cities. Many of the victims were women and children. After seven weeks of the bombing at least 1200 civilians had been killed and 4500 injured.

(k) In spite of the references to the need for a peaceful solution to be found in Security Council Resolutions, the public statements of Mrs Albright, Mr. Cook, Mr. Holbrooke, and others, and the reiterated threats of massive air strikes, make it very clear that no ordinary diplomacy was envisaged.

XV. A SYNOPSIS

124. The writer has contacts with a great number of diplomats and lawyers of different nationalities. The reaction to the NATO bombing campaign outside Europe and North America has been generally hostile. Most States have problems of separatism and could, on a selective basis, be the objects of Western "crisis management". The selection of crises for the "Kosovo" treatment will depend upon the geopolitical and collateral agenda. It is on this basis, and not a humanitarian agenda, that Yugoslavia is marked out for fragmentation on a racial basis, whilst Russia and Indonesia are not.

125. The opinions reported in the previous paragraph are not merely "political" reactions but reflect the historical experience of the regions concerned. The drafting of Article 2, paragraph 4, of the UN Charter precisely reflects the concerns of small States both in Europe and in Latin America in the period before the Second World War. Forcible intervention to serve humanitarian objectives is a claim which it is only open to powerful States to make against the less powerful. The fate of Yugoslavia will have caused considerable damage to the cause of non-proliferation of weapons of mass destruction.

IAN BROWNLIE, CBE, QC
and C.J. APPERLEY, LLM.

KOSOVO CRISIS INQUIRY: FURTHER MEMORANDUM ON THE INTERNATIONAL LAW ASPECTS

INTRODUCTION

1. In his letter dated 16 February 2000 Mr Silk, on behalf of the Committee, invited me to prepare an additional memorandum on any of the issues raised during the taking of evidence on 8 February. I have also been supplied with the transcript and the additional written questions.

2. The purpose of this further memorandum is to address two issues: first, the assertion of Professor Greenwood that the customary law has evolved on the basis of State practice "in the space of the last ten years", (*Transcript*, pp. 7–8) and, secondly, the questions of policy and prudence involved in any proposal to legitimate humanitarian intervention.

3. But at the outset, I would like to address a question of fact.

The Original Planning of the Air Campaign

4. In my first memorandum I stated that the air campaign had been planned by the end of August 1998. This is confirmed by the version of events published by Lord Robertson, *Kosovo: An Account of the Crisis*, Ministry of Defence, p.3. The relevant passage reads as follows:

> Throughout 1998 diplomatic efforts to find a peaceful, negotiated solution were taken forward by the Contact Group. But the international community became aware that this might not be enough. NATO Defence Ministers therefore decided in June 1998 to task NATO military planners to produce a range of options, both ground and air, *for military support to the diplomatic process*, and by early August the results had been reviewed by the NAC. NATO also undertook a series of air and ground exercises to demonstrate the Alliance's ability to project power rapidly into the region. Four RAF strike aircraft participated. (emphasis supplied).

5. The words emphasised prefigure the repeated use of the threat of massive bombing to force Yugoslavia to accept the political demands of the NATO Governments especially in the period October 1998 onward.

The Hypothesis that a New Principle of Customary Law had evolved

6. In the taking of evidence Professor Greenwood was asked to explain his view that there was in 1999 an existing right of humanitarian intervention. In response (*Transcript. p.7*) he stated that the answer "lies in my opinion, in customary international law", and he invoked "state practice which has taken place largely in the space of the last ten years ...".

7. Professor Greenwood invokes three episodes as evidence of State practice, as follows:

(a) The Air Exclusion Zone in Northern Iraq, 1991

8. The air exclusion zone in northern Iraq was, in the view of the British Government, justified by "the customary international law principle of humanitarian intervention": see my original memorandum, paragraphs 24 and 25. It is very difficult to understand what precedents lay behind this bald assertion and no explanation was forthcoming. In 1986 the Foreign and Commonwealth Office had been of a completely different opinion: see my original memorandum, paragraph 52.

9. The validity of the air exclusion zone "to protect the Kurds" as a precedent for humanitarian intervention is highly questionable. More or less contemporaneously the Government of Turkey bombed Kurdish targets within the air exclusion zone without any constraints or criticism from the Governments enforcing the exclusion zone.

(b) The Air Exclusion Zone in Southern Iraq, 1992

10. This was justified on the same basis. In the House of Lords, the Minister of State, Baroness Chalker, stated:

> Saddam Hussein continues to defy the UN. His Government are failing to meet Iraq's obligations under Resolution 687. He continues to repress his own population in defiance of Resolution 688. With our coalition partners, we are keeping the pressure on Iraq to implement in full the Resolutions of the UN Security Council.

> Where necessary, we do not flinch from backing up diplomatic pressure with action. On 27th August, with our American and French partners, we set up a no fly zone in southern Iraq, south of the 32nd parallel. That was clearly necessary because of the continuing serious humanitarian emergency among the civilian population there. We will continue to operate the no fly zone as long as Saddam's actions oblige us to do so (25 September, 1992).

11. These two episodes involved a very small number of States. According to my colleague, Professor Greenwood, the second episode involved four States. It would be impossible to find other recent authority who considered that these two episodes had changed the position in general international law relating to humanitarian intervention.

(c) The Operations in Liberia Authorised by ECOWAS, 1990–

12. The creation of ECOMOG in response to the civil strife in Liberia antedated the air exclusion zones in Iraq. The relevant documentation can be found in Weller (ed.) *Regional Peace-Keeping and International Enforcement: the Liberian Crisis*, Cambridge, 1994.

13. There is no evidence that this was seen by contemporary statesmen as a paradigm of humanitarian intervention. Two views of the operations are possible. According to the first, the legal basis remained obscure and some writers considered the action to be illegal. According to the second view, represented by Dr. Christine Gray:

> ECOWAS had not sought UN authorisation for ECOMOG. It seems, therefore, that ECOWAS did not regard the ECOMOG action as enforcement action for which Article 53 authorisation was necessary. Nor did any State in the Security Council claim that ECOMOG needed its authorisation. But ECOWAS did inform the UN of its actions, and approval was given by the UN Secretary-General and by the Security Council in statements and resolutions commending ECOWAS for its actions.
>
> When ECOWAS imposed economic sanctions on those factions that did not accept the Yamoussoukro IV peace agreement in October 1992, it asked the Security Council to make these sanctions mandatory for the entire international community. That is, it did not request Security Council authorisation but simply assistance. The implication is that ECOWAS did not regard economic sanctions as enforcement action under Article 53, an issue left unresolved by earlier practice with regard to Cuba. In the Liberian instance the sanctions were not against a State and this alone may have taken them out of the reach of Article 53. But the view that economic sanctions by a regional organisation do not need Security Council authorisation was confirmed by the action with regard to Haiti. The OAS imposed sanctions in 1991. The General Assembly supported this but the Security Council did not act until June 1993 when it passed Resolution 841 unanimously imposing an oil and arms embargo on Haiti. Thus, without discussion, it was assumed that OAS economic sanctions did not require Security Council authorisation.
>
> With regard to Liberia the Security Council did not go so far as to make the ECOWAS sanctions mandatory on all States, though it did impose an arms embargo under Chapter VII. It unanimously passed Resolution 788. This recalled Chapter VII, commended ECOWAS for its efforts to restore peace in Liberia, reaffirmed the Yamoussoukro IV Peace Agreement, condemned violations of the ceasefire and condemned the continuing armed attacks against the peacekeeping forces of ECOWAS in Liberia by one of the parties to the conflict. It "Requests all States to respect the measures established by ECOWAS to bring about a peaceful solution to the conflict in Liberia". The Security Council clearly assumed the legality of ECOMOG in this resolution and in its later resolutions. The latter show the growing UN involvement in attempts to end the civil war.

> In Resolution 813, also passed unanimously, the Security Council declared itself ready to consider measures against a party to the conflict if it did not implement the Yamoussoukro IV agreement. It called on the Secretary-General and ECOWAS to arrange a meeting; it was this meeting under the auspices of the UN, ECOWAS and the OAU that eventually produced the July 1993 Peace Agreement.
>
> The Security Council subsequently established UNOMIL, a UN peacekeeping force, to complement ECOMOG. As the Secretary-General said, this was the first time the United Nations undertook a peacekeeping mission in co-operation with a force set up by another organisation. A clear understanding about the role of the different groups was crucial. Accordingly Resolution 866 provided that ECOMOG had the primary responsibility for supervising the implementation of the military provisions of the peace agreement: UNOMIL was to monitor and verify this process. The UN involvement would contribute significantly to the effective implementation of the Peace Agreement and would serve to underline the international community commitment to conflict resolution in Liberia. The Secretary-General and ECOWAS were to make an agreement defining the respective roles of UNOMIL and ECOMOG.[1]

14. The ECOMOG operations appear to have constituted a regional peacekeeping exercise which, at a certain stage, received the support both of the UN Security Council and the OAU. The practical basis of the action was the need to restore order in a State without an effective government. Professor Greenwood is almost alone in categorising the operation as a development in a new customary law principle.

The Constituents of a Customary Law Rule

15. It is well recognised that there are certain criteria which condition the emergence of a new principle of customary law. There must be a general practice among States, and the practice must be consistent. The practice must also be accompanied by a conviction that the conduct is required by law (*opinio juris*). In relation to the data offered by Professor Greenwood, in my submission it comes nowhere near the threshold of proof of a new customary rule.

16. Even in respect of the NATO States, it cannot be assumed that all the Members acted on the basis of a rule of customary law. In the proceedings before the International Court initiated by Yugoslavia, most of the Respondent States were very reticent about the legal basis and relied upon non-legal formulations of humanitarian catastrophe. Moreover, in the General Assembly debate on 26 September 1999, the Belgian Foreign Minister observed that the Security Council Resolution of 10 June had involved "a return to legality".

17. The absence of a generality of practice is confirmed by the positions adopted by States participating in the Security Council emergency session on 23 March 1999. Russia, China, Belarus and India stated that the attack on Yugoslavia constituted a violation of the UN Charter. The United States, Canada and France relied upon the wording of certain Security Council Resolutions and made no reference to a rule of customary law. Germany (as Presidency of the EU) made no reference to such a legal principle but invoked a "moral obligation".[2] The United Kingdom and the Netherlands were the only Members to assert that the intervention was *legally* justifiable in general international law.

1. Christine Gray, in Hazel Fox (ed.). *The Changing Constitution of the United Nations*, B.I.I.C.L. 1997, p.91 at pp.107–108.
2. S/PV.3988, pp.16–18.

18. In concluding this reconnaissance of the relevant materials certain larger considerations of logic and principle must be reckoned with.

19. In the first place there is a presumption against a radical change in customary law: see Dr Akehurst, *British Year Book* Vol 47, p.19. More to the point, very few (if any) senior lawyers *writing prior to the crisis* have discerned the significant development now announced by Professor Greenwood.

20. There is a further point of major importance in this debate. If Professor Greenwood is correct, what has appeared is a principle which *directly qualifies* the clear provisions of the United Nations Charter. A customary rule may modify the provisions of the Charter but only on the basis of the congruent practice of the preponderance of Member States. No evidence of such practice has emerged.

Questions of Policy and Prudence

21. There are major considerations of policy and prudence which militate strongly against the practice of intervention on a unilateral or "allies" basis, in the absence of the authority of the Security Council. It is a practice only available to strong States or other States acting alongside the powerful. The resulting inequality is even less attractive when the motivations of the intervening States involve collateral strategic or ideological elements.

22. The principle of self-determination is always a possible source of destabilisation. If it is to be used as a lever to induce secession from outside, the results will be disastrous. This will be particularly the case when intervention takes place in favour of an ethnic group which is distributed across several boundaries. Intervention in one of the relevant States immediately creates a normative parallel for the elements of the group living in the other relevant States.

23. Intervention in an ethnic context is bound to create or exacerbate the very human rights abuses it is supposed to prevent or terminate. The NATO intervention in Kosovo was blatantly pro-Albanian. Non-Albanians were not seen as potential victims. After the removal of the Yugoslav administration the Albanian group expected the benefits of the victory achieved on their behalf. The victory was seen in exclusively ethnic terms, *but that had been the basis of the intervention*. This perception of the intervention as exclusively pro-Albanian has been reflected in Albanian conduct since June 1999 in respect of Serbs, Gypsies and other ethnic groups.

24. Bombing one ethnic group on behalf of another is bound to exacerbate group relations.

25. There is another dimension to the problem. Humanitarian intervention (as a matter of morality) should involve a short-term operation with the purpose of ending the human rights abuses and improving public order in co-ordination with the lawful Government. The Kosovo intervention was the culmination of a political agenda intended to *force* Yugoslavia into accepting a regime of autonomy in Kosovo imposed from outside, and also to change the lawful Government of Yugoslavia as a further political dividend. These aims have been stated publicly on numerous occasions.

26. In this context it is difficult to see the final intervention as "humanitarian" at all. The bombing was preceded by the removal of the OSCE monitors and the

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

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

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

IAN BROWNLIE, CBE, QC
and C.J. APPERLEY, LLM

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

I. INTRODUCTION

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

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

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

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

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

A. The Law of the UN Charter

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