Since it involved the application of a principle of last resort in circumstances of considerable difficulty, it is not surprising that there has been controversy about its legality. Nevertheless, I believe that the resort to force in this case was a legitimate exercise of the right of humanitarian intervention recognised by international law and was consistent with the relevant Security Council resolutions.

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INTERNATIONAL LEGAL ISSUES ARISING IN THE KOSOVO CRISIS

[*In 1999, the House of Commons Foreign Affairs Committee invited a number of international lawyers to submit papers on the legal aspects of the Kosovo crisis. Papers were submitted by Professor Ian Brownlie QC, Professor Christine Chinkin, Professor Christopher Greenwood QC, Professor Vaughan Lowe, and Mark Littman QC. The three last-named answered questions on the issue at a session of the Committee held in February 2000.*

The following paper is that submitted by Vaughan Lowe. In addition to the points discussed in the paper itself, the consideration of the papers by the Foreign Affairs Committee gives rise to two questions of great interest. First, when a State acts, may it (re)write the opinio juris *afterwards? Second, if the Executive and Parliament differ as to the correct or desirable justification for an action, whose view of the* opinio juris *is to prevail? In my view the answer to the first question must be, yes. International law is concerned with reasons for action, not motives for action; and reasons may well be most clearly and definitively articulated after the event. The second question goes to the heart of the debate over the control of foreign affairs; but it is difficult to see how international law, when assessing the significance of Britain's actions, can ignore the* opinio juris *of those who control those actions.* AVL]

INTERNATIONAL LEGAL ISSUES ARISING IN THE KOSOVO CRISIS

As is the case in all international crises, it is possible to identify a wide range of questions of international law that have arisen during the course of the Kosovo crisis. Of these, two are in my view of particular importance; and it is with these two that this memorandum is concerned. They are (1) the question of the right of humanitarian intervention, and (2) the question of the selection of targets for military attack.

Humanitarian Intervention

The general position in international law

Kosovo was not and is not a sovereign State. The conflict between Kosovo and Belgrade was a matter internal to one State, the Former Republic of Yugoslavia.

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The NATO military action in Kosovo, *Operation Allied Force* (26 March–10 June 1999[1]), was plainly an armed intervention in a foreign State, and an intervention in its internal affairs. It was a *prima facie* breach of Article 2(4) of the United Nations Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any State". That prohibition was reinforced in the context of Kosovo by the legal duty of NATO (and all other) States not to interfere in civil strife in another State. Even in cases where the civil strife is the result of the use of force by groups within a State in order to achieve self-determination, the general view is that while States are certainly obliged not to assist those using force to deny the right to self determination, neither may States assist those who are using force to assert the right.

As an exception to the general prohibition on the use of force, the United Nations Charter permits the use of force in two circumstances: first, in self defence; and second, with the authorisation of the Security Council. Neither provided a justification for the NATO bombing campaign. I deal with each in turn.

The right of self-defence is set out in Article 51 of the Charter, which states that

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

There was no element of individual or collective self-defence on the part of the NATO States, and the character of the NATO campaign was clearly not that of a defensive action. The purpose of self defence, and the limit of the right to use force in self defence, is the prevention of harm to the "defender" from an armed attack. There was no "armed attack", or anything close to an armed attack, upon a NATO State, such as would have provided a justification for the bombing campaign under Article 51.

Proposals have been made within the North Atlantic Assembly that the scope of the right of self defence should be extended to include the "defence of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes".[2] International law does not yet extend so far; and I think that it is unwise to seek to change international law in this direction. It would open the door to the justification of intervention in States for the "protection" of all manner of shared moral, cultural and political values under the pretext of self-defence; and as self defence is a clear *right* in international law, it would be difficult for the international community to impose effective constraints upon its exercise.

The second exception in the UN Charter to the prohibition on the use of force is that which permits the use of force with the authorisation of the Security Council. States, directly and acting through regional arrangements or organisations such as the OSCE and perhaps NATO (the doubt arises from NATO's limited purpose as a collective self-defence arrangement, focused on Article 5 of the NATO treaty),

1. The dates given by NATO: see <http://www.nato.int/kosovo/all-frce.htm>

2. North Atlantic Assembly, Resolution 283, *Recasting Euro-Atlantic Security: Towards The Washington Summit*, Nov. 1998, paragraph 15(e).

may be utilised by the Security Council for the maintenance of peace and security, under the terms of Articles 48 and 53 of the UN Charter. But Article 53 specifically provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council". It is clear that the non-defensive use of armed force without the consent of the State in which it is deployed constitutes "enforcement action". The Security Council resolutions concerning Kosovo, however, stopped short of authorising this use of force.

Resolution 1199 (1998), adopted by the Security Council at its 3930th meeting on 23 September 1998, stated that the Council had decided, "should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region". The Security Council was plainly asserting its continuing responsibility for the crisis. So, too, in Resolution 1203, adopted on 24 October 1998, the Council recorded its decision to remain seised of the matter. Neither resolution authorised military action by NATO. *Operation Allied Force* cannot be justified on the basis of Security Council authorisation.

Indeed, it is only in recent years that the Security Council has asserted that it possesses any competence in relation to what are, at least initially, internal disputes within States. Article 2(7) of the UN Charter provides that "nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State ..." Not until the 1990s, in its responses to the crises in Somalia, Iraq, Haiti, Rwanda and the Balkans, did the Security Council assert that certain situations internal to a State may be so grave as to threaten international peace and security and accordingly engage the competence of the Council, including its right to authorise the use of force under Chapter VII of the UN Charter. But there was no such authorisation given to NATO for *Operation Allied Force*.

The analysis of the text of the UN Charter, therefore, yields no clear legal justification for the NATO action. On the contrary, it suggests that the action was unlawful. The question is whether there is any further right to use force, such as would justify the NATO action.

NATO's justification of Operation Allied Force

The legal justification offered by NATO itself is one of some subtlety. Many commentators have suggested that international law should admit a right to use force in another State without the authorisation of the Security Council, when it is necessary in order to prevent massive and grave violations of human rights. This is what is known as the right of humanitarian intervention, though it is a very controversial matter and few lawyers would claim that the "right" is at present clearly established in international law. In fact, two issues are wrapped up in the concept of such a right. The first is the substantive question of the criteria upon which it may be judged lawful to intervene. The second is the procedural question of the manner in which it is to be determined whether those criteria are met. Proponents of the right of humanitarian intervention have tended to concentrate

on the substantive question; but the NATO justification shrewdly locked the two issues together.

The Secretary of State for Defence, Mr Robertson (as he then was), set out the Government's position concerning the multinational NATO intervention in Kosovo, in a statement made to the House of Commons on 25 March 1999:

> We are in no doubt that NATO is acting within international law. 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. UN Security Council resolution 1199 clearly calls on the Yugoslav authorities to take immediate steps to cease their repression of the Kosovar Albanians and to enter into a meaningful dialogue, leading to a negotiated political solution. [Cols *616–617*].

That statement is a useful epitome of the position that was, as I understand it, adopted by NATO and its member States.

The statement relies upon two elements: the prior prescription of policies or "purposes" by the United Nations Security Council, and the existence of an imminent humanitarian catastrophe that can, and can only, be averted by the use of force. It is not an assertion of a simple right of humanitarian intervention. The crucial differences between this approach and simple humanitarian intervention need to be emphasised.

First, the right to act is not a unilateral right, under which each and every State may decide for itself that intervention is warranted. The statement does not assert that States have the right to intervene using force in circumstances where there has been no prior determination of the gravity of the situation by the Security Council. The prior decision of the Security Council is asserted as a key element of the justification. Although the Security Council had not authorised the use of force in Kosovo, it had determined that the situation there constituted a threat to international peace and security and so made the determination that is the essential precondition under the UN Charter to the authorisation of the use of force by the Security Council.

Second, it is not asserted that the right is unlimited. The right is to take action "in support of purposes laid down by the UN Security Council". Conversely, any action whose objectives (in so far as they can be defined with any precision) went beyond the Security Council's stated purposes, as set out in its resolutions on Kosovo, would not be justified by the principle advanced by the Secretary of State. (In addition, it is clear that the right was understood to be subject to the requirements of proportionality and so on, which as a matter of international law constrain all uses of force.)

Third, it is not every "purpose" of the Security Council whose enforcement may be sought by the use of force in this way. In the Secretary of State's statement it was the existence of the impending humanitarian crisis, which had itself been the subject of explicit reports to and determinations by the Security Council (for

example, in Resolution 1203), that was said to justify the taking of action by NATO. The statement does not assert that NATO would have been justified, in the absence of Security Council authorisation, in taking any action at all if there had not been an imminent humanitarian crisis.

It would be very difficult to adduce convincing evidence that the right of intervention asserted by the Secretary of State is already clearly established as a rule of international law. Most international lawyers would in my view say that it is not, and that the NATO action lacked a clear legal justification. Indeed, at various stages of the crisis representatives of some NATO States seem to have revealed a lack of confidence in the legal justification. Foreign Minister Kinkel, for example, is reported to have said that the NATO action "must not become a precedent. As far as the Security Council monopoly on force is concerned, we must avoid getting on a slippery slope". Secretary of State Albright is reported to have adopted a similar position. But if the action was lacking legal justification at the time that it was taken, what now is the best policy? Should the use of force in Kosovo be treated as an anomaly, demanded by the exigencies of the situation? Or should it be treated as an instance of an emergent and exceptional right to humanitarian intervention?

How should international law develop?

International law is not a static system. It can change. States may make a treaty setting out new rules to cope with the changing demands of international life. If they do, the States that are parties to the treaty will be bound by the rules set out in it, but non-party States will not. It is unlikely that there is either an international consensus on what the law regarding humanitarian intervention should be, or even any substantial support for the convening of a conference to seek such a consensus. No treaty on the matter is likely within the near future.

The alternative is for international law to develop by changes in customary international law, which binds all States. New rules of customary law emerge when a consistent practice is followed or acquiesced in by States in general, with the belief that the practice is applying a rule of law and is not simply a matter of convenience or discretion. For a right of humanitarian intervention to emerge it would have to be shown that States do in fact intervene, or approve intervention by others, and that they consider the interventions to be the exercise of an articulated legal right of humanitarian intervention. (Like law-making in all customary law systems, this process seems to pull itself up by its own bootstraps; but the process has been well established in the international legal system for upwards of two centuries.) The attitude of the NATO States to *Operation Allied Force* is, therefore, very important. If they assert that the action was the exercise of a legal right, they help to lay the foundations of a legal rule that would entitle all States to act similarly in comparable situations.

On one view, this possibility is best avoided because of the dangers of abuse. The NATO action should, it is said, be regarded as an act of doubtful legality which had a clear moral and political justification. The moral and political justifications of the action are of course of the utmost importance. If this memorandum appears to focus its attention elsewhere, that does not indicate any doubt that actions such as *Operation Allied Force* must ultimately have a moral justification: no State is morally justified in forcibly intervening in another State

simply because it may be legally entitled to do so. But the purpose of this memorandum is to explore the main issues of legal principle, not the broader issues of morality and policy; and in that regard, some say that it is unwise to seek to change the established principles of law in order to accommodate one difficult moral case.

That is not a view that I share. From the legal perspective what 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. One has only to recall the Soviet interventions in Czechoslovakia and Afghanistan, and the U.S. interventions in Cuba and Grenada, for instance, to be able to generate examples of such circumstances. It is in my view preferable to seek to define with some precision the criteria that were considered to justify the NATO action. Better to define a narrow principle and have it invoked by others than to act on the basis of no principle and encourage unprincipled action.

A right of humanitarian intervention?

The elements in the Secretary of State's formulation of the principle may be set out as follows:

- prior determination by the Security Council of a grave crisis, threatening international peace and security
- articulation by the Security Council of specific policies for the resolution of the crisis, the implementation of which can be secured or furthered by armed intervention
- an imminent humanitarian catastrophe which it is believed can be averted by the use of force and only by the use of force
- intervention by a multinational force.

Each of those elements is of the highest importance.

If the Security Council is denied a determinative role, the only body charged with world-wide responsibility for the maintenance of peace and security will have been consciously excluded from the process of legitimating the use of force. The result would almost certainly be the increasing fragmentation of the international community into regional groupings; and at a time when old groupings are breaking up and new ones being formed, and the old balances of power between States are in a state of flux, the outcome of any such fragmentation is not predictable. While some may argue that, on the basis of a simple head-count, the 19 NATO democracies ought to be better placed to legitimate the use of force than the 15 States, of mixed political complexions, that happen to be in the Security Council at any given time, the unique authority of the Security Council as

the guardian of peace and security on behalf of the entire international community cannot be denied. The Security Council began to be a credible body in the 1990s: it would be foolish to consign it to the sidelines at the very time that it is beginning to prove itself able to work out ways of discharging its responsibilities.

The limitation of the action to the purposes set by the Security Council reflects the acknowledgement of the primacy of the responsibility of the Council for the maintenance of peace and security, and emphasises that the action is undertaken not for the benefit of, or as a unilateral exercise of the individual rights of, the intervening States but rather is action taken on behalf of the international community. The practice of prompt and frequent reporting to the Security Council on action taken underlines this aspect of the justification, and offers a valuable alternative to the more cumbersome device of "dual control" of military operations by the intervening States and the Security Council. The delays and difficulties in implementing dual controls during the Bosnian crisis were widely considered to have compromised the effectiveness of military action. Reporting acknowledges that the interveners are answerable to the Security Council, itself acting on behalf of the international community, for their actions.

The requirement that there be an imminent humanitarian catastrophe is also important. It is the acknowledgement of the need for some exceptional factor to justify States in acting without waiting for Security Council authorisation. It provides the moral justification for unilateral intervention. The requirement is, however, beset by difficulties. Most obviously, in order that the scale and imminence of the catastrophe be clearly established, the criterion itself requires States to stand to one side in the early stages of a conflict while grave violations of human rights occur. States will be asked how many people must die before action is justified (though numbers cannot be the only factor: the duration, methods and targets of the violence, and the clarity of the evidence implicating the authorities of the target State, must also be taken into account). States will be asked why they have not intervened in the instant case while they did in another. Those questions are poignant, and it is difficult to frame an answer that will satisfy critics. But that is because the criterion is a difficult one, not because the criterion is wrong.

The prohibitions on the threat or use of force against other States and on intervention in their domestic affairs are essential to the maintenance of the sovereignty and independence of States. Without them, the right of each State to choose its political, economic and cultural systems could not be maintained. The use of force in international relations, without the consent of the State in which it is used and without the authorisation of the one body that the international community has empowered to authorise uses of force, should not be undertaken except in the most exceptional cases. Internal disorder and civil war do not of themselves warrant outside intervention. If they did, the right of governments to tackle internal disorder, and of peoples to determine their own future free of outside interference, would be sacrificed. Regional powers could assert a right to impose their own solutions whenever they considered there to have been repression or a breach of human rights within a State. Difficult and uncomfortable as it might be, it is in my view correct to insist that States do stand aside while violence occurs within another State, until it reaches a point where the scale of the violence demands that the principles on the use of force and on the sovereign equality of States be overridden by exceptional rights of intervention.

It is also important not to lose sight of the importance of persisting with the search for a negotiated solution, and of the need to keep the role of intervention clear. If the purpose of intervention is to induce, or compel, the authorities in the target State to accept the terms of a particular "peaceful" settlement, the military action would, or at least should, have a character different from that which it would have if the purpose of the intervention is to impose a military solution.

While it is not made explicit in the part of the Secretary of State's statement quoted above, it must be remembered that the NATO action was multinational, and taken within a diplomatic matrix including NATO, the OSCE, and the UN. While it may be easy for States to remain silent in the face of threatened intervention by a powerful State in a region, actual participation in the intervention is a very different matter, unlikely to be undertaken unless the intervention is considered to be justified. Confining the precedent to multilateral humanitarian intervention offers a further (albeit fallible) safeguard against the use of humanitarian intervention as a cloak for oppressive intervention by regional superpowers.

I think it desirable that a right of humanitarian intervention, within the limits described above, be allowed or encouraged to develop in customary international law. No-one, no State, should be driven by the abstract and artificial concepts of State sovereignty to watch innocent people being massacred, refraining from intervention because they believe themselves to have no legal right to intervene. If armed forces are not used in these circumstances, one wonders what point there is in maintaining them.

There is little point in seeking to accelerate the process by drafting a convention on the question. As was remarked above, there is no reasonable prospect of consensus on the definition; and even if it were possible to draft a text there is no reason to suppose that States would wish to ratify and become bound by such a convention. Moreover, the international community is at the early stages of developing multilateral mechanisms for responding to humanitarian crises. A convention at this time might arrest the development of thinking and practice in this field. It is preferable to allow experience to accumulate, and to reflect upon its lessons, allowing the emergence of the right in customary international law.

In summary, in my view there was no clear legal justification for the NATO action in Kosovo, but it is desirable that such a justification be allowed to emerge in customary international law. That justification should be limited by the criteria adopted in the Secretary of State's statement to the House of Commons on 25 March 1999.

Targeting

The second major issue arising from the Kosovo crisis is the question of the selection of military targets. The deliberate targeting of certain facilities, such as broadcasting stations, bridges and electricity supply facilities, has been criticised and alleged to violate the limitations imposed by international law upon the conduct of hostilities.

The basic principle of international law is clear. It is conveniently expressed in Article 52 of Additional Protocol I (1977) to the 1949 Geneva Conventions:

Article 52–General Protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Contemporary warfare admits of no clear distinction between civilian and military targets. Practically all factories can, no doubt, be turned to the manufacture of some item of equipment useful for the armed forces. Petrol, food, and clothing are as essential for armed forces as for the rest of the population. With the exception of hospitals, places of worship and education, and cultural sites (as long as they have not been diverted for military use), practically all other facilities in a modern State are dual-use facilities, as valuable to the armed forces as to civilians.

The use of broadcasting facilities for the transmission of military information, for example, clearly marks those facilities out as legitimate military objectives, even though they may appear to be civilian facilities. But even when they are transmitting only, or primarily, to civilian audiences, broadcasting stations can play a powerful role in promoting or sustaining the war effort. It is, for example, notable that the earliest targets in any armed coup usually include broadcasting studios. Control of the media is an indispensable element in control of the State. If it could be shown that the studios in the former Yugoslavia were making a contribution to the war effort, by inciting continued violence against ethnic Albanians in Kosovo for example, that would open up the possibility that attacks upon them were justified. If it could be shown that fewer deaths, less injury and less damage would be caused by attacking them than by allowing them to continue to make their contribution to the war effort, the attacks would be justifiable as a matter of international law. This reasoning is, however, problematic.

It may be difficult to justify attacks on such facilities without compromising sources of secret intelligence. It may be even harder to explain targeting strategy by publicising intended targets and the reasons for their inclusion on the list without compromising the effectiveness of the military operation. And there is no way in which speculation on net savings in terms of lives and damage can be proved correct or incorrect. Nor is there any practical way of quantifying suffering. What weight, for instance, should be put on the additional terror caused by taking the war beyond Kosovo to suburban Yugoslavia? What weight does one attach to the pressure that one supposes was brought to bear on the Milosevic government by bombing bridges or cutting electricity supplies?

These points are made in order to establish a broader point. Whatever the legal limitations upon targeting, as long as it remains legitimate to target facilities that make a contribution to the war effort it is practically impossible to improve upon the existing formulation of the legal principle set out in Article 52 of Additional Protocol I. The problems arise not from the law, but rather from the making of factual judgments in concrete cases on the application of a perfectly clear rule, often on the basis of dated and incomplete information, to the facts.

If force is to be used at all, there must surely be a common interest in using as little force as is possible to achieve the objectives set. Put another way, the common objective must be to use force as effectively and efficiently as possible. Pursuit of that objective will often, perhaps usually, be enough to ensure that targets that make no contribution to military action are not attacked. However, in circumstances where one of the aims of military action is to overthrow an incumbent government, not by defeating it militarily but by inducing the population of the State to rise up against it, these constraints may not be effective. It might be thought that a popular uprising can be provoked by making life for the population difficult and unpleasant, in the hope that the population will blame the government of the State for their problems. If that were so, the military objectives themselves would inevitably tend to undermine attempts to distinguish between military and non-military targets. (I am not asserting that this was necessarily the case in the Kosovo action. The point is made in order to address a widespread popular concern that stemmed, no doubt, largely from the fact that news coverage showed a good deal of destruction of what many think of as ordinary urban facilities and much less of the destruction of the tanks and rockets that are the popular epitomes of military targets.)

The thinking behind the strategy of seeking to displace foreign regimes by inducing popular uprisings is no doubt complex. One element may be the thought that a popular uprising is likely to avoid creating a power vacuum in the State. Another may be the thought that, compared with a direct military attack on the foreign regime, it is more consistent with international law duties of non-intervention and rights of self-determination, than is a direct military attack on the regime itself. In any event, it is a strategy that would benefit from open debate. I do not believe that international law can dispel the suspicion of confusion over the legitimacy of targets in the context of such a strategy. It is fundamentally a problem demanding the explanation of the moral, political, and military justifications for the selection of targets.

Concluding remarks

It is likely that many specific difficulties in the detailed application of international law arose during the Kosovo crisis. Some of those may have caused serious operational difficulties. Such specific matters may, indeed, have a practical importance as great as the broader principles discussed in this memorandum. For example, the definition and implementation of rights to visit and search foreign ships bound for the coasts of a State against which force is being used is an area that has caused difficulties in past conflicts, in the Gulf and elsewhere, that have not yet been resolved. It would be paradoxical, for instance, if oil tankers were allowed to deliver cargoes bound for the former Yugoslavia at a time when NATO was bombing refineries in order to cut off oil supplies. No doubt the lawyers in the armed services have been asked to make a submission on these operational issues. I do not discuss them here; but they deserve the most serious consideration.

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