

Special Feature: Foreword

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SPECIAL FEATURE

FOREWORD

JUDGE JAMES P. TERRY*

The Kosovo crisis raises a number of perplexing issues for the United Nations (UN), the 19-member North Atlantic Treaty Organization (NATO), and individual nations concerned with the humanitarian crisis unfolding in this southern territory of the Federal Republic of Yugoslavia. Long accepted legal principles argue that intervention by a state into the territory of another state which offers no direct threat to its sovereign integrity, absent Security Council authorization, violates Article 2(4) of the UN Charter. Article 2(4) condemns the use of force by a state or states against any other state, unless taken in self-defense pursuant to Article 51. The Russian and Chinese Permanent Representatives to the Security Council advised in early March 1999 that their nations would not support a Security Council resolution which would authorize the use of force to stop the Serb attacks in Kosovo. This after neither Russia nor China impeded passage of Security Council Resolutions 1199 and 1203. These Security Council Resolutions under Chapter VII of the Charter called on both Serb and Kosovo Liberation Army forces to end the fighting, called upon Serb forces to withdraw, called upon Serb forces to cooperate with investigators and prosecutors from the War Crimes Tribunal at the Hague, and endorsed the October 15 and 16, 1998 monitoring agreements brokered by U.S. Special Envoy Richard Holbrooke, the architect of the Dayton Accords in Bosnia. When the Serbs then violated these obligations through renewed violence and refused to sign the follow-on Rambouillet Agreement in mid-March 1999 (calling for a cease fire, Kosovo autonomy, and a NATO peacekeeping force), and commenced an offensive designed to drive all Albanians from Kosovo, NATO reacted by initiating Operation Allied Force against Serb aggression on March 24, 1999. UN Secretary General Kofi Annan endorsed the NATO action on that same day.

This conflict in Kosovo is not the first crisis in which permanent members of the Security Council have refused to support military action

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necessary to preserve Charter principles. After a North Korean invasion of South Korea in 1950, and after the Security Council had demanded North Korean withdrawal in a resolution passed in the absence of the Russian ambassador to the Security Council, Russia stated in the Security Council that it would not support any military action in Korea. The General Assembly, using its residual authority in Articles 10, 11, and 14 of the Charter, then passed General Assembly Resolution 377V, the "Uniting for Peace Resolution." Under this authority to prosecute military action, the United Nations force led by General McArthur successfully drove the invaders from South Korea. In the Congo in 1960, after the Russian Ambassador to the United Nations raised questions concerning UN actions to restore the peace in that nation, the Secretary General, Dag Hammarskjold, relied upon his inherent authority under Article 99 of the UN Charter to direct a successful peace enforcement initiative. Similarly, in Kosovo, NATO has looked beyond the Article 39 mandate to seek approval from the Security Council and has relied upon authority claimed to arise from existing Security Council Resolutions 1199 and 1203 and its inherent authority as a regional organization to act in collective self-defense to prevent the ethnic cleansing and expulsion of an entire population, which could lead to a spread of violence into NATO states abutting the Balkans.

The determination by the United States to support a response by a regional organization under Chapter VIII of the UN Charter rather than to seek a UN-led operation for Kosovo, possibly through a General Assembly authorizing resolution, is more pragmatic than political. Our recent experience in Bosnia with UNPROFOR suggests that UN-led operations may not be capable of undertaking Chapter VII ("all necessary means") missions. These peace enforcement missions require careful planning, experienced leadership, and highly integrated command and control arrangements. This combination is required to execute sophisticated air-ground coordination, as well as to implement robust rules of engagement which will protect the force and the civilian population. Most importantly, this cohesion is absolutely essential if forces with different experience levels and capabilities are to be successfully integrated to create force multiplication rather than force division. UN-led peace enforcement operations, unless directed by one of a handful of states, will continue to have difficulty achieving this integration. It is this understanding which underlies the U.S. support for the current NATO-led peace enforcement operations in Kosovo.

The adaptation of NATO to a role as a Regional Organization under Chapter VIII with a peace enforcement charter must be seen as part of a broad, long-term U.S. and Allied strategy that supports the evolution of a peaceful and democratic Europe. This strategy benefits U.S. security and

builds on the bi-partisan premise that the security of Europe is a vital U.S. interest. Certainly, American sacrifices in two world wars and the Cold War have proven our commitment to the region as a community of shared values, and those U.S. sacrifices have more than established our interest in recognizing and encouraging the rapid settlement of disputes in the area.

Adaptation of NATO's interest in a broader European strategy under the UN Charter's Chapter VIII began in 1990, soon after the fall of the Berlin Wall. In July 1990, under the active leadership of the Bush Administration, NATO's London Summit Declaration set out new goals for the Alliance, called for changes in its strategy and military structure, and declared that the Alliance no longer considered Russia an adversary. These efforts were reaffirmed by the Alliance's declaration in Copenhagen in June 1991, which stated that NATO's objective was "to help create a Europe whole and free." At NATO's Rome Summit in November 1991, the Alliance adopted a new strategic concept, which reaffirmed the continuing importance of collective defense, while orienting NATO toward new security challenges, such as out-of-area missions, crisis management, and peacekeeping operations.

Since then, NATO has taken further steps to advance adaptation to a Chapter VIII role. At its January 1994 Summit in Brussels, the Alliance made important decisions related to its status as a Regional Organization. Initially, it launched the Partnership for Peace (PFP) to enable intensive political and military-to-military cooperation with Europe's new democracies as well as states which had considered themselves neutrals during the Cold War. PFP has proven to be an important and effective program for these States and for the Alliance: twenty-seven have joined PFP; a PFP Coordination Office has been established in Mons, Belgium; and more than 30 major PFP exercises have been held through January 1999, plus numerous exercises with Partners "in the spirit" of PFP. The program is proving its merit in Bosnia-Herzegovina, where thirteen PFP partner states are making substantial contributions to the NATO-led peace enforcement operation in the Balkans.

The contribution of member states to European security through their participation in the NATO-led Implementation Force (IFOR), and its successor Stabilization Force (SFOR), in Bosnia is critical to successful implementation of the military aspects of the Dayton Peace Accords. It is clear from these Bosnian missions that NATO members are already restructuring their forces so they can participate in the full spectrum of current and new Alliance demands, including both Article V (self-defense) missions under the NATO Charter and peace enforcement missions such as Kosovo.

In the comprehensive and carefully written article which follows, Gary Sharp has analyzed the international legal authority for NATO to use military force in Serbia-Montenegro in the defense of Kosovo. Examining the NATO military response from perspectives of customary international law, UN Charter precedents and the humanitarian law, Colonel Sharp examines whether state practice which condones humanitarian intervention has yet developed into customary international law. Concluding after careful analysis that it has, Sharp determines that "there is a very strong and convincing argument that contemporary state practice and customary international law permits a state to unilaterally use armed force in collective self-defense to prevent genocide and other widespread arbitrary deprivation of human life in violation of international law." Based upon the fear of the conflict spreading in to NATO and other European states, Colonel Sharp makes the case that it is patently rational for NATO to use reasonable and proportional force in collective self-defense to prevent the civil war from spreading beyond Serbia-Montenegro. The author rightly concludes that existing law and state practice permit a state or collective of states in a regional organization like NATO to use armed force to prevent genocide and other widespread abuses of human life.