THE LIMITS OF RECOURSE TO FORCE IN THE CONTEXT OF CONTEMPORARY GEOPOLITICS

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Abstract

Recourse to force represents a highly controversial subject matter, given its political sensitivity, as well as the legal framework that authorizes it.

At the present time, it has commonly been assumed that recourse to force is highly forbidden in International Law. However, modern history has shown that this rule is strictly a desiderate that may be unobserved in certain circumstances by states, with the tacit consent that the International Society has expressed through its inactiveness.

Thus, are military interventions of foreign states within the territory of other states legitimate? If so, how can reasonable motives be regulated to legitimate such actions under International Law?

In this context, is recourse to force infringing the notion of external sovereignty, that serves both at protecting the states' identity and personality, as well as at preserving individuals from armed conflicts?

The purpose of this paper is to find possible answers to these questions, considering the trends in contemporary geopolitics.

Keywords: *recourse to force, state, military intervention, sovereignty, infringement*

1. Introduction

1.1. Recourse to force – from rule of war to regulated exception in contemporary society

From a historical standpoint, it is widely acknowledged that recourse to force was the main tool for waging wars, "*as a legitimate means of policy, its foremost aim changing territorial boundaries*"[1].

Moreover, while waiting for the founding of The League of Nations, the right to war (*jus ad bellum*) was regarded as a normal manifestation of state sovereignty and as a means of resolving disputes between States[2].

In other words, recourse to force was regarded, up until the beginning of the 20th century, on the one hand, as an instrument in the use of military force in international relations between States, in particular for the conquest of territories and State expansion, and, on the other hand, as a legitimate expression of state sovereignty, which could not be bordered by willpowers expressed externally.

As a result, most international treaties concluded between States were more likely regulating the rules of war, rather than stating the rules of peaceful settlement of disputes between States, in order to avoid recourse to force in such cases.

Thus, at the end of the 19th century, the most striking concern at international level was the aim to find optimal solutions which would be in agreement with State sovereignty for the exclusion of war as a means of resolving conflicts between States.

The first attempts to seclude war as a means of regulation of disputes between States and imposing peaceful means therewith took place towards the end of the 19th century.

However, long before this period, there has been another noticeable effort, in the form of the Westphalian Peace Treaty of 1648. According to this agreement, European states arranged to end a distressing long war waged on religious and territorial limitations. The importance of this treaty, as concerns the exclusion of war in international affairs, resides in „*the separation of domestic, especially religious, and international affairs, that has strongly influenced both the drafting and interpretation of the prohibition of the use of force*". Nevertheless, it should be underlined that in accordance with traditional understanding, „*domestic affairs cannot serve as an exception from the prohibition of the use of force in international relations*"[3].

Going back to international regulations with an impact on the elimination of war as a legitimate means of resolving international disputes, it shall be emphasized that the Hague Peace Conferences of 1899 and 1907, that were gathered under the auspices of peace, disarmament and arbitrage, tried to solve the problem of disarmament, unsuccessfully. Nonetheless, an important victory of the two conferences resides in the systematization and perfection of the diplomatic procedures for regulating disputes, the consecration of Arbitration under peaceful means, as well as the institutionalization of International Jurisdiction. As an example, regarding the recovery of contractual debts,

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[1] Sebastian Heselhaus, *International Law and the Use of Force*, Encyclopedia of Life Support Systems (EOLSS), p. 2, available here: https://www.eolss.net/Sample-Chapters/C14/E1-36-01-02.pdf;

[2] Raluca-Miga Beșteliu, *Drept internațional public. Vol. II. Ediția 2,* ed. C.H. Beck, Bucharest, 2014, p. 161;

[3] Sebastian Heselhaus, *op.cit.*;

the Hague Convention II (Drago Porter Convention) imposed a type of prohibition on recourse to armed force provided that the debtor State shall accept and submit to an arbitrational settlement[4]. However, as concerns the settlement of conflicts between states, these two major events could not ascertain a solution to exclude war. Thus, States could continue to determine by their own free will the means of settling international disputes, whether these means were peaceful or involved the recourse to force.

Afterwards, the League of Nations Covenant was primarily aimed at drawing up principles and rules, as well as establishing an institutionalized framework for peacekeeping and organizing nations to prevent and avoid wars. Thus, for the first time in contemporary history, establishing international limitations on the right of States to resort to war was successfully achieved. Despite this notable accomplishment, the Covenant did not prohibit *per se* the use of war, thus recourse to force in international relations was still permitted.

Following the League of Nations Covenant, a series of treaties and agreements were concluded between States regarding the limitation of recourse to force in International Society. The relevant period during which these treaties have been concluded extends from 1925 to 1935, all of which are aimed at establishing rules of International Law in relation to non-recourse to war and the use of peaceful means of dispute resolution between States. One of the most important treaties is the General Treaty for Renunciation of War as an Instrument of National Policy, known as *the Briand-Kellogg Treaty*, signed in Paris on 26 August 1928 and entered into force on 24 July 1929.

According to Article 2 of the Briand-Kellogg Pact, "*The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means*"[5]. Parties failing to abide by this commitment "*should be denied of the benefits furnished by [the] treaty*". Nevertheless, the Pact does not provide any sanctions or collective compulsion measures in respect of possible violations of the prohibition on recourse to war. Moreover, this treaty does not even refer to banning of other means of armed force use except for war, which is expressly prohibited by its provisions.

As such, it is once again proved that the International Society was not prepared at that moment for the exclusion of recourse to force in international relations between States.

Finally, with the United Nations Charter (the U.N. Charter), the overall prohibition of recourse to force has become not only an international obligation of Member States, but even a fundamental principle of International Law, governed by o peremptory norms of general International Law. Thus, Article 2 paragraph 4 of the U.N. Charter sets forth a ban on "*the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the U.N.*". In other words, for the first time in modern history, a general rule of "*peaceful means of dispute resolution*" (Article 33 of the U.N. Charter) and "*general prohibition of recourse to force*" was adopted by the International Society. In addition, the U.N. Charter not only excluder war as a means of international relation between Member States but also prohibits measures short of war. The Charter comprises also one exception that permits States to recourse to force as an expression of the right of self-defense.

Probably the most important progress made at international level is that the U.N. Charter provides for express coercive measures that can possibly be taken by the U.N. in case of violation of the general principle of non-recourse to force, as established by Article 39.

1.2. The principle of non-recourse to force or force threat in international relations

As concerns the concept of "recourse to force" it has been linked, in international affairs, to relationship between States. Thus, given that recourse to force has been generally seen as a means of dispute resolution that may occur between States, at a certain time, as well as the consequences following such a conduct (especially World War II), the International Society had to come with better solutions that did not imply the use of military forces. In other words, the 20th century was marked by a quest for States to find an optimal manner to solve international disputes without the high price that humanity had to pay at its beginning.

According to Article 2 paragraph 4 of the U.N. Charter "*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*".

Hence, the U.N. Charter expressly states that the territory of a State cannot be subject to occupation by use of armed force, nor to territorial expansion by States through use force or force threat exercised against other States. Moreover, it is strictly forbidden to make use of force or of force threats against the political independence of other States[6].

However, the U.N. Charter legitimates recourse to force in merely two exceptional situations: as exercise of the right to self-defense and for the purpose of maintaining international peace and security.

As concerns the right to self-defense, Article 51 of the U.N. Charter states that nothing "shall impair the

[4] Sebastian Heselhaus, *op.cit.*;

[5] *The Briand–Kellogg Pact 1928*, Yale University, available here: http://avalon.law.yale.edu/20th_century/kbpact.asp. Romania acceded to the Briand–Kellogg Pact in 1929;

[6] Raluca-Miga Beșteliu, *op.cit*., p. 162;

inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.".

By interpreting the above quoted text, it follows that recourse to force, even in the case of self-defense, is strictly limited to the period prior to that the Security Council manages to take the necessary measures to maintain international peace and security. Additionally, it shall be noted that the right to self-defense regards not only the State against which is triggered by the armed attack, but also other Member States that are authorized to intervene in order to counteract the armed assault against the targeted Member State.

Consequently, recourse to force under Article 51 of the U.N. Charter shall be legitimate provided that the following requirements are met:

a) recourse to force is necessary to protect the security of the Member State targeted by an armed attack;
b) recourse to force is proportionate to the intensity of the armed attack;
c) measures taken by exercise of the right to self-defense are immediately reported to the Security Council.

The second situation that authorizes recourse to force under the provisions of the U.N. Charter is expressly stated by Article 39. According to this text, "*the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41[7] and 42[8], to maintain or restore international peace and security.*". In other words, Member States are approved to use force in order to preserve international peace and security, under the collective security system constituted by the U.N. Charter.

With that being said, there is a legitimate question arising from the system implemented by the U.N. Charter that authorizes recourse to (armed) force: how can abuse of recourse to force be identified and stopped, if it is at the shelter of the mask of an intervention aimed at maintaining international peace and security?

This paper aims to find the answer to this question, as well as to many others, by reporting on a practical case that has put a striking footprint on contemporary International Law: Kosovo.

2. The Kosovo Case Study

2.1. Historical overview

Even before the end of the hostilities in 1945, the United Nations have expressed the natural wish of its Members to ensure peace and prosperity. At least these where the declared objectives.

Despite the development of nuclear weapons and intercontinental missiles, the world did not go through a new global conflict since the end of World War II, although at least two times – during the Korean war of 1951 as well as during the Cuban crisis in 1962 – the risk escalated in that direction.

The United Nations did not always interfere to stop conflicts, many of them leading to heavy fighting, but when they did, the results were not conclusive in all cases, as the Middle East conflict proves it.

The preamble of the U.N. Charter states the wish of the representatives of the nations to "*save future generations from the scourge of war which two times during a human life has brought so much suffering to human kind".*

The first failure of the U.N. was the actual impossibility to maintain international peace and security and, consequently, the incapacity to adopt efficient collective measures to prevent and remove the threats against peace, suppress acts of aggression and solve through peaceful means the litigations and situations which could endanger peace.

So, the members of the United Nations committed, among others, to solve international disputes with peaceful methods and abstain from using force or threats with the use of force, except for self-defence or maintaining peace and international security cases.

According to the terms of the Charter, the General Assembly and the Security Council could interfere in any litigation whose extension could threaten the international peace and security but limited only to recommendations which were not legally binding.

Only the Security Council has the power to decide, according to Chapter VII, when to actually act in case of a peace threat, of the infringement of the peace or an act of aggression.

So, the Security Council could not only decide on the mandatory preventive coercive measures, but also on the repressive measures involving, if necessary, the use of armed forces.

[7] The U.N. Charter, Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations";

[8] The U.N. Charter, Article 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.";

For this, it was provided that the armed forces will be made available to the Council by the member states, according to the agreements concluded with it.

With all the "efforts" of Member States permanently in the Security Council to use their veto right in blocking the intervention in certain conflict areas, the U.N. efforts to re-establish peace did not fail. If we stick only with disputes which lead to the appearance of the hostilities, we can consider that since 1945 thirty focal points started in the world.

These conflicts can be grouped in four categories: the "*classic*", border disputes, especially in Latin America, but also in Africa and the Far East, civil wars, which turned into international conflicts because of the interference of external powers, to which colonization wars and armed conflicts related to the ideological opposition of both East and West blocks were added.

The U.N. did not interfere in at least a third of these conflicts. Three reasons which explain this passivity can be identified, even if they don't justify it:

First of all, various conflicts where examined in a regional framework or at least in that of the Organization of the American States (OSA) (for example, the conflict between El Salvador and Honduras in 1969) or in that of the Organization of African Unity (OAU) (for example: the border conflict between Ethiopia and Somalia in 1964).

Actually, the U.N. Charter encourages the resolution of international disputes in a regional framework, but the ambiguous phrasing of the Charter in chapter VIII questions the priority of notification of the regional organizations.

But the war returned strongly in the centre of the debates related to international law. And it did not return as a final ban practice, but as an aggressive and violent manner used by States to establish their own interests, and not as a scourge which can be avoided and repressed[9]. On the contrary, the war appears as a method to check, in certain contexts, the legitimacy, legal admissibility or even its use as method to apply the law, guaranteeing the compliance with "*international legitimacy*", "*war against terrorism*", "*preventive war*", "*war against rogue states*".

So, in the current context, we no longer refer to "*the war against poverty*" or the "*war against illiteracy and ignorance*", but we face a current reality in which the international community is called to express itself in relation to the threats related to the abusive use of force, according to the various partisan interests.

Each of the "*new wars*" in the past decade - from the first Gulf war to the Kosovo war, the Iraq war - clearly represent a challenge for the law, in general, and for the international law especially.

From all these wars, we think that Kosovo (March - June 1999) raises the most delicate doubts and problems from this perspective. In fact, this is the most "*moral*" of all these modern wars, the "*fairest*": a humanitarian intervention, implemented by the NATO Member States to avoid sacrificing the innocents, to stop the genocide committed by an oppressive regime and a bloody tyrant[10].

No matter if this is accurate, in the case of Kosovo there is a dilemma when there seems to be no other way to save an entire population but by force, through serious infringements of the fundamental rights, the only possibility found being to use the armed force against the government which declares to be a defender and protector of these rights.

In order to express opinions about such cases, the seriousness of the background problem cannot be omitted: if actually an assessment, no matter what this is, which confirms the possibility of an armed intervention, "*humanitarian*" can mean supplying an easy justification for hegemonic and aggressive policies, to unjustified and violent intrusion acts from one or more states into the affairs of other states and peoples, lethal attacks and military invasions.

On the other hand, such an "*assessment*" which stigmatizes the other party without any right of appeal, without the right to appeal against the right/ lawfulness of an intervention in force, can offer a convenient alibi, no matter the opinion of the international community in front of a real danger of humanitarian tragedies, contributing in this manner to abandoning the tragedy of a whole population subject to racist and dictatorial regimes.

2.2. The use of armed forces for the protection of human rights in the recent international practice

In order to attempt an assessment of the Kosovo war in general and of the humanitarian military intervention, in light of the current international legislation, it is essential to restore the wider image of the various hypothesis in which, in the past year, the armed force was used to protect human rights at international level.

A first group of cases is related to the system of the United Nations and, especially, to the operations to maintain (or restore) the peace implemented or authorized by the Security Council.

A use – no matter how limited – of armed forces for humanitarian purposes can be provided and took place sometimes in the context of peace maintenance operations in the strict meaning (sending the "*blue helmets*" in a state or in the border areas), as forces which target separating the forces in conflict or guaranteeing security and public order in serious

[9] In 1945, the founding states of the United Nations have solemnly declared that the Charter they would sign was based on the common interest to "*save future generations from the scourge of war, which two times during this generation lead to countless sufferings of humanity*".

[10] Regarding the terms "*fair*" or "*moral*" in relation to Kosovo, it is worth mentioning the article of President Clinton in The New York Times on May 24, 1999 ("*My Just War*"), the speech of first Minister Blair at the Economy Club of Chicago of April 22, 1999, Cassese "*Le cinque regole per una guerra giusta*", in AA. VV., "*L'ultima crociata"*, Roma, 1999, 74 ss., the observations of Brutti, in "*Guerra giusta o guerra utile? Le norme, l'esperienza, gli interessi*", in *Italiani europei*, 2002, n. 3, 165-169;

internal instability situations) or "*the consolidation of the post-conflict peace (sending military and civil staff to adjust the countries destroyed by civil wars, restored the conjunctive tissue of the civil society and political institutions [...], promoting the national reconciliation and the observance of human rights*"[11].

In both cases, we refer to the operations established by the United Nations' Security Council (more seldom by the General Assembly), performed under the guidance and control of the General Secretary's Office and implemented with the agreement of the territorial state in which the missions must be performed. In these type of operations, the use of force by the military staff, or by the police sent in the area, is generally allowed for legitimate self-defence or, in the measure strictly necessary to obtain the humanitarian purposes assigned to the mission: for example, to defend the populations in subject against violent attacks, prevent the serious infringement of the fundamental rights, protect humanitarian activity against non-governmental organizations, guarantee the security of humanitarian corridors or protected areas (for example, for groups in a certain ethnic group or refugee camps[12], out of which one can recall the interventions of the United Nations in Salvador (ONUSAL, 1991), Cambodia (UNTAC, 1992), Mozambique (ONUMOZ, 1992), Angola (UNAVEM III, 1995), Sierra Leone (UNAMSIL, 1999) and the first intervention of the "blue helmets" in Somalia (UNOSOM I, 1992)[13].

The use of force for humanitarian purposes does not bring, in this type of operation, specific admissibility problems in relation to international law. In fact, these operations take place with the approval of the territorial state as well as of any other contradictory party present in the area where the mission will take place (groups organized by insurgents, organized ethnic fractions). So these groups do not involve any form of violence against the territorial state, or against other international subjects: consequently they are not an international military coercion.

In addition, even if their legal grounds are not clearly identified, the related operations can be debated in - the Security Council - which has the power to use force in order to maintain international peace and security, and then (the operations) are led by military groups assigned by the states under the guidance and control of the General Secretary of the United Nations, to guarantee the impartiality of the intervention and its compliance with the purposes officially established for the mission.

A higher frequency in the "*humanitarian*" use of armed forces can be found in the hypothesis in which such use, although appeared in the context of a peace maintenance operation as the previous one, is implemented without considering the approval of the territorial sovereignty and is not limited to the purely "passive" dimension of the legitimate defence and protection of the populations or localities entrusted during the mission. This can happen, for example, in case of an "anarchy" situation, meaning a total collapse of the governmental organization, of the territorial state and when, because of the aggravation of dangers from which the populations must be protected or for the military and civil safety involved in the mission, it is necessary to disarm the hostile groups present in the surrounding territory. In these cases, the Security Council of the United Nations extends the initial mandate of the mission, assigning to the groups sent not only the task to keep the peace, but also apply the peace, apply, by force, objectives which are indispensable to the performance of the mission in that territory, in safety conditions and in a safe environment.[14] The episodes in which such situations appeared: the mandates for ensuring peace assigned to the United Nations protection force in former Yugoslavia (UNPROFOR, 1992), the second Force of the United Nations which operates in Somalia (UNOSOM II, 1993) and the Forces of the Nations sent in Rwanda (UNAMIR, 1992).

In relation to this type of intervention, one must notice that independently of the approval of the territorial state and of the other possible parties at conflict and which needs a real military constraint, this was always decided by the Security Council based on the assumption of its need to keep or re-establish peace and international security, in the presence of a threat against peace or a peace which is already infringed. This would justify its legitimacy in terms of international law as, it is known, it belongs to the Security Council, according to chapter VII of the UN Charta (especially art. 42) which provides using actions through military force in any case considered necessary to maintain international peace and security, in the presence not only of an act of aggression, but also an infringement of the peace or a simple threat against the peace.

Another type of "*humanitarian*" armed actions, related to the United Nations system, includes the interventions which are not directly organized and performed by the UN bodies, but which are authorized only by the Security Council, to be then implemented

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[11] Così Marchisio, *L'ONU. Il diritto delle Nazioni Unite*, Bologna, 2000, p. 260. Antonio Marchesi, *I diritti dell'uomo e le Nazioni Unite*, Milano, 1996, pp. 100-124;

[12] *Le développement du rôle du Conseil de Sécurité: peace-keeping and peace-building*, Dupuy (R.-J.), Dordrecht, 1993; *New Dimensions of Peace-Keeping*, Warner, Dordrecht-Boston-London, 1995; Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War*, New York, 1995; Gargiulo, *Le Peace Keeping Operations delle Nazioni Unite. Contributo allo studio delle missioni di osservatori e delle forze militari per il mantenimento della pace*, Napoli, 2000;

[13] *Interventi delle Nazioni Unite e diritto internazionale*, Picone, Padova, 1995;

[14] Corten e Klein, *Action Humanitaire et Chapitre VII: la redéfinition du mandat et des moyens d'action des forces des Nations Unies*, in *AFDI*, 1995, 105.; Lattanzi, *Assistenza umanitaria e intervento d'umanità*, Torino, 1997, 56-67. Magagni, *L'adozione di misure coercitive a tutela dei diritti umani nella prassi del Consiglio di Sicurezza*, in *CS*, 1997, p. 655;

in practice by the individual states, groups of states or the so-called regional organizations[15] As examples we have the authorization of the Security Council for the member states "*to use all necessary means*" to re-establish a safe environment for the humanitarian operations in Somalia, authorization followed by the Restore Hope operation, led by the UNITAF multinational force, with a mainly American structure; the authorization to use all necessary measures to defend the "*protected areas*" in Bosnia, followed, among others, by the NATO air operations called Air Strikes in April 1994 and the Deliberated Force, in August/ September 95; the authorization to use all necessary means to protect the displaced masses, the refugees and civilians in danger in Rwanda, followed by the turquoise operation, led by six states, under the command of France, which aimed to create a humanitarian security area from June to August 1994.

The compliance with the international law in relation to this type of intervention is not really conclusive in relation to the U.N. Charter, which doesn't explicitly provide the possibility of the Council to directly exercise/use a certain armed force through its own military groups, or authorize the "*individual or coalition*" member states to use armed measures to maintain international peace and security. Such an authorization is explicitly provided only in Article 53 of the Charter, in favour of the "*regional organizations*". In any case, if it is considered extended - in virtue of a consolidated practice and not appealed against by the UN member states - the power to authorize the Security Council in favour of some states, groups of states (or organizations which do not fully comply with the requirements established for the "*regional organizations*" specified by Article 52 of the Charter), it does not mean that the use of armed force in this "*authorized context*" should not legitimately comply with the precise and pretty strict conditions and requirements.

First, the authorization should involve - as it happened in the actual cases specified above - the existence of a danger situation, clearly qualified by the Security Council as a threat against peace or an infringement of the international peace.

Second, the use of force (elliptically understood with the expression "any necessary means") should be exclusively conceived and limited to the object considered essential by the Council to re-establish or keep peace and security in the region: to re-establish a safe environment for the populations threatened or a situation in which it is possible to prevent a serious infringement of the fundamental rights of this population.

Last, the security measures should take place under the careful and constant supervision of the Security Council, eventually through the U.N. General Secretary, specifically appointed by the Council.

Moreover, this last condition is very difficult to achieve in practice and for sure it was not always performed in a satisfactory manner in the above specified cases. Moreover, it remains more than a doubt in relation to the conformity of the United Nations law in the use of the armed force which took place in these episodes.

No matter the assessment of the individual episodes, one can state, in principle, that the use of force for humanitarian purposes authorized by the Security Council, in the measure in which it complies with the above-specified requirements, is acceptable for the current international law and especially for the law of the United Nations. Still, it is important to recall that in order for the authorization and the consistent use of force to be legitimate, it must be justified by the need to maintain or re-establish a peace and security situation, meaning eliminate or reduce this particular type of peace infringement or peace threat, which consists in serious and systematic infringements of the most fundamental human rights (for example, the right to life, physical and mental integrity, not to be reduced to slavery, not to be discriminated and isolated because of race, ethnicity or religious belief).

Once a "*safe environment*" was created - a situation in which these fundamental rights are not exposed to the risk of being stepped on - the military force for humanitarian reasons no longer has a reason in the UN system, neither authorized nor applied. This is actually the substantial limit inherent to the coercive intervention provided to the Security Council based on chapter VII of the UN Charter: "guardian of the international public order" (or, if you prefer, "international cop") this body has, without a doubt, the right and obligation to put the state or the organized group which seriously infringes human rights in the situation in which they "cannot harm" (meaning they cannot continue their barbaric brutality), re-establishing security and eliminating this peace threat; but it does not have the right to interfere in another manner or go on.

Consequently, the Council cannot legitimately "*judge", "sanction" or "punish*" the state or the group in charge, nor does it perform violent constraints to impose a change of political regime. The use of armed forces, even if partially motivated by the humanitarian protection purposes, which has the aim to remove a political regime, would be totally against the rights the United Nations has, would be an illegal action, even if adopted according to the procedural rules of the UN Charter[16]

Another type of cases in which in the past years there an international use of the armed forces for

[15] Freudenschuss, Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council, in EJIL, 1994, p. 492; Gaja, Use of Force Made or Authorized by the United Nations, in The United Nations at Age Fifty, a cura di Tomuschat, Dordrecht, 1995, p. 39.; Lattanzi, op. cit., p. 71.; Sarooshi, The United Nations and the Development of Collective Security. The Delegation by the Un Security Council of its Chapter VII Powers, Oxford, 1999;

[16] Arangio-Ruiz, On the Security Council's 'Law Making', in RDI, 2000, p. 609;

"humanitarian" purposes was, is the interventions established outside the decision-making system of the United Nations, which includes the Kosovo war[17].

A first type is given by the interventions performed with the agreement of the territorial state: the operation performed by ECOWAS ("The economic community of the states in Western Africa"), in Liberia between 1990-1991 with the agreement of the then government in charge (but against the will of the biggest insurgent group there) - a force of about 10.000 men (ECOMOG), mainly Nigerian, with the purpose - at least declared - to maintain public order and prevent the serious human rights infringements as a result of the ethnic tribal conflicts they produced and are still producing. Also, it could refer to the IFOR (Implementation Force) case, the multinational force mainly formed by the groups supplied by the NATO countries, provided in the Dayton agreements in 1995 and performed in Bosnia and Herzegovina, with the approval of all interested parties, Bosnia, Croatia, the Yugoslav Federation, the Croatian-Muslim Federation and the so-called Republika Srpská) with the purpose - among others - to guarantee, if necessary, the use of force, the application of the peace plan and a situation of total respect of the human rights.

In fact, as already observed for the peace maintenance and peace consolidation operations, the decisions adopted in the United Nations Organization do not involve military constraint towards the territorial state or other international subjects.

Very different is the case in which the "*humanitarian*" armed intervention of the states or coalition of states takes place without the agreement of the territorial state or even openly against that state. Precisely in this category we must follow the intervention of the NATO countries in Kosovo. And in the same category we have another famous episode: the Provide Comfort operation in the Iraqi Kurdistan.

In relation to the latter, it must be recalled that the real humanitarian intervention, meant to allow the humanitarian activity of the United Nations and of the non-governmental organizations in favour of the Kurdish populations submitted to the repressive regime of Saddam Hussein, although the mandate of the UN Security Council was very limited in time and intensity, the ground forces and the aircrafts of the "interfering" coalition's countries (US, France, The United Kingdom, Italy, Spain, The Netherlands and Australia) entered Iraq on April 17, 1991, creating certain safe enclaves in Kurdistan (the so-called safe havens) and establishing a flight free area, above the 36th parallel, without the need to use war violence, but limited to the application of a force threat. Although the next day (April 18) Iraq also reached an agreement (supplemented by the previous agreement of May 25), which allowed not only the performance of the humanitarian aid operations in the area and the establishment of safe havens, but also to the displacement of 500 UN "white helmets". This displacement was performed; the ground troops of the coalition withdrew the next July. But the flight corridor area remained, to which another was added, under parallel 32, by unilateral decision of the United States. It is important to underline that imposing and maintaining both flight interdiction areas have nothing "humanitarian" about them and, consequently, besides being illegitimate, are away from the interest area of this analysis.

In relation to the Provide Comfort operation, the Kosovo intervention had a very different area and resonance: in fact, after this intervention, the world problem was brought in front of the global public opinion, that of humanitarian intervention, with all its implications.

Before attempting a judicial assessment, it is necessary to recall the facts briefly (10). In the spring-summer of 1998, a wide repression campaign was launched against the ethnic Albanian population by the Yugoslav army and police, started also by the intensification of the guerrilla war and of the terrorist activity of UCK, the "Kosovo Independence" army. In autumn, according to the estimates of the High UN Commissary Office for Refugees, there were already over 200.000 refugees. Still, a big part of them (about 100.000) were convinced to return to their places of origin as a result of the agreement between Holbrooke - the US representative and Milosevic, in relation to the withdrawal of a big part of the Yugoslav armed forces in the area, under the control of an international mission established by OSCE.

In January 1999, the situation (Albania's guerrilla war and the Yugoslav repression) worsened again, until the very serious episode of Racak (where - for reasons and conditions not fully clarified - 45 Albanian ethnics were killed and mutilated), sealing in this manner also the failure of the OSCE mission.

In February, the negotiations performed at Rambouillet between an Albanian delegation and a Yugoslav delegation also failed, in the presence and under the pressure of the c.d. Contact group member states (United States, The United Kingdom, Russia, France, Germany and Italy). The proposed agreement was in fact rejected by the Albanian delegation (at it did not clearly stipulate the future independence of Kosovo) as well as by the Yugoslav one (as it provided detaching on the territory of Yugoslavia an international military force under the command of NATO). Still, in March, the Albanian party - convinced by the reinsurances of the United States, declared to accept the proposal. Yugoslavia insists in its refusal, perhaps in the conviction it managed to defeat the UCK guerrillas, despite the NATO military intervention, maybe thinking it could take advantage in case of a wider and more intense conflict, to eliminate for good part of the Albanian population in Kosovo and, in case

[17] Ronzitti, Uso della forza e intervento di umanità, in NATO, conflitto in Kosovo e Costituzione italiana, Milano, 2000, p. 1, Lattanzi, op. cit., p. 68<

of a division of the region, to keep a "safe" an ethnically controllable part of Kosovo.

On March 20, a new, painful and repressive campaign of the Federal Republic of Yugoslavia starts in Kosovo which, in a few days, leads to 15 000 refugees.

On March 24, the NATO countries start the bombing, which continues until June 9. The strategy followed by the Alliance immediately and clearly shows that the immediate objective is not to avoid an imminent humanitarian tragedy, but to protect the Albanian population in danger.

This is sooner the "mediated" and "indirect" objective wished to be obtained by reaching the objective to defeat Milosevic's Yugoslavia, meaning imposing the abandonment of Kosovo as counterparty for not destroying Serbia.

The Yugoslav military forces are than attacked and the air defence destroyed; but, considering the weak results of this operation, the bombings extend to non-military objectives; industrial plants, oil refineries, oil pipes, bridges, railways and roads, until the bombing of Belgrade and some objectives such as the head office of the Yugoslavian television, the head offices and residences of Milosevic and his family.

Meanwhile - and predictable - the Serbian repression in Kosovo intensifies. The infringement and worsening of the human rights violation, an "Ethnic cleaning" campaign, which determines the massive exodus of the Albanian population in only two months, especially in relation to Albania and Macedonia (The High UN Commission talks about 800.000 new refugees in two months)[18]

At the beginning of June, after Yugoslavia accepted the peace plan drafted between the G8 countries (the plan was also submitted to the general approval of China) and the inclusion of this plan in the resolution 1244 of the UN Security Council, the NATO countries officially ended the bombing, on June 10, 1999.

Between June-November the same year, almost all exiled Albanians returned, but, together with the entry of the mainly NATO multinational force (KFOR, the Kosovo force) and the resumption of the biggest part of the CK extremist fraction, the Kosovo Serbian diaspora starts. Approximately 200.000 Serbians leave their places of origin. Approximately 60.000 of them remain in Kosovo, focusing in certain "leopard-skin" areas, which need constant protection against vendettas and acts of violence. The hope of a multi-ethnic Kosovo seems, at least for the near future, affected for good. [19]

2.3. Arguments supporting the Kosovo war legitimacy thesis in terms of international law

The legitimate question made is if the Kosovo war and - in general - the unilateral and "*unauthorized*" armed humanitarian intervention can be or not be considered legitimate according to the current international law.

In order to assess this matter, it is necessary to examine the various legal arguments proposed to justify the NATO intervention in Kosovo.

A first series of arguments outline the NATO intervention as descendant or "tangible" in another manner to the international peace and security maintenance system, which operates in the United Nations.

So, it was suggested that the use of force against Yugoslavia was authorized by the previous resolutions of the Security Council, precisely through the Resolution 1199 of September 23, 1998 and 1203 of October 24 the same year.[20]

If read the two resolutions, it is easily obvious that while the situation created in Kosovo is classified as a threat against peace, it did not reveal any authorization, even ambiguous, to use armed forces. On the contrary, those acts of the Council are characterized, as noticed, by a substantial equidistance towards the parties in the already on-going conflict: both parties are actually being reproached the acts of violence already committed, and are called to avoid the catastrophic humanitarian risk[21]

In addition, the resolutions quoted always repeat the obligation of all U.N. Member States to respect the sovereignty and territorial integrity of the Yugoslav Federation, also underlining the main responsibility of the Security Council in relation to keeping and maintaining international peace and security.

In a different manner, and without denying that the NATO bombings were officially "unauthorized" when they took place (because of the lack of authorization by the Security Council) it was argued - in light of a very "free" reading of the 1244 Resolution of June 10, 1999 - that the Council itself would have corrected the inherent vice of the NATO bombings, approving also the implicit adoption of the military action performed by the countries of the Alliance[22] This justification must also be rejected.

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[18] Pretelli, La crisi del Kosovo e l'intervento della Nato, in Studi Urbinati, 1999/2000, pp.295, L'intervento in Kosovo - Aspetti internazionalistici e interni, de Sciso, Milano, 2001, p. 189;

[19] Lo Savio, Esodi di massa e assistenza umanitaria nella crisi del Kosovo, in L'intervento in Kosovo, cit., p. 99;

[20] Balanzino, NATO's Actions to Uphold Human Rights and Democratic Values in Kosovo: A Test Case for a New Alliance, in Fordham ILJ, 1999, 364 .; Bermejo Gracía, Cuestiones actuales referentes al uso de la fuerza en el derecho internacionál, in An. Der. Int., 1999, 3-70; Zanghì, Il Kosovo fra Nazioni Unite e diritto internazionale, in I diritti dell'uomo - cronache e battaglie, 1998, n. 3, 57; Saulle, Il Kosovo e il diritto internazionale, ibid., 53-54; Charney, Anticipatory Humanitarian Intervention in Kosovo, in AJIL, 1999, 834-841; Falk, Kosovo, World Order, and the Future of International Law, ibid., 847-857; Ferraris, La NATO, l'Europa e la guerra del Kosovo, in Aff. Est., 1999, pp. 492-507;

[21] Delbrück, *op.cit*., 28; Leanza, *op.cit*., 28; Momtaz, *op. cit.*, 98; Weckel, *op.cit*., pp. 21-25;

[22] *L'intervento in Kosovo*, cit., p. 57. Gargiulo, *La guerra: profili di diritto internazionale*, in *La Guerra - Profili di diritto internazionale e diritto interno*, Quaderni dell'Istituto di studi giuridici dell'Università di Teramo, n. 3, Napoli, 2002, pp. 88-89.

First of all, no matter how "generous" are the powers assigned to the Security Council on the UN Charter, they must be understood so that, in virtue of a subsequent practice, what was declared illegal from the start cannot be declared legal. One must not forget that the Council is granted mandatory legal powers only for the specific purpose to establish, during crisis periods, the necessary measures to restore and maintain international peace and security, and not for general governmental purposes or in relation to the assessment and "replacement" of the law[23]

Bur no matter the general aspects, it is enough to read the 1244 resolution previously mentioned to understand it does not involve any approval of the armed intervention. Moreover, in this resolution, the Council, starting from the situation decided as a result of this intervention - meaning from the acceptance of the peace plan by Yugoslavia - starts, according to this plan, the next steps which must be performed to obtain the full restoration of the peace and security in the area and the establishment of a temporary civil administration regime for Kosovo, organized and managed by the United Nations. In other words, the resolution 1244 looks towards the future and does not revise the past[24]

Moreover, one cannot ignore that two important permanent members of the Council - Russia and China - a few days after the bombing, voted to adopt a resolution condemning the military action of NATO[25].

The reality is that the silence regarding the military action, in the text of this resolution, was the only diplomatically viable method to return the Kosovo back in the hands of the United Nations, to entrust the task to manage the "post-war" to the world organization, which would establish and control a peaceful reconstruction of the area, respecting the human rights, the self-determination of the ethnic groups present there and, as much as possible, the territorial integrity of the Federal Republic of Yugoslavia.

If we wish to talk, in relation to this, about the "return to the international lawfulness", it is a substantially accepted statement, but the "return to lawfulness" involves being aware of the "illegality" previously committed by the NATO member states with their intervention and should be understood as a wish to close the "illegality brackets" and not in place of "amnesty" or even a "blessing" for what happened[26]

Briefly, with the silencing of the 1244 Resolution, no armed intervention was approved or implicitly approved; it just spread a veil on it.

Another type of argument, proposed to explain the eligibility of the Kosovo intervention in light of the United Nations law, shifts the focus from the "procedural" size of their approval (or approval) by the Security Council, of the content of prohibition to use armed force, provided in the UN Charter.

It was especially claimed that the NATO intervention did not infringe this interdiction, as it would regard only the use of armed force incompatible with the purposes of the United Nations. And as the NATO member states would bomb the Federal Republic of Yugoslavia to protect human rights - especially the fundamental rights of the Albanian population in Kosovo - their action would be legitimate as off-line, de facto, according to one of the main purposes of the UN[27].

We consider this argument at least debatable.

As shown in the specialty literature, art. 2, paragraph 4 of the UN Charter, in this text's preparatory works, as it results from the construction given with the numerous statements of the General Assembly, from the studies made by most part of the most representative doctrine, the interdiction of the states to use armed force in international relations (an interdiction which, as known, is one of the pillars of the whole United Nations legal system) refers not only - always and in any case - to any use of the force against territorial integrity or political independence of a state, but to any use of force incompatible with one of the objectives established by the United Nations. In other words, it is an absolute interdiction (without affecting the legitimate individual and collective defence exception, as well as the hypothesis in which the use of force is legitimately applied or decided by the Security Council)[28]

Indeed, the use of military force, which does not aim to undermine the political independence or territorial integrity of a state, can never be compatible with the objective of "developing a friendly relationship between nations" [article 1 paragraph 2 of the UN Charter] or the "peaceful resolution of international litigations" (article 2 paragraph 1 of the Charter" or "the performance of the international cooperation, the resolution of the international problems of an economic, social, intellectual or humanitarian order" (art. 1, paragraph 3 of the Charter).

Besides the incompatibility of the armed intervention in Kosovo with the various purposes of the United Nations, it is incontestable that this intervention, in its manner, as well as in its objectives, was open against the political independence and, last, against the territorial integrity of the Federal Republic of Yugoslavia. Consequently, it is classified, without a doubt, in the type of war intervention explicitly condemned and forbidden by the United Nations Charter.

[23] Così Condorelli, *La risoluzione 1244(1999), op. cit*., pp. 36-41; Henkin, *op.cit*., p. 826.
[24] Arangio-Ruiz, *op. cit.*;
[25] Sciso, *op. cit.*, p. 60.
[26] The conviction resolution project submitted by Russia, India and Belarus), according to the U.N. document S/1999/328. in the Security Council,
[27] Gargiulo, *op. cit.*, p. 92;
[28] Leanza, *op. cit.*, 27-29; Sofaer, *op. cit.*, 12 ss.; Weckel, *op. cit.*, pp. 31-33;

A second set of arguments which can be supported as base for the admissibility, in the international law, of a NATO military intervention, do not appear at UN system level, but at international law level.

These are actually the arguments which must be analysed, because of the less clear, as well as more permissive content in relation to the United Nations law, of the international unwritten regulations regarding the obligations of the states to abstain from the use of armed forces and as the admissibility of the "humanitarian" intervention in the customs law field is aligned, in principle, in the presence of certain conditions, even by those which do not hesitate to define the serious specific action performed by the NATO countries in the spring of 1999.

So, a first argument refers to the notion of "state of necessity", which must be understood as the reason for exclusion of the illicit facts approved by the general international law.

As we know, this liability exemption provision excludes the illicit nature of the behaviour of a state, in case such behaviour is the only way the state can protect an essential interest due to a sure, serious and imminent danger. Consequently, one could argue that while the protection of the fundamental rights of each individual and each group, no matter the nationality and territory it is part of - the prevention of "humanitarian catastrophes" everywhere - the whole international community (and, consequently, for each state) must show an interest, an essential preoccupation, so that after the intervention of one or more states towards the state where a humanitarian tragedy took place, no matter how licit or objective is considered, is actually justified if it was the only manner to protect a similar interest, essentially "humanitarian"[29].

However, several reasons leave this type of explanation seriously unclear and, above all, its ability to establish the legal admissibility of an armed intervention such as that in Kosovo.

One must not forget there are important conditions for the "*state of necessity*" to justify the performance of an illicit international act. As it results from the International Liability Project of the States of the International Law Commission, a State may invoke the "*state of necessity*" as justification only if its conduct does not in turn undermine the essential interest of the State to which it is addressed (Article 25 of the CDI Project).

It is undeniable that an intervention like that of NATO in Kosovo seriously undermines the essential interest - actual and legal protection - of the state against which one acts: the interest in not violating its territory, not interfering with external forces in the affairs its internal (as a reflection of non-interference in the internal affairs of the state, territorial integrity and inviolability of the frontiers and the failure to return to armed force or the threat of force as fundamental principles of international law, as stated in the UN Charter, art. 1, paragraphs 4, 7 of the Charter). This is, in particular, the interest not to be subjected to forms of armed constraint against political independence, territorial integrity, not to say against the right to life of its own citizens.

In addition, the "*state of necessity*" cannot be invoked no matter the circumstances, and, in any case, to justify the infringement of the peremptory norms of the general international law (*i.e. the jus cogens regulations)*, according to article 26 of the CDI Project.

NATO's armed action - objectively taken into account in terms of conduct, scope and intensity - outlines a clear example of an armed attack against a state, a behaviour that is undoubtedly in contrast with the meaning of the obligation which arises from the general international rule of law that requires states to refrain from using to armed forces in their relations. No "humanitarian" or other kind of necessity would be proper to justify such a behaviour.
For this series of reasons, the concept "state of necessity" proves to be insufficient to justify the specific case of NATO's intervention in Kosovo, it is difficult to generally use the basis of the legal admissibility of armed humanitarian interventions.

According to another argument, the use of force for humanitarian purposes would be allowed through an ordinary ad hoc standard established before the entry in force of the San Francisco Charter and the UN Constitution, which has so far survived the prohibition to use force established in the United Nations system and in the existence of which the decision of the NATO countries to intervene in Kosovo is an important manifestation and confirmation[30]

Also, this explanation is not convincing. Regardless of the fact that the doctrine of legitimacy of humanitarian intervention is supported by a minority part of the internationalist doctrine (generally by the Anglo-Saxon culture), the data of the practice and beliefs repeatedly expressed by most states to reject it.

The period before the end of World War Two is not considered. It is well known that until then the use of the armed force in international relations and war as a direct means for a state to affirm its interests was admitted in the international law, in more comprehensive terms than "it was a contemporary legal state" (the one that has begun - to be introduced - with the United Nations). It should also be noted that, even in the less recent past, the practice of armed humanitarian interventions has been extremely rare, unless they date back to the mid-nineteenth century and, in particular, relate to interventions of the European powers.

The intervention cases mainly motivated by humanitarian purposes and put in practice in the presence of a real humanitarian emergency where very few:

- the intervention of the Arab Countries in 1948

[29] Ronzitti, *Diritto internazionale dei conflitti armati*, Torino, 2001, pp. 30-34;
[30] Ronzitti, Diritto internazionale dei conflitti armati, Torino, 2001, 30-34;

(after the proclamation of the State of Israel), motivated - among others - by the protection of the Arab population present in Palestine, which was immediately followed by strong protests in many states, including the United States and the Soviet Union;

- the intervention in 1971 of India against Pakistan over Bangladesh, for which India has, however, invoked beyond any legitimate defence and protection of the right to self-determination;
- the interventions, between 1978 and 1979, of Vietnam in northern Cambodia against the Pol-Pot regime and Tanzania in Uganda against the Amin regime; but even in these cases, the reasons for the interventions essentially refer to legitimate defence or to the matter of territorial sovereignty and have revealed the real intentions of the intermediate states to create or consolidate in their favour an area of regional influence (such interventions have, however, provoked the wide and intense disapproval of many states and, in particular, of European countries);
- the US interventions in Grenada (1983) and Panama (in 1988); In these cases, in addition to the fact that there is no evidence of humanitarian urgency, the US did not refer to humanitarian motivations but to the need to protect its compatriots in danger abroad and / or the existence of a consensus to intervene with the territorial state;
- the Provide Comfort Operation in the Iraqi Kurdistan in 1991: however, it has taken place in a context of widely and differently justified use of force against Iraq, in the absence of which it is unlikely that the humanitarian intervention in question in favour of the abandoned Kurds would have been done.

A different reasoning line, according to which the admissibility of the armed humanitarian interventions, like those in Kosovo, would be proven, refers to the obligation theory, *erga omnes*[31].

This theory starts from noticing the increasing importance in the international law of a limited core of regulations, placed to protect the fundamental values of the entire international community, from which precisely each *erga omnes* state obligation would derive, that is, the obligations to this community considered as a whole (or, according to another version of the theory in question, to all and each state)[32]. These rules include, for example, the prohibition of aggression, respect for the self-determination of peoples, prohibition of serious human rights violations. The violation by a State of the obligations under these rules would entitle any other state or group of states to act in order to undertake responsibility for the state which caused the violation. This would happen regardless if the State which acted was or was not "personally" affected by the violation, meaning if it suffered direct damage or the prejudice of its own subjective right. Rather states would have the right to act against the responsible state, as it is called "on behalf of and on behalf of" the entire international community or, if you prefer, to protect the value of the fundamental interest for these communities, affected by the violation committed. Each state or group of states may therefore claim from the responsible state: the cessation of the unlawful conduct still in progress, the repair (in a broad sense) of the material and moral damages produced, as well as the guarantee that the violation committed shall not happen again. And above all, each state would have the right, in order to obtain the performance of the obligation by the responsible state, to resort to "countermeasures" against it, if necessary: that is to say, sanctioning behaviours which, per se, violate the rights of the responsible state , but which lose their illegality because they appear as a reaction to an offense already committed. This final right would expand to allow - in case of very serious violations of the *erga omnes* obligations - the unilateral use, by one or more states, to armed force against the responsible state. This would be acceptable in particular when the collective security system provided by the UN Charter and centred on the coercive powers of the Security Council has been paralyzed, that is, due to the veto of a permanent member and to implement, if necessary, the use of military force to sanction the responsible state and to guarantee the protection of the fundamental value violated by the behaviour of the state concerned.

Such a hypothesis would be given precisely in the presence of serious and systematic infringements of the human rights by a state, for which the Security Council could not establish a term by using the forces authorized by the states or regional organizations. The case of Kosovo would offer a clear example of this situation[33].

Also, it is not the case to refer to the evolutions of the related theory, which give rise to bigger doubts. These concerns regard, in particular, the interpretation of the United Nations Collective Security System as an appropriate mechanism for the enforcement of the author's liability obligations for the serious violation of the international law and the consideration of the intended Security Council's role as a "material body" usable by the international community to impose real sanctions against the responsible state[34].

However, there is at least one point worth approaching from the analysed perspective, namely that, in order to ensure that *erga omnes* obligations are complied with, in the event of their serious violation, the use by states or group of state of countermeasures involving even the use of force against the responsible state is approved.

This corollary - because the truth is not indispensable in a general theory of the *erga omnes* obligations - cannot be shared.

[31] Lillich, Reisman-McDougal in Humanitarian Intervention and the United Nations, Charlottesville, 1973, pp. 58, 177;
[32] Ronzitti, Uso della forza e intervento di umanità, cit., 3, Brownlie, International Law and the Use of Force by States, Oxford, 1963, p. 338;
[33] The International Court of Justice in the *Nicaragua* case (1986);
[34] Picone, *La 'guerra del Kosovo'*, cit., pp. 309, 343;

On the other hand, the evolution of the general international law in the period after the incorporation of the United Nations and the prohibition of the armed force in art. 2, paragraph 4 of the Charter has gradually progressed towards adopting the "absolute" interdiction of the states to use armed force in their relationships, to the legal status of the regular regulations and, in addition, to mandatory force.

Notwithstanding the right to self-defence (individual and collective) in the face of an armed attack, not even the serious violation of the obligations considered to be of fundamental interest to the entire international community - such as genocide or systematic and widespread violation of fundamental rights to a certain community - would make legitimate the unilateral use of the armed force by a state or a group of states against the responsible state (or, with more classical terminology, would justify the use of armed retaliation) in times of peace; and if the state or group of states interfere - *ut singuli* - in order to protect their own subjectively violated right, regardless of whether they claim to intervene to protect the fundamental values of the international community as a whole.

The existence in international law of such a mandatory limit for all counter-measures - including those that can be adopted in response to the *erga omnes* breach - has recently been reaffirmed by the two most authorized global authorities, designated to know international law: The International Court of Justice, which, in its 1996 opinion on the lawful use of nuclear weapons, has expressly denied any legitimacy of the counter-measures in times of peace[35] and the U.N. Commission on International Law, Article 50 of its Project regarding the liability of States has put countermeasures in contradiction with the obligation to refrain from threatening or using force, as laid down in the Charter[36] among the counter-measures prohibited by the international law.

Briefly: although it is considered acceptable for one or more states to react unilaterally to serious and systematic human rights violations committed by another state - such as those committed against the ethnic Albanian population in Kosovo - in violation of the rights of the responsible state, as countermeasure for the infringement of the *erga omnes* obligations, this reaction cannot legitimately constitute a use of armed violence against that state, as happened, in turn, with NATO's military action against the Federal Republic of Yugoslavia.

If we refer to the analysis performed until now in relation to the various arguments proposed in relation to the Kosovo war:

- at a general level, the military intervention for humanitarian purposes, performed unilaterally by a state or a group of states, was, at the time of NATO's military action, a case prohibited by international law;
- at particular level, the NATO countries which did not have (before, during nor immediately after the intervention) any valid title or justification for their action, seriously infringed Article. 2 paragraph 4 of the U.N. Charter, which orders the U.N. Member States to abstain from the threat and use of force in international relations, as well as the general rules which prohibits the use of armed forces.

Even if it were determined by more actually human humanitarian motivations and led in a humane and efficient and less devastating manner, the intervention would have violated international law: perhaps less seriously, but would have violated it anyway.

Moreover, judicial experts are aware of the fact that when we start to discuss based on relative, subjective and flexible parameters (such as "*good faith*", "*proportionality*" or "*necessity*"), it is always possible to find, in the assessment the actual situation - of the real and presumed facts, of the statements and counter-statement - it is easy to adopt an attitude that is not the most objective in favour of a conclusion or even the opposite of it. In this respect, the Kosovo case is not an exception[37].

Still, the judicial reflection on the Kosovo war cannot be considered concluded. Meaning it cannot stop to the existing law assessment, as it is said.

We still have the question, according to the intended law, if the Kosovo intervention and the manner in which it was received by the so-called international community does not represent an important element, a significant precedent, in the context of a replacement process of the current law or, if someone prefers, the effects of forming a usual regulation which would allow the armed intervention for humanitarian purposes, in certain conditions?[38].

From this perspective, some data should be reported, it is especially relevant that the official position of NATO (and, also, of the European Union) to justify the intervention was to appeal, mainly (but not exclusively) to the need to prevent a humanitarian catastrophe in danger [39]. This position was also developed and clarified in legal terms by some member states of the Alliance, especially by the United Kingdom, which repeatedly claimed, through the change of its previous orientation, the international lawfulness of the humanitarian unilateral interventions, even in the absence of the Security Council's approval[40].

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[35] Iovane, *La tutela dei valori fondamentali nel diritto internazionale*, Napoli, 2000, pp. 417-420;

[36] Iovane, *op. cit.*, pp. 417-418;

[37] *ICJ Rep.*, 1996, par. 46.

[38] Art.50 of the Project: "*Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations*";

[39] Picone, *La 'guerra del Kosovo', op. cit.*, p. 344;

[40] Petrovic, *Il rispetto del diritto internazionale umanitario da parte delle forze dell'Alleanza atlantica nel Kosovo*, in *L'intervento in Kosovo*, pp. 135-138.

Also, one cannot ignore the absence of any explicit disapproval of the action of NATO by the bodies of the United Nations, contextual or subsequent to the intervention.

Most important are the strong reserves about the lawfulness of the intervention, explicitly exposed by one of the NATO members: especially in France and, more than anywhere, in Germany, which explicitly declared the exceptional nature of the intervention, in the meaning of the incapacity to establish a valid precedent in terms of the extreme danger, as well as the illegality of any "humanitarian" intervention practice implemented outside the authorizing system for the use of force in the UN Security Council[41].

Last, we must not forget that the "*international community*" does not include only the member states or the NATO friends. Then, the various convictions and official protests regarding the serious opposition against the international law of the NATO action, coming from the most various geopolitical areas of the world, cannot be ignored: from Russia to India, from China to the twelve Latin-American countries of the "*Rio Group*", to the 114 countries of the "*non-aligned movement*"[42].

Paraphrasing Antonio Cassese, with reference to the Kosovo intervention[43]: "*one could state, in relation to this that, at least for the moment, ex injuria jus non oritur (unjust actions cannot create a right): a «humanitarian» war, such as the one lead by NATO, besides not finding any support in the existing international law, could not even improve this already inadequate and primitive legal system*".

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