
Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status

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Abstract

This article examines Kosovo's territorial status by reviewing the legal basis of its international administration. Despite the reassuring claim that the United Nations and NATO authority in Kosovo is based on Security Council Resolution 1244, the consensual element provided by the agreements underlying that resolution cannot be overlooked. Investigating the validity of these agreements, namely the 3 June 1999 Agreement and the Kumanovo Agreement, means linking the discussion to the application of Article 52 of the Vienna Convention on the Law of the Treaties on the coercion of states. This is necessary, with respect to the Kumanovo Agreement, due to the non-compliance of Operation Allied Force with the purposes and principles of the UN Charter and the coercion exercised over the Federal Republic of Yugoslavia. The picture is further complicated by the expansionist approach of the Security Council in interpreting its powers under Chapter VII. However, not even the broad terms of UN legality seem to encompass the Security Council's power to endorse agreements, which are void under Article 52 VCLT. The conclusion inevitably claims the unlawfulness of NATO security presence and recalls the need for signature of a Status of Forces Agreement (SOFA) between NATO and Belgrade as a means of curing the original illegality.

1 Introduction

The welcome revitalization of the UN Security Council (SC) during the 1990s has produced a very 'healthy' debate among international lawyers as to the extent to which international law represents a restraint on the freedom of action of the SC. One could possibly describe the discussion as being polarized between two camps. On the

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one hand are the ‘legalists’, envisaging a SC subject to and constrained by international law and the possibility of review by the International Court of Justice. On the other are the ‘realists’, envisaging a SC subject only to some overriding principles of international law embodied in the Charter, while politically, rather than legally, restrained by consensus-building and veto powers according to the UN Charter’s procedural rules.¹ This controversy was in the background of the discussion concerning the adoption of Resolution 1422, leading to the concession of temporally limited immunities from the jurisdiction of the International Criminal Court to personnel of states non-parties to the ICC Statute.² It also underlay discussions within and outside the SC concerning the adoption of a ‘second resolution’ authorizing military action against Iraq in March 2003, notwithstanding less ‘uncompromising’ conclusions reached by the Chief UN inspector Hans Blix.³ One of the main aims of this article is to add a further element to this debate, by looking at the international legality of SC action with regard to Kosovo and the international legality of the territorial status of the province as of today.

On 10 June 1999, the SC, by adopting Resolution 1244 under Chapter VII, placed Kosovo, a province within the Federal Republic of Yugoslavia (FRY),⁴ under joint administration of the UN and NATO. The resolution was passed one day after the end of NATO military action against the FRY, which, despite its declared humanitarian purpose, raised considerable controversies over its compliance with basic norms of *ius ad bellum* and *ius in bello*.⁵ The welcome return of the SC to the exercise of its primary functions of maintaining peace and security, and the end of the humanitarian crisis sparked by both the internal armed conflict between FRY troops and the Kosovo Liberation Army (KLA) and the NATO aerial bombardment, led even those states who had most harshly criticized the NATO intervention to salute with satisfaction the

¹ For a ‘legalist’ approach see *inter alia* Franck, ‘The “Powers of Appreciation”: Who Is the Ultimate Guardian of UN Legality?’, 86 *AJIL* (1992) 519; Arangio-Ruiz, ‘On the Security Council’s Law Making’, 83 *RDI* (2000) 609. For a ‘realist’ approach see Herdgegen, ‘The “Constitutionalization” of the UN Security System’, 33 *Vanderbilt Journal of International Law* (1993) 899; Reisman, ‘The Constitutional Crisis in the United Nations’, 87 *AJIL* (1993) 83. For an attempt to overcome the ‘all-or-nothing’ dichotomy between realists and legalists see Alvarez, ‘Judging the Security Council’, 90 *AJIL* (1996) 1. See also *infra* Section 3D.

² See SC Res. 1422 (2002) and debate in UN Doc. S/PV.4568; UN Doc. S/PV.4568 (Resumption 1). See also comment in Stahn, ‘The Ambiguities of Security Council Resolution 1422’, 14 *EJIL* (2003) 85.

³ See debate over the co-sponsored draft resolution proposed by the UK and Spain in early March 2003 in UN Doc. S/PV.4717, S/PV.4717 (Resumption), S/PV.4718.

⁴ The FRY has recently changed its constitutional structure to a looser form of federation and its official name is now Union of Serbia and Montenegro [hereinafter USM]. Articles 14, 59 and 60 of the new Constitution adopted on 4 February 2003 imply the continuation in the USM of the international legal personality of the FRY. See The Constitutional Charter of Serbia and Montenegro, in http://www.mfa.gov.yu/Facts/charter__e1.html. When referring to events prior to the entry into force of the new constitution, I will continue to use the acronym FRY, when referring to present and future situations I will use the acronym FRY/USM, for the sake of clarity.

⁵ For the debate surrounding *Operation Allied Force* both at a diplomatic and at a doctrinal level see *infra* Section 3C.

adoption of Resolution 1244.⁶ Voices doubting the legality and legitimacy of such an SC action were very isolated.⁷ The broad consensus, with only the abstention of China, by which the resolution was approved made the presumption of legality for Resolution 1244 even stronger. Effectiveness, meant as actual control over Kosovo, was at the core of the political settlement. Effectiveness, meant as the creation of law from factual situations, was at the core of the solution provided by Resolution 1244.

However, these presumptions can be rebutted. It is this article's contention that in the case of Chapter VII resolutions, presumptions of legality can be rebutted when a SC resolution is contrary to the UN purposes and principles and when contrary to *jus cogens*. It is submitted that the legal validity of the agreement providing a legal basis for the authority of NATO over Kosovo, the Kumanovo Agreement, is dubious under the Vienna Convention on the Law of Treaties (VCLT) and, as a consequence, so too are parts of Resolution 1244 referring, implicitly or explicitly, to paragraph 10 of Annex 2 of the same resolution.⁸ In particular, it is doubtful whether the Kumanovo Agreement can be considered valid according to Article 52 of the VCLT, which states that 'a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. According to the International Law Commission and the International Court of Justice decision in the *Icelandic Fisheries* case, this provision codifies an already existing customary norm.⁹ The SC, while having the power to supersede, through a new normative instrument of identical content, a void agreement under Article 52, cannot simply endorse such agreement if it is to abide by the Charter's principles.

This article commences by looking briefly at the factual background of the Kosovo crisis (Section 2). It then considers the legality of the international presence in Kosovo (Section 3), by analysing the relationship between Resolution 1244 and its underlying agreements (A), and the application of Article 52 VCLT to these agreements. This application depends on the existence of an objective element of coercion in the way the Kumanovo Agreement and the 3 June Agreement were concluded (B), on the compliance of *Operation Allied Force* with the *jus ad bellum* (C), and on the power of the SC to cure the invalidity of such agreements (D). It will then consider the legal consequences of a finding of unlawfulness (Section 4). Finally, the article concludes by proposing one possible way of curing such unlawfulness in the wider context of Kosovo's final status (Section 5).

⁶ UN Doc. S/PV. 4011, Statement of Russia 7.

⁷ *Ibid.*, Statement of China 11; S/PV. 4011 (Resumption 1), Statement of Mexico 17.

⁸ Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, signed in Kumanovo, FYROM, 9 June 1999 (denominated Kumanovo Agreement). It can be found in 38 ILM (1999) 1217.

⁹ *Fisheries Jurisdiction case*, UK v Iceland, ICJ Reports (1973) 3, at 14.

2 Factual Background

Kosovo had been a province of Serbia within the Socialist Federal Republic of Yugoslavia (SFRY) constitutional framework since 1974.¹⁰ The 1974 Constitution endowed Kosovo with substantial autonomy, in view of the distinctive ethnic composition represented by an overwhelming majority of ethnic Albanians. After Milosevic took power in Serbia in 1989, the degree of autonomy granted by Belgrade to Kosovo was substantively reduced, and the participation of ethnic Albanians in public office was actively discouraged. In response, Kosovo Albanian leaders withdrew from all public institutions, created parallel administrative structures and on 19 October 1991 declared Kosovo a sovereign and independent state. Kosovo's statehood was not recognized by any state and, apart from the parallel administrative structures, it did not fulfil the effective control test set out by the Montevideo Convention. The second part of the 1990s saw, on the one hand, the pursuit by most ethnic Albanians of a policy of civil and peaceful disobedience, and, on the other, uprisings of different local armed groups under the banner of the Kosovo Liberation Army (KLA).¹¹ During the course of 1997 and 1998, the level of violence was intensified by the KLA, with attacks on both military and civilian targets, which led to increasing reaction by the Yugoslav security forces. This also led to an increasing number of refugees and internally displaced persons.

The first definition by the SC of the Kosovo internal conflict as a threat to international peace and security dates back to the beginning of 1998, when, on 31 March, it adopted Resolution 1160, which condemned 'the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the KLA'.¹² Acting under Chapter VII, the SC imposed an arms embargo on the FRY.¹³ On 23 September the SC through Resolution 1199 again became seized of the matter, and it called for a ceasefire. The ceasefire was agreed three weeks later. Under the terms of the agreements struck, thanks to the mediation of Richard Holbrooke, the number of Yugoslav troops in Kosovo was significantly reduced by Belgrade, at the same time allowing 2,000 unarmed OSCE verifiers to step in, in order to oversee compliance with the ceasefire agreement and the establishment of an air verification mission over Kosovo by NATO forces.¹⁴ Such agreements were endorsed by the SC through Resolution 1203, which was also adopted under Chapter VII.

The standstill in armed activities was, however, brief. By the end of December violations of the ceasefire by the KLA started to intensify once again, leading to initial proportionate responses by Yugoslav forces,¹⁵ but a few weeks later to the massacre of

¹⁰ 1974 SFRY Constitution, Art. 1.

¹¹ For an historical account of the events of the 1990s in Kosovo, which led to the crisis see N. Malcolm, *Kosovo: A Short History* (1998).

¹² SC Res. 1160 (1998), at para. 2.

¹³ *Ibid.*, at para. 8.

¹⁴ Agreement on the OSCE Kosovo Verification Mission, 16 October 1998, UN Doc. S/1998/278; KVM Agreement between NATO and the FRY, 15 October 1998, UN Doc. S/1998/991.

¹⁵ See OSCE, KVM, Press Release no. 08/99, 9 January 1999.

45 civilians in the village of Racak.¹⁶ This sparked the diplomatic reaction of NATO countries which led, under the threat of air strikes, to an international peace conference in Rambouillet, France, at the beginning of February 1999. The negotiations lasted for one month and revolved around a draft agreement proposed by the Western members of the Contact Group, under the name of Rambouillet Agreements, providing for an interim substantial autonomy for Kosovo, the possibility of a referendum in three years for full independence from Belgrade, the withdrawal from Kosovo of all Yugoslav security forces and the establishment of an international security force led by NATO. The deal was accepted by the Kosovo leaders, but refused by Belgrade.¹⁷

On 24 March 1999, NATO started an aerial bombing campaign on the FRY, immediately followed by a retaliatory offensive by Yugoslav forces against the Albanian population in Kosovo. The campaign continued until 9 June 1999, when the FRY accepted at Kumanovo the withdrawal of any security presence from Kosovo and the deployment of a NATO-led military force.¹⁸ The following day the SC adopted Resolution 1244 under Chapter VII, which endorsed the Kumanovo Agreement and the Agreement on Political Principles of 3 June 1999, between the FRY and the EU and Russian envoys, Martti Ahtisaari and Victor Tchernomyrdine. The resolution decided on the establishment of a UN civil administration in charge of governing over Kosovo, with a view to implementing self-administration of the province and to facilitating a political process designed to determine Kosovo's future status.¹⁹ No mention was made in Resolution 1244 of any deadline for such determination. Ultimate authority was vested with the UN administration (UNMIK) for a transitional, but indefinite, period.²⁰ This was confirmed by the very first regulation of the Secretary-General Special Representative (SGSR), who assumed all executive and legislative powers within Kosovo, the right to appoint judges and civil servants and to remove them from their position, and asserted his authority to administer all funds and properties of the FRY within Kosovo.²¹ Since then, Kosovo has been an internationalized territory.²²

¹⁶ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Responses, Lessons Learned* (2000).

¹⁷ For an account of the Rambouillet Conference see Weller, 'The Rambouillet Conference on Kosovo', 75 *International Affairs* (1999) 211; Decaux, 'La Conférence de Rambouillet: Négociation de la dernière chance ou contrainte illicite', in C. Tomuschat (ed.), *Kosovo and the International Community* (2002), at 45–64. See also letter of FRY to the SC of 1 February 1999 (S/1999/107) condemning the practice of NATO to seek a political solution under military threat.

¹⁸ *Supra* note 8.

¹⁹ SC Res. 1244 (1999), paras 6, 10–11.

²⁰ *Ibid.*, para. 19.

²¹ UNMIK/REG/1999/1, UNMIK Official Gazette, 25 June 1999.

²² The definition of Kosovo as an internationalized territory can be drawn from an analogy of past regimes such as the Free City of Danzig, the Free Territory of Trieste (this latter was never implemented), and contemporary arrangements such as Bosnia and Herzegovina and East Timor. Such definition can be applied to those territorial arrangements where international organizations exercise full or partial jurisdiction in respect to the legislative, executive or judicial functions. See A. Marazzi, *I territori internazionalizzati* (1959); M. Ydit, *Internationalised Territories* (1961); R. Beck, *Die Internationalisierung*

3 The Significance of Resolution 1244 in Relation to its Underlying Agreements: The Application of Article 52 VCLT to the Kumanovo Agreement

A The Legal Basis of the International Presence in Kosovo: The Relation between SC Resolution 1244, the 3 June Agreement and the Kumanovo Agreement

The legal basis of the involvement of the international community in Kosovo is more complex than is normally claimed. Reading through UNMIK documents and SC resolutions, one may first get the idea that UNMIK and KFOR authority under international law is provided by Resolution 1244, adding to the perceived legality and legitimacy of Kosovo's territorial administration. However, an in-depth analysis of the events which led to the end of the NATO campaign and a contextual reading of Resolution 1244 tend to muddy the seemingly transparent waters of UN legality and legitimacy. As a starting point, a contextual reading of Resolution 1244 in relation to the other legal instruments recalled in its operative part is necessary.

As in previous resolutions concerning Kosovo, Resolution 1244 starts in the preamble by recalling the humanitarian tragedy taking place in Kosovo and the need to comply with all previous SC resolutions; it reaffirms the sovereignty and territorial integrity of the FRY; and it condemns all acts of violence against the Kosovo population and all terrorist activities. The first important element of the resolution is found in the preamble:

Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the Federal Republic of Yugoslavia's agreement to that paper.

These two instruments are then recalled in operative para. 2, where the SC, after invoking Chapter VII, decides that a political solution will be based on these two agreements. As also indicated in operative para. 2, the first instrument was a unilateral statement adopted by the G-8 Foreign Ministers conference on 6 May, enunciating those political principles which were then elaborated in detail in the second agreement, the 3 June Agreement. Its repetition in the resolution as Annex 1 does not play any self-evident function, since that statement was only a broad unilateral political basis for the accord of 3 June. Its role may well be that of reiterating the novel authority of the G-8 as a body competent for the maintenance of international peace and security, given that the draft resolution was the result of political negotiations within the G-8 in June, or of providing a basis for a more conciliatory approach by the SC towards Yugoslavia, thus accommodating Russian

von Territorien (1962); more recently Wilde, 'From Danzig to East Timor: The Role of International Territorial Administration', 95 *AJIL* (2001) 583.

and Chinese demands. However, this is only speculation, since no mention is to be found of this in the discussion leading to the adoption of Resolution 1244.

As to the agreement of 3 June, this was a more significant instrument both from a formal and substantive point of view. From a formal point of view, it can be seen as an agreement binding upon Yugoslavia. This is the way at least the FRY considered it, given that it went through the normal process of treaty ratification by the Serbian Assembly.²³ Further, it may have served the important purpose of giving a consensual basis to a resolution, whose legal effects upon the FRY could have been found to be controversial, given the uncertainty surrounding the FRY status at the UN at that time.²⁴ From a substantive point of view, the 3 June Agreement provided for the establishment of a UN civil presence entrusted with the task of providing 'a transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions'.²⁵ Such civil presence may act under Chapter VII of the Charter in the manner decided by the Security Council.²⁶ Indeed, this legal basis for the UN civil authority over Kosovo was superseded by Resolution 1244. The referral in its preamble to Chapter VII gives authority to the Special Representative of the Secretary-General (SRSG) to act as civil authority in Kosovo in the interim period, the length of which is left undefined.²⁷ This would be one form of authority to decide non-coercive measures according to Article 41. However, the fact that reference is made to the maintenance of law and order and establishment of a police force leads to the conclusion that Article 42 probably also represents a legal basis for these specific powers. Enforcement measures under Articles 41 and 42 are not subject to the domestic jurisdiction exception of Article 2(7) of the Charter. Further, such basis is complemented by UNMIK Reg. 1 and by the 2001 Constitutional Framework, which specify the powers entrusted to the SRSG by Resolution 1244. These two instruments clearly show that the SRSG is the supreme authority in Kosovo, and also that Kosovo institutions are subject to these powers.²⁸ The practice of the SC to support the establishment of a UN civil administration through its powers under Chapter VII had already been experimented within Bosnia and Herzegovina, and it has been eventually rendered explicit in East Timor.²⁹

²³ On the events within FRY leading to the ratification of the 3 June agreement see Mijatovic, 'A Hard Loss to Spin', Report on the Balkans' Crisis, 5 June 1999, Institute for War and Peace Reporting.

²⁴ See the ICJ decision of 3 February 2003 on the FRY request for a review of the Court's decision on jurisdiction in the case on genocide between Bosnia and Herzegovina and the FRY (*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1996, 595) in accordance with Art. 61(1) of the Statute (*Application for the Revision of the Judgment of 11 July 1996*, in <http://www.icj-cij.org/idoocket/iybh/iybhframe.htm>).

²⁵ 3 June Agreement, UN Doc. S/1999/649, at para. 5.

²⁶ *Ibid.*, at para. 2.

²⁷ SC Res. 1244 (1999), at para. 19.

²⁸ UNMIK/REG/1999/1, *supra* note 21, Sections 1, 4, 6; Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, UNMIK Official Gazette, 15 May 2001, Art. 12, 14(3).

²⁹ SC Res. 1031 (1995); SC Res. 1272 (1999). For a comparative analysis of these instruments see Wilde, *supra* note 22; Bothe and Maruhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-mandated Trusteeship Administration', in Tomuschat, *supra* note 17, at 217–242.

As to the military arrangement, the 3 June Agreement provided for the withdrawal of *all* Yugoslav security forces from Kosovo before a limited number of personnel would be permitted to return, whereas the G-8 statement of 6 May did not specify the ‘quantity’ of forces to be withdrawn.³⁰ The agreement recalled the deployment of an international military presence under Chapter VII, whereas in the previous statement no mention of Chapter VII was made.³¹ It demanded that such military presence would be established ‘with substantial NATO participation ... under unified command and control’, whereas in the G-8 statement reference was made only to a military presence ‘endorsed and adopted by the United Nations’.³² It is important to note that, as confirmed by the preamble, Yugoslavia accepted only points 1–9 of the political agreement of 3 June. It did not accept point 10, which would have committed Yugoslavia to accept a timetable for withdrawal of forces agreed in a military-technical agreement, and the condition that military activities would stop only after verification of the beginning of such activities. Further, such military agreement would also decide the timetable and limits of return of Yugoslav/Serb personnel with their role spelled out in para. 6.

The military-technical agreement is given a very low profile in Resolution 1244.³³ However, its signature on 9 June in Kumanovo by KFOR chiefs and Yugoslav army officers can hardly be overestimated and, indeed, its legal significance has been underestimated.³⁴ In Article 1(2) it states that the FRY authorities ‘understand and agree that the international security force (“KFOR”) will deploy following the adoption of the SCR (1244) ... and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission’. Article 1(4) then spells out the purposes of the agreement: (a) to establish a durable cessation of hostilities; (b) to ensure the withdrawal of all Yugoslav and Serb forces and prevent any re-entry without prior consent by the KFOR commander; (c) ‘to provide for the support and authorization of the international security force (“KFOR”) and in particular to authorize the international security force (“KFOR”) to take such actions as are required, including the use of necessary force, to ensure compliance with this Agreement and protection of the international security force (“KFOR”), and to contribute to a secure environment for the international civil implementation presence, and other international organisations, agencies, and non-governmental organisations ...’.³⁵ The suspension and termination of the bombing campaign by NATO is then conditioned upon the verification of a very detailed schedule of withdrawal of all Yugoslav forces.³⁶ The final important provision is Article V, which

³⁰ See 3 June Agreement, para. 2, cf. point 2 of the G-8 declaration.

³¹ Para. 3, cf. point 3.

³² Para. 4, cf. point 3.

³³ The agreement is recalled in Annex 2, through para. 10 of the 3 June Agreement.

³⁴ With one notable exception: Guillaume, ‘Le cadre juridique de l’action du KFOR au Kosovo’, in Tomuschat, *supra* note 17, at 243–286.

³⁵ See also KA, Art. II, para. 3(c); Appendix B, para. 2(5).

³⁶ *Ibid.*, Arts II, III.

establishes that the KFOR commander is the final authority regarding interpretation of the Agreement.

The Kumanovo Agreement (KA), despite its very low profile, is thus fundamental to an understanding of the legal framework created by Resolution 1244. It complements Resolution 1244 in a crucial respect for the territorial status of Kosovo, that of security and effectiveness. This had been the most disputed issue at the Rambouillet negotiations and it had led to the refusal by the FRY to sign the agreements and the initiation by NATO of the bombing campaign.³⁷ The 3 June Agreement, through its vague formula of end of all violence and repression in Kosovo, withdrawal of all military and paramilitary forces from Kosovo and the subsequent return of limited personnel for such purposes as 'liaison with the international civil mission and the international security presence', provided a basis for interpretation that would justify a gradual return to Belgrade's control over Kosovo. In addition, para. 4 referred to a substantial NATO presence in the security presence, but not to NATO authority over such military presence. Any more detailed commitment implicit in para. 10 was refused by the Yugoslav leadership. It was only one week later that consent was given to vest final security authority over Kosovo with the KFOR commander. And it was only 24 hours after such consent was given that the SC approved the same draft resolution mentioned in Article 1(2) KA. Further, Resolution 1244, despite being adopted under Chapter VII and despite authorizing at para. 7 the establishment of an international security presence, neither recalls any issue concerning the composition of the military force, if not for para. 4 of the 3 June Agreement, nor mentions the fact that the international security force is put under the ultimate and exclusive authority of a NATO commander. The KA, however, comes into Resolution 1244 through the back door of para. 10 of Annex 2. To think of it as a mere military-technical agreement of ceasefire, movements and redeployment of troops, and, perhaps, as argued by one writer,³⁸ of establishment of a regime of belligerent occupation is too restrictive. Its importance for a general political settlement is witnessed by the fact that suspension of military activities occurred only after its entry into force. Resolution 1244 and the KA recall in many respects SC Resolution 687, whose acceptance by Iraq had been a precondition to the cessation of hostilities in 1991.

B Were the KA and the 3 June Agreement Procured by the Threat or Use of Force?

The possible existence of coercion as an objective element affecting the legality of the KA and the 3 June Agreement, and the impact of this coercion on the adoption of Resolution 1244 have been analysed only *en passant* by some writers. Cerone only recalls this possibility and he makes the point that even if coercion was proved the invalidation by Article 52 would only apply if NATO intervention was found contrary

³⁷ See Weller, *supra* note 17.

³⁸ Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* (2001) 469.

to the rules of *jus ad bellum*.³⁹ Zappalà derives from the Chinese non-opposition to the adoption of Resolution 1244 on the basis that consent was given by the FRY, that such consent was not coerced through an unlawful intervention. His assertion seems, however, to imply the existence of an objective element of coercion.⁴⁰ Kohen is right in asserting that Resolution 1244 did not authorize the NATO intervention *ex post facto*. It is, however, difficult to agree with him that some parts of Resolution 1244 do not represent a deal coerced through the use of force upon the FRY.⁴¹ As seen, the KA is part and parcel of the legal and political solution provided by Resolution 1244. It is true that the content of the Rambouillet Agreement differs from that of Resolution 1244 plus KA in the three important respects mentioned by Kohen: no unrestricted right of movement by KFOR throughout the *whole* of the FRY territory;⁴² no deadline for the holding of a referendum;⁴³ no reference to the will of the Kosovo people.⁴⁴ However, that does not mean that Resolution 1244 plus KA was not an attempt to legalize the conditions imposed by NATO. It is just that those conditions were different as of the beginning of June 1999 from those at 18 March 1999. This may indicate a partial political achievement in Milosevic's strategy; however, those conditions were in any case imposed and the consent extorted through the use of force. This was made clear by the Yugoslav representative during the SC meeting of 10 June 1999, which led to the adoption of Resolution 1244, and was confirmed by the representatives of other states, even NATO states.⁴⁵ More explicitly, some important elements in the KA tend to support this interpretation: Article II talks explicitly at points a) and e) about suspension and cessation of the bombing campaign only once the withdrawals comply with the agreement's requirements. The statements of NATO political representatives were very clear on the fact that if the FRY wanted military action to halt, it should accept NATO's demands.⁴⁶ Furthermore, it is arguable that it is not the

³⁹ *Ibid.*, at 484.

⁴⁰ Zappalà, 'Nuovi sviluppi in tema di uso della forza armata in relazione alle vicende del Kosovo', 82 *RDI* (1999) 975, at 988, note 57.

⁴¹ Kohen, 'L'emploi de la force et la crise du Kosovo: vers un nouveaue désordre juridique international', 32 *Revue Belge de Droit International* (1999) 122, at 141.

⁴² Rambouillet Agreement, Annex B, para. 8.

⁴³ *Ibid.*, Ch 8, Art. 1(3).

⁴⁴ *Ibid.*

⁴⁵ Statement of the FRY representative Mr. Jovanovic: 'I must note with regret that the draft resolution proposed by the G-8 is yet another attempt to marginalize the world Organization aimed at legalizing *post festum* the brutal aggression to which the Federal Republic of Yugoslavia has been exposed in the last two and a half months. In doing so, the Security Council and the international community would become accomplices in the most drastic violation of the basic principles of the Charter of the United Nations to date and in legalizing the rule of force rather than the rule of international law. . . . The solutions which are being tried to be imposed on the Federal Republic of Yugoslavia set a dangerous precedent for the international community. . . . They provide a broad authority to those who have conducted a total genocidal war against a sovereign and peace-loving country and legitimize the policy of ultimatum and diktat'. See also statements of the USA representative Mr. Burrell, of the UK representative Mr. Greenstock. UN Doc. S/PV. 4011. And statement by the Cuban representative Mr. Rodriguez-Parrilla. UN Doc. S/PV.4011 (Resumption 1).

⁴⁶ See for instance the statement by NATO spokesman, James Shea, of 6 June 1999 referring to the KA negotiations: 'These talks . . . could take some time to conclude, but I must stress it is in the interest of the

imposition itself which makes an agreement null and void according to Article 52, but the extortion of the consent through the use of force.⁴⁷ In other words, a causality link ought to be proved. Claims of imposition can be evidence of a situation fitting into Article 52, but imposition is in itself insufficient. It may have economic and financial connotations rather than military ones, and it could lead states to denounce treaties whenever they perceive them as politically unequal.⁴⁸

As to the 3 June Agreement, the existence of coercion is more controversial. The G-8 proposal presented by the Russian and the EU envoys did not fully embody NATO's demands, and they represented a compromise between NATO's original demands, on the one side, and Russia and the FRY, on the other side.⁴⁹ The political principles established were rather broad and they were apt to support a rather favourable interpretation for the FRY. The reference to the suspension of military activities being conditioned to the acceptance of a detailed schedule of withdrawals, as already noted, was not accepted by Belgrade. Further, no agreement was reached on the number of Yugoslav armed personnel allowed to return to Kosovo. It is true that the 3 June Agreement represents the first acceptance by the FRY of the deployment of international troops with substantial NATO presence under Chapter VII, and that such consent possibly would not have been given without NATO's military action. However, it seems that the causality link between NATO's use of force and acceptance of the G-8 principles is not easily proven. Even if it were proved, the significance of the 3 June agreement is superseded by the KA as regards its security provisions, and by Resolution 1244 as regards the deployment of the UN civil administration.

C Was the Use of Force by NATO in Violation of Principles of International Law Embodied in the UN Charter? Some Exercises in 'Lateral Thinking'

At this stage the relationship between Article 52 and the *jus ad bellum* becomes crucial. Was the NATO intervention according to Article 52 'in violation of the principles of international law embodied in the Charter of the United Nations'?

It is not the purpose of this section to restart a lengthy examination of the alleged

Serbs for the signing to be as rapid as possible. The linkage is simple: we will not stop until they start, and as they are not starting their withdrawal, we are not stopping our operations.' Available at <http://www.cnn.com/world/europe/9906/06/kosovo.04/index.html>.

⁴⁷ In this sense Bothe, 'Consequences of the Prohibition of the Use of Force — Comments on Arts. 49 and 70 of the ILC's 1966 Draft Articles on the Law of Treaties', 27 *ZAÖRV* (1967) 507, at 513.

⁴⁸ To be noticed is the fact that the inclusion of the 'inequality' of treaties as a ground for invalidation was ruled out by Western states during the diplomatic conference which led to the adoption of the VCLT. A compromise was reached in allowing a Declaration on the Prohibition of the Threat or Use of Economic and Political Coercion in Concluding a Treaty, which, however, is not a legally binding instrument (UN Conference on the Law of Treaties, Official Records, Documents (1968–1969), at 285, UN Doc. A/CONF. 39/1/Add. 2 (1971)).

⁴⁹ See Black, 'Talks Raise Hope of Breakthrough', *Guardian*, 2 June 1999.

existence of a right of humanitarian intervention without SC authorization.⁵⁰ I only engage in an exercise of 'lateral thinking', by engaging the discussion with the basic tenets of the *jus ad bellum* and the legal claims put forward by NATO states to justify their action. It is well established that the UN Charter drafters provided only for one case of unilateral use of force: that of self-defence, according to Article 51. It did not provide for any exception based on human rights. As of 1986 the main judicial organ of the UN, the International Court of Justice, stated in *Nicaragua* that

while the United States might form its own appraisal of the situation as to the respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect . . . The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States.⁵¹

It may well be that after the Cold War the increasing sensitivity of the international community for the protection of human rights has developed a new customary norm and, as asserted by the UK government, one important precedent could be the implementation of a no-fly zone in Northern Iraq in 1991 in protection of the Kurdish minority.⁵² However, when international law is about the creation of customary norms, counterclaims cannot be easily discounted, in particular when the claimant is willing to bring about a modification of a norm of *jus cogens* like that on the prohibition of the use of force. Opposition to the doctrine of humanitarian intervention and to the claim of legality of the Kosovo intervention was made clear in important fora during and after the NATO campaign. During the discussion within the SC of 24 March and 26 March 1999, claims of illegality of the NATO action were expressed, apart from by the FRY, by Russia, Namibia, China, Belarus, India, Ukraine, Cuba.⁵³ At the 13th meeting of the Human Rights Commission, claims of non-conformity of the NATO action with UN principles were further voiced by Mexico, Uruguay, Peru, Mauritius, Chile, Venezuela, Colombia, Sri Lanka, Ecuador, South Africa and Botswana.⁵⁴

⁵⁰ Supporting to different degrees the right of humanitarian intervention see Fonteyne, 'The Customary Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter', 4 *California Western International Law Journal* (1974) 203; F. R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1997); Lillich, 'Kant and the Current Debate over Humanitarian Intervention', 6 *Journal of Transnational Law and Policy* (1997) 397; Charney, 'Anticipatory Humanitarian Intervention in Kosovo', 93 *AJIL* (1999) 834; Zappalà, *supra* note 40; Greenwood, 'International law and the NATO intervention in Kosovo', 4th *Report of the House of Commons Foreign Affairs Committee* (1999), reprinted in 49 *ICLQ* (2000) 926. For a meaningful appraisal of the debate over the question of humanitarian intervention see S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001).

⁵¹ *Nicaragua (Merits)* ICJ Reports (1986) 14, at 134.

⁵² See Brownlie, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects'; Chinkin, 'The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law'; Greenwood, 'International law and the NATO intervention in Kosovo', in 4th *Report of the House of Commons Foreign Affairs Committee*, *supra* note 50, at 878–925.

⁵³ UN Doc. S/PV. 3988, Statement of FRY 13; Statement of Russia 2; Statement of India 15; Statement of Belarus 15; Statement of Namibia 10; S/PV. 3989, Statement of China 9; Statement of Ukraine 10; Statement of Cuba, 12

⁵⁴ UN Doc. E/CN.4/1999/SR. 30, Statement of Mexico 13; Statement of Uruguay 14; Statement of Peru 14; Statement of Mauritius 14; Statement of Chile 14; Statement of Venezuela 14; Statement of Colombia 15;

Condemnation of all military actions outside the UN Charter framework and without authorization by the SC was also expressed in the Final Document issued at the XIII Ministerial Conference of the Non-Aligned Movement (NAM) on 8-9 April 2000. The NAM is composed of 114 states from five continents.⁵⁵ Even more outspoken in this sense was the Group of 77 South Summit, which made a clear differentiation between humanitarian assistance and humanitarian intervention:

We stress the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.... Furthermore, we stress that humanitarian assistance should be conducted in full respect of the sovereignty, territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States.⁵⁶

It is true that the whole picture of illegality may be considered blurred by a SC draft resolution proposed by Russia and Belarus condemning the NATO action, which was defeated by three to 12;⁵⁷ and by a Human Rights Commission draft resolution of the same tenor proposed by Russia, which was defeated by 11 to 24, with 18 states abstaining.⁵⁸ However, lack of condemnation cannot be interpreted as an implied *opinio iuris* supporting an expansion of the right to use force unilaterally beyond the Charter's principles. Further, some of the countries abstained from voting on those draft resolutions because of the unbalanced approach and the lack of condemnation of Yugoslav grave violations of human rights and because of serious misgivings in the wording. Yet they agreed that action without SC endorsement should not be supported.⁵⁹ What can at best be said is that the international community is divided on the question of the right of humanitarian intervention without SC authorization, and that there was a measure of tolerance and support towards Operation Allied Force in some sectors of the international community such as the West and Islamic countries. However, the largest and most populated countries — China, India, Russia, most of the Latin American countries and some African countries — opposed the action and the invocation of a right of humanitarian intervention. That can hardly be seen as confirmation of an already existing customary norm or as crystallizing an existing trend towards a relaxation or reform of a norm of *jus cogens*, unless we are easily ready to discount the universality of international law.⁶⁰

The alleged right of humanitarian intervention did not stand alone in the

Statement of Sri Lanka 15; Statement of Ecuador 15; Statement of South Africa 17; Statement of Botswana 17.

⁵⁵ The document can be found at <http://www.nam.gov.za/xiiiiminconf/final1.htm>.

⁵⁶ Group of 77 South Summit, Havana, Cuba, 10-14 Apr. 2000, Final Declaration, at http://www.g77.org/Docs/Declaration__G77Summit.htm.

⁵⁷ UN Doc. S/1999/328.

⁵⁸ UN Doc. E/CN.4/1999/L.2/Rev.1.

⁵⁹ See UN Doc. E/CN.4/1999/SR.50, Statement of Sudan 3; Statement of Nepal 5; Statement of South Africa 5.

⁶⁰ For similar conclusions see Chesterman, *supra* note 50; Gray, 'From Unity to Polarization: International Law and the Use of Force Against Iraq', 13 *EJIL* (2002) 1.

justifications given by NATO countries for their action. Another important argument was the one of implied authorization given by Resolutions 1160, 1198 and 1203. As already seen, those resolutions were all passed under Chapter VII, however no authorization was given in their wording. Russia and China expressly stated that they would not veto Resolution 1203, because of the lack of such authorization.⁶¹ In Resolutions 1160 and 1198, the SC only recalled the possibility of taking further action, if the SC's requests were not met by the FRY. Christine Gray rightly claims that '[T]his argument of implied authorization is open to serious criticism on the facts.'⁶² To open the door for this kind of implied authorization would prevent the SC from taking any type of policy and actions within Chapter VII but short of forcible measures. Further, as the Iraq experience shows, the UK and US are isolated in claiming such right to act, in defiance of the literary sense of Chapter VII resolutions and of the debates preceding those resolutions.⁶³

As a further ground of justification for its participation in the NATO action, Belgium claimed the state of necessity.⁶⁴ Such necessity would consist of the need to avert a humanitarian catastrophe. The state of necessity is in the law of state responsibility one of the circumstances which can preclude the wrongfulness of a certain action which would otherwise be considered unlawful. However, the ILC Commentary on the 2001 Articles on State Responsibility clearly states that a plea of necessity cannot cover forcible measures of humanitarian intervention, since these are regulated in principle by the primary obligations.⁶⁵ In any case, even considering the law of state responsibility, NATO action does not fit into the criteria for the application of the state of necessity as spelled out by Articles 25 and 26 of the ILC Articles on State Responsibility, which have been characterized as a customary norm by the ICJ in *Gabcikovo-Nagymaros*.⁶⁶

The first requirement is that the action must be the only means to pursue the protection of an essential interest. It is debatable whether that was the case in Kosovo. It seems that if the essential interest was the protection of the Kosovo Albanians from gross violations of human rights, such as the violation of the right to life or freedom of movement, NATO bombing could not possibly be the only means to protect such interest, and, considering the dramatic and foreseeable aggravation of the human

⁶¹ UN Doc. S/PV. 3937, Statement of Russia 12; Statement of China 14–15.

⁶² Gray, *supra* note 60, at 17.

⁶³ *Ibid.*; Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis', 12 *EJIL* (2001) 391; Sicilianos, 'L'autorisation par le conseil de sécurité de recourir à la force: un tentative d'évaluation', 106 *RGDIP* (2002) 5.

⁶⁴ *Legality of Use of Force case (Provisional Measures)*, Oral Pleadings of Belgium, 10 May 1999, CR 99/15; S/PV. 3988, 24 March 1999, Statement of the UK 11.

⁶⁵ J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 185. In other words, a plea of necessity should be assessed within the more general question of the existence of a right of humanitarian intervention (*jus ad bellum*) and not as an 'excuse' precluding the wrongfulness of a certain conduct (law of state responsibility). As seen above, the reactions in the international community to *Operation Allied Force* do not seem to support a relaxation of Art. 2(4) on humanitarian grounds.

⁶⁶ *Gabcikovo-Nagymaros case*, ICJ Reports (1997) 7, at para. 51.

rights situation on the ground during the campaign, one wonders whether the action was trying to protect such interest at all. If, instead, the essential interest was the protection of the Kosovo Albanians as a minority and thus their right to enjoy a meaningful autonomy in the FRY, there are good grounds to maintain that at that stage of diplomatic *impasse* that was the only means to ensure this objective. However, such requirement is tied to the condition, also provided by Article 25, that the alleged violator has not itself contributed to the creation of the state of necessity. NATO means of negotiation through the threat of the use of force since October 1998 contributed to the sidelining of moderate fringes of the Kosovo Albanians who were more keen on seeking a feasible diplomatic solution with Belgrade. Internally, it increased the power of the KLA, and it provided new fuel to their strategy of raising the levels of military activities in order to cause Yugoslav responses. At the levels of distrust and violence reached in March 1999, it may well have been that NATO action was the only means to provide protection to the Kosovar minority, yet the case can be made that such levels of distrust and violence were also caused by the NATO strategy. Article 25 also provides that the action should not impinge on an essential interest of the state. Obviously, territorial integrity and political independence represented essential interests of the FRY. Finally, Article 26 declares that the state of necessity shall not be invoked when the action is in violation of a norm of *jus cogens*, and this is obviously the case here. Thus, even invoking the state of necessity as a way of avoiding responsibility does not find support in international law.⁶⁷

Some authors have also argued that Resolution 1244 did provide for an *ex post facto* endorsement of the NATO action.⁶⁸ Nowhere in the resolution is NATO action condemned; however, in the same manner, nowhere does the resolution afford any endorsement of the action. Lack of condemnation can hardly be seen as an approval of the action by the SC. It is true that in Annex 2 there is reference to the acceptance of a military-technical agreement (i.e., the KA) as a condition for the cessation of military activities. But this is exactly the point in question. Was the procurement of the KA in violation of principles of international law as embodied in the Charter? This determination turns on the legality of NATO intervention, which may eventually turn on the existence of an *ex post facto* endorsement by the SC of this intervention. The circle may become vicious. It is incorrect to argue that the existence of such reference to the KA can be seen as an implied endorsement. The only reference to the agreement in the Annex does not provide any clear evidence of such intention. Further, it is clear from the discussion preceding and following the adoption of the resolution that its aim was only to restore the authority of the SC starting from the *de facto* situation created by the NATO intervention. It did not aim in any way to legalize and legitimize the military action, but only to legalize and legitimize the effects of such intervention. The above question should be rephrased. Was the SC acting within the boundaries of

⁶⁷ For the same conclusion see Kohen, *supra* note 41, at 137; Chesterman, *supra* note 50, at 214.

⁶⁸ See Henkin, 'Kosovo and the Law of "Humanitarian Intervention"', 93 *AJIL* (1999) 824; Wedgwood, 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1999) 828; Franck, 'Lessons of Kosovo', 93 *AJIL* (1999) 857.

international law in doing that? Or are we rather facing a classic operation of the principle of effectiveness in international law?

Another possible way of interpreting the use of force by NATO countries as being within the boundaries of UN legality is to conceive the intervention as a way to ensure the achievement of the right of self-determination of the Kosovo Albanians. Firstly, it is noteworthy that no NATO country has justified its action on these grounds. Further, by adopting this approach, two main complications have to be faced. The first is the question whether the Kosovo Albanians can be considered a people, having a right of self-determination within the FRY administrative boundaries. If this question is answered in the affirmative, the second question would be whether foreign states can lawfully intervene in an internal armed conflict, in order to support militarily the group striving for self-determination.

As shown by Julie Ringelheim, the first question was at the core of the political dispute between Belgrade and the Kosovar leaders: the former would claim that the Kosovo Albanians represented an ethnic minority, hence they were entitled to the protection of their individual human rights as members of a minority; the latter would claim that they ought to be considered a people entitled to self-determination and statehood within the territorial boundaries of *uti possidetis* as previously applied to former Yugoslav republics.⁶⁹ The response of the international community was in principle halfway between the two, promoting the right of Kosovo to substantial autonomy within the framework of FRY territorial integrity. However, the degree of self-government and autonomy was itself at the core of the divisions within the international community. As to the Kosovo Albanians' claim, it is clear that Kosovo cannot fall within the definition of Article 73 UN Charter defining non-self-governing territories under colonial administration. Thus, the classic enunciation of the right of self-determination under GA Resolution 1514 cannot apply to Kosovo. As to the Kosovo Albanian leadership's claim that Kosovo would be entitled to self-determination and secession, exactly as the former Yugoslav republics had been entitled to, some observations are of paramount importance. Looking at the UN and EU practice of recognition of the former Yugoslav Republic, it is arguable that the legal concept of self-determination was not adopted at UN debates, and that even the Badinter Commission leaned towards a legal solution of *de facto* collapse of the federal institutions and dismemberment of the old FRY.⁷⁰ A right of self-determination, even if not explicitly mentioned, could have been implied if a secession argument had been proposed by the Badinter Commission. But this was not the case. Further, the *uti possidetis* principle was applied by the EC Commission only with respect to the federated republics, but not the autonomous provinces of such republics.⁷¹ Even if such differentiation casts some doubts over its legitimacy, it is highly dubious that

⁶⁹ Ringelheim, 'Considerations on the International Reaction to the 1999 Kosovo Crisis', 32 *Revue Belge de Droit International* (1999) 475, at 484–486.

⁷⁰ Arbitration Commission, EC Conference on Yugoslavia, Opinion no. 8, 4 July 1992, in 92 *ILR* (1993) 199.

⁷¹ *Ibid.*, Opinion no. 2, 11 January 1992, in 92 *ILR* (1993) 167.

such a *vacuum* of legitimacy could fill the gap of legality of the Kosovo Albanians' claim. The Canadian Supreme Court decision of 1997 on the right to secession of Quebec under international law reinforces this conclusion.⁷² As to the right to substantial autonomy, there is no precedent in this sense in terms of legal entitlement, and, in any case, even where the international community has promoted measures of self-government and autonomy, these have not sacrificed cooperation between local and central institutions.⁷³ *Quod non datur*, even if the Kosovo Albanians were to be found to have a right of external self-determination, Western states have always opposed the developing states' view that there would be a right to foreign military assistance by means of military action, once the non-self-governing territory is subject to an armed attack.⁷⁴

In conclusion, the analysis of the arguments actually employed by NATO countries to justify the action, and other possible arguments such as the *ex post facto* endorsement and the enforcement of a right of self-determination, reveal that NATO intervention was in violation of the principles of international law embodied in the Charter; hence Article 52 would apply to the Kumanovo Agreement.

D Can the SC Endorse through Chapter VII an Agreement which is Invalid under Article 52 of the Vienna Convention on the Law of Treaties?

At this stage one should ask whether the SC can cure the invalidity under Article 52 VCLT of an international agreement by using its powers under Chapter VII of the Charter. If such power is acknowledged, it may become a purely academic exercise to review the validity of the KA under the VCLT, since the KA is endorsed in Annex 2 of Resolution 1244.

In a number of important advisory opinions of the ICJ, and in the very first case dealt with by the ICTY, international tribunals have defined very broadly the competence of the SC to act within the powers provided by Chapter VII.⁷⁵ Due to the lack of an institutionalized system of judicial review of the acts of the political organs of the UN, the SC would have the authority to decide its own competence in a particular matter by declaring that matter a threat to international peace and security, and to decide

⁷² *Re Reference by the Governor in Council concerning Certain Questions Relating to the Secession of Quebec from Canada*, 115 ILR (1999) 535.

⁷³ Ringelheim, *supra* note 69, at 526–527.

⁷⁴ A. Cassese, *Self-Determination of Peoples* (1995), at 150–158.

⁷⁵ *Certain Expenses of the United Nations*, ICJ Reports (1962) 151; *Legal Consequences for States of the Continued Presence of South-Africa in Namibia*, ICJ Reports (1971) 16; *Prosecutor v. Dusko Tadic A/K/A 'Dule' (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, ICTY, 2 October 1995, in 35 ILM (1996) 32. See, however, Judge Weeramantry's separate opinion in the *Lockerbie* case (*Case Concerning Questions of Interpretation and Application of the Montreal Convention arising out of the Aerial Incident at Lockerbie (Provisional Measures)*), ICJ Reports (1992) 3, Sep. Op. Judge Weeramantry, at 50) and the decision of the Trial Chamber in *Tadic (Prosecutor v. Dusko Tadic A/K/A 'Dule' (Decision on the Defence Motion of Jurisdiction)*, ICTY, 10 Aug 1995, at para. 7, in 105 ILR (1997) 427) supporting a doctrine of non-justiciability of actions of the SC under Ch. VII.

which kind of coercive or non-coercive measures to adopt. Such actions would enjoy a presumption of legality. The only legal limitation to the authority of the SC would be its compliance with the principles and purposes of the UN and norms of *jus cogens*.⁷⁶ In any case, a declaration of unlawfulness of an action of the SC could only arise incidentally in an advisory opinion or in a contentious case. Thus a state addressed by such measures could not seek a judicial review of the decision *per se*. Given the scope of this authority conferred to the SC, one should possibly rephrase the initial question in the negative, that is whether the SC would be acting contrary to the purposes and principles of the UN Charter, if it endorsed a treaty which is 'procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'? The answer may seem self-evidently affirmative.

However, it is worth looking at the practice of the SC in endorsing, through Chapter VII, imposed territorial settlements, in order to ensure peace and security in a certain area. Such practice is relatively recent. Despite not having been envisaged originally, it may represent one of the new creative developments in the way the SC has acted since the end of the Cold War and it may find legal support in the doctrine of inherent powers.⁷⁷ Yet, the precedents do not speak in favour of the development of any new normative standard enabling the SC to validate an agreement otherwise invalid under Article 52. Resolution 687, imposing a binding territorial settlement upon Iraq by way of endorsement of a conventional instrument, was coerced by the military operation *Desert Storm*, however such military action had been authorized by the SC.⁷⁸ Even then, a minority of states raised the question of contradiction of Resolution 687 with previous Resolution 660, which had called upon Iraq and Kuwait to settle the dispute by negotiations and peaceful means. According to these states, to impose a solution under duress and to sacrifice the principle of sovereignty of one of the parties to the dispute would be contrary to the principles and purposes of the UN Charter, thus beyond the Chapter VII powers of the SC.⁷⁹

Resolution 1031 endorsed the Dayton Peace Accords for Bosnia and Herzegovina; however, a causality link between the signature of the agreements by the Bosnian-Serbs and *Operation Deliberate Force* cannot be easily proved. What can at best be said is that the NATO bombing of the Bosnian Serb position in the summer of 1995 created the momentum for the military offensive of Bosnian and Croat forces on the ground, which then led to a general ceasefire. Such ceasefire was a starting point for a meaningful negotiation in Dayton, but it did not determine the final outcome of

⁷⁶ Apart from the above-mentioned case-law see also Art. 24(2) of the Charter stating that '[I]n discharging [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations' (emphasis added). See also Judge ad hoc Lauterpacht's Separate Opinion in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order of 13 September 1993, ICJ Reports (1993) 407, at 439–442.

⁷⁷ N. D. White, *Keeping the Peace* (1997), at 99.

⁷⁸ SC Res. 678 (1990). On the question of application of Art. 52 to the consent given by Iraq see Mendelson and Hulton, 'The Iraq-Kuwait Boundary', 64 *BYBIL* (1993) 135, at 149.

⁷⁹ S/PV. 2981, Statement of Iraq 32; Statement of Yemen 41; Statement of Cuba 61; Statement of India 77.

the negotiations.⁸⁰ Further, it is still generally held that NATO military action in Bosnia was lawful.⁸¹ In other words, Article 52 VCLT could not apply to these agreements, as, in the case of Iraq, the use of force was not in defiance of the principles and purposes of the UN Charter; in the case of Bosnia, even if we admitted the illegality of the action, the element of coercion is far from clear.

More problematic is the understanding of Resolution 1203 related to Kosovo. In this resolution, the SC, acting under Chapter VII, endorsed the agreements of October 15 and 16 1998 between the FRY and OSCE, and the FRY and NATO respectively, which were concluded after the issuance of an activation order by the NATO Secretary General.⁸² Such threat of the use of force without SC authorization was clearly in defiance of international law, however reservations as to the validity of the agreements were never raised. It seems that some delegations were more concerned with avoiding an escalation of the internal conflict and preventing any *actual* use of force by NATO, which was claimed to be contrary to international law and the UN Charter. They saw the Belgrade agreements as the means to avert such developments.⁸³ Despite that, the lack of reference to international law, the ad hoc solution provided and the uniqueness of the precedent hardly speak in favour of the development of new normative standards relaxing the obligation of the SC to abide by the principles and purposes of the UN Charter.

Another possibility would be for the SC to completely supersede the underlying agreement as a normative source. In this case, such resolution could entail a gap of legitimacy, yet, most probably, its legality would not be in question. As to Resolution 1203, it effected a novation of the allegedly invalid agreement between OSCE and FRY by creating a new legal basis for the OSCE verification mission. However, it is arguable that such novation did not occur with respect to the NATO air verification mission, whose normative content was still dependent on the Belgrade agreement. Likewise,

⁸⁰ See R. Holbrooke, *To End a War* (1999).

⁸¹ On *Operation Deliberate Force* see White, *supra* note 77, at 99; D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the Security Council of its Chapter VII Powers* (2000), at 262–263; Gray, *supra* note 60, at 4. These authors all reach a conclusion of lawfulness of that operation. See, however, *contra* Gazzini, *supra* note 63, at 428–430. The controversial point is whether the UN Secretary-General, who had been entrusted by the SC with the authority to order air strikes, still had ultimate control over the start, continuation and termination of military operations. Former UN Secretary-General Boutros-Boutros Ghali suggests that, despite the delegation of his ‘dual-key’ authority on 26 July 1995 to the NATO and UN military commanders on the ground, he received a formal commitment by a letter of NATO Secretary General General Claes that he would be still in a position to take back the authority delegated whenever he considered it necessary (see Boutros-Boutros Ghali, *Unvanquished: A US-UN Saga* (1999), at 236–248). See, however, the American envoy Richard Holbrooke’s reading of the events supporting different conclusions as to where the ultimate decision-making power in the operation would lie (Holbrooke, *supra* note 80).

⁸² UN Doc. S/1998/978; UN Doc. S/1998/991. The US representative at the SC stated quite frankly at the debate of 24 October 1998 which led to the adoption of Res. 1203 that ‘[W]e must acknowledge that a credible threat of force was key to achieving the OSCE and NATO agreements and remains key to ensuring their full implementation’ (S/PV. 3937, Statement of the US Representative, 15).

⁸³ *Ibid.*, Statement of Ukraine 4; Statement of Costa Rica 6; Statement of Brazil 10; Statement of Russia 11; Statement of China 14.

whereas the 3 June Agreement would appear to have been superseded by Resolution 1244, the KA, which provides the legal basis for NATO's authority over security matters, does not appear to have been superseded by Resolution 1244.

As to the compliance with norms of *jus cogens*, the answer is in this case less self-evident. However, given the fact that the prohibition of the use of force outside the UN Charter framework has been considered by the ICJ and the ILC as a principle of *jus cogens*, it may well be asserted that Article 52 also represents a norm of *jus cogens*, as it represents both a protection of the legal interests of those who are victims of an unlawful armed attack and of the international community as a whole.⁸⁴ An SC resolution endorsing an invalid agreement under Article 52 would be in breach of a norm of *jus cogens*, thus beyond the limits of UN legality.

The conclusion claims the illegality of the KA and parts of Resolution 1244, recalling and endorsing it. Hence, the legal basis of the NATO security presence in Kosovo proves to be shaky, making the territorial status of Kosovo partially unlawful.

4 Consequences of Invalidity

Having reached a finding of invalidity for a part of the legal framework provided by Resolution 1244, one should ask what are the legal consequences of such invalidity. One of the main difficulties in 'legalizing' the powers of the SC is the lack of definition of what would be the legal consequences of a finding of illegality. In this respect, the principle of effectiveness seems bound to play a dominant role. However, there is no reason why one should not apply the VCLT framework, if the substantive basis of invalidity is a treaty such as the KA.

The first question to be asked is whether Article 52 provides for a ground of absolute or relative invalidity; in other words, whether the KA ought to be considered as null and void *ab initio*, or whether it can still produce some legal effects and/or be cured by the coerced party's subsequent acquiescence or acceptance. The wording and the location of Article 52 within the VCLT seem to support the view that Article 52 describes a ground of absolute nullity.⁸⁵ Also the ILC Commentary leans towards this solution. The ratio of this finding is that the protection against the threat of use of force is of such fundamental importance for the international community that any juridical act concluded against such principle ought to be fully invalidated. When discussing the loss of a right to invoke a ground of treaty invalidity by way of acquiescence (Article 45), the ILC is unambiguous in stating that

the effects and implications of coercion in international relations are of such gravity . . . that a consent so obtained must be treated as absolutely void in order to ensure that the victim of the coercion should afterwards be in a position freely to determine its future relations with the

⁸⁴ *Military and Paramilitary Activities in Nicaragua (Nicaragua v. US)*, ICJ Reports (1986) 13, at 100; *ILC Yearbook* (1966 II), 247.

⁸⁵ See Arts 48–50 and cf. Arts 51–53 VCLT.

State which coerced it. To admit the application of the present article in cases of coercion might, in its view, weaken the proposition given by article 48 and 49 [then 51 and 52] to the victims of coercion ...⁸⁶

By contrast, both ILC Special Rapporteurs Fitzmaurice and Waldock thought that the coercion would vitiate the consent of the state, and therefore the state would be entitled to express subsequent implicit or explicit consent to the execution of the treaty provisions, once coercion had ceased.⁸⁷ According to such premises, the Swiss delegation to the 1969 Vienna Diplomatic Conference proposed an amendment to the draft article to the effect that the coerced state would be entitled to waive the invalidity of the treaty. The proposal was defeated 63-12, thereby supporting the idea that only a subsequent agreement would be able to confirm the validity of that legal regime.⁸⁸ It should be noted that, apart from one author,⁸⁹ the absolute nullity thesis has found acceptance in all writings, even though it is controversial as to whether such differentiation also exists under customary law.⁹⁰

Despite a general claim of imposition, the FRY/USM has neither claimed that the KA was null and void under Article 52, nor that parts of Resolution 1244 could be found invalid as a consequence of that. It has never started any procedure under Article 65-68 VCLT for the determination of such invalidity. Nor has the FRY/USM, in the case initiated before the ICJ against 10 NATO member states, amended its original application and claimed that, as a consequence of the illegality of the use of force by NATO, the KA and parts of Resolution 1244 should be declared invalid.⁹¹ This may seem to imply a form of acquiescence towards the 'legalization' of the KA. However, the formula of absolute nullity embodied in the VCLT hardly supports the idea that acquiescence can cure the invalidity of an agreement under Article 52. That is confirmed by the fact that Article 45(b) VCLT does not apply to coercion.⁹² The only way the FRY/USM could cure the substantive invalidity of the KA would be through subsequent agreement to which it has freely consented. However, despite the improved relations between Belgrade and NATO, such agreement has never been concluded. The UNMIK-FRY Common Document of 5 November 2001 only reiterates the acceptance of Resolution 1244's basic principles, and it addresses areas of

⁸⁶ *ILC Yearbook* (1966 II) 239.

⁸⁷ *ILC Yearbook* (1958 II) 26; *ILC Yearbook* (1963 I) 50-67, 227-230; *ILC Yearbook* (1966 I) 22-37, 122-125.

⁸⁸ See Cahier, 'Le caractéristique de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le droit des Traités', 76 *RGDIP* (1972) 645.

⁸⁹ Rozakis, 'The Law on Invalidity of Treaties', 16 *Archiv des Völkerrechts* (1973) 150.

⁹⁰ Cahiers, *supra* note 88; S. S. Malawer, *Imposed Treaties and International Law* (1977); G. Napolitano, *Violenza e trattati nel diritto internazionale* (1977); A. Aust, *Modern Treaty Law and Practice* (2000); Y. Dinstein, *War, Aggression and Self-Defense* (2001).

⁹¹ *Legality of Use of Force*, ICJ Reports (1999).

⁹² Art. 45 states that a 'State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be'. See *supra* note 86.

cooperation between the FRY/USM and UNMIK in the field of Kosovo's civil administration, not military control.⁹³ Hence, the nullity of the KA and of relevant parts of Resolution 1244 is not affected by subsequent agreement of the FRY/USM. Notwithstanding such conclusion, one has to face the reality that international law is a system largely based on self-help. The fact that the FRY/USM does not challenge the validity of the KA, even once it has ceased to be under coercion, makes international law ineffective in readdressing the results of its own breaches. On the other hand, the *de facto* situation originated by a violation of international law — such as KFOR's security administration in Kosovo — may produce juridical effects which are recognized at the international level. This phenomenon can be explained through the role played by the principle of effectiveness together with the international legitimacy acquired by NATO's security presence as evidenced by the SC's support for such presence. In other words, the role played by NATO in terms of peace-keeping and peace enforcement in the province makes KFOR's presence legitimate, as the presence is seen as protecting some of the fundamental interests of the international community, that of maintenance of peace and security, as an end and means to promote in turn self-government and human rights. In that sense, effectiveness on the ground and legitimacy in the wider community ensure the recognition of juridical effects produced by the unlawful territorial situation. However there is no legal 'continuity' between, on the one hand, a violation of international law and an invalid territorial title or competence based on that violation, and, on the other hand, the possibility of 'normalization' and recognition by the international community of juridical effects related to that factual situation.⁹⁴

5 Conclusions: The Ways Forward

This article has analysed the territorial status of Kosovo by reviewing the legality of the UN and NATO presence. The civil presence of the UN has been found to have a sound legal basis in Resolution 1244 and the 3 June Agreement, the content of which was recalled by the UNMIK-FRY agreement of November 2001. In contrast, the analysis of the Kosovo arrangement has demonstrated its unlawfulness as far as the KFOR security presence is concerned. In particular, it has been argued that Resolution 1244 goes beyond the limits of UN legality, by endorsing and recalling the mandate provided by the Kumanovo Agreement. This agreement is null and void under the Vienna Convention on the Law of Treaties. The question of the application of Article 52 VCLT to the Kumanovo Agreement has required an examination of the vexed question of the legality of *Operation Allied Force*, which has been found to be beyond the limits set by international law.

⁹³ UNMIK-FRY Common Document, 14 Nov. 2001.

⁹⁴ On the relation between effectiveness, legality and legitimacy in territorial situations see the decision of the Canadian Supreme Court of 1997 on the issue of secession of Quebec, *supra* note 72.

The way the Kumanovo Agreement still produces juridical effects has to be correlated to the role played by the principle of effectiveness in international law and the perceived legitimacy of the role played by NATO in post-conflict management in the Balkans. However, neither effectiveness nor legitimacy cure by themselves the illegality of such instrument. Given recent USM efforts to enter NATO's Partnership for Peace Programme and the prospect of the USM dropping its legal claims against NATO countries before the ICJ, one possibility to bridge this gap of legality may lie in the signature of a SOFA between Belgrade and NATO.⁹⁵ Annex B of the KA in Article 3 provided for the conclusion of a SOFA within a short period of time. This provision has not been followed up on as yet. Rather, it has been superseded by the UNMIK-KFOR Common Document of 17 August 2000 and by UNMIK Reg. 2000/47 of 18 August 2000, which have spelled out in detail the immunities enjoyed by KFOR personnel.⁹⁶ However, Belgrade's valid consent is still missing, and the signature of a bilateral instrument between the USM and NATO would possibly represent the best way forward.

Finally, this choice will be influenced by the wider and at present more pressing question of Kosovo's 'final status'. The new USM Constitution, adopted on 4 February 2003, states in its preamble that 'the state of Serbia . . . comprises the Autonomous Provinces of Vojvodina and Kosovo and Metohija which, under United Nations Security Council 1244, is currently under an international administration.'⁹⁷ Resolution 1244 at para. 11 decides that one of the main responsibilities of the international civil presence is to facilitate 'a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords'. At this stage, it is still the declared policy of UN Secretary-General Special Representative Michael Steiner to ensure sound standards of internal governance before moving to the question of final status.⁹⁸ However desirable this priority may be, the final status of Kosovo is, in the words of Singapore's representative to the SC, still best represented by the questioning ghost in *Hamlet*.⁹⁹ Ideally, the answer will come from an agreement between Belgrade and Pristina. Any solution imposed by an SC resolution may get caught up in a difficult conundrum. The choice to decide for Kosovo's independence and statehood, even if backed by a referendum, according to the Rambouillet accords,

⁹⁵ See FRY Foreign Ministry's Statement of Nov. 2002, 'Foreign Political Position of the FR of Yugoslavia with Emphasis on the Accession to the Partnership for Peace Program' in <http://www.mfa.gov.yu>. See also Guillaume, *supra* note 34, at 253.

⁹⁶ The regulation can be found in <http://www.unmikonline.org/regulations/2000/reg47-00.htm>. It is interesting to notice that the KA is never recalled in Reg. 2000/47.

⁹⁷ *Supra* note 4.

⁹⁸ See Statement of Michael Steiner, Special Representative of the Secretary General, to the SC of 6 February 2003, in UN Doc. S/PV.4702.

⁹⁹ 'The first metaphor I will use is the one of the play *Hamlet* and the ghost. You cannot stage the play *Hamlet* without having the scene of the ghost. In the same way, every time we meet to discuss Kosovo, there seems to be a ghost hanging around this room, asking us, what is the ultimate destination and how are we going to get there'. Statement of Singapore on the situation in Kosovo of 27 March 2002, in UN Doc. S/PV. 4498.

which were never signed by Belgrade, would be unprecedented and legally dubious. The choice to decide for Kosovo's autonomy within the USM with a return to an even limited USM civilian and military control would likely find strong opposition from Kosovo's institutions and the large majority of the population. The inherent risk is that Hamlet's ghost may hang around longer than anticipated.