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NATO, the UN and the Use of Force: Legal Aspects

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Abstract

The threat or use of force by NATO without Security Council authorization has assumed importance because of the Kosovo crisis and the debate about a new strategic concept for the Alliance. The October 1998 threat of air strikes against the FRY breached the UN Charter, despite NATO's effort to rely on the doctrines of necessity and humanitarian intervention and to conform with the sense and logic of relevant Council resolutions. But there are 'hard cases' involving terrible dilemmas in which imperative political and moral considerations leave no choice but to act outside the law. The more isolated these instances remain, the less is their potential to erode the rules of international law. The possible boomerang effect of such breaches can never be excluded, but the danger can be reduced by spelling out the factors that make an ad hoc decision distinctive and minimize its precedential significance. In the case of Kosovo, only a thin red line separates NATO's action from international legality. But should such an approach become a regular part of its strategic programme for the future, it would undermine the universal system of collective security. To resort to illegality as an explicit ultima ratio for reasons as convincing as those put forward in the Kosovo case is one thing. To turn such an exception into a general policy is quite another. If the Washington Treaty has a hard legal core which even the most dynamic and innovative (re-)interpretation cannot erode, it is NATO's subordination to the principles of the UN Charter.

1 The Threat or Use of Force in International Law

Contemporary international law establishes beyond any doubt that serious violations of human rights are matters of international concern. Impressive networks of rules and institutions, both at the universal and regional levels, have come into being as a result of this international concern. In the event of human rights violations which

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which reach the magnitude of the Kosovo crisis, these developments in international law allow states, acting individually, collectively or through international organizations, to make use of a broad range of peaceful responses. According to the dominant doctrine in the law of state responsibility (developed by the United Nations International Law Commission), the obligation on states to respect and protect the basic rights of all human persons is the concern of all states, that is, they are owed *erga omnes*. Consequently, in the event of material breaches of such obligations, every other state may lawfully consider itself legally ‘injured’ and is thus entitled to resort to countermeasures (formerly referred to as reprisals) against the perpetrator. Under international law in force since 1945, confirmed in the General Assembly’s Declaration on ‘Friendly Relations’ of 1970,¹ countermeasures must not involve the threat or use of armed force. In the case of Kosovo, pacific countermeasures were employed, for instance, by the European Union last year, with the suspension of landing rights of Yugoslav airlines within the EU. Leaving aside the question of whether this particular measure proved to be effective, it is somewhat surprising that a major Member State of the EU, at least initially, did not regard itself in a position legally to have recourse to this peaceful means of coercing the FRY to respect the human rights of the Kosovar Albanians. Yet this same state expressed no such doubts about the legality of its participation in the NATO threat of armed force which developed just a few weeks later.

The world community, for its part, acting through the United Nations Security Council, resorted to a mandatory arms embargo *vis-à-vis* the FRY, including Kosovo.² We do not have the necessary information at hand to be able to give a sound assessment of the impact and effectiveness of these non-military measures.

In the face of genocide, the right of states, or collectivities of states, to counter breaches of human rights most likely becomes an obligation.³ In Kosovo, however, what the international community is facing (i.e., at the time of writing, early March 1999) are massive violations of human rights and rights of ethnic minorities, but not acts of genocide in the sense of the 1948 Convention.⁴

Turning to the issue of enforcement of respect for human rights by military means, the fundamental rule from which any inquiry must proceed is Article 2(4) of the UN Charter, according to which

[a]ll Members [of the UN] 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.

It is clear, on the basis of both a teleological and historical interpretation of Article 2(4), that the prohibition enacted therein was, and is, intended to be of a comprehensive nature. Thus, contrary to certain views expressed during the Cold

¹ GA Res. 2625 (XXV) (1970).

² Operative para. 8 of SC Res. 1160 (1998).

³ Cf. the judgment of the International Court of Justice in the *Genocide (Bosnia-Herzegovina v. Yugoslavia)* case (1996).

⁴ Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

War years, the phrase ‘... or in any other manner inconsistent ...’ is not designed to allow room for any exceptions from the ban, but rather to make the prohibition watertight. In contemporary international law, as codified in the 1969 Vienna Convention on the Law of Treaties (Articles 53 and 64), the prohibition enunciated in Article 2(4) of the Charter is part of *jus cogens*, i.e., it is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character. Hence, universal *jus cogens*, like the prohibition embodied in Article 2(4), cannot be contracted out of at the regional level. Further, the Charter prohibition of the threat or use of armed force is binding on states both individually and as members of international organizations, such as NATO, as well as on those organizations themselves.

Moreover, it is important to draw attention to Article 52 of the just-mentioned Vienna Convention, according to which ‘[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’, paramount among these principles being Article 2(4).

The law of the UN Charter provides two exceptions from the prohibition expressed in Article 2(4) (the mechanism of the so-called ‘enemy-state-clauses’ (Articles 53 and 107) should be left aside as it is now unanimously considered obsolete). The first exception, embodied in Article 51 of the Charter, is available to states which find themselves to be victims of aggression:

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.

As the Charter reference to collective self-defence, Article 51 constitutes the legal foundation of the Washington Treaty by which NATO was established.⁵ Article 5 of the NATO Treaty bases itself expressly on Charter Article 51.

According to the UN Charter, then, individual or collective self-defence through the use of armed force is only permissible in the case of an ‘armed attack’. Like Article 2(4), Article 51 has become the subject of certain gross (mis-)interpretations, most of them put forward during the Cold War when the Security Council regularly found itself in a state of paralysis. Against such attempts to turn a clearly defined exception to the comprehensive Charter ban on the threat or use of force into a convenient basis for all sorts of military activities, it should be emphasized once again that Article 51 unequivocally limits whatever farther-reaching right of self-defence might have existed in pre-Charter customary international law to the case of an ‘armed attack’. In

⁵ North Atlantic Treaty (1949), 34 UNTS 243.

particular, any offensive self-help by threats or use of armed force without a basis in Chapter VII has been outlawed by the *jus cogens* of the Charter.

With regard to the second exception to the Charter ban on armed force, Chapter VII constitutes the very heart of the global system of collective security. According to its provisions, the Security Council, after having determined that a threat to the peace, breach of the peace, or act of aggression has occurred, may, if necessary, take military enforcement action involving the armed forces of the Member States. In actual UN practice, it is now common for such enforcement action to be carried out on the basis of a mandate to, or more frequently of an authorization of, states which are willing to participate, either individually or in *ad hoc* coalitions or acting through regional or other international organizations, among them prominently NATO. While the implementation of Chapter VII through a ‘franchising system’ of this kind creates numerous problems of its own, it is universally accepted that a Security Council authorization granted under Chapter VII establishes a sufficient basis for the legality of the use of armed force employed in conformity with the respective Council Resolution(s). Conversely, any threat or use of force that is neither justified as self-defence against an armed attack nor authorized by the Security Council must be regarded as a violation of the UN Charter.

Chapter VIII of the Charter (Regional arrangements) completes the legal regime thus devised. Hence, according to Article 53 para. 1,

[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.

The UN Secretary-General’s 1992 ‘Agenda for Peace’ emphasized the desirability, indeed necessity, of this mechanism of support.⁶ However, Article 53 para. 1 then continues:

But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council [with the now obsolete exception of the employment of the ‘enemy-state-clauses’].

This provision, too, has been subjected to considerable strains, particularly during the Cold War. One especially dubious example is the view that failure of the Council to disapprove regional military action could amount to (tacit) authorization. In view of the veto power of the permanent Council members, this is a specious argument. On the other hand, an interpretation of Article 53 para. 1 does in good faith leave room for the possibility of implicit as well as *ex-post-facto* authorization.

Before concluding this brief *tour d’horizon* of the relevant international law in force, reference must also be made to Article 103 of the Charter, according to which

[i]n 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.

Prominent among the Charter obligations thus enjoying priority is, of course, the

⁶ Boutros Boutros-Ghali, *An Agenda for Peace* (1992) SC Doc. S/24111, 17 June 1992.

prohibition on the threat or use of force embodied in Article 2(4), in the context of the other provisions of the Charter to which reference is made above (Articles 51 and 53, Chapter VII). Since Article 2(4) reflects a norm of *jus cogens*, any agreements, decisions and obligations conflicting with it are invalid. Hence, Article 103 renders the UN Charter itself, as well as the obligations arising under it from, for instance, binding Security Council decisions, a 'higher law' *vis-à-vis* all other treaty commitments of the UN Member States, among them those stemming from NATO membership.⁷

The question of the legality versus the illegality of so-called 'humanitarian intervention' must be answered in light of the foregoing. Thus, if the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a 'humanitarian intervention' by military means is permissible. In the absence of such authorization, military coercion employed to have the target state return to a respect for human rights constitutes a breach of Article 2(4) of the Charter. Further, as long as humanitarian crises do not transcend borders, as it were, and lead to armed attacks against other states, recourse to Article 51 is not available. For instance, a mass exodus of refugees does not qualify as an armed attack. In the absence of any justification unequivocally provided by the Charter 'the use of force could not be the appropriate method to monitor or ensure . . . respect [for human rights]', to use the words of the International Court of Justice in its 1986 *Nicaragua* judgment.⁸ In the same year, the United Kingdom Foreign Office summed up the problems of unilateral, that is, unauthorized, humanitarian intervention as follows:

[T]he 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, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation . . . In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.⁹

The question which arises at this point is, of course, whether the state of the law thus described could have changed in recent years, possibly after the demise of the East–West conflict or under the shock of the genocide and crimes against humanity committed in the former Yugoslavia. Could it not be that 'humanitarian interventions', now undertaken in the spirit of ensuring that Srebrenica does not happen again, as it were, deserve a friendlier reaction also on the part of international lawyers? Do recent or current instances of 'military humanitarianism' show themselves to be uninfected by the less laudable motives that characterized such actions in the past? To what extent will collective decision-making, or the involvement of NATO or the OSCE as such, guarantee that such improper motives are restrained or even eliminated? And, most importantly, how could even the purest

⁷ Cf. in this regard Art. 7 of the NATO Treaty.

⁸ ICJ Reports (1986), at para. 268.

⁹ UK Foreign Office Policy Document No. 148, reprinted in 57 *BYBIL* (1986) 614.

humanitarian motives behind military intervention overcome the formidable international legal obstacles just described? These obstacles could only be removed by changing the law of the UN Charter. There is no prospect of such a change, however. Thus, ‘humanitarian interventions’ involving the threat or use of armed force and undertaken without the mandate or the authorization of the Security Council will, as a matter of principle, remain in breach of international law. But such a general statement cannot be the last word. Rather, in any instance of humanitarian intervention a careful assessment will have to be made of how heavily such illegality weighs against all the circumstances of a particular concrete case, and of the efforts, if any, undertaken by the parties involved to get ‘as close to the law’ as possible. Such analyses will influence not only the moral but also the legal judgment in such cases.

2 Kosovo: A Thin Red Line

In the case of Kosovo, large-scale violence flared up in late 1997/early 1998. At that stage, the international community took steps to involve itself quickly and strongly, at least compared with earlier sad instances. In March 1998 the Security Council, acting under Chapter VII but without expressly determining that the Kosovo crisis amounted to a threat to the peace, adopted Resolution 1160 (1998), in which the Federal Republic of Yugoslavia and the Kosovar Albanians were called upon to work towards a political solution. In the same resolution, as mentioned earlier, the Council imposed a mandatory arms embargo *vis-à-vis* both parties.¹⁰ It emphasized ‘that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures’.¹¹

In the days that followed, the situation deteriorated rapidly: fighting intensified and the Serbian security forces as well as the Yugoslav Army used force in an excessive and indiscriminate manner, thus causing numerous civilian casualties, the displacement of hundreds of thousands of innocent persons from their homes, and a massive flow of refugees into neighbouring and more distant countries. In April of 1998, the Contact Group for the Former Yugoslavia agreed, with the exception of the Russian Federation, to impose new sanctions on the FRY. In June, the UN Secretary-General advised NATO of the necessity for a Security Council mandate for any military intervention in Kosovo. However, by that time it had become apparent that the Russian Federation would not agree to such a step.

In September 1998, the Security Council adopted Resolution 1199 (1998) which, also on the basis of Chapter VII, determined that the deterioration of the situation in Kosovo constituted ‘a threat to peace and security in the region’.¹² The Council demanded the cessation of hostilities, a ceasefire, as well as immediate steps by both parties to improve the humanitarian situation and enter into negotiations with international involvement. The FRY was requested to implement a series of measures aimed at achieving a peaceful solution to the crisis. In conclusion, the Council ‘[d]ecide[d], should the concrete measures demanded in this resolution and resolution

¹⁰ SC Res. 1160 of 31 March 1998.

¹¹ *Ibid.*, para. 19.

¹² SC Res. 1199 of 23 Sept. 1998.

1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region’.

During subsequent weeks, however, it became clear that (at least) Russia would veto any Council resolution containing a mandate or an authorization to employ threats or the use of force against the FRY. On the other hand, it was equally clear that the just-quoted reference to eventual further Council action in Resolution 1199 (1998) was not sufficient in itself to provide a legal basis for the threat or use of armed force by UN Member States or international organizations. Thus, the Security Council was in no position to take the ‘logical’ further step of following up on Resolution 1199 (called a ‘spring board resolution’ by the then German Foreign Minister Kinkel) and ultimately authorizing enforcement action if the situation did not improve.

At this point NATO took over, as it were. Its members gave the organization the go-ahead for military action if the FRY did not comply with the Council resolutions, and the Alliance prepared for air strikes against the FRY. The principal legal basis for such action was to be the concept of ‘humanitarian intervention’, linked as closely as possible under the circumstances to the UN Charter in order to further gain legitimacy. The NATO position was summarized in the following terms by Secretary-General Solana on 9 October 1998:

The relevant main points that have been raised in our discussion yesterday and today are as follows:

- The FRY has not yet complied with the urgent demands of the International Community, despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter.
- The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned inter alia of the danger of a humanitarian disaster in Kosovo.
- The continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY.
- The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future.
- The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199.

On the basis of this discussion, I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force.¹³

This announcement appears to have made a certain impression on the FRY. In any case, intensive diplomatic efforts, particularly on the part of US Special Envoy Richard Holbrooke, during the following days led to a ceasefire and the conclusion of two agreements: a first agreement of 16 October 1998 between the FRY and the OSCE, providing for the latter to establish a verification mission in Kosovo, and including an undertaking by the FRY to comply with Resolutions 1160 and 1199; and a second agreement between the FRY and NATO, signed on 15 October 1998, providing for the

¹³ Letter from Secretary-General Solana, addressed to the permanent representatives to the North Atlantic Council, dated 9 October 1998, document on file with the author.

establishment of an air verification mission over Kosovo in order to complement the OSCE mission. According to the first-mentioned agreement,

[I]n the event of an emergency situation in Kosovo which in the judgement of the [OSCE] Mission Director threatens the safety of members of the Verification Mission, the FRY shall permit and cooperate in the evacuation of Verification Mission members [by a NATO Extraction Force].¹⁴

Holbrooke further reached an accord with the FRY, according to which negotiations on a framework for a political settlement were to be completed by 2 November 1998.

On 24 October 1998, the UN Security Council returned to the scene again, reacting to the conclusion of the Holbrooke agreements with the adoption of Resolution 1203 (1998). Acting under Chapter VII, the Council formally endorsed and supported the two agreements concluded on 15 and 16 October concerning the verification of compliance by the FRY and all others concerned in Kosovo with the requirements of its Resolution 1199, and demanded full and prompt implementation of these agreements by the FRY. It affirmed that the unresolved situation in Kosovo constituted a continuing threat to peace and security in the region.

After some time, during which there was an improvement in the humanitarian and security situation in Kosovo, violence increased again, culminating in the events in Racak in mid-January 1999. In response, NATO threats of air strikes were resumed.

On 28 January 1999, UN Secretary-General Kofi Annan, he himself a former special UN envoy to NATO, met with the North Atlantic Council. His statement to the Council includes the following passages:

We must build on the remarkable cooperation between the UN and SFOR in Bosnia to further refine the combination of force and diplomacy that is the key to peace in the Balkans, as everywhere. The success of the NATO-led mission operation under a United Nations mandate is surely a model for future endeavours . . .

Let me conclude by congratulating you on the upcoming 50th anniversary of the alliance, and wish you all success in your deliberations on devising a new strategic concept for the next century. How you define your role, and where and how you decide to pursue it, is of vital interest to the United Nations, given the long tradition of cooperation and coordination between NATO and the UN in matters of war and peace. I look forward to hearing your views on this matter.¹⁵

At a press conference in Brussels, the UN Secretary-General, when asked about the preconditions of military intervention in the FRY/Kosovo, is reported to have said that '*normally* a UN Security Council Resolution is required'.¹⁶

On the same day, NATO Secretary-General Solana made a statement to the press on behalf of the North Atlantic Council, in which he affirmed that NATO fully backed a new initiative of the Contact Group and was ready to employ its military capabilities if necessary. He then added: 'You have seen from the visit of the United Nations

¹⁴ 38 *ILM* (1999) 24.

¹⁵ Document on file with the author.

¹⁶ Document on file with the author (emphasis added).

Secretary-General to NATO earlier today that the United Nations shares our determination and objectives.¹⁷ On the evening of 29 January 1999, following decisions of the Contact Group taken a few hours earlier aimed at reaching a political settlement between the parties to the Kosovo conflict and establishing a framework and timetable for that purpose, the President of the Security Council made a statement according to which the Council welcomed and supported the decision of the Contact Group and demanded that the parties should accept their responsibilities and comply fully with these decisions as well as the relevant Council resolutions. Further, the Security Council reiterated its full support for international efforts, including those of the Contact Group and the OSCE Verification Mission, to reduce tensions in Kosovo and facilitate a political settlement.¹⁸

The next day, the North Atlantic Council repeated the threat of air strikes, if the 'requirements of the international community' and all relevant Security Council resolutions were not observed. In this context it welcomed the just-mentioned Presidential Statement.¹⁹ On 1 February 1999, the FRY representative at the UN requested an emergency meeting of the Security Council 'following the NATO threats to the sovereignty of [his] country'. According to the FRY, '[t]he decision by NATO, as a regional agency, to have its Secretary-General authorize air strikes against targets on FRY territory . . . represents an open and clear threat of aggression against the FRY as a sovereign and independent Member State [*sic*] of the United Nations.'²⁰ The FRY letter then drew attention to the requirement of UN authorization of enforcement action to be undertaken by a regional organization.

As of March 1999, the international community is expecting the parties to the Kosovo conflict to return to the negotiating table(s) and hammer out the details of a 'Rambouillet Agreement'. As things currently stand, the Security Council will be requested, in this agreement, to issue a mandate for a NATO-led multinational peace mission (KFOR), involving armed forces of both members and non-members of NATO, to secure the implementation of the 'Rambouillet Agreement', by military means if necessary. However, in view of the fact that the future agreement would embody the consent of the FRY to the deployment of a multinational peace force on its territory, NATO and its member states appear to regard a UN Security Council mandate/authorization as politically desirable, but not indispensable, should the veto of a permanent member stand in the way. This at least was the viewpoint taken by the German Government in the parliamentary debate in late February 1999, which led to the *Bundestag's* approval of German participation in the military implementation of the future 'Rambouillet Agreement' as well as in NATO operations within the framework of the Extraction Force.²¹ A similar view had been expressed earlier on

¹⁷ NATO Press Release [99] 11.

¹⁸ S/PRST/1999/5.

¹⁹ NATO Press Release [99] 12.

²⁰ Document on file with the author.

²¹ Cf. *Deutscher Bundestag, 14. Wahlperiode*, Docs. 14/397 and 14/414; see further the report of the members of the *Auswärtiger Ausschuss* (foreign relations committee) of the *Bundestag* annexed to the second document, at 5.

with regard to the effect of the Holbrooke Agreements on the legality of the presence of the OSCE Verification Mission in Kosovo and on that of the eventual evacuation of OSCE Verification Mission members by the NATO Extraction Force.²²

In contrast, it is said that the current position of the Russian Federation is to call for a Security Council mandate based on Chapter VI in addition to an agreement with the territorial sovereign. If this condition were met, it appears that Russia would also be willing to participate in a NATO-led multinational peace mission in Kosovo.

Thus stands the chain of events relevant in the present context. In the following, these facts will be assessed in relation to the law set out in Section 1 above.

First, contrary to the standpoint taken in the FRY's request of 1 February for an emergency Council meeting, NATO is not a regional organization in the sense of Chapter VIII of the UN Charter. On the part of NATO, this was expressly clarified years ago in a letter addressed by the organization's former Secretary-General Willy Claes to the UN Secretary-General. Consequently, the requirement enshrined in Article 53 para. 1 of the Charter (cf. text at note 6 *supra*) for an — express or implicit, prior or *ex-post-facto* — authorization of enforcement action under regional arrangements or by regional agencies is not formally applicable in the case of NATO. The Alliance constitutes an international organization on the basis of Article 51 of the Charter; the only 'enforcement action' envisaged in this Article is self-defence. If NATO now widens the scope of its activities beyond 'Article 5 missions',²³ it leaves the area of relative freedom of action granted by Article 51 of the UN Charter and becomes fully subjected to the legal limits established by the 'higher' (cf. Article 103) Charter law intended to contain or prohibit any other, i.e. offensive, kind of coercion or enforcement by military means. Thus, we are back to the basic principle of 'no threat or use of armed force except in self-defence or if called for, respectively authorized, by the Security Council'. In our case, the requirement of such authorization would result (not from Chapter VIII but) from Chapter VII of the Charter. However, as to the modalities of Security Council authorization, the clarifications developed on Article 53 para. 1 will certainly be applicable by way of analogy. The argument could even be made that legal limitations to be applied in cases of interaction between the UN and regional organizations foreseen by the Charter would have even greater weight *vis-à-vis* an organization like NATO which is now venturing into the field of 'enforcement action' against third states (arg. *a minori ad majus*). In concrete terms, NATO could be authorized by the Security Council to threaten or use armed force against the FRY not only expressly and prior to such action but also implicitly *ex post* though not tacitly.

Since, as was shown above, an express authorization of the threat or use of force against the FRY never materialized, the follow-up question would be whether the sequence of Security Council reactions to NATO activities and their results described earlier could be seen as an implicit authorization granted *ex post*. In favour of a positive reply, one could point to the remarkable degree of 'satisfaction', as it were, expressed

²² Cf. the passage from the agreement of 16 October 1998 quoted *supra* in text at note 14.

²³ On the internal, 'constitutional' aspects of this development see *infra* Section 3.

by the Council in its Resolution 1203 (1998) as well as in the Presidential Statement of 29 January 1999 with the Holbrooke agreements and the subsequent successes of the Contact Group — results causally linked to the NATO threat of imminent air strikes. These signals of political approval could, at any stage, have been prevented by the opposition of any permanent member of the Council. But the Russian Federation chose to remain silent. On the other hand, however, Russia had made it clear in the fall of 1998 that it was not ready to follow up on Resolutions 1160 and 1199 by agreeing to the ultimate step of unleashing armed force against the FRY. This position appears not to have changed since then. In light of this, the view that the positive reception by the Council of the results of NATO threats of force could be read as an authorization of such force granted implicitly and *ex post* is untenable. But would this not mean that the Security Council has welcomed and endorsed developments brought about in violation of the UN Charter? The question of such illegality *vel non* will have to be looked at, but, independently of a final legal judgment, the fact is that the Security Council, as a political organ entrusted with the maintenance or restoration of peace and security rather than as an enforcer of international law, will in many instances have to accept or build upon facts or situations based on, or involving, illegalities.

In consideration of the foregoing, it may be concluded that the NATO threats of air strikes against the FRY, not having been authorized by the Security Council either expressly or implicitly, are not in conformity with the UN Charter. In this regard, it makes little difference that the threat had not been carried out until the time of writing because Article 2(4) prohibits such threats in precisely the same way as it does the actual use of armed force.

Let us now look at the interaction between the UN and NATO from the other, i.e. the NATO, side. Such a complementary perspective might place the legal deficiency just diagnosed in a mitigating context, so to speak.

Indeed, one is immediately struck by the degree to which the efforts of NATO and its member states follow the 'logic' of, and have been expressly linked to, the treatment of the Kosovo crisis by the Security Council. In an address delivered in Bonn on 4 February 1999, US Deputy Secretary of State Strobe Talbott referred to an 'unprecedented and promising degree of synergy' in the sense that the UN and NATO, among other institutions, had 'pooled their energies and strengths on behalf of an urgent common cause'; as to the specific contribution of the UN, he saw this in the fact that 'the UN has lent its political and moral authority to the Kosovo effort'.²⁴ Note the silence as to UN legal authority.

Aside from the absence of a formal authorization discussed above, a reading of the relevant Council resolutions together with the respective pronouncements of NATO (members) might lead an observer to conclude that the two sides acted in concert. The most remarkable illustration of this is the way in which SC Resolution 1203 (1998) welcomed and endorsed the agreements between NATO/OSCE and the FRY brought about (or at least, helped along) by the unauthorized NATO threats.

²⁴ Manuscript on file with the author, at 9.

If we analyse the reasoning behind the announcement of NATO that armed force would be used if the FRY did not desist from further massive violations of human rights (cf., above all, Secretary-General Solana's letter of 9 October 1998²⁵), we see that it follows two lines: first, it evokes elements of the doctrine of 'humanitarian intervention' without calling it by name; but secondly, and much more pronouncedly, it refers to, and bases itself on, the UN Charter and Security Council as well as other UN action concerning Kosovo wherever and in whatever way possible. Above all, it draws attention to SC Resolutions 1160 and 1199 and the fact of the FRY's non-performance of the obligations deriving from them under the Charter. Further, the letter leaves no doubt that it is the United Nations which represents the international community in its concern for the Kosovo crisis and formulates the respective community interests. Thus, NATO tries to convince the outside world that it is acting 'alone' only to the least degree possible, while in essence it is implementing the policy formulated by the international community/United Nations; it is filling the gaps of the Charter, as it were, in a way that is consistent, in substance, with the purposes of the UN. And, as already mentioned, then follows SC Resolution 1203 endorsing and building upon NATO action. Similarly, the Presidential Statement of 29 January 1999 welcomes and supports the achievements of the Contact Group following renewed NATO threats after the massacre at Racak — in the words of US Deputy Secretary of State Strobe Talbott, thus lending 'its political and moral authority to the Kosovo effort'.

Considering this interaction, or 'synergy', between the United Nations and NATO, one can agree with the view of the then German Foreign Minister Kinkel, according to whom NATO, in the state of humanitarian necessity in which the international community found itself in the Kosovo case, acted in conformity with the 'sense and logic' of the resolutions that the Security Council had managed to pass. The NATO threat of force continued and backed the thrust of SC Resolutions 1160 and 1199 and can with all due caution thus be regarded as legitimately, if not legally, following the direction of these UN decisions.

However, despite all this 'synergy', closeness and interrelatedness of NATO and UN engagements in the Kosovo crisis, there is no denying the fact that a requirement of Charter law has been breached.

This deficiency did play a central role in the deliberations of the Parliament of the Federal Republic of Germany (*Bundestag*) in mid-October 1998 in relation to German participation in NATO air strikes. In these debates, the international legal issues involved were discussed at great length and in considerable depth. The respect for UN Charter law demonstrated throughout the debates was remarkable. Such deference became particularly apparent in the critical discussion of the absence of a Security Council authorization. The German Federal Government, while recognizing this legal flaw, argued that the situation in Kosovo was so desperate as to justify the NATO threat, even without UN authorization, in a state of humanitarian necessity leaving no choice of other means. In this regard, differently from the NATO Secretary-General, the Government called a spade a spade and spoke of the NATO threat as an instance of

²⁵ Reproduced verbatim *supra* text at note 13.

'humanitarian intervention'. The *Bundestag* finally gave its approval to German participation in the NATO action. But it was stressed by all voices in favour of such participation, in particular by the Federal Government, that German agreement with the legal position taken by the Alliance in the specific instance of Kosovo was not to be regarded as a 'green light' for similar NATO interventions in general. To quote Foreign Minister Kinkel before the *Bundestag*:

The decision of NATO [on air strikes against the FRY] must not become a precedent. As far as the Security Council monopoly on force [*Gewaltmonopol*] is concerned, we must avoid getting on a slippery slope.²⁶

This statement will also be relevant for Section 3 of this article. Whether the denial of precedential value expressed in it, which runs like a red thread through the German parliamentary debate, will have the desired effect cannot of course be decided by Germany alone. But what is of great importance is the emphasis on the part of both the German Federal Government and the *Bundestag* on the singularity of the Kosovo case from which no conclusion on a general rule or policy is to be drawn.

To briefly review two more technical issues: to characterize the NATO threat of armed force against the FRY as 'humanitarian intervention' does not fit the standard schema, as it were, of this controversial notion. Within the categories of international legal self-help and enforcement, these threats rather constitute reprisals, or countermeasures, intended to induce the FRY to comply with its obligations arising, in a first phase, from general international law and the relevant Security Council resolutions, and, in a second phase, from the Holbrooke Agreements of October 1998. However, such characterization does not change the result of the legal analysis: as already mentioned at the outset, countermeasures (reprisals) involving the threat or use of armed force are prohibited under international law, irrespective of any good humanitarian intention behind them, except if authorized by the Security Council under Chapters VII or VIII of the Charter.

The second observation relates to the view that, since a 'Rambouillet Agreement' would incorporate the consent of the FRY to the presence of the NATO-led multinational peace force in Kosovo, KFOR would possess a sufficient legal basis even without a Security Council mandate authorizing it. As mentioned earlier, the Russian Federation appears to regard a UN mandate based on Chapter VI as necessary but also as sufficient for the same purpose.

These views seem convincing only in as much as what is envisaged in Kosovo remains within the purview of classic peacekeeping; that is, of a mission not involving the use of armed force. If, however, KFOR is eventually to engage in 'robust' peacekeeping (consider, for instance, the issue of disarming the KLA), a legal basis for the presence and activity of KFOR in the form of FRY consent only appears rather fragile, and a critical departure from former practice. Further, it is not to be expected that in a 'Rambouillet Agreement' the FRY will consent expressly to the use of armed force by KFOR, if necessary, against the Yugoslav army and police (consider the

²⁶ *Deutscher Bundestag, Plenarprotokoll 13/248*, 16 October 1998, at 23129.

extremely guarded formula concerning possible action by the NATO Extraction Force within Kosovo in the Holbrooke Agreement of 16 October 1998²⁷). In view of the explosive environment in which KFOR is to operate, a Chapter VII mandate in addition to the consent of the territorial sovereign appears highly desirable, to say the least.

By way of conclusion to this section: whether we regard the NATO threat employed in the Kosovo crisis as an *ersatz* Chapter VII measure, ‘humanitarian intervention’, or as a threat of collective countermeasures involving armed force, any attempt at legal justification will ultimately remain unsatisfactory. Hence, we would be well advised to adhere to the view emphasized and affirmed so strongly in the German debate, and regard the Kosovo crisis as a singular case in which NATO decided to act without Security Council authorization out of overwhelming humanitarian necessity, but from which no general conclusion ought to be drawn. What is involved here is not legalistic hair-splitting versus the pursuit of humanitarian imperatives. Rather, the decisive point is that we should not change the rules simply to follow our humanitarian impulses; we should not set new standards only to do the right thing in a single case. The legal issues presented by the Kosovo crisis are particularly impressive proof that hard cases make bad law.

3 NATO’s Future ‘Strategic Concept’: From ‘Out of Area’ to ‘Out of Treaty’?

At present, NATO is hammering out a new ‘strategic concept’ to define its role in the 21st century. It is to be adopted on the occasion of the Alliance’s 50th Anniversary Summit in Washington in late April 1999. At the time of writing, the negotiating process is still under way. Most documents relating to the issues raised in the present paper are confidential. Nevertheless, the general direction in which the United States in particular wants the Alliance to move in the future is quite clear. For instance, in the address already mentioned above, Deputy Secretary of State Strobe Talbott had, among other things, the following to say about what he referred to as the ‘deepening’ of NATO:

In that project [i.e., the transformation of NATO] . . . we must be ambitious. NATO was founded and designed to deal with the Soviet Union and the Warsaw Pact. That state and that alliance are gone, and so is the threat they posed . . . This isn’t to say that NATO’s original task of collective defense is finished or that collective defense is no longer at the core of the Alliance’s mission. NATO must maintain its capability enshrined in Art. V of the Treaty of Washington, to deter and if necessary defeat what might be called classic aggression. Such a threat could arise in the future. But it is less likely to do so if NATO remains robust and ready.

However, that is not enough if NATO is to remain relevant to the times. With the end of the Cold War, new, less spectacular, but more diversified threats have arisen. Disputes over ethnicity, religion or territory, can, as we’ve already seen, trigger armed conflict, which in turn can generate cross-border political instability, refugee flows and humanitarian crises that endanger European security.

²⁷ See text *supra* at note 14.

NATO must be able to deal with threats like these while maintaining its core function of collective defense.

...

[I]n re-inventing NATO, [we] must make hard political choices and a convincing political case with our constituencies. Here, I would submit, is the case we should make about the role and mission of the new NATO: It should start, . . . , with Art. V of the Washington treaty — our commitment to collective defense. But we also need to recognize that most current and foreseeable European security challenges involve non-Art. V missions; therefore we need to be better prepared to deal with them as well.

Furthermore, in this increasingly complex and interdependent world of ours, we face a more diverse and far-flung array of threats than we did in Truman and Adenauer's day. The proliferation of weapons of mass destruction and the scourge of terrorism do not fit neatly into our old slogans and concepts like 'The Free World' and 'The Iron Curtain,' or old geographic simplicities that suggested out-dated geopolitical ones — like 'East versus West.' . . . This means that as we maintain our ability to defend the territorial integrity of all NATO members, we also need forces, doctrines and communication assets that will allow us, when necessary, to address the challenges of ethnic strife and regional conflict that directly affect our security but that lie beyond NATO territory — as we have done, and are doing, in the Balkans. Also, it is mere prudence and common sense, not excessive ambition, to suggest that a truly modernized Alliance should be able to cope effectively with the all-too-modern challenges posed by the spread of ballistic missiles and WMD [weapons of mass destruction].

Some commentators contend that such adaptations require a revision of the North Atlantic Treaty, or believe that we are proposing one. This is untrue. The framers of the Washington Treaty were careful not to impose arbitrary functional or geographical limits on what the Alliance could do to protect its security.

Let me be clear: I am *not* saying there are *no* limiting factors on what NATO can and should do. Of course there are. NATO is a *consensus* organization, and it defines its common interests accordingly — by consensus of its members. We would not go anywhere as an Alliance unless all our members want us to go there. No ally can force others to agree to a NATO action. Under Art. IV of the Treaty of Washington, NATO members will consult when their security is threatened, and together they will determine the appropriate response.

There are also limits implicit in the military capabilities of the Allies themselves. No one is suggesting that we deploy NATO forces, say, to the Spratley Islands.²⁸

The Deputy Secretary of State concluded this point by saying:

Nor are we suggesting that NATO act in splendid isolation from — or high-handed defiance of — the United Nations or the OSCE. All NATO Allies are members of both of those organizations. We believe NATO's missions and tasks must always be consistent with the purposes and principles of the UN and the OSCE. We expect NATO and its members will continue to be guided by their obligations under the UN Charter and the Helsinki Final Act.

At the same time, we must be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure. We will try to act in concert with other organizations, and with respect for their principles and purposes. But the Alliance must reserve the right and the freedom to act when its members, by consensus, deem it necessary.²⁹

The future role thus envisaged for NATO and the legal-institutional consequences which the proposed new concept implies for the relationship between NATO and the

²⁸ *Supra* note 20.

²⁹ Manuscript, at 4, 7f.

United Nations also became apparent in a ‘Resolution on Recasting Euro-Atlantic Security’, adopted by the North Atlantic (Parliamentary) Assembly in November 1998. In this document, the Assembly,

[g]uided by the vision that NATO in the 21st century should be an enduring political-military alliance among sovereign states whose purpose is to apply power and diplomacy to the collective defence and promotion of Allied security, democratic values, the rule of law, and peace,

urged member governments and parliaments of the North Atlantic Alliance

...

b. to accelerate progress in developing capabilities to meet emerging security challenges that may demand both Article 5 and non-Article 5 missions, including meeting the threat of the proliferation of weapons of mass destruction and international terrorism and enhancing power projection, surveillance assets, communications, sustainment, information superiority, and interoperability;

...

d. to seek to ensure the widest international legitimacy for non-Article 5 missions and also to stand ready to act should the UN Security Council be prevented from discharging its purpose of maintaining international peace and security;

e. to affirm that the inherent right of individual or collective self-defence, also enshrined in Article 51 of the UN Charter, must include defence of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes; ...³⁰

Certainly, these formulas will not be the last word as to how NATO will define its future legal-institutional relationship with the universal organization of the UN. But the message which these voices carry in our context is clear: if it turns out that a Security Council mandate or authorization for future NATO ‘non-Article 5’ missions involving armed force cannot be obtained, NATO must still be able to go ahead with such enforcement. That the Alliance is capable of doing so is being demonstrated in the Kosovo crisis. Whether such a course is legally permissible is a different matter. In the November 1998 resolution of the North Atlantic Assembly, two different legal arguments can be identified in this regard. According to the first one, the right of self-defence ‘also enshrined’ in Article 51 of the UN Charter is to be interpreted so broadly as to include the defence of ‘common interests and values’. This text calls for two brief observations: to start with, the wording might create the impression that self-defence in international law has a broader scope than that foreseen in Article 51, i.e., that it is justified not only against armed attacks but beyond that specific instance also against other threats. What other menaces the authors have in mind is then made clear: attacks on ‘common [i.e., NATO] interests and values’. To thus widen the scope of self-defence, as a legal institution, is intolerable, indeed absurd, from a legal point of view and does not deserve further comment. What might be mentioned, however, is that ‘respect for the obligations arising from treaties and other sources of international law’³¹ also counts among the values common to NATO member states.

³⁰ NATO Doc. AR 295 SA (1998).

³¹ Preamble to the UN Charter.

The second argument, contained in para. d. of the North Atlantic Assembly resolution, reads like a codification of the course that NATO is steering in the Kosovo crisis. Therefore, the legal critique put forward in the preceding part of the present paper is fully applicable. It is probably no coincidence that the wording chosen for para. d. is similar to that of the 'Uniting for Peace' Resolution of the UN General Assembly of 3 November 1950, considering the keenness of NATO to have its actions partake of UN legitimacy, so to speak. But of course, according to 'Uniting for Peace', it was the General Assembly, as a UN organ comprising all Member States, that was to shoulder the burden of maintaining or restoring international peace and security *in lieu* of the Security Council, not an extraneous, regional organization comprising only about 10 per cent of UN membership.

'Uniting for Peace' was an attempt to fill a gap in the Charter system of collective security during the darkest period of the Cold War (and, of course, of the hot war in Korea). As mentioned earlier, during the same period several fundamental Charter provisions, like Articles 2(4), 51 and 53, were subjected to 'realist' reinterpretations in order to allow individual states as well as regional or defence organizations to return to pre-Charter conditions as regards the use of force. Considering the almost permanent stalemate in the Security Council extending over decades, such *ersatz* constructs might have had a certain legitimacy at the time. But today things are different: since the end of the Cold War, the Security Council is functioning precisely in the manner envisaged in 1945. During the decade up to and including 1997, Chapter VII was invoked no less than 112 times; during the same period the number of vetoes cast was extremely small. Considering this state of affairs, to circumvent substantive and, in particular, procedural cornerstones of Charter law is, therefore, much more dangerous to the integrity of the UN peace system than the aberrations of the past.

In view of the Russian position *vis-à-vis* the prospect of NATO 'peace missions' engaging in military enforcement out of area, a new formula has recently been put forward, according to which the necessary legal basis for non-Article 5 missions comprising the use of armed force is, 'as a rule', to be provided either by a mandate of the UN Security Council or by acting 'under the responsibility of the OSCE' (thus the address of German Federal Chancellor Gerhard Schroeder to the Munich Security Forum on 6 February 1999).³²

The alternative thus offered may possibly appease the Russian Federation, but it cannot satisfy the international lawyer: the OSCE has grown into a regional organization in the sense of Chapter VIII of the Charter. As such, any military enforcement action under its responsibility will require authorization by the UN Security Council according to the rules described earlier. Thus, such peace enforcement under the aegis of the OSCE will not only require the consent of the Russian Federation but also that of the Security Council in accordance with Article 53 para.1 of the UN Charter. From the standpoint of United Nations law, therefore, the issue is not only how to obtain the consent/participation of Russia in peace

³² *Bulletin des Presse- und Informationsamts der Bundesregierung* No. 8, of 22 February 1999, at 91.

enforcement but how to achieve this at the regional level in full conformity with the Charter.

Turning to a more subtle, ‘linguistic’, point, it is interesting to observe how certain, particularly US, voices place the United Nations in the company of regional organizations or similar institutions. For instance, in the Bonn address of Deputy Secretary of State Strobe Talbott repeatedly referred to already, we find the following observation:

We started [the] process of institutional joint action in Bosnia, and we have built on it in Kosovo. We have seen five bodies — NATO, the EU, the OSCE, the United Nations and the Contact Group develop an unprecedented and promising degree of synergy. By that I mean that these disparate but overlapping organizations have pooled their energies and strengths on behalf of an urgent common cause.³³

In the current debate, the formula of the UN and relevant Western regional institutions mutually reinforcing each other seems to have gained acceptance. To the present author, this way of describing the relationship of the institutions mentioned is to be treated with great caution. On the one hand, it is undeniably reassuring to see the ‘political authority’ of the UN emphasized by Mr Talbott relying on and backed up by the muscle of more dynamic regional institutions. But on the other hand, in political as well as legal discourse, this view could (is meant to?) have the effect of putting the United Nations on the same hierarchical level as these institutions, thereby relativizing the legal primacy due to the obligations flowing from the UN Charter.³⁴ In most quarters of the world, including Germany, it is accepted that the UN Charter is not just one multilateral treaty among others but an instrument of singular legal weight, something akin to a ‘constitution’ of the international community. This status of the Charter should not be prejudiced by NATO.

In his Bonn address, the US Deputy Secretary of State spoke of the hard political choices to be made ‘in re-inventing NATO’.³⁵ In the same vein, however, he denied that such re-invention would require a revision of the North Atlantic Treaty. In the present paper, focusing as it does on UN law, only a few brief comments can be made in this regard.

If we compare the practices of amendment and revision of the constituent instruments of international organizations in general with the capacity of NATO to absorb, as it were, new roles and missions without any formal changes considered necessary to the original founding treaty, this flexibility is already astonishing at present, even before the imminent ‘re-invention’. Thus, quite aptly, some members of the German Federal Constitutional Court once spoke of the NATO Treaty as ‘a treaty on wheels’.

At the level of international law, the power of member states of international organizations to develop, amend and revise the constitutive instruments of these

³³ Manuscript, at 9.

³⁴ Cf. on Charter Art. 103 *supra* Section 1.

³⁵ Cf. *supra* text at note 28.

institutions by mutual agreement or subsequent practice is far-reaching. In the case of organizations working on the basis of majority decisions, the legal limits to such changes will be debated, in some instances adjudicated, in terms of doctrines like those of *ultra vires* versus 'implied powers'. These issues will hardly arise in the practice of international organizations which, like NATO, arrive at decisions by unanimous vote or employ a consensus method. Hence, from that point of view almost any transformation of NATO is feasible as long as all members agree, and this without a formal revision of the constituent treaty instrument. In this regard, Mr Talbott's remarks are perfectly correct. However, no unanimity of NATO member states can do away with the limits to which these states are subject under peremptory international law (*jus cogens*) outside the organization, in particular the higher law (cf. Article 103) of the UN Charter on the threat or use of armed force. NATO is allowed to do everything that is legally permissible, but no more. Legally, the Alliance has no greater freedom than its member states. This point has been the main thrust of the present paper.

However, the question of legal limitations to the transformation of NATO leads to a further issue: that of the democratic legitimacy of such 're-invention'. The acuteness and topicality of this question may vary from country to country. In the Federal Republic of Germany it has been at the heart of several great constitutional controversies ultimately resolved by the Federal Constitutional Court (*Bundesverfassungsgericht*). In these cases, one of the decisive issues was the extent to which alterations of existing obligations deriving, *inter alia*, from the NATO Treaty, or the creation of new such obligations, could be affected by way of 'soft law', for instance by decisions of the North Atlantic Council, while still being covered by the *Bundestag*'s original approval of the NATO Treaty almost half a century ago. The Court was prepared to go quite far in allowing the dynamic evolution of NATO to escape the prerequisite of new parliamentary approval, but it did indicate certain borderlines, among them, in its 1994 judgment on the constitutionality of German participation in NATO/WEU action against the FRY in the Mediterranean and in UNOSOM II, the conformity of all these activities with the rules and procedures of the UN Charter as the overarching, universal system of collective security. Hence, in view of the strong emphasis placed by the German Government as well as the *Bundestag* on the singular, exceptional character of, and the express denial of precedential value to, the threat of force by NATO against Yugoslavia expressed in the fall of 1998, a general authorization for a 'new' NATO to proceed to military enforcement out of area without UN Security Council assent, if necessary, might well transcend the limits set up by the German Basic Law. The German Constitution provides for several procedures to have this question adjudicated by the Karlsruhe Court. In sum, there is reason for caution here; this is also because the *Bundesverfassungsgericht* has demonstrated its willingness to uphold the constitutional requirements for German participation in international organizations and supranational integration even against heavy political headwinds.³⁶

³⁶ Cf. the 1993 *Maastricht* decision, [1994] CMLR 57.

As the Background Paper prepared by Jeffrey Laurenti for the United Nations Association of the U.S.A. for the present Roundtables puts it so well, some voices in the current debate fear

that abandonment of the Security Council's asserted monopoly on determining the lawful use of force against others, except in self-defense, could put the world community on a slippery slope of competing claims of 'rights' to intervene — with the potential consequence of escalating hostilities rather than resolving them. Some see a disquieting historical precedent for alliance self-authorization for use of force in the Warsaw Pact's intervention in Czechoslovakia in 1968 (an intervention that was, to be sure, directed within its own membership). Some warn that such fragmentation of lawful authority on use of force could prompt the emergence of counter-alliances among those fearful of high-handed interventionism by an overweening Western alliance. If the U.N. has too many inhibitions about the use of force, these worry, NATO under U.S. pressure may have too few.³⁷

The present author shares these concerns. He feels in good company, in view of the vehemence with which the German Government as well as the *Bundestag* emphasized in the October 1998 debate that the decisions taken by NATO on Kosovo must not be seen as a precedent leading to a general right of the Alliance to intervene militarily out of area without a Security Council mandate/authorization. The genie of NATO 'self-authorization' must not be let out of the bottle. Apparently, this is the opinion of other NATO member governments as well.

The law of nations being a horizontal system, claims to international legality and admissibility put forward by its actors, be they states or organizations, are prone to have a boomerang effect. True, at present NATO is the only regional institution capable of countering (self-defined) security challenges effectively, if necessary by military means. But things might change in the future, and other states or new alliances in Europe or in other parts of the world might then also proclaim to 'stand ready to act' without the Security Council, or affirm to defend certain 'interests and values' by armed force (to use the language of the November 1998 North Atlantic Assembly resolution). Reference to 1968 does not seem to be far-fetched: when the Soviet Union followed up on the Warsaw Pact intervention in Czechoslovakia with the 'Brezhnev doctrine', condemnation by the West, particularly the United States, of both the invasion and the general concept justifying it was resolute and strong; statements about the invalidity of such *inter se* derogations of fundamental Charter precepts abounded. One wishes that some of the respect paid to the UN Charter on that sad occasion would also mark the debate on NATO's strategic concept for the 21st century. The fact also mentioned in the UNA Background Paper, that the Warsaw Pact's intervention in 1968 was directed within its own membership, is not designed to quell legal concerns; on the contrary, the (unauthorized) threat or use of force against a state which is not a member of a certain international organization, and which might therefore not share this organization's 'common interests and values', appears even more indefensible than force employed within the organization's circle of members.

³⁷ J. Laurenti, 'NATO, the U.N., and the Use of Force', background paper prepared for the United Nations Association of U.S.A (1999).

In this regard, the announcement that the new NATO is to become more instrumental in meeting the threat of proliferation of weapons of mass destruction is of a particularly 'extrovert' nature, considering, as the UNA Background Paper does, that, aside from its nuclear-armed members, no country in NATO's own region has programmes for the development of these weapons. As the Background Paper also mentions, the international treaty regimes controlling these weapons all provide for the Security Council to enforce them. In light of this, it is to be hoped that a future role of the Alliance in this field would be linked to the already existing one of the Council by foreseeing the prerequisite of a Security Council mandate for any NATO action which assumes the nature of enforcement.

4 Concluding Remarks

It is disquieting to observe how the UN/NATO relationship has changed within a few years. In 1994, at its Brussels summit, NATO had declared its readiness to cooperate with the United Nations in 'peacekeeping and other operations under the authority of the UN Security Council'. In December 1997, the Final Report of a high-level International Task Force on the Enforcement of UN Security Council Resolutions regarded as 'doubtful that NATO would consider taking enforcement action, at least out of area, without Security Council authorization'.³⁸

Less than a year later these doubts were dispelled. In the field under consideration here, NATO action has moved from full collaboration with the UN in both peacekeeping and enforcement in Bosnia to enforcement action in place of the UN, albeit still authorized by the Security Council to implement the Dayton Agreement, and now in the context of Kosovo it has shifted to enforcement in place of the UN without such authorization. For some, this last-mentioned schema is now generally to be embedded in NATO's new 'strategic concept'. According to the UNA Background Paper, this development suggests a shift in the UN/NATO relationship from mutual reinforcement³⁹ to fundamental competition:

Under such a scenario, the organization in danger of sliding into irrelevance seems to be not NATO but the United Nations. In a political variant of free-market competition, the U.N. Security Council risks disappearing as a serious security body as the genuinely powerful prefer to work through a more convenient instrument. All that the Security Council can offer is 'legitimacy,' in the view of some Western governments — and NATO may provide the desired multilateral cover, with less obstruction.

Such a development would be deplorable. In the words of UN Secretary-General Kofi Annan:

[P]eacekeeping is not, and must not become, an arena of rivalry between the United Nations

³⁸ United Nations Association of the U.S.A. *Words to Deeds: Strengthening the U.N.'s Enforcement Capabilities* (1997), at 45.

³⁹ Cf. on this phrase *supra* text at note 33.

and NATO. There is plenty of work for us both to do. We work best when we respect each other's competence and avoid getting in each other's way.⁴⁰

This article has attempted to demonstrate that, while the threat of armed force employed by NATO against the FRY in the Kosovo crisis since the fall of 1998 is illegal due to the lack of a Security Council authorization, the Alliance made every effort to get as close to legality as possible by, first, following the thrust of, and linking its efforts to, the Council resolutions which did exist, and, second, characterizing its action as an urgent measure to avert even greater humanitarian catastrophes in Kosovo, taken in a state of humanitarian necessity.

The lesson which can be drawn from this is that unfortunately there do occur 'hard cases' in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law. The more isolated these instances remain, the smaller will be their potential to erode the precepts of international law, in our case the UN Charter. As mentioned earlier, a potential boomerang effect of such breaches can never be excluded, but this danger can at least be reduced by indicating the concrete circumstances that led to a decision *ad hoc* being destined to remain singular. In this regard, NATO has done a rather convincing job. In the present author's view, only a thin red line separates NATO's action on Kosovo from international legality. But should the Alliance now set out to include breaches of the UN Charter as a regular part of its strategic programme for the future, this would have an immeasurably more destructive impact on the universal system of collective security embodied in the Charter. To resort to illegality as an explicit *ultima ratio* for reasons as convincing as those put forward in the Kosovo case is one thing. To turn such an exception into a general policy is quite another. If we agree that the NATO Treaty does have a hard legal core which even the most dynamic and innovative (re-)interpretation cannot erode, it is NATO's subordination to the principles of the United Nations Charter.

To end on a lighter note: all of us leave the path of virtue from time to time. But one should not announce such a dangerous course as a general programme for the future, especially at one's 50th birthday.

⁴⁰ Address at Georgetown University on 23 February 1999; UN Doc. SG/SM/6901, PKO 80.