Is there a Legal Basis for the NATO Intervention in Kosovo?

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The atrocities committed by the Federal Republic of Yugoslavia against the civilian population in Kosovo are clearly contrary to international law. They constitute grave violations of human rights and amount to crimes against humanity. Attempts by the Yugoslav authorities to characterize the events there as internal affairs and to hide behind the concept of sovereignty lack legal foundation. These events are of deep concern to the international community.

Does it follow that a group of States or a military alliance has the right to use force in reaction to this Situation?

The prohibition of the use of force, as embodied in Article 2(4) of the Charter of the United Nations, is one of the cornerstones of contemporary international law. The Charter provides for certain limited exceptions. One is the right to self-defence provided for in Article 51 of the Charter. But the application of Article 51 requires an "armed attack . . . against a Member of the United Nations". Even the most generous interpretation of the right to collective self-defence cannot cover assistance to an ethnic minority that suffers repression at the hands of its government.

Another exception to Article 2(4) of the Charter is enforcement action by the Security Council under Chapter VII, specifically Article 42. Before taking enforcement action, the Security Council has to determine the existence of a threat to the peace, a breach of the peace or an act of aggression under Article 39 of the Charter. The Security Council has repeatedly characterized massive human rights violations or grave humanitarian situations as threats to the peace. With regard to Kosovo, the Security Council already stated in Resolution 1160 (1998) of 31 March 1998 that it was acting under Chapter VII of the Charter.

In Resolution 1199 (1998) of 23 September 1998 and in Resolution 1203 (1998) of 24 October 1998 it affirmed that the situation in Kosovo constitutes a threat to peace and security in the region. In this context, the Security Council imposed an embargo on military supplies in Resolution 1160 (1998) in accordance with Article 41 of the Charter. But it has not taken or authorized military enforcement action.

A determination under Article 39 that the conditions for enforcement action exist does not authorize member States to use force to implement the Security Council's decision. The Council must take a separate decision under Article 42.

The veto of one or several Permanent Members of the Security Council in a situation of this kind may well be in violation of article 55(c) of the Charter which enjoins the United Nations to promote "universal respect for, and observance of, human rights". But the casting of a veto or the mere prospect of a veto in the Security Council does not free other member States to do individually or collectively what only the Security Council can do.

In 1950, the General Assembly of the United Nations, in response to the prospect of continuing paralysis of the Security Council, adopted the so-called Uniting for Peace Resolution, 377(V). It foresees recommendations for collective measures, including the use of armed force when necessary, if the Security Council fails to exercise its primary responsibility for the maintenance of international peace and security. No such recommendation was passed by the General Assembly in the present case. It is doubtful whether an attempt to do so would have attracted the necessary majority. The Security Council, by emphasizing at the end of

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Resolutions 1160, 1199 and 1203 (1998) that it remained seised of the matter, indicated that, at least from a formal perspective, it was exercising its primary responsibility.

Security Council Resolution 1203 (1998) contains another, more unusual reference to the Security Council's powers. It reaffirms that "under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council". At the time (October 1998), NATO military intervention was already a much debated topic. Since action by the General Assembly was not a realistic prospect, it appears that this was an attempt to remind NATO of the Security Council's prerogative. Under Article 53(1) of the United Nations Charter, enforcement action by regional arrangements or regional agencies is not permissible without the authorization of the Security Council. NATO does not see itself as a regional arrangement or agency under Chapter VIII of the Charter. But this fact does not free it from the Charter's restraints.

The Security Council has been flexible about endorsing measures involving the use of force by a regional organization in the past. In 1990, a multinational military force set up by the West African regional organization ECOWAS was sent into Liberia to help end the civil war there, without prior authorization by the Security Council. On 19 November 1992, the Security Council adopted Resolution 788 (1992) in which it commended and supported the action by ECOWAS. But it is difficult to draw far-reaching conclusions from this case. It can hardly be read as doing away with the need for Security Council authorization under Article 53(1).

Humanitarian intervention is sometimes invoked as a justification for military action that is normally prohibited by international law. But this is a highly dubious legal argument. It does not command sufficient authority to qualify as a rule of customary international law. It is contested even if nationals of the intervening State are in peril. Its power to justify armed intervention on behalf of nationals of the oppressing State is even weaker.

There may well be situations where positive law is morally unsuitable to deal which a situation of extreme urgency and gravity, where the observance of the procedures prescribed by law lead to evident injustice and humanitarian hardship. No reasonable human being would passively witness genocide in order to await the vote of a body that may or may not provide the legal basis for doing what everybody perceives as right and necessary. Can the bombardment of Yugoslavia by NATO, which started on 24 March 1999, be justified as an extralegal but morally just humanitarian intervention? The purpose of such an intervention can only be to take the Steps absolutely necessary to stop the immediate atrocities. Its purpose cannot be to punish or to impose a legal regime for the future. To this end it must be suitable to achieve its humanitarian goal. It must also be proportionate, that is, use the minimum force absolutely necessary to help the victims.

As to suitability, military experts warned from the beginning that aerial bombardment was an insufficient strategy to stop Yugoslav forces in their policy of murder, mass rape and expulsion. The events during the weeks following 24 March 1999 have proved them right. The incidence of these violations has actually increased dramatically leading to the expulsion or displacement of most of the population in the province. Even if the sharp rise in atrocities by Serb forces is not to be attributed to NATO's action, this action has done nothing to stop or reduce the atrocities. Aerial bombardment was a predictably unsuitable tool to help the victims.

Proportionality is more difficult to assess. The fact that the measures taken did not achieve the desired result does not necessarily demonstrate that they were not disproportionate. In fact, much of the military action seems to have been less designed to aid the victims directly than to put pressure on the leadership and population of Serbia. Attacks on the country's general infrastructure probably had some effect on its military capability. But the primary purpose appears to have been to demonstrate to the government and the population that it would be wiser to comply with NATO's demands. Leaving aside questions

of applicability of the First Additional Protocol of 1977 to the Geneva Convention of 1949, attacks on the general power system and water supply of the population would be impermissible under Article 54(2) of Protocol l.

One of the aims of the military action against Yugoslavia is to induce its President to agree to a peace accord based on the Rambouillet framework. The letter from President Clinton to the Speaker of the House of Representatives of 26 March 1999 explaining the military action makes this clear. If this aim is achieved, the resulting agreement may well be void under the law of treaties. Article 52 of the Vienna Convention on the Law of Treaties provides that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

This note was written on 7 June 1999 before the adoption of Security Council Resolution 1244 (1999).