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## Kosovo and NATO: Selected Issues of International Law

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## **ABSTRACT**

NATO's military intervention in Yugoslavia has raised several issues of international law. Are there legal justifications for overriding the traditional principle of international law that states are free to order their internal affairs as they see fit without outside interference? Do its actions comport with the Charter of the United Nations? Is its engagement in an out-of-area conflict that is not a response to an armed attack on one of its members permissible under the North Atlantic Charter? This report examines those issues. It will be updated as events warrant.

# Kosovo and NATO: Selected Issues of International Law

## Summary

The initiation of air attacks by NATO and its intervention in Yugoslavia have posed a number of issues involving international law. First, questions have been raised about whether NATO's actions violate the principles of non-intervention and the sovereignty of states over their internal affairs. Kosovo is not an independent state but is a part of Yugoslavia; and the conflict between the Serbs and the KLA and the maltreatment of ethnic Albanians, therefore, had previously been an internal matter rather than an international one. But international law has traditionally afforded states complete sovereignty over their internal affairs and has barred intervention into those affairs by other states. Thus, one issue is whether there are other principles under international law that justify overriding the traditional principles of non-intervention and sovereignty.

Another issue concerns whether NATO's initiative has been authorized by the U.N. Security Council or must find legal justification elsewhere. The Security Council has had the Kosovo situation under review for some time and addressed the matter in several resolutions last year. But it has not authorized its members or any regional organization to take military action. As a consequence, questions have been raised about whether NATO's intervention is consistent with the UN Charter.

A third issue concerns whether NATO's actions fall within the authority conferred by the North Atlantic Treaty. NATO was created primarily as a defensive alliance to protect the territory of its members from armed attack. But in this instance none of its members has been subjected to attack or the threat of attack. Moreover, NATO is engaging in a mission outside the territory of any of its members. Thus, questions have been raised about its authority under the North Atlantic Treaty to engage in an out-of-area mission that is not a response to an attack on one of its members.

This report examines these issues and concludes that the implications of NATO's intervention in Yugoslavia for international law depend to a great degree on assumptions regarding the current state of international law. If, for instance, one assumes that the principles of the sovereignty of states over their internal affairs and non-intervention remain absolute pillars of international law, NATO's actions are clearly violative. Similarly, if one assumes that the U.N. Charter has made the use of force by states unlawful except as authorized by the Security Council or in self-defense against armed attack, NATO's actions, again, appear violative, even though they appear consistent with the North Atlantic Treaty. But absent these assumptions, a number of different conclusions emerge. NATO's actions, for instance, may find legal justification in the emerging doctrine of humanitarian intervention as well as in the customary international law of self-defense. Both of these issues remain subjects for debate in international law. NATO's actions, thus, both reflect and promote particular aspects of this ongoing debate about humanitarian intervention and self-defense.

This report will be revised and updated as events warrant.

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# Kosovo and NATO: Selected Issues of International Law

## Introduction

On March 24, 1999, the North Atlantic Treaty Organization (NATO) initiated air strikes against the Federal Republic of Yugoslavia (Serbia-Montenegro) in an attempt to convince the Yugoslav government to cease its ethnic cleansing in Kosovo and to enter into a political settlement for that region. In response the Yugoslav army, Serbian police forces, and paramilitary groups accelerated and expanded their attacks on the Kosovo Liberation Army (KLA) and ethnic Albanian civilians in Kosovo. Those actions precipitated a flood of Kosovar refugees pouring into Macedonia, Albania, and Montenegro.

The initiation of air attacks by NATO and its involvement in armed conflict in Yugoslavia has raised a number of issues involving international law, including the following:

(1) *Principle of Non-intervention.* Kosovo is not an independent state but is a part of Yugoslavia; and the conflict between the Serbs and the KLA and the maltreatment of ethnic Albanians, therefore, had previously been an internal conflict rather than an international one. As a consequence, some have questioned whether military intervention by outside powers in that conflict violates the traditional principle of international law barring intervention by one state or group of states in the internal affairs of another state.

(2) *United Nations Charter and NATO's Intervention.* The United Nations Security Council has had the Kosovo situation under review for some time and has addressed the matter in several resolutions. But it has not authorized its members or any regional organization to take military action. Moreover, the U.N. Charter is interpreted by some as prohibiting the use of force except in limited circumstances. As a consequence, questions have been raised about whether NATO's intervention is consistent with the UN Charter.

(3) *North Atlantic Treaty.* NATO was created primarily as a defensive alliance to protect the territory of its members from armed attack. But in this instance none of its members has been subjected to attack or the threat of attack. Moreover, NATO is engaging in a mission outside the territory of any of its members. Thus, questions have been raised about its authority under the North Atlantic Treaty to engage in an out-of-area mission that is not a response to an attack on one of its members.

To aid the House and the Senate in their examination of the various legal components of U.S. involvement in NATO's actions,<sup>1</sup> this report explores these issues of international law. It will be revised as events warrant.

## Principle of Non-Intervention

International law has traditionally dealt with how states in the international arena conduct themselves in their relationships with one another. Its development has been premised on the notions that all states, whatever their size and relative power, are equal and that each is sovereign within its own territory. As a consequence, international law has made non-intervention in the internal affairs of other states a central obligation. Only in recent decades has international law begun to address how states conduct themselves in their internal affairs, *i.e.*, how they treat their own nationals.

The Charter of the United Nations itself recognizes this legal heritage. The Charter states one of the UN's purposes to be

[t]o develop friendly relations among Nations based on respect for the principle of equal rights and self-determination of peoples ...<sup>2</sup>

and asserts that

[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State ...<sup>3</sup>

Moreover, the U.N. Charter commits its members to

settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered<sup>4</sup>

and provides that

[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State ...<sup>5</sup>

In the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United*

<sup>1</sup>As of this date, the Committee on International Relations of the House of Representatives has reported both H.J.Res. 44 and H.Con.Res. 82 with a recommendation that they be rejected by the House. Senator McCain has introduced S.J.Res. 20 in the Senate.

<sup>2</sup>U.N. Charter, Art. 1(2).

<sup>3</sup>*Id.* Art. 2(7).

<sup>4</sup>*Id.* Art. 1(2).

<sup>5</sup>*Id.* Art. 2(4).

*Nations*,<sup>6</sup> the General Assembly in 1970 adopted by consensus the following elaboration of these principles of the Charter:

All States enjoy sovereign equality ... (which) includes the following elements:

- (a) ...;
- (b) ...;
- (c) ...;
- (d) The territorial integrity and political independence of each State are inviolable;
- (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems.

....

No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

....

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

International law, it is clear, has traditionally deemed each state to have the sovereign right to order its internal affairs as it sees fit, free from outside interference.

Viewed through this prism, NATO's actions seem clearly violative of customary international law and of the U.N. Charter. However, three developments in the past half-century arguably allow this principle of non-intervention to be overridden in some circumstances. First, the U.N. Charter itself states that the principle of non-intervention in the internal affairs of states "shall not prejudice the application of enforcement measures under Chapter VII."<sup>7</sup> That Chapter authorizes the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to make recommendations and other actions to maintain or restore international peace and security." Similarly, the General Assembly resolution noted above expanding on the meaning of the Charter with respect to friendly relations among states explicitly states that "[n]othing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security." Thus, international law as reflected in the Charter appears to permit intervention in the internal affairs of states under the auspices of the UN to the extent that the Security Council determines that those affairs threaten international peace and security. That, however, has not happened in the current situation (*see* next section).

Secondly, the U.N. Charter also recognizes in Article 51 the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain

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<sup>6</sup>G.A. Res. 2625 (XXIV) (1970).

<sup>7</sup>U.N. Charter, Art. 2(7). Chapter VII authorizes the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take measures "to maintain or restore international peace and security."

international peace and security.”<sup>8</sup> Thus, the Charter clearly allows a state or group of states to intervene in the internal affairs of another state if necessary to defend themselves from an armed attack by that state. Again, that has not happened in the current situation; at least in Kosovo, Yugoslavia has attacked only its own nationals, not another state. However, it should be noted that there is an ongoing debate concerning whether the limitation of self-defense in Article 51 to responses to armed attack comprises the whole of what international law now allows. Historically, the right of self-defense embodied in customary international law was not limited to a state’s response to an armed attack but covered various other forms of self-help involving the use of force but falling short of war — retorsion,<sup>9</sup> reprisals,<sup>10</sup> embargoes, boycotts, temporary occupations of foreign territory, pacific blockades, *etc.* Moreover, notwithstanding the prohibition on the use of force in Article 2(4) of the UN Charter, numerous states have continued to use these forms of self-help, including military force, since the adoption of the U.N. Charter. Thus, some contend that Article 51’s reference to the “inherent right of ... self-defense” and the continued use of forcible forms of self-help by states shows that the U.N. Charter preserves and allows all the forms of self-defense that had previously been sanctioned by customary international law. Others contend that the Article 51 limitation supersedes what had been customary international law in these matters, that the limitation is now binding on states, and that the continued use of force by states apart from armed attacks is in violation of the Charter.<sup>11</sup> Thus, the use of self-defense as a justification for overriding the principles of sovereignty and non-intervention seems most tenable under international law when it is a response to an armed attack, as permitted by Article 51 of the U.N. Charter. But its legitimacy may also be argued, although with less certainty, in situations not involving a response to an armed attack, such as that in Yugoslavia. The argument that NATO’s actions in Yugoslavia constitute a form of anticipatory collective self-defense has been used with respect to NATO’s actions in Yugoslavia.<sup>12</sup>

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<sup>8</sup>*Id.* Chapter VII, Art. 51.

<sup>9</sup>Retorsion is the commission of an unfriendly but legal act in response to a prior, equally unfriendly legal or illegal act by another state. Frequently, it takes the form of *tit for tat*. State A will impose travel restrictions on the diplomats of state B; state B will respond in kind with respect to the diplomats of state A. State A will deny visas to certain officials of state B; state B will respond in kind. But it doesn’t have to be a response in kind. When Iran seized the U.S. embassy and most of its staff in 1979, for instance, the U.S. responded not by seizing Iranian diplomats but by such measures as freezing Iranian assets in the U.S., invalidating all visas issued to Iranians, and embargoing exports to Iran. *See, generally, von Glahn, Gerhard, Law Among Nations* (1992), pp. 633-640.

<sup>10</sup>Reprisals are illegal acts undertaken in response to another state’s illegal acts — military incursions into the territory of the offending state, bombardment of its territory, and nonperformance of treaty obligations, for example. *See von Glahn, supra n. 6, pp. 640-644.*

<sup>11</sup>*See von Glahn, supra, p. 646, and Simma, Bruno, The Charter of the United Nations: A Commentary* (1994), pp. 661-678.

<sup>12</sup>*See, e.g., Hearing Before the Committee on International Relations of the House of Representatives: United States Policy on Kosovo* (April 21, 1999) (statement of Secretary of State Madeleine K. Albright).

A final legal justification for overriding the principle of non-intervention emerges from the modern development of the international law of human rights. On the basis of the tenets of human rights recognized by the tribunals at Nuremberg and Tokyo after World War II and more recently in the charters of the tribunals for the former Yugoslavia and Rwanda; the provisions of the U.N. Charter obligating its members to promote and encourage respect for human rights<sup>13</sup>; the formulation and adoption by the U.N. General Assembly of the Universal Declaration of Human Rights in 1948<sup>14</sup>; and the widespread adoption of numerous treaties and conventions concerning human rights such as the Geneva Conventions,<sup>15</sup> the International Covenant on Civil and Political Rights,<sup>16</sup> the Genocide Convention,<sup>17</sup> the Convention on the Elimination of Racial Discrimination,<sup>18</sup> and the Torture Convention,<sup>19</sup> it is contended by some that states are no longer free under international law to mistreat their own nationals but are obligated to respect their fundamental human rights. A corollary of this development is that it may now be lawful for another state or states or the international community to intervene in the internal affairs of a given state in order to rectify serious violations of human rights, *i.e.*, to intervene for essentially humanitarian reasons in order to protect the nationals of that state from depredations by their own government. As defined by one author, humanitarian intervention means

the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights, whether or not the intervention is authorized by the target state or the international community.<sup>20</sup>

This doctrine is not yet fully developed in international law. But humanitarian considerations have been repeatedly invoked to justify NATO's actions in Yugoslavia<sup>21</sup>; and the doctrine of humanitarian intervention may, at least in some form, provide a possible justification under international law for NATO's intervention in Kosovo and Yugoslavia.

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<sup>13</sup>U.N. Charter, Articles 1(3), 13(1)(b), and 55(c).

<sup>14</sup>U.N. Document A/811 (1948).

<sup>15</sup>6 UST 3114, 3217, 3316, and 3516 (1956).

<sup>16</sup>TIAS \_\_\_ (1992).

<sup>17</sup>TIAS \_\_\_ (1989).

<sup>18</sup>TIAS \_\_\_ (1994).

<sup>19</sup>TIAS \_\_\_ (1994).

<sup>20</sup>Murphy, Sean D., *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996), at 3-4.

<sup>21</sup>*See, e.g., Hearing Before the Committee on International Relations, supra n. 9* (statement of the Secretary of State); White House Office of the Press Secretary, *Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate* (March 26, 1999); and NATO Press Release, *Statement by the North Atlantic Council on Kosovo* (Jan. 30, 1999).

## The United Nations and NATO's Air Strikes

As noted above, the UN Charter appears to authorize intervention in the internal affairs of states in certain circumstances, notwithstanding the traditional pillars of international law of state sovereignty and non-intervention. Under Chapter VI of the Charter, the Security Council may

investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

In such situations the Security Council may also make recommendations for resolving the dispute or situation. Chapter VII of the UN Charter, in turn, authorizes the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and not only to make recommendations but also to take action “to maintain or restore international peace and security.” Such action can include the use of armed force as well as economic and diplomatic measures. Neither Chapter VI nor Chapter VII is explicitly limited to disputes between states.

In addition, Chapter VIII of the UN Charter specifically permits regional entities to deal with “matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.” Chapter VIII further provides that such entities may seek the “peaceful settlement of local disputes” and authorizes the Security Council to use “regional arrangements or agencies for enforcement action under its authority,” where appropriate. But it prohibits enforcement action by such regional entities “without the authorization of the Security Council ....”

The legal issue is whether NATO's military intervention in Yugoslavia is consistent with these provisions or must seek justification under international law elsewhere. Thus, it deserves notice that the Security Council has repeatedly taken action with respect to Kosovo. After large-scale violence broke out in late February, 1998, the Security Council in **Resolution 1160**<sup>22</sup> took cognizance of developments in Kosovo under Chapter VII of the Charter and undertook a number of actions to try to bring about a peaceful resolution of the situation. Among other measures, the Security Council imposed an arms embargo on Yugoslavia (including Kosovo), called for negotiations between governmental authorities in Yugoslavia and the Kosovar Albanian leadership, approved “a substantially greater degree of autonomy and meaningful self-determination” for Kosovo, and endorsed the efforts of the Contact Group<sup>23</sup> and the Organization for Security and Cooperation in Europe (OSCE) to

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<sup>22</sup>S/Res/1160 (March 31, 1998).

<sup>23</sup>The Contact Group is composed of France, Germany, Italy, Russia, Great Britain, and the United States.

resolve the situation peacefully. Subsequently, in **Resolution 1199**<sup>24</sup> the Security Council in September, 1998, took note of the escalating conflict in Kosovo and the increasing numbers of refugees and displaced persons, specifically identified the situation as constituting a threat to peace and security in the region, called for a cease-fire and renewed negotiations, and endorsed the efforts of the European Community Monitoring Mission and the Kosovo Diplomatic Observer Mission in Kosovo. Finally, in October, 1998, the Security Council in **Resolution 1203** endorsed the agreements permitting the OSCE to monitor compliance on the ground in Kosovo with its previous resolutions and NATO to do so from the air, reiterated that the situation constituted a continuing threat to peace and security in the region, called on Yugoslavia to honor its commitment to negotiate a political settlement of the conflict, reaffirmed the right of refugees and displaced persons to return to their homes in safety, and reiterated its previous endorsement of enhanced autonomy for Kosovo. Although the Resolution made no mention of the threat of NATO air strikes, the Council was undoubtedly aware that NATO on October 13 had threatened air strikes if Yugoslavia continued to obstruct compliance with the UN's resolutions and negotiations toward a political settlement.

All of these resolutions, it is apparent, explicitly contemplated the active involvement of regional organizations in Europe in trying to resolve the situation in Kosovo. But none of the resolutions specifically authorized the use of force against Yugoslavia either by Member States or by regional organizations such as NATO. The absence of such authorization stands in contrast to past resolutions authorizing the use of force by regional organizations in Bosnia-Herzegovina, where the authorization has been explicit.<sup>25</sup> Thus, although it might be argued that the objectives of NATO's actions are "consistent with the Principles and Purposes of the United Nations" (Chapter VIII), it seems more difficult to conclude that NATO's air strikes against Yugoslavia meet the requirement of Article VIII that enforcement action by regional agencies not be undertaken without the authorization of the Security Council.

Similarly, it seems doubtful that NATO's air strikes fall within the Charter's provisions concerning self-defense. As noted above, Article 51 of the Charter provides that

[n]othing 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.

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<sup>24</sup>S/Res/1199 (September 23, 1998).

<sup>25</sup>See, e.g. S/Res/816 (1993) authorizing Member States "acting nationally or through regional organizations" to use "all necessary measures" to enforce a no-fly zone over Bosnia-Herzegovina; S/Res/836 (1993) authorizing Member States "acting nationally or through regional organizations" to take "all necessary measures through the use of air power" to protect six safe haven areas for Bosnian Muslims; S/Res/ 1031 (1995) authorizing Member States "acting through or in cooperation with" NATO to establish a multinational implementation force to assist in the implementation of the Dayton Agreement; and S/Res/1088 (1996) authorizing Member States "acting through or in cooperation with" NATO to establish a smaller multinational stabilization force to enforce compliance with the Peace Agreement.

Thus, if Yugoslavia had engaged in an armed attack on a member state of the U.N. (which includes all of the member states of NATO) rather than on its own citizens in Kosovo, NATO's air strikes might find legal justification in Article 51. But in this instance there has been no armed attack on a member of the United Nations as required by Article 51. Instead, Yugoslavia's use of armed force has been against its own nationals.

Thus, NATO's military initiative in Yugoslavia does not appear to find legal refuge in the provisions of the UN Charter but must look elsewhere. As noted in the foregoing section, at least two possibilities exist — (1) the doctrine of humanitarian intervention, and (2) the customary law of self-defense. Humanitarian intervention involves forcible intervention by other states to protect the nationals of a country from large-scale depredations by their own government. That seems to be exactly what NATO is doing, at least in part — protecting the Albanian Kosovars from ethnic cleansing by the Belgrade government. But the doctrine of humanitarian intervention is of relatively recent vintage in international law and several controversies still attend its invocation. One key issue of contention relevant to the current situation is whether humanitarian intervention is permissible outside the auspices of the U.N. Some commentators argue that self-initiated humanitarian intervention by a state or group of states cannot be reconciled with the restraints on the unilateral use of force embodied in the U.N. Charter, while others contend that those restraints are sufficiently flexible to allow unilateral interventions in some circumstances.<sup>26</sup> Closely related arguments are that recognition of a right of unilateral humanitarian intervention under international law, uncontrolled by the Security Council, would inevitably lead to abuse by unscrupulous states and that it is not possible to develop criteria for such interventions that would obtain universal adherence.<sup>27</sup> Thus, NATO's intervention in Yugoslavia may find legal support in international law in the emerging doctrine of humanitarian intervention, but its actions appear both to reflect and to promote a particular view of humanitarian intervention. Its actions affirm, first, that intervention by a regional group of states in the internal affairs of another state is permissible to remedy gross violations of human rights and, secondly, that such intervention is lawful even absent Security Council authorization or, at least, when the Security Council is unable to act.

Another possible legal contention is that the member states of NATO are engaging in an exercise of collective self-defense permitted by international law. The dangers posed to European peace and security by Yugoslavia's actions in Kosovo and, before then, in Slovenia, Croatia, and Bosnia-Herzegovina, have been frequently cited in support of NATO's actions. For instance, President Clinton stated as follows in his March 26, 1999, letter to the Speaker of the House and the President *pro tem* of the Senate:

The continued repression by the FRY military and security police forces constitutes a threat to regional security, particularly to Albania and Macedonia

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<sup>26</sup>See the discussion in Murphy, *supra*, at 356-387, and Gordon, Ruth, "Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti," 31 *Texas International Law Journal* 43 (1996).

<sup>27</sup>*Id.*

and, potentially, to Greece and to Turkey. Tens of thousands of others have been displaced from their homes, and many of them have fled to the neighboring countries of Bosnia, Albania, and Macedonia. These actions are the result of policies pursued by President Milosevic, who started the wars in Bosnia and Croatia, and moved against Slovenia in the last decade.<sup>28</sup>

Secretary of State Albright reiterated this justification in recent testimony before the House Committee on International Relations:

Kosovo is a small part of a region with large historic importance and a vital role to play in Europe's future. The region is a crossroads where the Western and Orthodox branches of Christianity and the Islamic world meet. It is where World War I began, major battles of World War II were fought, and the worst fighting since Hitler's surrender occurred in this decade. Its stability directly affects the security of our Greek and Turkish allies to the south, and our new allies Hungary, Poland and the Czech Republic to the north. Kosovo itself is surrounded by small and struggling democracies that are being overwhelmed by the flood of refugees Milosevic's ruthless policies are creating. Today, this region is the critical missing piece in the puzzle of a Europe whole and free. That vision of a united and democratic Europe is critical to our own security. And it cannot be fulfilled if this part of the continent remains wracked by conflict.<sup>29</sup>

Again, however, NATO's actions appear to reflect and promote a particular view of what kind of collective self-defense remains lawful. Its actions suggest that Article 51 of the U.N. Charter is not to be read as limiting customary international law regarding self-defense; that the unilateral use of force remains viable, at least when the Security Council is unable to act; and that force may be used in anticipation of the development of a serious threat to regional peace and security to forestall that development.

### **NATO's Legal Authority**

A further question in the current situation concerns whether NATO's intervention in Yugoslavia is consistent with the North Atlantic Treaty.<sup>30</sup> That Treaty was adopted in 1949 essentially as a collective defense pact to protect against Soviet aggression. Article 5 stated the Treaty's essential obligation: An armed attack against one member state was to be considered an armed attack against all of the member states, and every state was to "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." Article 11, in turn, provided that this and the other provisions of the Treaty were to be carried out by the member states "in accordance with their respective constitutional processes."

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<sup>28</sup>Letter from President Clinton to the Speaker of the House and the President *pro tempore* of the Senate (March 26, 1999).

<sup>29</sup>*Hearing Before the Committee on International Relations, supra* n. 18 (statement of Secretary of State Albright).

<sup>30</sup>63 Stat. 2241 (1949).

The pact, thus, essentially protected the territories of the member states from outside attack. In the current situation, of course, NATO's initiative has not been triggered by an outside attack on any of its member states and concerns an area outside the territory of any of them. As a consequence, it seems clear that the initiative cannot be said to fall under the rubric of Article 5.

NATO's initiative in Yugoslavia may find legal justification, however, in Article 4 of the Treaty, as elaborated by NATO's post-Cold War New Strategic Concept. Article 4 provides as follows:

The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.

Thus, Article 4 does not commit the member states of NATO to take any particular action, but it does allow them to consult together with respect to perceived threats to their security apart from an armed attack. Moreover, it does not limit such perceived threats to those involving the territorial area of the member states, nor does it appear to place any limits on the kind of responses the member states might make to such perceived threats.

Secretary of State Dean Acheson articulated a broad scope for Article IV when the North Atlantic Treaty was being debated in 1949. According to the official notes of the State Department on a press conference held on March 18, 1949,<sup>31</sup> Secretary Acheson first stated that the scope of issues subject to discussion under Article IV is "broader than what fell within the scope of ... Article V." Then,

asked if there was no provision for anything except consultation, except armed attack on one of the signatories, the Secretary replied that there were Article I [settlement of disputes by peaceful means], II [promotion of democracy and stability], III [development of defense resources to deter attack], and IV. Asked if there were no limiting clause, the Secretary stated that there was no limiting clause. A correspondent asked if the area of the Treaty was specified but was not necessarily limited as to what the Parties might do after they might consult, considering the fact that an attack to security might originate outside of the geographical limits of the Treaty .... Asked if the Treaty stipulated that if armed attack should originate outside of the area no action might be taken, the Secretary replied in the negative.

In 1990 NATO developed and adopted a "New Strategic Concept" to guide its operations in the post-Cold War era.<sup>32</sup> That document noted that "[t]he security challenges and risks which NATO faces are different in nature from what they were in the past" and that NATO needed to adopt "a broad approach to security":

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<sup>31</sup>U.S. State Department Document, Press Conference of Secretary of State Dean Acheson (March 18, 1949). No verbatim transcript was made.

<sup>32</sup>The New Strategic Concept was approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Rome on November 7-8, 1990.

Risks to Allied security are less likely to result from calculated aggression against the territory of the Allies, but rather from the adverse consequences of instabilities that may arise from the serious economic, social and political difficulties, including ethnic rivalries and territorial disputes, which are faced by many countries in central and eastern Europe.

The document further noted that one of the “fundamental security tasks” performed by NATO was

[t]o serve, as provided for in Article 4 of the North Atlantic Treaty, as a transatlantic forum for Allied consultations on any issues that affect their vital interests, including possible developments posing risks for members’ security, and for appropriate co-ordination of their efforts in fields of common concern.

The document further claimed that this statement made no change in the rights and obligations of the member states as originally provided in the North Atlantic Treaty. This expansive understanding of NATO’s functions was reportedly reaffirmed in a revision of the New Strategic Concept adopted by NATO’s member states at the 50<sup>th</sup> anniversary celebration in Washington on April 24, 1999.<sup>33</sup>

Although the U.S. Senate did not explicitly address the issue of out-of-area missions for NATO when it first gave its consent to the North Atlantic Treaty in 1949, it did do so in its recent resolution of advice and consent to the accession of Poland, Hungary, and the Czech Republic to the Treaty. In a declaration attached to the resolution of advice and consent it adopted on April 30, 1998, the Senate stated:

(i) in order for NATO to serve the security interests of the United States, the core purpose of NATO must continue to be the collective defense of the territory of all NATO members; and

(ii) NATO may also, pursuant to Article 4 of the North Atlantic Treaty, on a case-by-case basis, engage in other missions when there is a consensus among its members that there is a threat to the security and interests of NATO members.<sup>34</sup>

## Conclusion

The implications of NATO’s intervention in Yugoslavia for international law depend to a great degree on assumptions regarding the current state of international law. If, for instance, one assumes that the principles of the sovereignty of states over their internal affairs and non-intervention remain absolute pillars of international law, NATO’s actions are clearly violative. Similarly, if one assumes that the U.N. Charter has made the use of force by states unlawful except as authorized by the Security Council or in self-defense against armed attack, NATO’s actions, again, appear violative, notwithstanding that though those actions seem consistent with the North Atlantic Treaty as elaborated by the New Strategic Concept.

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<sup>33</sup>See *New York Times* (April 25, 1999), p. 12).

<sup>34</sup>144 CONG.REC. S4219 (daily ed. May 4, 1998) (text of resolution of ratification to the Protocols to the North Atlantic Treaty of 1949 on the accession of Poland, Hungary, and the Czech Republic).

But from a perspective that assumes NATO's actions in Yugoslavia are intended to accord with international law, several different conclusions regarding the international legal implications of those actions may be drawn. Again, from this perspective its actions appear to be consistent with the North Atlantic Treaty as elaborated by the New Strategic Concept. But its intervention in Yugoslavia clearly asserts the proposition that the principles of non-intervention and the sovereignty of individual states over their internal affairs are not absolute principles of international law but are now subject to limitation by the international community, at least in certain circumstances. Its actions further suggest that lawful limitations on the principles of non-intervention and the sovereignty of states can be derived from the still-developing doctrine of humanitarian intervention and from the customary law of self-defense. With respect to emerging doctrine of humanitarian intervention, its actions reflect and promote the view that unilateral intervention for humanitarian purposes is permissible apart from authorization by the Security Council, at least where the Security Council is unable to act. With respect to self-defense, its actions reflect and promote the view that Article 51 of the U.N. Charter does not prohibit the unilateral use of force in situations other than defense against armed attack, that the use of force by states for reasons of collective self-defense is lawful apart from authorization by the Security Council, at least where the Security Council is unable to act; and that the unilateral use of force by states is permissible under international law as a matter of anticipatory self-defense to prevent the development of a serious threat to regional peace and security, at least where the Security Council is unable to act. From this perspective, in other words, NATO's actions both reflect and shape international law.