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# Brief Remarks on the Unilateral Use of Force

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## Abstract

*There can be no doubt that the NATO action in Kosovo can (and must) be seen as legitimate, while, on the other hand, the jamming of the Security Council by China and Russia cannot. The actual lawfulness of the initiative, however, is more debatable, even though arguments based both on the UN Charter and on the law of state responsibility can be made in its favour and indeed become persuasive when seen together with, and in light of, Resolution 1244 (1999) of the Security Council. Nevertheless, it is essential that new 'community' mechanisms be found in the future in order to avoid being restricted to a choice between the 'Zorro' principle (as applied in Kosovo) and the Munich policy. A revival of Resolution 'Dean Acheson' (1950) and a deepening of the notion of 'state crime' and its consequences provide, among others, possibilities for limiting the need for legitimate but legally dubious unilateral uses of force.*

The task of a commentator may be both easy and difficult: easy since one may simply hand out good and bad marks and have the final word on the subject; difficult since, if the main authors have examined the issues thoroughly and intelligently, there may remain little to be said. It is definitely a case of the latter in taking up the task of commenting upon the articles by Ruth Wedgwood and Vera Gowlland-Debbas. Both authors have covered the issues in great depth and, what is more, I find myself largely in agreement with them.

These authors have focused on a single debate seen at different angles — a debate that can be summarized in two short questions:

- when is unilateral action lawful? and
- when such an action is unlawful, can it be legitimate?

To this last question, the answer is, indisputably: 'Yes, of course, it might be, and it sometimes is, legitimate, to disregard the law.' This holds true in the domestic sphere as well as in international society and, in the long term, there can be no doubt: Antigone always triumphs over Creon.

This issue has been recently dealt with by both Bruno Simma and Antonio Cassese

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in their very stimulating articles about the Kosovo crisis published in this Journal.<sup>1</sup> While they do not agree on important points, both writers try to reconcile the ethical and the legal perspectives, but they do so differently. Briefly, Simma seems to consider that NATO's intervention was not 'that much' illegal and that the 'thin red line' was not 'really' crossed, while Cassese says, approximately: 'Indeed the intervention was illegal — but this is not the important issue and, in any case, it constitutes an important precedent.'

There should be no difficulty with this approach. Law is not an aim per se and even if it is to be hoped that (social) moral standards and legal rules will usually coincide, the latter can be forgotten (if they shock the human conscience). However, for a lawyer this is not fully satisfactory. Such reasoning compels one to oppose the ethical perspective on the one hand and the legal approach on the other.

The question can therefore be posed from another angle: in situations like Kosovo, or Rwanda, or East Timor, is the choice exclusively between the 'Munich principle' (and this would be the result of the 'legalistic' approach) and the 'Zorro principle' (that is, an unlawful but legitimate intervention)?

In this respect, it is worth recalling a very 'Franco-French' debate that has raged among French international lawyers for about 12 years on the so-called '*droit*' or '*devoir d'ingérence*' (the right or duty to intervene). When it was launched in the late 1980s by Bernard Kouchner and Mario Bettati<sup>2</sup> it engendered both irony and scepticism.<sup>3</sup>

In very broad terms, the idea is that, in the case of a humanitarian catastrophe, whatever its cause (civil war, famine, natural disaster), external actors have a right or/and a duty to intervene. Initially, however, this doctrine was mainly aimed at justifying an intervention by humanitarian NGOs, not by foreign states.<sup>4</sup> It does not, therefore, really solve the problem when states (and the use of armed force) are involved: if such a thing as the *devoir d'ingérence* does exist, it would legitimate in law 'Zorro's interventions' by NGOs, but leaves open the question of the legality of third states' interventions. In any case, it begs the question: Does such a *devoir d'ingérence* exist, legally speaking?

<sup>1</sup> Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1–22; Cassese, 'Ex injuria ius oritur: Are We Moving towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23–30; for a third approach, see Pellet, "La guerre du Kosovo" — Le fait rattrapé par le droit', *Forum international* (1999) 160–165.

<sup>2</sup> On this debate, see e.g. M. Bettati and B. Kouchner (eds), *Le devoir d'ingérence* (1987); O. Corten and P. Klein, *Droit d'ingérence ou obligation de réaction?* (1992); Alain Pellet (ed.), *Droit d'ingérence ou devoir d'assistance humanitaire? Problèmes politiques et sociaux*, nos. 758–759, 1–22 December 1995, Doc. Française; or M. Bettati, *Le droit d'ingérence — Mutation de l'ordre international* (1996).

<sup>3</sup> I must say that I was among those who were, at the time, at least sceptical. I still doubt that the words were appropriately chosen: nearly as a matter of definition, 'intervention' is negatively considered in the international sphere and the ICJ's radical condemnation in 1949 (see judgment of 9 April 1949 in the *Corfu Channel* case, ICJ Reports (1949) 35) still holds true today. However, the very idea that lies at the origin of the concept is worth consideration.

<sup>4</sup> It has now been expanded by its proponents. Thus, for example, Dr Kouchner defines the UN action in Kosovo as an illustration of the *devoir d'ingérence*.

Indeed, as shown by Wedgwood and Gowlland-Debbas, the Kosovo crisis is probably the most appropriate case to choose for discussing the problem in concrete terms. However, the relevance of this example should to some extent be qualified. As aptly noted by Ruth Wedgwood in a recent article, 'A NATO decision deserves greater deference than purely unilateral action'.<sup>5</sup> This is persuasive: NATO's intervention in Serbia is an illustration of 'regional or collective unilateralism', not of purely 'state unilateralism'; it implies at least some checks and balances, both in the decision-making and in action (even though this argument is disliked by the United States). The Kosovo case would nevertheless have been clearer if Yugoslavia had been part of the Alliance, and one hypothesis where unilateralism could be acceptable is intervention *inside* a regional alliance; in this respect 'African unilateralisms', referred to in some of the papers in this Symposium, are often different in nature from the Kosovo case.

This being said, my own views on Kosovo are not far from those of Wedgwood and Gowlland-Debbas. My first reaction was to follow Antonio Cassese's rather 'schizophrenic' approach and to see NATO's intervention as legitimate, but unlawful, but since then Resolution 1244 (1999) has reconciled lawfulness with legitimacy, at least bearing in mind the general pattern of arguments that could have been made since the very beginning of NATO's strikes. When taken in isolation, none of them seems to me probative; taken together in light of Resolution 1244, they make, I think, a good legal case.

Right from the beginning, two tracks could have been explored by international lawyers (and they have been): the law of international responsibility on the one hand, that of the UN legal framework on the other. Professor Gowlland-Debbas has particularly stressed the first aspect, but she has linked it very closely with the 'UN track'. However, even though she accepts that they do not entirely merge, she suggests that these two chapters of international law come so close to each other that they almost become as one. That is doubtful.

Both bodies of legal rules work in a similar way in many respects. But this does not mean that the Charter mechanisms are part of the general law of international responsibility or that both regimes are entirely intermingled — and for a conclusive reason: their purposes are clearly distinct. As made clear in Articles 1 and 3 of the ILC Draft Articles on State Responsibility, responsibility is the global mechanism — which exists in all legal systems — that deals with the consequences of a wrongful act. For its part, the Charter is not concerned with the enforcement of legal rules, but with the maintenance of peace.

Of course, it can happen — it is to be hoped more often than not — that both aims coincide. However, the coincidence is purely fortuitous. I cannot agree with Vera Gowlland-Debbas when she suggests that a decision of the Security Council under Chapter VII can be seen as a circumstance precluding wrongfulness under the general rules of the law of responsibility. If compliance with a Chapter VII decision precludes wrongfulness, it is because of Article 103 of the Charter and has nothing to do with the law of state responsibility as such. At best the Charter could be seen as a

<sup>5</sup> 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1999) 833.

'self-contained responsibility régime',<sup>6</sup> although some arguments in favour of NATO's intervention in Serbia can certainly be based on the law of state responsibility.

There can be little doubt that ethnic cleansing was being committed in Kosovo before March 1999 and the Bosnian precedent showed how far it could have gone (there were no less than 200,000 deaths in Bosnia and Herzegovina). Nor can there be any real doubt that ethnic cleansing amounts to genocide, an indisputable 'crime' in the meaning of Article 19 of the ILC Draft Articles,<sup>7</sup> and, even more, a 'crime against the peace and security of mankind'.<sup>8</sup>

One of the consequences of such a crime is that all members of the international community may, and probably must, react to such an internationally wrongful act.<sup>9</sup> But — and this is an important 'but' — there is at least a limit to this right or duty of reaction: the prohibition of the use of force, except when in accordance with the UN Charter, and it seems dubious that a state could react to a crime by breaching another peremptory norm of general international law.<sup>10</sup>

The other body of legal rules which could have been invoked as being relevant by NATO in Kosovo is the UN Charter norms. Here again arguments can be made — and they have been made, in different forms, both by Ruth Wedgwood and by Vera Gowlland-Debbas:

- First, it must be borne in mind that the Security Council had determined, in Resolutions 1160, 1199, 1203 (1998) and 1239 (1999), all under Chapter VII of the Charter, that the situation in Kosovo constituted a threat to the peace. However, and, here again, this is a big 'but', a threat to the peace is different from an armed attack. While, in this last hypothesis, members of the UN may resort to collective or individual self-defence until the Security Council takes 'such action as it deems necessary in order to maintain or restore international peace and security' (Article 51), the only legal consequence of a finding that a situation constitutes a threat to the peace is that the Council *itself* is entitled to authorize or to decide recourse to armed force. The Security Council's findings under Article

<sup>6</sup> On self-contained régimes, see e.g. Simma, 'Self-Contained Régimes', *NYBIL* (1995) 111–136; Riphagen's 3rd Report on State Responsibility, *A/CN.4/366, ILC Yearbook* (1982), Vol. II, Part 1, paras 72–73 and Arangio-Ruiz's 3rd Report, *A/CN.4/440, ILC Yearbook* (1991), Vol. II, Part 1, paras 84–88.

<sup>7</sup> The most unfortunate paragraph 3 of Article 19 cites among the four categories of crimes that it lists serious breaches of international obligations 'of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid' (see ILC, *Report on the Work of its 48th Session* (1996), GA Official Records, Supplement No. 10, A/51/10, at 131).

<sup>8</sup> See Article 17 of the ILC Draft Code of Crimes against the Peace and Security of Mankind, *ibid.*, at 85–86.

<sup>9</sup> See the very poorly conceived Articles 40, para. 3, and 51–53 of the ILC draft on State Responsibility, *ibid.*, at 141 and 146.

<sup>10</sup> The recently (June 1999) and provisionally adopted Article 29 *bis* of the ILC draft does not change the picture. It provides that '[t]he wrongfulness of an act of a State is precluded if the act is required in the circumstances by a peremptory norm of general international law'. It would have a role to play if, and only if, the 'duty to intervene' in the case of genocide would have a peremptory character; and it would be difficult to go that far.

39 of the Charter can certainly not be equated with the decision to take action under Article 42.<sup>11</sup>

- Secondly, similarly, little can be inferred from the negative vote of 3 to 12 on the Indian (and others') proposal condemning NATO's action. It cannot be accepted that a *non*-decision is equivalent to a decision and certainly not to a 'legitimizing' decision. Otherwise, a veto by any of the so-called 'big five' would legally transform any unlawful act into a legal one and this cannot be so.

The legal conclusion is, and must be, that there was a case for NATO's action; but, at least if taken in isolation, the legal arguments in favour of it were not persuasive enough to make it a winning case. Simma's 'thin red line' existed when NATO decided its action in Serbia and still existed when it put it into operation.

However, and, on this point, I entirely agree with Ruth Wedgwood, Resolution 1244 (1999) dramatically changed the picture. Indeed, it does not formally declare that NATO's intervention was lawful — and, in any case, this is not the Security Council's duty — and both China and Russia maintained that they did not accept its legality. However, it clearly endorses the *consequences* of this intervention and it cannot be seriously maintained that the principal organ of the United Nations vested with the 'primary responsibility for the maintenance of international peace and security' (which includes the determination of the existence of an act of aggression — Article 39) would have given its blessing to such an act if only because one effect of a crime (and an act of aggression<sup>12</sup> too is a crime<sup>13</sup>) can legally produce no consequence nor can its consequences be recognized under any circumstances. As the, very 'shy', Article 53(a) of the ILC Draft Articles on State Responsibility puts it: 'An international crime committed by a State entails an obligation for every other State: (a) not to recognize as lawful the situation created by the crime . . .'.<sup>14</sup>

In other words, there certainly were doubts as to the legality of NATO's action before 10 June 1999. However, when put together, the arguments in favour of its lawfulness become persuasive — and particularly so in light of Resolution 1244. At the end of the day legality meets legitimacy.

This does not mean that the picture is satisfactory. The *ex post facto* legalization of NATO's intervention in Serbia is unfortunate and introduces in the international legal order a part of uncertainty which is deeply repugnant to the very function of law in any society<sup>15</sup> and it is impossible to assume that it will not happen again in similar situations in the future. But, here, as Cassese notes, in the future, the Kosovo case will constitute a very powerful precedent.

<sup>11</sup> In this respect, perhaps Professor Wedgwood goes too far in aggregating both kinds of resolution: under Article 39 the Council defines a situation; under Articles 41 and 42, it decides measures.

<sup>12</sup> If NATO's action were not lawful, I do not see how it could be legally qualified but as an act of aggression (which is what it is called in Milosevic's Yugoslavia).

<sup>13</sup> See Article 19, para. 3(a), of the ILC draft, *supra* note 7, at 131.

<sup>14</sup> *Ibid.*, at 146. This is not only a consequence of the 'Stimson doctrine' as Ruth Wedgwood alleges.

<sup>15</sup> However, it must be noted in passing that all domestic systems are acquainted with the 'disreputable' use of 'regularization statutes' which cover up previous unlawful administrative behaviours.

This rather unfortunate situation could have been avoided by reviving the resolution ‘United for Peace’ — and in this respect I must dissociate myself from Vera Gowlland-Debbas. Resolution 377(V) was precisely adopted in view of situations where the Security Council is not in a position to assume its primary (but not exclusive) responsibility conferred upon it by Article 24 of the UN Charter. And it has, during the last 50 years, been used in sufficiently varied situations as to cover its possible original ‘constitutional’ weakness.<sup>16</sup>

However, Resolution Dean Acheson has not been used — a sign of the arrogance of the big powers as well as of the disappearance of the Third World from the international scene. There is no doubt that the latter was ill at ease with an action which it probably approved from a political point of view,<sup>17</sup> but was not desirous of giving its blessing to a ‘threatening’ precedent and chose a low profile, thus missing an opportunity to regild the prestige of the not unjustly discredited General Assembly. For their part, the United States and its allies were certainly willing to avoid interference from the ‘plebeian’ Assembly in their ‘leadership’ — another name for (illegitimate) hegemony.

It is crystal clear that the United States’ claimed and self-appointed ‘leadership’ drives it to not infrequent intolerable unilateral acts (the Helms–Burton or D’Amato Acts) or actions (Granada, Nicaragua, Panama. . .).<sup>18</sup> But they are in good company and it cannot be denied that other big (or semi-big) states are far from irreproachable in this respect, including the European Communities, or India, or China, or even France which is described in Ruth Wedgwood’s paper as the ‘fifth gendarme’ (and which would probably like to be the second!). There is, however, a difference. There is but one superpower — and I suggest that this imposes upon it a special burden and a special duty of self-restraint. It may not always act accordingly, and this might explain why, seen from Europe, US good conscience is more often than not resented as ideological, economic, political and even military arrogance since, when used outside any multilateral machinery, unilateralism is the means for such arrogance. Power does not confer ‘leadership’, but special responsibility.

This being said, the main point must not be lost from sight: whatever the respective responsibilities of the Western Group, and primarily, of the United States, and, to a much lesser extent of the Third World, the main states deserving blame in the circumstances are those, namely China and Russia, which impeded the Security Council from deciding on measures equal to the situation created by Yugoslavia in

<sup>16</sup> For a reliable review of cases (before 1980) where recourse was made to the Dean Acheson Resolution, see J.F. Guilhaudis, ‘Considérations sur la pratique de l’Union pour le maintien de la paix’, *AFDI* (1981) 382–398. See also P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed., (1999) 815–816 and 957.

<sup>17</sup> For once, it seems difficult to ascribe undisclosable or shameful designs to the Western powers: they have (to their cost) reacted to crimes against a Moslem and a poor population; with no oil and no ‘Monicagate’ in sight.

<sup>18</sup> This unfounded messianic approach is reflected and (hopefully) caricatured in Allan Gerson’s paper in the previous issue of this journal.

Kosovo. Whatever the legality of NATO's intervention, their opposition to any credible answer to Milosevic's cynical enterprise was indeed illegitimate.

In an article published in 1988 in the *American Journal of International Law*, Ruth Wedgwood wrote that '[u]nilateralism sits *uncomfortably* in a *multilateral* world'.<sup>19</sup> This might be an over-optimistic view since it implies that the world has become truly multilateral, which, in turn, presupposes that the change from the Westphalian inter-states society to a communities-oriented international law has already taken place.

Indeed, the world has changed. The League of Nations Covenant, then the UN Charter, have introduced a dose of multilateralism into international relations. It remains that 'community' mechanisms have never worked well — and for several reasons: sometimes, the danger remained outside the world organization (this was the case during the inter-war period); or the balance of powers was not properly calibrated, either because it was bilateral and 'too equal' (or seen as being so), as was the case during the Cold War, or because it is too unequal, as it is now.

This explains the permanence of a private justice in the international sphere,<sup>20</sup> which can find a lawful expression in 'legitimate countermeasures', or in an unacceptable unilateralism, as soon as it comes to the use of force without authorization from a responsible international organ, that is, primarily, the Security Council and, in the last resort, the General Assembly of the United Nations. This form of unilateralism must be firmly rejected, whether the US, China or France (or others) like it or not.

The paradox here is that community values have made progress at the conceptual and, to a lesser extent, at the normative levels but, at the same time, this development encourages resort to unilateral measures. Suffice it to mention the notion of state crimes<sup>21</sup> which is, no doubt, a progression in the direction of community values since it shows that at least some forms of unilateralism are simply intolerable in the modern world. But, simultaneously, this induces a 'counter (or neo-)unilateralism' since individual states, or groups of states, arrogate to themselves a unilateral right of reaction to the lack of accompanying institutional progress.

It is the duty of our generation (and the next ones) to strengthen and deepen these conceptual advances<sup>22</sup> and to see to it that they go hand in hand with parallel effective institutional mechanisms. If crimes are prevented, conceptually speaking, it will become indispensable to find some international machinery in order to neutralize the

<sup>19</sup> 'The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction', 92 *AJIL* (1998) 726 — emphasis added.

<sup>20</sup> See D. Alland, *Justice privée et ordre juridique international* (1994).

<sup>21</sup> The quickly developing 'international criminal law' is another example.

<sup>22</sup> In this respect, it is to be hoped that the International Law Commission will not yield to the increasing pressures from some big states (not all Western) which try to 'kill' the very notion of 'state crime' — see Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *EJIL* (1999) 425–434 and 'Vive le crime! Remarques sur les degrés de l'illicite en droit international' in ILC, *International Law at the Dawn of the Twenty-First Century — Views from the I.L.C.* (1997) 287–315.

unilateralist temptations of the big powers<sup>23</sup> exactly as the mechanism for dispute settlement has accompanied the definition of new rules of the game in trade relations<sup>24</sup> and has constituted a great achievement of ‘communitarianism’ versus ‘unilateralism’.

The same kind of evolution is desperately needed in the even more fundamental field of the maintenance and restoration of peace, in order to avoid in the future the very unsatisfying alternative between the ‘Zorro’ and ‘Munich’ principles.

<sup>23</sup> The previous Special Rapporteur of the ILC on State Responsibility, Professor Arangio-Ruiz, made some very innovative proposals in this respect (see in particular his seventh report, *A/CN.4/469* and Add.1 and 2, *ILC Yearbook* (1995), Vol. II, Part 1), but they were clearly unrealistic and, in any case, such a construction is out of the mandate and reach of the Commission.

<sup>24</sup> The present writer does not share the underlying values inspiring these new rules; the fact is, however, that they reflect a common multilateral approach by most of the members of the international society which has established correlative enforcement procedures.