brad Roth and Richard Falk do.\(^101\)

The logic of Franck’s argument appears to be that, although most of the world’s states are not ready to be allowed to determine unilaterally when an intervention is just, the same may not be true for America and its allies. With great power comes great responsibility, the argument might go. And sometimes the world hegemon must bend the rules to prevent the law – in this case, the general prohibition on the use of force – from falling into self-destruction – in this case, failing to respond to potential ethnic cleansing.\(^102\) While this is a morally reasonable position, particularly if one views US hegemony positively, other scholars worry about the foundations that substantiate it. The inequality and unfairness that underlie Franck’s argument are not lost on critics of the Kosovo action, especially neo-Marxists.

As Hardt and Negri argue, when a power claims to act in the greater interest of the world community, this is further evidence of imperial sovereignty. ‘Empire’, they argue, ‘is formed not on the basis of force itself but on … the capacity to present force as being in the service of right and peace.’\(^103\) Insofar as NATO members and proponents justified the Kosovo action as ultimately supporting international peace and justice, then Hardt and Negri make an important point. The intervention does force us to ask who or what is defining peace, justice, sovereignty, and order in today’s world. When a scholar argues that NATO’s use of force was legitimate, they are also making a statement about the source and nature of these phenomena.

\(^98\) See Guicherd (n 53) 20.
\(^99\) See Franck (n 32) 266.
\(^100\) Ibid.
\(^101\) See, for example, Michael Ignatieff, Empire Lite: Nation Building in Bosnia, Kosovo, Afghanistan (Vintage, 2004); Roth (n 47); and Falk (n 73).
\(^103\) See Hardt and Negri (n 95) 15.
VI. Just cause – justice versus fairness

Throughout this article we have seen that critics accused the Kosovo intervention of various legal and political shortcomings. In response, many proponents argued that, notwithstanding these potential limitations, the intervention was still justified because NATO was responding to a severe humanitarian crisis that could have become much worse. At root, this is an argument that, while the above shortcomings are relevant, what is most important is that NATO had ‘just cause’ and an ethical duty to act militarily. However, the moral strength of this argument turns on the empirical details of the humanitarian situation in Kosovo before NATO’s air strikes and, perhaps more significantly, a scholar’s interpretation of these details.

Assessing the empirical aspects of the humanitarian situation in Kosovo prior to NATO’s bombing was methodologically challenging and normatively complex. Much turned on the time period that a scholar examined, the criteria and evidence they required, the authority and sources they cited, and the value judgments they made regarding thresholds such as ‘large scale’. In part because of these differences, proponents and critics offered varying descriptions of the situation in Kosovo before the intervention, with ‘genocide’ at one end of the spectrum, and ‘domestic conflict’ at the other. Consequently, proponents and critics came to very different conclusions about whether the Kosovo action was just. This section argues that these disagreements ultimately reflected whether a scholar prioritizes justice or fairness, and their view of each concept in world affairs and international law.

i. Just cause: working criteria

The International Commission on Intervention and State Sovereignty (ICISS) provides helpful criteria to assess arguments about whether NATO had just cause. It proposed that any military intervention for human protection purposes should be an ‘exceptional’ response to ‘serious and irreparable harm occurring to human beings, or imminently likely to occur’. Two such circumstances, actual or apprehended, were suggested: 1) large scale loss of life, with genocidal intent or not, resulting from deliberate state action or an unwillingness or inability to act; or 2) large scale ethnic cleansing, carried out by killing, expulsion, acts of terror or rape. Although these circumstances might seem obvious, agreeing on when they are occurring, and how to respond, are actually two key challenges of humanitarian intervention, as will be seen below.

ii. Proponents and justice

Like many proponents, David Campbell argued that NATO had just cause to intervene militarily in Kosovo. He believed that the situation there before the bombing was ‘clearly a humanitarian catastrophe’ that amounted to ‘genocide’. Military action was just, he thought, because Milošević’s policies in Kosovo were based on effacing ‘alterity’.

Campbell supports this argument by suggesting that left-wing criticisms of the intervention rely on conventional theories of justice that promote inaction in the face of

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105 While the ICISS report is not universally accepted regarding humanitarian intervention, its policy-oriented approach is advantageous because it represents a working consensus among its twelve Commissioners ‘as to what is politically achievable in the world as we know it today’. See ICISS report (n 56) VIII.

106 Ibid, 32.

107 See Campbell (n 104) 116 and 118.
Under such theories, he posits, justice is the application of rules governed by impartiality. Regarding international relations, justice has been traditionally understood through its subservience to order and sovereignty. This subservience, Campbell thinks, makes conventional arguments about the Kosovo action focus on exceptional circumstances rather than problematizing the relationship between order and justice. Campbell is correct that, as seen earlier, NATO’s action was often justified as an exception. This forces us to ask whether the situation was really that extraordinary, or whether Alliance members were worried about formalizing a doctrine of humanitarian intervention that could be exercised by other states.

Unsatisfied with traditional theories, Campbell defines justice as ‘the relationship to the other’, and ‘the site of an irreducible responsibility’. Accordingly, he posits, we should struggle for alterity and oppose the suppression of difference. One such example, Campbell thinks, was the Kosovo conflict. Employing a questionable logic of ‘guilt by association’, he argued that because Bosnia accused the FRY of genocide, Bosnian Serbs were indicted for this crime, and stolen UN equipment from Srebrenica was seen in the Serbian armoury during fighting in Kosovo, it should ‘hardly surprise’ us that genocide was also happening there.

The point here is not to debate the difficult question of what constitutes genocide. Perhaps it is telling that Milošević was charged with crimes against humanity and war crimes for his role in the Kosovo conflict, but not genocide. The point is that, by depicting the conflict in absolute terms and implying that moral conclusions should be clear to anyone using his theory of justice, Campbell downplays the complexity of the debate and misrepresents what is so divisive about NATO’s use of force. By describing the conflict as genocide, Campbell aims to denounce left-wing criticisms as based on conventional theories of justice that appear empty in the face of violence. These critiques seem empty, he thinks, because they rely on premises common to conservative views. Both are allegedly based on theories of justice that prioritize order and sovereignty. Campbell is correct that both left-wing and conservative perspectives criticized the Kosovo action. However, he misportrays why they did so.

iii. Neo-Marxists and fairness

Conservative observers and realist scholars tended to criticize NATO’s intervention because it had little to do with the national interest of Alliance members, and the conflict posed no significant threat to the balance of power. Thus, Campbell is right that this viewpoint prioritizes order. By contrast, we saw that neo-Marxists criticized the action because they thought NATO’s humanitarian goals were a cover for other objectives. These scholars do not think that an ethical idea, whether the liberal concept of a ‘responsibility to protect’ or Campbell’s notion of justice as a ‘relationship to the other’, can exist abstracted from productive forces and power distributions that are themselves unjust and unfair.

Neo-Marxists show NATO’s insincerity using logic that some may question. These scholars often argued that, if a concern for human rights was really motivating NATO countries in Kosovo, then why do they not respond with equal concern to other injustices in

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108 Ibid, 104 and 122.
109 See Campbell (n 104) 105 and 109.
110 Ibid, 119.
111 This was confirmed by the Public Information Services department of the ICTY. See also ‘Case Information Sheet’, www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf, at 6.
112 See Campbell (n 104) 120.
113 See, for example, Meirshimer (n 21) 133-138.
places like Rwanda, Congo and Palestine? This argument assumes that all ‘like cases’ should be treated similarly. As outlined below, other scholars often do not share the same unyielding commitment to fairness, and believe that additional factors affect the appropriateness of a humanitarian intervention. In sum, contrary to Campbell’s argument, neo-Marxists critique the Kosovo action more because they prioritize fairness and less because they value order and sovereignty in the way that neo-realists do. Campbell is correct, though, that by emphasizing fairness, neo-Marxists do not prioritize justice in the manner that he and other scholars do.

For example, in a book chapter entitled ‘Chomsky’s Problem: Fairness First’, Keith Doubt argued that the distinction between fairness and justice informed much of the debate on the morality of the Kosovo intervention. Generally speaking, fairness can be associated with being impartial, equitable, and consistent with the rules. Regarding international law and international relations, Chris Reus-Smit notes that multilateralism is based ‘on the underlying liberal principle that rules should be equally and reciprocally binding on all legal subjects in all like circumstances’. Justice, by contrast, can be associated with doing what is morally right or reasonable. Doubt posits that, while ‘justice is based on an a priori knowledge of what is true or good from a universal rational point of view’, fairness ‘rejects the assumption that there is one rational conception of the good’. Instead, fairness provides rules for producing rather than examining ethical maxims through cooperation and dialogue.

While Doubt criticized neo-Marxists like Noam Chomsky for abandoning justice regarding the Kosovo crisis, he acknowledged that their commitment to fairness is normatively powerful. By demonstrating the West’s mixed record of humanitarian concern, Chomsky exposes the hypocrisy and inconsistency with which human rights standards are applied and interventions are selected. Regarding NATO’s action in Kosovo, Chomsky argued that it was unfair and irresponsible. This was in part because the extensive bombing campaign did not avert or improve the humanitarian crisis in the area, one of NATO’s primary objectives for intervening. In fact, the military action was associated with a dramatic worsening of the situation. The number of people killed by local fighting rose from about 2,000 prior to the bombing to an estimated 10,000 - 12,000 after the campaign ended. The number of civilian deaths attributable to NATO’s air strikes was estimated to be at least 500. At the peak of the conflict, the number of refugees rose from around 25,000 to nearly 860,000, the (then) largest population displacement in Europe since World War II.

Granted, there was heated disagreement about what ‘caused’ this rapid deterioration and, therefore, who was responsible. Proponents tended to blame Milošević, and the killings perpetrated by Serbian forces. Critics tended to blame NATO’s military action. Much of the debate turned on whether a scholar thought NATO members should have predicted that the situation would deteriorate the way it did. As one British official recalled after the conflict,

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117 See Reus-Smit (n 18) 31 (drawing on John Gerard Ruggie (ed), Multilateralism Matters: The Theory and Praxis of an Institutional Form (Columbia University Press, 1993)).
118 See Doubt (n 115) 109, 120.
119 See Chomsky (n 9).
121 Human Rights Watch, Under Orders: War Crimes in Kosovo (October 2001) 437. For a critique of these civilian casualties, see Patricia Owens, ‘Accidents Don’t Just Happen: The Liberal Politics of High-Technology “Humanitarian” War’ (2003) 32(3) Millennium 595. For an assessment of the constraining influence of the civilian-immunity norm on NATO’s targeting practices in Kosovo, see Wheeler (n 80) 189-216.
122 According to the Yugoslav Red Cross, these figures were in addition to the more than one million people displaced within Serbia itself as a direct result of NATO bombing. See Yugoslav Red Cross, ‘Report on the Humanitarian Situation’ (8 May 1999); and UNHCR (n 8) 6.
they knew ‘that people would be driven from their homes’ but the scale was unexpected.\textsuperscript{123} There was no explicit intelligence warning, he said, that bombing would lead to a prior plan to drive people from their homes. By contrast, Chomsky argued that we can be confident that Milošević had plans to expel the Kosovar Albanians due to ‘his well-known record, the history of Albanian-Serbian relations in Kosovo, and US threats’.\textsuperscript{124}

Note that Chomsky’s empirical assessment of the pre-bombing situation was thus similar to that of many supporters of the Kosovo intervention. As Adam Roberts argued, by late 1998 and early 1999, it became evident that the bitter war between the Kosovo Liberation Army and the Yugoslav army ‘was at risk of developing into wholesale “ethnic cleansing” of the Kosovar Albanians’.\textsuperscript{125} In essence, both Chomsky and Roberts appear to have agreed that a humanitarian catastrophe was ‘imminently likely to occur’, one of the cases of ‘just cause’ outlined earlier by the ICISS. However, while these two scholars started from similar empirical interpretations, they arrived at different moral conclusions about how NATO should have reacted. Citing comments made by Wesley Clark, NATO’s Commanding General, that it was ‘entirely predictable’ that Serbian violence would intensify after air strikes began, Chomsky argued that an ‘ethic of responsibility’ forbade NATO from bombing because it knew this would worsen severely the humanitarian crisis.\textsuperscript{126} Suffice it to say that Chomsky’s idea of ‘responsibility’ differs from Campbell’s idea noted earlier.

Two fundamental tenets inform Chomsky’s normative prescription. The first is a ‘Hippocratic oath’ that one should do nothing if what one intends to do will cause more harm than good. Regarding the Kosovo crisis, this meant that, rather than bombing, concerned countries should have continued pursuing a negotiated resolution or done nothing.\textsuperscript{127} The second tenet is fairness. As Doubt noted, for Chomsky, NATO’s air strikes were completely unfair, ‘not only to the Serbian nation and its people, given the loss of civilian lives and enormous material damage, but also to the Albanians in Kosovo on whose behalf the bombing, it is claimed, [was] carried out’.\textsuperscript{128} Moreover, from the perspective of fairness, why are the concerns of the Kosovar Albanians greater than other oppressed groups in the world?\textsuperscript{129}

In sum, the disagreement over whether NATO had ‘just cause’ for its action, and how best to respond to the Kosovo conflict, ultimately reflect whether a scholar prioritizes justice or fairness, and their understanding of each concept in world affairs and international law.

\section*{VII. Conclusion}

This article revisited the debate over NATO’s unilateral use of force in Kosovo in 1999 to help better understand why the issue of humanitarian intervention is so divisive. It was argued that the action sparked disagreement because of substantive differences in the meta-views of scholars regarding the source and nature of legitimacy and sovereignty, and the values they ascribe to the international community. Many of the disagreements turned on whether a scholar prioritizes the natural and universal moral foundations of international law and legitimacy, or bases these foundations more procedurally on state consent and sovereign equality. This in turn reflected whether they emphasize justice and freedom, or fairness and

\begin{footnotesize}
\textsuperscript{123} Quoted in Judah (n 13) 241.
\textsuperscript{124} See Chomsky (n 9) 36.
\textsuperscript{125} See Roberts (n 15) 104.
\textsuperscript{126} See Chomsky (n 9) 20.
\textsuperscript{127} Noam Chomsky, ‘Now It’s a Free for All’, \textit{The Guardian} (17 May 1999) 18.
\textsuperscript{128} See Doubt (n 115) 111.
\textsuperscript{129} Ibid.
\end{footnotesize}
equality. Finally, intellectual polarization about NATO’s intervention stemmed from differing views on the existence and desirability of larger global trends, such as US hegemony or Empire, in international law and international politics following the Cold War.

In light of these findings, it appears that the positions of critics and proponents were incompatible or, perhaps, incommensurable. How do we make sense of these seemingly irreconcilable views? Are we stuck in a post-modern quagmire, where each account is as meritorious as its counterpart? Or is this the normal state of debate regarding international law and international relations? These are questions to which answers could yield policy and theoretical implications.

i. Policy implications

Regarding policy ramifications, some might wonder whether the multiple and conflicting arguments over the Kosovo action provide any cogent basis for humanitarian intervention in the absence of express authorization from the UN Security Council. A key challenge exposed by the Kosovo crisis, and reaffirmed by the recent Syrian conflict, is what can or should be done when some states think that a ‘conscience shocking’ situation is occurring but the Security Council will not authorize the use of force in response. Proponents of the Kosovo action worry that a blind commitment to the principles of right legal authority and non-intervention can lead to inaction in the face of serious injustice and suffering. Critics worry that, by condoning the use of non-defensive force outside the UN-system, we risk eroding the foundations of international law, and increasing anarchy and violence in the world. Choosing which view to prioritize in future crises will turn in part on whether decision-makers value process or ends. That said, the question remains whether there are, or should be, alternative sources of legitimacy that states can draw on to justify a unilateral humanitarian intervention.

We saw that some proponents justified NATO’s military action in Kosovo as ethically necessary. This is not an unreasonable position. Even Martti Koskenniemi, who criticizes the way ‘our obsessive talk about Kosovo makes invisible the extreme injustice of the system of global distribution of wealth’, acknowledged ‘that in the context of 1999, with the experience of passivity in [Rwanda] and in Srebrenica, Western European officials had to take action’. One problem with a moral justification, however, is that it locates an intervention’s legitimacy in a largely private realm. As Koskenniemi also argues, ‘[s]uch an understanding celebrates the emotional immediacy of the inner life as the sanctuary of the true meaning of dramatic events that cannot be captured within law’s technical structures’. Proponents might respond that a private ethical view can still be publicly shared by the international community. However, we saw that international reaction to the Kosovo intervention was mixed at best, and over 65% of states reaffirmed that unilateral humanitarian intervention is illegal and unacceptable. Therefore, justifying any similar future action on ethical grounds would arguably downplay these views, and avoid the modern requirement of explaining one’s actions with reference to public, universal and secular legal principles.

Instead of portraying any similar future action as a legal exception justified by higher morality, another option is to acknowledge that international law has gaps regarding humanitarian intervention, and address such gaps through norm development or law reform.

130 The author thanks Michael Byers for suggesting this line of inquiry.
132 See Koskenniemi (n 91) 172, 170.
133 Ibid, 173.
Regarding norm development, the ongoing international initiatives on the ‘responsibility to protect’ and ‘responsibility to prevent’ stem in part from the Kosovo intervention. They have arguably helped legitimate the idea that sovereignty involves responsibility, and that the international community has a duty to help protect people from mass atrocity. However, insofar as these initiatives have stressed the role of the Security Council and peaceful measures in fulfilling this duty, the most controversial aspect of humanitarian intervention – i.e. the potential unilateral use of non-defensive force – has arguably not been resolved. Similarly, while NATO’s military action in Libya in 2011 may have shown the impact of the ‘R2P’ norm, it also arguably reaffirmed the importance that states grant to Council authorization in matters of humanitarian intervention.134

In addition to norm development, some scholars argue that the legitimacy of future humanitarian interventions could be increased through law reform.135 For example, amending the UN Charter could affirm the idea of sovereignty as responsibility, or provide a procedural measure to ensure other voices are heard when the Security Council cannot agree on how to respond to a humanitarian crisis. Such changes, it is argued, could help protect against abuses of the Council veto, and encourage states to respond to humanitarian crises and justify themselves against shared legal principles. Granted, there are risks in trying to formalize humanitarian intervention. As advocates themselves note, unless such action is a) regulated by strict and accepted criteria, b) collective in composition, c) just in intent and execution, and d) subordinate to larger challenges such as Security Council reform, one risks increasing world anarchy.136 While these caveats are important, they still skirt around the fact that there are currently no internationally accepted criteria or processes for unilateral humanitarian intervention. Moreover, critics argue, trying to agree on such criteria by creating a ‘humanitarian’ exception to the prohibition on the use of force may ultimately erode the historical advances that have been made in human rights and conflict prevention.137

Therefore, regarding whether the multiple arguments over the Kosovo intervention provide any cogent basis for unilateral humanitarian intervention, we are again faced with incompatible positions. Is it possible to reconcile these different views or move forward in the debate? It is suggested in the next subsection that, while it is probably not possible to reconcile differing perspectives, progress requires scholars to stipulate their assumptions more openly, admit that a liberal paradigm dominates the debate, and adopt interdisciplinary approaches to analysing the Kosovo action specifically and the issue of humanitarian intervention generally.

ii. Theoretical implications

In his book, From Apology to Utopia, Martti Koskenniemi argues that post-Enlightenment international legal debate has been fraught with seemingly irreconcilable disagreements. ‘Theoretical discourse,’ he notes, ‘has repeatedly ended up in a series of opposing positions without finding a way to decide between or overcome them’.138 According to Koskenniemi, the way to move beyond these disagreements is not through increased doctrinal analysis of legal tenets. Thus, regarding the divergent views about the Kosovo action, the answer lies not in more analysis of issues such as whether NATO had right authority or just cause. This investigation has shown that, not only do scholars disagree about which rules and standards

135 See, for example, Guicherd (n 53); and Roth (n 47).
136 See Guicherd (n 53) 24-25.
137 See, for example, Franck (n 32) 267; and Byers and Chesterman (n 42) 179.
are most relevant for assessing these issues, they often cannot agree on the empirical details of the event itself in order to apply these rules and standards.

A better solution, argues Koskenniemi, is to ‘explicate the assumptions about the present character of social life among States and on the desirable forms of such life which make it seem that one’s doctrinal outcomes are justified even as they remain controversial’.\textsuperscript{139} In other words, when assessing the Kosovo action, scholars should be more open about the assumptions that animate their world view and the normative goals that guide their analysis. A good example of this practice is Chris Reus-Smit and Peter Christoff’s candid argument that the independence movement of the Kosovar Albanians was worthy of support because of its cosmopolitan qualities.\textsuperscript{140} Whether or not scholars and policy-makers agree with this argument, they can be clear about why they do or do not, by assessing the justifiability and accuracy of its assumptions.

Koskenniemi’s main thesis is that a liberal theory of politics underlies international legal discussion, and affects scholarly assumptions about the present character and desirability of social life among states.\textsuperscript{141} Regarding the debate over the Kosovo intervention, a dominant liberal paradigm thus impacts the terms and scope of such debate, and the questions and solutions that arise. Scholars expend significant energy assessing issues such as whether NATO had right intent, or when human rights can override state sovereignty. Critics like Koskenniemi wonder why other pressing issues, such as world hunger and poverty, seem to arouse less attention and fail to be labelled ‘conscience shocking’ situations.\textsuperscript{142} They do not believe that a liberal paradigm, with its narrow emphasis on individual rights and its unjust tolerance of material inequity, is the best model from which to pursue the emancipatory promise of modernity. This reflects a fundamental disagreement over what the political, ethical, and legal agenda of the international community should be. Proponents believe that critics ignore the challenges of the current agenda and avoid its difficult questions. Critics think that proponents are trapped in the wrong agenda and are asking the wrong questions.

In light of the above observations, it does not seem possible, at least at this time, to reconcile the differing empirical and normative interpretations of the Kosovo intervention. Future research could examine a broader range of conceptual implications stemming from these incompatible views, and seek to develop a theory or method for determining that one position is more valid than another.\textsuperscript{143} Future work could also investigate whether other conflicts, such as those in Darfur, Libya or Syria, have led to similar scholarly disagreements, or whether differences in these cases have narrowed or changed the scope of intellectual debate. For now, though, this article’s concluding interpretations of the disagreements over the Kosovo intervention and its suggestions for how to progress from them have to remain less ambitious and admittedly brief.

First, polarized views about the Kosovo action and humanitarian intervention arguably provide epistemological value. As Koskenniemi notes, the opposition between two seemingly different concepts or arguments (for example, order versus justice) helps provide the meaning behind each.\textsuperscript{144} Thus, insofar as the meaning of the ‘Kosovo intervention’ is created in part by diverging scholarly views of the event, it is arguably more useful to study how and why these views exist rather than to try to reconcile them superficially.

\textsuperscript{139} Ibid, xv.
\textsuperscript{140} See Reus-Smit and Christoff (n 10) 8.
\textsuperscript{141} See Koskenniemi (n 138) xvi.
\textsuperscript{142} See Koskenniemi (n 91) 172.
\textsuperscript{143} For a theoretically innovative and empirically grounded collection that pursues this idea, see Richard Price (ed), \textit{Moral Limit and Possibility in World Politics} (Cambridge University Press, 2008).
\textsuperscript{144} See Koskenniemi (n 138) xxi.
Second, determining the relative validity of different positions may require, counterintuitively, a philosophical commitment to indeterminacy and contextualism. As Koskenniemi notes, issues of ad hoc justice cannot be solved with lawyerly certainty, and deciding what to do cannot be meaningfully done without deciding ‘what is possible and good to do in the particular circumstances in which [a] problem arose’.\textsuperscript{145} Thus understood, choosing between alternative evaluations of the Kosovo action becomes a primarily political project that acknowledges the specificity and complexity of the event, and the current lack of consensus regarding difficult questions such as how the world should manage armed conflict.

Finally, disentangling scholarly disagreements about the Kosovo intervention and proceeding from them requires an interdisciplinary approach that both critics and proponents often lack. As Koskenniemi argues, such an approach ‘involves venturing into history, economics and sociology on the one hand, and politics on the other’.\textsuperscript{146} The Kosovo crisis and NATO’s intervention are multi-contextual phenomena that can be assessed in either broad or specific terms, depending on the question and problem that a scholar or policymaker seeks to address. Critics are correct that the events indicate larger trends related to globalization, the internationalization of law, and the material and cultural dominance of the West post-Cold War. However, proponents are also right that the humanitarian crisis in Kosovo and the intervention itself need to be understood in light of local and specific factors, such as the history of conflict and the growth of ethno-nationalism in the area, and the ethical motivations of Western leaders who sought to avoid another ‘bloodbath’ in the Balkans.

Seventeen years after the Kosovo intervention, scholars and policymakers debating how to address other politically divisive humanitarian crises – and the legality and legitimacy of unilateral military responses to these crises – should keep the above points in mind.

\textsuperscript{145} Ibid, 497.
\textsuperscript{146} Ibid.