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**REDEFINING SOVEREIGNTY.
THE USE OF FORCE AFTER THE END OF THE COLD
WAR.
NEW OPTIONS, LAWFUL AND LEGITIMATE?
(Rome, 24-25 November 2000)**

Conference Report

by Istituto Affari Internazionali

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Conference Report

The conference was organised by the Institute for International Affairs (IAI) with the support of the Centre for High Defence Studies (CASD), the German Marshall Fund of the United States, the NATO Office for Information and Press and the Thyssen Foundation. It was held in Rome, at the Centre for High Defence Studies, on 24 and 25 November 2000.

Many scholars from all over the world were invited to discuss the manifold questions rising from the various instances of use of force which have occurred after the end of the cold war. The main arguments under discussion were the implications of the use of force after 1990 on the classical concept of State sovereignty. This topic was analysed both from the political and the legal points of view.

The first day was devoted to examination of the political issues, while the legal questions were dealt with on the second day. Each day the proceedings were divided into four sessions: (First day) Intervention in the Post-Cold War Era; The Moral Imperative for Intervention in Case of Genocide and Other Humanitarian Emergencies; International Missions in Kosovo: from Military Intervention to Institution-Building; The Role of Regional Organizations in Maintaining Peace and Security; (Second day) The Current Status of the Principle Prohibiting the Use of Force in International Relations and the Legal Grounds for Intervention by Individual states or Group of states; NATO's New Strategic Concept and Non-Art. 5 Operations; Constitutional Constraints in the Use of Force by states; Post-Conflict Peace-Building.

1. Policy Perspective

Intervention in the Post-Cold War Era

The end of the cold war and the disappearance of the harsh opposition between western countries and communist states revived the Security Council. Acting pursuant to Art. 39 of the United Nations Charter, the Security Council considers various situations, like the systematic maltreatment of minorities, as threats to peace. The determination of a threat to peace allows for collective action according to Art. 42 of the United Nations Charter. However, since the end of the cold war, no Art. 42 action has taken place. In some cases, like in Somalia, the Security Council authorised a group of states to use force for the restoration of peace. In other cases, like in Kosovo, it did not issue any authorisation.

Nevertheless, in the case of Kosovo, the majority of NATO countries stated that the gross violations of human rights called for a collective action even without the Security Council authorisation and consequently intervened against the Federal Republic of Yugoslavia. According to these countries, the protection of human rights justified the interference in the domestic affairs of another State, the principle of non-intervention being connected to an obsolete concept of sovereignty.

On this subject, different views were expressed during the first session of the conference. In particular, it was observed that the theory of the priority of the protection of human rights over the principle of non-interference re-introduces the outdated concept of just war -- intervention in the name of human rights being considered “just”. In this sense, it opens the way to other interventions for “just” causes.

On the other hand, it was remarked that non-intervention itself can be considered a measure for protecting human rights, in as much as it prevents collective violence, and cannot be considered obsolete.

Finally, in order to prevent an uncontrolled escalation in the power of intervention on the part of the most powerful states, it was stressed that a substantial reform of the existing instruments for protecting human rights is required. The United Nations themselves should be radically reformed. But the debate on reform of the Organisation has now completely faded out.

The Moral Imperative for Intervention in Case of Genocide and Other Humanitarian Emergencies

The principle of State sovereignty, which does not allow for any intervention in the internal affairs of a State, is clearly in conflict with the moral imperative of upholding human rights world-wide, which would require intervention for their protection, if necessary. This subject was dealt with in the second session of the conference.

In order to solve the conflict between state sovereignty and intervention in the name of humanity, establishment of a “cosmopolitan law” in the Kantian sense was proposed. The “cosmopolitan law” would be more effective than the existing international law in guaranteeing the objective of the United Nations, namely global peace, through its effective monopoly on coercion. The core of the “global law” should be the Universal Declaration on Human Rights and should proceed not from the consent of states, but directly from the consent of citizens.

In this perspective, states would have only limited sovereignty. In particular, they could not violate human rights with impunity. Any violation of human rights could be brought before a court having global jurisdiction.

In practice, this view would be supported by the expected reform of the United Nations and the recent institution of the International Criminal Court.

International Missions in Kosovo: from Military Intervention to Institution-Building

In Resolution 1244 (1999), the Security Council welcomed the acceptance by the Federal Republic of Yugoslavia of the principles established by the G-8 Foreign Ministers and authorised the deployment in Kosovo of an international civil and security presence. The international civil presence should provide an interim administration for Kosovo. It is led by a Special Representative appointed by the Secretary-General in consultation with the Security Council. On the other hand, the international security presence should, *inter alia*, ensure the public safety and order of the region. It is composed mainly of NATO soldiers.

The international missions in Kosovo and their main tasks were deeply debated during the third session of the conference. As was pointed out, Resolution 1244 (1999) requires, on the one hand, close interaction between the military and the civilian components and, on the other, continuous co-operation among the various international institutions acting in Kosovo. Tasks and responsibilities are, in fact, distributed among

different international actors. In particular strong co-ordination is necessary between the United States and European countries.

The aim of the international action in Kosovo is not only to restore security in the region, but also to build institutions. To this end, the European Union can play an important role. Economic reconstruction has also been identified as having a decisive influence on institutions. A participant drew attention to the possible “taiwanization” of Kosovo: in the near future Kosovo might resemble Taiwan, a small geographical area characterised by a highly developed economy.

Some recent events, namely the fall of Milosevic, the alteration of relations between Serbia and Montenegro and the local elections in Kosovo, were considered worthy of note, as factors influencing the situation in the region. Developments in Albania and Macedonia were also taken into account: they too could influence the situation in Kosovo.

As for the final status of Kosovo, three scenarios were proposed: independence; substantial autonomy, following an agreement with the FRY; or the perpetuation of the present situation. In this connection, the high costs of the international missions in Kosovo were pointed out. They are largely borne by NATO countries and will, in the long run, become a heavy burden for their finances.

The Role of Regional Organisations in Maintaining Peace and Security

Chapter VIII of the United Nations Charter deals with regional arrangements. Art. 52 par. 1 states that nothing in the Charter precludes the existence of regional arrangements or agencies, the aim of which is the maintenance of international peace and security, provided that they are consistent with the purposes and principles of the United Nations.

The role of regional organisations in maintaining international peace and security was largely debated during the fourth session of the conference. In particular, the following remarks are worthy of note.

First of all, Chapter VIII does not contain any definition of regionalism, regional arrangements or regional organisations. It is not clear whether geographical proximity among member states is necessary for an international organisation to be qualified as regional. Although such proximity is not clearly requested by the Charter, it is doubtful whether some organisations, such as NATO, may be considered regional agencies pursuant to Art. 52 par. 1. In this regard, opposite opinions were expressed. According to Art. 54, a regional organisation must keep the Security Council fully informed of the activities undertaken for the maintenance of international peace and security and this obligation does not suit NATO.

Secondly, genuine regionalism must be kept separate from imposed regionalism. Europe is an area of genuine regionalism: suffice it to cite, for example, the European Union and the Council of Europe.

Thirdly, regional organisations are generally a substitute for or in competition with the United Nations and not subordinate to or co-operative with it. This is the context in which the discussion on the limits on the use of force by regional organisations took place. Pursuant to Art. 53, regional organisations may take enforcement actions only if authorised by the Security Council. In the Kosovo crisis, the Security Council did not previously authorise NATO intervention as it was opposed by the Russians. In this regard, it was argued that Resolution 1244 (1999) could be considered a *post facto* authorisation of NATO's use of force.

In order to overcome the difficulty of obtaining a specific authorisation when required, a number of participants proposed that NATO or other regional organisations be given a general authorisation. This view, however, was not shared by everyone. It was said that the Security Council has only specific powers: it can act solely with reference to positive cases. The Security Council has no normative powers and cannot issue a general authorisation to use force.

2. Legal Issues

The Current Status of the Principle Prohibiting the Use of Force in International Relations and the Legal Grounds for Intervention by Individual states or Group of states

Art. 2 par. 4 of the United Nations Charter prohibits 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. As the International Court of Justice stated in the judgement on *Military and Paramilitary Activities in and against Nicaragua*, the prohibition of use of force in international relations is, by now, a customary rule. It is doubtful, however, whether there is a perfect coincidence between Art. 2 par. 4 of the Charter and the customary rule.

In the opinion of many scholars, the prohibition of the use of force is indeed a principle of *ius cogens*. The classification of the prohibition of the use of force is relevant in many respects. In particular, an *ius cogens* principle may be modified only by a new principle having the same value.

On the content of Art. 2, par. 4, prohibiting the use of force, contrasting views were expressed during the fifth session of the conference. Some scholars maintained that Art. 2 par. 4 prohibits every kind of use of force, with the exception of self-defence. Others stressed that the prohibition established by Art. 2 par. 4 concerns only the use of force directed against the territorial integrity or the political independence of a state or inconsistent with the purposes of the United Nations in any other manner. Consequently, self-defence is not the only instance of use of force which does not fall under the provision of Art. 2 par. 4.

As for self-defence, various matters were pointed out. Art. 51 expressly admits the use of force in self-defence. However, it is debated whether the lawfulness of the reaction in self-defence must be assessed not only with reference to its necessity and proportionality to the attack, but also with respect to its immediacy. Moreover, it still remains unclear whether nuclear weapons may be used in self-defence. In the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice referred to «extreme measures of self-defence», which might legitimize the use of nuclear weapons. The admissibility of anticipatory self-defence is another open question. In the judgement on *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice did not take a stance on this question.

Several controversial instances of use of force were carefully examined. In particular, a lively debate took place on the admissibility of humanitarian intervention. It is doubtful whether a customary rule is developing on this subject. According to a number of scholars, such a rule began to develop with the intervention of Western states in Northern Iraq in 1991. This view was not shared by everyone. Other scholars

maintained that no customary rule is developing and that humanitarian intervention remains unlawful.

On the other hand, no doubts were expressed about the lawfulness of the use of force by states or regional organisations, if properly authorised by the Security Council. However, instances may occur in which the Security Council is not able to issue an authorisation. The Kosovo crisis is a case in point. In this regards, some remarks were formulated *de lege ferenda*. The Security Council might issue a general resolution, authorising states or regional organisations to use force when specific conditions occur. Otherwise, the General Assembly, according to a scholar, might authorise the use of force whenever the Security Council is not able to act.

NATO's New Strategic Concept and Non-Art. 5 Operations

The New Strategic Concept, approved at the Washington Summit on 23 and 24 April 1999, gives the Alliance additional powers to those assigned by the Washington Treaty of 1949 and the Strategic Concept of 1991. In particular, it enables NATO to conduct military operations without the limits established by Art. 5 of the Washington Treaty, in order to perform its fundamental task of crisis management in the Euro-Atlantic area.

Pursuant to Art. 5 of the Washington Treaty, the Alliance could use force only in self-defence, for reacting to an armed attack against its members, and had to report immediately the measures taken to the Security Council. The New Strategic Concept enables NATO generally to use force in order to face crisis that arise in the Euro-Atlantic area, like humanitarian emergencies, and does not explicitly mention any obligation to report the measures taken to the Security Council. Nevertheless, it recognises the primary responsibility of the Security Council for the maintenance of international peace and security.

The New Strategic Concept and non-Art. 5 operations were closely examined in the sixth session of the conference. Many scholars wondered whether the New Strategic Concept may be considered an amendment of the Washington Treaty. In this regard a scholar pointed out that the New Strategic Concept belongs to the realm of “soft law”.

Moreover, it was observed that the NATO intervention in Kosovo may be considered an anticipated implementation of the New Strategic Concept; it began before adoption of the Concept. As for the need for a Security Council authorisation, some scholars noted that such an authorisation was not necessary because of the large international consensus on the intervention and the previous Security Council resolutions on the Kosovo crisis. Moreover, it was stressed that the Alliance's intervention in Kosovo aimed at restoring the peace and security of the region in conformity with the United Nations Charter.

Constitutional Constraints in the Use of Force by states

The seventh session of the conference focused on the constitutional constraints in the use of force by states. Constitutions regulate the use of force by a State in relations with other states and establish procedures for authorising such use of force. During the cold war, constitutional rules on the use of force were frozen, as were international ones. As of 1990, they have again been taken into consideration. Thus, their examination is now extremely useful.

Many scholars stressed the problem of coincidence between constitutional and international rules on the use of force. These norms often correspond, but there is not always complete correspondence.

As for Italy, Art. 11 of the Constitution prohibits aggressive wars. Art. 87 par. 9 states that the President of the Republic proclaims the state of war previously decided by the Parliament. With reference to constitutional procedures on the use of force, the need for transparency was pointed out.

Finally, with regard to European countries, the possibility of European constraints in the use of force, developed within the European Union in addition to constitutional ones, was envisaged.

Post-Conflict Peace-Building

In the last session of the conference, various questions related to post-conflict peace-building were dealt with. Special attention was devoted to restoration of civil society, which was considered the principal aim of every peace-building action. In this regard, United Nations efforts were stressed. The United Nations has invested considerable resources in attempting to restore civil society in countries devastated by war.

The most comprehensive attempt to restore civil society is represented by the establishment of an international administration in the territory concerned. An interim administration may be established even in the absence of a pre-existing peace agreement between the opposing parties. In order to restore civil society, a peace enforcement operation without a mandate to administer the territory concerned fully, may also be conducted. A more limited attempt to restore civil society consists of peace-keeping operations, usually launched once a peace settlement has been reached. Finally, the lowest international involvement is requested in monitoring missions.

The range of activities related to restoring civil society is very wide. It may include: the drafting of a Constitution; the preparation and holding of elections; the creation of administrative institutions; the introduction of a human rights culture; the establishment of accountability for previous human rights violations; the return of refugees and displaced persons.

These activities may be conducted directly by United Nations forces, like UNOSOM II in Somalia, or may be delegated by the United Nations to regional organisations, like the Economic Community of West African States (ECOWAS) in Liberia and Sierra Leone, or to coalitions of willing states, like the coalition led by Italy in Albania.

In various cases, efforts to restore civil society have had positive outcomes. They have proven successful especially in cases of long conflicts, whose parties were tired of strife and attracted by the benefits of living in an ordinary civil setting.