A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis

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Abstract

A previous article by the author in this Journal suggested that, in the light of the NATO intervention in Kosovo, a new customary rule might be in the process of formation; namely – subject to certain stringent conditions – a rule legitimising the use of forcible countermeasures by groups of states in the event of failure by the UN Security Council to respond to egregious violations of international humanitarian law. By way of a follow-up, this article examines the views of states expressed during and since the Kosovo crisis. The author concludes that many states have conceded the moral and political necessity of the NATO intervention. This, however, stopped short of the view that such conduct was legitimate in terms of existing international law. So far no consistent usus *has emerged. By contrast,* opinio necessitatis *has been widespread and seems to be in the process of crystallizing; however, this has not gone unopposed. Consequently, humanitarian countermeasures outside the Charter framework are still unauthorized by current international law.*

In a recent paper on the attack by NATO on the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY),[1] I suggested that, in connection with the violation by NATO states of Article 2(4) of the United Nations Charter, a new customary rule was most likely in the process of emerging in the world community. This rule would legitimize the taking of forcible countermeasures by groups of states in the event of failure of the United Nations Security Council to authorize the use of force in response to gross, systematic and large-scale breaches of human rights amounting to egregious crimes against humanity.

It may prove useful to briefly examine the position taken, during and after the armed attack, by the states concerned and the reaction of other states both outside and within the United Nations. Are these indicative of the emergence of this rule, or was

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[1] See 10 *EJIL* (1999) 23.

the armed action inconsequential in terms of the evolution of international law, amounting simply to a serious breach of the United Nations Charter?

Some interesting inferences can be drawn from a perusal of the statements made by the various countries concerned and from the action taken, subsequent to the use of force, by the Security Council.[2]

First, only very few states contended that the action on the part of NATO countries was contrary to the United Nations Charter in that it violated Article 2(4). These states include the FRY, Russia, China, Cuba, Belarus, Ukraine, Namibia, India as well as – in rather nuanced and diplomatic terms – Mexico.[3] Certain other states, such as Brazil and Costa Rica, preferred merely to express doubts and misgivings about the legality of the action of NATO countries.[4] The overwhelming majority of states did not condemn the NATO intervention as illegal. Of equal importance is the fact that the draft resolution proposed in the Security Council by three states to condemn NATO action was rejected by 12 votes to three.[5] Even more significantly, Resolution 1244 (1999) adopted by the Security Council on 10 June 1999 to authorize 'the deployment in Kosovo, under United Nations auspices, of international civil and military presences' contains no criticism, not even implicitly, of the NATO use of force – unless of course one considers that an implied reservation may be found in the first preambular paragraph of the resolution, which stated that the Security Council has 'the primary responsibility . . . for the maintenance of international peace and security'.

Secondly, the states participating in the use of force have not claimed that they acted in conformity with international law, i.e. that in participating in the armed attack, they were exercising a right laid down in international rules. A possible exception is represented by Belgium, which contended that it had been under 'an obligation' to intervene (it would seem from the context of this proposition that Belgium was referring to a legal obligation proper).[6] Another state (Federal Republic

[2] For an excellent survey of the position of the various states see Zappalà, 'Nuovi sviluppi in relazione alle vicende del Kosovo', *Rivista di diritto internazionale* (1999, pp. 975–1004). His legal appraisal of the NATO military action differs, however, from mine. See also the Report by A. Paecht, '*Kosovo as a Precedent: Towards a Reform of the Security Council'? International Law and Humanitarian Intervention*, 16 September 1999, submitted to the NATO Parliamentary Assembly, particularly at 3 *et seq*.

[3] In the Security Council, the delegate of Mexico stated among other things that 'From the onset of the crisis, Mexico lamented that ways of achieving a peaceful settlement to the conflict in Kosovo had not been found and that force had been used *without the explicit consent* of the Security Council' (SC 4011th Meeting, 10 June 1999, at 17) (emphasis added). See also the statement by Costa Rica, cited *infra* note 4.

[4] See the statement by the Brazilian delegate in the Security Council (SC, 4011th Meeting, at 17) as well as that by Costa Rica, 4011th Meeting (Resumption), at 4.

[5] See my paper *supra* note 1, at 28.

[6] See the Belgian oral pleading before the International Court of Justice in the *Legality of Use of Force* case, ICJ, Verbatim Record, 10 May 1999, at 13 (*[L]e Royaume de Belgique est d'avis que l'intervention armée trouve son fondament sans conteste dans les résolutions du Conseil de sécurité que je viens de citer. Ces résolutions du Conseil de sécurité sont claires, elles sont basées sur le chapitre VII de la Charte, constate[nt] une menace contre la paix et la sécurité internationales. Mais il faut aller plus loin et développer l'idée de l'intervention humanitaire armée.* L'OTAN, le Royaume de Belgique en particulier, était tenu d'une véritable obligation d'intervenir *pour prévenir une catastrophe humanitaire qui était en cours et qui avait été constatée par les résolutions du Conseil de sécurité . . .'* (emphasis added).

of Germany), while considering that the action was justified, was nevertheless eager to stress that it must not set a precedent,[7] a proposition later taken up – rather inconsistently – by Belgium.[8]

Thirdly, the states participating in the attack have justified their action by stressing that it was warranted by the overwhelming need to put a stop to the atrocities perpetrated by the Serbs in Kosovo. For instance, the German delegate, speaking on behalf of the European Union in the Security Council, spoke of the 'humanitarian tragedy of enormous scale' set off by the gross violations of human rights perpetrated by the government of the FRY.[9] In his speech before the General Assembly, President Clinton referred to 'mass slaughter and dislocation', adding that the 'atrocities committed by the Serbs forces were unacceptable'.[10] Belgium argued before the International Court of Justice that NATO had acted in order to safeguard fundamental values which had obtained the status of *jus cogens* principles.[11] In practice, all states participating in the military action, as well as other states, agreed that it was imperative to resort to the use of force in order to react adequately to such large-scale and egregious breaches of human rights. To justify NATO's action it was also stressed that, as President Clinton put it, NATO's action had 'helped vindicate the principles and purposes of the U.N. Charter'. As he noted, '[h]ad we chosen to do nothing in the face of this brutality, I do not believe we would have strengthened the United Nations. Instead, we would have risked discrediting everything it stands for.'[12] Furthermore, the military action was also regarded as warranted in that it had been preceded by repeated pronouncements of the Security Council to the effect that the atrocities committed in Kosovo by the FRY against its own citizens amounted to a threat to the peace.[13]

[7] See the declaration of the Foreign Minister K. Kinkel and the deliberations of the German parliament (*Bundestag*) reported by Simma, 'NATO, the UN and the Use of Force: Legal Aspects,' 10 *EJIL* (1999), at 12–13.

This position was restated even more forcefully by the German Foreign Minister, J. Fischer, in his statement of 22 September 1999 in the UN General Assembly. It is worth citing the relevant passage: *Das Eingreifen im Kosovo erfolgte in einer Situation der Selbstblockade des Sicherheitsrats nach dem Scheitern aller Bemühungen um eine friedliche Lösung als Nothilfe und ultima ratio zum Schutz der vertriebenen Kosovo-Albaner. Die Geschlossenheit der europäischen Staaten und des westlichen Bündnisses wie auch verschiedene Resolutionen des Sicherheitsrats waren dabei von entscheidender Bedeutung. Der nur in dieser besonderen Lage gerechtfertigte Schritt darf jedoch nicht zu einem Präzedenzfall für die Aufweichung des Monopols des VN-Sicherheitsrats zur Autorisierung von legaler internationaler Gewaltanwendung –und schon gar nicht zu einem Freibrief für die Anwendung äusserer Gewalt unter humanitärem Vorwand werden. Dies würde Willkür und Anarchie Tür und Tor öffnen und die Welt ins 19. Jahrhundert zurückwerfen' (in Auswärtiges Amt,* Press release, at 2).

[8] See *infra* note 30.

[9] See SC 4011th Meeting, S/PV. 4011 (Resumption 1), at 2.

[10] Statement of 21 September 1999, White House, press release, at 5.

[11] '[NATO intervened] *pour sauvegarder des valeurs fondamentales érigées en jus cogens . . . [C]'est une intervention pour sauver une population en péril, en détresse profonde'*. (ICJ, Verbatim Records, Hearings of 10 May 1999, at 13).

[12] Statement, *supra* note 10, at 4–5. See also the declarations by other states cited by Zappalà, *supra* note 2, at 982–987.

[13] See, e.g., the statement of the German Foreign Minister in the UN General Assembly, quoted at note 6.

Fourthly, all the states just referred to placed emphasis, either explicitly or implicitly, upon the fact that they regarded their action as justified only because it was not taken by one state but by a group of states acting unanimously within the framework of an intergovernmental organization.[14]

Fifthly, the same states insisted that they had never stopped attaching crucial importance to the central role of the Security Council. The armed attack was initiated only as an exceptional measure justified by the failure of that body to act. However, as soon as the Security Council was in a position to take the issue into its own hands, they would discontinue any military action. This point was made with particular emphasis by the French Prime Minister in the UN General Assembly.[15] In other words, their action was not intended as a first step in the direction of supplanting the central role of the Security Council; it was only conceived of as a *pis-aller*, as an extreme measure designed to counter egregious violations of international humanitarian law and which was to be terminated as soon as the Security Council was prepared to take over. This general attitude of respect for the substance of the Security Council's prerogatives is borne out by the position of the same states in the East Timor crisis. As is well known, the Security Council, after expressing its concern 'at reports that systematic, widespread and flagrant violations of international humanitarian law and human rights' had been committed in East Timor, determined, by Resolution 1264 (1999) adopted on 15 September 1999, that the situation constituted a 'threat to peace and security'. Consequently, acting under Chapter VII of the Charter, it authorized the establishment of a multinational force designed, among other things, to restore peace and security in the area. In this case the absence of the veto (or of the threat of veto) prompted those states which had intervened militarily in Kosovo to remain, on this occasion, within the bounds of the Charter system. However, it seems warranted to infer from the statements of these states that, while they fully recognized the central and crucial role of the Security Council, they would nevertheless in future envisage resort once again to forcible countermeasures, without the authorization of that body,

[14] See, e.g., the statement by President Clinton, supra note 10, at 4. See also the statement made on 22 September 1999 in the UN General Assembly by the Italian Foreign Minister, press release, at 2, as well as the statement made there by the German Foreign Minister and cited *supra* note 6.

[15] In his statement of 20 September 1999, Mr Jospin stated the following: *'[L]e rôle du Conseil de sécurité est plus que jamais primordial. . . . Certes, il a pu exister des circonstances où l'urgence humanitaire a commandé d'agir sans délai. Mais cette démarche doit rester une exception. Nous devons alors veiller, comme dans le cas du Kosovo, à réinsérer cette action dans le cadre de la Charte. Notre fin fondamentale est qu'il revient au Conseil de sécurité de régler les situations de crise. . . . Car la vocation universelle de l'Organisation est intangible'* (*Ministère des Affaires Etrangères*, press release, at 1). See also the statements in the Security Council of the delegates of France (4011th Meeting, S/PV.4011, at 12), the Netherlands (*ibid,* at 12), Canada (*ibid,* at 13), United States (*ibid,* at 13–14), United Kingdom (*ibid,* at 17–18), Germany (on behalf of the European Union), (4011th Meeting (Resumption), at 2) and Hungary (*ibid,* at 12).

whenever faced with similar humanitarian tragedies, and as a last resort in the event of inaction on the part of the Security Council.[16]

Sixthly, many of the states which did not participate in the armed attack, while refraining from challenging the legality of NATO's attack, have insisted on the exclusive prerogatives of the Security Council in the area of peace and security, and on the need not to circumvent them. They have laid emphasis on the necessity of continuing to consider the Security Council as the only body entitled to legitimize resort to force in the world community.[17]

It should be added that a few states have endeavoured to translate the recent events in Kosovo and the reaction of NATO into legal terms. In particular, the Netherlands has pointed out that 'the Charter is not the only source of international law',[18] thus implying that general norms may exist, or be in a nascent state, outside the Charter. The same state has noted in particular that 'a gradual shift [is] occurring in international law', whereby 'respect for human rights [is] more mandatory [than in the Charter] and respect for sovereignty less absolute'. As a result there now exists a 'rule, now generally accepted in international law, that no sovereign state has the right to terrorise its citizens'.[19] This position seems to be shared, at least to some extent, by a few other states.[20]

[16] See, e.g., the statement made by President Clinton on 22 June 1999 in Skopje, Macedonia, to the KFOR troops: 'But never forget if we can do this here, and if we can then say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them *en masse* because of their race, their ethnic background or their religion, and it's within our power to stop it, we will stop it' (White House, press release, 22 June 1999, at 2). See also the statement made on 22 September 1999 by the Italian Foreign Minister in the UN General Assembly: '[T]he ultimate sanction of the United Nations [to the use of force is] so indispensable, since an international legal standard cannot – except in temporary or very special situations – be the prerogative of any single group of states' (Italian Mission to the UN, press release, at 3). On the central role of the Security Council see the apposite remarks by Zappalà, *supra* note 2, at 995–996.

[17] See, e.g., the statements in the Security Council of the delegates of Slovenia (4011th Meeting, S/PV.4011, at 9–11), Malaysia (*ibid,* at 15), Brazil (*ibid,* at 17), Argentina (*ibid,* at 18), Bahrain (*ibid,* at 19), Gabon (*ibid,* at 20), Gambia (*ibid,* at 20), Costa Rica (4011th Meeting (Resumption), at 5), Iran (*ibid,* at 13), Albania (*ibid,* at 13–14) and Mexico (*ibid,* at 17).

[18] *Supra* note 15.

[19] *Ibid.*

[20] See, e.g., Canada, *ibid,* at 13.

Finally, some states,[21] the UN High Commissioner for Human Rights[22] as well as non-governmental organizations and vast segments of public opinion have strongly condemned, or at least expressed serious reservations about, the manner in which military operations have been conducted by NATO countries. In particular, they have denounced the attacks on civilians or at least the heavy casualties among civilians described as constituting 'collateral damage' to the military attacks. In the view of most of those critics, the frequency of such incidental 'damage' and its disproportionate nature amounted to serious infringements of international humanitarian law. It is worth adding that in its various Orders on interim measures in the *Case Concerning the Legality of Use of Force,* brought by the FRY against various NATO members before the International Court of Justice, the Court seems to have echoed these concerns: it stated that it deemed it 'necessary to emphasize that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law'.[23]

What legal appraisal can be made of these developments? I would suggest that it is premature to maintain that a customary rule has emerged. The element of *usus* or *diuturnitas* is clearly lacking. True, international law does not necessarily require that there should be a consistent repetition over time of the acts or conduct for a new rule to take shape. There may be cases where a single episode of some magnitude, combined with the reaction of other states, may suffice to bring about the formation of a rule. Thus, for instance the norm concerning the free use of outer space took shape as soon as the first spacecraft was launched, without any protest by states against the clear violation of the then existing *usque ad sidera* sovereign rights of each territorial state. However, in the present case more seems to be required. The exclusive right of each state over its outer space was abstract so long as no state could make practical use of that right. Instead, the rights and obligations at stake in the case under

[21] See for example the statements made on 10 June 1999 in the Security Council by the delegates of the FRY, *ibid*, at 4–5, of Russia, *ibid,* at 7, of China, *ibid*, at 8, of Brazil, *ibid*, at 17, of Costa Rica, *ibid,* (4011th Meeting, Resumption), at 11, of Belarus, *ibid*, at 12, of Cuba, *ibid*, at 13–15.

[22] See the following reports of the High Commissioner to the UN Commission on Human Rights: 9 April 1999, at 3; 16 April 1999, at 4; 22 April 1999, at 4; 30 April 1999, at 2–3 ('In the NATO bombing of the Federal Republic of Yugoslavia, large numbers of civilians have incontestably been killed, civilian installations targeted on the basis that they are or could be of military application, and NATO remains the sole judge of what is or not acceptable to bomb. In this situation, the principle of proportionality must be adhered to by those carrying out the bombing campaign. . . . We face, as a matter of conscience, various issues of principle in this situation. . . . The principle of proportionality: It surely must be right to ask those carrying out the bombing campaign to weigh the consequences of their campaign for civilians in the Federal Republic of Yugoslavia. . . . The principle of legality: It surely must be right for the Security Council of the United Nations to have a say in whether a prolonged bombing campaign in which the bombers choose their targets at will is consistent with the principle of legality under the Charter of the United Nations'); 31 May 1999, at 7–8, as well as 12 ('The High Commissioner calls on NATO to respect the principles of international humanitarian law, including the principle of proportionality, in their military actions against the Federal Republic of Yugoslavia'); 7 September 1999, at 15–16 and 28.

[23] See, e.g., the Order of 2 June 1999 in the dispute between Yugoslavia and Belgium, at para. 19, or the Order issued in the dispute between Yugoslavia and Canada, at para. 18. All the other Orders contain an identical paragraph.

discussion are real and concrete. They embrace the right of sovereign states to exclusive jurisdiction over their territory, the correlative obligation of all states to respect sovereignty and the obligation, incumbent upon all member states of the world community, to refrain from using force without the authorization or the request of the Security Council or pursuant to Article 51 of the United Nations Charter. Plainly, the matter is too delicate and controversial to warrant the contention that the evolution of international law in this area may result from a single episode, however significant its magnitude, and regardless of the involvement of many states and the reaction of others.

In order to establish whether a new rule may have emerged, it thus seems judicious to await any repetition of such actions under the same conditions and exigencies.

As for the psychological element of customary law, it may, by contrast, be submitted that it has *in part* materialized, albeit in a manner which has yet to be precisely specified.

There is room for the view that the birth of a customary rule must not always be ascertained by searching for *opinio iuris*, namely the conviction of states that they must behave in a certain manner because they are so obliged by a general legal norm. In many instances, the conduct of states is clearly in breach of existing law. Such states nevertheless consider it to be politically, economically or morally necessary to act in such manner. For these cases one may instead speak of *opinio necessitatis.* This *opinio* is what in 1933 Scelle appositely defined as '*le sentiment, ou tout au moins l'instinct, d'obéir à une nécéssité sociale*'.[24] As has been rightly noted,[25] this has happened, for example, in the case of the 1945 Truman proclamation on the jurisdiction and control of the territorial state over the adjacent continental shelf and its resources. The proclamation, as has been correctly maintained, 'was not the expression of a belief in the existence of a *legal* necessity imposed by current law: it was, rather, an assertion of *political* necessity and reasonableness'.[26]

In the case under discussion the *opinio necessitatis* has been forcefully and loudly proclaimed by the states engaging in military action. Thus, for instance, the United States emphasized before the International Court of Justice that a failure of NATO to act 'would have been to the irreparable prejudice to the people of Kosovo' and that 'the Members of NATO [therefore] refused to stand idly by to watch yet another campaign of ethnic cleansing unfold in the heart of Europe'.[27] The Netherlands government stated that 'the terrible, unceasing human tragedy in Kosovo' left it 'no other choice'.[28] The Italian government noted that NATO had been 'constrained' to

[24] G. Scelle, 'Règles générales du droit de la paix', 46 *RdC* (1933-IV), at 434.

[25] See M. Mendelson, 'The Formation of Customary International Law', 272 *RdC* (1998) 271.

[26] *Ibid.*

[27] ICJ, Verbatim Records, Hearing of 11 May 1999, at 7–8.

[28] Statement made on 25 March 1999 in the Dutch Parliament by the Foreign Minister, press release, reported by Zappalà, *supra*, at 987, note 46.

intervene 'to avoid genocide'; the use of force had been 'inevitable'.[29] The same sense of an impelling moral and human necessity was shared by other states. Thus, for example, in March 1999 Slovenia stated in the Security Council that the atrocities carried out by the FRY had made 'the current military action inevitable'.[30]

It would therefore seem that the *opinio necessitatis* was strong and widespread. True, this *opinio* was not shared by all states. There were protests and criticisms by a limited number of countries, which included, in particular, Russia and China. In addition, two of the states participating in NATO's action, namely the Federal Republic of Germany[31] and Belgium,[32] explicitly stated that the episode should not set a precedent. They thereby intended to set forth their opinion that the action had been exceptional and should remain an isolated event. Arguably, they shared the *opinio necessitatis*, but were probably not prepared to extend it to similar future actions. The contention can be made that, at least to some extent, the opposition or reservations of some of the aforementioned states may also be due to the conduct of hostilities by the armed forces of NATO countries and the heavy civilian casualties they caused. Be that as it may, the conclusion is warranted that, although the psychological element of customary law has come into being, it does not yet possess, however, the requisite elements of generality and non-opposition.

Whether or not the above views are shared, one thing seems to be certain. The new customary rule in the process of formation can only have the limited content I have endeavoured to suggest in my previous paper, and must be subject to the stringent conditions I tried to set out there.[33] It cannot give states a blanket authorization to use force whenever the Security Council is crippled by the veto of one or more of the Permanent Members, or is unable to act because of the prospect of a veto. Forcible countermeasures may only be legitimized by the nascent rule if certain strict requirements are met. Amongst other things, it must be a collective reaction of states to systematic massacres amounting to serious crimes against humanity. In addition, prior to any military action, the situation must be considered by the Security Council to constitute a threat to peace and security. Furthermore, resort to forcible countermeasures must not be condemned by the majority of states, for instance through the General Assembly. Moreover, the action, in terms of its implementation, must be and remain fully in accordance with humanitarian principles and rules.

[29] Statement made in the Italian House of Deputies on 26 March 1999, Verbatim Records, at 4, reported by Zappalà, *supra* note 2, at 986, note 42. See also the statements made by the Spanish and German governments in their respective Parliaments, quoted by Zappalà, *ibid,* at 987, notes 47 and 48.

[30] See SC 3989th Meeting, 26 March 1999, S/PV.3989, at 4.

[31] See *supra* note 7.

[32] In his statement of 25 September 1999 in the UN General Assembly, M. L. Michel, the Deputy Prime Minister and Foreign Minister of Belgium stated among other things the following:
My country deeply regrets that a potential double veto could stifle Council action in situations of such extreme urgency. We hope that resorting to force without the approval of the Security Council will not constitute a precedent. The world needs an international legal order that prevails over the law of the jungle. In this respect, we wish to believe that resolution 1244 signals a return to international legality' (Press release of the Belgium Permanent Mission to the UN, at 4).

[33] *Ibid,* at 27.

It should be clear from the above that the rule, given that it is still in the process of crystallizing, cannot but constitute a fallback solution for cases where inaction would be utterly contrary to any principle of humanity. The drawbacks and dangerous implications of such a rule should not be discounted. It goes without saying that enforcement action taken by the Security Council, or authorized by it, remains the lynchpin of the present system for the maintenance of international peace and security.