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The UN and NATO in the New World Order: Legal Issues

Rahul Rao

History is replete with instances of crises that have proved to be turning points in the human endeavour to shape subsequent events. The Second War was undoubtedly one of those turning points, out of which was born a resolve not to push the world ever again to the brink of total destruction and an idealism that led to an extraordinarily ambitious project in collective security—the founding of the United Nations (UN) in 1945. Charged with the maintenance of international peace and security along with a host of other responsibilities, the new organization embodied the collective hopes and aspirations of the international community for a better world. In its fifty-four year chequered history, it has had a mixed record in living up to those aspirations. Consequently, its standing in the international community has oscillated from being regarded as a legitimate “world government”, to being considered as an increasingly irrelevant entity in a world driven by market forces and brute power.

Kosovo is the latest in a series of crises that has put the ability of the UN to maintain international order to a real test. It has raised old questions regarding the relevance of the UN with all its organs, structures and procedures as well as rules of international law in a world where these can be bypassed by a few states that possess the military capability to do so. While these questions are not new, this article does not answer them with indictment of the organization, as many critics tend to do today. On the contrary, it is premised on the notion that the UN (or at least the concept of the UN) is indispensable to world peace. As the most representative international institution, it is uniquely situated to deal with most pressing problems of the world. Its near-universal membership makes it the ideal negotiating forum and gives it the legitimacy to take hard decisions that are often inevitable. This article, therefore, proceeds on the assumption that the question of whether we need the UN is no longer an issue. If it is ineffective in dealing with international problems, the emphasis should be on finding ways and means of strengthening its potential as an actor capable of influencing the course of international events

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and relations. At any rate, the onus to propose alternative mechanisms should be on its critics. Although there is a great disagreement over these views it is believed that they have been vindicated in a sense by the Kosovo crisis. This may sound somewhat paradoxical, considering that by most estimates, the UN was virtually sidelined by the North Atlantic Treaty Organization (NATO) in the management of the Kosovo crisis.

The Conflict

The Kosovo crisis provides a good starting point for a discussion on the relationship between the UN and NATO, simply because it has provoked an intense debate on the issue and demonstrated the enduring relevance of understanding the legal questions involved. Mainstream reportage of the crisis would have us believe that the UN was a silent spectator to events in the region, paralyzed as it was by the inability of the permanent members of the Security Council to forge a consensus on a course of action. On the contrary, the UN response to the crisis was far more complex. It is necessary to set out some of the key events preceding NATO's blitzkrieg of Serbia, with specific reference to the role of the Security Council at each stage.

On 31 March 1998, the Security Council adopted Resolution 1160 (1998), acting under Chapter VII of the UN Charter but without expressly stating that the Kosovo crisis amounted to a threat to peace. The resolution imposed a mandatory arms embargo on the Federal Republic of Yugoslavia (FRY) as well as the Kosovo Albanians and called upon both the parties to work towards political solution. It emphasized that "failure to make constructive progress towards the peaceful resolution of the situation in Kosovo" would "lead to the consideration of additional measures."¹

But the situation in Kosovo deteriorated rapidly, as fighting intensified.² The heightened level of conflict prompted the Security Council to adopt Resolution 1199 on 23 September 1998 which claimed that the situation in Kosovo constituted "a threat to peace and security in the region." It demanded the cessation of hostilities and immediate steps by both the parties to improve the humanitarian situation and to enter into negotiations with international involvement. The FRY was required to implement a series of measures aimed at achieving a peaceful solution to the crisis. In conclusion, the Council decided that in the event that the concrete measures outlined in Resolution 1160 and 1199 were not taken, it would

¹ Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law* (Oxford), vol. 10, no. 1, 1999 (Internet edition: <http://www.ejil/journal/Vol10/No1/ab1.html>).

² *Crisis in Kosovo—Amnesty International's Concerns*, 20 April 1999. Human rights organizations reported that Serb security forces as well as the Yugoslav Army were using force in an excessive and indiscriminate manner, causing numerous civilian casualties, the displacement of hundreds of thousands of civilians, and a massive exodus of refugees into neighbouring and other countries.

“consider further action and additional measures to maintain or restore peace and stability in the region.”³

In the weeks that followed, Russia made it clear that it would veto any Security Council resolution containing a mandate or authorization to employ threats or the use of force against the FRY. In an attempt to resolve this deadlock, NATO members authorized the use of force (air strikes) against the FRY if it did not comply with the Security Council resolutions. The legality of this threat was grounded in an alleged right of humanitarian intervention. In a letter to the permanent representatives to the North Atlantic Council, dated 9 October 1998, the Secretary General of NATO, Javier Solana sought to justify the threat of force against the FRY. He referred to the Security Council’s view through Resolution 1199, that the conflict in Kosovo constituted a threat to peace and security in the region as well as the fact that the FRY had not yet complied with Resolutions 1160 and 1199. He concluded by saying that because of the unfolding crisis in Kosovo and the impossibility of obtaining a Security Council authorization for the use of force to end the same due to Russian opposition, “the [NATO] 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.”⁴

The threat had some impact on the FRY. The US Special Envoy Richard Holbrooke was able to broker a cease-fire in the region and facilitated two agreements. Under the first agreement, concluded between the FRY and the Organization for Security and Cooperation in Europe (OSCE) on 16 October 1998, the FRY undertook to comply with Resolutions 1160 and 1199, while the OSCE would establish a verification mission in Kosovo. The second agreement, reached earlier on 15 October 1998 between the FRY and NATO, provided for the establishment of an air verification mission to complement the OSCE mission.⁵

On 24 October 1998, the UN Security Council acting under Chapter VII adopted Resolution 1203 (1998), formally endorsing the two agreements. It demanded full and prompt implementation of these agreements by the FRY and reaffirmed that the unresolved situation in Kosovo constituted a continuing threat to peace and security in the region.⁶

For a brief period there was slight improvement in the situation, but it deteriorated again in mid-January 1999, when the events at Racak led NATO to renew its threats of air strikes. On 28 January 1999, the UN Secretary-General met the North Atlantic Council and emphasized the importance of cooperation between the UN and NATO. At a press conference in Brussels, when asked about the preconditions for military intervention in the FRY, he is reported to have said, “normally a UN

³ Simma, “NATO, the UN and the Use of Force: Legal Aspects”.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

Security Council resolution is required.”⁷ On the same day, NATO Secretary-General Solana was quoted as saying, “You have seen from the visit of the UN Secretary-General to NATO earlier today that the UN shares our determination and objectives.”⁸ He went on to affirm that NATO fully backed a new initiative of the Contact Group for the Former Yugoslavia and was ready to employ its military capabilities if necessary.

On 29 January 1999, the Contact Group took certain decisions aimed at reaching a political settlement and establishing a framework and timetable for that purpose. The President of the Security Council welcomed and supported the decision of the Contact Group. He demanded that the parties should accept their responsibilities and comply fully with these decisions as well as the relevant Council resolutions. Finally, the Security Council reiterated its full support to international efforts aimed at reducing tension in Kosovo, including those of the Contact Group and the OSCE Verification Mission to facilitate a political settlement.

On 30 January 1999, the North Atlantic Council issued a statement reiterating that the crisis in Kosovo remained a threat to peace and security in the region. It called upon both the parties to begin negotiations at Rambouillet by 6 February 1999 and demanded the full and immediate observance of a cease-fire. It went on to state:

If these steps are not taken, NATO is ready to take whatever measures are necessary in the light of both parties’ compliance with international commitments and requirements, including in particular assessment by the Contact Group of the response to its demands to avert a humanitarian catastrophe, by compelling compliance with the demands of the international community and the achievement of a political settlement. The Council has therefore agreed today that the NATO Secretary General may authorize air strikes against targets on FRY territory . . .⁹

On the failure of the parties to reach an agreement at Rambouillet, NATO acted upon this statement and commenced its bombing of Serbia.

Legality of the NATO Campaign

The debate over the legitimacy of NATO’s actions in Serbia is split between those who are critical of the bombing campaign because it lacked legal legitimacy and those who support it on the ground that it enjoyed a certain degree of political and moral legitimacy. Both sides, however, agree that the Kosovo crisis is unprecedented

⁷ Ibid.

⁸ Ibid.

⁹ Marc Weller, “The Rambouillet Conference on Kosovo”, *International Affairs* (London), vol. 75, no. 2, 1999, p. 222.

and represents an obvious erosion of UN authority. It is not intended here to examine the legal arguments advanced by both sides in great detail. The main concern of this article lies in the implications that the UN was not the primary actor. Nevertheless, in order to understand the manner in which NATO violated the UN Charter and the consequent erosion of UN authority, an understanding of the legal issues involved is crucial.

Article 2 (4) of the UN Charter states: "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."¹⁰

This prohibition of the threat or use of force forms the very basis for the maintenance of international peace and security. The only two exceptions are the right of self-defence codified in Article 51 and collective security measures undertaken by the Security Council under Chapter VII of the UN Charter.¹¹ It is important to note that NATO did not justify its attack on the FRY on the ground of self-defence. Article 51 permits the exercise of the right of self-defence only "if an armed attack occurs against a Member." While attempts have been made in the past to construct the phrase "armed attack" in variety of ways, its meaning was clarified by the International Court of Justice in *Nicaragua vs. United States*.¹² Although the court did not lay down an exhaustive definition, it included within the ambit of the phrase, *inter alia*, action by regular armed forces across an international border, the sending by or on behalf of a state of armed bands or groups which carry out acts of such gravity which amount to an actual armed attack, etc.¹³ These categories indicate that only physical acts of aggression will qualify as an "armed attack". None of the parties to the conflict in the Balkans alleged that the FRY had launched an "armed attack" against another state.

Thus, NATO justified its threat and subsequent use of force against the FRY on two broad grounds: (a) that the Security Council had determined, by means of Resolution 1199, that the situation in Kosovo constituted a threat to peace and security in the region; and (b) that there was large scale human suffering in the region, specifically, the repression of ethnic Albanians in Kosovo and the exodus of thousands of refugees into neighbouring Albania and Macedonia. The issues that arise for discussion, therefore, are: (a) whether the mere determination by the Security Council that a situation constitutes a threat to peace and security, gives a Member state the right to use force to deal with it and (b) whether the right of unilateral humanitarian intervention is recognized in international law.

¹⁰ United Nations Charter, 1945, art. 2(4).

¹¹ Malcolm N. Shaw, *International Law* (Cambridge, 1998), pp. 777–823; John F. Murphy, "Force and Arms," in Christopher C. Joyner, ed., *The United Nations and International Law* (Cambridge, 1997), p. 102.

¹² ICJ Reports, 1986, p. 14.

¹³ *Ibid.*, p. 9.

Security Council Authorization

It may be recalled that Resolution 1199 concludes by stating that if the FRY did not implement the measures optioned in Resolution 1160 and 1199, the Security Council would "consider further action and additional measures to maintain or restore peace and stability in the region."¹⁴ It is evident from a plain reading of the resolution that the Security Council intended to give the FRY an opportunity to comply with its wishes and reserved the right to determine "further action and additional measures" to be taken in the event that they were not complied with. It was not left to other states to determine what "further action and additional measures" were to be taken, nor was it remotely implied that the action and measures referred to should take the form of the use of force.

Article 42 of the UN Charter provides that the Security Council may authorize the use of force only after determining that non-lethal sanctions under Article 41 would be or are inadequate.¹⁵ This means that it must expressly determine that military measures are necessary.¹⁶ These rules flow from the principles underlying Article 42, that armed force should be used only as a last resort, and Article 33, that the parties to any dispute must first seek a resolution by peaceful means.¹⁷ Resolution 1199, on which NATO based its use of force, falls far short of determining that non-military measures had failed to deal with the threat of peace posed by the Kosovo crisis, and that military measures were therefore needed. Indeed Resolution 1199 does not even mandate or authorize the implementation of non-military measures, but merely imposes certain demands on the FRY and warns that non-compliance with the same would necessitate a consideration of further action and additional measures. The argument of an implied enforcement mandate in Resolution 1199 is further weakened by the fact that the Security Council while adopting Resolution 1203 of 24 October 1998, found it necessary to emphasize that the "primary responsibility for the maintenance of international peace and security is conferred on Security Council."¹⁸

In short, the UN Charter clearly lays down that the decision to take collective security measures under Chapter VII is a two step process involving, first, the determination by the Security Council under Article 39 that there exists a "threat to the peace, breach of the peace or act of aggression." This may be followed by a

¹⁴ Simma, "NATO, the UN and the Use of Force: Legal Aspects", n. 1., *ibid.*

¹⁵ United Nations Charter, 1945, art. 42. "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces."

¹⁶ Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime", *American Journal of International Law* (Washington, D.C.), vol. 93, no. 1, 1999, p. 128. Such an understanding led all the NATO allies to reject the US position that explicit Security Council authorization was not required for the use of force, in June 1998.

¹⁷ *Ibid.*

¹⁸ Weller, "The Rambouillet Conference on Kosovo", n. 9, p. 224.

decision of the Security Council to adopt measures not involving the use of armed force under Article 41 (such as the disruption of economic relations or the severance of diplomatic relations) or to use such force as may be necessary to maintain international peace and security under Article 42.¹⁹ Resolution 1199 is merely a determination under Article 39. To construe it as an authorization for the use of force is to conflate the two steps described above.

Indeed it may be argued that the fact that Secretary-General Solana's letter mentions the improbability of obtaining a Security Council resolution containing an explicit mandate for enforcement action, as a reason for the NATO strike, may be interpreted as an admission by NATO that such a resolution was necessary. That NATO proceeded to threaten and use force, knowing full well that it was doing so without authorization, make its violation of the UN Charter all the more flagrant.

Humanitarian Intervention

NATO invoked the highly controversial and tenuous doctrine of unilateral humanitarian intervention to justify its action against the FRY. While a detailed discussion of this doctrine is beyond the scope of this article, it is important to examine whether such a right exists in international law, since it was, perhaps, the more important of the two justifications given by NATO for its use of force. By drawing attention to the unfolding disaster in Kosovo, NATO countries were able to strike a sympathetic chord in the general public as well as in diplomatic and other influential circles, thus buttressing their case for intervention.

The right of humanitarian intervention is not provided for in the UN Charter or in any international human rights instrument. Indeed, Article 2 (7) of the UN Charter prohibits intervention in matters which are essentially within the domestic jurisdiction of any state. In addition, numerous General Assembly resolutions have reiterated the principle of non-intervention in the internal affairs of sovereign states. Thus, the Declaration on the Inadmissibility of Intervention, passed by the General Assembly on 21 December 1965, states that an "armed intervention is synonymous with aggression" and "a violation of the Charter of the United Nations." The resolution condemns armed intervention "for any reason whatsoever", making no exception even for the protection of human rights.²⁰

The right of humanitarian intervention does not find place in international politics. The fact is that where invoked, this 'right' has found little international support and where it could legitimately have been invoked, it was not. Thus, although the brutal suppression of Biafra's attempt to secede from Nigeria in the late 1960s evoked international condemnation, no other state asserted a right of intervention. Similarly, no right of humanitarian intervention was invoked by any state in

¹⁹ Shaw, n. 11, p. 859.

²⁰ Thomas M. Franck and Nigel S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", *American Journal of International Law*, vol. 67, no. 2, 1973, p. 301.

response to the massacre of Jews in Europe prior the Second World War or blacks under the white racist regimes in South Africa and Rhodesia. Further, even when Tanzania intervened in Uganda in 1979, following several years of atrocities committed against the population by the regime of Idi Amin, it justified its action not on humanitarian grounds, but on the somewhat dubious basis of self-defence. When Vietnam invaded Cambodia in 1979 to overthrow the Pol Pot regime which had been responsible for acts of genocide, the invasion was deplored and little support was found for the right of humanitarian intervention claimed by Vietnam. India's intervention in Bangladesh in 1971, in response to an influx of ten million refugees may be cited as an ideal instance of humanitarian intervention. Although India initially referred to humanitarian considerations, it later claimed that it had responded to an armed attack by Pakistan. It has been argued that India's *volte-face* was a consequence of the realization that no right of humanitarian intervention existed in international law.²¹

The attitude of western governments on the issue is also meaningful. It is interesting to note that in 1986, the UK Foreign Office in a policy document succinctly stated its reasons for rejecting the notion of a right of unilateral humanitarian intervention.

[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, 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 principles of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.²²

The above policy statement has been cited not because the understanding of the UK Foreign Office is conclusive on the state of the law, but because as one of the NATO powers committed to military action against the FRY on humanitarian grounds, it is significant that it had adopted such a strong position on the issue only thirteen years before.

Jurists are also virtually unanimous on the point that no right of unilateral humanitarian intervention exists in international law. At one end of the spectrum of international legal opinion stands Oppenheim who argues that such a right may exist, or is at least evolving. The latest edition suggests a number of factors that

²¹ Tim Hiller, *Sourcebook on Public International Law* (London, 1998), pp. 611–12.

²² UK Foreign Office Policy Document No. 148, *British Yearbook of International Law* (London), vol. 57, 1986, p. 614.

should be taken into consideration in determining whether humanitarian intervention is justified in a particular situation.²³ While a careful reading of these considerations appears to give the NATO action a measure of legitimacy, Oppenheim concludes by stating that the intervention “would have to be peaceful action (which need not exclude it being carried out by military personnel) in a compelling emergency.”²⁴ Clearly, the nature of intervention contemplated even by this expanded and rather generous conception of the right of humanitarian intervention is very different from that undertaken by NATO. One would submit that a *jus cogens* norm such as the prohibition on the use of force codified in Article 2 (4) of the UN Charter, cannot be eroded by exceptions such as the right of humanitarian intervention, unless they have themselves attained the status of *jus cogens* norms. Since this has clearly not yet happened, the use of force cannot be justified on the basis of a right of humanitarian intervention.

Having said that international law does not yet recognize a right of humanitarian intervention, it cannot be denied that the international community has been confronted with situations in which certain governments have followed repressive policies against their own people. Humanitarian intervention on behalf of victims of such repression, while not legal, may be justified on moral grounds. Some commentators, while recognizing the possibility of such exceptions, have argued that a change in the law is not called for, since this would only weaken the norm prohibiting the use of force. Rather, humanitarian intervention undertaken in such exceptional situations should be based on a “higher” moral obligation and, therefore, while regarded as illegal, should not be condemned.²⁵ Such a perspective might help explain the response of the UN to NATO’s actions.

Legality of UN Action

Even a cursory overview of the events that culminated in NATO’s bombardment of Serbia reveals that the UN, far from being proactive, merely reacted to events as they occurred. When it became apparent that Russia and perhaps China would

²³ Sir Robert Jennings and Sir Arthur Watts, eds, *Oppenheim’s International Law* (London, 1996), p. 443.

If humanitarian intervention is ever to be justified, it will only be in extreme and very particular circumstances. Crucial considerations are likely to include whether there is a compelling and urgent situation of extreme and large-scale humanitarian distress demanding immediate relief, whether the territorial state is itself incapable of meeting the needs of the situation or unwilling to do so (or is perhaps itself the cause of it); whether competent organs of the international community are unable to respond effectively or quickly enough to meet the demands of the situation; whether there is any practicable alternative to the action to be taken; whether there is likely to be any active resistance on the part of the territorial state; and whether the action taken is limited both in time and scope to the needs of the emergency.

²⁴ *Ibid.*

²⁵ Views of Ellen Frey-Wouters discussed in “Sovereignty Eclipsed?: The Legitimacy of Humanitarian Access and Intervention”, *Project on Multilateral Institutions and Global Security* (Working Paper No. 2) (York, 1995).

exercise their veto to prevent Security Council authorization for the use of force against the FRY, the UN was virtually sidelined by NATO, which assumed absolute command over operations in Kosovo. However, it would be incorrect to suppose that the UN remained a passive bystander throughout the crisis. The truth is that the response of the Security Council was so ambiguous as to call into question its own compliance with the UN Charter.

For instance, as has been explained above, NATO's first threat of force made in a letter dated 9 October 1998 was illegal because it was not authorized by the Security Council and could not be justified on the basis of self-defence. This threat of force compelled the FRY to return to the negotiating table and led to the conclusion of two agreements providing for the establishment of ground and air verification missions in Kosovo with the active involvement of the OSCE and NATO. It is a well known principle of international law, now codified in Article 52 of the Vienna Convention on the Law of Treaties (1969) and recognized by the International Court of Justice in the Fisheries Jurisdiction case,²⁶ that a treaty concluded as a result of the threat or use of force is void.²⁷ Nevertheless, the Security Council in Resolution 1203 (1998) endorsed and supported these agreements and demanded their full implementation by the FRY, thus practically acquiescing in a violation of international law. Any permanent member of the Council could have vetoed its gestures of political approval, but none did so. I am not suggesting that in adopting such an attitude, the Security Council implicitly authorized the use of force against the FRY. It is well established that failure of the Security Council to condemn an unlawful threat or use of force does not amount to implicit authorization of the same. This was also the position taken by the US during the Cuban missile crisis of 1962, when the Security Council failed to condemn an illegal resolution passed by the Organization of American States, threatening the use of force against Cuba if she continued to receive arms from the Soviet Union. The majority of legal opinion did not regard this as implicit authorization.²⁸

Nevertheless, it is possible to discern a degree of moral and political legitimization of NATO actions in Resolution 1203 as well as in the Presidential Statement of 29 January 1999. This was the view taken by the US Deputy Secretary of State Strobe Talbott who, when asked about the specific contribution of the UN, was quoted as saying that "the UN has lent its political and moral authority to the Kosovo effort."²⁹ His omission of any mention of legal authority speaks volumes. Perhaps this is understandable considering that the Security Council, as a political organ entrusted with the maintenance of international peace and security as opposed to a judicial body concerned with the interpretation of law, is often called upon to act

²⁶ ICJ Reports, 1974, p. 3.

²⁷ Jennings and Watts, n. 24, p. 1290. See also Lord McNair, *The Law of Treaties* (Oxford, 1986), p. 210.

²⁸ Michael Akehurst, "Enforcement Action by Regional Agencies, with Specific Reference to the Organization of American States", *British Yearbook of International Law*, vol. 42, 1967, p. 217. See also N.D. White, *The Law of International Organizations* (Manchester, 1996), p. 215.

²⁹ Simma, "NATO, the UN and the Use of Force: Legal Aspects".

in situations outside the framework of law. In such situations, the Security Council could adopt a course of action which seems just under the circumstances, dispensing with strict compliance with rules of international law. Such a course would not necessarily violate the UN Charter. Article 24 (2) provides that the Security Council, in discharging its duties, shall act in accordance with the principles and purposes of the UN. Article 1, which determines the purposes of the UN, stipulates that it shall act in conformity with principles of justice and international law. Since justice is not identified with international law, it has been suggested that the Security Council could choose between the two.³⁰ In the case of Kosovo, therefore, it could be argued that the Security Council has chosen to act in accordance with principles of justice rather than international law.

While there is no doubt that NATO's use of force against the FRY violated international law, it may be considered permissible, even desirable, when viewed as a morally justifiable intervention that was given the political and moral endorsement of the UN. Of course one's judgement on this issue will inevitably be influenced by how one views the human rights violations that took place in Kosovo prior to NATO's threat and use of force, and those which resulted from the NATO intervention, etc. When the Kosovo conflict is studied in isolation and these factors are taken into consideration, NATO's violation of international law appears somewhat less egregious. However, when NATO's actions are located in the context of its evolving relationship with the international community and the UN in particular, they become part of a dangerous trend that poses a grave threat to international peace and security. This brings us to a discussion on the dynamics of the UN-NATO relationship with reference to certain key issues and events.

Relationship Between UN and NATO

NATO's Identity Crisis

The North Atlantic Treaty Organization (NATO) was established by the North Atlantic Treaty in 1949, as a carefully circumscribed, uni-dimensional security organization, complementing the multi-dimensional security framework of the UN. The language of the Treaty makes it amply clear that NATO was conceived within the framework of the UN Charter and was intended to remain subordinate to the UN. Article 5 of the North Atlantic Treaty expressly bases itself on Article 51 of the UN Charter, which recognizes the inherent right of member states to act in individual or collective self-defence in response to an armed attack, until the Security Council has taken measures to maintain international peace and security. Article 5 of the Treaty states that

³⁰ Hans Kelsen, "Collective Security and Collective Self-Defence under the Charter of the United Nations", *American Journal of International Law*, vol. 42, no. 4, 1948, p. 788.

The parties agree that an attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self defence 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. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.³¹

The subordination of NATO to the UN is acknowledged by the preamble to the North Atlantic Treaty, in which the parties reaffirm their faith in the purposes and principles of the UN Charter. In Article 1, the parties accept once more their Charter obligations to settle disputes by peaceful means and to refrain from the use of force in any manner inconsistent with the purposes of the UN. In both Articles 5 and 7, the parties recognize the primacy of the Security Council in the maintenance of international peace and security. Indeed, Article 7 goes to the extent of clarifying that the Treaty does not affect "in any way the rights and obligations under the Charter of the Parties which are members of the United Nations". It therefore reiterates Article 103 of the UN Charter, which provides that in the event of a conflict between a member's obligations under the Charter and its obligations under any other international agreement, the former will prevail.³²

NATO's subordination to the UN was also acknowledged by its architects from the very inception. They were acutely conscious of the fact that it would be extremely unpopular if NATO was perceived to be undermining the UN and thereby pushing the world once again to the negative politics of spheres of influence, associated with the two World Wars.³³ This was a difficult task symbolically because the UN was created with the express purpose of obviating the need for such military blocs. But it was very tactfully tackled by US Secretary of State Dean Acheson, who informed the American public in a radio broadcast on 18 March 1949, that "the Pact is carefully and conscientiously designed to conform in every particular with the Charter of the United Nations" and that "it is an essential measure for strengthening the United Nations". He went on to state that "it is the firm intention of the parties to carry out the Pact in accordance with the provisions of the United Nations Charter and in a manner which will advance its purpose and provisions."³⁴

³¹ North Atlantic Treaty, 1949, art. 5.

³² Richard H. Eindel, Thorsten V. Kalijarvi and Francis O. Wilcoc, "The North Atlantic Treaty in the United States Senate", *American Journal of International Law*, vol. 43, no. 4, 1949, p. 637.

³³ High Guesterson, "Presenting the Creation: Dean Acheson and the Rhetorical Legitimation of NATO", *Alternatives* (Boulder), vol. 24, no. 1, 1999, p. 46.

³⁴ *Ibid.*, p. 47.

The provisions of the North Atlantic Treaty are by themselves insufficient to define NATO's relationship with the UN. Legal opinion is divided on the exact nature of that relationship, with one school of thought regarding NATO merely as a collective self-defence organization under Article 51 of the UN Charter, and another arguing that it is a regional organization within the meaning of Chapter VIII of the Charter. In order to understand the relevance of this controversy, it is necessary to perceive the distinction between the two. From a plain reading of the UN Charter, a collective self-defence organization established under Article 51 would have the right to use force in response to an armed attack against one or more of its members, without Security Council authorization, until the Council has taken measures necessary to maintain international peace and security.

The scope of activities of a regional organization envisaged by Chapter VIII of the Charter is considerably broader. Article 52 provides that nothing contained in the Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to international peace and security as are appropriate for such arrangements or agencies, provided that these are consistent with the purposes and principles of the UN. Article 53 provides that the Security Council, where appropriate, shall utilize such regional arrangements or agencies for enforcement action under its authority, but that no regional enforcement action shall be taken without the authorization of the Security Council. Article 54 provides that the Security Council is to be kept fully informed at all times of activities undertaken or under contemplation by regional organizations. It should be noted that Articles 52 (2) and (3) encourage peaceful settlement of disputes through regional mechanisms before they are referred to the Security Council. However, only the Council may authorize enforcement action. It may therefore be concluded that regional organizations are permitted to take measures short of the use of force to deal with matters relating to international peace and security within their regions without Security Council authorization. Such measures may include peacekeeping operations, provided the legal principles of peacekeeping, namely, consent, cooperation, neutrality and limited use of force for defensive purposes only, are complied with. The Arab League force in Kuwait (1961), the Commonwealth force in Southern Rhodesia (1979) and the Organization of African Unity force in Chad (1981) are examples of peacekeeping forces legitimately despatched by regional organizations without Security Council authorization.³⁵

While a plain reading of the Charter appears to give collective self-defence organizations and regional arrangements distinct spheres of activity, complications arise because Charter provisions may be interpreted as permitting each to assume the functions of the other. Thus, nothing in Chapter VIII precludes regional organizations from exercising the right of collective self-defence in the event of an armed attack. Although this is not expressly mentioned in Chapter VIII as being within the competence of regional organizations, Article 51 clearly recognizes

³⁵ White, *The Law*, p. 207.

that the right of individual or collective self-defence is inherent and remains unaffected by the UN Charter.³⁶

However, there has been some controversy over whether the converse necessarily follows—that is, whether collective self-defence organizations can exercise the considerably broader powers of regional organizations under Chapter VIII. Some jurists answer this question in the negative and point to state practice in support of their contention.³⁷ The Warsaw Pact, undoubtedly a collective self-defence organization, claimed the authority as a regional organization under Chapter VIII, to intervene “peacefully” and settle regional disputes in Hungary and Czechoslovakia, in the absence of any external armed attack. The US condemned its actions, arguing that the Pact had not previously claimed to be a regional arrangement or agency and that “no such claim could at this late stage properly be put forward,”³⁸ thus adopting the position that collective self-defence organizations could not act as regional organizations under Chapter VIII.

A significant distinction between collective self-defence organizations and regional organizations under Chapter VIII lies in their respective reporting requirements *vis-à-vis* the Security Council. An organization established under Article 51 may use force in self-defence in response to an armed attack without Security Council authorization, and is not obliged to report its actions to the Council before such action is taken. An Organization established under Chapter VII may use force even when not acting in self-defence but only with the prior authorization of the Security Council and is obliged under Article 54 to report even those actions that are under contemplation to the Security Council.³⁹ It follows that inaction of the Security Council does not prevent an organization established under Article 51 from continuing to act in self-defence, but precludes an organization established under Chapter VIII from initiating any action involving the use of force.⁴⁰

Conscious of the stringent reporting requirements it would have to comply with, NATO has consistently declared that it is not a regional organization within the meaning of Chapter VIII. US Secretary of State Dean Acheson left no room for doubt on this score in his testimony before the Senate Foreign Relations Committee on 27 April 1949:

³⁶ Hans Kelsen, “Is the North Atlantic Treaty a Regional Arrangement?” *American Journal of International Law*, vol. 45, n. 1, 1951, p. 163. See also White, *The Law*, p. 207; D.W. Bowett, “Collective Self-Defence under the Charter of the United Nations”, *British Yearbook of International Law*, vol. 32, 1955, p. 131.

³⁷ Thomas M. Franck, “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States”, *American Journal of International Law*, vol. 64, no. 4, 1970, p. 827.

³⁸ *Ibid.*

³⁹ Akehurst, “Enforcement Action by Regional Agencies, with Specific Reference to the Organization of American States”, p. 184.

⁴⁰ Gerhard Bebr, “Regional Organizations: A United Nations Problem”, *American Journal of International Law*, vol. 49, no. 2, 1955, p. 74.

... article 53 says that [a] regional arrangement shall not, itself, undertake positive coercive enforcement action against any country unless the Security Council asks it to do so ... Article 53 has nothing whatever to do with the right of self-defence, individual or collective. Therefore article 53 is not involved in discussions in any way whatever. Under the North Atlantic Treaty nobody proposes to take enforcement action, aggressive action, preliminary action, any sort of action at all, except defensive, after an attack has occurred.⁴¹

British Foreign Secretary Bevin was equally categorical in his statement before the House of Commons:

The Treaty is not a regional arrangement under Chapter VIII of the Charter. The action which it envisages is not enforcement action in the sense of Article 53 of the Charter at all. The Treaty is an arrangement between certain states for collective self-defence as foreseen by Article 51 of the Charter. It is designed to secure the Parties against aggression from outside until such time as the Security Council has taken the necessary measures.⁴²

That NATO is not a regional organization within the meaning of Chapter VIII, has also expressly been clarified in a letter from its former Secretary General Willy Claes to his UN counterpart.⁴³ This position appears consistent with a plain reading of the North Atlantic Treaty, which, while expressly basing itself on Article 51, makes no reference to Chapter VIII. This means that NATO must confine the scope of its operations strictly to collective self-defence and would be barred from undertaking other kinds of operations. But this has not deterred it from undertaking missions in Kosovo and earlier in Bosnia. It is submitted that if it wants to evade the stringent authorization and reporting requirements *vis-à-vis* the Security Council under Chapter VIII and claim the status of a collective self-defence organization under Article 51, then it must limit its use of force to self-defence in response to an armed attack. NATO cannot use force when it is not acting in self-defence and evade the scrutiny of the Security Council.

A significant body of legal scholarship argues that NATO is a regional organization, even though its constitutive Treaty makes no mention of this. Kelsen advances a trite argument, according to which the principal characteristic of regional organizations, as set out in Article 52, is that they must deal with such matters relating to the maintenance of international peace and security as are appropriate for regional action. There can be no doubt that the organization of collective self-

⁴¹ Ibid., p. 80.

⁴² Ibid.

⁴³ Burno Simma, "NATO, the UN, and the Use of Force: Legal Aspects", Paper presented at two Policy Roundtables organized by the United Nations Association of the United States of America, New York and Washington, D.C., 11 and 12 March 1999 (Internet edition: <http://www.unausa.org/issues/sc/simma/Intm>).

defence is a matter relating to the maintenance of international peace and security. Since the North Atlantic Treaty expressly restricts the exercise of collective self-defence to an area determined in the Treaty and referred to as the "North Atlantic area", the Treaty fulfils all the requirements of a regional arrangement under Chapter VIII.⁴⁴

The consequence of regarding NATO as an organization established under Article 51 of the UN Charter is that its operations are limited to acting in self-defence. This may not restrict NATO's operations to the extent that one might expect. During the Dominican crisis, the US asserted the right of the Organization of American States (OAS) to use force by stretching the meaning of the phrase "self-defence" far beyond that contemplated in Article 51, to include "defence" against an "attack" of an alien ideology (Communism) and foreign "inspiration."⁴⁵ Although the OAS is a regional organization, the scope of its right of self-defence is no wider than that of an individual country or collective self-defence organization established under Article 51. Thus, the expansive interpretation of the right of self-defence would, if accepted, apply to collective self-defence organizations as well as individual states, besides regional organizations. As a regional organization, NATO would be entitled to take measures short of the use of force to settle disputes without Security Council authorization,⁴⁶ but would require such authorization for the use of force,⁴⁷ unless acting in self-defence. In practice, regional organizations have been able to carve out a large measure of autonomy for themselves, especially with regard to the scope of their "peaceful settlement" functions. Thus, as a member of the OAS, the US has sought to include within the ambit of the phrase "peaceful settlement" such endeavours as the "peaceful" invasion of Guatemala, the "peaceful" deployment of naval forces to blockade Cuba, and the "peaceful" occupation of the Dominican Republic.⁴⁸ The distinction between regional and collective self-defence organizations appears to have blurred in practice, with both categories of institutions exercising almost coextensive powers as a result of permissive constructions of the very different Chapter provisions dealing with them.

NATO's New Identity

In view of Article 5 of the North Atlantic Treaty it is evident that NATO was intended to be a collective self-defence organization operating strictly within the

⁴⁴ Kelsen, "Is the North Atlantic Treaty a Regional Arrangement?", n. 37, p. 163.

⁴⁵ Franck, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States", n. 38, p. 834.

⁴⁶ White, n. 29, p. 203.

⁴⁷ Michael J. Levin, "The Law of Force and the Force of Law: Granada, the Falklands and Humanitarian Intervention", *Harvard International Law Journal* (Cambridge) vol. 27, no. 2, 1986, p. 630.

⁴⁸ Franck, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States", p. 826.

confines of Article 51 of the UN Charter. In addition, Article 7 of the Treaty provides that the Treaty shall not affect "the primary responsibility of the Security Council for the maintenance of international peace and security," which according to jurists means that the Security Council cannot use NATO for enforcement action under Article 53.⁴⁹ This seems to strengthen the feeling that NATO is not a regional organization under Chapter VIII. In recent years, however, the UN has often treated NATO as a regional arrangement or agency under Chapter VIII. Take, for instance, the utilization of NATO by the UN for the enforcement of Security Council resolutions in Bosnia. Acting under Chapter VII of the UN Charter, the Security Council in Resolution 770 (1992), called upon states "to take nationally or through regional agencies . . . all measures necessary to facilitate in coordination with the UN the delivery by relevant UN humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia . . ."⁵⁰ Subsequently, the Security Council provided for a no-fly zone over Bosnia in Resolution 781 (1992) and authorized the enforcement of the no-fly zone Resolution 816 (1993). Safe havens were established for refugees under Resolutions 819, 824, 836 and 844 of 1993. Resolution 836 authorized the limited use of air power by member states. It is under these resolutions that NATO acted on a number of occasions. For instance, in February 1994, it threatened air strikes against the Bosnian Serbs surrounding Sarajevo if they failed to withdraw their heavy weapons. In the same month, it shot down four Serb warplanes over Bosnia. In November 1994, NATO planes bombed Serb airbases in Croatia and in May 1995 Serb ammunition dumps near Pale.⁵¹ As military pressure mounted, the warring factions entered into negotiations, which concluded with the signing of the Dayton peace agreement in Paris on 14 December 1995. The Security Council, by way of Resolution 1031 (1995), authorized NATO to use force to implement the Dayton Accords.⁵²

Under Article 53 of the UN Charter, the Security Council is free to utilize regional arrangements or agencies for enforcement action under its authority. By authorizing NATO to enforce its resolutions, the Security Council has recognized NATO as a regional arrangement or agency within the ambit of Article 53, which as explained earlier, implies that it may have a role even when it is not acting in self-defence. While this is *ultra vires* the North Atlantic Treaty, it does not raise any legal issues under Article 103 of the UN Charter. This is because NATO may use force only in collective self-defence under the North Atlantic Treaty. Chapter VII permits the Security Council to authorize the UN force for purposes other than those in self-defence.

The legality of the delegation of the use of force by the Security Council to individual states, ad hoc coalitions of states or regional organizations for the

⁴⁹ A.L. Goodhart, "The North Atlantic Treaty of 1949", *Recueil Des Cours* (The Hague), vol. 79, no. 2, 1951, p. 223.

⁵⁰ White, n. 29, p. 219.

⁵¹ Ibid.

⁵² Lobel et al., "Bypassing the Security Council Ambiguous Authorizations to Use Force, Ceasefires and the Iraqi Inspection Regime", p. 142.

purpose of enforcing its resolutions, has never been seriously questioned by the majority of member states.⁵³ However, reservations have been expressed over the political wisdom of such a course of action. The “contracting-out” of the use of force to states acting individually or in groups has been necessitated by the fact that the UN has no standing military force to enforce Security Council resolutions. The authorization for the use of force is given to states that are able and willing to intervene in a specific conflict situations. This “willingness” usually stems from the interest that states may have in a given situation. The Security Council may, thus, provide legitimacy to the intervening states trying to further their own foreignpolicy objectives. This would reinforce traditional spheres of influence. Thus, Russia was authorized to act in Georgia, the US in Haiti, France in Rwanda, NATO (with token Russian participation under nominal US command) in the former Yugoslavia, the US and its western allies (with similar Arab participation) in Iraq, as so on.⁵⁴ The Kosovo crisis is especially disturbing because the regional *hēgemōn* (NATO) acted without UN authorization or the face-saving “international” participation that has been considered necessary, at least politically, in the past. Sub-contracting the use of force to “interested” states has also meant that conflict situations in which major powers do not have a stake, are ignored by the international community.

The other major issue with respect to sub-contracting, concerns the command control of the operations. Obviously, some degree of discretion has to be granted to the actual enforcers of the Security Council mandate or authorization, so as to enable them to take timely and effective measures on the ground to meet changing circumstances. At the same time, ideally the Security Council must retain overall control of the operations, so as to ensure that its mandate or authorization is applied not for partisan purposes, but in the interests of the international community. This was achieved to a large extent in the Security Council’s resolutions concerning Bosnia such as Resolution 958 (1994) which authorized NATO air strikes “subject to close co-ordination” with the UN Secretary General and the United Nations Protection Force (UNPROFOR). By and large, NATO air strikes took place at the request, or with the consent, of UNPROFOR under the so-called ‘dual-key’ approach.⁵⁵ Furthermore, the Security Council Resolution 1031 (1995) terminated all its prior authorizations in that regard and decided to review it within one year to determine whether it should be continued.⁵⁶

Nevertheless, tensions between the UN and NATO were apparent in the statement of the NATO Secretary General to the effect that NATO was not “a sub-

⁵³ Benedetto Conforti, *The Law and Practice of the United Nations* (The Hague, 1997), p. 203.

⁵⁴ Tobias Vogel, “The Politics of Humanitarian Intervention”, *Journal of Humanitarian Assistance*, <http://www.jha.sps.cam.ac.uk/a/a0,18.htm> (visited 27 April 1999).

⁵⁵ White, n. 29, pp. 197, 202.

⁵⁶ Lobel and Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime”, p. 142.

contractor of the UN.”⁵⁷ On two occasions, NATO enforced heavy weapons exclusion zones without Security Council authorization. The then NATO Secretary General Manfred Woerner was extremely annoyed with the UN Special envoy and there were accusations that the (British) UN military commander in Bosnia had instructed British troops on the ground to sabotage NATO air strikes. These were the obvious weak points in the facade of UN-NATO cooperation.⁵⁸ The difficulties that the Security Council faces when striking a balance between delegating effective military control and retaining political control over a peace initiative, were particularly evident in the enforcement of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFA). According to Article 1, 1 (b) of Annex I-A to the GFA the multinational military Implementation Force (IFOR) charged with the enforcement of the GFA was to operate “under the authority and subject to the direction and political control of the North Atlantic Council through the NATO chain of command.”⁵⁹ NATO was therefore effectively placed in control of the implementation of the military aspects of the Dayton peace plan, although the Security Council retained a significant measure of Control over these operations. The mandate and modalities of IFOR were wholly independent of the GFA and its related agreements, and were conditional on the subsequent adoption of decisions by the Security Council.⁶⁰

Collision between the UN and NATO

Even as NATO bombed Serbia relentlessly during the spring of 1999, it celebrated its 50th anniversary at a summit in Washington, D.C., in April. The irony of the coincidence reflected the need for the organization to justify its relevance now that the threat of external attack on Europe had receded, rendering the collective self-defence commitment underlying Article 5 of the North Atlantic Treaty rather redundant. Indeed this process of redefinition had begun much earlier, as was evident from the Resolution on Recasting Euro-Atlantic Security, adopted by the North Atlantic (Parliamentary) Assembly in November 1998. This document enjoined member states, *inter alia*.

(b) to accelerate progress in developing capabilities to meet emerging security challenges that many demand both Article 5 and non-article 5 missions, including meeting the threat of the proliferation of weapons of mass destruction and international terrorism . . .

⁵⁷ Vogel, “The Politics of Humanitarian Intervention”.

⁵⁸ *Ibid.*

⁵⁹ John Woodhulfe, “The Evolution of a New NATO for a New Europe”, *International Comparative Law Quarterly* (London), vol. 47, no. 1, 1998, p. 194. Annex I-A of the GFA contains the Agreement on Military Aspects of the Peace Settlement (AMAPS).

⁶⁰ *Ibid.*

(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.⁶¹

Both these commitments are *ultra vires* the North Atlantic Treaty because they involve undertaking missions outside the scope of Article 5, which is the very *raison d'être* of NATO. Paragraph (b) lends support to the view that NATO is looking for new enemies in order to justify its continued existence. Having traditionally defined itself in opposition to the Communist "other" which no longer exists, NATO is forced to look for the "emerging security challenges." While the proliferation of weapons of mass destruction (WMD) and international terrorism are certainly legitimate security concerns of any country, NATO's decision to deal with these as it deems fit raises serious problems of jurisdiction. Aside from its nuclear member countries, no other country within NATO's own region has programmes for the development of WMD.⁶² Furthermore, all international treaties creating regimes controlling WMD provide for their enforcement by the Security Council.⁶³ NATO's unilateral assumption of this responsibility sets up competing jurisdictions. Finally, the exact nature of the security challenge is also not unclear. Does the possession of WMD by India and Pakistan, for instance, threaten the security of NATO members, thereby justifying the development of "capabilities to meet" this challenge? Or do these countries have to expressly threaten or use WMD to invite its action? The fact that paragraph (b) states that non-Article 5 missions may be needed to deal with the "emerging security challenges" indicates that it need not always act in self-defence. In other words, it may take remedial action even if it does not feel threatened.

Paragraph (d) is a codification of NATO's actions such as in Kosovo, which as discussed earlier violated the UN Charter and international law. Non-Article 5 missions involving the use of force would be legal only with the authorization of the Security Council under Article 53 of the UN Charter, as in Bosnia. The Charter, while recognizing and giving scope for initiatives by regional organizations for the maintenance of international peace, does not permit such organizations to act in place of the Security Council if it is "prevented from discharging its purpose of maintaining international peace and security", however desirable this may be in a given context.⁶⁴ The Security Council is the ultimate arbiter on the need to use

⁶¹ Simma, "NATO, the UN and the Use of Force: Legal Aspects".

⁶² Ibid.

⁶³ Jeffrey Laurenti, *The Policy Issue, NATO, the UN, and the Use of Force Policy Roundtables* organized by the United Nations Association of the United States of America, New York and Washington, D.C. 11 and 12 March 1999.

⁶⁴ Bebr, "Regional Organizations: A United Nations Problem", p. 70, who after an extensive discussion of Articles 52, 53 and 54 of the UN Charter, concludes that "Failure of the Security Council to act, for whatever reason, would frustrate any possible defence by a regional organization even in case of an emergency" (This would not, of course, preclude the exercise of the right of self-defence in

force for the maintenance of international peace and can be “prevented” from discharging this function only by one of the permanent members which has recourse to veto. The system of collective security envisaged by the UN Charter is premised on the supremacy of the Security Council in all matters concerning the use of force, which necessarily implies that all regional organizations are subordinate to the Council in this respect. Permitting regional organizations to override decisions of the Council would destroy this fragile system. However, the very real possibility that the Security Council may be paralyzed by a lack of unanimity amongst its permanent members demands that some alternative mechanism be activated for the maintenance of international peace and security in such an eventuality. It has been suggested that because Article 24 of the UN Charter imposes primary (but not exclusive) responsibility for the maintenance of international peace and security on the Security Council, there is a secondary responsibility on the totality of UN members as represented by the General Assembly to act if the Council is unable to discharge its primary responsibility. For there is a reference to “collective measures” for the maintenance of international peace and security in Article 1 (1) of the Charter. The General Assembly Resolution on Uniting for Peace of 3 November 1950 appears to facilitate the discharge of this secondary responsibility by authorizing Members to take action of this kind in case of the failure of the Security Council.⁶⁵ But it is clear that this responsibility is to be assumed not by NATO but by the totality of UN members.

Finally, the fact that paragraph (d) speaks of ensuring “the widest international legitimacy for non-Article 5 missions” suggests that NATO has doubts regarding the legality of such missions. If they were legal there would be no need to legitimize them.

Key officials in NATO governments, particularly the US government, have asserted quite unambiguously that they do not consider NATO to be subordinate to the UN. US Deputy Secretary of State, Strobe Talbott, in an address delivered in Bonn on 4 February 1999, said:

We believe NATO’s missions and tasks must always be consistent with the purposes and principles of the UN and the OSCE . . . 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

response to an armed attack). However, flawed interpretations to the contrary have been suggested since NATO’s inception. See Heindel et al., “The North Atlantic Treaty in the United States Senate”, p. 637, who (wrongly) suggests that the North Atlantic Treaty operates inside the Charter, but outside the veto. It does not replace UN peace machinery; it functions only if and when that machinery breaks down”. It is submitted that nothing in the UN Charter permits regional organizations to assume the functions of the Security Council when it is paralyzed by the veto of a permanent member, however desirable this may be.

⁶⁵ Bowett, “Collective Self-Defence under the Charter of the United Nations”. pp. 156–57; Bebr, “Regional Organizations: A United Nations Problem”, p. 75.

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.⁶⁶

It is interesting to note the manner in which the UN is equated with, and given no greater importance than, a regional organization such as the OSCE. Clearly, its pre-eminence is no longer recognized. In this context, it is submitted that one of the principles on which the UN is based is that regional organizations must act within the parameters of the role envisaged for them under Charter VIII, without usurping its functions. Hence it will be impossible for NATO's missions to be "consistent with the purposes and principles of the UN" if it continues to insist that it is not subordinate to the UN. In a similar vein, Senator William Roth, the Chairman of the North Atlantic Assembly has said, "Even though all NATO Member States would prefer to act with a [UN] mandate, they must not limit themselves to acting only when such a mandate can be agreed,"⁶⁷ thereby implying that a Security Council authorization for the use of force would be politically desirable. How far NATO has moved in its relation with the UN will become clear if one compares the above statements with NATO's declaration of readiness to cooperate with the UN in "peacekeeping and other operations under the authority of the UN Security Council,"⁶⁸ made at its 1994 Brussels summit.

Conclusions

NATO has come a long way from its inception in 1949, as an organization founded on the principle of collective self-defence of the North Atlantic area and clearly subordinate to the UN. In the first phase of its existence, which coincided with the Cold War years, it acted as a counterbalance to the Warsaw Pact assisting in the maintenance of the peace through the balance of terror. NATO did not play an overt role in this process. Its very existence in a state of perpetual readiness for armed attack offset the perceived threat from the Communist world.⁶⁹ With the disintegration of the Soviet Union and the collapse of Communist regimes in several East European countries, that threat was no longer felt and NATO was forced to find a new justification for its existence. Thus began the second phase in its history, when it found meaning in acting in concert with the UN in the maintenance of international peace and security. During this phase, NATO was seen not as subservient to the UN, but as an equal partner—enforcing its resolutions and

⁶⁶ Simma, "NATO, the UN, and the Use of Force: Legal Aspects."

⁶⁷ Tomas Valasek, "NATO: Last Resort, Not a Panacea", speech delivered to the Institute for Policy Studies' briefing "Kosovo in Crisis", 9 November 1998.

⁶⁸ Ivo H. Daalder, "NATO, the UN, and the Use of Force: Legal Aspects", Paper presented at two Policy Roundtables organized by the United Nations Association of the United States of America, New York and Washington, D.C., 11 and 12 March 1999 (Internet edition: <http://www.unausa.org/issues/sc/daalder.htm>).

⁶⁹ Daneil S. Papp, *Contemporary International Relations* (Needham Heights, 1997), p. 48.

acting strictly within the terms of its authorization. The Kosovo crisis is a logical and somewhat predictable progression in this sequence of events, as NATO has ~~taken the incremental step of acting without Security Council authorization. In~~

this third phase, NATO is no longer a partner of the Security Council, but on its own.

This does not represent the limits of NATO's ambitions. It has on numerous occasions emphasized that it is not subordinate to the UN and that it no longer considers Security Council authorizations for the use of force necessary before taking its military actions. It has also shown no hesitation to move beyond collective self-defence in order to deal with what it regards as "emerging security challenges" and recognizes no geographical constraints on its theatre of activity.⁷⁰ By arrogating to itself the power to define new threats to, or breaches of, international peace, NATO has taken over the Security Council's function under Article 39. Indeed, the new security challenges identified by it are likely to require interventions outside Europe. When this happens, its usurpation of the Security Council's role under Chapter VII of the UN Charter will be complete.

While NATO is currently the only regional organization in the world that possesses the military infrastructure to threaten and use force at will, it is not inconceivable that other regional organizations might develop such capabilities in the future. Acquiescing to NATO's actions would therefore set a dangerous precedent that could be exploited by other groups of nations. Indeed, NATO's brazen disregard for international law is likely to provoke the formation of similar groupings in "self-defence". The existence of a number of such groups could give rise to competing claims of a right to intervene in a given conflict,⁷¹ a situation that could only spell anarchy and the demise of the collective security mechanisms established by the UN Charter.

Of course the Kosovo crisis and a host of other conflicts in the past have demonstrated that the Security Council is often unable to intervene decisively in a conflict, because it is paralyzed by the veto of a permanent member. But to recognize the right of states to unilaterally intervene in conflict is to admit that they can legitimately decide whether military intervention is warranted in a given situation. This not only erodes the Security Council's monopoly on the use of force but also undermines its efficiency as an international institution. Thus, an alternative has to be found that does not undermine the monopoly of the Security Council on the use of force while simultaneously enhancing its efficacy as a decision-making forum. The veto power of the permanent members is undoubtedly the main hurdle standing in the way of effective decision-making. By requiring the concurrence of all permanent members on what are often controversial issues, the UN Charter sets potentially unattainable standards of unanimity. No other international organization

permits one of its members to bring its work to a complete halt, holding the entire international community to ransom for purely political reasons.

In the case of Kosovo, the international community was unanimous in its opinion that the slaughter of ethnic Albanians in Kosovo could not be allowed to continue and that some sort of intervention was necessary, but was divided over the nature of that intervention. As non-military measures appeared to do little to improve the situation on the ground, the majority of the members of the Security Council favoured the use of force. Russia's threat to use veto effectively deterred such action, thereby denying a morally defensible military campaign, the legitimacy of Security Council authorization.

This has not led the US and other permanent members who were in favour of intervention in this case, to demand the abolition of the veto. As permanent members themselves, they are well aware of the power of the veto and are unwilling to give this up for the purpose of strengthening the effectiveness of the Security Council.⁷² The paralysis of UN machinery does not unduly worry them. Indeed they feel it provides an opportunity for NATO, in which they wield considerably greater influence, to act unilaterally.

Historically, NATO has shown a willingness to push the boundaries of permissible unilateral use of force and has carved out greater measures of autonomy in each phase of its existence. One may fear that the UN risks disappearing as a credible collective security mechanism capable of maintaining international peace and security.

The UN has, justifiably, come in for severe criticism in recent years over its inability to perform its collective security functions. Many consider it an increasingly irrelevant entity in today's world and do not feel the need for its continued existence. This is a strong view. With regard to its collective security functions, as the discussion in the foregoing pages tries to show the failure of the Security Council is the result of collective failure of its permanent members. This collective failure stems largely from their unwillingness to give up their veto power, thus preventing the UN from becoming a more autonomous actor in international relations. However, collective security is only one aspect, albeit an important one, of the multi-faceted role that the UN has come to play. Nowhere is this better illustrated than in Kosovo itself. On the termination of NATO's bombing campaign, it has fallen upon the UN to oversee the return of refugees, provide them with food and shelter, and assist in the rebuilding of Kosovo's shattered economy and institutions of law and order and democratic governance.⁷³ The reconstruction of civil

⁷² Between 1965 and 1990, the US cast over five times as many vetoes as the Soviet Union. The Soviet Union last used its veto in 1984. Between 1984 and 1990, the US has delivered thirty-two vetoes and Britain ten. In 1992, the US was the only country to oppose a resolution urging states to take further steps to promote the UN system of collective security and calling on states to respect the principles enshrined in the UN Charter. See Mark Curtis, *The Great Deception—Anglo-American Power and World Order* (London, 1998), p. 173.

⁷³ Mark Devenport, *Analysis: UN Faces Kosovo Challenge* (BBC Online, 1 July 1999).

society, the judiciary, police and other public institutions in a province torn apart by ethnic hatred and strife is one of the most sensitive and important elements in the Kosovo peace settlement. Such reconstruction should be the foremost priority for the international community as it is crucial for lasting peace in the region. These are tasks that NATO is neither equipped for nor willing to perform. That they have been given to the UN is eloquent testimony to its continuing relevance.

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