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The legality of NATO's action in the former republic of Yugoslavia (FRY) under international law

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“negotiations” of the issues (presented by NATO) were not normal negotiations but were conducted under the threat of massive use of force. It is positively Orwellian for Lord Robertson to speak of “negotiations”.

27. The modalities of the operations against Yugoslavia are substantially incompatible with humanitarian intervention. I refer to the use of very powerful modern weapons in urban areas, the offensive generally against the economy of a whole country, and the use of cluster bombs. Many civilians were killed or maimed, hospitals were damaged and internal refugee flows induced. Moreover, during the bombing the declared purpose of the operations was to induce the population to overthrow the lawful government of Yugoslavia.

28. One of the difficulties attending the legal evaluation of the military operations is the substantial doubt about the real purpose of the war. Even if humanitarian intervention were lawful, it is difficult to see the NATO attack (or its aftermath) as a *genuine* example (on the facts) of such action.

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THE LEGALITY OF NATO'S ACTION IN THE FORMER REPUBLIC OF YUGOSLAVIA (FRY) UNDER INTERNATIONAL LAW

I. INTRODUCTION

THE use of force has been prohibited in international relations since at least the United Nations Charter, 1945. Article 2 (4) of the Charter states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the United Nations.

This principle is accepted customary international law and regarded as a peremptory norm of international law (*jus cogens*) by many authors. Operation Allied Force, as an undoubted use of force against the territory of another State, is accordingly contrary to international law unless it either:

- (i) comes within the terms of an exception to the prohibition against force; or
- (ii) can be justified under customary international law that has evolved independently of, and consistently with, the Charter.

This paper will consider first the legality of Operation Allied Force under the UN Charter and secondly the position under customary international law. The legal analysis is complex and this paper does not purport to be comprehensive. Rather it raises some of the many arguments that might be made.

A. *The Law of the UN Charter*

The Charter recognises three exceptions to the prohibition against the use of force: self-defence; enforcement action under Chapter VII; and enforcement action by regional arrangements under Chapter VIII.

1. *Individual or Collective Self-defence*

UN Charter, article 51, preserves the inherent right of self-defence "if an armed attack occurs against a Member of the United Nations ..." No NATO Member State had suffered any "armed attack", nor was under any threat of attack. Self-defence could only be justified in terms of the collective self-defence of Kosovo. However the right to self-defence under both the UN Charter and customary international law appertains to States, not to sub-State entities. Since Kosovo is not a State the right to self-defence under article 51 is inapplicable.

2. *Chapter VII Action*

UN Charter, Article 24 gives the Security Council the "primary" (not exclusive) responsibility for the maintenance of international peace and security. The UN collective security arrangements are provided for in Chapter VII. The UN Charter, Article 39 provides for the Security Council to determine the existence of a threat to the peace, breach of the peace or act of aggression and then to "make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42 ...". Article 42 authorises the Security Council "to take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security". There may still be arguments about the legal basis of Security Council authorisation in the absence of armed forces agreements under Article 43. However in the case of Kosovo there was no Security Council authorisation.

2.1. *NATO's Action Received No Prior Security Council Authorisation*

In Security Council Resolution 1160, 31 March 1998 the Security Council acted under Chapter VII to impose an arms embargo on the FRY in accordance with Article 41. It therefore understood the situation to constitute a threat to international peace and security. It called upon all States to "act strictly in conformity with this resolution".

The Security Council allocated no broad or specific competence for the implementation of this resolution, as it did for example in the Beria Resolution when the United Kingdom was authorised to enforce the sanctions imposed upon Southern Rhodesia.¹

In Security Council Resolution 1203, 24 October 1998 specific obligations were directed towards the Kosovo Albanian leadership: to comply with all relevant resolutions; to condemn terrorist actions; and to pursue its goals by peaceful means only. It also made demands of the Yugoslav Government: compliance with all relevant resolutions; full implementation of the Agreements of 15 October 1998 between itself and NATO; compliance with the OSCE Verification Mission and the NATO Air Verification Mission over Kosovo; and to be mindful of its primary responsibility for the safety and security of all diplomatic personnel and for the safe return of refugees and displaced persons.

Other States were only urged to provide personnel for the OSCE Verification Mission and resources for humanitarian assistance. It can be argued that the

1. SC Resolution 217, 20 Nov. 1965.

resolution envisaged the possibility of the use of force in its endorsement of NATO and OSCE agreements with Belgrade for the deployment of verifiers within Kosovo and its affirmation in paragraph 9 that "in the event of an emergency, action may be needed to ensure their safety and freedom of movement."

This wording, however, assumes the use of force only for a specific and limited reason—the protection of the Verification Mission. It cannot be construed as a broader authorisation of force. In the event, the Verification Mission left Kosovo immediately before the commencement of Operation Allied Force so concern for its safety did not figure in the decision to use force.

The Security Council resolved in Resolution 1199, 23 September 1998 "to consider further action and additional measures to maintain or restore peace and stability in the region" in the event of noncompliance. In Resolution 1203 a month later it decided only "to remain seized of the matter". In the event the possibility of the use of the veto by the Russian Federation meant that no further Security Council action was authorised.

2.2. *Authorisation Cannot Be Implied From Omission*

It is becoming commonplace to argue that omissions by the Security Council to authorise certain actions are "as good as" positive votes. Such justifications have been given for example for the bombing of Iraq in December 1998 and for the use of force to maintain air lanes over Iraq. In this context the response to a question in the United Kingdom Parliament about the legality of the use of force in response to noncompliance with Security Council Resolution 949, 15 October 1994 is informative. In that resolution, acting under Chapter VII of the UN Charter, the Security Council demanded that Iraq not deploy military units to the South of Iraq. When asked whether the use of force without any further Security Council resolution would be justified if Iraq were to deploy troops to the South, the government spokesperson in the House of Lords replied that it would not.² On the other hand, at the time of the bombing of Iraq in December 1998 for noncompliance with UNSCOM, the government considered the use of force to be legal, despite no specific authorisation for the use of force for this purpose in a string of resolutions dating back to the ceasefire resolution, 687, 3 April 1991.

It has been suggested, for example by Professor R. Wedgwood, that the lack of a vote in the Security Council prior to the onset of Operation Allied Force can be read as tacit approval.³ Professor Wedgwood has further argued that account should be taken of informal statements from "a high-ranking Russian official with senior foreign policy responsibilities" that some use of force against the FRY would not be unuseful. This is an argument that international law should give weight to the "back-channel communications of states".

The argument that omission is an implied authorisation is flawed. Article 27 of the Charter lays down the Security Council voting procedure and 27(3) provides for the veto for non-procedural matters. It cannot simply be discounted in favour

2. HL Debs, 561, WA, 6 Feb. 1995.

3. R. Wedgwood, "Kosovo and the Law of Humanitarian Intervention", 93 A.J.I.L. 828 (1999).

of "off the record" remarks by officials. This would fuse diplomacy and law and undermine consistency and certainty in the application of the Charter. It would also inhibit open and frank discussion in negotiations for fear that statements would be taken as authoritative of a State's position in preference over its formal vote in the Council. Since, in the case of Kosovo, no such vote was ever taken, there can only be speculation as to how States would in fact have voted over what specific proposals. Speculation cannot be a basis for legal authorisation and what remains clear is that the Security Council did not authorise the use of force against the FRY in March 1999.

2.3. *The Action Has Been Endorsed Ex Post Facto*

This argument is discussed below in the context of regional enforcement.

3. *Regional Enforcement under Chapter VIII*

3.1. *Requirement for Security Council Authorisation*

However the action against the FRY was not unilateral but the joint action of a collective self-defence organisation, NATO.

Chapter VIII of the UN Charter provides for regional enforcement.

Article 53 states:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council ...

It has been suggested that *ex post facto* authorisation (or ratification) of the enforcement action of a regional agency is sufficient, for example in the context of the OAS blockade of Cuba in 1963. However the literal wording of Article 53 is unambiguous: no enforcement action shall be taken without authorisation by the Security Council. Article 31 of the Vienna Convention on the Law of Treaties, 1969 requires that words be given their literal meaning and Article 53 does not seem open to any other interpretation. Further, the purpose of Article 53 is that the Security Council should retain control over situations requiring enforcement action. The meaning of enforcement action has also been controversial, but there is little doubt that Operation Allied Force comes within it.

3.2. *NATO and Subsequent Practice under Article 53*

Nevertheless it has also been suggested that Article 53 has been made more flexible through subsequent practice and by tacit acquiescence in this practice by the Security Council.

The UN has neither the resources nor the capability to resolve all issues that arise and increasingly has looked to regional bodies for assistance. Accordingly in an *Agenda for Peace*, 1992 and its 1995 Supplement, former Secretary-General Boutros Boutros-Ghali urged the development of complementary and coherent strategies between regional and global organisations.

This was done in the conflicts surrounding the dissolution of the former Yugoslavia, notably in Bosnia-Herzegovina where the Security Council used NATO, a collective defence organisation, for humanitarian purposes.

For example, SC Resolution 770, 13 August 1992 called upon States to take nationally or through regional agencies ... "all measures necessary to facilitate and co-ordinate with the United Nations ... humanitarian assistance."

Similarly, pursuant to SC Resolution 816, 31 March 1993 the Security Council authorised "Member States acting nationally or through regional organizations to enforce no-fly zones over Bosnia." NATO carried out this function.

It is worth noticing that these events assumed NATO to be a regional agency or arrangement within the terms of UN Charter, Chapter VIII, although these terms are also open to various interpretations. Further, NATO used force for humanitarian ends in a non-Member State (Bosnia-Herzegovina) on the basis of these resolutions despite article 5 of the North Atlantic Treaty, 1949, which provides for the use of force only in collective self-defence of its members.

Thus there has been adaptation of NATO's competence, as defined by its constituent treaty, through Security Council resolutions. It does not follow from this, however, that it can use force on humanitarian grounds without such authorisation.

3.3. *Article 53 and Operation Allied Force*

These two interlocking arguments—that *ex post facto* ratification by the Security Council is sufficient authorisation and that the Security Council has through its practice accorded regional arrangements greater flexibility in enforcement action—can be applied to Operation Allied Force. It can be argued that the NATO action with respect to the FRY was implicitly endorsed by the Security Council through Security Council Resolution 1203, 24 October 1998 and subsequently endorsed by its failure to condemn the bombing campaign and by the adoption of Security Council Resolution 1244, 10 June 1999, after the end of the bombing campaign.

First, Security Council Resolution 1203, 24 October 1998 endorsed and supported the agreements signed in Belgrade on 15 and 16 October 1998 (between the FRY and the OSCE and NATO respectively) after NATO had indicated that force might be required against the FRY. If the Council had considered inappropriate the indication (threat) that force might be used (and UN Charter, Article 2(4) applies to the threat, as well as the use, of force), it is unlikely that it would have supported the terms of the agreements.

Second, a draft resolution proposed by the Russian Federation, Belarus and India on 26 March 1999 condemning the bombing as violating UN Charter Articles 2(4), 24 and 53 was rejected by a vote of 12–3. This might be taken as tacit approval.

Third, Security Council Resolution 1244, 10 June 1999 adopted in its Annex 2 the Agreement on the Principles to move towards a Resolution of the Kosovo Crisis (the Peace Plan), authorised the international security presence in Kosovo to exercise "all necessary means" to fulfil its responsibilities and entrusted the Secretary-General with organising a parallel international civil presence there. An argument can be made that the Security Council would not have endorsed the Peace Plan if it was condemning the action that led to it, and thus that Resolution 1244 can be read as bestowing subsequent approval (authorisation) upon Operation Allied Force.

The previous occasion that most closely resembles this situation is the intervention by ECOWAS through its enforcement arm, ECOMOG, in Liberia in 1990–2. ECOMOG intervened in the civil war in Liberia without Security Council authorisation. Its action was at first primarily humanitarian but it subsequently entered into more offensive action, more appropriately seen as enforcement action. ECOMOG is the military force of a regional economic organisation. Under the Protocol Relating to Mutual Assistance on Defense, 1981 it was envisaged that ECOMOG might be called upon to act “in cases of armed conflict between two or more members”. It was not envisaged that it would intervene in internal conflict in its own Member States (as was the case in Liberia and subsequently Sierra Leone). Thus ECOMOG (like NATO) intervened in an internal situation and outside the terms of its own constituent Treaty,⁴ but unlike NATO intervened only within Member States.

In Security Council Resolution 788, 19 November 1992 the Security Council, in operative paragraph 1 (that is not just in the Preamble), “commend[ed] ECOWAS for its efforts to restore peace security and stability in Liberia”. It also condemned armed attacks against ECOWAS forces (which it termed peacekeeping forces). The Security Council reiterated its commendation of ECOWAS in Resolution 856, 10 August 1993 when it authorised military observers to go to Liberia prior to the establishment of UNOMIL.

The importance of these resolutions is that they suggest a change of Security Council practice whereby subsequent authorisation might suffice. However, in Security Council Resolutions 788 and 856, ECOWAS is commended by name. In contrast, Security Council Resolution 1244 welcomes the general principles with respect to the settlement of the political crisis in Kosovo, but nowhere refers directly to NATO, or its enforcement action. Further, unlike Security Council Resolution 1203 which “endorses and supports” the October 1998 Agreements between NATO and the FRY, Security Council Resolution 1244 welcomes the Peace Plan in the preamble but only “decides that a political solution to the Kosovo crisis shall be based on [its] general principles” in the operative paragraph. This language accepts the *status quo* without explicitly endorsing the action.

Even if the argument that retroactive authorisation of enforcement action by regional agencies is sufficient compliance with UN Charter, Article 53 is accepted, the case for asserting that this occurred in Security Council Resolution 1244 is weak. It is only through implication; there is no explicit commendation as occurred with ECOWAS.

The Security Council's attitude with respect to Operation Allied Force has been one of sitting on the sidelines, neither rejecting nor approving the action that was unfolding without its participation.

Arguments for the legality of NATO's actions in the FRY are strengthened by taking all these actions together: the Security Council recognised the situation in Kosovo as warranting Chapter VII action; it imposed those measures upon which it could secure agreement; prior to the bombing it affirmed the on-going actions of

4. See further See V. Nanda *et al.*, “Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention under International Law—Part II”, 26 *Denver Journal of International Law* 827 (1998).

various European organisations, the EU, the OSCE and NATO, that did not involve the use of force; when it could take no stronger measures itself it did not condemn the regional agency that did so act; and subsequent to the action it made its decisions on the basis of the political agreement that had been reached. These actions imply some approval but they do not substitute for the fact that there was no prior authorisation of the action. The plain words of Article 53 were discounted.

It seems that there has been a creeping evolution with respect to both the Security Council and NATO. The former has extended Chapter VII by using it to authorise humanitarian assistance and then calling upon regional agencies or arrangements to provide the necessary forces to secure its delivery, thus moving closer to intervention on humanitarian grounds. The latter, an organisation established for collective self-defence, has undertaken collective humanitarian intervention with, and subsequently without, Security Council authorisation. At each stage the interpretation of the Charter and the North Atlantic Treaty has been further extended, until the actions fall outside the terms of both.

B. Customary International Law: Humanitarian Intervention

If the legality of Operation Allied Force cannot be based on the UN Charter, it might nevertheless be legal under customary international law that has developed alongside and consistently with the Charter. The most obvious contender is the so-called doctrine of humanitarian intervention. The use of force against the FRY was described by a United Kingdom representative as "directed exclusively to averting a humanitarian catastrophe".⁵ Many similar statements from the leaders of other NATO States can be found.

The doctrine of humanitarian intervention has been asserted by a number of writers as allowing intervention, including the use of force on the territory of another State, for protection against gross violations of human rights committed against that State's own citizens.⁶ (Where intervention is to protect a State's own citizens it is more properly considered as an aspect of self-defence.)

1. Is The Doctrine of Humanitarian Intervention Applicable in International Law?

In the 19th century there were a number of incidents of intervention by States either to rescue their own nationals, or those of other States, from actual or threatened harm on the territory of another State. Such incidents have no

5. UK Permanent Representative in the Security Council, 24 March 1999, cited *Legality of the Use of Force (Yugoslavia v. UK)* Oral Pleadings, ICJ Doc. CR/99/23, para. 7, 11 May 1999.

6. For a selection of the opposing views on international law in this area see R. Lillich ed., *Humanitarian Intervention and the United Nations* (1973); M. Bazlyer, "Re-examining the doctrine of humanitarian intervention in light of the atrocities in Kampuchea and Ethiopia", 23 *Stanford Journal of International Law* (1987) 547; M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York, Basic Books, 2nd ed. 1992); S. Simon, "Contemporary legality of unilateral humanitarian intervention", 24 *California Western International Law Journal* (1993) 117; S. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996); N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985).

precedent effect today because of the colonial environment in which they took place and the changed regime with respect to the use of force established by the UN Charter.

The UN Charter establishes a legal regime based upon the sovereign equality of States (Article 2(1)), the obligation to settle disputes peacefully (Article 2(3)), the prohibition of the use of force (Article 2(4)), and non-intervention into the domestic jurisdiction of States (Article 2(7)). All these foundational principles were reiterated in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.⁷ Any intervention into another State, even upon humanitarian grounds, is incompatible with these principles and as such contrary to the Charter.

Two interlocking arguments against this view have been advanced:

1.1. Humanitarian intervention is consistent with the terms of the Charter

There are two schools of thought with respect to Article 2(4). The view that probably remains dominant is that it is a comprehensive exclusion of the use of force in international relations and that the clause "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations" amplifies the totality of States' rights. The other view is that this clause limits the prohibition against the use of force. The *only* force that is prohibited is that that is contrary to the territorial integrity or political independence of any State, or the purposes of the United Nations. Accordingly if the force does not come within these categories it is legal.

The U.K. argued the second position in the *Corfu Channel Case*.⁸ It asserted that its actions in sweeping the Corfu Channel for mines was not against the territorial integrity or political independence of Albania. It was solely to protect navigation and to collect evidence of the existence of mines there. The International Court of Justice found the U.K. to have acted contrary to international law. However the argument for intervention is stronger in the context of human rights. The maintenance of international peace and security is not the only purpose of the United Nations. Article 1(3) states as another purpose of the Organisation:

To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms ...

Further, Article 56 states:

All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Article 55(c) spells out in more detail the purposes of Article 1(3):

universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

7. GA Res. 2625 (XXV), 24 October 1970.

8. (*UK v. Albania*) 1949 ICJ Rep. (Judgment of 9 April 1949).

It can be argued that where the force is aimed solely at the protection of human rights it does not threaten the political independence and territorial integrity of any State and is entirely consistent with the purposes of the UN Charter. Further, the domestic jurisdiction exclusion, UN Charter, Article 2(7) has not been allowed to interfere with the growth of the human rights regime and the understanding that how a State treats its own citizens is not shielded from international scrutiny. States parties to the International Covenant on Civil and Political Rights 1966 have undertaken to "respect and ensure" the rights within their own territories. Under the Preamble they also recognise that the rights "can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights". It is not such a large step to make this a more general obligation to ensure human rights within other territories as well, an obligation that can also be read into the pledge to take "joint action" in UN Charter, Article 56. From these instruments the case can be made that the use of force in defence of human rights in extreme cases is not contrary to the UN Charter, falls within its purposes and is certainly morally justified. On the other hand, it must also be acknowledged that the structure of the UN Charter gives priority to State sovereignty.

1.2. Humanitarian Intervention is a Principle of Customary International Law

The other interlocking argument supporting a doctrine of intervention justified on humanitarian grounds is that there is sufficient uniform and consistent State practice, accompanied by the required *opinio juris* (belief in the existence of the law), to establish the principle as a customary international law exception to the UN Charter.

State practice has to be considered according to whether or not an instance of intervention was authorised by the Security Council. In the post-cold war era when the use or threat of veto has been lessened, the Security Council has authorised intervention on humanitarian grounds under Chapter VII of the Charter without the consent of the State in question. In 1991 with respect to the situation of the Kurds at the end of the Gulf War, Security Council Resolution 688, 5 April 1991 insisted that Iraq allow access by international humanitarian organisations and appealed to all Member States "to contribute to these humanitarian relief efforts". This paved the way for the Security Council to authorise intervention on humanitarian grounds, which it did in the case of Somalia. Security Council Resolution, 794, 3 December 1992 determined the humanitarian situation to be a threat to international peace and security and authorised the use of "all necessary means" to establish a "secure environment for humanitarian relief operations". This resolution was ground-breaking in two ways: the assertion that a humanitarian crisis had implications for international peace and security and thus warranted Security Council intervention and the fact that no consent was given by Somalia.

Since Somalia, humanitarian assistance backed by military force has been authorised in Bosnia and Rwanda. It can be confidently asserted that Security Council practice has extended the concept of what constitutes a threat to international peace and security, and thus the conditions for intervention, to cover humanitarian catastrophes. The legitimate use of force in such situations has remained controversial. The resolutions have authorised "all necessary means" to

ensure the delivery of humanitarian assistance but not to assist any warring side in an internal conflict. Force was therefore initially limited to actions in self-defence, but this position has been undermined by the use of force to protect no-fly zones in Bosnia as described above, and the NATO bombing of Bosnian Serb positions, for example in August 1995.

However the fact that the Security Council has authorised intervention on humanitarian grounds under Chapter VII does not automatically legitimate such action without authorisation. The customary international law requirement of *opinio juris* cannot be deduced from the actions of States that are authorised by the Council. It is necessary to consider unauthorised interventions and here the picture is less clear. The most commonly cited examples are the intervention of India into Pakistan in 1971 for the protection of the Bengalis, which led to the creation of the State of Bangladesh; the intervention of Tanzania in 1979 that caused the overthrow of Idi Amin in Uganda; and that of Vietnam which terminated the murderous regime of the Khmer Rouge in Cambodia. However in all three cases the States in question did not claim the right to humanitarian intervention, but rather that of self-defence in that there had been border invasions and other acts or threats of force committed against them. In addition, the response of the international community was equivocal. Bangladesh was recognised as an independent State and admitted to the United Nations but the Heng Samrin regime in Cambodia was not accorded recognition in the West, nor was it allowed to represent Cambodia in the UN.

In other situations where humanitarian intervention might have been applicable, other legal justifications for the action were also argued by the protagonists. These include: rescue of a state's own nationals (U.S. action in Grenada in 1983; Israeli action in Entebbe in 1976; U.S. attempt to rescue the hostages held in Tehran in 1980); invitation from the legitimate government (U.S. action in Grenada in 1983 and Panama in 1989; USSR action in Afghanistan); restoration of democracy (U.S. action in Grenada in 1983 and Panama in 1989).

In each of these instances the response of the international community was at best equivocal and there were condemnatory resolutions in the General Assembly. They also of course reflect the cold war divisions of their day.

It should also be remembered that in the context of Korea the General Assembly recommended the use of force under the Uniting for Peace Resolution when the Security Council was unable to continue its authorisation because of the Soviet veto. In the *Certain Expenses of the United Nations Opinion*⁹ the ICJ considered the costs to be legitimate expenses of the UN provided the action was within the overall purposes of the UN. On the one hand this shows that the Security Council has only primary (as opposed to exclusive) responsibility for the maintenance of international peace and security, on the other that there remains a preference for some form of UN response. The General Assembly has not recommended a similar intervention on humanitarian grounds (although it has recommended humanitarian assistance).

In what is perhaps the fullest defence of humanitarian intervention, Fernando Tesón has justified it by reference to the sovereignty and security of peoples.¹⁰

9. 1962 ICJ Rep. (Adv. Op. 20 July 1962).

10. F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* 2nd ed. 1997.

Tesón considers that the ultimate justification for the continuation of the State is the protection of the natural rights of its citizens. A government violating those rights forfeits domestic and international legitimacy, and foreign intervention to suppress government abuse is justified. Other writers have been less clear about the legality of humanitarian intervention but consider it a form of "international civil disobedience". Tesón's view may receive some support from the Copenhagen Document of the Conference on the Human Dimension of the CSCE (as it then was), 29 June 1990, although it is not a legally binding instrument.

Article 1 of the Copenhagen Document expresses the commitment of the participating States to the protection of human rights and fundamental freedoms as a "basic purpose of government". Article 6 asserts that the "will of the people freely and fairly expressed ... is the basis of authority and legitimacy of the government." The Document goes on to recognise the responsibility of the participating States to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, and also in Article 11 recognises the importance of remedies. Article 11.2 recognises the "right of the individual to seek and receive assistance from others in defending human rights".

It could be argued that the individuals of Kosovo did just this and that the NATO States responded by giving assistance. However article 37 states firmly that none of these commitments may be interpreted as implying any right to engage in any activity contrary to the UN Charter, including the territorial integrity of States.

I do not think that State practice is sufficient to conclude definitively that the right to use force for humanitarian reasons has become part of customary international law. I would submit that the most that can be asserted is that there is an emerging concept of humanitarian intervention based upon the purposes of the Charter, the growing commitment to the active protection of human rights and limited State practice. The exception is genocide. Under the Genocide Convention, 1948, article 1 States parties "undertake to prevent and punish" the crime of genocide. As far as I am aware, this justification was not made for NATO's action.

2. *What are the Conditions for Humanitarian Intervention?*

Those in favour of a legal doctrine of unilateral humanitarian intervention have been concerned to emphasise its exceptional nature and the need for strict criteria for its application. There is no authoritative decision on the criteria but among those most commonly asserted are:

(i) A gross violation of human rights occurring in the targeted State

Since coercive intervention is *prima facie* illegal, circumstances purporting to justify it must be strictly construed. Accordingly the violations of human rights must be of the most fundamental rights of the sort most frequently designated as *jus cogens* (e.g. right to life; right to be free from torture; right not to be subject to genocide). It is controversial whether economic and social rights can be included but systematic denial of food (as in Somalia) would appear to do so. Perhaps a good guide would be to consider whether those denials of human rights that

constitute crimes against humanity under the Rome Statute for an International Criminal Court, 1998 would warrant intervention. Concern about political security and the instability of a regime do not warrant intervention on humanitarian grounds.

(ii) The UN is unable or unwilling to act

The primary responsibility of the Security Council for the maintenance of international peace and security under UN Charter, article 24 gives a priority to Security Council action. While the Security Council's mandate is not explicitly directed at human rights, it has extended its Chapter VII powers to such situations (Somalia, Bosnia) and such authorised intervention is clearly legal. However if the UN is unwilling or unable to authorise action, there is a moral imperative for some other body to act in its place, preferably through collective action, and such action should not be deemed illegal.

(iii) An overwhelming necessity to act

The objective is to prevent, or put an end to, gross human rights abuses when there is no longer any expectation that the domestic authorities will do this, the UN is unable or unwilling to act, all non-military options have been explored and there is some impartial and neutral evidence (for example a report from the International Committee of the Red Cross; reports from inter-governmental organisations such as the bodies of the Human Rights Commission, or regional human rights bodies; NGO human rights reports) that the humanitarian situation can no longer be contained.

There is a dilemma between the need to wait until the intervention is necessary according to some objective criteria, and the additional loss of lives likely as a result of delay. This was most tragically demonstrated in Rwanda where early warnings of the impending genocide were ignored. If the doctrine of humanitarian intervention is to have practical benefits, it seems likely that it will move into one of "anticipatory humanitarian intervention" (on an analogy with "anticipatory self-defence").¹¹ This shows the very real tension between State sovereignty and human rights guarantees for a doctrine that is inherently difficult to formulate in a precise and legal way. Yet since the doctrine is intended to operate as an exception to the prohibition on the use of force and against state sovereignty, it must be strictly construed.

(iv) The Intervention must be Proportionate

This relates to the means of intervention rather than the decision to intervene. The 1949 Geneva Red Cross Conventions and the First 1977 Protocol Additional to the Geneva Conventions that provide the legal regime for the conduct of international armed conflict are applicable to all international armed conflict regardless of whether the use of force is justified by international law.

11. J. Charney, "Anticipatory Humanitarian Intervention in Kosovo", 93 A.J.I.L. 834 (1999).

3. *Were the Conditions Satisfied in the Case of Operation Allied Force?*

There is little doubt that there were significant violations of human rights in Kosovo. Security Council Resolution 1199, 23 September 1998 refers to "reports of increasing violations of human rights and of international humanitarian law", the Security Council's alarm at the "impending humanitarian catastrophe" and the need to prevent its occurrence. Reports of massacres such as that in Racak in January 1999 added to the picture of the commission of gross and widespread human rights abuses. The displacement of over 230,000 persons from their homes is also pointed to in Security Council Resolution 1199.

What is less clear is whether the intervention was "necessary", whether all other means of preventing the continuing violations of human rights had been sought, and whether the intervention was limited to humanitarian objectives.

Human rights abuses had been reported in Kosovo for many years without foreign, armed intervention. While their cumulative effect was mounting it is not clear that there was a greater emergency in March 1999 than at other times. The precipitating factors appear to have been the intensification of fighting between the KLA and Serbian forces and the refusal of the FRY government to accept the terms of the Rambouillet Agreement. The insistence at Rambouillet on what were termed "non-negotiable principles" and the threat of NATO force undermined that process as an attempt at a negotiated settlement. The withdrawal of the OSCE Verification Mission after the failure of a negotiated settlement removed a restraint upon abuses by Serbian forces, and violations intensified.

In addition, both the Rambouillet principles and the five principles initially asserted by NATO as the conditions for cessation of bombing show the problems of applying the doctrine of humanitarian intervention. At Rambouillet the territorial integrity of the FRY and the self-government and guarantee of human rights of the people of Kosovo were both stressed. The role and participation of the OSCE and other international bodies to ensure the latter undermine the former. Similarly NATO stressed among its objectives an end to the killings by Yugoslav army and police (an end to human rights violations) and the deployment of a NATO led international force. It may well be the case that long-term protection of the civilian population could not be achieved without such continuing intervention. However such realities make the purported requirement of humanitarian intervention, that it be limited to humanitarian objectives, unworkable. It is hard to envisage a way to bring about a permanent end to human rights abuses of a sufficient gravity to warrant foreign intervention without some far-reaching political settlement. This will inevitably undermine the political independence of the targeted State.

Aerial air strikes are not effective for protecting people on the ground who are likely to suffer additional discrimination and abuse because of the bombing. In the short term the action did not achieve its humanitarian goals and might be more accurately labelled reprisal or forcible countermeasures for prior illegal acts. There is no exception to UN Charter, article 2(4) allowing for reprisals.¹² In the

12. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 Oct. 1970.

long term, NATO's forcible intervention and subsequent peace building through KFOR may bring about that situation (although in April 2000 this is looking bleak). This highlights still another dilemma of humanitarian intervention: the tension between short term and long term consequences. The doctrine does not give adequate guidance on this question.

It has been argued, for example by Professor Cassese, that the Geneva Conventions and Protocol I constitute customary international law. It would be possible to go through the articles of the Geneva Conventions to determine the conformity of the NATO action with them, but that would be beyond the scope of this survey of the law. However one of the over-riding principles of international humanitarian law is the distinction between combatants and non-combatants. While NATO stressed its selection of military targets, it is arguable that the form of combat, high aerial bombing and the use of cluster bombs, were contrary to this basic principle of humanitarian law.

In determining whether the action satisfies the requirement of proportionality, two other considerations are those of human rights and environmental law. In its advisory opinion on *The Legality of Nuclear Weapons*,¹³ the International Court of Justice considered the relevance of each.

The Court opined that the International Covenant on Civil and Political Rights, 1966 does not cease to be applicable in times of war (para. 25). All NATO members are parties to the ICCPR. Article 6 guarantees the right not to be arbitrarily deprived of life. The Court considered that the determination of what constitutes arbitrary deprivation of life must be determined by the *lex specialis*, international humanitarian law, which again warrants examination of the observance of the distinction between combatant and non-combatant in the campaign. It should be noted that the UN High Commissioner for Human Rights has expressed concern about NATO's compliance with human rights law. Further, the General Assembly and the UN Committee on Economic and Social Rights have both emphasised the importance of complying with continuing human rights obligations in the context of unilateral economic measures. The General Assembly has urged States to refrain from adopting or implementing "any unilateral measures . . . impeding the full realization of the rights set forth in the Universal Declaration of Human Rights".¹⁴ The human rights of the civilian population include their right to an adequate standard of living under the International Covenant on Economic, Social and Cultural Rights, 1966, article 11, to which the U.K. (and other NATO members, but not the U.S.) is a party.¹⁵

The Legality of Nuclear Weapons advisory opinion is also relevant with respect to the environmental consequences of conflict. The Court considered that environmental considerations must be taken into account when assessing what is necessary and proportionate action in pursuit of military objectives. It referred to the General Assembly's Resolution On the Protection of the Environment in Times of Armed Conflict,¹⁶ where the General Assembly stated that destruction

13. ICJ Reports, 1996 (Adv. Op. 8 July 1996).

14. GA Res. 53/141, 8 March 1999, Human Rights and unilateral coercive measures.

15. The relationship between economic sanctions and respect for economic, social and cultural rights, General Comment 8 (E/C.12/1997/8), 5 Dec. 1997.

16. GA Res. 47/37, 25 Nov. 1992.

of the environment not justified by military necessity and carried out wantonly is clearly contrary to customary international law. While NATO's action was not "wanton" the assessment of environmental damage against military necessity in a campaign of this sort is less clear.

I do not have access to objective data about either the human rights situation of Yugoslav civilians or the environmental conditions in the FRY. It is to be noted that the European Union has urged the provision of fuel for heating in areas where the opposition is in control in Yugoslavia indicating the shortage of and need for such essentials. Environmental damage, notably to the Danube, is disrupting communications and trade to third States. Such facts must be taken into account in determining whether the action was necessary and proportionate.

C. Summary of Conclusions

1. The NATO bombing does not come within the exceptions to the prohibition against the use of force provided for by the UN Charter. It was neither individual nor collective self-defence; it was not authorised by the Security Council in accordance with either Chapter VII (articles 39 and 42) or Chapter VIII (article 53).
2. The doctrine of unilateral humanitarian intervention (that is without Security Council authorisation) remains controversial in customary international law. Proponents of the doctrine assert that it is supported by Security Council authorised intervention in Somalia, former Yugoslavia and Rwanda, as well as by unilateral action such as that by India (1971), Tanzania (1979) and Vietnam (1979). Others argue that there is no unequivocal State practice and that such a principle conflicts with those of sovereignty, non-intervention and UN Charter, Article 2(7). The Security Council has been inconsistent, although there has been a trend towards the authorisation of intervention on humanitarian grounds and instances of what might be termed unilateral "humanitarian intervention" can be justified on other grounds, in particular self-defence. There is no authoritative opinion on this disputed area of international law, although it is clear that the doctrine has greater support than, for example, a decade ago.
3. If it is accepted that there is a right under international law to intervene with the use of force in the territory of another State for the protection of human rights, it must be as an exception to the prohibition on the use of force and only permissible under certain exceptional conditions: there must be a gross violation of human rights occurring in the targeted State that the domestic State is unable or unwilling to alleviate; the UN must be unwilling or unable to act; the action must be limited to humanitarian purposes; there must be a necessity for such action and the action must be proportionate to the humanitarian objectives. There is a preference for collective action.
4. It is not clear that the NATO action satisfied these stringent conditions.
5. Even if the use of force is found to be legal, the obligations of the laws of war and human rights remain. The Geneva Conventions on the Laws of War, 1949 and the First 1977 Protocol distinguish between combatants and non-

combatants. While it is not suggested that military targets were not pursued, maintenance of this legal distinction is difficult to reconcile with cluster bombing from a considerable height and the foreseeable continued civilian casualties from unexploded bombs.

6. The General Assembly and the UN Committee on Economic and Social Rights have both emphasised the importance of continuing human rights obligations in the context of unilateral measures. These include the rights of the civilian population of the FRY to an adequate standard of living under the International Covenant on Economic, Social and Cultural Rights, 1966, Article 11, to which the U.K. (and other NATO members, but not the U.S.) is a party.
7. Reprisals or forcible countermeasures are not permissible under international law.
8. It must be remembered that NATO's action, as State practice, will itself contribute to the affirmation of international law and thought must therefore be given to the precedent effect of the action.
9. While Operation Allied Command does not fall directly under any of the doctrines of international law permitting the use of force, the cumulative effect of the arguments may be thought to be persuasive. The Security Council was aware of the action and did not condemn it; humanitarian considerations were important and the subsequent Peace Plan has been made operational with Security Council authorisation. I can see the force of the arguments that led Professor Simma to conclude that the NATO actions fall on the right side of the "thin red line" that divides legality from illegality.¹⁷ In this view the actions have a legitimacy, if not strict legality under international law. However I do not consider that the accumulative effect is to bestow legality and conclude that there must be considerable doubt as to whether the basis for military intervention in the FRY was sufficient. What is clear is that the NATO intervention is leading international law into new areas. As a matter of policy, broadening the parameters for the international use of force without articulation by the constitutionally authoritative body further weakens the prohibition on the use of force and the authority of the Charter. The aftermath in Kosovo also emphasises the need for full, prior consideration to be given to peace-building and reconstruction.
10. The veto is part of the UN Charter and currently there is no requirement upon the permanent members to give reasons for their use, or anticipated use of the veto power.¹⁸ This is a matter for Security Council reform, which is an on-going question upon which Her Majesty's government has expressed its views.

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17. B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", 10 *European Journal of International Law* 1 (1999).

18. See L. Henkin, "Kosovo and the Law of Humanitarian Intervention", 93 *AJIL* 824 (1999).

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