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# NATO's Attack on Serbia: Anomaly or Emerging Doctrine?

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*Dateline Belgrade, 30 March 1999: At 0400, Greenwich Mean Time, NATO bombs began falling on this capital city of the Federal Republic of Yugoslavia (FRY). War has not been declared, and in fact, neither the FRY nor Serbia[1] has attacked or even threatened to attack any NATO country or ally. So why has NATO unleashed the dogs of war on Serbia?*

This article does not attempt to assess right or wrong in the NATO attack on the Federal Republic of Yugoslavia. It does, however, examine the factual background and legal arguments for and against that action. And it raises questions which the international community should address in resolving the appropriateness of the use of force in humanitarian crises. Finally, it proposes guidelines which NATO and the United States, if they are to be the moral leaders of the free world, can take to formalize a doctrine of humanitarian intervention.

Each NATO member and the FRY are signatories to the United Nations Charter. Article 2(4) of the Charter prohibits member states from "the threat or use of force against the territorial integrity . . . of any state, or in any other manner inconsistent with the Purposes of the United Nations." [2] The only recognized exception to this prohibition is contained in Article 51, which recognizes the "inherent right" of a member state to use force in self defense if "an armed attack occurs" against it, until the Security Council acts. [3] As a matter of international law, a treaty between states is a contract, and in most cases specifically becomes the law of the contracting states. Even if a treaty is not the supreme law of the land, as it is in the United States, a treaty is recognized in international relations as a binding obligation on the parties to the treaty, [4] and the United Nations Charter itself specifically states that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." [5] As a treaty binding its members, including nearly every state in the world, the Charter is, then, supreme international law.

The other exception under the United Nations Charter to the use of armed force is when it is authorized by the United Nations in the pursuit of maintaining or restoring peace. This exception, contained in Chapter VII of the Charter dealing with peace enforcement, is limited to those situations in which the UN Security Council has declared that a situation is a "threat to the peace, breach of the peace, or act of aggression." [6] Under those circumstances the Security Council may take such action by air, sea, or land forces as may be necessary to restore international peace and security.

The NATO attack on Serbia was not in response to an armed attack, nor was it authorized by the Security Council. Instead, NATO conducted its attack in support of the "aims of the international community" and to resolve a "humanitarian emergency," [7] arguing that it simply could not stand by and do nothing. [8] Apologists argue that NATO's actions were either authorized because they supported the purposes of the UN Charter, or that they were authorized under an emerging doctrine of "humanitarian necessity." It is, however, generally acknowledged that the attack was "illegal"; that is, it was not in accordance with the established procedures under the Charter to launch such an act. The deeper question remains: Was this simply an anomalous event which must be expected from time to time in international relations, or is there a new doctrine of international law which will permit such actions in the future? [9] Subsidiary questions arise: If there is a new doctrine of "humanitarian necessity," what are its limits, and is it a positive obligation on the international community, or merely a defense to be exercised selectively when the parties feel like it? Finally, does NATO's vigilante action taken in contradiction to the UN Charter portend the decline of the UN and a return to the power politics of the 19th century? These questions have profound implications for the rule of

international law.

## **Background**

The factual background of the Kosovo situation is important in order to examine NATO's claim that it was acting to prevent a humanitarian tragedy. Conflict in the Balkans is centuries old. Without reopening the conflicting claims of moral superiority, suffice it to say that the uneasy peace forged by Tito during his reign of Yugoslavia died with him. Ethnic Serbs and ethnic Albanians reverted to the internecine struggle that has characterized their relationship since at least 1389.[10] In 1989 Serbian leader Slobodan (meaning "peace") Milosevic revoked the autonomy of the Serbian province of Kosovo, populated about 90 percent by ethnic Albanian Muslims. Serbia began removing ethnic Albanian Kosovars from provincial government, and Kosovars reacted by setting up a shadow government, economy, and schools, which encouraged Serbs to become more repressive in their dealings with Muslims of the province. These actions finally resulted in a low-grade civil war, with FRY forces and Serbian paramilitaries on one side and the Kosovo Liberation Army (KLA) on the other. Repression continued, with many Kosovars being forced from their homes and out of the province, and by early 1998 the Kosovo civil war was being viewed by the Western press as evidence of "ethnic cleansing."

As Kosovo began to occupy the main attention of the news media, the United Nations issued stern warnings to Serbia to cease its hostilities against its province. In March 1998 the Security Council adopted Resolution 1160, in which the UN condemned "the use of excessive force by Serbian police against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army." Further, the UN called on Serbia and the Kosovar Albanian community "urgently to enter . . . a meaningful dialogue on political status issues," and called for an international boycott on the transport of military items to the FRY and Kosovo. The resolution further stated that the Security Council was acting under Chapter VII of the Charter.[11] Nowhere in the resolution did the Security Council call for armed intervention, nor did it mention NATO. In subsequent Resolutions 1199 (1998), adopted on 23 September 1998, and 1203 (1998), adopted on 24 October 1998,[12] the Security Council, still acting under Chapter VII of the Charter, did determine that the "deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region," but again stopped short of calling for the use of force to end the threat. By the end of 1998, the actions of the Serbian army and Serbian paramilitaries were creating large numbers of refugees and displaced persons.

During the same period, NATO troops, acting under United Nations mandate, were already involved in the Balkan conflicts, occupying the former Yugoslav province of Bosnia-Herzegovina to separate warring Serbs, Croats, and Muslims. NATO began issuing its own warnings to Serbia to cease actions which NATO believed were causing a flood of refugees in the region, and on 13 October 1998 the NATO Council issued activation orders for air strikes.[13] Continued reports of "atrocities," some documented, some not, came out of Kosovo, and the Contact Group on the Former Yugoslavia[14] brought the parties together in January and March 1999 for negotiations, first at Rambouillet, France, and then in Paris. At first, Milosevic appeared to give in to NATO and UN demands and permitted military observers in Kosovo and Serbia, but ultimately Milosevic did not agree to the negotiated conditions and refused to call off his forces. As the movements of the observers became more restricted and their safety threatened, they were withdrawn on 20 March 1999, and thereafter the UN Secretary General admitted that the UN had no reliable source of information on conditions in Kosovo.[15] The "atrocities," which Serbia stated were legitimate military actions taken in response to KLA terrorist activities, continued to create floods of refugees into the neighboring areas of Macedonia, Montenegro, and Albania. Certainly the flow of refugees was destabilizing to peace in the region, but it was not an armed attack on any neighboring state.[16] Finally, on 23 March 1999, NATO Secretary General Solana announced that the order had been issued to NATO air forces to attack Serbian forces in Kosovo.

After the air attacks began, refugee movements multiplied exponentially, amounting ultimately to more than half the population of the province, with another third listed as internally displaced from their homes. Initially, NATO directed its air attacks against Serbian ground forces in the province, but on 30 March 1999 the NATO Secretary General announced that he had directed NATO forces to initiate a "broader scope of operations,"[17] which amounted to an attack on the civil infrastructure of Serbia. Although air damage to Serbian military forces appears to have been light, it was apparently the continued attacks on civil infrastructure targets that caused Milosevic to sue for peace. On 9 June 1999, Serbia and NATO signed a Military Technical Agreement to end the bombing, in exchange for which Serbian

forces would withdraw from Kosovo.[18] The withdrawal took place as planned, and on 10 June 1999 the United Nations Security Council, in Resolution 1244 (1999), finally mandated NATO to establish an international security force, or KFOR, of up to 50,000 troops, which still occupies the province.

## The Legal Basis

The United Nations Charter prohibits the use of force in international relations except when authorized by the Security Council. In Resolution 1160, the Security Council called on the parties to achieve a peaceful solution, and in the following three resolutions the Security Council continued its call, while recognizing that a threat to peace and stability in the region existed. At no time, however, did the Security Council authorize the use of armed force against the FRY. The political reason appeared to be that Russia, a historical ally of Serbia, would use its veto to prohibit any such action. So NATO decided that it was easier to seek forgiveness than to act in the face of a certain denial of permission. It attacked, framing its statements continually on the "intent" of the United Nations. But why didn't it seek General Assembly permission as had been done before when the Security Council was deadlocked and couldn't take action?[19] Perhaps because with more than 13 million refugees in the world,[20] the General Assembly might well have asked "why Kosovo?"

Analysts have posed many possible answers for NATO's actions, ranging from the security of NATO in southwestern Europe to the need for NATO to demonstrate its will to win after trapping itself in a seeming no-win occupation of Bosnia. Whatever the real reason, NATO attempted to justify its attack on the basis of the doctrine of "humanitarian necessity." [21] In a statement issued by the North Atlantic Council of NATO on 12 April 1999, the ministers stated:

The crisis in Kosovo represents a fundamental challenge to the values of democracy, human rights, and the rule of law, for which NATO has stood since its foundation. . . . The FRY has repeatedly violated United Nations Security Council resolutions . . . [which] has created a massive humanitarian catastrophe which also threatens to destabilize the surrounding region. . . . These extreme and criminally irresponsible policies . . . justify the military action by NATO.[22]

Is NATO correct that there is a new norm of humanitarian necessity that justifies the attack under international law? Clearly there is no treaty provision that supports the concept of humanitarian necessity, although sections of the United Nations Charter hint at the concept. So if such a doctrine is emerging, it must come either from "natural law" or "customary law" (*jus cogens*). It is hard to argue that one act creates customary law when the classical concept of custom comes from long usage and recognized scholarly comment.[23] But, of course, custom must start somewhere. Likewise, the corollary to a new doctrine of humanitarian necessity would be an obligation *erga omnes* on Serbia not to violate the human rights of its citizens. But no side in this conflict is arguing that such a doctrine justifies the use of force, probably because it would open the Pandora's Box of the international conscience. While states are expected to respect the rights of individuals,[24] the inherent tension between this obligation and the concept of state sovereignty has caused statesmen and scholars alike to back away from enforcement of the concept in any manner but on the peaceful field of battle in courts of law. The world is not prepared for the specter of the international community meddling in the internal matters of its member states in any but the most egregious situations. Therefore, the UN Charter gave rise to no formal international response to Soviet invasions of its protectorates of Hungary and Czechoslovakia; the international community did not attack South Africa, although it generally condemned apartheid; and the United States was attacked in the press, not in battle on its sovereign territory, over racial discrimination. Another approach to this dilemma is perhaps to recognize that there are some "soft" laws that are quoted but not always enforced.[25]

Ignoring the delicate questions of interference in a sovereign state's internal affairs, if there is a new customary norm to prevent renegade acts of humanitarian brutality, it must have definable boundaries. What would be the limits of the customary sanction of the use of force in the case of humanitarian necessity? British Prime Minister Tony Blair outlined "the new doctrine of the international community" in a speech to the Council on Foreign Relations in Chicago on 22 April 1999: The civilized world must intervene to protect human rights when (1) it is sure of its case, (2) it has exhausted all diplomatic options, (3) there are military operations which can be sensibly and prudently undertaken, (4) it is prepared for the long term, and (5) national interests are involved. If this is a new customary doctrine of international law, there are serious doubts that the five elements were met in the case of Kosovo. Was NATO sure of

its case? It appears in the aftermath that the number of killings alleged to have been perpetrated by the Serbians was multiples of the true figure. Had NATO exhausted all diplomatic means? We may never know what negotiations were carried on in private, but certainly there was hardly time given for the UN sanctions to take effect, and perhaps if NATO really wanted to stop Milosevic, it could have offered him rewards instead of punishment. Were the military operations sensible and prudent? Battle damage assessments after the air war indicate that perhaps five percent of Serbian tanks, artillery, and fighting vehicles were destroyed. And the military operation quickly turned to deliberate attacks on Serbian civilian infrastructure. The operation was a success in terms of NATO casualties, but did it really accomplish its intended goal? Was NATO prepared for the long run? Probably not. Other than getting sucked into providing an occupation army to KFOR (which NATO members are trying even now to exit), no member other than Britain was in favor of sending in ground forces. That would have been long term. And finally, were national interests at stake? It is hard to discern what national interests were involved for either Britain or the United States. So as the leader of one of NATO's founding states defined the emerging doctrine, it is doubtful that the Kosovo air war met any of the criteria. And, of course, each of the criteria is determined from the point of view of Western civilization, not necessarily that of the people who are its victims.[26]

The bottom-line defense of the action by the British government is that "as an exceptional measure to halt an overwhelming humanitarian catastrophe, military intervention is legally justifiable under international law, when all other possibilities have been exhausted." [27] This position is a volte-face for Great Britain. In 1986, the United Kingdom Foreign Office stated:

The overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention for three main reasons: first, the UN Charter and the corpus of modern international law do not seem to specifically incorporate such a right; secondly, State practice in the past two centuries . . . at best provides only a handful of genuine cases of humanitarian intervention, and on most assessments, not at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation.[28]

In addition to policy statements by the parties, this defense also has been held to be legally insufficient by the International Court of Justice in *The Nicaragua Case*:

The protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training and arming of Contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States.[29]

Were NATO's deliberate attacks on Serbia's infrastructure any more defensible?

But even if Blair's definition of the doctrine is correct, when should this authority be exercised? A lead newspaper article reported that a tyrannical leader of a despotic predominantly Christian state was conducting war on its Muslim populace, depopulating and destroying one of its provinces and flattening the provincial capital city. And, asked the reporter, what is being done to stop this humanitarian crisis? The answer was nothing. NATO did not bomb Moscow to stop the military action in Chechnya and the destruction of Grozny. NATO took no action to stop that "ethnic cleansing" and imposed no economic sanctions against the Putin government. So is this doctrine mandatory or convenient? Serbia is not an ally of any NATO country; it is small, backward, and out of the way. Perhaps, then, another element of the doctrine is that it is only exercised when those exercising it know that they can win. International Courts have held that international law does not require nations to act, but instead is based on the agreement of states and places limits on how and when they act.[30] This is very convenient for NATO: It doesn't have to address the other 12 million refugees in the world. But it leaves uncomfortable gaps in the enforcement process of international law. When will the doctrine of humanitarian necessity be raised? When does a nation step over the line of creating a humanitarian emergency? And when can a nation expect that the international community will enforce the doctrine? In such circumstances, is the doctrine anything more than a convenient excuse for a more powerful state or states to enforce their wills on their weaker neighbors? These are troubling questions that are not answered by the concept of an emerging doctrine.

Perhaps the real answer is that because the system of international law is horizontal--i.e., there is no hierarchy of authority to enforce it--a nation always has the right to resort to force to protect its national interests.[31] But were the actions of Serbia a threat to the national interests of any of the NATO countries or their allies? Certainly the forced movement of a million refugees into neighboring territory creates disruption and suffering, but it is perhaps more common than not in human history. Three million ethnic Germans were expelled from Czechoslovakia after the Second World War. The mere fact that there are currently 13 million refugees in the world certainly argues that refugee status by itself is hardly unique. So what national interest may have been at stake to justify the NATO attack on Serbia? If there were national interests, they were at a deeper political level. Perhaps the possibility of Russia building an oil pipeline through the region to sell its oil to Europe? Perhaps the recognized criminal activity in FRY, especially drug dealing, the products of which are generally aimed at Western Europe? But none of these was mentioned in the rationale to attack, and cannot, therefore, be asserted by NATO now to justify taking aggressive action *ex post facto*.

Moreover, a well established corollary to the inherent right to use force is that it must be proportional to the threat addressed, and must avoid damage to people other than combatants.[32] Modern warfare has seen the use of "total warfare" to defeat the enemy. But there are few apologists for this concept. Here, NATO deliberately attacked nonmilitary targets such as oil refineries, power stations, bridges, and even civilian television broadcasting facilities.[33] The argument is made with some force that these attacks were not proportional to the somewhat vague "national interests" of the attacking states. There are even good arguments that the attacks on Serbia did nothing to relieve the flow of refugees, but may only have served to force Serbia to surrender to avoid being destroyed as a society. This is hardly a badge of honor for an alliance that is upholding the rights of the free world. In fact, the flow of refugees increased after the bombing began--perhaps because the Kosovars were fleeing the falling bombs as much as the repressive Serbs? So it is doubtful that NATO can successfully maintain that the bombing was proportional to the wrong that it sought to right.

The customary Law of Treaties, as codified in the Vienna Convention, states "every treaty in force is binding on the parties to it and must be performed by them in good faith." [34] NATO is clearly sensitive to charges that it acted illegally and bypassed the UN Security Council. In his report "Kosovo One Year On," Lord Robertson, the new Secretary General of NATO, recites a litany of factors that NATO took into account--the FRY had failed to comply with UN Security Council resolutions, the UN Secretary General had warned of a humanitarian disaster, the risks of a catastrophe in light of the FRY failure to seek a peaceful resolution of the crisis, the unlikelihood that the Security Council would approve any further action, the threat to peace and security in the region--and he concludes that, therefore, "a sufficient legal basis existed for the Alliance to threaten, and if necessary, use force against the FRY" and "left NATO no option but to use force." [35] These "considerations," however, do not amount to a legal basis to ignore UN Charter prohibitions against the use of force.

Even if NATO can maintain that it was merely exercising the emerging right of nations to use force to prevent humanitarian disasters, was the situation in Kosovo a humanitarian disaster? President Clinton and the US State Department continually accused Milosevic of ethnic cleansing, claiming that as many as 100,000 Kosovars had been murdered by Serbian forces. British Prime Minister Tony Blair followed suit in the accusations of ethnic cleansing. So what is ethnic cleansing? There is no definition in international law, and none discernible in municipal law. The traditional concept of this type of action is genocide. So why not call it genocide? Perhaps because the facts didn't support the charge. While Serbia was hardly supporting the rights of its ethnic Albanian citizens, was it out to exterminate them? Subsequent UN investigations of killings in Kosovo have turned up 2,108 dead.[36] This is a large number, but not the 100,000 used to justify the attacks, and not a number to justify a charge of genocide. True, many Kosovars are missing and we will never know the actual number killed, and true, there were other atrocities such as rape and destruction of homes, but do these facts justify this attack as opposed to any other attack to end a humanitarian emergency? Probably not.[37]

The legal basis for the NATO attack is weak at best. NATO is probably on stronger grounds to simply state that the attack suited its political aims, and since it won, who will take action against NATO anyway?[38] This raises the issue of "vigilantism," that is, the self-authorization by NATO of action to enforce international law. US Deputy Secretary of State Strobe Talbott stated at the NATO 50th anniversary celebration in Washington in April 1999: "We must be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure. But the Alliance must reserve the right and the freedom to act when its members, by consensus, deem it

necessary." [39] Has NATO implied that when the United Nations doesn't act to suit its goals, it reserves the right to enforce those goals by force? If so, we have truly returned to the power politics of the Bismarck era.

## **Implications for International Relations**

Even though the United Nations Charter forbids the use of force except in limited circumstances, that has not stopped attacks by one state against another in the past 50 years. [40] Consequently, the NATO attack on Serbia can be viewed as simply another anomaly in international relations--one which may or may not be repeated from time to time, but one which does not erode the basic rule of law, because the international community still believes that norms of international right behavior should govern the acts of states.

The more pessimistic may take the view that the attack portends the end of international law and order. They would argue that since NATO chose to ignore the Security Council, the UN is being marginalized and subordinated to international power politics, and that the powerful nations will continue to act as they see fit, in derogation of the rule of law. History has proved that there is some validity to this Hobbesian view of the world. But, as in municipal law, it is the exception that proves the rule: it is the criminal who is apprehended and punished who proves that we live in a society of law. The danger is, to quote the International Court of Justice reciting the law in another context, that:

Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected. [41]

But the jury is still out on this particular chapter of international relations.

NATO's attack may also be viewed as the beginning of a new doctrine of international relations in which the world community agrees to take action to protect human rights by force. NATO and the United States now have an opportunity to take the lead in defining a new doctrine of humanitarian intervention. NATO states that it has stood for the rule of law since its founding, and it should not avoid the responsibility of following the rule of law whenever possible. Instead of apologizing for the attack, NATO can posit the outlines of a doctrine that will sanction such actions in the future. Such a doctrine should be based on the traditional just war doctrine, long recognized as customary law by international society.

The just war doctrine in Western tradition stems from Greek and Roman concepts, but the father of the modern just war doctrine is Hugo Grotius, [42] who wrote in the early 17th century. Borrowing from Grotius, the following concepts can form the basis of debate before any nation intervenes in the internal affairs of another state for matters of humanitarian necessity.

- First, the intervention must be based on a just cause--that is, there is an actual humanitarian crisis in process, or so close to taking place that it cannot be avoided without intervention. This may take significant intelligence collection to determine what is really going on inside the "victim" state. Mere supposition or press reports should not be the basis for military intervention.
- Second, the intervention must have a reasonable chance of success. The nation undertaking the intervention is invading the sovereignty of another nation, and the nature of the intervention must be such that it is not merely an adventure, but a reasoned approach to relieving human suffering. This also requires the intervening state to be willing to commit the troops and supplies necessary to achieve success, which in democratic societies means that it has public support for the duration of the action.
- Third, the goals of the intervention must be proportional to the injury expected to be caused by military operations. This requires a reasoned calculation by the political leaders of the costs, in lives and dollars, both to the intervening and "victim" state, to determine if the cost is worth the venture. It also requires the political leaders to publicly state an end goal, both short- and long-term, to be achieved by the intervention, and then to stick with that goal or, if changing

it, to reopen the public debate. Finally, proportionality means that the intervention will end as soon as the humanitarian crisis is over.

- Fourth, there must be a public declaration of the national intent. Public declaration is important to give the "victim" state an opportunity to take corrective action to alleviate the humanitarian crisis before intervention is necessary.
- Fifth, the declaration must be made by a legitimate state authority. In the concept of a just war, the requirement is that only a state may go to war, because only a state is an actor on the international scene. With respect to a humanitarian intervention, a similar requirement will assure that the military action is taken by a lawfully constituted authority, and is not just a cover for a private intervention in the affairs of another country.
- Sixth, the intervention must be a last resort. Other recourses to stop the crisis--and the urgings implicit in the previous five steps--must have failed, so that there is no alternative to a resort to force. In the modern context, this would also require a request by the intervening state to the United Nations Security Council, or to the General Assembly if the Security Council fails to act.

In addition to these traditional just war concepts, to the maximum extent possible, any humanitarian intervention should be taken by a regional organization or coalition of concerned states. Several states acting in concert reduces the possibility that the military intervention is merely land or power aggrandizement by an aggressor.

These concepts can lay a groundwork for future humanitarian interventions. Many more issues must be addressed before the world community is clear on when and how such actions should take place, and by whom, but by asserting a positive approach to a doctrine of humanitarian action, NATO will be responsibly exercising its leadership role. Even if a doctrine is formulated, only time will tell if the international community is willing to commit the resources to intervene collectively in situations where a nation is mistreating its citizens. But a recognized doctrine may alleviate the fear that the international community will simply override municipal law by telling states how to act internally. Also, by advancing this type of doctrine, NATO and the United States can assure the world that the attack on Serbia does not portend the destruction of the ideal of the international rule of law so carefully crafted in the United Nations Charter, and that history will look back at this as, rather, the first application of a new doctrine on the use of force in cases of humanitarian necessity.[43]

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## NOTES

1. The Federal Republic of Yugoslavia (FRY) was formed in 1992 of the republics of Serbia and Montenegro. Four other former Yugoslavian republics (Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia) declared independence in 1991. Kosovo is a province of Serbia. The largest ethnic population of the federation is Serbian, and the capital, Belgrade, is located in Serbia. For convenience, since this is a conflict between ethnic Serbs and ethnic Albanians, the FRY is often referred to as Serbia.
2. United Nations Charter, Chapter I, Article 2(4).
3. Ibid., Chapter VII, Article 51.
4. Vienna Convention on the Law of Treaties, Articles 26 and 27. Although Article 4 provides that the Convention is not retroactive, and therefore it wouldn't apply to the United Nations Charter, it is arguable that it has entered customary International Law, 23 May 1969, 115 U.N.T.S. 331, 8 International Law Materials 679 (1969).
5. United Nations Charter, Chapter XVI, Article 103.
6. Ibid., Chapter VII, Articles 39 to 51.
7. Statement on Kosovo, Issued by the Heads of State and Government participating in the meeting of the North

Atlantic Council in Washington, D.C., on 23-24 April 1999, internet, <http://www.nato.int/docu/pr/1999/p99-62e.htm>.

8. Edmund Burke said that for evil to triumph it is only necessary for good men to do nothing.

9. It may be difficult for apologists to maintain the concept of an emerging doctrine when Secretary of State Madeline Albright stated in a 28 June 2000 address to the Council on Foreign Relations that NATO's airstrikes should not be used as a precedent for intervention in other conflicts: "Every circumstance is unique." Quoted in "Stratfor Special Report," internet, <http://www.stratfor.com/cis/specialreports>. Also, German Foreign Minister Kinkel stated in a speech before the Bundestag that "the decision of NATO must not become a precedent." Deutscher Bundestag, Plenarprotokoll 12/248, 16 October 1998, p. 23129.

10. The year of the Battle of Kosovo, when Serbs, in defense of European Christianity, won a moral victory, while suffering a physical defeat, at the hands of the Muslims of the Ottoman Empire.

11. UN Resolution 1160 (1998), adopted by the Security Council at its 3868th meeting, 31 March 1998, internet, <http://www.un.org/Docs/scres/1998/sres.1160.htm>.

12. United Nations resolutions can be viewed on the internet at <http://www.un.org/Docs/scres/>.

13. NATO website, "NATO's Role in Relation to the Conflict in Kosovo," internet, <http://www.nato.int/kosovo/history.htm>, accessed 25 September 2000.

14. France, Germany, Italy, the Russian Federation, United Kingdom, and United States.

15. UN Resolution 1203 endorsed the establishment by the Organization for Security and Cooperation in Europe (OSCE) of a Kosovo Verification Mission. That mission was withdrawn on 20 March 1999, after which no firsthand verification of the situation within Kosovo was available.

16. Serbian forces were attacking the KLA, and some confused reports of cross-border shelling and possible troop incursions into Albania were alleged, but none appeared to amount to an attack by Serbian forces on Albania. Of course, Serbian troop movements into Montenegro were issues internal to the FRY.

17. Letter dated 30 March 1999 from the Secretary-General to the President of the Security Council, internet, <http://www.un.org/Docs/>.

18. It is instructive that the agreement, which refers to the International Security Force (KFOR) later mandated by UN Resolution 1244(1999), was not signed by or on behalf of the UN, but noted that "the UN Security Council is prepared to adopt a resolution, which has been introduced, regarding these presences." NATO website, "Military Technical Agreement," internet, <http://www.nato.int/kosovo/docu/a990609a.htm>, accessed 25 September 2000.

19. In 1956, following the Suez crisis, Britain and France, who were on opposite sides, would not agree to any UN action. The matter was referred to the General Assembly, which authorized creation of the UN Emergency Force. Although not a Security Council deadlock situation, in 1962 Secretary-General U Thant took the matter of UN supervision of elections in West New Guinea to the General Assembly for approval on the ground that it was a matter of decolonization, and therefore of broad concern to member states.

20. The US Committee for Refugees estimated the number of "refugees and asylum seekers" at the end of 1998 as 13,500,000. US Committee for Refugees, "Worldwide Refugee Information," internet, [http://www.refugees.org/world/statistics/wrs99\\_table3.htm](http://www.refugees.org/world/statistics/wrs99_table3.htm), accessed 25 September 2000.

21. The United Nations appears to first have called the Kosovo situation a "humanitarian tragedy" in a statement by the Secretary General on 9 April 1999, and later a "humanitarian catastrophe" in Security Council Resolution 1239(1999) adopted on 14 May 1999 (internet, <http://www.un.org/Docs/scres/1999/>), both well after the bombing commenced and therefore unavailable to justify NATO's actions in March.

22. "The Situation in and around Kosovo," Statement issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, on 12 April 1999, internet, <http://www.nato.int/docu/pr/1999/p99-051e.htm>.
23. Compare *The Paquete Habana*, 173 U.S. 677 (1900).
24. Charter of the International Military Tribunal, Annex to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 59 Stat. 1544 (1945); The Universal Declaration of Human Rights, G.A. Resolution 217A (III), U.N. Doc. A/810, at 71 (1948).
25. B. Simma, "NATO, the UN and the Use of Force: Legal Aspects," *European Journal of International Law*, internet, <http://www.ejil.org/journal/Vol10/No1/ab1-1.html>.
26. Robert Skidelsky, "The End of National Sovereignty?" *Prospect Magazine*, internet, <http://www.prospect-magazine.co.uk>.
27. Written answer, House of Commons, Hansard, 26 April 1999, vol. 330, col. 35w.
28. UK Foreign Office Policy Document No. 148, reprinted in 57 BybIL (1986) 614, cited in Simma.
29. *Nicaragua v. United States*, 1986 I.C.J. 14, 1986 WL 522 (Merits).
30. *The Lotus Case*, 1927 P.C.I.J., Ser.A. No. 10.
31. Compare, "It always lies within the power of a State to endeavor to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war," from Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922), para. 597, p. 189. Contrast this, however, with the provisions of the Vienna Convention on the Law of Treaties, Articles 51 and 52, which provide that any treaty or consent to a treaty procured by force is void. Article 53 of the Vienna Convention also provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Thus the Military Technical Agreement ending the bombing could be claimed by Serbia to be void.
32. Compare the Hague Conventions on the protection of non-belligerents; *The Nicaragua Case*.
33. The attack on Serbian television building in Belgrade has caused calls to the International Criminal Tribunal for the Former Yugoslavia to examine whether NATO or any of its pilots should be tried as war criminals. It is unlikely that this will occur, but it points out that the attack on civilian targets is not condoned in international law. "War Crime Tables Turned on NATO," *The Irish Times*, 6 January 2000.
34. Article 26, Vienna Convention of the Law of Treaties, 23 May 1969, 1155 U.T.S., 8 International Legal Materials 679 (1969).
35. Lord Robertson, "Kosovo One Year On," internet, <http://www.nato.int/kosovo/repo2000/index.htm>, accessed 25 September 2000.
36. OSCE report, *As Seen, As Told* (1999), internet, <http://www.osce.org/kosovo/reports/hr>, accessed 2 October 2000. NATO maintains that 225,000 Kosovar men are missing and "at least 5,000 Kosovars had been executed" (<http://www.nato.int/kosovo/history.htm>), and the US State Department claims that extrapolating the 2,108 confirmed war dead means that 6,000 were killed ([http://www.state.gov/www/global/human\\_rights/kosovarii/homepage.html](http://www.state.gov/www/global/human_rights/kosovarii/homepage.html)). Out of a population of 1.8 million, 2,000 to 6,000 deaths would not be too unusual in a one-year period.
37. Several German courts, primarily considering the status of applications for asylum, concluded that "ethnic Albanians in Kosovo have neither been nor are now exposed to regional or countrywide group persecution in the Federal Republic of Yugoslavia" and: "Events since February and March 1998 do not evidence a persecution program based on Albanian ethnicity. The measures taken by the armed Serbian forces are in the first instance directed toward

combating the KLA and its supposed adherents and supporters." International Association of Lawyers Against Nuclear Arms, 9 May 1999, internet, [http://www.infoshop.org/news4/german\\_kosovo.html](http://www.infoshop.org/news4/german_kosovo.html).

38. Or, as John Harington said: "Treason doth never prosper, what's the reason? Why, if it prosper, none dare call it treason!" *Epigrams*, Book iv, *Of Treason* (1618), Ep. 5, in *Bartlett's Familiar Quotations*, also MS Bookshelf 98.

39. Quoted in Simma.

40. For example, Syria and Egypt attacks against Israel (1963, 1967); US troops in Lebanon (1958); Soviet Invasion of Czechoslovakia (1968); Soviet invasion of Hungary (1956); Tanzania invasion of Uganda (1979); Vietnam invasion of Cambodia (1979); Soviet invasion of Afghanistan (1979); Iran-Iraq war (1976); Iraq invasion of Kuwait (1990).

41. The Diplomatic and Consular Staff Case, *United States v. Iran*, 1980 I.C.J. 3.

42. Hugo Grotius, *The Law of War and Peace* (New York: Bobbs-Merrill, 1962).

43. On 29 April 1999, Yugoslavia filed suit in the International Court of Justice against ten NATO states, seeking an interim provisional measure of an order against the NATO countries to cease bombing Serbia. On 2 June 1999, the ICJ dismissed the request for provisional measures and indicated that, while not necessarily dispositive of the actions, the Court's jurisdiction only extended to cases that arose between the parties after they had acceded to the Court's jurisdiction. Yugoslavia acceded to ICJ jurisdiction only on 26 April 1999, after the bombing commenced. In addition, the cases against the United States and Spain were dismissed because of specific reservations by those two countries in their acceptance of ICJ jurisdiction. The remaining cases continued on the jurisdictional issue, but no further decisions were rendered as of June 2000.

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