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Ex iniuria ius oritur: *Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*

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Abstract

Cassese comments on the article by Simma, also in this issue, on the legitimacy of the use of force by NATO in the Kosovo crisis. The author agrees with Simma that NATO's action falls outside the scope of the United Nations Charter and, by that token, is illegal under international law. This breach is not a negligible one and it is not to be countenanced merely by referring to its exceptional character and by stating that it should not be seen as setting a precedent. The author explores the notion that NATO's action may nevertheless be taken as evidence of an emerging doctrine in international law allowing the use of forcible countermeasures to impede a state from committing large-scale atrocities on its own territory, in circumstances where the Security Council is incapable of responding adequately to the crisis. The author argues that where a number of stringent conditions are met, a customary rule may emerge which would legitimize the use of force by a group of states in the absence of prior authorization by the Security Council. This is subject to various caveats, including the need to bear in mind the threat to global security which is inevitably involved in the use of force without such authorization.

I fully subscribe to the cogent argument put forward by B. Simma¹ that the threat of force, followed by the use of armed violence, by NATO countries against the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY) is contrary to the United Nations Charter. Those countries acted without any authorization of the Security

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¹ Simma, 'NATO, the UN and the Use of Force: Legal Aspects', this issue, at 1.

Council under Chapter VII of the Charter, nor could their action be justified as collective self-defence pursuant to Article 51 of the Charter.² Hence, recourse to force has taken place outside, and indeed against, the Charter framework.

My agreement with Simma ends, however, when he contends that ‘only a thin red line separates NATO’s action in Kosovo from international legality’ and then goes on to note that

should the Alliance now set out to include breaches of the UN Charter as a regular part of its strategic programme for the future, this would have an immeasurably more destructive impact on the universal system of collective security embodied in the Charter. To resort to illegality as an explicit *ultima ratio* for reasons as convincing as those put forward in the Kosovo case is one thing. To turn such an exception into a general policy is quite another.³

In short, for Simma the illegality perpetrated by NATO countries is not so grave; and, at any rate, it must not set a precedent and should remain exceptional. I respectfully disagree.

The breach of the United Nations Charter occurring in this instance cannot be termed minor. The action of NATO countries radically departs from the Charter system for collective security, which hinges on a rule (collective enforcement action authorized by the Security Council) and an exception (self-defence). There is no gainsaying that the Charter system has been transgressed, in that a group of states has deliberately resorted to armed action against a sovereign state without authorization to do so by the Security Council. It would not be appropriate to object that the United Nations Charter has already been violated on many occasions by states resorting to force in breach of Article 2 para. 4: on those occasions states have always tried to justify their action by relying upon (and abusing) Article 51. In the present instance, the member states of NATO have not put forward any legal justification based on the United Nations Charter: at most, they have emphasized that the Security Council had already defined the situation in Kosovo as a ‘threat to peace’. Even cursory consideration of the Charter system shows, however, that this argument does not constitute *per se* a legal ground for initiating an armed attack against a sovereign state.

In the current framework of the international community, three sets of values underpin the overarching system of inter-state relations: peace, human rights and self-determination. However, any time that conflict or tension arises between two or more of these values, peace must always constitute the ultimate and prevailing factor.

² For an authoritative statement of existing law, see O. Schachter, *International Law in Theory and Practice* (1991), at 128 ‘[I]nternational law does not, and should not, legitimize the use of force across national lines except for self-defence (including collective self-defence) and enforcement measures ordered by the Security Council. Neither human rights, democracy or self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional just war causes or righting wrongs. This conclusion is not only in accord with the U.N. Charter as it was originally understood; it is also in keeping with the interpretation adopted by the great majority of States at the present time. When governments have resorted to force, they have almost invariably relied on self-defence as their legal justification’.

Along the same lines, and with specific reference to self-determination, I take the liberty of referring to my book, *Self-Determination of Peoples – A Legal Reappraisal* (1995), at 199–200.

³ *Supra* note 1, at 22.

Under the UN Charter system, as complemented by the international standards which have emerged in the last 50 years, respect for human rights and self-determination of peoples, however important and crucial it may be, is never allowed to put peace in jeopardy. One may like or dislike this state of affairs, but so it is under *lex lata*.

Nor can one confine oneself to hoping that this dramatic departure from UN standards will remain an exception. Once a group of powerful states has realized that it can freely escape the strictures of the UN Charter and resort to force without any censure, except for that of public opinion, a Pandora's box may be opened. What will restrain those states or other groups of states from behaving likewise when faced with a similar situation or, at any event, with a situation that in their opinion warrants resort to armed violence?

Having made these points, I cannot but add, however, that any person deeply alert to and concerned with human rights must perforce see that important moral values militated for the NATO military action. Admittedly, strategic, geopolitical or ideological motivations may have also contributed to prompting NATO to threaten and then take military action against the FRY. From the angle of law, what primarily counts, however, are the official grounds adduced by NATO countries to justify their resort to force. Their main justification has been that the authorities of FRY had carried out massacres and other gross breaches of human rights as well as mass expulsions of thousands of their citizens belonging to a particular ethnic group, and that this humanitarian catastrophe would most likely destabilize neighbouring countries such as Albania, Bosnia and Herzegovina and the Former Yugoslav Republic of Macedonia, thus constituting a threat to the peace and stability of the region.

Be that as it may, any person of common sense is justified in asking him or herself the following dramatic question: Faced with such an enormous human-made tragedy and given the inaction of the UN Security Council due to the refusal of Russia and China to countenance any significant involvement by the international community to stop the massacres and expulsions, should one sit idly by and watch thousands of human beings being slaughtered or brutally persecuted? Should one remain silent and inactive only because the existing body of international law proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of human compassion?

My answer is that from an *ethical* viewpoint resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is *contrary to current international law*.

I contend, however, that as legal scholars we must stretch our minds further and ask ourselves two questions. First, was the NATO armed intervention at least rooted in and partially justified by contemporary trends of the international community? Second, were some parameters set, in this particular instance of use of force, that might lead to a gradual legitimization of forcible humanitarian countermeasures by a group of states outside any authorization by the Security Council?

Let me first of all consider what may be regarded as the *basic premise or root* of the NATO intervention in the present international community.

First, it is a truism that today human rights are no longer of exclusive concern to the particular state where they may be infringed. Human rights are increasingly becoming the main concern of the world community as a whole.⁴ There is a widespread sense that they cannot and should not be trampled upon with impunity in any part of the world.

Second, the concept is now commonly accepted that obligations to respect human rights are *erga omnes* and, correlatively, any state, individually or collectively, has the right to take steps (admittedly, short of force) to attain such respect.

Third, the idea is emerging in the international community that large-scale and systematic atrocities may give rise to an aggravated form of state responsibility, to which other states or international organizations may be entitled to respond by resorting to countermeasures other than those contemplated for delictual responsibility.

Fourth, and consistent with this trend, the international community is increasingly intervening, through international bodies, in internal conflicts where human rights are in serious jeopardy. Think of the action by the Organization of African Unity and the United Nations in Liberia to address the plight of Liberian nationals caught in a protracted and bloody civil war (1990), by the United Nations in Iraq to protect the human rights of Iraqi Kurds in the north and Iraqi Shiites in the south (1991–1992), in Somalia to try both to prevent widespread violations of international humanitarian law resulting from a sanguinary civil war and to create conditions conducive to the undertaking of relief operations, as well as to the bringing about of national reconciliation (1992), in Bosnia and Herzegovina to protect civilian populations (1992–1995) and in Rwanda to stop the genocide of Tutsis (1994). Think also of the action by the Organization of American States and the United Nations in Haiti designed to address the situation of violence and persecution following the overthrow of a democratically elected government, in particular ‘the deterioration of the humanitarian situation and the continuing escalation by the illegal *de facto* regime of systematic violations of civil liberties’⁵ (1993–94).

Fifth, peaceful measures for settling disputes or solving conflicting situations are increasingly regarded as crucial and the idea is firmly rooted in the world community that such peaceful measures must always take precedence over resort to armed violence, with a view to safeguarding the goal of peace.

Sixth, it has been claimed by some non-governmental organizations and even governmental officials that under certain exceptional circumstances, where atrocities reach such a large scale as to shock the conscience of all human beings and indeed jeopardize international stability, forcible protection of human rights may need to outweigh the necessity to avoid friction and armed conflict. To put it differently,

⁴ Today the prophetic proposition of Kant based on a ‘cosmopolitan or world law’ has come true. In his *Eternal Peace* (1795), he wrote that ‘the narrower or wider community of all nations on earth has in fact progressed so far that a violation of law and right in one place is felt in *all* others’. See I. Kant, *Moral and Political Writings* (C. J. Friedrich (ed.)) (1949), at 448.

⁵ SC Res. 940 (1994), adopted on 31 July 1994.

'positive peace', i.e. the realization of justice, should prevail over 'negative peace', i.e. the absence of armed conflict.

Based on these nascent trends in the world community, I submit that under certain strict conditions resort to armed force may gradually become justified, even absent any authorization by the Security Council. These conditions may be enumerated as follows:

- (i) gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central governmental authorities or with their connivance and support, or because the total collapse of such authorities cannot impede those atrocities;
- (ii) if the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes, while at the same time refusing to call upon or to allow other states or international organizations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that those authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations or decisions of such organizations;
- (iii) the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power. Consequently, the Security Council either refrains from any action or only confines itself to deploring or condemning the massacres, plus possibly terming the situation a threat to the peace;
- (iv) all peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted, notwithstanding which, no solution can be agreed upon by the parties to the conflict;
- (v) a group of states (not a single hegemonic Power, however strong its military, political and economic authority, nor such a Power with the support of a client state or an ally) decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of Member States of the UN;
- (vi) armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained. Moreover, it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies on the ground. The more urgent the situation of killings and atrocities, the more intensive and immediate may be the military response thereto. Conversely, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed confrontation.

Let us now briefly consider the circumstances surrounding the initiation of armed attack by NATO countries on the FRY. First, it seems indisputable that before the attack, as Secretary-General Solana put it on 9 October 1998, ‘the danger of a humanitarian catastrophe’ in Kosovo loomed large⁶ or, as he wrote on 17–18 April 1999 (after the initiation of the attack), ‘a brutal campaign of forced deportation, torture and murder’ had been going on in the heart of Europe leading to a humanitarian tragedy.⁷ Suffice it to mention that as early as 23 September 1998 the Security Council, in its Resolution 1199 (1998), stated that it was

gravely concerned at the recent fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the [UN] Secretary-General, the displacement of over 230,000 persons from their homes.

Other reports of international organizations testify to the magnitude of the violations of human rights in Kosovo.⁸

Second, for many years now, the FRY has defied resolutions and decisions of the Security Council, thus blatantly demonstrating its unwillingness to comply with the international Rule of Law.

Third, in three successive Resolutions (1160, of 31 March 1998, 1199, of 23 September 1998, and 1203, of 24 October 1998) the Security Council unanimously decided that it was acting under Chapter VII of the United Nations Charter, and in the second and third of these resolutions explicitly defined the situation in Kosovo as a ‘threat to peace and security in the region’.

Fourth, it cannot be denied that peaceful means of settling disputes commensurate to the unfolding crisis had been tried and exhausted by the various countries concerned, through the negotiations promoted by the states comprising the Contact Group for the Former Yugoslavia, and at Rambouillet, and later Paris.

Fifth, armed action has not been unilaterally decided by a hegemonic Power, but has been freely agreed upon by a group of countries, namely the 19 member states of NATO.

Sixth, no strong opposition has emerged in the majority of Member States of the United Nations. It is a fact that the draft resolution sponsored in the Security Council by Belarus, India and the Russian Federation (UN Doc. S/1999/328) aimed at condemning NATO’s use of force was rejected by a vote of 12 to three (China, Namibia

⁶ See the text reported by Simma, *supra* note 1, at 7.

⁷ See Secretary-General Solana’s article in *International Herald Tribune*, 17–18 April 1999, at 6.

⁸ See, *inter alia*, the ‘Monthly Report of 20 March 1999 on the situation in Kosovo pursuant to the requirements set out in Security Council resolutions 1160 (1998) and 1203 (1998)’ made by the Chairman-in-Office of the OSCE and transmitted by the UN Secretary-General to the Security Council (UN Doc. S/1999/315), as well as the Report of 23 March 1999 of the Secretary-General of NATO to the Security Council, transmitted by UN Secretary-General to the Council on 25 March (UN Doc. S/1999/338).

and the Russian Federation). It should also be noted that no state or group of states has taken the step that would have been obvious in case of strong opposition to NATO armed intervention: to request an immediate meeting of the General Assembly.

Even in light of the aforementioned circumstances, resort to force by NATO countries remains nevertheless unlawful as it is contrary to the United Nations Charter.

However, if one takes into account the premise of that forcible action and the particular conditions surrounding it, the following contention may be warranted: this particular instance of breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace. Such a rule, should it eventually evolve in the world community, would constitute an *exception* to the UN Charter system of collective enforcement based on the authorization of the Security Council. In other words, it would amount to an exception similar to that laid down in Article 51 of the Charter (self-defence). In the case of self-defence, unilateral resort to armed violence is justified by the need to repel an instant and overwhelming aggression which leaves no choice of means and no moment for deliberation. In case of forcible countermeasures to prevent crimes against humanity, unilateral resort to force (i.e. resort to force outside any authorization of the Security Council) would be warranted by the need to terminate violations of human rights so grave as to pose a threat to international peace, under circumstances where there would exist no alternative means to put a stop to such violations.

Both the exceptions just mentioned would have a few traits in common. They (i) would be justified by very special and unique circumstances, (ii) must always constitute an *extrema ratio*, (iii) must be strictly limited to the purpose of stopping the aggression or the atrocities, (iv) must be strictly proportionate to the need to attain this goal, and (v) must yield to collective enforcement under United Nations authority as soon as possible.

Plainly, the parameters for a possible evolution of international law that I have endeavoured to delineate are not so tight as to exclude possible abuse and manipulations. In particular, one should be alive to the enormous risks of escalating armed violence: if one of the Permanent Members feels too offended by the forcible countermeasures either because its strategic interests are affected or because that resort to force may eventually offset the international balance of power, an extremely dangerous armed conflict might ensue. Possible resort to armed countermeasures, even under the strict conditions I have attempted to set out, should therefore be used *with great circumspection* by those states which decide to have recourse to such an extreme measure. In particular, they should pay the greatest attention to the reaction of the majority of states, as it may be brought to the fore in an urgent meeting of the General Assembly or, as in the case under discussion, in the absence of such a meeting. In addition, resort to forcible countermeasures must in any event be

conducted in conformity with the canons of international humanitarian law, including the basic principle of proportionality.⁹

Despite all these possible shortcomings, I believe that it is our task as international lawyers to pinpoint the evolving trends as they emerge in the world community, while at the same time keeping a watchful eye on the actual behaviour of states. Standards of conduct designed to channel the action of states are necessary in the world community as in any human society. And it is not an exceptional occurrence that new standards emerge as a result of a breach of *lex lata*. To suggest realistic but prudent parameters in line with the present trends in the world community might serve the purpose of restraining as much as possible recourse to armed violence in a community that is increasingly bent on conflict and bloodshed.

⁹ In this context, the Communiqué issued by NATO on 24 April 1999 on the occasion of the Washington Summit may give rise to serious concern. In paragraph 38 of the Communiqué, concerning future relations with the United Nations in the field of peace and security, NATO members, 'as stated in the Washington Treaty [of 4 April 1949, establishing NATO] . . . recognise the primary responsibility of the United Nations Security Council for the maintenance of international peace and security'. This is stated in such a way, however, that may warrant the suggestion that mere lip-service is being paid to this fundamental aspect of the United Nations Charter. Indeed, in the same paragraph, the Communiqué goes on to state: 'We look forward to developing further contact and exchanges of information with the United Nations, in the context of co-operation in conflict prevention, crisis management, crisis response operations, including peacekeeping, and humanitarian assistance. . . . The Alliance will consider on a case-by-case basis future co-operation of this [i.e. humanitarian] kind.' True, in paragraph 6 of the Communiqué, concerning the future security tasks of NATO in the area of 'crisis management', it is stated that NATO intends 'to stand ready, case-by-case and by consensus, in conformity with Article 7 of the Washington Treaty, to contribute to effective conflict prevention and to engage actively in crisis management, including crisis response operations'. As is well known, Article 7 refers to 'the primary responsibility of the Security Council for the maintenance of international peace and security'. Hence, these two paragraphs of the Communiqué, taken together, may lend themselves to the interpretation that NATO recognizes that Security Council authorization is indispensable for the use of force in situations other than those covered by Article 51 of the United Nations Charter. However, no mention is made in the Communiqué of the legal grounds, if any, justifying departure from this doctrine in the case of Kosovo (Kosovo is mentioned in paragraph 26, when it is stated that: 'Throughout the Kosovo crisis, NATO and Russia have shared the common goals of the international community: to halt the violence, to avert a humanitarian catastrophe, and to create the conditions for a political solution'). Furthermore, no criteria are laid down for the possible running of 'crisis response operations' where such operations would involve the use of force without Security Council authorization. The Communiqué of NATO does not, for example, specify that such operations will be reserved for situations in which there are massacres and deportations of whole civilian populations, or suggest any other such requirements which would at least restrict the conditions under which NATO would feel justified in resorting to force without Security Council approval.