THE MILITARY INTERVENTION by the nineteen-member North Atlantic Treaty Organization (NATO) in Kosovo, a province of Serbia in the Federal Republic of Yugoslavia, was the first of its kind undertaken by the alliance. Under the 1949 North Atlantic Treaty, NATO was formed as a regional security organization. With its mission to act in a defensive capacity to protect its members from external aggression, under the treaty the parties specifically 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 . . . if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.²

Thus, the intervention was arguably beyond NATO’s intended mission. Equally important, by unilaterally intervening in Kosovo, NATO bypassed the United Nations. Its use of force clearly failed the test of strict compliance with

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
the constraints of the UN Charter,\(^3\) for it did not seek prior authorization of the Security Council to use force. Although the UN eventually assumed an important role in shaping the future of Kosovo, it was invited to perform that task only after the end of the conflict.\(^4\)

I concede that it is too early to write a definitive commentary on the legal implications of this intervention. Some tentative conclusions can, however, be reached even at this time, which is a couple of months after Slobodan Milosevic's acceptance of NATO's terms to end its air operations against Yugoslavia. These conclusions form the subject of this paper. In the next section, I relate pertinent aspects of the armed conflict in Kosovo to provide the context for the discussion that follows on the role of the United Nations in the conflict.

It is undoubtedly a laudable goal that the world community should effectively respond to heinous crimes such as genocide in Rwanda and ethnic cleansing, forced expulsions, and egregious violations of human rights in Bosnia and Kosovo. But after NATO's intervention in Kosovo, the nature of the response to such deprivations and the kind of precedent it sets are valid questions because of their implications.

**Air Operations by NATO and the Kosovo Peace Accord**

**Context.** Arguably, the roots of the ethnic conflict in Kosovo go back hundreds of years.\(^5\) Although as a province of the Ottoman Empire Kosovo was ceded to Serbia after Turkey's defeat in the Balkan Wars of 1912–1913, the area is regarded by Serbs as the cradle of their civilization, their cultural birthplace. It was at the Battle of Kosovo in 1389 that the Serbs were defeated and ever since they have painfully remembered the date. Also, many of their monasteries, churches, and sacred places are in Kosovo.

The discussion here will, however, be confined to more recent events. A decade ago, in 1988–1989, Yugoslavia and Serbia made constitutional changes under which the special autonomy enjoyed by the Autonomous Province of Kosovo under the 1974 constitution was revoked. That was the beginning of Milosevic's repressive policies in Kosovo which eventually led to the current crisis.

During 1998, violence spread with intensified attacks by ethnic Albanian rebels on Serbian military and police forces and a crackdown by these forces, "result[ing] in the deaths of over 1,500 Kosovar Albanians and forc[ing] 400,000 people from their homes."\(^6\) Consequently, the concern grew that the violence might spread into neighboring Macedonia and also draw Albania into the conflict, destabilizing the region. In May–June 1998, the North Atlantic Council
held meetings on the Kosovo crisis at foreign and defense ministerial levels and began considering a large number of possible military options.  

Earlier, the so-called “contact group,” composed of France, Germany, Italy, Russia, the United Kingdom, and the United States, had begun attempts to find a diplomatic solution to the conflict. In March 1998 the group proposed a comprehensive arms embargo on the Federal Republic of Yugoslavia, including Kosovo. Also in March 1998, the Organization for Security and Cooperation in Europe (OSCE) convened a special session of its Permanent Council to assess the deteriorating situation.

After considering the reports of the contact group and the OSCE, the UN Security Council, acting under Chapter VII of the Charter, resolved on March 31 to impose an arms embargo on the Federal Republic of Yugoslavia, including Kosovo. The Council also expressed “its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration,” and accepted the contact group’s proposal that the Kosovo problem should be solved on the principle of the territorial integrity of Yugoslavia.

Furthermore, the Council 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 or any other group or individual and all external support for terrorist activity in Kosovo, including finance, arms and training,” and threatened additional measures in case of the “failure to make constructive progress towards the peaceful resolution of the situation in Kosovo.” Yugoslavia, however, was insistent that under the UN Charter the Kosovo situation was a matter solely within its domestic jurisdiction.

Subsequently, on September 23, 1998, the Security Council, again acting under Chapter VII, adopted another resolution in light of the deteriorating humanitarian situation. It called upon the parties to cease hostilities and “enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo.” It demanded that Yugoslavia “enable effective and continuous international monitoring in Kosovo by the European Community Monitoring Mission and diplomatic missions accredited to the [State]” and facilitate “the safe return of refugees and displaced persons to their homes and allow free and unimpeded access for humanitarian organizations and supplies to Kosovo.”

On October 13, the NATO Council authorized Activation Orders for air strikes to be undertaken by NATO military forces within 96 hours as part of a
phased air campaign in Yugoslavia unless the parties agreed to implement the terms of Security Council Resolution 1199 of September 23. However, within the next three days successful diplomatic efforts resulted in Yugoslavia's agreement with the OSCE for the establishment of a verification mission in Kosovo and another agreement between Yugoslavia and NATO providing for the establishment of an air verification mission over Kosovo to complement the OSCE verification mission. The United States also succeeded in diplomatic negotiations under which Yugoslavia agreed on a framework for a political settlement of the conflict.

Because of these developments and visits to Belgrade by NATO Secretary General Javier Solana, U.S. envoys Richard Holbrooke and Christopher Hill, and NATO Generals Claus Naumann and Wesley Clark, NATO called off the air strikes. Yugoslavia also agreed on limits on the number of Serbian forces in Kosovo and on the scope of their operations.

Acting again under Chapter VII, on October 24 the Security Council adopted another resolution reiterating the terms of the two earlier resolutions, endorsing and supporting the verification agreements signed between Yugoslavia and the OSCE and NATO, respectively, and demanding, *inter alia*, that both the government of Yugoslavia and the Kosovo Albanians “comply fully and swiftly” with the terms of those resolutions and “cooperate fully” with the OSCE and NATO verification missions. A special NATO military task force was established to assist with emergency evacuation of Kosovo forces if they were put at risk by renewed conflict; it was situated in Macedonia.

Subsequently, on November 12, the Secretary General reported to the Security Council that the October agreements had “contributed towards defusing the immediate crisis situation in Kosovo and [had] created more favourable conditions for a political settlement.” In his report, the Secretary General addressed the military, security, humanitarian and human rights situation in Kosovo, and envisaged that the UN’s role in Kosovo, “will focus on humanitarian and human rights issues.”

Also through the Secretary General, the OSCE reported that its verification mission would be composed of up to 2,000 unarmed verifiers and among the mission's tasks would be “to supervise elections in Kosovo in order to ensure their openness and fairness.” Similarly, the Secretary General of NATO noted in his October 27 letter to the UN Secretary General that the North Atlantic Council had decided to maintain the activation order for the limited air response on the understanding that execution would be subject to a further Council decision and
assessment that the Federal Republic of Yugoslavia was not in substantial 
compliance with Security Council Resolution 1199 (1998) . . . [and had] also 
decided to continue the present air activities as part of the phased air campaign.31

The relatively optimistic picture presented by the UN Secretary General, 
however, did not live up to its promise. As a result of mutual provocations and 
increasingly excessive force being used by the Serbian military and Special Po-
lice against the Kosovar Albanians at the beginning of 1999, the situation was 
worsening. Hence, the contact group met on January 29 and agreed that the 
parties must come together for negotiations under international mediation.32 
The urgency of the mandate was underlined by NATO's commitment to strike if 
required.33 The result was the first round of negotiations in Rambouillet, outside 
Paris, from February 6 to 23, and a second round in Paris from March 15 to 18. 

Under the proposed Rambouillet Accords,34 the basic principles of the 
framework were the maintenance of territorial integrity of the Federal Republic 
of Yugoslavia and political autonomy for Kosovo.35 However, the term which 
Yugoslav President Milosevic was unwilling to accept was the implementation 
plan contemplating the establishment of a multinational military implementa-
tion force with NATO at its core.36 Another major difficulty was the provision 
that after three years the mechanism for a final settlement for Kosovo would be 
determined by the convening of an international meeting primarily “on the ba-
sis of the will of the people”37 of Kosovo. This meant that ethnic Albanians, 
constituting a 90 percent majority, would hold the key to Kosovo’s future sta-
tus. Ultimately, the Kosovar Albanian delegation signed the proposed peace 
agreement but the Serbs did not.38

The Serbian offensive against the ethnic Albanian Kosovars was immedi-
ately intensified with the Serbs defying their October agreement by moving 
greater force into Kosovo. On March 20, its effectiveness having been blocked 
by the Serbs, the OSCE verification mission withdrew, a last minute effort by 
U.S. envoy Richard Holbrooke to persuade Milosevic to sign the accords failed, 
and on March 23 NATO’s air campaign—“Operation Allied Force”—was 
launched.39

Air Strikes Continue for Eleven Weeks. NATO Secretary General Javier 
Solana stated the reason for ordering the strikes:

All efforts to achieve a negotiated political solution to the Kosovo crisis have 
failed and no alternative is open but to take action. We are taking action 
following the Federal Republic of Yugoslavia government’s refusal of interna-
tional community demands: the acceptance of the interim political settlement, which
has been negotiated at Rambouillet; full observance of limits on the Serb Army and the special police forces, agreed on 25 October; an end to the excessive and disproportionate use of force in Kosovo.\(^\text{40}\)

In Solana’s words, the objective of the air strikes was “to prevent more human suffering, more repression, more violence against the civilian population of Kosovo . . . [and] to prevent instability spreading in the region.”\(^\text{41}\)

NATO bombed Yugoslavia for eleven weeks. From the beginning, the attacks consisted of missiles and smart bombs. Satellite-guided cruise missiles were launched from ships and B-52s to knock out Yugoslavia’s air defense systems, and smart bombs were dropped from aircraft, including F-15s, F-16s and the B-2 Stealth bomber.\(^\text{42}\)

As the strikes began, President Bill Clinton justified the action in the following terms:

Today we and our 18 NATO allies agreed to do what we said we would do, what we must do to restore the peace. Our mission is clear: to demonstrate the seriousness of NATO’s purpose so that the Serbian leaders understand the imperative of reversing course; to deter an even bloodier offensive against innocent civilians in Kosovo; and, if necessary, to seriously damage the Serbian military’s capacity to harm the people of Kosovo. In short, if President Milosevic will not make peace, we will limit his ability to make war.\(^\text{43}\)

UN Secretary General Kofi Annan was concerned that NATO had acted without Security Council authorization. However, he blamed Yugoslavia’s intransigence in repeatedly rejecting a diplomatic resolution of the conflict for the air strikes. In his words,

I deeply regret that, in spite of all the efforts made by the international community, the Yugoslav authorities have persisted in their rejection of a political settlement, which would have halted the bloodshed in Kosovo and secured an equitable peace for the population there. It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace.\(^\text{44}\)

Three weeks into the air campaign, on April 13, General Clark summed up the campaign’s intent: “attack, disrupt, degrade, deter further Serb actions and keep it going and further degrade Serb military potential. . . .”\(^\text{45}\) He elaborated:

We are operating on what I would call two axes of attack, or two lines of operations: we are going after the forces inside Kosovo and around Kosovo to

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destroy these forces, to isolate them, to interdict them and to prevent a
continuation of their campaign or its intensification; and at the same time we are
going after an array of more strategic target sets that have to do with forces that
are possible to be used to reinforce bases of supply, the integrated air defense
system which protects the entire array of targets around the country, and also
higher level command and control, petroleum and many other factors here that
feed this military and security juggernaut that was assembled.46

In order to prevent hurting innocent civilians, causing so-called "collateral
damage," Clark added, "this campaign has the highest proportion of precision
weaponry that has ever been used in any air operation anywhere. We are going
after militarily significant targets and we are . . . taking all possible measures to
avoid civilian damage."47

Civilian casualties continued to occur, however, because of errors as these
smart bombs would miss their targets.48 To illustrate, General Clark went on to
explain how, because of bad weather, a NATO pilot engaged in mounting a re-
motely directed attack on a bridge struck a passing train, killing many pas-
engers.49

Calling the human cost of the war in Kosovo “unacceptably high,” UN Sec-
retary General Kofi Annan issued a press statement on April 28 on the “deteri-
orating humanitarian situation” in Yugoslavia.50 He said,

The civilian death toll is rising, as is the number of displaced. There is increasing
devastation to the country’s infrastructure, and huge damage to [Yugoslavia’s]
economy. For example, Mr. Sommaruga [the President of the International
Committee of the Red Cross who recently visited there] told me that the
destruction of the three bridges in Novi Sad also cut off the fresh water supply to
half of that city’s population of 90,000 people.51

According to an independent Serb study reported in the Sunday Times (Lon-
don) after the bombing had been halted, the air campaign had resulted in se-
vere damage to the Yugoslav economy—an estimated loss of $29 billion.52
This figure included $4.1 billion to the country’s infrastructure, $2.77 billion in
damage to factories, oil refineries, and other industrial facilities, $270 million to
power plants, $355 million to the transportation system, and $2.3 billion in
“the human toll caused by deaths, injuries and unemployment.”53 The bulk of
the cost, $23.2 billion, is the estimated loss to Yugoslavia’s gross domestic pro-
duct over the next decade.54

The cost of the war according to NATO, the United Nations, and other
sources, as reported by the Associated Press at the end of the conflict, was:
35,219 sorties flown, resulting in the destruction of many targets, including 102 aircraft, over 400 artillery pieces, over 200 armored personnel carriers, over 100 tanks and 283 other military vehicles, and 16 command posts. Estimates of civilian casualties ranged from 2,000 to 5,000, and the number of refugees was 855,000, according to the UN High Commissioner for Refugees, while several hundred thousand were displaced.

Later reports, based on investigations of the physical evidence of the results of the bombing, showed that NATO's damage estimates to the Yugoslav army were exaggerated, for the pilots had hit several clever decoys—dummy and deception targets. A UN team, the Inter-Agency Needs Assessment Mission, sent in May to Yugoslavia by Secretary General Kofi Annan, reported to the Security Council on June 9 that the air strikes had a "devastating impact" on the environment, industry, employment, essential service and agriculture. The mission team reported:

Damage to oil refineries, fuel dumps and chemical and fertilizer factories, as well as the toxic smoke from huge fires and the leakage of harmful chemicals into the soil and the water table have contributed to as yet unassessed environmental pollution in some urban areas, which may in turn have a negative impact on health and ecological systems.

According to subsequent reports, however, the earlier estimates of the massive pollution caused by the military campaign may have been overstated. Also, a World Bank team assessing reconstruction needs in Kosovo reported, on July 13, "significantly less damage to homes, power plants and roads than thought"—at the lower end of the estimates that have ranged from $3 billion to $5 billion over a three year period.

The Kosovo Peace Accords. The failure of the Rambouillet Conference, and thus of diplomacy, led to NATO's bombing in Yugoslavia, and despite an intensified bombing campaign, the war dragged on. Efforts at finding a political solution, however, continued. On May 6, the foreign ministers of the Group of Eight, at their meeting in Bonn, Germany, agreed on a set of principles to move toward a resolution of the Kosovo crisis. These principles included an immediate and verifiable end to the violence and repression in Kosovo; withdrawal from Kosovo of military police, police, and paramilitary forces; effective international civil and security presences to be deployed in Kosovo as endorsed and adopted by the United Nations; establishment of an interim administration for Kosovo to be decided by the UN.
Security Council; the safe and free return of all refugees and displaced persons and unimpeded access by humanitarian aid organizations to Kosovo; a political process toward the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo based on the principles of sovereignty and territorial integrity of Yugoslavia, and the demilitarization of the Kosovo Liberation Army; and a comprehensive approach to the economic development and stabilization of the region. Left vague were terms covering the composition and the command of the peacekeeping force envisaged by the Group of Eight.

Eventually, after protracted diplomatic negotiations, led primarily by Russian envoy and former Prime Minister, Victor Chernomyrdin (who traveled to Belgrade five times to talk with Milosevic) and NATO envoy President Martti Ahtisaari of Finland, with the assistance of U.S. Deputy Secretary of State Strobe Talbott, a deal was struck between President Milosevic and NATO to end the bombing. The Yugoslav Parliament accepted the peace document.

The prior principles announced by the Group of Eight formed the core of the international proposal to end the Kosovo conflict, which was accepted by Milosevic on June 3. The major difference from the prior set of principles was that now the international security presence to be deployed was to be “with substantial NATO participation ... under unified command and control.” A military-technical agreement was to be “rapidly concluded that would, among other things, specify additional modalities including the roles and function of Yugoslav/Serb personnel in Kosovo.” Subsequently, after the foreign ministers of the Group of Eight agreed on a draft Security Council resolution to end the conflict, the Security Council resolved that the political solution to the Kosovo crisis would be based on the General Principles earlier adopted by the Group of Eight foreign ministers.

**NATO’s Bypassing the United Nations and the UN Role after the Bombing is Halted**

The reason that the United States and NATO bypassed the United Nations by not seeking authorization from the UN Security Council to use force was obviously their fear and the near certainty that Russia and China would use their veto power in the Council to block the action; both these permanent members of the Security Council had strongly opposed the use of air strikes against Yugoslavia.

As NATO’s strikes began, the Security Council held an urgent meeting. Calling the strikes a blatant violation of the United Nations Charter, some
States condemned them as a unilateral use of force, while others justified them on the ground that the action would prevent a humanitarian catastrophe in Kosovo likely to result from Serbian attacks on Kosovar Albanians.\textsuperscript{71} The Russian representative said that the Security Council “alone should decide the means to maintain or restore international security,” and that NATO’s action would set a dangerous precedent.\textsuperscript{72} He further warned that “the virus of a unilateral approach could spread,” and that those who had initiated the military venture “bore complete responsibility for its consequences.”\textsuperscript{73}

China’s representative said that the NATO action “amounted to a blatant violation of the United Nations Charter as well as the accepted norms in international law,” and that the Chinese government strongly opposed the NATO action.\textsuperscript{74} He added that the Kosovo question should be solved by the people in Kosovo, as it was an internal matter of the Federal Republic of Yugoslavia, that China “was opposed to the use of or the threat of use of force in international affairs, or power politics of the ‘strong bullying the weak,’ ” and that only the Security Council could take such action, for it alone shouldered the primary responsibility for maintaining peace and security.\textsuperscript{75}

The NATO action was strongly supported by the representatives of the United States,\textsuperscript{76} United Kingdom,\textsuperscript{77} and Canada,\textsuperscript{78} among others. On March 26, the Security Council rejected a demand for the immediate cessation of the use of force against Yugoslavia and the urgent resumption of negotiations, as proposed in a draft resolution submitted by Belarus, Russian Federation, and India. Only three countries—China, Namibia, and Russia—voted in favor, while twelve voted against, with no abstentions.\textsuperscript{79}

Subsequently, on May 14, 1999, the Security Council adopted a resolution inviting the United Nations High Commissioner for Refugees (UNHCR) and other international humanitarian relief organizations to extend relief assistance to the internally displaced persons in all parts of Yugoslavia, as well as to other civilians being affected by the continuing crisis.\textsuperscript{80} The Council also emphasized that the humanitarian situation would “continue to deteriorate in the absence of a political solution to the crisis consistent with the principles” adopted by the Foreign Ministers of the Group of Eight on May 6, and urged all concerned to work towards that aim.\textsuperscript{81}

The vote to adopt the resolution was 13 in favor, with China and Russia abstaining. In explaining his country’s abstention, the Chinese representative expressed his concern that the U.S.-led NATO had launched military attacks without the Security Council’s authorization and, by bypassing the United Nations, had created “the largest humanitarian disaster since the Second World War.”\textsuperscript{82} He also said that
NATO had brazenly attacked the Chinese Embassy in Belgrade with five missiles. Three people in the Embassy had been killed and more than 20 injured. The Embassy building had been severely damaged. Such a criminal act was a flagrant encroachment on China's sovereignty and a serious violation of international law and the norms governing international relations. As a victim, China had every reason, on both moral and legal grounds, to demand that NATO stop bombing the Federal Republic of Yugoslavia immediately and unconditionally.83

In explaining why his country could not support the text of the resolution, the Russian representative said that "Russia had repeatedly warned against the dire consequences created by NATO's illegal military actions. It was continued bombing that could lead to an escalation of the humanitarian tragedy—a fact that was not reflected in the resolution. Narrow national interests had prevailed over Charter obligations in the case of some Member States."84

Earlier, on May 8, the Security Council had met at the request of the government of China, after the Chinese Embassy in Belgrade was accidentally bombed by NATO the preceding day.85 The Chinese representative read a statement from his government that said:

Flagrant bombing by NATO, led by the United States, had already caused enormous casualties and now it had gone so far as to bomb the Chinese Embassy. That was a violation of the sovereignty of China, and of the basic norms of international relations. China expressed the utmost indignation and severe condemnation of this barbaric activity. It made the strongest protest. NATO, headed by the United States, must assume the responsibility. China reserved the right to take further measures.86

He added: "The frenzied bombardment by NATO, led by the United States, of Yugoslavia over the last 45 days had resulted in civilian casualties. It had now violated a mission. This was shocking. NATO should stop the air strikes immediately and unconditionally."87 He was joined by the representative of Russia expressing outrage "over the barbaric action," and calling for an immediate halt to the strikes.88 The United States representative expressed his government's regrets and offered condolences to the Chinese Ambassador,89 and was joined by several other representatives expressing their sympathy to China and condolences to families of victims.90

Finally, after lengthy negotiations, the UN Security Council adopted a resolution on June 10, 1999,91 under which the United Nations was called upon to provide "international civil and security presences" in Kosovo.92 The Council decided that the General Principles adopted by the G-8 Foreign Ministers on
May 6, as further elaborated in the international proposal accepted by Milosevic and the Yugoslav Parliament on June 3, would form the basis of a political solution to the Kosovo crisis.93

The Council demanded a "complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized."94 It also requested the Secretary General to appoint "a Special Representative to control the implementation of the international civil presence," and for the Special Representative to "coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner."95

The Council enumerated the responsibilities of the international security presence which would include demilitarization of the Kosovo Liberation Army and establishment of a secure environment in Kosovo, "in which refugees and displaced persons [could] return home in safety, the international civil presence [could] operate, a transitional administration [could] be established, and humanitarian aid [could] be delivered."96

The Council authorized the Secretary General
to establish an international civil presence in Kosovo in order to provide an interim administration [there] under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia and which [would] provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.97

This, indeed, was a tall order, and the Council detailed the main responsibilities of the international civil presence. These would include the promotion of the establishment of substantial autonomy and self-government in Kosovo, performance of the basic civilian administrative functions for as long as required, the organization and overseeing of the development of provisional institutions for democratic and autonomous self-government and facilitation of a political process designed to determine Kosovo’s future status. Also included were the support of the reconstruction of key infrastructure and other economic reconstruction, protection and promotion of human rights, and maintenance of civil law and order, including establishing police forces.98

After a slow start, the functions contemplated in the Council resolution are being performed by the various actors. For example, the civilian and security presences are in place, refugees have returned, and, although belatedly, the KLA demilitarization is finally taking place.99 However, the dreams of establishing
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democratic institutions in Kosovo and building a multiethnic, multicultural society there are far from realization.

Yugoslavia's Request to the International Court of Justice for Provisional Measures

On April 29, 1999, Yugoslavia instituted proceedings before the International Court of Justice against Belgium “for violation of the obligation not to use force.”100 Similar claims were brought against nine other main NATO countries: Canada,101 France,102 Germany,103 Italy,104 the Netherlands,105 Portugal,106 Spain,107 the United Kingdom,108 and the United States.109 Yugoslavia based its claim on the UN Charter and several international legal conventions, including the 1949 Geneva Convention and 1977 Additional Protocol I, and the Genocide Convention.110 It requested the Court to indicate the following provisional measure: “The Kingdom of Belgium shall cease immediately its acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia.”111

After holding public hearings between May 10 and 12, 1999, at which the parties made oral presentations,112 the Court issued an Opinion on June 2 in which it reflected, in its preambular paragraphs, on the use of force in Kosovo:

... Whereas the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia;

... Whereas the Court is profoundly concerned with the use of force in Yugoslavia; whereas under the present circumstances such use raises very serious issues of international law;

... Whereas the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court; [and]

... Whereas the Court deems it necessary to emphasize that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law....113

The Court indicated that, while it does not have to “finally satisfy itself that it has jurisdiction on the merits of the case,” it must ensure that “the provisions invoked by the applicant appear, prima facie, to afford a basis on which the
jurisdiction of the Court might be established." The Court noted that Yugoslavia's Declaration recognizing the compulsory jurisdiction of the Court "in all disputes arising or which may arise" after the signing date, was deposited with the Secretary General on April 26. Yugoslavia's contention was that, under its Declaration, the Court should consider all disputes effectively arising after April 25. Specifically, it referred to bombing attacks that NATO had waged on April 28, May 1, May 7, and May 8.

The Court, however, determined that, since the bombings in question had begun on March 24 and had continued beyond April 25, the legal dispute between Yugoslavia and NATO member States arose "well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole." It added, "The fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose," and that "each individual air attack could not have given rise to a separate subsequent dispute. . . . [and] at this stage of the proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium." Thus, the Court concluded that it could not base its jurisdiction upon Yugoslavia's Declaration and, by a vote of 12 to 4, rejected Yugoslavia's request for the indication of provisional measures.

Also, the Court did not consider the provisions of the Genocide Convention to be applicable since, under the Convention's definition of genocide at Article II, the essential characteristic of the crime is the intended destruction of a national, ethnic, racial, or religious group, and, in the Court's opinion, NATO bombings did not entail the element of intent towards a group as such.

With minor variations, the Court also rejected Yugoslavia's claims against other NATO members. The determination was made on technical grounds in some cases, such as that the United States had made reservations to Article IX of the Genocide Convention, under which any dispute pertaining to the Convention could be brought before the Court, and declarations of Spain and the United Kingdom, under which no State accepting the ICJ's compulsory jurisdiction could institute proceedings within twelve months after the filing of the Declaration.

Although the Court did not indicate any provisional measures requested by Yugoslavia, it did state that its findings "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves." The Court also asked the parties to "take care not to aggravate or
extend the dispute,” for it had not passed judgment on the question of “the compatibility of particular acts with international law,” a question that could be reached only when the Court addressed the merits after having established its jurisdiction and heard legal arguments by all parties. The Court added that, whether States accept or reject its jurisdiction, “they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law,” and that “any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which . . . is left to the parties.”

Thus, although the Court refused to pass judgment on the legality of NATO’s offensive in the absence of an authorizing UN Security Council resolution, it unequivocally expressed its concern about the use of force and the human suffering and loss of life in Kosovo.

Analysis

NATO’s Flawed Operation. NATO’s operation was flawed from the outset. Costly miscalculations had led the alliance to begin air strikes. The assumption that NATO’s threat of bombing would force Milosevic to back down, and that, in any event, he would not be able to withstand more than two to four days of air strikes, was subsequently proven false. After the failure of Rambouillet, NATO perceived its credibility to be at stake, especially as its fiftieth anniversary was so close at hand. And as the war dragged on, NATO intensified its attacks, severely damaging Serbia’s infrastructure, ruining its economy, and causing numerous civilian casualties.

Also from the outset, the United States and NATO had sent a clear signal to Milosevic that they would not use ground forces. Without the use of ground forces against Serbia, Milosevic appropriately reasoned that he could withstand NATO’s attacks. Given the importance of Kosovo to the Serbs, it was foolhardy for NATO to assume that Milosevic would quit Kosovo without much resistance, as he had earlier done in Krajina when the Croats cleansed the area of Serbs, apparently with western complicity.

To go back to the Rambouillet Conference, it was again flawed thinking on the part of NATO that Milosevic could accept the take-it-or-leave-it proposition, an integral part of Rambouillet, that the agreement on Kosovo’s constitution was simply an interim measure, allowing the final status to be determined in three years when the people of Kosovo would finally decide their future. It was easy for any observer to understand what the provision meant—indeed for Kosovo in three years, which Milosevic could not accept. Similarly, for
Rambouillet to impose an international force, more or less as an occupying force in Yugoslavia, to keep the peace in Kosovo was surely unacceptable to the Serbs.

And finally, the NATO operation miserably failed to accomplish its twin missions—one, to protect Kosovar Albanians from the excessive use of force by Serbs, and two, to prevent destabilization of the Balkan region. Instead, Milosevic intensified the ethnic cleansing being waged against the Kosovars. The outcome was that villages were burned, homes destroyed, and thousands of Kosovar Albanians murdered. Over 800,000 ethnic Albanians fled Kosovo into Albania, Macedonia, Montenegro, and abroad, and hundreds of thousands were displaced within Kosovo. And the region was troubled—Macedonia and Albania bursting with refugees and other neighboring countries feeling the economic pain caused by the devastation of Yugoslavia. Thus, political and economic stability was a further casualty of the operation.

**NATO's Actions in Kosovo Required UN Authorization.** Article 2, paragraph 4 of the UN Charter explicitly prohibits the use of force in international relations. The only exceptions are: action taken by the Security Council under Chapter VII, regional actions under Chapter VIII, and unilateral or collective self-defense measures under Article 51. A regional body may legitimately use force only pursuant to prior authorization by the Security Council. Even if NATO, a regional security organization, could have justified its offensive on moral grounds, that is, in response to the gross violation of Kosovar Albanians' human rights, it did not seek prior authorization because of the certainty of the Russian and Chinese vetoes, for these two permanent members of the Council had openly opposed NATO bombings of Yugoslavia.

The bypassing of the United Nations has not set a healthy precedent. As Secretary General Kofi Annan, in his address to the General Assembly on September 20, 1999, said, "While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community."

Annan presented the dilemma faced by the international community in the Kosovo situation, that is, its inability to reconcile the question of legitimacy of intervention by a regional organization without the Council's authorization on the one hand, and the effective halting of gross and systematic violations of human rights—a universally accepted imperative—on the other. This, he said,
can only be viewed as a tragedy and is likely to present a “core challenge” to the Security Council in the next century: how to forge unity behind the principle that massive, systematic violations of human rights should not be allowed to happen anywhere.136

The Secretary General provocatively asked those who hailed the NATO military action in Kosovo as the heralding of a new era when States and groups of States can take military action without prior Council authorization, that is, “outside the established mechanisms for enforcing international law”: “Is there not a danger of such interventions undermining the imperfect, yet resilient security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?”137

In his address to the General Assembly the day following the Secretary General’s, President Clinton defended NATO’s action in Kosovo, saying it “had followed a clear consensus expressed in several Security Council resolutions: that the atrocities committed by Serb forces were unacceptable, that the international community had a compelling interest in seeing them end.”138 He said that had NATO chosen to do nothing in the face of this brutality in Kosovo, it would not have strengthened the United Nations, but instead, “we would have risked discrediting everything the United Nations stands for.”139 He added:

By acting as we did, we helped to vindicate the principles and purposes of the UN Charter, to give the UN the opportunity it now has to play the central role in shaping Kosovo’s future. In the real world, principles often collide and tough choices must be made. The outcome in Kosovo is hopeful.140

The norms stated in Article 39 of the UN Charter authorizing the use of force only when the Security Council determines that there has been a threat to or breach of the peace or act of aggression141 were fashioned at the end of the Second World War and in the era of interstate conflicts. Since most contemporary conflicts leading to violence are likely to be intrastate and not interstate, have these norms become too restrictive and hence outdated? Professor Michael Glennon has recently suggested that the old UN rules on peacekeeping and peacemaking, premised on Article 2, paragraph 7’s prohibition against intervention in “domestic” matters, are dead and that their death “should not be mourned.”142 Although he decries ad hoc approaches, he says that in Kosovo, justice and the UN Charter seemed to collide, and that new international rules are emerging.
Is it a collision of principles that we are witnessing, and are the UN norms being replaced with newly emerging norms to meet the needs of the time? Principles do often collide, and, as Professor Glennon reflects, the imperative to halt gross violations of human rights and the doctrines of sovereign equality and non-interference in internal affairs are seemingly irreconcilable. But that does not mean that the existing Charter norms are unworkable and are being replaced by new norms.

As I have earlier argued, by interpreting Article 2(4) broadly and giving due consideration to the human rights provisions in the Charter and to the impressive array of human rights norms developed in the last half-century, one can make a strong case that the UN Charter does leave room for armed humanitarian intervention. Thus, my contention has been that when the UN is unwilling or unable to act, as happened in Rwanda, a regional organization or even a group of States could have validly intervened to halt the tragedy of genocide that occurred there. This contention, however, does not signify the demise of the “antiquated” rules of the United Nations Charter, nor the emergence of new rules. Nor does it endorse unconstrained regional action on the model of NATO’s bombings in Yugoslavia.

It should, however, be noted that at the end of the bombing campaign, NATO did appropriately turn to the United Nations, and, as mentioned earlier, Security Council Resolution 1244 explicitly stated that the deployment of international civil and security presences in Kosovo is to be under UN auspices. To reiterate President Clinton’s words, NATO acted “to give the UN the opportunity it now has to play the central role in shaping Kosovo’s future.”

In his General Assembly address, Secretary General Annan reminded the Assembly of the Preamble of the UN Charter, which states that “armed force shall not be used, save in the common interest.” He emphasized that under the Charter the Security Council is required to be the defender of the “common interest,” and that UN member States should find a way to find common ground in upholding the Charter principles and acting in defense of that common interest. He said that the choice must not be between Council unity and inaction in the face of genocide, as happened in Rwanda, and Council division and regional action, as happened in Kosovo.

It is indeed lamentable that the Security Council could not find a way through preventive diplomacy or preventive action, such as sending several thousand more OSCE monitors into Kosovo, to avert the NATO military action. The Rambouillet Accord, as a special example, was so greatly tilted
against the Serbs that they could not have been expected to accept its terms, and there was no opportunity accorded to them for revision of the document.

It would have been preferable for the UN to have undertaken armed intervention when it became necessary in Kosovo. However, as NATO began the air campaign, its action was ill-conceived and poorly planned. On legal grounds, though, it still did not meet the criteria outlined earlier for unilateral or regional humanitarian intervention actions. These criteria, as applicable here, are necessity, proportionality, and maximization of the best outcome.

One can argue that the necessity criterion was met. As to the other factors, there remains a valid question whether the intense bombing of Serbia, especially that of the infrastructure and civilian targets, was proportional; it was perhaps excessive. The most questionable aspect, however, is that the probable humanitarian impact of the air campaign was never adequately considered. To reiterate, the use of ground forces was rejected at the outset; Milosevic’s determination was grossly underestimated; and the likely intensification of ethnic cleansing by the Serbs after the air strikes would begin was practically ignored. And with the ethnic cleansing having also occurred in reverse after the end of the bombing and the withdrawal of Serb forces from Kosovo, as most Serbs have left Kosovo under pressure from the Kosovars, the outcome has not been the establishment of a multiethnic society in Kosovo, an express objective of the campaign. Under any objective criteria, the NATO action is hard to justify.

Notes

2. Id., art. 5.
3. U.N. CHARTER arts. 2(4), 24, 103; chs. VII, VIII.
5. For a historical perspective, see generally JULIE A. MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR (1999); GREG CAMPBELL, THE ROAD TO KOSOVO: A BALKAN DIARY (1999); DAVID FROMKIN, KOSOVO CROSSING: AMERICAN IDEALS MEET REALITY ON THE BALKAN BATTLEFIELDS (1999).
6. NATO’s Role in Relation to the Conflict in Kosovo at 2, <http://www.nato.int/kosovo/history.htm> (updated 15 July 1999) [hereinafter NATO’s Role].
7. See id.
11. Id., para. 5.
12. Id., Preamble.
13. Id., para. 19.
16. Id., para. 3.
17. Id., para. 4(b).
18. Id., para. 4(c).
19. NATO's Role, supra note 6.
24. See id.
25. Id., at 3.
27. Id., paras. 3,4.
29. Id., para. 45.
31. Id., annex II.
32. See NATO's Role, supra note 6, at 3.
33. Id.
35. Id., Framework and ch. 1, Constitution.
36. Id., ch. 7.
37. Id., ch. 8, art. 1(3).
38. See NATO's Role, supra note 6, at 3.
41. Id.
43. N.Y. TIMES, March 25, 1999, at A15, col. 2. In the President's words: "We act to prevent a wider war." Id.
46. Id.
47. Id. at 5.
48. See Steven Lee Myers, NATO Raid Hits China Embassy; Beijing Cries “Barbarian Act”; Allies Admit Striking Hospital, N.Y. TIMES, May 7, 1999, at A1, col. 6 (includes a chart entitled “As War Continues, Errors Mount,” showing that, from March 24 until May 7 when NATO accidentally hit the Chinese Embassy, eight errors had occurred, targeting residential areas, a bus, a train, a hospital, and refugees).
49. Id.
51. Id.
52. Eve-Ann Prentice, Cost of NATO Damage Estimated at $29 Billion, LONDON SUNDAY TIMES, Overseas News Section, July 23, 1999. The article describes the Serbian group conducting the study as being seen by many western diplomats in Belgrade to be a “reliable source of economic information.” Id.
53. Id.
54. Id.
56. Id. at 1-2.
57. See, e.g., Steven Lee Myers, The Toll—Damage to Serb Military Less than Expected, N.Y. TIMES, June 28, 1999, at A1, col. 2; Richard J. Newman, The Bombs That Failed in Kosovo, U.S. NEWS & WORLD REPORT, Sept. 20, 1999, at 28 (noting that, while NATO reported that Allied pilots had hit 110 tanks, 210 armored personnel carriers, and 449 towed artillery mortars, NATO teams subsequently found only 26 tanks, 12 armored personnel carriers, and 8 pieces of artillery mortars destroyed in Kosovo).
59. Id. at 2.
60. See Fred Pearce, Atrocity Stories, NEW SCIENTIST, Sept. 11, 1999, at 46.
62. See Ved Nanda, It’s Time for a Diplomatic Solution, DENVER POST, May 6, 1999, at B7 (calling for an end to the bombing in favor of a diplomatic solution).
64. Id.
65. For an insightful account of the long process, see Blaine Harden, Crisis in the Balkans: Doing the Deal—A Special Report; A Long Struggle That Led Serb Leader to Back Down, N.Y. TIMES, June 6, 1999, sec. 1, at 1, col. 4.
67. For the text of the proposal, see Kosovo Peace Accord: 10 Steps to a Verifiable End of Violence, N.Y. TIMES, June 4, 1999, at A20, col. 2 [hereinafter Kosovo Peace Accord]. See also Steven Erlanger, Milosevic Yields on NATO’s Key Terms; 50,000 Allied Troops to Police Kosovo, N.Y. TIMES, June 4, 1999, at A1, col. 5; Tim Judah, What Do We Do With Serbia Now? id. at 29A, col. 2; Editorial, The Kosovo Peace Plan, id. at 28A, col. 1; Michael Wines, Reception in Moscow for
Legal Implications of NATO's Armed Intervention in Kosovo

Accord is Scalding, N.Y. TIMES, June 5, 1999, at A7, col. 6; Edmund L. Andrews, Russians and NATO Negotiating Pact Details, id. at A6, col. 1.

69. Id., principle 10.

72. Id.
73. Id.
74. Id. at 9.
75. Id. at 9–10.
76. Id. at 3–4.
77. Id. at 8–9.
78. Id. at 4.


The Security Council,
Recalling its primary responsibility under the United Nations Charter for the maintenance of international peace and security,
Deeply concerned that the North Atlantic Treaty Organization (NATO) used military force against the Federal Republic of Yugoslavia without the authorization by the Council,
Affirming that such unilateral use of force constitutes a flagrant violation of the United Nations Charter, in particular Articles 2(4), 24 and 53,
Recognizing that the ban by NATO of civil flights in the airspace of a number of countries in the region constitutes a flagrant violation of the principle of complete and exclusive sovereignty of every State over the airspace above its territory in accordance with article 1 of the Chicago Convention on International Civil Aviation,

Reaffirming its commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,
Determining that the use of force by NATO against the Federal Republic of Yugoslavia constitutes a threat to international peace and security,
Acting under Chapters VII and VIII of the Charter,
1. Demands an immediate cessation of the use of force against the Federal Republic of Yugoslavia and urgent resumption of negotiations;
2. Decides to remain actively seized of the matter.

81. Id., para. 5.
83. Id.
84. Id. at 6.
87. Id. at 3.
88. Id.
89. See id.
90. See id. at 3–8.
91. Supra note 4.
92. Id., para. 5.
93. Id., para. 1 & annexes 1, 2. See also supra notes 63, 64, 66, 67.
94. Id., para. 3.
95. Id., para. 6.
96. Id., para. 9.
97. Id., para. 10.
98. Id., para. 11.


102. ICJ, Legality of Use of Force (Yugoslavia v. France), reprinted at id. at 1059.
103. ICJ, Legality of Use of Force (Yugoslavia v. Germany), reprinted at id. at 1075.
104. ICJ, Legality of Use of Force (Yugoslavia v. Italy), reprinted at id. at 1088.
105. ICJ, Legality of Use of Force (Yugoslavia v. Netherlands), reprinted at id. at 1101.
106. ICJ, Legality of Use of Force (Yugoslavia v. Portugal), reprinted at id. at 1126.
107. ICJ, Legality of Use of Force (Yugoslavia v. Spain), reprinted at id. at 1149.
108. ICJ, Legality of Use of Force (Yugoslavia v. United Kingdom), reprinted at id. at 1167.
109. ICJ, Legality of Use of Force (Yugoslavia v. United States), reprinted at id. at 1188.
110. See id. at 951, para. 3.
111. Id. at 953, para. 7.
112. See id. at 954.
113. Id. at 955–956, paras. 16–19.
114. Id. at 956, para. 21.
115. ICJ Statute, art. 36, para. 2.
116. Yugoslavia v. Belgium, supra note 100, at 957, para. 28. See also id., paras. 24–27.
117. Id. at 957–958, para. 29.
118. Id. at 961–962, para. 51(1).
119. Id. at 958–960, paras. 34–41.
120. supra notes 101–109.
122. supra note 107, at 38 I.L.M. 1157, paras. 23–33.
125. id., paras. 47, 49.
126. id., para. 48.
127. For a report suggesting that President Clinton was too distracted by impeachment hearings to pay adequate attention to the Kosovo crisis, see Elaine Sciolino & Ethan Bronner, How a President, Distracted by Scandals, Entered Balkan War, N.Y. Times, April 18, 1999, sec. 1, at 1, col. 2.
129. Article 2, paragraph 4, enumerates as one of the Charter principles: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”
132. Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

133. Article 53(1) reads in part: “The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . .”
134. Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General in Address to General Assembly, U.N. Press Release GA/9595, Sept. 20, 1999, at 3 [hereinafter Secretary-General’s Address].
135. Id.
136. Id.
139. Id.
140. Id.
141. See notes 129–133 and accompanying text for other exceptions on the legitimate use of force.


144. See supra notes 91–98 and accompanying text.

145. Supra note 134.

146. Secretary General's Address, supra note 134, at 4.

147. Id.

148. Id.

149. See Ved Nanda, et al., supra note 143, at 827.