THE KOSOVO CRISIS AND NATO'S APPLICATION OF ARMED FORCE AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA

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I. INTRODUCTION

IN the fifth week of NATO's 78-day aerial intervention in the Federal Republic of Yugoslavia (FRY), the FRY initiated proceedings in the International Court of Justice against ten of its member States which it accused of violating the principles of international law in relation to the *jus ad bellum* and the *jus in bello*.[1] NATO's action, known as Operation Allied Force, had commenced on the night of 24 March 1999 when cruise missiles were directed on Serbian targets located in the Kosovan capital of Pristina and in the Republic's capital of Belgrade.[2] This robust application of armed force came on the eve of the 50th anniversary of NATO, an organisation which was established after the Second World War for the collective defence of its member States, and constituted the first offensive launched against another sovereign State in the organisation's entire history.

The realisation of armed force in March 1999 occurred after member States of NATO, in particular the United States and the United Kingdom, had threatened coercive action against the FRY in a series of communications dating back to the summer and autumn of 1998.[3] NATO, however,

* University of Nottingham. Anthony Aust, Nigel White and Michael C. Wood made helpful comments on a previous draft of this article and their suggestions are much appreciated. The contents of the article formed the basis of seminar presentations at the Department of Law in the University of Durham (19 Nov. 1999) and the Department of War Studies at King's College, University of London (26 Nov. 1999).

1. I.C.J. Press Communiqué No.99/17 (29 Apr. 1999). The applications for proceedings against Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom based the jurisdiction of the Court on Art.36(2) of its Statute and on Art.IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, whereas the applications for proceedings against France, Germany, Italy and the United States based the jurisdiction of the Court on Art.IX of the Genocide Convention and on Art.38(5) of the Rules of the Court. In each of these cases, the FRY also filed a request for interim measures of protection, based on Art.73 of the Rules of the Court, where it asked the Court to order these States to "cease immediately [their] acts of use of force" and to "refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". For full provision of all relevant documentation pertaining to the applications, the oral proceedings and rulings of the Court, see <http://www.icj-cij.org/>.

2. Fitchett, "NATO Missiles Open Air War Against Yugoslavia", *International Herald Tribune* (London), 25 Mar. 1999, p.1.

3. Binyon and Bone, "Yeltsin Veto Threat Stalls Kosovo Raids", *The Times* (London), 7 October 1998, p.15 and Binyon, "Britain Gives Airstrike Warning to Belgrade", *The Times* (London), 13 Mar. 1999, p.16.

had also issued its own set of ultimata to the FRY to negotiate and settle its political differences with the *Ushtria Clirimtare e Kosoves* (UCK) (otherwise known as the Kosovo Liberation Army (KLA)), an organisation which had been established in 1993 to pursue independence for the province of Kosovo from the FRY.[4] These formal exchanges took place amidst continuing allegations and mounting evidence of the FRY's apparent policies of the terrorisation and "ethnic cleansing" of the Kosovar Albanians, who form(ed) over 90 per cent of the inhabitants of the province.[5] The FRY had acted in this manner as a direct response to the KLA's reworked strategy of outright confrontation with the political authorities in Belgrade, which had, in turn, contributed to the upsurge in violence in the province.[6] Indeed, during oral proceedings before the International Court of Justice, the FRY claimed that the "problem in relations between this community and the State [of the FRY] ar[o]se from the militant secessionist movement culminating in a claim to secession".[7]

The chief focus of this article is the legal justifications advanced by NATO (or, more accurately, its member States) in defence of Operation Allied Force. The examination of these claims made under the *jus ad bellum* means that there is limited scope for consideration of the conduct

4. Butcher, "NATO Warns Milosevic of Kosovo Air Strikes", *Daily Telegraph* (London), 25 July 1998, p.19; Walker, "NATO General Turns Screw on Milosevic", *The Times* (London), 22 Oct. 1998, p.17 (noting the threat of the Supreme Commander of NATO, General Wesley Clarke, that President Milosevic had to remove an additional 4,500 armed forces and police from Kosovo or face air strikes); Evans, "NATO Warns Serbs of Military Action", *The Times* (London), 11 Dec. 1998, p.16 and Cornwell, "NATO Delivers Final Warning to Milosevic", *The Independent* (London), 29 Jan. 1999, p.13. This approach resulted after canvassing all member States of NATO for their support for air strikes against the FRY: Robbins, "NATO Surveys Members on Kosovo Air Strikes: Objective is to End Attacks by Serbs", *Wall Street Journal* (New York), 13 Aug. 1998, A10. The Secretary-General of NATO, Javier Solana, admitted in Oct. 1998 that a "consensus" had formed within the organisation to the effect that "it will be necessary to resort to the last option that we have". See Nicoll and Peston, "Solana Sees NATO Accord on Strikes", *Financial Times* (London), 8 Oct. 1998, p.2.

5. Amnesty International, *A Human Rights Crisis in Kosovo Province* (1998); Human Rights Watch, *A Week of Terror in Drenica: Humanitarian Law Violations in Kosovo* (1999); "Intervene and Be Damned?", *The Economist*, 4–10 July 1998, p.14.

6. Harding, "A State of One's Own", *London Review of Books*, 19 Aug. 1999, Vol.21, p.10, at p.12. For a comprehensive account of historical developments, see Beaumont and Wintour, "Kosovo: The Untold Story", *The Observer* (London), 18 July 1999, p.13. It was also reported that Mujahidin fighters had joined the effort of the KLA: Walker, "US Alarmed as Mujahidin Join Kosovo Rebels", *The Times* (London), 26 Nov. 1998, p.18.

7. <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>. In its view, the "basic rights of individuals—members of minorities—are provided for by the Yugoslav Constitution and relevant laws. There is a large number of minority communities in Yugoslavia. In the northern part of Serbia, Vojvodina, the Hungarians, Slovaks, Romanians, Ruthenians are the largest minority communities. There are no special difficulties in relations between them and the State. These communities are represented at all levels of State organisation. They are practising local self-government and exercising their rights in the fields of education, culture and media. The Albanian community in Kosovo and Metohija has the same legal status and same rights".

of hostilities under the *jus in bello*, or the international legal regulation of warfare. A brief section has, however, been devoted to this topic and is intended for reference purposes; the issues raised therein therefore await more detailed treatment elsewhere. By way of introduction, the article commences with an assessment of four resolutions adopted by the Security Council, the executive arm of the United Nations, in the space of eight months: Resolutions 1160 (March 1998), 1199 (September 1998), 1203 (October 1998) and 1207 (November 1998). It will then sketch the immediate background to the application of armed force by member States of NATO, before providing an exposition of the justifications given for Operation Allied Force. An account of the international reaction to these justifications follows, and a brief critique is given of the academic reception of the intervention. The article concludes by placing emphasis on the broader context of associated interventions that have taken place since the end of the Cold War, and on understanding the significance of Operation Allied Force within this specific historical setting.

II. UNITED NATIONS RESOLUTIONS

FOR its part, the United Nations had adopted its first resolution on the crisis in Kosovo on 31 March 1998, in the form of Security Council Resolution 1160 (1998).[8] The resolution came in response to the proposal of the so-called Contact Group, comprising the foreign ministers of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States, that a comprehensive arms embargo be adopted for the FRY, including the province of Kosovo.[9] The Council also condemned the "use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army". The resolution went on, in its operative part, to call upon the Kosovar Albanian leadership to "condemn all terrorist action" and—in a clear reference to the policies and activities of the KLA—emphasised that all "elements in the Kosovar Albanian community should pursue their goals by peaceful means". Of course, the obvious preference of the United Nations was for warring sides to engage in "meaningful dialogue on political status issues" and, to this end, the Security Council noted the readiness of the Contact Group to facilitate this dialogue with the government in Belgrade. Indeed, the

8. For an excellent and comprehensive electronic database of United Nations materials, see <http://www.un.org/peace/kosovo/sc-kosovo.htm>.

9. Security Council Resolution 1160 (1998), operative para.8 (where the Security Council "[d]ecide[d] that all States shall, for the purposes of fostering the peace and stability in Kosovo, prevent the sale or supply to the [FRY], including Kosovo, by their nationals or from their territories or using their flag vessels and aircraft, of arms and related *matériel* of all types, such as weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, and shall prevent arming and training for terrorist activities there").

Council confirmed its endorsement of the approach of the Contact Group, "that the principles for a solution of the Kosovo problem should be based on the territorial integrity of the [FRY] and ... that such a solution must also take account of the rights of the Kosovar Albanians and all who live in Kosovo".[10]

It will be recalled that retention of the territorial *status quo* formed the basis of the initial reaction of the United Nations to the fragmentation of the Socialist Federal Republic of Yugoslavia from June 1991 onwards.[11] Adopting this self-same principle, the Council used Resolution 1160 (1998) to express its support for an "enhanced status for Kosovo", which was understood to mean "a substantially greater degree of autonomy" and what it called "meaningful self-determination".[12] In so doing, the Council made reference to the Helsinki Final Act of 1975 and the 1945 United Nations Charter, but it said that its position in this regard was held without prejudice to the "outcome" of the dialogue *inter partes*. From this resolution, the Council emerged as a facilitator of political dialogue between the parties, operating within the specific framework of human rights and humanitarian law standards, their respective procedures and institutional apparatus. Hence, the Council expressed support for the Organisation for Security and Co-operation in Europe (OSCE) (seventh operative paragraph) and the International Criminal Tribunal for the former Yugoslavia (ICTY) (17th operative paragraph). Resolution 1160 (1998) noted that the FRY was obliged to "co-operate" with the ICTY,[13] and, in an apparent acknowledgement of reported developments on the ground, urged the Office of the Prosecutor of the ICTY to "begin

10. *Ibid.*, operative para.5. In the preamble of the Resolution, the Council affirmed the "commitment of all member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".

11. In the preamble of Resolution 713 (25 Sept. 1991), the Security Council recalled the principles of the United Nations Charter and emphasised that "no territorial gains or changes within Yugoslavia brought about by violence are acceptable". Upholding the "principle of unity and territorial integrity" had been a central concern of States, in particular Ecuador, Zimbabwe, India, China and Zaire, in the debate that preceded the adoption of this resolution by the Security Council: UN Doc.S/PV.3009 (25 Sept. 1991). See further Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 A.J.I.L. 569. In addition, s.5(4) of the Yugoslav Constitution of 1974 stipulated that "[t]he frontiers of the Socialist Federal Republic of Yugoslavia may not be altered without the consent of all Republics and Autonomous Provinces".

12. *Supra* n.10.

13. According to Art.29 of the Statute of the ICTY, States "shall co-operate" with the ICTY "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". The Statute also makes provision for the temporal jurisdiction of the ICTY, but does not specify a cut-off date: the ICTY has "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" (Art.1): UN Doc.S/25704 (3 May 1993).

gathering information related to the violence in Kosovo that may fall within its jurisdiction".[14]

Although the Security Council admitted the "serious" nature of the "political and human rights issues in Kosovo" in the operative part of Resolution 1160 (1998), it is important to observe that it did not formally specify the situation in Kosovo at that point in time to be a threat to peace and security (although such an inference can and should be drawn because the Council went on in that resolution to impose a mandatory arms embargo, which it could only have done under Chapter VII of the Charter). The formal determination only came in September 1998, after the Council reflected upon the intensification of violence in the province during (and throughout) the summer period. Fuelled by a substantial inflow of weapons into Kosovo,[15] the conflict had assumed dire and dramatic proportions, which were identified in a sombre report prepared for the Council by United Nations Secretary-General, Kofi A. Annan, in August 1998.[16] Faced with the findings and revelations contained therein, the Council now affirmed in Resolution 1199 of 23 September 1998 that the "deterioration of the situation in Kosovo" constituted "a threat to peace and security in the region".[17]

The Council formed this opinion by reference to the normative context that it had articulated in its previous resolution, that is the provisions of international law relating to human rights and humanitarian warfare. Hence, the preamble of the Resolution 1199 (1998) referred to the "recent intense fighting in Kosovo" and "in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which had resulted in numerous civilian casualties and, according to the Secretary-General, the displacement of over 230,000 persons from their homes".[18] The Council expressed its deep concern at reports of increasing violations of human rights and humanitarian law and, in explicit terms, it emphasised the need to respect the rights of all the

14. *Supra* n.9, operative para.17 (which also specified that the Contact Group countries would "make available to the Tribunal substantiated relevant information in their possession").

15. Crossette, "UN Chief Reports Little Help in Monitoring Balkan Arms Ban", *New York Times*, 11 Aug. 1998, A3.

16. Report of the Secretary-General of the United Nations Prepared Pursuant to Security Council Resolution 1160 (1998), UN Doc.S/1998/712 (5 Aug. 1998), noting, *inter alia*, "increased heavy fighting between the security forces of the [FRY] and the [KLA]" and that the numbers of civilian and military casualties were "at their highest point since the outbreak of the conflict" (para.11). The Secretary-General also lamented that the "unrelenting violence" had led to "a dramatic increase" in internally displaced persons (para.12), although the number of refugees in northern Albania had remained "approximately the same" (para.13).

17. Security Council Resolution 1199 (23 Sept. 1998), Preamble.

18. *Ibid.* Secretary-General Annan had earlier issued a report on Kosovo: UN Doc.S/1998/834 and Add.1. (4 Sept. 1998).

inhabitants of Kosovo. However, the resolution stopped short of any authorisation of the use of coercive measures against the FRY: nowhere in the text of the resolution did the Council authorise correctional or remedial armed intervention, an outcome explained by the fundamental nature of the differences in opinion held by the permanent members of the Council and, indeed, by the lingering threat of veto action of any formal authorisation of armed force.[19]

This interpretation of the limited significance of the resolution is supported by comparing its text with earlier resolutions of the Council. The product of intense deliberation, Resolution 1199 (1998) announced that the Council was acting under Chapter VII of the Charter, but no authorisation was given for the time-honoured "all necessary means" clause that has become a regular feature of such operations. To this extent, Resolution 1199 (1998) finds a more accurate comparator in the form of Resolution 688 (1991), adopted at the end of the Gulf Conflict in 1991, than it does in Resolution 929 (1994) on Rwanda or Resolution 940 (1994) on Haiti. Instead, in the case of Kosovo, the Council had indeed acted under Chapter VII of the Charter, but it had done so to build upon and strengthen the measures which it had articulated in Resolution 1160 (1998). In re-stating the principles that it had set out in its earlier resolution of March 1998, of the need for "meaningful dialogue" to "reduce the risks of humanitarian catastrophe",[20] the Council demanded an immediate cessation of hostilities as well as the maintenance of a cease-fire in Kosovo. It then reiterated the importance of "a negotiated political solution",[21] and further demanded that the FRY adopt "concrete measures towards achieving a political solution".[22] The mechanisms in place for "effective international monitoring" in Kosovo were also endorsed.[23] Furthermore, the FRY was called upon "to bring to justice" those members of its security forces that had been involved in the "mistreatment of civilians" and the "deliberate destruction of property".[24]

Diplomatic initiatives continued throughout this period, with the result that an agreement was reached on 12 October between President Milosevic of the FRY and Richard Holbrooke, who had been the chief

19. Black, Steel and Walker, "Russia Digs in Against NATO Strikes", *The Guardian* (London), 7 Oct. 1998, p.2.

20. *Supra* n.17, operative para.1.

21. *Ibid.*, operative para.3.

22. *Ibid.*, operative para.4. In operative para.6, the Council insisted that the Kosovo Albanian leadership "condemn all terrorist action" and that "all elements in the Kosovo Albanian community should pursue their goals by peaceful means only".

23. *Ibid.*, operative para.8.

24. *Ibid.*, operative para.14.

architect of the Dayton Peace Accords in December 1995.[25] It was this agreement that paved the way for the arrangements made between the FRY and NATO (15 October) and with the OSCE (16 October), both of which provided for verification missions to ensure compliance with the earlier resolutions of the Security Council.[26] The Council was then driven to adopt two further resolutions in the remainder of 1998. In the first of these, Resolution 1203 of 24 October, the Council endorsed the persistence—and apparent accomplishments—of these political and diplomatic efforts,[27] and demanded from the FRY "full and prompt implementation" of the agreements that it had reached on 15 and 16 October.[28] The second resolution, of 17 November 1998, condemned the FRY for its failure "to execute the arrest warrants issued by the [ICTY]" in September 1998 and demanded "the immediate and unconditional execution of those arrest warrants, including the transfer to the custody of the Tribunal of those individuals".[29] Yet, even this admirable perseverance of the Council was not able to yield its intended results: towards the end of December 1998, Secretary-General Annan wrote in ominous terms of the "alarming signs of potential deterioration" and of "growing tensions on the ground".[30] The humanitarian situation had, it seemed, only to get worse before getting any better. Reports had already begun to surface of further fighting in the province of Kosovo,[31] and only seemed to differ in respect of the nature or the extent of atrocities they were detailing.[32]

25. *Keesing's Record of World Events* (1998), Vol.44, p.42580. A cease-fire had been announced by the KLA four days beforehand, on 8 Oct., but it was broken on 17 Oct. when KLA members killed three Serbian policemen at Orlate: *idem*, at 42581.

26. The former agreement, reached with NATO, established the Kosovo Verification Mission (KVM), which would provide an air surveillance system to verify compliance with Security Council Resolution 1199 (1998): UN Doc.S/1998/991 (23 Oct. 1998). This system was said to complement the ground surveillance system, which had been created by the agreement reached with the OSCE: UN Doc.S/1998/978 (16 Oct. 1998). By virtue of that agreement, the FRY accepted a monitoring mission of the order of 2,000 members at a time of reducing the presence of police and armed forces on the ground.

27. In particular, it endorsed (in the first operative paragraph of the resolution) the agreements reached between the FRY, NATO (on 15 Oct. 1998) and the OSCE (on 16 Oct. 1998) concerning the verification mechanisms established to monitor compliance with Resolution 1199 (1998).

28. *Supra* n.26.

29. Security Council Resolution 1207 (17 Nov. 1998), operative para.3. In operative para.1, the Council reminded the FRY of its legal obligations under the ICTY Statute.

30. UN Doc.S/1221/1998 (24 Dec. 1998), para.4.

31. "New Fighting in Kosovo is Reported", *International Herald Tribune* (London), 18 Dec. 1998, p.18.

32. See e.g. Physicians for Human Rights, *Medical Group Documents Systematic and Pervasive Abuses by Serbs Against Albanian Kosovar Health Professionals and Albanian Kosovar Patients*: Press Release, 23 Dec. 1998. See further Bird, "Serbs 'Tortured Kosovo Doctors' for Role in War", *The Guardian* (London), 31 Dec. 1998, p.15.

III. THE IMMEDIATE BACKGROUND TO THE APPLICATION OF ARMED FORCE

IT is clear from this brief account that the FRY had not relented in its treatment of the Kosovar Albanians.[33] A defining moment occurred, however, in January 1999, when 45 civilians were killed in the market-town of Raçak[34] in an attack that was generally understood to be the work of Serbian forces.[35] The incident was strongly condemned in a statement by the President of the Security Council, who noted with deep concern reports that the victims of this episode were civilians, including women and at least one child.[36] Further concern was expressed at the report of the United Nations High Commissioner for Refugees, that 5,500 civilians had fled Raçak following the attack, which showed "how rapidly a humanitarian crisis could again develop if steps are not taken by the parties to reduce those tensions".[37] The event is regarded as a major turning-point in the conflict in the FRY because it focused world attention on the nature, methods and magnitude of the conflict and its potential for further deterioration.[38]

At one and the same time, the attack heightened political tensions in the region and further afield, triggering an intensive round of political and diplomatic interventions which ended with the re-doubling of peace efforts at Rambouillet, France, in February 1999.[39] There, representatives of the Kosovar Albanians met those of the FRY/Serbian governments (although President Slobodan Milosevic was not present) under the joint

33. The Security Council was informed in June 1999 of how systematic "ethnic cleansing" had taken place in Kosovo before and during NATO's aerial campaign and that there was "indisputable evidence of organised well-planned violence against civilians, aimed at displacing and permanently deporting [the Kosovar Albanians]". See Usborne, "Serbs 'Went on A Rampage of Violence' ", *The Independent* (London), 3 June 1999, p.14.

34. Strauss, "Kosovo Killings Inquiry Verdict Sparks Outrage", *Daily Telegraph* (London), 18 Mar. 1999, p.15 (citing an official European Union report of a Finnish investigation whose author labelled the killing "a crime against humanity" but did not use the word "massacre").

35. Whitaker, "Belgrade's Link to Massacre", *The Independent* (London), 29 Jan. 1999, p.13 and Bird, "Raçak Report Finds Serbs Guilty", *The Guardian* (London), 18 Mar. 1999, p.13.

36. UN Doc.S/PRST/1999/2 (19 Jan. 1999). The report referred to emanated from the KVM. The Security Council also noted that, against the advice of the KVM, Serb forces returned to Raçak on 17 Jan. and that fighting broke out. The same statement warned the KLA against actions which were "contributing to tensions".

37. *Ibid.*

38. Evans, "War Crimes Threat for Milosevic", *The Times* (London), 9 Mar. 1999, p.11 (reporting Prime Minister Blair's warning that "President Milosevic and his commanders must ... understand that NATO will not stand by in the face of renewed repression in Kosovo or atrocities like the one we witnessed in Raçak").

39. Buchan, "Contact Group to Push for Peace Conference on Kosovo", *Financial Times* (London), 23–24 Jan. 1999, p.3. For a fuller account of the developments at Rambouillet, see Judah, *Kosovo: War and Revenge* (2000), pp. 196–226 and Weller, "The Rambouillet Conference on Kosovo" (1999) 75 *Int. Affairs* 211.

chairmanship of the British Foreign Minister (Robin Cook) and French Foreign Minister (Hubert Védrine). Three ambassadors were appointed by the Contact Group—Christopher Hill (United States), Wolfgang Petritsch (EU) and Boris Mayorski (the Russian Federation)—to steer the negotiations at Rambouillet, in the hope of bringing matters to a workable compromise and peaceful conclusion. The extent of the problem soon surfaced when both sides proved intransigent on core elements of the peace plan put forward by the Contact Group: the FRY/Serbian delegation rejected outright the proposed presence of a 35,000-strong international force and the Kosovar Albanian delegation (led by Hashim Thaçi, one of the founder members of the KLA) were apprehensive about any stipulation for the KLA to disarm.[40]

Protracted negotiations continued and culminated on 23 February 1999 with the co-called Interim Agreement for Peace and Self-Government in Kosovo.[41] The agreement followed, its preamble noted, the principles that had been adopted at a ministerial meeting of the Contact Group in London on 29 January 1999.[42] The basic thrust of its contents was captured in the chapter providing the "Framework" for self-government, which stipulated that the citizens of Kosovo would have "the right to democratic self-government through legislative, executive, judicial and other institutions" established in accordance with the agreement. Its preamble also recalled "the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia". The Framework went on to provide for the legal equality of national communities within the province, and added that these "shall not use their additional rights to endanger the rights of other national communities or the rights of citizens, *the sovereignty and territorial integrity of the Federal Republic of Yugoslavia*, or the functioning of [the] representative democratic government of Kosovo" (emphasis supplied). In addition to these arrangements, other features included provision for paramilitary units, including those of the KLA, to disarm and for the FRY to reduce its army presence in Kosovo to 1,500.

When respective delegations left Rambouillet at the end of February, the Interim Agreement had not been endorsed by the parties, although the Kosovar Albanians, overcoming their initial reluctance to agree to these terms, recognised its "autonomy" package as a "fair deal" and were

40. *Keesing's Record of World Events* (1999), Vol.45, p.42806.

41. UN Doc.S/1999/648 (7 June 1999), located at <http://www.un.org/peace/kosovo/99648-1.pdf>.

42. UN Doc.S/1999/96 (29 Jan. 1999).

reported to be prepared to accept the Interim Agreement in principle.[43] On 8 March, it was announced that KLA commanders were themselves prepared to support the Rambouillet peace plan which President Milosevic "rejected out of hand" on 12 March, notwithstanding an urgent round of shuttle diplomacy conducted by Richard Holbrooke.[44] There was a further attempt to bring the parties to agreement at the Kleber Conference Centre in Paris on 15 March, which met with little success, as did Holbrooke's final attempt to broker peace on 22 and 23 March.[45] It remained the position of the FRY, as stated before the International Court of Justice in May 1999, that "no State with a minimum self-respect" could "possibly accept" the proposal that had been presented at Rambouillet, or, indeed, any derivation thereof.[46] The FRY rejected the proposed accord because it felt that members of the Contact Group attempted to "impose a project of self-government, non-existent anywhere in the world, which encompasses elements of sovereignty and jurisdiction over and above those of federal units".[47] As the prospects for peace diminished further, it was reported with depressing inevitability that armed forces from member States of NATO had begun to assemble in the region, and that "an aerial armada of warplanes" in Italy and the Adriatic Sea were prepared to start bombing as and when the possibilities for peaceful settlement were reduced to nought.[48]

IV. THE JUSTIFICATION(S) FOR OPERATION ALLIED FORCE IN INTERNATIONAL LAW

As the end of March 1999 approached, it became clear that the chances were now limited for Secretary-General Annan's repeated calls for a political settlement to be realised. Earlier that month, he had concluded that the human rights and humanitarian situation in Kosovo remained

43. Perlez, "Albright Brings Foes Face to Face at Kosovo Talks", *New York Times*, 15 Feb. 1999, A1 and Fitchett, "Kosovar Team Accepts Conditional Agreement: Talks to Resume After Albanians Consult at Home", *International Herald Tribune* (Frankfurt), 24 Feb. 1999, p.1.

44. *Keesing's Record of World Events* (1999), Vol.45, p.42846 (who was "surrounded by hardline generals who had convinced him that, given a free hand, they could quickly eradicate the UCK and were accordingly ready to risk limited air attacks from NATO").

45. *Ibid.*, and "Holbrooke's 'Two Days of Intense Talks' ", *Financial Times* (London), 24 Mar. 1999, p.2 and Judah, *supra* n.39, at p.227.

46. *Supra* n.7. Serbian President Milan Miluntinovic announced at Rambouillet that, in the context of the crisis in Kosovo, he could see "no circumstances" in which foreign forces would be allowed on Yugoslav soil. He also questioned the potential utility of such a force: Buchan, "Success of Rambouillet Talks Far From Guaranteed", *Financial Times* (London), 22 Feb. 1999, p.2.

47. *Ibid.* The FRY also contended that the settlement proposed at Rambouillet provided "for some sort of protectorate over [Kosovo], as well as military occupation by international military forces under the direction of NATO".

48. Buchan and Dinmore, "US Steps Up Pressure on Serbs and Ethnic Albanians", *Financial Times* (London), 22 Feb. 1999, p.14.

"grave" and that tensions in Kosovo were still mounting.[49] After due consideration, NATO finally made good its official threat to use armed force when its aircraft and warships opened fire on selected targets in the FRY on 24 March.[50]

In the aftermath of the application of armed force against the FRY on 24 March, justifications for Operation Allied Force were forthcoming from the leaders of member States of NATO. Neither was it uncommon for these justifications to blend legal assertions with points of political or moral principle, nor was it the case that NATO offered its own, unified legal defence for its recourse to armed force.[51] Unfortunate though this was, the clear basis that emerged in the legal justifications that were given by intervening States suggested that NATO, as an international actor, had availed itself of the controversial and so-called right of humanitarian intervention. In corroboration of this view, it should be observed that the prevailing opinion amongst member States of the organisation was that, since the resolutions of the Security Council were not able to provide sufficient legal cover for the application of armed force against the FRY, an alternative rationale in international law would need to be found, and that this rationale was located in the right of humanitarian intervention in customary international law.

It fell to the United Kingdom to make this point in the starkest of terms and, of the member States of NATO, to advance this legal position in the most clear form in the immediate wake of the action. The United Kingdom was not a newcomer at invoking the legal right of humanitarian intervention at an official level: indeed, it had assumed a pioneering role in quantifying the coalition action in northern Iraq in 1991 in precisely these terms.[52] On this occasion, Prime Minister Tony Blair hinted in a

49. UN Doc.S/1999/293 (17 Mar. 1999), para.4. See also, at para.33, his statement that "the number of Yugoslav troops deployed in the field exceeds the agreed level by a factor of five. Kosovo Albanian paramilitary units are consolidating their presence throughout Kosovo, including areas they did not control before. As a result, fighting now affects areas previously untouched by hostilities, leading to further deterioration of the situation and new displacements of civilian population".

50. Davison, "Massive Bombardment by NATO smashes into Serb Air Defences", *The Independent* (London), 25 Mar. 1999, p.3.

51. Although NATO Secretary-General Javier Solana did provide a political rationalisation of the action when he said that NATO was not "waging war against Yugoslavia. We have no quarrel with the people of Yugoslavia who for too long have been isolated in Europe because of the policies of their government. Our objective is to prevent more human suffering and more repression and violence against the civilian population in Kosovo": Press Communiqué of 23 Mar. 1999, <http://www.NATO.int/docu/pr/1999>. See further the evidence of "reasoning behind the announcement of NATO that armed force would be used if the FRY did not desist from further massive violations of human rights" in *infra* n.88, at pp.7 and 12.

52. A legal counsellor of the Foreign and Commonwealth Office said that the "intervention in northern Iraq 'Provide Comfort' was in fact, not specifically mandated by the United Nations, but the States taking action ... did so in exercise of the customary international law principle of humanitarian intervention": (1992) 63 B.Y.B.I.L. 824, 827.

series of public statements that the basis for the action was securely anchored in humanitarian need. He said that the objective of the NATO action was "to prevent [President] Milosevic from continuing to perpetuate his vile oppression against innocent civilians".[53] The message was the same when he made a national broadcast on the first night of the action, when he spoke of the need for "total resolve to achieve our aims, for the sake of humanity and for the sake of the future safety of our region and the world".[54] During his visit to Macedonia in May 1999, the Prime Minister reiterated this position: "[t]his is not", he said, "a battle for NATO; this is not a battle for territory; this is a battle for humanity. This is a just cause, it is a rightful cause."[55]

Such statements serve as models of the political rhetoric used to mobilise public opinion in support of Operation Allied Force. In truth, though, it took specific questioning from Her Majesty's Opposition to elicit a firm legal statement from the British Government. Michael Howard, the shadow Foreign Secretary, had phrased the enquiry in such a manner in a debate in the House of Commons, that there was little (if any) room to avoid a direct answer:

> Is it the government's view that the relevant resolutions of the Security Council—Resolutions 1160, 1199 and 1203—provide a sufficient legal basis for NATO action? Or do[es] the government contend that there exists in international law a general right to intervene to prevent a humanitarian catastrophe? Is it their view that the action breaks new ground in international law?[56]

The official response was forthcoming in the same debate, later that day. George Robertson, the Secretary of State for Defence, announced that the government was in "no doubt" that NATO was acting in accordance with international law, and he did so in a manner that relied on the right of humanitarian intervention in all but name:

> Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. Those circumstances clearly existed in Kosovo. The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the [United Nations] Security Council, but without

53. Bird, Black, Walker and Ellison, "NATO Unleashes Massive Air and Missile Strikes Across Defiant Yugoslavia: The Onslaught Begins", *The Guardian* (London), 25 Mar. 1999, p.1.

54. *The Guardian* (London), 27 Mar. 1999, p.4.

55. Farrell and Webster, "Blair to Double Aid For Refugees", *The Times* (London), 4 May 1999, p.1.

56. *HC Hansard*, Vol.328, col.543, 25 Mar. 1999. See further Riddell, "NATO Attacks Create New Doctrine of Intervention", *The Times* (London), 26 Mar. 1999, p.8.

> the Council's express authorisation, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe.[57]

That theme—of combating internal repression—was seized upon by President Clinton during his address to the 54th Session of the General Assembly in September 1999, where he argued that "[h]ad we chosen to do nothing in the face of this brutality, I do not believe we would have strengthened the United Nations. Instead we would have risked discrediting everything the United Nations stands for".[58] However, soon after the commencement of Operation Allied Force, President Clinton had also emphasised the possible implications of the humanitarian situation in Kosovo for international peace and security. In a national televised broadcast in March 1999, he claimed that NATO had taken action to "prevent a wider war, to defuse a powder-keg at the heart of Europe that has exploded before in this century with catastrophic results".[59] It is maintained here, however, that this theme acted as secondary to the principal consideration which precipitated the NATO action, namely the humanitarian suffering in Kosovo. President Clinton had, after all, made frequent references in the same address to the humanitarian hardship taking place there, conjuring notions of "genocide in the heart of Europe" and arguing that any "hesitation" could be read by President Milosevic as a "licence to kill".[60]

This interpretation of events is reinforced by later, related developments. In its oral proceedings before the International Court of Justice in this case,[61] the United States pointed out that, in its view, all "peaceful possibilities" for resolving the crisis had been exhausted, before it listed not one but "a number of factors" in defence of Operation Allied Force:

> — the humanitarian catastrophe that has engulfed the people of Kosovo as a brutal and unlawful campaign of ethnic cleansing has forced many

57. *HC Hansard*, Vol.328, cols.616–617, 25 Mar. 1999. To similar effect, see Baroness Symons's written answer of 16 Nov. 1998, where it was admitted that cases have arisen—as with northern Iraq in 1991—"when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council *but without the Council's express authorisation* when that was the only means to avert an immediate and overwhelming humanitarian catastrophe" *HL Hansard*, Vol. 594, WA 140 (16 Nov. 1998) (emphasis supplied). See also the statement of Sir Jeremy Greenstock at the Security Council in New York, at *infra* n.68. The Foreign and Commonwealth Office had earlier distributed a Memorandum to its NATO partners, stating that "force can ... be justified on the grounds of overwhelming humanitarian necessity *without a United Nations Security Council Resolution*": reproduced in Roberts, "NATO's 'Humanitarian War' over Kosovo" (1999) 41 *Survival* 102, 106 (emphasis supplied).

58. UN Doc.GA/9599 (21 Sept. 1999).

59. Clines, "NATO Opens Broad Barrage Against Serbs as Clinton Denounces 'Brutal Repression' ", *New York Times*, 25 Mar. 1999, A5 and Dejevsky, "Clinton Acts to Avert A 'Catastrophe' ", *The Independent* (London), 25 Mar. 1999, p.2.

60. "Excerpts of President Clinton's Address on NATO Attacks on Yugoslav Military Forces", *Washington Post*, 25 Mar. 1999, A34.

61. *Supra* n.1.

> hundreds of thousands to flee their homes and has severely endangered their lives and well-being;
> — the acute threat of the actions of the [FRY] to the security of neighbouring States, including the threat posed by extremely heavy flows of refugees and armed incursions into their territories;
> — the serious violation of international humanitarian law and human rights obligations by forces under the control of the Federal Republic of Yugoslavia, including widespread murder, disappearances, rape, theft and destruction of property; and, finally
> — the resolutions of the Security Council, which have determined that the actions of the Federal Republic of Yugoslavia constitute a threat to peace and security in the region and, pursuant to Chapter VII of the Charter, demanded a halt to such actions.[62]

From this itinerary of multiple justifications, it is quite apparent that the United States believed that there existed a series of legal grounds for NATO to behave in the way it did. That said, it is not unusual for States to provide more than one legal justification for the use of armed force. Indeed, it would appear that this is a phenomenon to which the United States is especially prone.[63]

Two significant points, however, emerge from the American rationalisation of NATO's action in this manner. The *first* is that the United States chose to frame its justifications, presented before a court of law, without reference to specific legal language or principles: note that the term "humanitarian intervention" is not used in the citation above, nor is there mention of the right of collective self-defence (as, perhaps, we would expect there to be given the accusation of "armed incursions" into sovereign territories). It should nevertheless be borne in mind that these arguments were made with respect to the request for provisional measures made by the FRY and not with regard to the *merits* of the actual application of armed force against the FRY. As such, it is quite understandable that the broad statement of justifications that was given by the United States in the International Court of Justice in May 1999 was not furnished with all the aspects of legal detail or exactitude that it would have been had the case been at the stage of adjudication on its merits.

Secondly, it is implicit from the phrasing of these (four) justifications that the United States had chosen to prioritise its arguments in defence of Operation Allied Force. The statement excerpted from the oral proceedings identified "the humanitarian catastrophe that ha[d] engulfed the people of Kosovo" at the head of its list of justifications—and, as we have

62. CR 99/24: Verbatim Record of 11 May 1999 <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>.

63. See in particular the legal justifications given for the American intervention in Grenada in Oct. 1983 in Moore, *Law and the Grenada Mission* (1984), pp. 125–129 and the statement of President George Bush in defence of the American intervention in Panama in Dec. 1989: Statement of the Office of the President, 3 Jan. 1990.

seen, this was the same rationale that had been at the forefront of the political and public statements made by President Clinton in defence of the NATO operation. These justifications were now being made in a legal context, to a different audience and before a different forum and, even though the relevant legal principles were not articulated in specific terms, the justifications are significant to the extent that they reflect the official position of the United States. In addition, it is clear that the penultimate and final justifications given in the above list serve to underscore the principal justification offered by the United States in that list, namely the ending of the atrocities in the theatre of conflict in Kosovo. Indeed, it was this justification of humanitarian intervention that, above all others mentioned, was given most prominence in the remainder of the oral proceedings of the United States before the Court.[64]

This is not to say that other, more explicit invocations of humanitarian intervention were not made: before the Court in its oral proceedings, Belgium recognised the importance of the resolutions of the Security Council, but said that it needed to "go further and develop the idea of humanitarian intervention" because the purpose of the NATO intervention was "to rescue a people in peril, in deep distress".[65] Belgium then went on to characterise the application of force as "an armed humanitarian intervention, compatible with Article 2(4) of the Charter, which covers only intervention against the territorial integrity or political independence of a state".[66] However, as was the case with the United States, Belgium also formulated an alternative justification, rooting the legal basis of Operation Allied Force within the doctrine of a state of necessity. Other parties to the case before the Court refused to become entangled by the particulars of this issue,[67] though those which did

64. CR 99/24: *supra* n.62: "A failure by NATO to act immediately would have been to the irreparable prejudice of the people of Kosovo. The [member States] of NATO refused to stand idly by to watch yet another campaign of ethnic cleansing unfold in the heart of Europe".

65. CR 99/15: Verbatim Record of 10 May 1999.

66. *Ibid.*

67. See e.g. France's position not to "seek to enter in any way whatever into a discussion on the substance of the alleged dispute which the Application aims to resolve. Instead, she will limit herself to showing that the Court has no jurisdiction to entertain that Application". CR 99/17: Verbatim Record of 10 May 1999. It is imperative to mention, though, that France "associate[d] herself completely" with the arguments that "have been and will be developed before you by the Respondents in the other cases to be considered by the Court at these hearings". Italy also considered that it was "unnecessary and even an abuse of [the Court's] patience to spend time at this stage on matters relating solely to the merits [of the case for the use of force] and it will therefore avoid as far as possible making any such reference": CR 99/19: Verbatim Record of 11 May 1999. See also the position of the Netherlands, CR 99/20: Verbatim Record of 11 May 1999 and Portugal, CR 99/21: Verbatim Record of 11 May 1999.

appealed to variations of the argument which placed the right of humanitarian intervention at its core.[68]

V. THE INTERNATIONAL RESPONSE TO OPERATION ALLIED FORCE

No sooner had Operation Allied Force been launched, and its respective justifications been given, than States began to give their formal reactions to the use of armed force. In analysing the basis of these responses, it is perhaps useful to refer to the distinction made between the prudence of the action and its lawfulness,[69] since criticisms of the action emanated from either of these considerations (and not necessarily from both of them). Indeed, these responses revealed how particular the concerns of certain countries were: Austria, for example, said that her neutrality needed to be defended, which meant that her airspace would be closed to NATO aircraft because of an absence of formal authorisation from the United Nations.[70]

With respect to the prudence of the action, there was deep anxiety in some European capitals about the ultimate impact of air power, and of the effectiveness of using air power alone.[71] Apprehension—shared in equal measure by Italy and Greece (both member States of NATO)—also focused on the possible adverse humanitarian consequences of military action (i.e. in terms of an increase in refugee traffic into neighbouring countries). In the Chamber of Deputies, the lower house of the Italian legislature, a resolution was adopted on 26 March by a margin of 318 to 188 (with six abstentions), which said that "the government should work with NATO allies towards an initiative to re-open negotiations immediately and suspend [the] bombing".[72] In the end, though, these reservations were overcome, and the words of the

68. See e.g. the argument of Germany at CR 99/18: Verbatim Record of 11 May 1999, that the NATO action had been undertaken "as a last resort in order to put a stop to the massive human rights violations perpetrated by the [FRY] in Kosovo and to protect the population of Kosovo from the unfolding humanitarian catastrophe". Indeed, one expert commentator has already written that the German government "called a spade a spade and spoke of the NATO threat as an instance of 'humanitarian intervention' ": *infra* n.88, at pp.12–13. The United Kingdom recalled the statement made by its Permanent Representative to the United Nations, Sir Jeremy Greenstock, who described Operation Allied Force as "an exceptional measure to prevent an overwhelming humanitarian catastrophe": CR 99/23: Verbatim Record of 11 May 1999. The Permanent Representative informed the Security Council that the "force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged for that purpose". UN Doc.S/PV. 3988 (24 March 1999). See also Black, "Allies Argue A Humanitarian Case", *The Guardian* (London), 25 Mar. 1999, p.3.

69. Halliday, "Are the Actions of NATO in Kosovo Prudent and Are They Legal?", *The Irish Times* (Dublin), 1 Apr. 1999, p.18 located at <http://www.ireland.com/newspaper/opinion/1999/0401/opt3.htm>.

70. *Supra* n.53.

71. Davison, "Military Analysts Say Bombing Will Not Be Enough", *The Independent* (London), 27 Mar. 1999, p.5.

72. *Keesing's Record of World Events* (1999), Vol.45, p.42848.

Italian Defence Minister—that "[t]he price of passivity would be much higher than that of a military action"—were heeded.[73] Official support for the action was announced when Prime Minister Massiomo d'Alema confirmed the availability of Italian soil for use by NATO aircraft.[74] Romania and Slovenia had granted NATO access to their air space, and the Bulgarian legislature approved the use of its air space for Operation Allied Force, but did so as late as 4 May.[75] Of the new member States of NATO, the Czech Republic and Poland announced full support for the action, but Poland expressed reservations.[76]

Russia also questioned the wisdom of resorting to armed force. President Yeltsin warned of an escalation of armed conflict as a result of the intervention,[77] but he reserved his most severe criticism for attacking the lawfulness of Operation Allied Force.[78] China, too, made "uncompromising denunciations" of the action, which she regarded as a "flagrant violation of international law".[79] She later condemned the action as "absolute gunboat diplomacy" against the FRY.[80] India shared these

73. Truehart and Delaney, "Europeans Back Raids, But With Apprehension", *International Herald Tribune* (Frankfurt), 25 Mar. 1999, p.5.

74. Although Prime Minister d'Alema also urged for the initiative to "return to the political track": see Evans, Webster and MacIntyre, "NATO Split over Air Campaign", *The Times* (London), 26 Mar. 1999, p.1. See also Blitz, "Italy 'Loyal to Operation' ", *Financial Times* (London), 14 Apr. 1999, p.2.

75. *Keesing's Record of World Events* (1999), Vol.45, p.42957.

76. Green, "Stern Test for NATO's Three New Members", *International Herald Tribune* (London), 25 Mar. 1999, p.5 (Prime Minister Viktor Orban pledged not to deploy Hungarian forces in the FRY). See also Fitchett, "Czechs Overcoming 'Hesitation' on Raids", *International Herald Tribune* (London), 12 Apr. 1999, p.9 (where Michael Zantovsky, Chairman of the Czech Senate's Committee on Foreign Affairs, Defence and Security, admitted that "government and public opinion weren't quite ready initially, so hesitation, even opposition, created a split from the first").

77. Whitehouse, "Russia Warns of Another Vietnam", *The Guardian* (London), 25 Mar. 1999, p.3 (noting that the action "means war in Europe, possibly even more"). See further Evans and Brodie, "Yeltsin Says West Risks A World War", *The Times* (London), 10 Apr. 1999, p.1.

78. President Yeltsin is reported to have described the action as "open aggression": "Russia Condemns NATO at UN", *BBC Online Network*, 25 Mar. 1999 <http://news.bbc.co.uk/hi/english/world/europe/newsid_303000/303127.stm>. The FRY's Representative at the United Nations, Vladislav Jovanovic, also referred to the action as an "aggression": Usborne and Reeves, "UN Swept Aside by Bombing Offensive", *The Independent* (London), 25 Mar. 1999, p.4. President Nursultan Nazarbayev of Kazakhstan thought that the "bombing should be stopped, while at the same time stopping the Serbs from pushing the Kosovars from their country"—although he did not go as far as calling the intervention unlawful: "Kazakhstan Backs Russia on Kosovo", *International Herald Tribune* (London), 29 Apr. 1999, p.5.

79. Binyon, "Strikes Condemned By Third World", *The Times* (London), 26 Mar. 1999, p.6.

80. Kynge, "China Hits At 'Gunboat Diplomacy' ", *Financial Times* (London), 11 May 1999, p.2.

sentiments. Iraq appeared alone in the Muslim world in siding with President Milosevic and the FRY.[81]

At the United Nations in New York on 25 March, the Russian Federation (together with India and Belarus) sponsored a draft resolution in the Security Council which sought to condemn the NATO action as an unlawful act.[82] According to the Russian Federation, the vote was to be a choice between law and lawlessness, but the proposed resolution went down to a spectacular defeat by 12 votes to three, when only China and Namibia supported the position of the Federation.[83] The five NATO members on the Council—the United Kingdom, Canada, France, the Netherlands and the United States—were supported by Argentina, Bahrain, Gabon, the Gambia, Malaysia and Slovenia. Something would be amiss if inferences were not to be drawn from this important vote, although one does need to be cautious in attributing legal significance to its outcome. To what extent did 12 States vote against the resolution on the basis of its *form* rather than its *substance*? To what extent is this voting margin a proper reflection of the attitudes of the broader membership of the United Nations? The methodological question is also raised of whether the 12 votes against the draft resolution can indeed be regarded as support for Operation Allied Force and, if so, the extent to which this support supplies an endorsement of the legal rationalisation given for the action, i.e. whether it can be regarded as a collective *opinio juris sive necessitatis*, or whether it is unsafe to presume the existence of this ingredient on this issue under these circumstances.[84]

That said, in terms of an initial impression, the sizeable rejection of the draft resolution does suggest that there was a much broader and indeed deeper base of support for the NATO action than some States—including certain permanent members of the Security Council—had given credit for. As a consequence, the NATO action comfortably escaped the censure of the United Nations in an exercise that ultimately served to illuminate the extent of State approval for, or (at the very least) sympathy

81. Binyon, "Iraq is Only Muslim State to Back Serbs", *The Times* (London), 6 Apr. 1999, p.5.

82. UN Doc.S/1999/328 (25 Mar. 1999). See also Blundy and Bone, "Russia Forces UN Vote on Airstrikes", *The Times* (London), 26 Mar. 1999, p.6.

83. Bone and Blundy, "Russians Fail in UN Attempt to End the Bombing", *The Times* (London), 27 Mar. 1999, p.8.

84. Brownlie, *Principles of Public International Law* (5th ed., 1998), pp.7–8 (drawing a distinction between two approaches—one where the International Court of Justice is "willing to assume the existence of *opinio juris* on the bases of evidence of a general practice" and the other, "more rigorous approach", where the Court "has called for more positive evidence of the recognition of the validity of rules in question in the practice of States"). Brownlie concludes that "[t]he choice of approach appears to depend upon the nature of the issues ... and the discretion of the Court". For an interpretation that regarded the vote as "implying acceptance of the action as legal", see *The Economist*, 3–9 April 1999, pp.19–20.

with, the decision to use force in such circumstances. In addition, it should be noted that the Secretary-General of the United Nations, who appeared to back the threat of armed force against the FRY,[85] delivered qualified support for the NATO action.[86] It should also be borne in mind that neither of the resolutions adopted by the Security Council *after* the commencement of Operation Allied Force contained any criticism of NATO's action: Resolution 1239 (1999) of 14 May concerned and confined itself to the work and activities of international humanitarian relief organisations and Resolution 1244 (1999) of 10 June put in place the foundations for the international civil and security presence in Kosovo that accompanied the end of hostilities. A major application of armed force had therefore taken place in international relations without any formal authorisaton *or* condemnation by the Security Council—a Council that had, for all practical purposes, proved unable to rustle itself into meaningful action to discharge its primary responsibility for the maintenance of international peace and security under Chapter V of the United Nations Charter. Yet, it had been the Council that had expressed alarm, in the preambular paragraphs of Resolution 1199 (1998) "at the impending humanitarian catastrophe" in Kosovo and had itself emphasised "the need to prevent this from happening".

VI. GENERAL CRITIQUE

OPERATION Allied Force elicited a keen, immediate and vigorous debate in the electronic pages of the *European Journal of International Law*,[87] where Professor Bruno Simma argued that "only a thin red line

85. Binyon, "UN Chief Backs Use of Force", *The Times* (London), 29 Jan. 1999, p.17, where Secretary-General Annan is reported to have said: "The bloody wars of the last decade have left us with no illusions about the difficulty of halting internal conflict by reason or by force—particularly against the wishes of the government of a sovereign State" (although it should be noted that the Secretary-General emphasised that "where horror threatens", the world had to be clear about the "credibility, legitimacy and morality of intervention and non-intervention"). During NATO's campaign, the Secretary-General spoke of "emerging international law that countries cannot hide behind sovereignty and abuse people without expecting the rest of the world to do something about it". See Burt and Anderson, "UN Warns Yugoslavia over Human Rights", *Financial Times* (London), 26 May 1999, p.2.

86. "Annan Gives Strikes Qualified Support", *BBC Online Network*, 24 Mar. 1999 <http://news.bbc.co.uk/hi/english/world/europe/newsid_303000/303148.stm>. Secretary-General Annan later identified "two compelling interests in the case of Kosovo"—whether it is "legitimate for a regional organisation to use force without a UN mandate" and whether it is "permissible to let gross and systematic violations of human rights, with grave consequences, continue unchecked"—which he felt the international community had been unable to resolve: "Two Concepts of Sovereignty", *The Economist*, 18–24 Sept. 1999, p.81. Cf. Littlejohn, "Annan Criticises NATO's Action in Kosovo", *Financial Times* (London), 9 Sept. 1999, p.4 (where the Secretary-General concluded that the NATO intervention represented a threat to the "very core of the international security system").

87. <http://www.ejil.org/journal/Vol10/No1/ab1.html>.

separate[d] NATO's actions in Kosovo from international legality".[88] This opinion was written prior to the actual application of armed force by NATO, but within the context of NATO's persistent threats to exercise its military might against the FRY if the atrocities in Kosovo did not cease. That factor should not itself detract from the validity of the reasoning set forth by Simma, if one considers the approach adopted by the International Court of Justice in its *Nuclear Weapons Advisory Opinion* (1996) on the juridical relationship between the "threat" and the "use" of armed force under the Charter of the United Nations.[89]

The question which therefore needed to be addressed was whether the application of armed force against the FRY was permissible under the principles and rules of public international law. Simma locates his examination of NATO's behaviour within the legal framework of the United Nations Charter, arguing that the "fundamental rule from which any inquiry must proceed" is Article 2(4).[90] This article prohibits all member States of the United Nations from threatening or using force "against the territorial integrity or political independence of any States, or in any other manner inconsistent with the Purposes of the United Nations" and admits just two exceptions: Article 51 (the right of individual and collective self-defence) and Chapter VII ("the global system of collective security").[91] That neither of these exceptions applied in the case of NATO's threatened or actual intervention meant that, in Simma's view, its actions constituted "a violation of the [United Nations] Charter".[92]

Moreover, for Simma, NATO cannot be regarded as a regional arrangement or agency under Chapter VIII of the Charter—which provides (in Article 53 of the Charter) that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council"—because it is an organisation

88. Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 E.J.I.L. 1, 22.

89. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) 35 I.L.M. 809, 823 ("The notions of 'threat' and 'use' of force under Article 2 paragraph 4 of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal ... [N]o State ... suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal"). See further Simma's statement, *ibid.*, at p.11, that "it makes little difference that the threat had not been carried out until the time of writing because Article 2(4) prohibits such threats in precisely the same way as it does the actual use of armed force".

90. *Supra* n.88, at p.2.

91. *Ibid.*, at pp.3–4 (noting, for the sake of comprehensiveness, that "the mechanism of the so-called 'enemy-state clauses' (Articles 53 and 107) should be left aside as it is now unanimously considered obsolete").

92. *Ibid.*, at p.4. See further the argument at *ibid.*, at p.334, that in the absence of Security Council authorisation, "military coercion employed to have the target State return to a respect for human rights constitutes a breach of Article 2(4) of the Charter".

designed for and committed to the *collective defence* of its members.[93] The conclusion contrasts with the legal characterisation of NATO by the FRY in February 1999 as a "regional agency" which had acted without authorisation from the Security Council and had, in consequence, "flagrantly violate[d] the principles enshrined in the Charter of the United Nations, particularly Article 2(4) thereof".[94] The FRY was not alone in subscribing to this view: other States shared it as well.[95] Furthermore, it has been suggested that any such determination "cannot depend upon a technical interpretation of whether NATO is a regional organisation or a collective self-defence system" but, rather, on "whether military action is being taken in self-defence against an armed aggression (Article 51) or in pursuance of the various other purposes making up the mandate of most regional organisations (Article 53)".[96]

Without more, and studied within the normative framework which Simma outlines, Operation Allied Force is left without a legal mooring in the Charter—neither under Chapter VII nor, it would appear, under Chapter VIII.[97] However, this well-reasoned conclusion is to be tempered, we are informed, with an appreciation of the circumstances surrounding the launch of "any instance of humanitarian intervention", where:

> a careful assessment will have to be made of how heavily such illegality weighs against all the circumstances of a particular concrete case, and of the efforts, if any, undertaken by the parties to get "as close to the law" as

93. Under Art.5 of the 1949 North Atlantic Treaty, the Parties agreed that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in the exercise of the right of individual or collective self-defence, recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith . . . such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area". 34 U.N.T.S. 541. See further Higgins, "Peace and Security: Achievements and Failures" (1995) 6 E.J.I.L. 445 and White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (2nd ed., 1997), p.21.

94. UN Doc.S/1999/107 (2 Feb. 1999).

95. See the communiqué issued on 25 Mar. 1999 by Mexico on behalf of the countries which are members of the Permanent Mechanism for Consultation and Concerted Political Action in Latin America (the Rio Group). The communiqué expressed "regret" that "the recourse to the use of force in the Balkan region [occurred] in contravention of the provisions of Article 53(1) and Article 54 of the Charter of the United Nations": UN Doc. S/1999/347 (26 March 1999).

96. Franck, *Fairness in International Law and Institutions* (1995), p.312.

97. Simma's assessment is that the "requirement" of Art.53(1) of the Charter, "for an—express or implicit, prior or *ex-post-facto*—authorisation of enforcement action under regional arrangements or by regional agencies is not formally applicable in the case of NATO. The Alliance constitutes an international organisation on the basis of Article 51 of the Charter; the only 'enforcement action' envisaged in this Article is self-defence": *supra* n.88, at p.10.

> possible. Such analyses will influence not only the moral but also the legal judgment in such cases.[98]

The threats—and ultimate application—of armed force by member States of NATO are then given their rightful context:

> NATO tries to convince the outside world that it is acting "alone" only to the least degree possible, while in essence it is implementing the policy formulated by the international community/United Nations; it is filling the gaps of the Charter, as it were, in a way that is consistent, in substance, with the purposes of the [United Nations]. And, ... then follows [Security Council] Resolution 1203 endorsing and building upon the NATO action. Similarly, the Presidential Statement of 29 January 1999 welcomes and supports the achievements of the Contact Group following renewed NATO threats after the massacre at Raçak—in the words of the US Deputy Secretary of State Strobe Talbott, thus lending "its political and moral authority to the Kosovo effort".[99]

Engagement in this approach draws Simma down the path of making determinations of a *relative* nature on the lawfulness of a particular intervention. The context in which an armed intervention occurs is important to our overall assessment, because that allows us to make more precise judgments about where an intervention features on the scale of un/lawfulness. Presumably, then, the un/lawfulness of a given intervention is a matter of degree, and, on this account, some unlawful actions can and should be regarded as less unlawful than others. For Simma, this is the appropriate verdict for Operation Allied Force: NATO had done a "rather convincing job" of edging its case towards the zone of lawfulness (i.e. legal acceptability), but had not *in ultimo* been successful, which explains why only a "thin red line" prevented its action from being considered lawful.[100] We can afford to reach this conclusion because the "complementary perspective [shared between NATO and the Security Council] might place the legal deficiency ... in a mitigating context, so to speak".[101]

Judge Antonio Cassese, writing after the commencement of the NATO action, went one step further. He felt that the "breach of the United Nations Charter occurring in this instance cannot be termed minor",[102] and that there could be no extraneous circumstances which affect or moderate this conclusion. In his opinion, NATO countries "radically

98. *Ibid.*, at p.6.
99. *Ibid.*, at p.12.
100. *Ibid.*, at p.22.
101. *Ibid.*, at p.11. Cassese, *infra* n.102, at p.353, regards the distinction drawn by Simma as one where unlawful actions can be "not so grave" as opposed to "grave" violations of the United Nations Charter.
102. Cassese, "*Ex Injuria ius Oritur*: Are We Moving Towards Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 E.J.I.L. 23, 24.

depart[ed] from the Charter system for collective security, which hinges on a rule (collective enforcement action authorised by the Security Council) and an exception (self-defence)".[103] This legal regulation of the use of force contained in the Charter—rehearsed earlier in this article—means that there can be:

> no gainsaying that the Charter system has been transgressed, in that a group of States has deliberately resorted to armed action against a sovereign State without authorisation to do so by the Security Council. It would not be appropriate to object that the United Nations Charter has already been violated on many occasions by States resorting to force in breach of Article 2(4); on those occasions States have always tried to justify their action by relying upon (and abusing) Article 51. In the present instance, the member States of NATO have not put forward any legal justification based on the United Nations Charter: at most, they have emphasised that the Security Council had already defined the situation in Kosovo as a "threat to peace". Even cursory consideration of the Charter system shows, however, that this argument does not constitute *per se* a legal ground for initiating an armed attack against a sovereign State.[104]

The full measure of this criticism of Operation Allied Force occurs when Judge Cassese characterises the episode as a conflict between two competing philosophies: "should respect for the Rule of Law be sacrificed on the altar of human compassion?"[105] The answers provided—and *answers* are provided to this question in the hope of resolving the fundamental dilemma at hand—demonstrate that there are multiple reference points for framing (and responding to) the enquiry. "[F]rom an *ethical* viewpoint", argues Cassese, "resort to armed force was justified" but "as a legal scholar" he "cannot avoid observing in the same breath that this moral action is *contrary to current international law*".[106]

Reconciling matters in this manner is an approach that has, of course, appealed before and, indeed, is reminiscent of the conclusion reached by Thomas M. Franck and Nigel S. Rodley in their seminal article on humanitarian intervention in the *American Journal of International Law*

103. *Ibid.*, at p.24.
104. *Ibid.*
105. *Ibid.*, at p.25. This predicament was experienced elsewhere: "How can I, as an advocate of human rights, resist the assertion of a moral imperative on States to intervene in the internal affairs of another State where there is evidence of ethnic cleansing, rape and other forms of systematic abuse, regardless of what the Charter mandates about the use of force and its allocation of competence?" Chinkin, "Kosovo: A 'Good' or 'Bad' War?" (1999) 93 A.J.I.L. 841, 843.
106. *Ibid.*

in 1973.[107] However, Cassese proceeds to reflect upon the responsibilities of the legal scholar in calculating whether *current international law* has been subjected to change as a result of recent developments. He commits himself to examining whether Operation Allied Force accords with, and is "partially justified by", what are called the "contemporary trends of the international community".[108] That role of the scholar is even more critical and apparent now than it was a generation or so ago,[109] for the reason that, in the past decade, we have been exposed to a succession of armed interventions—of which the armed reaction by NATO against the FRY is the most recent instalment—that have been conducted for the purposes of humanitarian protection but without authorisation from the Security Council. Yet, what we have also witnessed—and Operation Allied Force is no exception in this regard—is that these actions have been justified by States in terms of the right of humanitarian intervention under international law. This phenomenon constitutes a significant and decisive departure from the State practice of the Cold War period, where it was seldom (if at all) the case that this controversial right was used as an official defence for armed intervention—even in cases which appeared conducive to its invocation.[110]

The *prima facie* evidence in favour of a right of humanitarian intervention does not end there. Cassese himself observes how "no strong opposition has emerged in the majority of member States of the United Nations" towards Operation Allied Force.[111] The same has been said of

107. Franck and Rodley, "After Bangladesh: The Law of Humanitarian Intervention By Military Force" (1973) 67 A.J.I.L. 275 (where they admitted the occasional desirability of such operations, but felt that even where desired, such operations would fall foul of international law and would, instead, benefit from the defence of "superior necessity" which "belongs in the realm not of law but of moral choice, which nations, like individuals, must sometimes make, weighing the costs and benefits to their cause, to the social fabric and to themselves").

108. Cassese, *supra* n.102, at p.25.

109. Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention" (1998) 19 *Michigan J.I.L.* 1005, 1047.

110. See in particular the analysis of the 1971 Indian intervention in East Pakistan: Akehurst, "Humanitarian Intervention" in Bull (Ed.), *Intervention in World Politics* (1984), p.95.

111. Cassese, *supra* n.102, at p.28 (where reference is also made to the rejection of the draft resolution sponsored by Belarus, India and the Russian Federation, cited *at supra* n.82, and the fact that "no State or group of States [took] the step that would have been obvious in case of strong opposition to NATO armed intervention: to request an immediate meeting of the General Assembly"). See Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*" (1999) 10 E.J.I.L. 791, 792 ("The overwhelming majority of States did not condemn the NATO intervention as illegal"). However, Cassese does maintain, at p.796, that "it is premature to maintain that a customary rule has emerged" because "[t]he element of *usus* or *diuturnitas* is clearly lacking." For a different appreciation of the nature of the "international legal decision process", see Reisman, "Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention" (2000) 11 E.J.I.L. 3, 13. Cf. Charney, "Anticipatory Humanitarian Invervention in Kosovo" (1999) 93 A.J.I.L. 834, 838–841.

the intervention that occurred in Liberia under similar circumstances in August 1990,[112] as well as that of coalition forces in Iraq in 1991 and 1992.[113] A broader set of questions and enquiries is prompted by these reflections, about the interface between international treaty and customary law, about the nature of making international law and about its rules of change—and, of course, the relevance of our continuing existence in a decentralised legal order.[114] Once we have an appreciation of these and related matters, we shall be better equipped and better informed to assess the significance of Operation Allied Force for international law. Are we justified, for example, in comparing this action with the earlier interventions mentioned? To what extent do these earlier interventions share the same factual and legal co-ordinates as Operation Allied Force? Do any of these interventions register as *precedents* of humanitarian intervention as that term is understood in international law? How many such *precedents* are required, and at what (if any) frequency must they occur, for a so-called *right* of humanitarian intervention to come into being in international law? Finally, and perhaps with a more speculative frame of mind, in addition to the established principles of the means and methods of warfare, how (if at all) should international law regulate the choice of *military strategy* and the *modalities* of such operations? How much—and what kind of—armed force should be applied in the name of humanitarian intervention?

VII. THE CONDUCT OF HOSTILITIES DURING OPERATION ALLIED FORCE

DESPITE the regular impression given that NATO had fought a clean, clinical, legal conflict,[115] its campaign contained several controversial actions which stand to be judged in accordance with the laws regulating international armed conflict, as contained, *inter alia*, in the Geneva Conventions of 1949 and the First Additional Protocol of 1977, as well as the provisions of customary international law. The purpose of this section of the article is not to conduct an in-depth assessment of the lawfulness of each of these incidents under the *jus in bello*. Rather, it seeks to provide a

112. Farer, "A Paradigm of Legitimate Intervention" in Damrosch (Ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993), p.316, at p.336 (noting that the intervention "evoked not a peep of censure from either the wider African community of States or the [United Nations]. What little reaction that occurred seemed quietly approving"). Indeed, the Security Council was later, on 19 Nov. 1992, to endorse the armed intervention in Resolution 788 (1992).

113. Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law" (1992) 55 *Modern Law Rev.* 153, 176.

114. Higgins, *Problems and Process: International Law and How We Use It* (1994), p.253.

115. Sengupta, "Targets Get Legal Check", *The Independent* (London), 8 Apr. 1999, p.2.

preliminary inventory of the incidents that proved the most controversial during the 35,000 sorties undertaken in 11 weeks—either because of the object(s) that were targeted for bombardment, or because of the consequences of a particular bombing:

- the Petrovaradin Bridge over the River Danube at Novi Sad was destroyed on 1 April;[116]
- the destruction of metal processing and tobacco plants in Nis on 4 April;[117]
- NATO bombs hit two residential areas in Aleksinac on 5 April in an apparent "accident of war";[118]
- Serbian state media reported that a NATO missile had struck a block of flats in Pristina on 7 April;[119]
- one of the bombs aimed at the main telephone exchange in Pristina—a "critical target" because of its use for communications between Serbian forces in Kosovo and Belgrade—hit a residential area on 8 April;[120]
- severe damage was inflicted on the Zastava car plant on 9 April (the plant was understood to produce hunting rifles and pistols);[121]
- NATO missiles were targeted on a railway bridge in Leskovac, but struck a five-carriage passenger train crossing it on 12 April;[122]
- NATO planes attacked vehicles on a road near Djakovica on 14 April, and it was reported that civilians were killed as a result of two tractor-pulled wagons being struck;[123]
- NATO targeted and hit a combined petro-chemicals, fertiliser and refinery complex on the banks of the Danube in Pancevo on 18 April, releasing the toxic gas phosgene, chlorine and hydrochloric acid into the atmosphere;[124]

116. For an analysis of the consequences of this aspect of the campaign, see LeBor, "Air Strikes Bring Danube to A Halt", *The Independent* (London), 23 Apr. 1999, p.3.

117. Walker, "Missiles Hit Diesel Supplies and Wipe Out Serb Tobacco Works", *The Times* (London), 6 Apr. 1999, p.6.

118. Erlanger, "'Technical Defect' Kills Seven in Serb Town", *International Herald Tribune* (London), 7 Apr. 1999, p.1.

119. Walker, "Missile Kills At Least Nine in Flats", *The Times* (London), 8 Apr. 1999, p.5.

120. Davison, "NATO 'Sorry' For Getting Facts Wrong", *The Independent* (London), 10 Apr. 1999, p.2 (reporting that, in addition to the telephone exchange, the post office, a bank and a row of civilian homes had been hit).

121. Dinmore, "'Tomahawk Democracy' Decried As Car Plant Bombed", *Financial Times* (London), 10–11 Apr. 1999, p.2.

122. Bird and Norton-Taylor, "Blair: We'll Not Compromise: Ten Die As NATO Missiles Strike Train", *The Times* (London), 13 Apr. 1999, p.1.

123. Dobbs and Vick, "Airstrikes Kill Scores of Refugees", *Washington Post*, 15 Apr. 1999, A1. NATO later admitted that an American F16 pilot had bombed a convoy of internally displaced persons by mistake, and authorities in Belgrade claimed that at least 72 people had been killed: Evans and Bremner, "NATO Admits Bombing Convoy", *The Times* (London), 18 Apr. 1999, p.1 and Bremner, "Film Shows NATO Bombing Civilians", *The Times* (London), 20 Apr. 1999, p.5.

124. Walker, "Poison Cloud Engulfs Belgrade", *The Times* (London), 19 Apr. 1999, p.1.

— Serbian television headquarters was bombed on 23 April, and 10 people were reported killed;[125]
— the last bridge across the River Danube, located at Novi Sad, was hit on 26 April;[126]
— NATO is accused of firing four missiles into the centre of a housing estate in Surdulica on 27 April;[127]
— NATO anti-radar missile hit Gorda Bania, a residential suburb of the Bulgarian capital, Sofia, on 29 April;[128]
— it is reported that a NATO missile hit a passenger bus on a bridge at Luzane on 1 May, killing at least 40 people;[129]
— NATO bomb hit a civilian bus at Savine Vode in Kosovo on 3 May, with a local magistrate reporting the deaths of 17 people;[130]
— NATO employed the graphite (or "soft") bomb on 3 May, short-circuiting 70 per cent of the national electricity supply;[131]
— the Chinese Embassy in Belgrade was struck by a NATO missile on 8 May;[132]

125. Binyon, "Blair Defends Strategy As Ten Die in TV Centre Attack", *The Times* (London), 24 Apr. 1999, p.15. In early April, NATO issued an ultimatum that Serbian radio and television stations would be attacked unless they offered six hours of impartial reporting: Sengupta, "NATO Threatens to Hit Serb [Television] Stations", *The Independent* (London), 9 Apr. 1999, p.2 and "NATO Plans to Destroy Serb 'Propaganda' Media", *Financial Times* (London), 9 Apr. 1999, p.1 (noting that only those transmitters that had a "military use" would be targeted).

126. Dinmore, "NATO Destroys Major Bridge", *Washington Post*, 4 Apr. 1999, A14.

127. Fisk, "NATO Attacks Housing Estate", *The Independent* (London), 28 Apr. 1999, p.1. On 28 April, NATO acknowledged that at least one laser-guided bomb had missed its target and had hit civilian houses in a neighbourhood of Surdulica: Whitney, "NATO Bomb Kills Twenty Serbian Civilians", *International Herald Tribune* (London), 29 Apr. 1999, p.1.

128. Norton-Taylor *et al.*, "Rogue Missile Hits Suburb of Bulgarian Capital", *The Guardian* (London), 30 Apr. 1999, p.2. Although the stray missile caused limited property damage, it was reported that there were no injuries: Hope, "Opposition To War Rises in Bulgaria", *Financial Times* (London), 30 Apr. 1999, p.2.

129. Prentice, "Albanians Die As Missile Hits Bus", *The Times* (London), 3 May 1999, p.10. NATO confirmed that the attack had occurred, but said that it was impossible to verify the number of casualties: Castle, "Allies Admit Killing 23 Civilians in Bridge Bombing", *The Independent* (London), 3 May 1999, p.4.

130. Evans, " 'Second Bus Hit' in Two Days", *The Times* (London), 4 May 1999, p.14 and Sengupta, Boggan and Cranshaw, "NATO 'Kills 20' in Second Bus Bombing As Blair Promises to Take More Refugees", *The Independent* (London), 4 May 1999, p.1.

131. Evans, "Graphite Bomb Short-circuits Power Stations", *The Times* (London), 4 May 1999, p.13. The fear was expressed that "permanent damage" was being done to the water and electricity supply systems: Erlanger, "Living 'Like Cavemen in Belgrade': No Water, No Electricity", *International Herald Tribune* (London), 25 May 1999, p.1.

132. Williams, "Missiles Hit Chinese Embassy", *Washington Post*, 8 May 1999, A1. For the expected reaction from China, see *supra* n.80. Claims have subsequently been made that the attack, which killed three Chinese nationals, was deliberate and not accidental: Sweeney, Holsoe and Vulliamy, "Revealed: NATO Bombed Chinese Deliberately", *The Observer* (London), 17 Oct. 1999, p.1.

- the bridge over the River Velika Morava, at Varvarin, is reported to have been struck twice by three missiles on 30 May, with apparently 11 fatalities;[133]
- four missiles hit a hospital complex at Surdulica on 31 May, killing 18 civilians and wounding 43 others;[134]
- an apartment building in Novi Pazar is reported to have been hit, with at least 20 people killed and more than 40 wounded;[135]
- stray NATO bombs hit Morini, Albania, on 1 June, injuring a refugee.[136]

As member States of NATO come to terms with the cost of Operation Allied Force, estimated to be in the region of US$11 billion,[137] attention will be focused on the accuracy of targeting decisions and the actual effectiveness of striking tanks, mortars, armoured personnel carriers and other forms of military hardware.[138] These studies should occur against the background of the relevant provisions of international law—provisions which the governments of States participating in Operation Allied Force have agreed to—and must be conducted in light of the cost of the conflict in both human and environmental terms.[139] Furthermore, the need for understanding the successes and limitations of air operations, conducted within the confines of legal regulation, is made all the more apparent by recent suggestions that such wars could become the wars of the future.[140]

VIII. CONCLUSION

THE NATO intervention, controversial and regrettable though it was in certain quarters, witnessed an important and undeniable invocation of

133. "Bonn and Paris Ask For Kosovo Review: NATO Keeps Up the Pressure As Missiles Knock Out Bridge", *International Herald Tribune* (London), 31 May 1999, p.1 and Gall, "NATO Bombing Shatters Quiet Sunday in Varvarin", *International Herald Tribune* (London), 1 June 1999, p.11.

134. Erlanger, "NATO Strikes Kill 18 More Serb Civilians", *International Herald Tribune* (London), 1 June 1999, p.10.

135. "Up to 29 Civilians Reportedly Killed in NATO Bombing Raids", *The Irish Times* (Dublin), 1 June 1999, p.1.

136. Fischer, "Stray NATO Bombs Hit Albanian Town, A Refugee Arrival Point", *International Herald Tribune* (London), 2 June 1999, p.4.

137. Cornwell, "Kosovo Conflict to Cost NATO Nations $11bn", *The Independent* (London), 22 Oct. 1999, p.14.

138. Castle, "Doubts Still Linger Over NATO's War Evidence", *The Independent* (London), 17 Sept. 1999, p.16 (reporting claims that only 13, as opposed to 110, Serb battle tanks had been hit during NATO's bombing campaign). For one of the first assessments of the lawfulness of specific aspects of NATO's military campaign, see Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (2000) and available at <http://www.hrw.org/reports/2000/nato/>. A summary of this report is contained in Marshall, "NATO Accused of Violating International Law in Kosovo", *The Independent* (London), 7 Feb. 2000, p.1.

139. Brown, "Danube Study Questions Warfare that Bombs Polluting Targets", *The Guardian* (London), 27 Oct. 1999, p.15.

140. Fitchett, "Allies Emphasise Need to Prepare for Kosovo-Style Air Wars", *International Herald Tribune* (London), 12 Nov. 1999, p.8.

the so-called right of humanitarian intervention in state practice, and it now remains for the wider normative implications of this development to be calculated. In this regard, it must be admitted that Operation Allied Force did not command a universal base of support among States and was even subjected to accusations of unlawfulness by States such as the Russian Federation, China and Iraq.[141] A microscopic appreciation of the reactions of those States opposed to the intervention reveals, however, that not all of these States considered that the armed intervention contravened international law: other reasons explain their disapproval and criticism of Operation Allied Force.[142]

In the main, a clear consensus does appear to have taken shape among a broad cross-section of States, and it is a consensus which favoured an armed response to halt, or at least alleviate, the humanitarian catastrophe at the heart of the conflict raging in Kosovo. This approval, and even forthright endorsement, of Operation Allied Force occurred in the full knowledge that the relevant resolutions of the Security Council contained no authorisation for the application of armed force, and, had they done, they would have become casualties of Russian and Chinese vetoes. The important factor for present purposes is that the absence of authorisation did not lead States participating in the operation to claim that their intervention had thereby become a moral one, without any legal foundation. The intervention was not perceived by them as a simple question of "moral choice" and "moral choice" alone,[143] but a matter upon which international law deliberated—where it permitted coercive action in cases of extreme humanitarian hardship through the exercise of the right of humanitarian intervention.

That such an impressive and diverse range of States found sufficient cause to use armed force against a sovereign State in the full gaze of world attention—and then to issue elements of legal argumentation, which revolved around the claim of humanitarian intervention, in defence of their action—must mean that it would be ill-advised to give short shrift to the principal justification that materialised for Operation Allied Force. Of critical importance is the fact that the example we now have before us is neither the product of the imagination nor the exaggeration of jurists sympathetic to humanitarian intervention, but, rather, the real working and practice of States faced with a Security Council unwilling to authorise the use of armed force in circumstances of severe humanitarian need. The legal impact of this state practice, coming as it does on the heels of the interventions in Liberia (1990) and Iraq (1991 and 1992), must now be measured—a task that falls as much to legal scholars as it does to the

141. *Supra* nn.78–81.
142. *Supra* n.69.
143. *Supra* nn.106 and 107.

International Court of Justice (which is still seized of eight of the cases brought before it in April 1999).[144]

For one of those scholars at least, "nascent trends in the world community" suggest that "under certain strict conditions resort to armed force may gradually become justified, even absent any authorisation by the Security Council".[145] For this proposition to become justified and legally sustainable, however, certain positivist credentials need to be met in international law. It is appropriate at this juncture to recall the *dictum* of the International Court of Justice in 1986, that "[r]eliance by a State on a novel right or an unprecedented exception to the principle [of non-intervention] might, if shared in principle by other States, tend toward a modification of customary international law".[146] Cassese implies that we might have already embarked upon this course of processing a new *lex lata* from the developments that have taken place in State practice: it is not, after all, "an exceptional occurrence that new standards emerge as a result of a breach of *lex lata*".[147] That one is led, on account of these passings, to conclude—either now or at some future point in time—that the right of humanitarian intervention has sufficient empirical foundation within international law is not to pass judgement on the desirability (or otherwise) of such a finding. That is a separate enterprise to the one at hand, which is the scholar's disciplined and historical understanding of events and of "their meaning and relationship to other events".[148] It is to be hoped that Operation Allied Force will finally shift the emphasis of enquiry from programmatic denials and zealous acceptances of legal claims of humanitarian intervention to a serious, dispassionate and judicious treatment of their ultimate value and worth.

144. On 2 June 1999, the Court held that it manifestly lacked jurisdiction for two of the ten cases that had been referred to it for provisional measures (Yugoslavia's proceedings against Spain and the United States of America), but that in the remaining cases, it lacked *prima facie* jurisdiction: see I.C.J. Communiqué No.99/23 (2 June 1999). This meant that it could not indicate provisional measures in those cases. The Court, however, said that it remained seized of those cases because its findings "in no way prejudge[d] the question of the jurisdiction of the Court to deal with the merits" of the cases, which left "unaffected the right of the Governments of Yugoslavia and [of the respondent States] to submit arguments in respect of those questions": I.C.J. Press Communiqué No.99/39 (2 July 1999), where the Court decided that the FRY should submit a memorial in each of the eight cases by 5 Jan. 2000 and that the respondent States (Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom) should submit a counter-memorial by 5 July 2000.

145. *Supra* n.102, at p.27.

146. *Nicaragua Case*: Case Concerning Military and Paramilitary Activities In and Against Nicaragua (1986) I.C.J. Reports 14, 109 (para.207).

147. *Supra* n.102, at p.30, and n.111.

148. *Supra* n.107.