THE KOSOVO CRISIS – 1999[+]

Daniel Franchini[*] and Antonios Tzanakopoulos[**]

I. Facts and context

Most case studies in this book could begin with a statement along the lines that 'few military interventions have generated the controversy, both in public opinion and legal literature, that [insert cross-border use of force here] has'. This cannot be true of all of them, and yet the NATO intervention in Kosovo in 1999 is 'exceptional'—pun intended. Not only was it NATO's first large scale military action, it was also the first major intervention in Europe without Security Council authorisation following the 'resurrection' of the Security Council in the aftermath of the end of the Cold War. The intervention profoundly divided States, pundits, and international lawyers, with some voices lauding the first war in history fought 'in the name of principles and values',[1] and others criticising it as a 'criminal act'.[2]

Kosovo was the place where the opening salvos of the breakup of the Socialist Federal Republic of Yugoslavia were metaphorically fired with the rise to power of Milosevic in 1987 and the subsequent withdrawal of Kosovo's autonomy.[3] The region enjoyed autonomous status to a greater or lesser extent throughout the life of the SFRY.[4] Kosovo was also the place where the last salvos of that breakup were quite literally fired in 1999. Populated by an ethnically Albanian majority, Kosovo has long been the object of nationalist aspirations of both Serbs and Albanians.[5] Both ethnicities trace there the narrative that establishes their 'imagined communities', i.e. their respective national identities.[6] For the Serbs this is connected to their defeat in battle in Kosovo in 1389 which led to their being absorbed into the Ottoman Empire; for the Albanians it is their ancestors that were displaced by the Serbs from Kosovo, while it is there that the League of Prizren

[+] Thanks are due to Christian Tams and Miles Jackson, as well as to Sotirios-Ioannis Lekkas and Nikiforos Panagis, for comments and suggestions during drafting. Responsibility however rests with the authors.

[*] DPhil candidate, Lincoln College, University of Oxford

[**] Associate Professor of Public International Law, University of Oxford; Fellow, St Anne's College, Oxford.

[1] Vaclav Havel, 'Kosovo and the End of the Nation-State' *N.Y. Rev. Books* (June 1999) 4.

[2] Robert Fisk, 'Who Needs NATO?' 63(7) *The Progressive* (July 1999).

[3] Milosevic's rise to power is deemed to have begun with his speech in Kosovo Polje in 1987, which established him as the 'undisputed champion of the Serb national cause': see Philip Auerswald and David Auerswald, *The Kosovo Conflict: A Diplomatic History through Documents* (Kluwer Law International 2000) 1; see also Noel Malcolm, *Kosovo: A Short History* (Macmillan 1998) 341. See generally Λένα Διβάνη, 'Εθνικιστικές έριδες στη Γιουγκοσλαβία', in Λένα Διβάνη, Λίνος-Αλέξανδρος Σισιλιάνος and Αχιλλέας Σκόρδας (eds), *Διεθνείς κρίσεις και παρέμβαση της διεθνούς οργανώσεως* (1994) 235, 242-244 [Lena Divani, 'Nationalist Disputes in Yugoslavia' in Lena Divani, Linos-Alexandros Sicilianos, and Achilleas Skordas (eds), *International Crisis and the Intervention of the International Community* (Ant. N. Sakkoulas 1994) 235, 242-244 (in Greek)].

[4] See e.g. the SFRY Constitutions of 1946, 1963 and 1974 (the latter granting the most extensive degree of autonomy). See further Marc Weller, *The Crisis in Kosovo 1989-1999* (Documents and Analysis Publishing 1999) 46-47.

[5] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) (hereafter *Kosovo Report*) 33.

[6] For the term and on the narration of an identity that cannot be remembered see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (rev edn, Verso 2006) 5-7 and 204-206.

was established, which led the national uprising against the Turks and the establishment of Albania.[7]

In the late 1980s, Belgrade adopted a tough stance towards Kosovo, gradually reducing its autonomy and finally removing it by dissolving the Kosovo Assembly in 1990.[8] While at first the war raging in the constitutive republics of the SFRY had little impact on Kosovo, the situation there started deteriorating from 1992 onwards.[9] With the end of the Bosnian War in 1995, the voice of radical separatist movements, fueled by the failure of the Dayton Peace Agreement to consider Kosovo's autonomist aspirations, progressively translated into action.[10] The Kosovo Liberation Army (KLA), a relatively low-key guerrilla group up to that point, began claiming responsibility for a number of attacks against the Serbian police.[11] In response, the Serbian police started a violent campaign of repression and counterinsurgency.[12] As violence intensified, the situation in Kosovo drew the attention of the international community. On 31 March 1998, upon request of the so-called Contact Group (France, Germany, Italy, the Russian Federation, the United Kingdom, and the United States), the UN Security Council adopted Resolution 1160, imposing an arms embargo on the Federal Republic of Yugoslavia (i.e. what remained of the SFRY, essentially Serbia and Montenegro, later known as Serbia and Montenegro, and finally just Serbia after Montenegrin independence in 2006) and calling for a 'meaningful self-administration of Kosovo'.[13] The Resolution, adopted under Chapter VII, also emphasised that 'failure to make constructive progress [… would] lead to the consideration of additional measures'.[14]

Far from abating, the conflict continued to escalate in the spring of 1998. Faced with increasing KLA presence, the Yugoslav army began a large-scale operation in Kosovo aimed at stopping KLA activities through targeting the ethnic Albanian civilian population.[15] By the end of May 1998, 300 people were reported to have been killed, while refugee flows of 12,000 ethnic Albanians spilled into neighbouring Albania.[16] It is at this stage that NATO first considered military intervention.[17] The deteriorating situation on the ground provoked reactions from several other international institutions as well. The Permanent Council of OSCE established border monitoring stations on the Kosovo-Albania border.[18] These reported shelling of Kosovo villages

[7] See Malcolm (n 3) 58, 217; Divani (n 3) 256-257.
[8] 'Law Terminating Work of SAP of Kosovo Assembly and the Executive Council, 5 July 1990' in Weller (n 4) 61-62. For an account of the events that led to the dissolution of the Kosovo Assembly see Malcolm (n 3) 344-347; Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009) 35-39.
[9] See Malcolm (n 3) 350-351.
[10] The fact that Kosovo was not discussed at Dayton was seen as the failure of the strategy of passive resistance championed by Kosovo Albanian leader Ibrahim Rugova: see Tim Judah, *Kosovo: War and Revenge* (Yale Nota Bene 2002) 124-125; Michael Ignatieff, *Virtual War: Kosovo and Beyond* (Chatto & Windus 2000) 13.
[11] *Kosovo Report* (n 5) 51. See also Ignatieff (n 10) 13; Tim Judah, *Kosovo* (OUP 2008) 79. For an account of the origin of the KLA, see Chris Hedges, 'Kosovo's Next Masters?' *Foreign Affairs* (May-June 1999) 31.
[12] *Kosovo Report* (n 5) 67. See also Judah (n 11) 83.
[13] UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160 [5].
[14] Ibid [19].
[15] *Kosovo Report* (n 5) 71-72.
[16] *Kosovo Report* (n 5) 72.
[17] Relevant declarations by a number of NATO and Member States officials are recorded in *Kosovo Report* (n 5) 72-73.
[18] OSCE, 156th Permanent Council, PC. Dec/218 (1998).

and frequent incursions both ways throughout July and August.[19] The ICTY Office of the Prosecutor announced its preliminary determination as to the existence of an 'armed conflict' in the region.[20] The President of the UN Security Council issued a statement calling for an immediate cease-fire.[21] Finally, in September 1998, the UN Security Council adopted Resolution 1199. The Resolution recognized that the situation in Kosovo amounted to a threat to the peace, imposed a ceasefire, and demanded that both parties take steps 'to improve the humanitarian situation and to avert the impending humanitarian catastrophe'.[22] One of the specific demands was that Yugoslavia 'cease all actions […] and order the withdrawal of security units used for civilian repression'.[23]

Shortly after the adoption of Resolution 1199, NATO issued the so-called 'Activation Warning', which authorised air strikes in the event that Serbia failed to withdraw its security forces from Kosovo within 96 hours.[24] Against this background, the Contact Group (through US Special Envoy Richard Holbrooke) and FRY President Slobodan Milosevic negotiated an agreement based on Resolution 1199. Milosevic agreed to withdraw FRY security forces and allow access to an OSCE verification mission (OSCE KVM) to monitor the enforcement of the agreement.[25] The Milosevic-Holbrooke agreement was submitted to the UN Security Council, which endorsed it in Resolution 1203.[26] At first, the agreement appeared to have achieved its goal of pacifying the area. However, as FRY troops withdrew, KLA attacks intensified, taking advantage of the new situation on the ground.[27] This unleashed a 'new cycle of major hostilities'[28] which the KVM was unable to contain.[29] By January 1999, FRY forces had returned to Kosovo in large numbers with tanks and heavy artillery.[30] One of the most widely reported incidents occurred on 15 January 1999, when FRY forces attacked the village of Recak/Račak, killing 45 people.[31] Upon investigating the incident, the OSCE KVM found 'evidence of arbitrary detentions, extra-judicial killings, and mutilation of unarmed civilians'.[32] Two days later, the ICTY Chief Prosecutor was refused entry into Kosovo at the border with Macedonia.[33]

---

[19] OSCE, *Kosovo/Kosova: As Seen, As Told* (1999) <www.osce.org/odihr/17772> 284. See also *Kosovo Report* (n 5) 73.
[20] ICTY, Office of the Prosecutor, Press Release (7 July 1998) CC/PIU/329-E.
[21] Statement by the president of the Security Council (24 August 1998) UN Doc S/PRST/1998/25.
[22] UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199 [2].
[23] Ibid [4].
[24] NATO, Statement by the Secretary General Following the ACTWARN Decision (24 September 1998) <archives.nato.int/uploads/r/null/1/4/144826/STATEMENT_SEC_GEN_1998-09-24_ENG.pdf>; NATO, Statement to the Press by the Secretary General Following Decision on the ACTORD (13 October 1998) <www.nato.int/docu/speech /1998/s981013a.htm>.
[25] *Kosovo Report* (n 5) 76. See also 'Press Statement by Federal Government of Yugoslavia, October 14, 1998' (1998) 9(6) *Foreign Policy Bulletin* 49.
[26] UNSC Res 1203 (24 October 1998) UN Doc S/RES/1203 [1].
[27] *Kosovo Report* (n 5) 78. See also Judah (n 11) 191.
[28] Report of the Secretary-General Prepared Pursuant to Resolution 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council (24 December 1998) UN Doc S/1998/1221 [3].
[29] *Kosovo Report* (n 5) 80.
[30] Ibid.
[31] See UNSG, Report by United Nations Secretary-General Annan to the Security Council (30 January 1999) UN Doc S/1999/99 [11-13].
[32] OSCE, *Kosovo/Kosova* (n 19) 354.
[33] *Kosovo Report* (n 5) 81.

As the situation quickly deteriorated, the Contact Group made another attempt at negotiations by convening a meeting at Rambouillet in February 1999. While the Contact Group's handling of the negotiations was harshly criticised,[34] negotiations ultimately broke up when the FRY delegation refused to sign the proposed agreement.[35] From that moment onwards, events unfolded rapidly. On 19 March 1999, the OSCE withdrew all KVM personnel from Kosovo in view of the severe deterioration on the ground and the imminent bombing campaign by NATO.[36] On 22 March, the UN Secretary General urged the FRY to immediately cease the offensive in Kosovo and 'even at this late hour, to cooperate fully with the members of the Contact Group in their efforts to prevent further confrontation'.[37] On 23 March, the NATO Secretary-General wrote to the UN Secretary General warning of an impending humanitarian catastrophe in Kosovo.[38] On the same day, the FRY government declared a state of emergency.[39] Finally, on 24 March, NATO started an aerial bombing campaign against the FRY (*Operation Allied Force*).[40]

Two days after the campaign begun, the Russian Federation (together with Belarus and India, who were not Members of the Security Council at the time) proposed that the UN Security Council adopt a resolution qualifying NATO's intervention as a 'flagrant violation' of the prohibition on the use of force.[41] The draft resolution was rejected by 12 votes to 3. After four weeks of limited success, NATO intensified its campaign – which according to a number of NATO Members had been meant to last only 'a few days'[42] – and extended its attacks to military-industrial infrastructure within Serbia itself.[43] On 28 April 1999, the FRY filed applications with the ICJ against ten NATO Member States, claiming to be the victim of unlawful use of force and of genocide, and requesting provisional measures. The ICJ rejected the requests for provisional measures on 2 June 1999, on the basis that no *prima facie* jurisdiction existed with respect to any of the respondents.[44]

---

[34] See e.g. Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (Pluto Press 1999) 110. For a different account, see Ivo Daalder and Michael O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo* (Brookings Institution Press 2000) 84-89.

[35] *Kosovo Report* (n 5) 82.

[36] 'OSCE Chairman-in-Office Pulls out OSCE Personnel out of Kosovo' (19 March 1999) Press Release No 24/99 <reliefweb.int/report/serbia/osce-chairman-office-pulls-out-osce-personnel-out-kosovo>; see also OSCE, *Kosovo/Kosova* (n 19) vii.

[37] 'Secretary-General Gravely Concerned at Escalation of Violence in Kosovo' (22 March 1999) UN Press Release SG/SM/6936.

[38] Annex to the Letter dated 25 March 1999 from the Secretary-General Addressed to the President of the Security Council (25 March 1999) UN Doc S/1999/338.

[39] 'Communiqué by the Federal Government of Yugoslavia, March 23, 1999' (1999) 10(3-4) *Foreign Policy Bulletin* 47.

[40] *Kosovo Report* (n 5) 85.

[41] Belarus, India and Russian Federation: Draft Resolution (26 March 1999) UN Doc S/1999/328.

[42] *Kosovo Report* (n 5) 92.

[43] *Kosovo Report* (n 5) 93. See also William Arkin, 'Operation Allied Force: "The Most Precise Application of Air Power in History"', in Andrew Bacevich and Eliot Cohen (eds), *War Over Kosovo: Politics and Strategy in a Global Age* (Columbia University Press 2001) 10.

[44] *Legality of the Use of Force (Yugoslavia v Belgium)* (Provisional Measures) [1999] ICJ Reports 124; *Legality of the Use of Force (Yugoslavia v Canada)* (Provisional Measures) [1999] ICJ Reports 259; *Legality of the Use of Force (Yugoslavia v France)* (Provisional Measures) [1999] ICJ Reports 363; *Legality of the Use of Force (Yugoslavia v Germany)* (Provisional Measures) [1999] ICJ Reports 422; *Legality of the Use of Force (Yugoslavia v Italy)* (Provisional Measures) [1999] ICJ Reports 481*; Legality of the Use of Force (Yugoslavia v Netherlands)* (Provisional Measures) [1999] ICJ Reports 542; *Legality of the Use of Force (Yugoslavia v Portugal)* (Provisional Measures) [1999] ICJ Reports 656; *Legality of the Use of Force (Yugoslavia v Spain)* (Provisional Measures) [1999] ICJ Reports

The NATO aerial bombing campaign against the FRY continued until early June. On 3 June 1999, EU Special Envoy Martti Ahtisaari and Russian Special Envoy Viktor Chernomyrdin reached an agreement with President Milosevic on the basis of a peace plan drafted by the G8.[45] According to this plan, the FRY would accept to withdraw its troops from Kosovo and would allow the deployment of a multinational peacekeeping mission under UN auspices.[46] NATO ended its air campaign on 10 June 1999.[47] On the same day, the UN Security Council adopted Resolution 1244 which welcomed the agreement,[48] and established a framework for the administration of Kosovo by a UN operation (UNMIK).[49] Within this framework, the Security Council authorised the deployment of an international military force, described as an 'international security presence' (KFOR).[50]

II. The positions of the main protagonists and the reaction of third States and international organizations

1. The NATO Position

NATO did not advance any fully articulated legal argument in support of its action in Kosovo. Its official position relied on a number of factors, the combination of which allegedly provided 'a sufficient legal basis' for military intervention.[51] In the 2000 Report prepared by the NATO Secretary General, Lord Robertson of Port Ellen stressed that 'the Allies were sensitive to the legal basis for their action' and that

> there was a major discussion in the North Atlantic Council, during which the Council took the following factors into consideration:
> - the Yugoslav government's non-compliance with earlier UN Security Council resolutions,
> - the warnings from the UN Secretary General about the dangers of a humanitarian disaster in Kosovo,
> - the risk of such a catastrophe in the light of Yugoslavia's failure to seek a peaceful resolution of the crisis,
> - the unlikelihood that a further UN Security Council resolution would be passed in the near future, and
> - the threat to peace and security in the region.
>
> At that point, the Council agreed that a sufficient legal basis existed for the Alliance to threaten and, if necessary, use force against the Federal Republic of Yugoslavia.[52]

761; *Legality of the Use of Force (Yugoslavia v United Kingdom)* Provisional Measures) [1999] ICJ Reports 826; *Legality of the Use of Force (Yugoslavia v United States of America)* (Provisional Measures) ICJ Reports 916.

[45] 'Decision by the National Assembly of the Republic of Serbia, June 3, 1999' and 'Press Release by the Federal Republic of Yugoslavia, June 3, 1999' (1999) 10(3-4) *Foreign Policy Bulletin* 214.

[46] 'Kosovo Peace Plan, June 3, 1999' (1999) 10(3-4) *Foreign Policy Bulletin* 215.

[47] 'NATO Secretary General Dr. Javier Solana on suspension of air operations' (10 June 1999) NATO Press Release (1999) 093.

[48] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 [2].

[49] Ibid [10]-[11].

[50] Ibid [7]-[9].

[51] Lord Robertson, 'Kosovo one Year on Achievement and Challenge' (21 March 2000) <www.nato.int/kosovo/repo2000> 24.

[52] Ibid.

This position, including the lack of any clear statement as to the legal basis of the operation, is consistent with that expressed by the then Secretary General, Javier Solana at the time NATO began its campaign. In a statement to the press on 23 March 1999, Solana stressed that the use of military action was the only remaining alternative 'following the Federal Republic of Yugoslavia Government's refusal of the International Community's demands'.[53] Among the objectives of the mission, Solana emphasised the need 'to prevent more human suffering and more repression and violence against the civilian population of Kosovo' and 'to prevent instability spreading in the region'.[54] It was not entirely clear, however, how this provided a legal basis for the use of force by the Alliance. Significantly, Solana emphasised that the 'military action [was] intended to support the political aims of the International Community' and spoke of 'a moral duty' to intervene.[55] Similar language emphasising the intention and goals of NATO action rather than the legal basis for it is used in a number of subsequent statements by the NATO Secretary General.[56] A statement issued by the North Atlantic Council at the Extraordinary Ministerial Meeting of 12 April 1999 does not shed further light on this issue. It reiterates some factors mentioned by the Secretary General, namely the FRY's repeated violations of the UN Security Council resolutions, the 'assault by Yugoslav military, police and paramilitary forces, under the direction of President Milosevic, on Kosovar civilians [which] created a massive humanitarian catastrophe', and the fact that the crisis 'threatens to destabilise the surrounding region'.[57] '[T]hese extreme and criminally irresponsible policies, which cannot be defended on any grounds, have made necessary and justify the military action by NATO'.[58]

2. The Position of NATO Member States

Notwithstanding the much emphasised 'unity' behind NATO's decision to resort to force,[59] there was no apparent consensus as to the legal justification for the intervention. Individual Member States proffered significantly diverging legal arguments for the action. At one end of the spectrum, Belgium and the United Kingdom appear to be the only two Member States that advanced a clear legal basis, namely an allegedly existing or emerging right of forcible humanitarian intervention, though the Netherlands also claimed that 'military action in an international context is possible "in order to avert large-scale and massive violation of basic human rights in the framework of a

[53] NATO, Press Statement by the Secretary General (23 March 1999) Press Release (1999)040 <www.nato.int/docu/pr/1999/p99-040e.htm>.
[54] Ibid.
[55] Ibid.
[56] See NATO, Press Statement by the Secretary General (24 March 1999) Press Release (1999)041; Letter dated 27 March 1999 from the Secretary-General of the North Atlantic Treaty Organization to the Secretary-General of the United Nations (30 March 1999) UN Doc S/1999/360.
[57] NATO, Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council (12 April 1999) Press Release M-NAC-1(99)51 <www.nato.int/docu/pr/1999/p99-051e.htm>.
[58] Ibid.
[59] For non-Article 5 responses, NATO requires the agreement of all Member States; thus, the opposition of one State would have been sufficient to halt the operation. Solana emphasised that 'NATO is united behind this course of action': NATO, Press Statement by the Secretary General (23 March 1999) Press Release (1999)040. See also: UK, Statement by the Deputy Prime Minister, HC Deb 24 March 1999, vol 328, col 383; US, 'Remarks by Secretary of State Albright, March 25, 1999' (1999) 10(3-4) *Foreign Policy Bulletin* 67. The theme of 'unity of the Alliance' was also at the centre of NATO 50th Anniversary Summit on 22 April-7 May 1999. See further statements in 'NATO Leaders Gather for 50th Anniversary Summit, Convey Unity and Determination on Air Campaign' (1999) 10(3-4) *Foreign Policy Bulletin* 130ff.

humanitarian emergency operation"'.[60] Other Member States were more opaque in their attempt to offer a legal basis, and some appeared to admit that there was no legal basis for the action at all.

In its oral pleadings before the ICJ, Belgium took the view that the UN Security Council resolutions adopted in the run-up to the NATO campaign, which were adopted under Chapter VII of the Charter, provided 'an unchallengeable basis for the armed intervention'.[61] Remarkably, however, Belgium also stressed the 'need to go further and develop the idea of armed humanitarian intervention'.[62] The use of force could thus find justification in the fact that 'NATO intervened to protect fundamental values enshrined in the *jus cogens* and to prevent an impending catastrophe recognized as such by the Security Council'.[63] This action would be legal because it 'is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia […], [but] an armed humanitarian intervention, compatible with Article 2, paragraph 4'.[64] According to Belgium, there was 'no shortage of precedents' supporting this doctrine.[65] However, the alleged right of humanitarian intervention was put forward merely as an additional justificatory ground, complementing the legal basis offered, according to Belgium, by UNSC resolutions. Further, humanitarian intervention was argued in combination with an alleged state of necessity.[66] It is unclear whether the reference to necessity was meant to reinforce the point regarding the alleged right of humanitarian intervention or to offer an additional standalone basis for the intervention.

In presenting the UK Government's position before Parliament on 23 March 1999, the Prime Minister, Tony Blair, described the military intervention as 'an exceptional measure to prevent an overwhelming humanitarian catastrophe'.[67] While there has been some debate as to the scope of this statement,[68] the Secretary of State for Defence, Mr Robertson, dispelled any doubts as to the Government's position concerning the legality of the intervention in a statement made to the House of Commons on 25 March 1999:

> Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. Those circumstances clearly exist in Kosovo.
>
> The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the UN Security Council, but without the Council's express authorisation, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe.[69]

---

[60] Dutch Ministers of Foreign Affairs and Defence, Letter to Parliament dated 8 October 1998 (2000) 31 NYIL 190.

[61] ICJ, Public sitting (10 May 1999) CR 1999/15, 11. See also 'Pratique du pouvoir exécutif et le contrôle des chambres législatives en matière de droit international (1995-1999)' (2002) 35 *RBDI* 5, 254-255.

[62] ICJ, Public sitting (10 May 1999) CR 1999/15, 11.

[63] Ibid, 11-12.

[64] Ibid, 12.

[65] Citing India's intervention in Eastern Pakistan; Tanzania's intervention in Uganda; Vietnam's intervention in Cambodia, and the West African states' interventions in Liberia and Sierra Leone: ICJ, Public sitting (10 May 1999) CR 1999/15, 12.

[66] ICJ, Public sitting (10 May 1999) CR 1999/15, 13.

[67] Statement by the Prime Minister, HC Deb 23 March 1999, vol 328, col 161.

[68] This statement became the subject of discussion before the ICJ: Public sitting (11 May 1999) CR 1999/23, 13.

[69] HC Deb (25 March 1999) vol 328, col 616-617. This is consistent with a view a view expressed a few months earlier by the then Parliamentary Under-Secretary of State, Baroness Symons of Vernham Dean: HL Debs (16 November 1998) col WA 140. See further the Memorandum submitted by the Foreign and Commonwealth Office (22 January

A day earlier, Sir Jeremy Greenstock, the UK Permanent Representative at the UN Security Council, had put forward a similar position:

> The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions.
>
> Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.[70]

The UK Government consistently maintained this position before the House of Commons Foreign Affairs Committee.[71]

As far as other NATO Member States are concerned, their position was less straightforward. On the one hand, most of them referred, to varying extents, to the existence of a humanitarian catastrophe on the ground. Many also placed emphasis on the relevant UN Security Council resolutions. The specific legal value that they attached to these factors remained, however, rather unclear.

In his Address to the Nation on 24 March 1999, US President Clinton mentioned the protection of 'thousands of innocent people' and the prevention of a 'wider war' as reasons to act.[72] A clear legal basis was not provided, however. In fact, President Clinton referred to a 'moral imperative' alongside the protection of America's national interest.[73] The US Permanent Representative added but a few words on the point during the Security Council meeting of 24 March 1999:

> We and our allies have begun military action only with the greatest reluctance. But we believe that such action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo — all of which foreshadow a humanitarian catastrophe of immense proportions.
>
> […] In this context, we believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster.[74]

In its oral pleadings before the ICJ, the United States stated that 'the actions of the Members of the NATO Alliance find their justification in a number of factors', without further qualification.[75]

1999) in Foreign Committee, *Minutes of Evidence Taken Before the Foreign Affairs Committee, 26 January 1999* (HC 1998-99, 188).

[70] UNSC Verbatim Record (24 March 1999) UN Doc S/PV.3988, 12.

[71] Foreign Affairs Committee, Fourth Report (HC 1999-2000, 28-II) [124]. See also 'United Kingdom Materials on International Law' (1998) 69 *BYBIL* 593.

[72] 'Remarks by President Clinton, March 24, 1999' (1999) 10(3-4) *Foreign Policy Bulletin* 63.

[73] Ibid 64.

[74] UN Doc S/PV.3988 (n 70) 4-5.

[75] These factors were: the humanitarian catastrophe; the security of neighbouring States; the serious violation of international humanitarian law and human rights by the FRY; and the resolutions of the Security Council. See *Legality of Use of Force*, Public sitting (11 May 1999) CR 1999/24, 10.

In a similar vein, statements by representatives of Canada,[76] the Netherlands,[77] Hungary,[78] and Italy,[79] stressed that NATO's action was justified in the light of the ongoing humanitarian catastrophe (at times coupled with the potential destabilisation of the region) and/or the FRY's failure to comply with the requirements of the Security Council resolutions. The specific legal basis on which these States relied to resort to force is however expressed in vague terms, such as lack of alternatives,[80] or is treated as self-evident. At times, authority is also drawn from the UN Security Council's rejection of the proposal of a resolution condemning the attacks.[81] Disquiet over the ongoing situation – if not outright admission of its illegality – was however common at the time; the Italian Foreign Minsiter, Lamberto Dini, for example, stated in his address to the Italian Parliament on 20 April 1999, referring to the situation in Kosovo :

> There is no agreed definition, among the Allies, of a legal basis for missions in support of peace. Some demand that the Alliance act within the mandate of the United Nations, although with some exceptions to avoid potential stalemate. […] Others advocate stricter conditions, such those of the Brussels summit of 1994, which refer to the authority of the UN Security Council or the responsibility of OSCE.
> We should seek a solution that, while allowing actions within the spirit of the United Nations to ensure respect of fundamental human rights […], does not lead us to crippling vetoes […]'.[82]

For other NATO Member States, the preceding UNSC resolutions do not seem to be merely one of many factors that contributed to the legality of NATO's recourse to force, but *the decisive factor*. In addition to the abovementioned position expressed by Belgium before the ICJ, this clearly emerges in the statements by France. The Ministry of Foreign Affairs, in the immediate aftermath of the first attack, asserted that:

> NATO's action finds its legitimacy ('légitimité') in the authority of the Security Council. The resolutions of the Council concerning the situation in Kosovo […] have been adopted under Chapter VII of the United Nations Charter which deals with coercive actions in case of a breach of peace. […] None of the obligations [stemming from the resolutions] has been observed by Belgrade. […] Therefore, recourse to force has become inevitable. It responds to Belgrade's violation of its international obligations resulting from the resolutions of the United Nations Security Council taken under Chapter VII of the Charter.[83]

---

[76] House of Commons Debates, 36th Parl, 1st Sess, No 216 (27 April 1999) at 1315 (Arthur C Eggleton). See also UN Doc S/PV.3988 (n 70) 5-6; UNSC Verbatim Record (26 March 1999) UN Doc S/PV.3989, 2.
[77] UN Doc S/PV3988 (n 70) 8.
[78] Statement by the Ministry of Foreign Affairs (27 March 1999) in Heike Krieger (ed), *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (CUP 2001) 406.
[79] Statement by the Italian Prime Minister D'Alema, Camera dei Deputati, Resoconto Stenografico, No 513 (26 March 1999) 5.
[80] UN Doc S/PV.3988 (n 70) 5-6 (Netherlands).
[81] Ibid, 12 (Netherlands).
[82] XIII Legislatura, 'Comunicazioni del Governo sugli sviluppi della situazione nei Balcani e sul vertice di Washington' Commissioni Riunite (III e IV), Resoconto Stenografico (20 aprile 1999) 8 [authors' translation].
[83] Communiqué officiel du ministère des Affaires étrangères français: 'Les bases juridiques de l'intervention' (25 March 1999) <www.crdp-montpellier.fr/ressources/dda/kosovo/dda5b2.html> [authors' translation]. See also UN Doc S/PV.3988 (n 70) 9. It is also worth noting that, in the months preceding the war, France had on various occasions stated that an UNSC autorisation would be necessary in order to resort to force: see 'Pratique française du droit international' (1998) 44 AFDI 736-738.

Most importantly, the French Foreign Minister carefully stressed that what he euphemistically called the 'management of the crisis in Kosovo' constituted a 'conjonction exceptionnelle', which prevented it from establishing a precedent for the future.[84] Similar positions regarding the exceptional and non-precedential character of the operation were taken also by Germany[85] and Belgium.[86]

Among the NATO Member States who participated in the operation, Germany was perhaps the most uncomfortable with the absence of a UNSC resolution authorising the use of force. As noted, Germany was concerned about the precedential value of the intervention in Kosovo, and was quick to dismiss it even before the operation had commenced. At an early debate in the *Bundestag*, the Minister of Foreign Affairs, Klaus Kinkel, asserted that

> [u]nder these exceptional circumstances of the present crisis in Kosovo, as they are described in UN Security Council resolution 1199, the threat to use force and, if necessary, the threat and even the use of force by NATO is justified. The German government shares this legal opinion with all the other 15 NATO partners. With its decision NATO has not created a new legal basis which could constitute a general authorization for subsequent NATO interventions, nor did it intend to do so. NATO's decision must not become a precedent. We must not take the slippery slope concerning the UN Security Council's monopoly [on the authorization to use force]. However, in Kosovo there is an acute humanitarian emergency situation of a massive scale which requires immediate action. The possibilities for negotiating have been exhausted, the use of force is an *ultima ratio*.[87]

Coming back to the issue after Operation *Allied Force* had commenced, the new German Foreign Minister, Joseph (Joschka) Fischer, emphasised that

> NATO is no alternative to the United Nations. NATO's reform debate about the new concept is not about putting into question the [United Nation's] monopoly on force […]. The Security Council should simply have acted in the case of Kosovo. I would have been happy, if we had received a Resolution under Chapter VII. I hope that now with the involvement of Russia such a resolution will be adopted, since all the previous resolutions led to this point.[88]

Finally, one NATO Member State refused to participate in the military operations in Kosovo. Although in the end it did not veto the NATO strikes (and without commenting specifically on their legality), Greece asked on numerous occasions for them to stop and for diplomacy to be given a new chance, all the while considering openly to use its veto to halt the on-going offensive.[89]

---

[84] Hubert Védrine, 'La gestion de la crise du Kosovo est une exception' *Le Monde* (25 March 2000).
[85] UN Doc A/54/PV.8, 22 September 1999, at 12 and see further below.
[86] UN Doc A/54/PV.14, 25 September 1999, at 17; see also 'La pratique belge en matière de droit international' (2002) 35 *RBDI* 252.
[87] Statement by Klaus Kinkel, *Deutscher Bundestag, BT Plenarprotokolle* 13/248 (16 October 1998) 23129 [authors' translation].
[88] Statement by Joseph Fischer, *Deutscher Bundestag, BT Plenarprotokolle* 14/35 (22 April 1999) 2778-2779 [authors' translation].
[89] Ministry of Foreign Affairs, Press Release (26 March 1999) available at <http://www.hri.org/MFA/altminister/releaseseng/march99/strikeng260399.htm>; Press Release (29 March 1999) available at <http://www.hri.org/MFA/altminister/releaseseng/march99/koseng290399.htm>; Press Release (23 April 1999) available at <http://www.hri.org/MFA/altminister/releaseseng/april99/dileng230499.htm>; Press Release (May 1999) available at <http://www.hri.org/MFA/altminister/releaseseng/may99/pending.htm>; see also some of these documents in Krieger (n 78) 405.

3. Reactions by other States and International Organisations

The Kosovo crisis generated an impressive amount of responses from States and international organisations. A small number of these responses were, to some extent, supportive of the attacks.[90] There is no specific indication, however, as to whether these States consider the action to be lawful. A statement issued by the European Council in the immediate aftermath of the attacks exemplifies this stance, though we should note that the membership of the EU included a large number of NATO Member States:

> The international community has done its utmost to find a peaceful solution to the Kosovo conflict. […]
> The Yugoslav leadership under President Milosevic has persistently refused to engage seriously in the search for a political solution. […] Finally, the Yugoslav security forces are conducting military operations against the civilian population in Kosovo in contravention of the provisions of UN Security Council resolution 1199.
> On the threshold of the 21st century, Europe cannot tolerate a humanitarian catastrophe in its midst. It cannot be permitted that, in the middle of Europe, the predominant population of Kosovo is collectively deprived of its rights and subjected to grave human rights abuses. We, the countries of the European Union, are under a moral obligation to ensure that indiscriminate behaviour and violence, which became tangible in the massacre at Racak in January 1999, are not repeated. We have a duty to ensure the return to their homes of the hundreds of thousands of refugees and displaced persons.[91]

Besides these statements, the overwhelming majority of the responses to the attacks was critical of NATO's action, and deemed it an unlawful use of force contrary to Article 2(4) of the UN Charter. Aside from the FRY, which would be expected to consider the use of force against it as unlawful, similar reactions were registered by the Russian Federation along with the Commonwealth of Independent States, the People's Republic of China, India, Argentina along with the Rio Group, and the Non-Aligned Movement.

Upon commencement of the NATO campaign, the FRY severed all diplomatic relations with the United States, the United Kingdom, France, and Germany because of their 'aggression' against its territory.[92] In its application before the ICJ, the FRY maintained that the bombing of its territory constituted a breach of the prohibition on the use force[93] and, in its oral pleadings, specifically challenged the argument concerning humanitarian intervention.[94]

Beyond the FRY, Russia and China were the most vocal opponents to the use of force in Kosovo. When the UN Security Council adopted Resolution 1160 (1998), Russia noted that the settlement of the conflict in Kosovo could be reached 'exclusively through peaceful and political means' and that no use of force was being authorised.[95] China (abstaining from the vote) went as far as to claim that no threat to international peace and security was present.[96] The position of these two

---

[90] UN Doc S/PV.3988 (n 70) 6-7 (Slovenia and Gambia). See also statement by El Salvador in Krieger (n 78) 492.
[91] Berlin European Council, Presidency Conclusions (25 March 1999) available at <www.europarl.europa.eu /summits/ber1_en.htm>.
[92] 'Press Statement by the Federal Republic of Yugoslavia, March 25, 1999' (1999) 10(3-4) *Foreign Policy Bulletin* 66.
[93] *Legality of Use of Force*, Application (29 April 1999) 4.
[94] *Legality of Use of Force*, Public sitting (10 May 1999) CR 1999/14, 34-40.
[95] UNSC Meeting (23 September 1998) UN Doc S/PV.3930, 3.
[96] Ibid.

Permanent Members of the Council was even more categorical at the adoption of Resolution 1203 (1998). Both States abstained, with Russia stating that it 'expect[ed] the immediate rescission of the NATO decision on the possible use of force'.[97] China, for its part, stressed that

> [i]n principle, China does not oppose the adoption of a well-focused technical resolution by the Council to endorse the agreements reached between the Federal Republic of Yugoslavia and relevant parties and to encourage peaceful approaches on the question of Kosovo. […] However, we do not favour the inclusion in the resolution of content beyond the above agreements. We are even more opposed to using Council resolutions to pressure the Federal Republic of Yugoslavia or to interfere in its internal affairs. […] We believe that the resolution just adopted does not entail any authorization to use force or to threaten to use force against the Federal Republic of Yugoslavia, nor should it in any way be interpreted as authorizing the use of force or threatening to use force against the Federal Republic of Yugoslavia.[98]

Following the commencement of the NATO campaign, the condemnation from these two States was explicit. The words of the Russian Permanent Representative at the Security Council meeting of 24 March 1999 are a case in point:

> The Russian Federation is profoundly outraged at the use by the North Atlantic Treaty Organization (NATO) of military force against the Federal Republic of Yugoslavia. […] Those who are involved in this unilateral use of force against the sovereign Federal Republic of Yugoslavia — carried out in violation of the Charter of the United Nations and without the authorization of the Security Council — must realize the heavy responsibility they bear for subverting the Charter and other norms of international law and for attempting to establish in the world, de facto, the primacy of force and unilateral diktat. […] Attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences. Moreover, by the terms of the definition of aggression adopted by the General Assembly in 1974, 'No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression' (*General Assembly resolution 3314 (XXIX), annex, article 5, para. 1*).[99]

During the same debate at the UN Security Council, the Permanent Representative of India voiced strong opposition to the NATO operation, labeling it 'unprovoked military aggression'.[100] Namibia, Gabon, and Argentina also opposed the attacks.[101] Other States – namely Ukraine,[102] Belarus,[103] and Cuba[104] – objected to the legality of the operation a few days later, when discussing the proposal to adopt a resolution condemning the attacks.

---

[97] UNSC Meeting (24 October 1998) UN Doc S/PV3937, 12.
[98] Ibid 14.
[99] UN Doc S/PV3988 (n 70) 2-3. See also the Chinese position ibid, 12.
[100] Ibid 16.
[101] Ibid 10-11.
[102] UN Doc S/PV.3989 (n 76) 10.
[103] Ibid 12.
[104] Ibid 12.

Besides the reactions of individual States, the crisis in Kosovo generated negative responses from a number of international organisations and groups of States.

A Declaration adopted by the Inter-Parliamentary Assembly of States Members of the Commonwealth of Independent States[105] characterised NATO's military operations 'in the territory of sovereign Yugoslavia, without the authorization of the United Nations Security Council, as a challenge to the current system of international relations, and a real threat to peace and stability in Europe and the world.'[106]

In a Communiqué issued on 25 March 1999, the Rio Group[107] 'regret[ted] the recourse to the use of force in the Balkan region in contravention of the provisions of Article 53, paragraph 1, and Article 54 of the Charter of the United Nations'.[108]

Finally, the Non-Aligned Movement, which represents a majority of Member States within the UN and generally (at the time 114 States),[109] adopted a declaration on 9 April 1999 in the following terms:

> The Non-Aligned Movement, reaffirming the Movement's commitment to the sovereignty, territorial integrity, and political independence of all states, and reaffirming the Non-Aligned Movement's principles and the sanctity of the United Nations Charter, is deeply alarmed at the worsening crisis in Kosovo, Federal Republic of Yugoslavia and the Balkan region.
> The Non-Aligned Movement reaffirms that the primary responsibility for the maintenance of international peace and security rests with the United Nations Security Council.
> […]
> The Non-Aligned Movement calls for an immediate cessation of all hostilities, and the swift and safe return of all refugees and displaced persons.
> The Non-Aligned Movement firmly believes that the urgent resumption of diplomatic efforts, under the auspices of the United Nations and the relevant Security Council resolutions 1199 and 1203, constitutes the only basis for a peaceful, just and equitable solution to the conflict.[110]

4. The Position of UN organs

In the lead-up to the crisis, the UN Security Council adopted three Chapter VII resolutions. Resolution 1160 (1998), upon condemning the 'excessive force by Serbian police forces against civilians […], as well as all acts of terrorism by the Kosovo Liberation Army or any other group […] in Kosovo', and asking for a peaceful resolution which included some 'meaningful self-administration' of Kosovo, imposed an arms embargo on the FRY.[111] It urged the ICTY Prosecutor

---

[105] At the time comprising Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Uzbekistan, and Ukraine as an associate member.
[106] Annex II to the Letter to the UN Secretary-General (22 April 1999) UN Doc A/53/920, S/1999/461.
[107] Comprising at the time Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Panama, Uruguay, Venezuela, and a rotational representative from the Caribbean and Central American States, see <www.nti.org/learn/treaties-and-regimes/rio-group>.
[108] Annex to the Letter to the UN Secretary-General (26 March 1999) UN Doc A/53/884, S/1999/347.
[109] See <http://www.nam.gov.za/background/history.htm>. Incidentally, and not without a sense of dramatic irony, the NAM had held its first summit in Belgrade in 1961 with Yugoslav leader Tito as its first Secretary-General.
[110] Statement by the NAM on the situation in Kosovo (9 April 1999) available at <www.nam.gov.za/media/990409kos.htm>.
[111] UNSC Res 1160 (n 13) 1 and [5].

'to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction'.[112] It also contained a statement that appeared in all subsequent resolutions, namely that 'failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures'.[113] Resolution 1199 (1998), affirming that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region, imposed a ceasefire and demanded that the FRY authorities and the Kosovo Albanian leadership take steps 'to improve the humanitarian situation and to avert the impending humanitarian catastrophe'.[114] Resolution 1203 (1998) 'welcomed' the agreement signed on 16 October 1998 between the OSCE and the FRY (the so-called Milosevic-Holbrooke agreement) providing for the establishment of the OSCE verification mission.[115] While at that time NATO had already threatened to use force in Kosovo (having issued an Activation Order), in endorsing the agreement, Resolution 1203 did not make any mention of the threat of use of force. Neither did it, however, provide any authorisation for the use of force, in terms of employing the shibboleth of States being authorised to use 'all necessary means' to achieve the goals set by the Council. Rather, it reaffirmed that 'under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council'.[116] Finally, Resolution 1203 expressed renewed concern at the 'grave humanitarian situation throughout Kosovo and the impending humanitarian catastrophe' and re-emphasized the 'need to prevent this from happening'.[117]

There was no further UN Security Council resolution before *Operation Allied Force* commenced. After that moment, following a heated debate within the Council and the failed attempt to pass a resolution condemning the attacks,[118] the Security Council adopted two further relevant resolutions. Resolution 1239 (1999) regarding the provision of humanitarian relief in Kosovo expressed 'grave concern at the humanitarian catastrophe in and around Kosovo, Federal Republic of Yugoslavia, as a result of the continuing crisis'.[119] Significantly, it also reaffirmed 'the territorial integrity and sovereignty of all States in the region'.[120] Immediately after the end of the hostilities, the Security Council adopted Resolution 1244 (1999). While still considering the situation in Kosovo a threat to peace and security, the Security Council welcomed the acceptance by the FRY of the peace agreement drafted on the basis of the G8 principles.[121] It also decided, acting under Chapter VII, on the deployment of civil and security personnel for an international administration of Kosovo 'under the auspices' of the UN.[122] The Resolution contained no explicit condemnation of the use of force by NATO, nor did it contain any ratification of such action. Rather, the Resolution began by '[b]earing in mind the purposes and principles of the Charter of the United

[112] Ibid [17].
[113] Ibid [19].
[114] UNSC Res 1199 (n 22) [2].
[115] UNSC Res 1203 (n 26) [1].
[116] Ibid, 1.
[117] Ibid, 2.
[118] See nn 70, 74, 77, 97, 102 above.
[119] UNSC Res 1239 (14 May 1999) UN Doc S/RES/1239, 1.
[120] Ibid.
[121] UNSC Res 1244 (n 48) 2 and [2].
[122] Ibid [5].

Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security'.[123]

The UN Secretary General released the following statement on 24 March, in the immediate aftermath of the commencement of NATO strikes:

> It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace. In helping maintain international peace and security, Chapter VIII of the United Nations Charter assigns an important role to regional organizations. But as Secretary-General I have many times pointed out, not just in relation to Kosovo, that under the Charter the Security Council has primary responsibility for maintaining international peace and security—and this is explicitly acknowledged in the North Atlantic Treaty. Therefore, the Council should be involved in any decision to resort to the use of force.[124]

In his Annual Report, however, the UN Secretary General appeared more explicitly critical of NATO's military action:

> What is clear is that enforcement action without Security Council authorization threatens the very core of the international security system founded on the Charter of the UN. Only the Charter provides a universally accepted legal basis for the use of force.[125]

An even more critical voice towards the legality of NATO's military action came from the UN High Commissioner for Human Rights. In the report on the human rights situation in Kosovo on 30 April 1999, for example, the High Commissioner stated that

> [i]n the NATO bombing of the Federal Republic of Yugoslavia, large numbers of civilians have incontestably been killed, civilian installations targeted on the basis that they are or could be of military application, and NATO remains the sole judge of what is or not acceptable to bomb. […] We face, as a matter of conscience, various issues of principle in this situation. […] The principle of legality: It surely must be right for the Security Council of the United Nations to have a say in whether a prolonged bombing campaign in which the bombers choose their targets at will is consistent with the principle of legality under the Charter of the United Nations.[126]

Other organs of the UN made statements during the Kosovo crisis, although without directly taking a position as to the legality of the attacks. For example, the UN Commission on Human Rights adopted a resolution on the human rights situation in Kosovo, which, while condemning the 'widespread and systematic practice of ethnic cleansing perpetrated by the Belgrade and Serbian authorities against the Kosovars', makes no mention of the NATO action.[127]

The ICJ never reached the merits of the cases brought before it by the FRY against certain NATO Member States as to the legality of the use of force in the Kosovo crisis.[128] In the orders in which

---

[123] Ibid, 1.
[124] UNSG Press Release (24 March 1999) UN Doc SG/SM/6938.
[125] UNSG Report on the Work of the Organization (1999) UN Doc A/54/1, 66.
[126] Report on the Human Rights Situation involving Kosovo (30 April 1999) UN Doc HC/K304.
[127] ECOSOC Report of the Fifty-Fifth Session of the Commission on Human Rights (20 July 1999) UN Doc E/1999/23, E/CN.4/1999/167, 33.
[128] All applications were rejected for lack of jurisdiction: some already at the provisional measures stage, for 'manifest lack of jurisdiction, even *prima facie*', which caused the Court to remove them from the list (see e.g. *Legality of Use of Force (Yugoslavia v US)* (Provisional Measures) [1999] ICJ Reports 916, 924 [25] and 925 [28]), while others after

it refused to issue provisional measures, however, the Court made some important remarks with regard to the then on-going action in Kosovo.[129] The Court declared itself 'profoundly concerned with the use of force in Yugoslavia', which 'under the present circumstances [...] raises very serious issues of international law'.[130] The Court further 'deem[ed] it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law'.[131] Indeed, it even highlighted that 'whether or not States accept the jurisdiction of the Court, they remain in. any event responsible for acts attributable to them that violate international law, including humanitarian law',[132] and that 'when such a dispute [relating to the legality of such acts that may violate international law] gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter'.[133]

III. Questions of Legality

The NATO intervention in Kosovo has animated scholarly debate for almost two decades and countless contributions have been dedicated to investigating the extent to which this episode may have shaped the international law on the use of force. While opinions differ,[134] the majority of commentators agree that *Operation Allied Force* was an unlawful use of force,[135] although some add the legally irrelevant qualification that it was nonetheless a 'legitimate' one.[136] Cassese, for example, stated that 'from an *ethical* viewpoint resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is *contrary to current international law*'.[137] The Independent International Commission on Kosovo concluded that the intervention was 'illegal but legitimate'.[138] The UK Foreign Affairs Committee found that

full consideration of preliminary objections (see e.g. *Legality of Use of Force (Serbia and Montenegro v UK)* (Preliminary Objections) [2004] ICJ Reports 1307).

[129] The references below are from the Order in the *Legality of Use of Force (Yugoslavia v US)* (Provisional Measures) [1999] ICJ Reports 916, but similar observations are made in all the relevant orders.

[130] Ibid, 922 [15]-[16].

[131] Ibid 922, [17]-[18].

[132] Ibid 923, [31].

[133] Ibid 925, [33].

[134] For opinions in favour of the legality of the operation, see n 185 below.

[135] See, among others, Jonathan Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 AJIL 838; Ian Brownlie, Memorandum Submitted to the Foreign Affairs Committee (HC 2000, 28-II) reprinted in (2000) 49 ICLQ 904-905; Vaughan Lowe, Memorandum Submitted to the Foreign Affairs Committee (HC 2000, 28-II) reprinted in (2000) 49 ICLQ 941; Simon Chesterman, *Just War or Just Peace?* (OUP 2002) 231-232; Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2012) 338; Daniel Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm' (2002) 13 EJIL 618; Marcelo Kohen,'L'emploi de la force et la crise du Kosovo: vers un nouveau désordre international' (1999) 33 RBDI 123.

[136] See Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 22; Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (CUP 2002) 174–191; Martti Koskenniemi, '"The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law' (2002) 65 MLR 162; Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 AJIL 826; Alain Pellet, 'Brief Remarks on the Unilateral Use of Force' (2000) 11 EJIL 385 (although note text at n 172 below).

[137] Antonio Cassese, '*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 EJIL 25 [emphasis in the original].

[138] *Kosovo Report* (n 5) 4.

'NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds'.[139]

Leaving aside questions of legitimacy for the time being,[140] any assessment of the legality of NATO's actions should begin with the arguments put forward by the organisation and its Member States. The striking feature of the relevant statements, relayed in section II, is that, beyond overall agreement as to the situation on the ground that gave rise to the intervention and the general objectives of the latter,[141] a multitude of positions were taken by NATO and its Member States as to the legality of the action. It is hard to escape the impression that many of these statements were left deliberately vague and ambivalent as to the legal basis of the intervention.[142]

While some authors have claimed that the 'principal justification' advanced by NATO was an alleged right of humanitarian intervention,[143] it is difficult to see a specific argument being advanced in the statements by the NATO Secretary General and the North Atlantic Council as the principal legal basis for the use of force. For example, the Secretary General's statement of 23 March 1999 mentions a variety of reasons for intervening,[144] combining political and ethical arguments such as the reference to the 'moral duty' to intervene.[145] Brownlie has thus pointed out the 'relative absence of reference to specific considerations of public international law'.[146] As to the statements of individual NATO Member States, these hardly convey any consistent or uniform view regarding the legal basis for military action. Some Member States avoided putting forward any explicit legal basis,[147] including some against whom proceedings were brought before the ICJ, in their pleadings before the Court.[148] Two States (Belgium and the United Kingdom) argued on the basis of an alleged right of forcible humanitarian intervention,[149] while the Netherlands also referred to the 'possibility of intervention' to put an end to a humanitarian crisis in slightly more ambivalent terms.[150] All other Member States referred, to some extent, either to a humanitarian

---

[139] Foreign Affairs Committee, *Fourth Report: Kosovo* (HC 2000, 28-I) 138.
[140] See further section IV below.
[141] Though note the conclusion of the UK Foreign Affairs Committee that NATO had a 'rather confused message' as to the objectives of the operation, which 'did not help to explain NATO's action to the public, and rather suggests that NATO was not itself clear about what it was trying to do'; *Fourth Report* (n 139) [76].
[142] Cf Christine Gray, *International Law and the Use of Force* (OUP 2008) 40.
[143] Christopher Greenwood, 'Humanitarian Intervention: The Case of Kosovo' (1999) 10 FYBIL 168. See also Dino Kritsiotis, 'The Kosovo Crisis and Nato's Application of Armed Force against the Federal Republic of Yugoslavia' (2000) 49 ICLQ 340.
[144] See text at nn 53-55.
[145] See also Olivier Corten, 'Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?' in Philip Alston and Euan Macdonald (eds), *Human rights, intervention and the use of force* (OUP 2008) 109. Even Sofaer, who believes that these arguments 'pertain to the NATO's action legality' concedes that 'no single factor satisfies any specific, accepted theory for intervention': Abraham Sofaer, 'International Law and Kosovo' (2000) 36 Stanford J Intl L 13.
[146] Brownlie (n 135) 878.
[147] See e.g. Greece, who did not advance any argument as to the legality of the action, and who, while not vetoing it at any stage as it could have done, kept asking for the strikes to cease and reserved its right to veto the action throughout: text at n 89.
[148] See *Legality of Use of Force*, Public sitting (10, 11, and 12 May 1999) CR 99/16 (Canada); CR 99/17 (France); CR 99/19 (Italy); CR 99/21 (Portugal).
[149] See Belgium's pleadings before the ICJ at n 61. See also UK statements at nn 69-70 above.
[150] See text at n 60 and n 77 above.

catastrophe (either potential or ongoing) and/or to the relevant UN Security Council resolutions.[151] As Corten has put it, 'the legal aspect of the reasoning is often hard to distinguish from the political or moral aspect'.[152]

Against this background of general ambivalence, and in an attempt to bring some structure into the discussion, we fall back to the general regulation of the use of force in order to provide an assessment of the legality of the NATO operation in Kosovo. We will assess the legality of the operation under the scheme of the UN Charter (subsection 1), before proceeding to discuss the possibility that a further exception to the prohibition of the use of force in the guise of a right of forcible humanitarian intervention has emerged in customary international law (subsection 2).

1. Legality under the UN Charter

Article 2(4) of the UN Charter prohibits the threat or use of force in international relations. We first discuss whether the prohibition is engaged in the instance or whether, as some have argued, a humanitarian use of force does not offend against the prohibition as it is not against the territorial integrity or political independence of the State where force is used, or is not inconsistent with the purposes of the UN (subsection i). If the provision is engaged, there are two exceptions from its scope under the Charter, schematically speaking. Authorisation by the Security Council (subsection ii), and self-defence under Article 51 (subsection iii). We examine these issues in turn.

i. Article 2(4) UN Charter

Some commentators have argued that, because the prohibition of the threat or use of force under Article 2(4) UN Charter concerns 'the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations', it would not be engaged 'in a case where that threat or action proved *essential* to effectuate the United Nations' purposes'.[153] A similar, if vague, attempt at justification can be traced back to the statements of NATO and some of its Member States who put emphasis on the limited scope and humanitarian objectives of the operation,[154] all the while shying away from fully articulating the argument. Such arguments however have long been refuted on the basis of the

[151] See emphasis on humanitarian aspects in statements by Canada (at n 76), the Netherlands (at n 77), Hungary (at n 78), and Italy (at n 79); also note heavier reliance on UNSC resolutions in statement by France (at n 83).
[152] Corten (n 145) 108.
[153] Harold Koh, 'The War Powers and Humanitarian Intervention' (2016) 53 Hous. L. Rev. 971, 1007; see also Anthony D'Amato, 'International Law and Kosovo' (1999) 33 UNLR 112-114; Sofaer (n 145) 14; Julie Mertus, 'Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo' (2000) 41 WMLR 1743, 1763; Philippe Weckel, 'Interventions humanitaires et maintien de la paix' (2000) 104 RGDIP 19, 34.
[154] See statements by NATO Secretary General at nn 53, 56, 57. See also statements by the UK Prime Minister (at n 67) and the US President (at n 72). Along similar lines, Georg Nolte, 'Kosovo und Konstisutionalisierung: Zur Humanitären Intervention der NATO-Staaten' (1999) 59 ZaöRV 941, 943-944: 'NATO States limited themselves to justifying the operation [on the basis of] supporting the goals of the international community' [authors' translation].

Charter's legislative history, including by the International Court of Justice in its first ever case,[155] and the majority of authors agree that these expressions are not qualifications of the prohibition.[156]

ii. Authorisation by the Security Council

The UN Security Council had long been involved in the situation in Kosovo. The three Chapter VII resolutions it adopted before NATO's intervention left little doubt as to the gravity of the situation on the ground. The Security Council spoke repeatedly of an 'impending humanitarian catastrophe'[157] and demanded that various steps be taken by the FRY authorities and the Kosovar Albanian leadership to avert it.[158] However, as condemnatory as the language of these resolutions was, these never went as far as to authorise the use of force against the FRY. Over the last two decades, it has been the practice of the Security Council to consider widespread and particularly serious human rights violations as 'threats to the peace' and there are various examples of UN-authorised interventions before (and after) Kosovo where the Council sought to attain (in part) humanitarian objectives.[159] Unlike in these cases, however, none of the resolutions adopted by the Security Council in the context of the Kosovo crisis contained the 'all necessary means' formula, nor any other statement referring to the use force. All that can be found in Resolutions 1160, 1199, and 1203 (1998) are statements emphasizing that the Security Council would consider 'additional measures' should the relevant actors fail to meet its demands.[160]

Despite this, some NATO Member States seemingly sought to rely on these Security Council resolutions as if they contained an implied authorisation to use force in case of non-compliance with the demands of the Council.[161] Such 'implied authorisation' arguments however, which also found some traction in the literature,[162] are difficult to defend. In no way can the reference to the possibility that the Security Council may consider 'additional measures' be interpreted as

---

[155] See *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [1949] ICJ Rep 4, 35. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*(Merits) (1986) ICJ Rep 14, [268].

[156] See, among others, Simma (n 136) 3; Brownlie (n 135) 885; Vaughan Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' (2011) MPEPIL [12]-[14]; Kohen (n 135) 134; Momtaz, '"L'intervention d'humanité" de l'OTAN au Kosovo et la règle du non-recours à la force' (2000) 82 Rev ICR 89, 96; Dieter Dieseroth, '"Humanitäre Intervention" und Völkerrecht' (1999) 52 NJW 3084, 3086.

[157] UNSC Res 1199 (n 22) [2]; UNSC Res 1203 (n 26) [11].

[158] Ibid.

[159] These include the UN-authorized interventions in Somalia (UNSC Res 794 (3 December 1992) UN Doc S/RES/794, 1-3); Haiti (UNSC Res 940 (31 July 1994) UN Doc S/RES/940, 1); Rwanda (UNSC Res 929 (22 June 1994) UN Doc S/RES/929, 1-2); Bosnia and Herzegovina (UNSC Res 836 (4 June 1993) UN Doc S/RES/836, 2; UNSC Res 1088 (12 December 1996) UN Doc S/RES/1088 [10]); Albania (UNSC Res 1101 (28 March 1997) UN Doc S/RES/1101, 2); cf Lowe and Tzanakopoulos (n 156) [16]. After Kosovo, the authorisation for the use of force in Libya was also based on humanitarian considerations: UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, 1, [4].

[160] UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160 [19]; UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199 [16].

[161] See e.g. Belgium's pleadings before the ICJ at n 61; statement by French Foreign Minister at n 83. Simma also reports that the US Deputy Secretary of State Strobe Talbot, in an address delivered in Bonn on 4 February 1999, stated that 'the UN has lent its political and moral authority to the Kosovo effort': Simma (n 136) 11.

[162] Ruth Wedgewood, 'Kosovo and the Law of Humanitarian Intervention' (1999) 93 AJIL 828. Before Kosovo, the argument had been put forward in Sean Murphy, *Humanitarian Intervention* (Penn Press 1996) 171-172.

containing an implied authorisation to use force.[163] It is also significant that Russia and China explicitly noted, in meetings following the adoption of Resolutions 1199 and 1203, that they did not vote against the resolutions solely because these could not be interpreted, in their view, as authorising the use force.[164] No Members of the Council objected to these interpretations at the time, which makes it implausible to argue that the Security Council meant to implicitly authorise the use of force in the instance.[165]

It is equally hard to defend the view – put forward by some authors[166] – according to which the Security Council, while failing to authorize the use of force beforehand, nonetheless tacitly approved it subsequently. Some of these authors argue that this subsequent authorisation or ratification of the use of force can be gleaned by the fact that the Security Council had the opportunity to condemn the use of force as unlawful but chose not to do so. This is because the Security Council failed to adopt a resolution, proposed in the immediate aftermath of the commencement of the NATO bombing campaign,[167] which would have characterised the NATO operation as an unlawful use of force.[168] However, whereas the fact that the Security Council condemns a particular use of force as unlawful constitutes strong evidence of the view of the international community to the same effect, the failure by the Security Council to condemn a particular use of force is a non-event, a situation in which the Security Council has not decided.[169] As such, it does not constitute evidence in support of legality of the action. What would constitute such evidence, rather, would be a resolution of the Security Council confirming the legality of the operation, or at the very least commending the action.[170] It has been argued further that the *opinio juris* expressed by those Members of the Council who voted against the condemnatory draft resolution in the instance cannot be interpreted as accepting the legality of NATO's action; some

[163] See e.g. Simma (n 136) 7; Vaughan Lowe, Memorandum Submitted to the Foreign Affairs Committee (HC 2000, 28-II) reprinted in (2000) 49 ICLQ 936; Yves Nouvel, 'La position du Conseil de sécurité face à l'action militaire engagée par l'OTAN et ses Etats membres contre la République fédérale de Yougoslavie' (1999) 45 Annuaire français de droit international 298; Kohen (n 135) 122; Natalino Ronzitti, 'Raids aerei contro la Repubblica Federale di Jugoslavia e Carta delle Nazioni Unite' (1999) 82 Riv Dir Intern 479; Gowlland-Debbas (n 170) 373; Tarcisio Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)' (2001) 12 EJIL 391 431. In fact, Schreuer believes that the wording of Resolution 1203 (1998) (see text at n 116 above) was 'an attempt to remind NATO of the Security Council's prerogative': Christoph Schreuer, 'Is There a Legal Basis for the NATO Intervention in Kosovo?' (1999) 1 Int'l L.F. D. Int'l 151, 154.

[164] See statements by Russia at nn 95, 97; statements by China at nn 96, 98.

[165] Corten (n 145) 114; see also Spinedi, 'Uso della forza da parte della NATO in Jugoslavia e diritto internazionale' (1998–XII) 3 *Quaderni Forum* 27; Michael Bothe, 'Die NATO nach dem Kosovo-Konflikt und das Völkerrecht' (2002) 10 SZIER 177, 182.

[166] See Sean Murphy, 'The Intervention in Kosovo: A Law-Shaping Incident' (2000) 94 ASIL Proc 303; Ruth Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 AJIL 828, 830. Greenwood stresses that the rejection of the draft resolution is 'important as evidence of international reaction to the operation and the justifications advanced by the NATO States but non-condemnation is not the same as authorization': Greenwood (n 143) 155.

[167] Text at n 41.

[168] See text at n 166.

[169] See Gray (n 142) 23; Corten (n 145) 120; Kohen (n 135) 136. See also Greenwood (n 143) 155

[170] See e.g. UNSC Res 788 (19 November 1992) S/RES/788 [2], '[c]ommend[ing] ECOWAS for its efforts to restore peace, security and stability in Liberia' at. See also Ruth Wedgwood, 'Unilateral Action in the UN System' (2000) 11 EJIL 349, 357. The conclusion is, however, not uncontroversial: see Lowe and Tzanakopoulos (n 156) [20]. See also Vera Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance' (2000) 11 EJIL 375.

of them were simply wary of approving a resolution that was seen as unbalanced, supporting Milosevic's oppressive government at a very delicate moment.[171]

Others yet argue, in the same spirit of subsequent authorisation or ratification, that the Security Council decision to authorise an international civil and security presence in Kosovo in Resolution 1244 (1999), adopted after the cessation of hostilities, operated to ratify *ex post facto* 'what earlier might have constituted unilateral action questionable as a matter of law'.[172] However, no such ratification of NATO's unilateral military action can be found in Resolution 1244 (1999).[173] The Resolution contains no statements in this sense and, while the measures taken by the Security Council in the aftermath of the intervention were necessarily premised on NATO's acts, this 'is not the same as saying that the resolution converted what had been an unlawful action into one which was legal'.[174] As Simma pointed out, the Security Council 'will in many instances have to accept or build upon facts or situations based on, or involving, illegalities'.[175] In order to effectively deal with certain situations, the Security Council will have to be pragmatic and 'accept', as it were, the existence of facts on the ground, i.e. the existence of a *fait accompli*, without this amounting to acquiescence,[176] much less to ratification. It would make little sense to consider any action that the Council takes in a situation from which it was previously excluded as constituting approval of acts it neither authorised nor condoned.

Absent UN Security Council authorisation, reference to previous Security Council resolutions does not furnish grounds for unilateral military action within the system of the UN Charter.[177] It is also irrelevant that the operation was not carried out by an individual State or a group of States, but within the framework of a regional international organisation referred to in Article 53 UN Charter.[178] Pursuant to Article 53 UN Charter, such action requires UN Security Council

---

[171] A number of States, for example, complained that the draft resolution ignored the responsibility of the FRY for its ongoing violations: see UN Doc S/PV.3989 (n 76), 3 (Slovenia), 8 (Malaysia), 14 (Bosnia and Herzegovina). See also Corten (n 145) 120; Lowe and Tzanakopoulos (n 156) [21].

[172] Pellet (n 136) 387. Pellet nonetheless stresses that Resolution 1244 'does not formally declare that NATO's intervention was lawful […] However, it clearly endorses the consequences of this intervention and it cannot be seriously maintained that the principal organ of the United Nations […] would have given its blessing to such an act if only because one effect of a crime (and an act of aggression too is a crime) can legally produce no consequence nor can its consequences be recognized under any circumstances'; ibid, 389. See also Henkin (n 136) 827; and, more recently, Jordan J Paust, 'Use of Military Force in Syria by Turkey, NATO, and the United States' (2013) 34 U Pa J Int'l L 431, 439.

[173] See Brownlie (n 135) 49 ICLQ 895; Christine Chinkin, Memorandum Submitted to the Foreign Affairs Committee (HC 2000, 28-II) reprinted in (2000) 49 ICLQ 912-913.

[174] Greenwood (n 143) 156. See also Gowlland-Debbas (n 170) 375.

[175] Simma (n 136) 11.

[176] See Dinstein (n 135) 338.

[177] Chesterman notes that reference to the action being taken 'in support of' or 'consistent with' Security Council resolutions reduced the UNSC authorization from a source of legal authority to simply 'one policy justification among others': Chesterman (n 135) 218.

[178] Many have pointed out that NATO may not even qualify as a regional organization under Article 53; indeed, *Operation Allied Force* marked a significant departure from NATO's role, in accordance with its constitutive instrument, as a collective self-defence organization: see Lowe (n 163) 935-936; Gray (n 142) 39; Simma (n 136) 19; Paolo Picone, 'La "guerra del Kosovo" e il diritto internazionale generale' (2000) 83 Riv Dir Intern 319. Dinstein, however, maintains that NATO's status as a collective self-defence organization 'does not diminish' its standing as a regional arrangement: Dinstein (n 135) 336.

authorisation and, despite some opinions to the contrary,[179] no agreement as to a different interpretation of Article 53 UN Charter has been reached through State practice so as to affect even the manner in which such authorisation can be given.[180] Any unauthorised action thus, whether undertaken by one State or more, even within the framework of an international organisation, remains unilateral—or may even be considered technically *multi*lateral—but does not become collective action under the UN Charter.

iii. Self-defence under Article 51 UN Charter

Finally, notwithstanding some proposals to the contrary, none of the main protagonists advanced arguments based on self-defence under Article 51 UN Charter.[181] Such a legal basis is ill-suited for situations of humanitarian crisis of the Kosovo type, where whatever force is being used does not traverse international borders (or does not target foreign nationals) and could thus never qualify as an armed attack (however broadly construed) against another State.[182] As Lowe stressed, not only does international law 'not yet extend so far', it is also 'unwise to seek to change [it] in this direction'.[183] The only possible justification of the operation that remains, then, is the emergence of an extra-Charter right of forcible humanitarian intervention under customary international law, and it is to this that we now turn.

2. Forcible Unilateral Humanitarian Intervention under Customary International Law

i. Existence of a Right of Forcible Unilateral Humanitarian Intervention

The debate over the existence of a so-called 'right of humanitarian intervention' in international law dates back centuries, even if in different forms.[184] The Kosovo crisis however brought the issue into sharp relief. Given the difficulty in squaring the intervention in Kosovo with the framework of the UN Charter, two NATO Member Sates and certain authors defended its legality by asserting the existence or emergence (crystallisation) of a new rule of customary international

[179] Wedgwood (n 166) 832; Murphy, ''The Intervention in Kosovo:…' (n 166) 304; Jordan Paust, 'NATO's Use of Force in Yugoslavia' (1999) 2 TRANSLEX 2, 3.

[180] Jürgen Bröhmer, Georg Ress, and Christian Walter, 'Regional Arrangements, Article 53' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary, Volume II* (3rd edn, 2012) 1492. However, the authors argue, ibid 1493, that a limited exception for humanitarian intervention has emerged in custom. See also Schreuer (n 163) 152; Dinstein (n 135) 337.

[181] Simma reported that proposals were made within the North Atlantic Assembly to argue an extension of the scope of the right of self-defence so as to include the 'defence of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes'; Simma (n 136) 16. As Corten observed, no such indication can be found in the final text of the Washington Summit communiqué of 24 April 1999; Corten (n 145) 116. See also NATO, Resolution on 'Recasting Euro-Atlantic Security' (1998) NATO Doc AR 295 SA [15(e)].

[182] For example, a mass exodus of refugees does not qualify as an armed attack; Simma (n 136) 6. See also Dinstein (n 135) 337; Mertus (n 153) 1756.

[183] Lowe (n 163) 935.

[184] See Lowe and Tzanakopoulos (n 156) [4-6].

law allowing the unilateral use of force for humanitarian aims.[185] It is, however, difficult to claim that such a rule had emerged at the time the Kosovo crisis occurred or was crystallised by that action through consolidation of practice and *opinio juris* relating to it by the acting and reacting States. What proponents of humanitarian intervention need to demonstrate is that a new rule of customary international law has developed through the practice of States either as a 'reinterpretation' of Article 2(4) UN Charter ('subsequent practice') or as an instance of supervening custom which carved out a new exception to the prohibition under Article 2(4).[186] This task is made particularly difficult by the fact that the prohibition on the use of force, at least with regard to its core, is widely regarded as a norm of *jus cogens* and thus the new exception would also have to achieve this status.[187] Developments in the context of human rights law are unhelpful because advocates of humanitarian intervention must show not only that certain human rights have acquired peremptory status,[188] but that a parallel right to use force to protect them has emerged.[189]

Pointing to precedents establishing of a rule of humanitarian intervention is particularly hard, especially before the Kosovo crisis. Indeed, from a survey of the pre-Kosovo literature, Brownlie found that only a minority of authors had adopted a view in favour of humanitarian intervention; most authors agreed that no such a right had emerged.[190] Those who support the emergence of a new rule can only invoke a handful of instances of alleged relevant practice, which normally include the ECOWAS/ECOMOG interventions in Liberia (1990) and Sierra Leone (1997) and the US, UK, and French intervention in Iraq from 1991.[191] Some authors also cite earlier cases, such as the Indian intervention in East Pakistan (Bangladesh) in 1971, the Tanzanian intervention in Uganda in 1978, and the Vietnamese intervention in Democratic Kampuchea in 1978.[192] However, the precedential value of this practice is questionable, considering that, with the exception of UK's initial position with respect to the use of force in Iraq to protect the Kurds in 1991,[193] no other State has ever claimed any right of humanitarian intervention in these cases.[194] While there was of course humanitarian 'sugar-coating' in almost all of them, the legal basis for the use of force put

---

[185] See, for example, Kritsiotis (n 143) 358; Bartram Brown, 'Humanitarian Intervention at a Crossroads' (2000) 41 WMLR 1740; Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers 2005) 374-375; Momtaz (n 156) 100; Greenwood (n 143) 144.

[186] Lowe and Tzanakopoulos (n 156) [26].

[187] Cf Article 53 VCLT.

[188] For the argument that the protection of human rights would provide a legal basis for humanitarian interventions, see Mertus (n 153) 1772; Salvatore Zappalà, 'Nuovi sviluppi in relazione alle vicende del Kosovo' (1999) 82 Riv Dir Intern 975, 998. See also: Knut Ipsen, 'Der Kosovo-Einsatz – Illegal? Gerechtfertig? Entschuldbar?' (1999) 74 Friedens-Warte 19, 20f; Christian Tomuschat, 'Völkerrechtliche Aspekte des Kosovo-Konflikts' (1999) 74 Friedens-Warte 33ff.

[189] Gray (n 142) 48; Bothe (n 165) 181.

[190] Brownlie (n 135) 886-891.

[191] See Greenwood (n 143) 168; Picone (n 178) 342; Serge Sur, 'Le recours à la force dans l'affaire du Kosovo et le droit international' (2000) 22 Notes de l'Ifri 28; Nigel Rodley, 'Humanitarian Intervention' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 784-786. See also: Belgium's pleadings at n 65 above; see also statement by UK at n 69 above.

[192] Editors to add cross-references. See, also, among others: Wedgwood (n 166) 833; Sur (n 191) 28; Koh (n 153) 1008. See also Belgium's pleadings at n 65.

[193] See statements by UK Secretary of State for Foreign and Commonwealth Affairs, Mr Douglas Hurd, and Secretary of State for Defence, Mr Malcolm Rifkind, in 'UK Materials on International Law' (1992) 63 BYIL 824.

[194] Lowe and Tzanakopoulos (n 156) [29]; Corten (n 145) 107; Charney (n 135) 836.

forward by the intervening States was invariably some iteration of the right of self-defence.[195] Attempts to recast this practice as supporting a right of humanitarian intervention are thus characterised by a considerable degree of revisionism.[196]

Even in the absence of any considerable number of precedents, some still might argue that the intervention in Kosovo and the reaction to it provided the necessary (missing) practice and *opinio juris* for the crystallisation of a customary rule. Cassese identified this possibility early on, when he wrote that the intervention in Kosovo 'may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace'.[197] It is improbable however that this had happened at the time, and it is still improbable that it has happened today.

First, as it was highlighted above, it is an overstatement that, during the Kosovo crisis, 'nineteen NATO members accepted the legality of some form of humanitarian intervention without U.N. Security Council approval'.[198] Only two States, Belgium and the United Kingdom, can be said to have put forward a doctrine of humanitarian intervention as the legal basis for action, with the Netherlands referring to the 'possibility of intervention' but stopping short of advancing any fully fledged argument.[199] Neither NATO, nor the majority of its Member States advanced any similar argument.[200] It is true that many NATO Member States referred to humanitarian considerations as one of the factors that triggered the intervention, at times reinforced by reference to the determination of the UN Security Council that a humanitarian crisis existed on the ground.[201] Such humanitarian considerations, however, do not provide the necessary *opinio juris* for the establishment of a rule of customary international law. Motives, even when expressly stated, do not amount to legal justifications.[202] The fact that most NATO Member States were so reluctant to put forward an argument based on humanitarian intervention militates against the establishment of such a rule.[203] Germany and France in particular went to great lengths to stress the exceptional

[195] Gray (n 142) 34; Brownlie (n 135) 919-920; Momtaz (n 156) 99; Brown (n 185) 1704; Nigel Rodley and Basak Çalı, 'Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law' (2007) 7 HRL Rev 275, 279; Peter Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' (2001) 12 EJIL 437, 444-445; Mary Ellen O'Connell, 'The UN, NATO, and International Law after Kosovo' (2000) 22 Hum Rts Q 57, 71.
[196] Gray (n 142) 49.
[197] Cassese, '*Ex iniuria ius oritur*' (n 137) 29.
[198] Koh (n 153) 976. See also Murphy, ''The Intervention in Kosovo:…' (n 166) 302.
[199] See UK statements at nn 69-70 above. See Belgium's pleadings before the ICJ at n 61. See also Netherland's statements at nn 60 and 77.
[200] Gray (n 142) 40, 51; Nouvel (n 163) 303.
[201] Greenwood (n 143) 156, 169; Nolte (n 154) 944.
[202] Lowe and Tzanakopoulos (n 156) [34]. Cf Michael Akehurst, 'Custom as a Source of International Law' (1974-5) 47 BYIL 1, 39.
[203] Michael Matheson, former Legal Adviser at the US State Department, believes that this was a precise strategy, since 'many NATO states-including the United States-had not accepted the doctrine of humanitarian intervention as an independent legal basis for military action'. Relying on 'the unique combination of a number of factors that presented itself in Kosovo' was therefore 'a pragmatic justification designed to provide a basis for moving forward without establishing new doctrines or precedents that might trouble individual NATO members or later haunt the Alliance if misused by others': Michael Matheson, 'Justification for the NATO Air Campaign in Kosovo' (2000) 94 Am. Soc'y Int'l L. Proc. 301.

character of the situation,[204] and may even be seen as having denied that their participation in the operation was coupled with a claim that the operation was legal[205]—hence they denied that their practice in the instance was coupled with *opinio juris*.[206] Many of the NATO Member States were rather more concerned with restoring the authority of the UN Security Council at the earliest opportunity.[207]

If, in view of the above, there is still any lingering doubt as to the extent to which a customary rule might have emerged from the Kosovo crisis, it should be dispelled when considering the reactions of other States to the NATO operation. As discussed in section II, these reactions were overwhelmingly negative, resulting in a significant majority of States in the international community unequivocally rejecting any right of humanitarian intervention.[208] Nor can it be said that support for humanitarian intervention came from the statements of UN organs. The position of the Security Council, which cannot be said to have implicitly approved or subsequently ratified this action, has already been discussed.[209] The same goes for the statements of the Commission on Human Rights, which simply avoided commenting on the legality of the use of force by NATO.[210] The High Commissioner for Human Rights left little ambiguity as to its condemnation of the campaign.[211] Finally, the statements by the UN Secretary General, while initially hinting to some degree of approval of the operation on an ethical basis,[212] clearly convey unease with the situation—if not rejection of its legality—and concern that the action may undermine existing legal rules.[213]

These reactions leave little doubt as to the fact that a new rule of customary international cannot have developed at the time. Indeed, when Cassese revisited the issue a few months after his first reaction on the issue,[214] he concluded that 'it is premature to maintain that a customary rule has emerged'.[215] Others have also taken this position, which continues to reflect the state of the law today.[216]

---

[204] See statements by the UK Prime Minister at n 67 above; the French Foreign Minister at 84 above; the German Foreign Minister at 87 above.

[205] See the Italian Foreign Minister's admission that there is no agreement among the Allies as to the legal basis of missions such as that in Kosovo, text at n 82 above. See also France's and Germany's concerns that Kosovo should not become a precedent, text at nn 84 and 87, respectively.

[206] See Maurice Mendelson, 'The Subjective Element in Customary International Law' (1995) 68 BYIL 177, 198.

[207] Corten (n 145) 116; see eg Deliberations of the *Deutscher Bundestag*, *BT Plenarprotokolle* 14/35 (22 April 1999) 2778 (Fischer).

[208] See above statements by Russia (n 99), China (*ibid*), India (n 100), Argentina (n 101), the CIS (n 106), the Rio Group (n 108), and the Non-Aligned Movement (n 109). See also Corten (n 145) 119; Bothe (n 165) 182; *contra* Greenwood (n 143) 169.

[209] See section III(1)(b) above.

[210] Text at n 127 above..

[211] Text at n 126 above.

[212] Text at n 124 above.

[213] Text at n 125 above; see also Corten (n 145) 119.

[214] See n 137 above.

[215] Antonio Cassese, 'A Follow-up: Forcible Humanitarian Countermeasures and *opinio necessitatis*' (1999) 10 EJIL 796.

[216] See, among many others, Gray (n 142); Olivier Corten, *The Law Against War* (Pedone 2012) 549; Dinstein (n 135) 338; Malcom Shaw, *International* Law (CUP 2014) 840; Benedetto Conforti, *Diritto internazionale* (Editoriale Scientifica 2002) 377; Dieseroth (1999) 3087.

ii. The Conditions of an Alleged Right of Forcible Unilateral Humanitarian Intervention

Even if we were to accept, *ex hypothesi*, that a right of humanitarian intervention had emerged or crystallised on account of the NATO intervention in Kosovo, it is still not a foregone conclusion that the alleged conditions for the exercise of the right had been met in the instance. First, it must be pointed out that there is precious little consensus as to what these requirements should be.[217] Some of the most commonly suggested conditions are:

> a) the existence of a humanitarian 'emergency' or 'disaster' or 'crisis' or 'catastrophe' or 'necessity' or 'tragedy', usually related to the widespread and gross or egregious violation of human rights of (a part of) the population of a State or to the commission of grave international crimes;
> b) the inability or unwillingness of the territorial State to act to address the situation;
> c) the exhaustion of all other realistically possible remedies, including all peaceful remedies and recourse to the UN Security Council (and arguably also the UN General Assembly under the 'Uniting for Peace' procedure), which are unwilling or unable to act;
> d) the acceptance of limitations (both in scope and in time) upon the use of force (as the necessary and sole available course of action), confining it to strictly humanitarian objectives that must be expected to do more harm than good, respecting the principle of proportionality; and for some
> e) a preference towards multilateral (rather than unilateral, and as second best to collective) action, as well as towards the (relative) disinterestedness of the intervening States and/or organizations.[218]

Most importantly, there is even less agreement as to the procedure for the determination of the fulfillment of these conditions or requirements.[219] Each one of the alleged conditions, especially those of the existence of a humanitarian catastrophe, the exhaustion of all peaceful avenues, and so forth, is open to question as to whether it has been fulfilled.[220] Who will decide? Leaving this to each State independently in the process of the normal power of auto-determination would simply

---

[217] There exist as many variations of these requirements as authors discussing the emergence of a right of humanitarian intervention. Note the differences between: Greenwood (n 143) 170; Cassese, '*Ex iniuria ius oritur*' (n 137) 27; Mertus (n 153) 1780; Daniel Thürer, 'Der Kosovo-Konflict im Lichte: Von drei – echten und scheinbaren – Dilemmata' (2000) 38 AVR 1, 8-9; Picone (n 178) 345; Lowe (n 163) 939; Rodley (n 191) 788ff. Cf also the lengthy list proposed by the ILA: 'Third Interim Report of the Subcommittee on the International Protection of Human Rights by General International Law' (1974) *ILA Report of the Fifty-Sixth Conference* 217. For Byers and Chesterman, '[i]t is extremely unlikely that workable criteria for a right of humanitarian intervention without Security Council authorization will ever be developed to the satisfaction of more than a handful of states': Michael Byers and Simon Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law' in JL Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003) 202. On the necessary vagueness and over-/under-inclusiveness of these criteria, see also Anthea Roberts, 'Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?' in Philip Alston and Euan Macdonald (eds), *Human rights, Intervention and the Use of Force* (OUP 2008) 211; Hilpold (n 195) 450; Koskenniemi (2002) 167; Corten (n 145) 135.

[218] Lowe and Tzanakopoulos (n 156) [39].

[219] Even authors that support a right of humanitarian intervention recognize the dilemma in determining whether the relevant conditions are met; see for example Zappalà (n 188) 1001.

[220] Corten (n 136) 136. Picone, who supports the legality of humanitarian intervention, admits that 'abstract catalogues' of legitimacy requirements are unreliable because they are utterly subjective: Picone (n 178) 344-345.

constitute a return to an unregulated right to resort to force.[221] Having the Security Council determine the existence of the relevant conditions would simply move the veto issue at this earlier stage of determination.[222] Replacing the Security Council with some other international organisation or regional arrangement would run *contra*, not *praeter*, the UN Charter and would essentially constitute also a return to an unregulated right to resort to force, merely dependent on the auto-determination of an international organisation other than the UN, rather than that of a State or group of States.[223]

In any event, while some authors consider that these conditions were met in the case of Kosovo,[224] others believe these requirements were not present at the times the intervention occurred. It is unclear, for example, whether the 'ethnic cleansing' perpetrated by the FRY against the ethnic Albanians in Kosovo was already underway when NATO decided to intervene or began *only after* the bombing campaign commenced.[225] Moreover, some maintain that the modalities of the attacks, in particular high altitude bombing,[226] 'disqualify the mission as a humanitarian one', particularly under the principle of proportionality.[227]

IV. Conclusion: Precedential Value

For as long as arguments are put forward to the effect that unilateral use of armed force by States or international organisations other than the UN is lawful when it pursues humanitarian objectives in the face of a humanitarian catastrophe, crisis, or some similar designation, so will NATO's intervention in Kosovo remain a case in point: a precedent to which States, international organisations, international lawyers, and so forth, will have to turn and which they will have to discuss. Such arguments are still being put forward on occasion, though mostly by authors and

[221] It is thus troublesome that certain authors, such as Picone, have put forward a view that regional organizations and individual States should maintain their power to unilaterally use force outside the framework of the UN Charter in order to react to *erga omnes* violations: Picone (n 178) 333.
[222] See Lowe and Tzanakopoulos (n 156) [41]-[42].
[223] See Nicolas Valticos, 'Les droits de l'homme, le droit international et l'intervention militaire en Yougoslavie' (2000) 104 RGDIP 5, 13; Momtaz (n 156) 101.
[224] In this sense Greenwood (n 143) 171; see also Cassese, '*Ex iniuria ius oritur*' (n 137) 27; Mertus (n 153) 1780.
[225] The Kosovo Report, for example, concluded that, while it is unclear whether the NATO campaign provoked the 'ethnic cleansing', it created the internal environment that made such operation feasible: see *Kosovo Report* (n 5) 88-89. See also Kohen (n 135) 139. Picone, who argues in favour of humanitarian intervention, also concedes this point: Picone (n 178) 346. Others, however, deem that the ethnic cleansing was 'amply documented' and 'no more can be added' to this: Tesón (n 185) 378.
[226] The NATO operation was limited to bombing from 15,000 feet, in connection also with the Organisation's 'zero casualty' policy (with respect of course to its own troops): APV Rogers, 'Zero-casualty Warfare' (2000) 82 Rev ICR 165. On the 'predictable unsuitability' of aerial bombardment for pursuing humanitarian aims, see Schreuer (n 163) 153.
[227] Brownlie (n 135) 49 ICLQ 898; see also Charney (n 135) 841; Richard Falk, 'Kosovo, World Order, and the Future of International Law' (1999) 93 AJIL 855-856; Nico Schrijver, 'NATO in Kosovo: Humanitarian Intervention Turns into Von Clausewitz War' (1999) 1 Int'l L.F. D. Int'l 155, 159; Mertus (n 153) 1786; Picone (n 178) 348. See, for example, the controversy following the bombing of the Serbian Television Tower on 22 April 1999: George Aldrich, 'Yugoslavia's Television Studios as Military Objectives' (1999) 1 Int'l L.F. D. Int'l 149; Kohen (n 135) 144.

commentators[228] and far less so by States.[229] Many authors, however, consider the Kosovo operation at best an 'unfortunate' and at worst a 'dangerous' precedent.[230] How dangerous the precedent may be is evident in the subtle but clear Russian argumentation regarding its involvement in Crimea, where distinct overtones of humanitarian intervention language are obvious.[231]

In the light of our assessment of the legality of the operation in Kosovo in section III above, it is hard to escape the conclusion that the NATO intervention in Kosovo has next to no precedential value[232]— that is, when it comes to establishing the legality of humanitarian intervention. It has enormous precedential value the opposite way, however: as evidence of the non-existence of such a rule at the time of the operation in 1999, and as evidence of the very strong reaction of the vast

[228] The US use of force against Syria in April 2017 has prompted a discussion that is in many ways reminiscent of the one that followed NATO's intervention in Kosovo. Thus, the majority of commentators has condemned the attacks as manifestly unlawful: see, among others, Ryan Goodman, 'What Do Top Legal Experts Say About the Syria Strikes?' (*Just Security*, 7 April 2017) <www.justsecurity.org/39712/top-legal-experts-syria-strikes>; Marty Lederman, 'Why the Strikes against Syria Probably Violate the UN Charter and (therefore) the U.S. Constitution' (*Just Security*, 6 April 2017) <www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution>; Marko Milanovic, 'Illegal but Legitimate?' (*EJIL:Talk!,* 10 April 2017) <www.ejiltalk.org/illegal-but-legitimate/>; Monica Hakimi, 'US Strikes against Syria and the Implications for the Jus ad Bellum' (*EJIL:Talk!,* 7 April 2017) <https://www.ejiltalk.org/us-strikes-against-syria-and-the-implications-for-the-jus-ad-bellum>; Nancy Simons, 'The Legality Surrounding the US Strikes in Syria' (*Opinio Juris,* 25 April 2017) <opiniojuris.org/2017/04/25/the-legality-surrounding-the-us-strikes-in-syria>.

A small number of authors, however, has defended the legality of the strike: Harold Koh, 'Not Illegal: But Now the Hard Part Begins' (*Just Security*, 7 April 2017) <www.justsecurity.org/39695/illegal-hard-part-begins>; Jens David Ohlin, 'I agree with Harold Koh' (*Opinio Juris,* 8 April 2017) <opiniojuris.org/2017/04/08/i-agree-with-harold-koh>; Jennifer Trahan, 'In Defense of Humanitarian Intervention' (*Opinio Juris,* 19 April 2017) <opiniojuris.org/2017/04/19/in-defense-of-humanitarian-intervention>;

For similar debate in the context of the US threat of use of force against Syria in 2013, see Dapo Akande, 'The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect' (*EJIL:Talk!,* 28 August 2013) <www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria>.

[229] The UK still holds the position that unilateral forcible humanitarian intervention is allowed under international law: see Policy paper: 'Chemical Weapon Use by Syrian Regime: UK Government Legal Position' (29 August 2013) <www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version> [4]; and more recently, UK Attorney General's speech at the International Institute for Strategic Studies (11 January 2017) <www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies>. However, State responses to the US bombing on Syria in April 2017 have – with the notable exception of Russia – been characterised by the usual ambiguity as to the legal basis of the attacks: see Julian Ku, 'Almost Everyone Agrees that the US Strikes Against Syria are Illegal, Except for Most Governments' (*Opinio Juris*, 7 April 2017) <opiniojuris.org/2017/04/07/almost-everyone-agrees-that-the-u-s-strikes-against-syria-are-illegal-under-international-law-except-for-most-governments>.

[230] Charney (n 135) 841. See also Falk (n 227) 856; Jack Goldsmith, 'The Kosovo Precedent for Syria Isn't Much of a Precedent' (*Lawfare*, 24 August 2013) <www.lawfareblog.com/kosovo-precedent-syria-isnt-much-precedent>; Chris O'Meara, 'United States' Missile Strikes in Syria: Should International Law Permit Unilateral Force to Protect Human Rights?' (*EJIL:Talk!,* 18 April 2017) <https://www.ejiltalk.org/united-states-missile-strikes-in-syria-should-international-law-permit-unilateral -force-to-protect-human-rights>; David Wippman, 'Kosovo and the Limits of International Law' (2001) 25 Fordham Int'l LJ 142.

[231] See text at nn 260-261 below.

[232] Simma (n 136) 14; Corten (n 145) 146.

majority of the international community to even the suggestion that it should become a rule.[233] What is for sure, at any rate, is that anything that has happened in the past has precedential value. This is so despite German and other NATO Member States' arguments at the time that this particular instance was 'exceptional' and should not be regarded as a precedent.[234] Paraphrasing Vaughan Lowe we might say that if you want to make sure that something becomes a precedent you should make sure to declare that it is not a precedent.[235] The question is not whether the Kosovo crisis is a precedent; it cannot be any other way. The question is rather 'a precedent for what?' We argue here that the precedential value of the Kosovo crisis is as a clear rejection of any existing or potential right of forcible unilateral humanitarian intervention.

Be that as it may, the Kosovo crisis did force States and commentators alike to question the current state of the law.[236] In response to a Canadian initiative at the Millennium Summit of the UN,[237] an 'International Commission on Intervention and State Sovereignty' was established in order to study the question of humanitarian intervention.[238] In its 2001 Report, the Commission, while elaborating the concept of 'responsibility to protect',[239] concluded that:

> A. There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
> B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out.[240]

---

[233] There is no shortage of statements by states and groups of states rejecting the idea of a right of humanitarian intervention in the aftermath of the Kosovo intervention. See e.g. the declaration given at the 35th anniversary of the creation of the 'Group of 77' (comprising 132 states): G77, Ministerial Declaration (24 September 1999) at <www.g77.org/doc/Decl1999.html> [69-70]; see also NAM, Final Document, XIII Ministerial Conference, Cartagena (Columbia) (8-9 April 2000) at <www.nam.gov.za/xiiiminconf/index.html> [11]. For further examples and references, see Corten (n 216) 512-517.

[234] Text at n 204 above.

[235] See text at n 259 below; and to quote Sir Humphrey Appleby, who is of one mind with Lowe in the instance: 'Many things must be done, Minister. But nothing must be done for the first time'.

[236] In this sense, the aspiration of the Italian Foreign Minister to find 'new solutions within the spirit of the Charter': text at n 82 above; cf the more conservative view of the German Foreign Minister ('the question is not about an alternative to the UN'): text at n 88 above. See also Corten (n 145) 124; Cassese, '*Ex iniuria ius oritur*' (n 137) 23; Wippman (n 230) 129; Jane Stromseth, 'Rethinking Humanitarian Intervention: the Case for Incremental Change' in JL Holzgrefe and Robert O Keohane, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003) 232.

[237] Statement by Jean Chrétien, Prime Minister of Canada, UNGA Meeting (7 September 2000) UN Doc A/55/PV.6, 16.

[238] The task of the Commission, in its own words, was to understand 'when, if ever, it is appropriate for states to take coercive – and in particular military – action, against another state for the purpose of protecting people at risk in that other state'; this was made necessary by the fact that 'NATO's intervention in Kosovo in 1999 brought the controversy to its most intense head': ICISS, *The Responsibility to Protect* (December 2001) VII.

[239] 'Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect': ICISS, *The Responsibility to Protect* (December 2001) XII. See, in general, Ingo Winkelmann, 'Responsibility to Protect' (2010) MPEPIL.

[240] ICISS, *The Responsibility to Protect* (December 2001) XII–XIII.

The 'responsibility to protect'—annoyingly referred to as 'R2P'[241] by people who treat the use of force with seriousness akin to that reserved for Facebook chats, where one can freely communicate by LOLs and TTYLs (as long of course as the bombs do not fall on *their* heads)—was first acknowledged in the 2004 Report of the High-level Panel on Threats, Challenges and Change,[242] which had been created by the UN Secretary General in the aftermath of the 2003 Iraq War.[243] It was then endorsed by the Secretary General in his Report *In Larger Freedom.*[244] However, the 2005 World Summit Outcome of the General Assembly made no mention of a right of unilateral humanitarian intervention and confirmed the traditional approach to the use of force even in cases of humanitarian catastrophes: any forcible action would have to be authorised by the Security Council under Chapter VII UN Charter.[245]

However, there is another, subtler way in which the Kosovo crisis has influenced and continues to influence discussions on the use of force. This is owed to the significant moral overtones present in the statements of NATO and its Member States,[246] along with the *de lege ferenda* (or moralistic, depending on how charitable one feels) stance taken by a number of authors who sought to reconcile the potential or certain illegality of the action with the(ir) perceived moral necessity to intervene.[247] Kosovo 'laid the foundation stone for the "illegal but legitimate" argument'.[248] This particular argument has been put forward most notably, among others, by Simma[249] and Franck.[250] Simma argued that 'only a thin red line separated NATO's use of force from international legality' in that NATO attempted to refer to the UN Security Council resolutions 'in whatever way possible' and tried 'to convince the outside world that it is acting "alone" only to the least degree possible'.[251] While these actions remain unlawful due to the absence of authorisation, moral and political considerations may compel a group of States to act; this, however, should not turn into an exception to the rule because 'resort to illegality as an explicit *ultima ratio* for reasons as convincing as those put forward in the Kosovo case is one thing. To turn such an exception into a general policy is quite another'.[252] Similarly, Franck made an analogy to the concept of mitigating circumstances in order to argue that, in exceptional circumstances, certain illegal actions should bear reduced or only nominal consequences.[253]

---

[241] See Lowe and Tzanakopoulos (n 156) [46].
[242] 'A More Secure World: Our Shared Responsibility', Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, United Nations (2004) UN Doc A/59/565 [203].
[243] UN Secretary-General Address to the General Assembly (23 September 2003) <www.un.org/webcast/ga/58/statements/sg2eng030923.htm>.
[244] Report of the UN Secretary-General (21 March 2005) UN Doc A/59/2005 [7].
[245] UN General Assembly World Summit Outcome (24 October 2005) UN Doc A/RES/60/1. See also Lowe and Tzanakopoulos (n 156) [46].
[246] See emphasis on the 'moral duty' to act in statement by the NATO Secretary General (at nn 55-56 above); 'moral imperative' in statement by the US President (at n 72 above); the 'spirit of the Charter' in the statement by the Italian Foreign Minsiter (at n 82 above).
[247] See text at nn 136-139 above.
[248] Jure Vidmar, 'Excusing Illegal Use of Force: From Illegal but Legitimate to Legal Because it is Legitimate?' (*EJIL:Talk!*, 14 April 2017) available at <www.ejiltalk.org/excusing-illegal-use-of-force-from-illegal-but-legitimate-to-legal-because-it-is-legitimate>.
[249] Simma (n 136) 19.
[250] Franck (n 136) 174ff.
[251] Simma (n 136) 12.
[252] Ibid 22.
[253] Franck (n 136) 184.

This, in the abstract, is a perfectly tenable position, considering that it does neither add to nor detract from the assessment of the legality of unilateral interventions of the Kosovo type. In fact, the aim of this view is precisely to downplay the precedential value of the Kosovo intervention.[254] Nevertheless, shifting the discourse from legality to legitimacy begs a number of questions: what is legitimacy? Who will give us a definition which commands general approval? What values will that definition reflect? Who will decide whether the criteria of legitimacy have been fulfilled in each case? And what consequences will that fulfilment entail?[255]

The problem with legitimacy as juxtaposed to legality (note that in American parlance the two terms are sometimes employed as synonymous) is precisely that it lies in the eye of the beholder.[256] Given the lack of any generally agreed upon definition, or of precise criteria (the devil is always in the details!), legitimacy becomes a 'weasel word', an empty vessel which sounds good and with which nobody in their right mind would take issue—but which masks or obscures the fundamental disagreement as to its scope and content that lies underneath.[257]

The risk in the instance is that, if exceptional circumstances may affect or even remove the consequences of an egregious breach of Article 2(4), the line between legitimacy and legality may blur,[258] the fundamental vagueness of the former infecting the latter. Lowe identified this problem when suggesting that a codification of new rule might be necessary in the aftermath of Kosovo:

> [W]hat may appear at first sight to be wise caution in not seeking to modify the rules on the use of force may come on closer analysis to seem less prudent. If the Kosovo campaign is labelled by NATO States as an action *sui generis* that is not to be regarded as a precedent for future actions, it will surely come to be regarded by other States as a precedent for the use of force by any State in circumstances which are said to be *sui generis* and not to constitute precedents for future actions. Other States and other regional organisations may assert a similar right to use force, without Security Council authorisation, and perhaps in circumstances where NATO and the rest of the international community do not consider the use of force to have the moral justification that the general international toleration of Operation Allied Force suggests existed in relation to Kosovo'.[259]

In the light of this, it is ironic – although hardly surprising, or at least it will not have been surprising for Lowe – that, when Russia intervened in the Crimean peninsula in the summer of

---

[254] Roberts (n 217) 195.

[255] cf Roberts (n 217) 205. On the subjective value of these considerations, see Alain Pellet, 'Guerre du Kosovo - Le Fait Rattrape par le droit' (1999) La, 1 Int'l L.F. D. Int'l 160, 165.

[256] Jack Goldsmith, 'The Precedential Value of the Kosovo Non-Precedent Precedent for Crimea' (*Lawfare*, 17 March 2014) <www.lawfareblog.com/precedential-value-kosovo-non-precedent-precedent-crimea>.

[257] See disagreement as to the criteria for a 'legitimate' humanitarian intervention at n 217 above. On the uncertainties of 'legitimacy' in the context of humanitarian intervention, see also Bothe (n 165) 194.

[258] As Chesterman noted, '"exceptional" responses may very quickly become rules': Chesterman (n 135) 217. See also Sofaer (n 145) 8 (although considering NATO's operation as lawful); and more recently Anthea Roberts, 'Syrian Strikes: A Singular Exception or a Pattern and a Precedent?' (*EJIL:Talk!*, 10 April 2017) <www.ejiltalk.org/syrian-strikes-a-singular-exception-or-a-pattern-and-a-precedent>; and Federica Paddeu, 'Excusing Humanitarian Intervention: A Reply to Jure Vidmar' (*EJIL:Talk!*, 27 April 2017) <www.ejiltalk.org/excusing-humanitarian-intervention-a-reply-to-jure-vidmar>.

[259] Lowe (n 163) 939. For a similar point, see Nolte (n 154) 956: 'Would NATO States be happy if Russia or China intervened elsewhere tomorrow?'.

2014, it cited precisely the Kosovo precedent in support of its action.[260] The reaction of the international community to this 'non-precedent' was thankfully similarly unkind.[261]

[260] Address by President of the Russian Federation (18 March 2014) <en.kremlin.ru/events/president/news/20603>. Goldsmith, 'The Precedential Value…' (n 256).

[261] A UNSC draft resolution proposed by 43 states (including all NATO states who participated in the Kosovo intervention) which would have reaffirmed the UNSC's commitment to the sovereignty and territorial integrity of Ukraine and would have declared the separatist referendum invalid, was approved by 13 members but was vetoed by Russia, while China abstained: UNSC Meeting (15 March 2014) UN Doc S/PV.7138, 3. The UNGA adopted, by 100 votes to 11 (with 58 abstentions), Resolution 68/262 in which 'call[ed] upon all states international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status': UNGA Res 68/262 (27 March 2014) UN Doc A/RES/68/262 [6]. The Heads of State or Government of EU Member States, in a joint Statement, 'strongly condemn[ed] the unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation': Statement of the Heads of State or Government on Ukraine (6 March 2014) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141372.pdf>.