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Political Science

Chair of International Law

Kosovo: a case study for international management of humanitarian crisis
in the frame of the international law

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Introduction

The Kosovo conflict that sprang in February 1998 is a tragical event of the contemporary history of the European area and the outcome of a critical international management of the socio-political equilibrium between Albania, the KLA, *i.e.* the Kosovo Liberation Army (Albanian: *Ushtria Çlirimtare e Kosovës* – UÇK) and NATO on one side, while the Federal Republic of Yugoslavia, also known as the State Union of Serbia and Montenegro, on the other. On 24 March 1999 the North Atlantic Treaty Organisation started an impressive air strike on Serbia, with the aim of ending the Kosovan War, a conflict which had started since February 1998. The NATO operation lasted until 10 June 1999, the day when an agreement was reached between the Yugoslav and the Kosovo Albanian forces to allow the international presence on the territory to help managing the dialogues between the two governments on the request of independence of Kosovo from the Federal Republic of Serbia. It resulted with the Military Technical Agreement signed by all parts on 9 June 1999, in North Macedonia and it ended the Kosovo War. The key provisions of the agreement provided for the withdrawal of Serbian troops from Kosovo, followed by the suspension of the bombardment of Yugoslavia by NATO, and the entrance of peacekeeping forces in the territory to arrange a secure environment for civilians¹. On 17 of February 2008, the Provisional Institutions of Self-Government declared the formal independence of Kosovo from Serbia²: as of December 2018, 105 States have recognised Kosovo as a sovereign nation. The process has however slowed down during the past years because of the lack of recognition by the neighbouring States like Bosnia-Herzegovina and by those involved in the process of secessions, such as Serbia and Russia. The conflict in Kosovo has raised a series of numerous questions in the field of international law, some still discussed today. One of the most interesting aspect of the discussion developed around the case of Kosovo is on the existence of a legal framework which allows international bodies to undertake forceful actions to enter in a conflict, as in the case of NATO. Further discussion is developed around the issue related to the recognition of independence of Kosovo. As said before, today 105 States have recognized Kosovo as a sovereign State, the others have not yet because, according to some, the process of secession has violated the principle of integrity of the Serbian nation and, despite respecting the right of self-determination for all populations, it is believed that independence of Kosovo has been achieved through unilateral declarations, which are not sufficient and are inconsistent with international law in the process of independence of a nation. The conflictual positions of the international community have generated during the years a puzzling frame for international lawyers, who have followed the practices of States from outright support

¹Agreement 1999/682 of NATO of 2 August 1999, on military Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia.

² Written Contribution of the Republic of Kosovo to the ICJ advisory opinion of 17 April 2009, *on accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*.

to unhesitating opposition. The difficult task faced in here is to relate and to legitimise the political process of independence of Kosovo within the international law system, alongside with the principle of self-determination as the starting point of the whole procedure conducted in the '90s. Some of the crucial issues to be found in the analysis of the subject related to the international legal framework are related to: the issue of international recognition, the strife between preserving the national integrity and the principle of self-determination, the legitimacy of unilateral acts of independence, the attainment of statehood's criteria and the effects of the consequent solutions implemented by international organizations. One of the main aims of this final dissertation is to analyse the framework of legal action undertaken by Kosovo to establish its independence from Serbia. By doing so, chapter 2 will look at the principles of international law quoted by Jan Klabbbers in "International Law" for defining a State as such, then it will be seen if such definition is suitable for the state of Kosovo. The discussion will be followed by the legal history of secession and declaration of independence of Kosovo, and I will go through the main documents issued, specially from the European Union, on the matter of the administration of Kosovo by international bodies. Part of the work will analyse the reasons behind the different positions taken by the international community over whether recognising Kosovo's independent status or not. More specifically, I will analyse the positions of Russia and Serbia which will be confronted with those of the European Union and of the USA. It is believed that Russia and Serbia's opposition to an independent Kosovo plays a key role in influencing the effective capacity of the new-born country to enter effectively into international relations. As a consequence, it is meaningful to try to interpret the reasons of all parts in order to have a clearer and more complete view on this debate. Moreover, it is particularly relevant to gain an overview of today's position of the European area in order to follow the more recent development on the field of international law seen the peculiar status of Kosovo and the reason why it is playing a valuable role in diplomatic affairs.

The primary purpose of this bachelor's degree Final dissertation is to analyse the peculiar case of Kosovo, a country sprung from the dissolution of former Yugoslavia, as a product of the peace-building international legal frame set up by the Charter of the United Nations, specifically by Chapter VII. One of the aspects that will be analysed is the intervention of NATO in the conflict without the explicit authorisation by the Security Council, the legal basis behind such decision and the conduct of the peace-keeping operations (blue helmets) during the war. In conclusion, there will be an analysis of the reconstruction of Kosovo and a discussion on the direct administration of the territory by the United Nations, along with a digression on matters of International Criminal Law.

Chapter 1: Chrono-history of the Balkan War and formation of Kosovo

1. The origin of the conflict

1.1. Before the 1910s

The political situation in Kosovo has always been highly tense and full of conflicts between the two main ethnical groups living in the region: Serbs and Albanians. In order to better understand the developments, the actions were undertaken by all counterparts of the Kosovan Conflict and the consequences of it, it is necessary to look at Kosovo's history and to the relationship subsisting between Albanians and Serbians. It can be said that Kosovo has always had a significant symbolic value for the Serbian national identity since the “Battle of Kosovo” on the 15th of June 1389, fought between the Serbian led by the prince Lazar Hrebeljanović and the invading army of the Ottoman Empire, led by Sultan Murad I. The battle took place on the Kosovo field, a plain located about 5 kilometres far from Prishtina, the modern capital of Kosovo. Although it is challenging to accurately know how the conflict was conducted because of the scarce and, sometimes, conflicting sources, the battle was won by the Ottoman troops, despite heavy mutual losses. This defeat became one of the most influential moments of Serbia's history, contributing to developing a sense of greatness and common belongingness in the Serbian population. Quoting the words of Isabelle Dierauer: “it is complicated to understand the depth of affection Serbs have for Kosovo. Kosovo Polije (Battle of Kosovo) is more uniquely significant to the Serbian soul than Vally Forge, Gettysburg and Normany. Orthodox priests have walked the hills of Kosovo one and a half millennia, as have Serbian shepherd girls and farmers. It is sometimes referred to as the Jerusalem of the Serbs. At the Battle of Kosovo, the Serbs earned the title of The Guardians at the Gate of Europe as they prevented the Turks from advantaging further into Europe. For this, all of Western Europe should be grateful”³. Inter-ethnic conflicts between Serbians and Albanians arose when Kosovo was part of the Ottoman Empire (from 1455 to 1912) and, given the social division according to religious belief, Islamization allowed Albanians to reach higher social status than Serbians, who were predominantly Catholics. The underlying ethnic tensions awoke nationalistic feelings from both parts, leading to the establishment of the League of Prizren in 1878 by the Albanians and widespread massacres committed against the Serbian population at the turn of the XX century.

1.2. First and Second Balkan War⁴

The first decades of XX century saw the outbreak of two main conflicts in the Balkan region, whose outcome would be influential for the disputes between populations concerning the independence and the right of

³ I. DIERAUER, *Disequilibrium, Polarization, and Crisis Model: An International Relations Theory Explaining Conflict*, Lanham, 2013, p. 88.

⁴ R. C. HALL, *Balkan Wars 1912-1913*, in U. DANIEL *et al.* (eds.), *1914-1918-online*, in *International Encyclopedia of the First World War*, Berlin, 2014.

self-determination for Kosovo. Between 8 October 1912 and 30 May 1913, the First Balkan War was fought as a response to the willingness of the Balkan League (composed by the kingdoms of Bulgaria, Serbia, Greece and Montenegro) to drive the Ottoman Empire out of the Balkan peninsula, following the implementation of repressive policies by the Young Turks. On March 13, 1912, before the beginning of the armed actions, Serbia and Bulgaria signed an agreement on the division of the lands in case of victory: the southern Macedonia area until the Kriva Palanka–Ohrid line was to be assigned to Bulgaria, while northern Macedonia to Serbia, until the Shar Mountains (*i.e.* Kosovo). The division was arbitrated by the Russian Empire, who was interested in establishing a pro-Russian League in the region to prevent further enlargement of the Austro-Hungarian Empire. Greece joined the League to solve the Crete's question left open after the Greco-Turkish War of 1897 on the control of the island. While the Bulgarian army fought mainly on Thrace, the Serbian army proceeded in breaking the Ottoman army in Macedonia, Kosovo and Albania, getting to the Adriatic Coast in December, while the Greek navy occupied the Aegean Islands, preventing reinforcements for the Ottomans to ship. On 28 November 1912, Albania declared its independence from the Ottoman Empire, supported by Italy and the Austro-Hungarian Empire. Further diplomatic efforts were displaced during the Albanian Congress of Trieste, Austria, on 1st May 1913, where 119 representatives coming from new-born Albania, Bulgaria, Egypt, Italy, Romania, Turkey and the United States recognised the provisional government guided by Ismail Qemal and discussed the country's boundaries. The Treaty of London on 30 May 1913 concluded the First Balkan War: it envisaged the creation of an independent Albania, the new demarcation of the Ottoman Empire's boundaries on the peninsula, reduced to a straight line drawn from the Black Sea port of Midya to the Aegean port of Enos as stated in Article II of the Treaty⁵. Nonetheless, ensuring the pressures from Serbia and Greece, almost 30-40% of the territory claimed by Albania according to ethnic and cultural similarities was assigned to Greece and Serbia: the former received the region of Chameria, the latter received the region of Kosovo Vilayet, because of its historical and symbolic importance for Serbians. A few months later the end of the First Balkan War, because of Bulgaria's dissatisfaction with the division of the territories, the Second Balkan War took place. During the first conflict, Serbia had occupied large areas of Macedonia, and it had strengthened its grip as a compensation for its loss of the Northern Adriatic coast, after the prohibition of Austria. Hostilities over Macedonia escalated quickly during the spring of 1913, despite the failing attempts of Russia to mediate among the States. The Bulgarians attacked Greek and Serbian armies on 29-30th June 1913, and the war broke out officially. Besides, both the Romanians and the Ottomans took advantage of the weak military position of Bulgaria and attacked it too. Under such circumstances, Bulgaria was forced to bestow Macedonia to Greece and Serbia, and southern Dobrudzha to Romania. On 29 September 1913, the Treaty of Constantinople was signed between the Ottoman Empire and the Kingdom of Bulgaria: it established

⁵ Peace Treaty between Bulgaria, Greece, Montenegro, Serbia and Turkey of 30 May 1913, on the territorial regulation after the conclusion of the First Balkan War, Art. 2.

the modern territorial boundaries between Eastern Thrace, Bulgaria and Greece. One influential consequence of the two Balkan Wars was the estrangement of Bulgaria from Russia: Bulgaria was a strategic country for the international relations of Russia and to put pressures on the Ottoman Empire. Because of the failing ambassadorial role played by Russia during the conflicts, Bulgaria sought in the Western countries a potential future ally, in particular in the Triple Alliance. Russia was left with only Serbia as a potential ally in the Balkans and, when in July 1914 the Austro-Hungarian Empire threatened Serbia, Russia had to defend it in order to do not lose the last stronghold in the Balkans. A second consequence of the conflicts was the awareness of the Austro-Hungarian Empire about Serbians and Montenegrins' ambitions of enlargement in Albania: determined to preclude any further expansion of the two Slavic countries, the Viennese government on three separate episodes (December 1912, April 1913 and in October 1913) started a series of conflicts against Serbia and Montenegro over Albanian controversies. The condition of perpetuated tensions on behalf of Serbia led to the decision of the Austro-Hungarian Empire to compete against the Serbs at the beginning of the First World War.

1.3. WWI: Foundation of Yugoslavia⁶ and Versailles Self-determination principle, an introduction⁷

The idea of a unified nation can be traced back to 1848, with the foundation of a South Slavic Federation, a project carried by the Serbian authorities with the help of the Croats. The process of unification of the Slavic countries was aimed by an original intent of gathering them together under the same political authority. However, after the Balkan Wars, only Serbia and Montenegro had acquired enough relevance and independence, while all other Yugoslav countries were still under the power of the Austro-Hungarian Empire. Managing to push back the Ottomans alongside with Bulgaria and Greece, Serbia acquired a predominant status in the eyes of everyone in the region⁸. Afterwards World War I, the collapse of the Austro-Hungarian Empire in 1918 signed the moment of emergence of the Kingdom of Serbs, Croats and Slovenes, better known as the “Kingdom of Yugoslavia” after 1929, ruled by the royal Serbian family of the Karadjordjevics. A further legal support for the independent cause of the Slavs was the principle of self-determination, described for the first time by the U.S. President Woodrow Wilson on 8 January 1918 in a statement called “The Fourteen Points”; the document was used as a general guideline for peace negotiations and it contains progressive ideas on foreign policy: the President called for “(...) Open covenants of peace, (...) questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined, (...) Rumania, Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea;

⁶ I. BANAC, *The National Question in Yugoslavia: Origins, History, Politics*, New York, 1993; M.GLENNY, *The Balkans 1804-1999: Nationalism, War and the Great Powers* London, 2001.

⁷ Peace Treaty between Allied Powers and Germany of 28 June 1919, on the end of the First World War and on the conditions for surrenders.

⁸ T. JUDAH, *Yugoslavia: 1918 – 2003*, 2 February 2011, available at: www.bbc.com

and the relations of the several Balkan states to one another determined by friendly counsel along historically established lines of allegiance and nationality; and international guarantees of the political and economic independence and territorial integrity of the several Balkan states should be entered into”⁹. Peculiar is point no. 11, which explicitly refers to the right of Balkan population to self-determine their sovereignty and their international position with no interference from other entities. Despite that, the resentments were numerous and came from all parts: Croatians felt they moved from the Austrian authority to the Serbians, without any chance of accomplishing a new Illyria¹⁰, while Macedonians resented the new subordinated political status. The most discontents were, however, the Kosovan Albanians: Kosovo underwent several divisions, and from April 1922 it was split among three districts of the Kingdom: Kosovo, Zeta and Raška. In 1929, when the Kingdom of Yugoslavia was founded, Kosovo was reorganized among the Banate (province) of Morava (today Central Serbia and East Kosovo), the Banate of Vardar (today Kosovo, Serbia and North Macedonia) and the Banate of Zeta (today West Kosovo, Montenegro and Bosnia-Herzegovina), despite the willingness of being unified with the new-born State of Albania, as to follow the principle of unifying same ethnic populations.

1.4. WWII: Germany and Italy in the Balkans

In the prelude of World War II, the Serbian Prime Minister of Kingdom of Yugoslavia Milan Stojadinović sought a neutral position for its country, by signing a pact of non-aggression with Italy but, at the same time, strengthening its relations with Nazi-Germany: in 1935, the Prime Minister signed the first economic treaty with Germany¹¹. Meanwhile, the Kingdom of Italy represented by Benito Mussolini tried to take revenge on the competed territories of Dalmatia lost during World War I against the Kingdom of Yugoslavia, by giving support to the Croatian Ustaša - Croatian Revolutionary Movement. The movement had a fascist and Croatian ultranationalist footprint, active between 1929 and 1945, and its primary goal was to achieve an independent status from Belgrade government, emphasizing the need for “pure race”, free from Serbs, Roma and Jewish people¹². On 25th May 1941 Yugoslavia signed the Tripartite Treaty with Germany and Italy, starting the sequence of actions that led to the establishment of the *Nezavisna Drzava Hrvatska* (NDH - Independent State of Croatia) in Zagreb. As reported by Michele Frucht Levy: “the Ustaša tried to claim that Croats had Gothic roots. There were approximately 1.8 million Serbs, 700,000 Bosnian Muslims (Bosniaks), 40,000 Jews, 28,500 Roma, 300,000 from

⁹ Speech of Woodrow Wilson’s Fourteen Points of 8 January 1918, on the principles for a durable and solid peacetime in Europe.

¹⁰ Z. BLASEVIC, *Indetermination: Narrative identity and symbolic politics in early modern Illyrism*, in B. TRENCSENYI, M. ZÁSZKALICZKY (eds.), *Whose Love of Which Country. Composite States, National Histories and Patriotic Discourses in Early Modern East Central Europe*, Leiden – Boston, 2010, p. 203-224.

¹¹ G. WEINBERG, *The Foreign Policy of Hitler's Germany Starting World War Two 1937-1939*. Chicago, 1980.

¹² M. F. LEVY, *The Last Bullet for the Last Serb”: The Ustaša Genocide against Serbs: 1941–1945*, in *The Journal of Nationalism and Ethnicity*, 37 no. 6, 2010, p. 807-837.

other minority groups, and 4.8 million Croats in the NDH. The Bosnian Muslims were declared “the blood of our blood ... the flower of our Croatian Nation” and granted rights and privileges. But according to Education Minister Mile Budak, “1/3 of Serbs we shall kill, another we shall deport, and the last we shall force to embrace the Roman Catholic religion and thus meld them into Croats”¹³. From that moment on, numerous campaigns of genocide were conducted by the extreme-right wing Zagrebian government against the Serbs living in Croatia and Bosnia. Occupation of Yugoslavia occurred in 1941 by the Axis forces, who dismembered the nation: Germany occupied Bosnia-Herzegovina and some parts of Slovenia, while Italy occupied most of Kosovo that passed under the legal jurisdiction of Italian-controlled Albania and the left areas were given to Bulgaria and Hungary. Resistance was organised by two groups of guerrilla armies: the Serbian Chetnik forces, led by the General Draža Mihailović and loyal to the old Serbian government, and the Communist partisans, led by Marshall Josip Broz - also later known as Tito. Both groups received aids by the Allies, despite the confused information about which group was fighting against the Nazi-Fascist and who was re-conquering Yugoslavia for itself. On 26th November 1942, the guerrilla groups established the Anti-Fascist Council for the National Liberation of Yugoslavia, also known by its abbreviation AVNOJ, as the coordinating organisation for conducting the liberation forces against the Axis occupation. The international community recognised both AVNOJ and its subsequent declarations during the Teheran Conference on November-December 1943, providing AVNOJ with international legal legitimacy. Yugoslavia was founded on 29 November 1943 in Jajce, Bosnia, in the middle of inter-ethnic wars: AVNOJ declared itself as provisional parliament and established the National Committee of Liberation of Yugoslavia, headed by Marshall Josip Broz, called Tito, who at the time was the Supreme Chief of the Liberation Army.

1.5. Federal Republic of Yugoslavia and Tito

At the end of World War II, the Federal Republic of People in Yugoslavia was established by AVNOJ, adopting a constitution on 31 January 1946 modelled on the 1936's Soviet Constitution. According to it, the Federal Republic was composed by six people's republics, with the exception of two independent regions in Serbia: Kosovo and Vojvodina. The Federal Assembly was bicameral and composed of delegates representing all republics and provinces, despite the presence of a one-party system. The legislative and the executive powers were in the hand on the Assembly's Presidium and in the Government, while an additional body was the Politburo of Central Committee, the real incumbent ruler of the Federation. Marshall Tito was nominated President for life, and under his rule the country experienced a dictatorship operated on propaganda for maintaining brotherhood and unity. The political ideology of Yugoslavia in the '40s and in the '50s is divided in two moments: at the beginning, the nation followed a quite strict Stalinist ideology, from which it broke during the '50s because of Tito's international ambitions, oriented towards wider openness forward Western countries in Europe. Sources of

¹³ *Ibidem*, p. 809.

legitimacy in the hand of the new regime are described in the words of Repe Božo: “The first was power in Communist hands before the war ended. The second was international recognition and legal continuity with the old Yugoslav regime achieved with compromises with the Allies and the Government in exile. The third was partisan war. The fourth was won on elections: despite that they were undemocratic, people mostly supported communist party and people’s front. The fifth, relevant only for communists was historical imperative to achieve the last history step by Marxist theory: the rule of worker’s class incarnate in power of its avant-garde: communist party”¹⁴. The break from Soviet Socialism marked the begin of the era known as “Titoism”, a political theory defined in Collins English Dictionary as: “(Government, Politics & Diplomacy) the variant of Communism practised by Tito in the former Yugoslavia, characterized by independence from the Soviet bloc and neutrality in East-West controversies, a considerable amount of decentralization, and a large degree of worker control of industries”¹⁵ Tito started to oppose the Soviet Union’s doctrine of international relation during the Cold War, getting political independence from the Union and becoming the only Eastern European country defined “socialist, but independent”. By virtue of American financial aids, Yugoslavia had the chance in 1953 of signing the Balkan Pact¹⁶ with NATO, in order to prevent further expansion of the USSR and to strengthen diplomatic relationships with Western powers. Nonetheless, tensions between Kosovo Albanians and Kosovo Serbians took place, especially on the field of religion: Islam was mainly practised by Albanians and Muslim Slavs which were highly encouraged to move to Turkey, while Serbs and Montenegrins were at government, controlling security forces and industries in Kosovo. At the same time, numerous armed undertakings by Albanians occurred: while the Commission for National Defence of Kosovo, formed by the political leader Hasan in Prishtina, lobbied with the USA and other Western countries for the inclusion of his nation in the new State of Albania, nationalist exponents like Isa Bolteini and Bajram Curri gathered together armed movements against the Belgrade regime. All those armed actions were taken under a hidden life to avoid persecution by the Belgrade regime, leading to a legal phenomenon of the so-called "kaçak" (rebels), aimed by feelings of patriotism, independence and freedom from Serbia. As the scholar Malcolm in "Kosovo: A Short History" claimed, "[It] is clear that, overall, the kaçak movement was a political phenomenon, directed against Serbian rule as such, and it is also clear that the anti-Albanian policies of the government and local authorities were a powerful stimulus to the rebellion" Such actions seemed to be necessary since Serbia had decided to implement a program of colonisation to settle thousands of

¹⁴ R. BOŽO, *Das Besondere am "Titoismus" – seine Gewaltherrschaft und sein Zerfall*, in 3 *"Flammenzeichen Jugoslawien"*, 13, 1992, p. 27 – 32.

¹⁵ Definition of “Titoism” in British, noun (1), contributions in compilations and edited by Harper Collins Copyrights, S.v. “Titoism”, 2019, available at: www.collinsdictionary.com

¹⁶ Treaty of Alliance, Political Cooperation, and Mutual Assistance Between the Turkish Republic, the Kingdom of Greece, and the Federal People's Republic of Yugoslavia (also known as Balkan Pact) of 9 August 1954, on the formation of a military alliance

Serb families in Kosovo, which provided for the transfer of almost 40,000 Muslim Albanian families in Turkey by an agreement signed between Yugoslavia and Turkey in 1938. Kosovo experienced a period of coexistence with the other Social Federal Republic of Yugoslavia led by Tito: it was the time of Communism, and the political élite seemed willing to follow the ideology of integration among nations in Yugoslavia. Nonetheless, the suppression of Albanians in Kosovo was perpetuated: in mid-1945, and the years after the end of the war, it is considered that tens thousands of Albanians were killed and persecuted¹⁷. Consequently, around the 1960s various resistance movements were created to give a voice to the disadvantaged socio-political conditions of Albanians in Kosovo: most of the popular discontent was shown by the disruptive actions of young and university students, who came to be more and more involved in the national cause¹⁸. First public demonstrations took place in Prishtina, Kosovo's capital, on 27 November 1969, where hundreds of people gathered together under the slogans "One people, one state, one party" and "We want the Republic"¹⁹.

1.6. *The 1974 Constitutional Reform.*

In light of those episodes, the Central Committees of the Communist Party and Tito himself tried to play the demonstrators down. Nonetheless, they had to agree on a revision of the Constitution, and the 1974 Yugoslavian Constitution granted significant autonomy to Kosovo which could have its administration, assembly and judiciary. One of the significant changes on 1974 new Yugoslav Constitution was the restructuring of governmental branches of the provinces: Serbian's provinces Vojvodina and SAP Kosovo received broader rights than before, such as the authorisation to have their state and party Presidencies. The new constitution dealt mainly with the systematisation of socio-economic systems towards the realisation of self-determination by nations members of the Federal Republic of Yugoslavia. From 1974 on, sovereign rights were recognised in Part III, Chapter I of the new Constitution: art. 244²⁰ declared that: "In the Socialist Federal Republic of Yugoslavia, the nations, nationalities, working people and citizens shall realize and ensure sovereignty, equality, national freedom, independence, territorial integrity, security, social self-protection, the defence of the country, the international position of the country and its relations with other states and international organizations, the system of socialist socio-economic relations based on self-management, the basic democratic freedoms and rights of man and the citizen (...)", while art. 245, 246 and 247²¹ deal with "the right to express its nationality and culture shall be realised; thus each nationality shall be guaranteed the free use its culture and alphabet, and for this purpose of

¹⁷ A. R. BEKAJ, *The KLA and the Kosovo War: From Intra-State Conflict to Independent Country*, in *Berghof Transition Series*, no. 8, 2010, p. 10.

¹⁸ L. PEROVIĆ et al., *Yugoslavia from a Historical Perspective*, Helsinki, 2017, p. 286-87.

¹⁹ D. KOSTOVIC, *Three Decades of Demonstration in Kosovo*, in *History of Protests in Kosovo*, 6 October 1997, available at: www.ecn.org.

²⁰ The Socialist Federal Republic of Yugoslavia Constitution, art. 244, sec. 1.

²¹ *Ibidem*, Art. 247.

setting up organisations and enjoy other constitutionally-established rights”. Moreover, crucial points can be found in art. 248, where it is stated that: “In addition to the constitutional rights (...), nationalities shall also realise their sovereign rights in the Communes as the basic self-managing and socio-political communities”, meanwhile in art. 249, paragraph 2, it is declared that: “Every citizen of a republic shall simultaneously be a citizen of the Socialist Federal Republic of Yugoslavia”²². As it can be seen, the nature of the fourth and last Constitution of Yugoslavia will be the source of the legal basis used in the process of separation among State Members accomplished by the respective national armies of each counterpart: as Professor Đurić Mihailo from the Belgrade Law School stated, after such constitutional reform Yugoslavia was becoming a mere geographical term in exchange for more independence and autonomy for each nation-state²³. As a consequence, he warned about the changes in the legal and social aspects of the Republic which would have led it to a rejection of the state-community model proposed by Tito²⁴. However, despite the significant changes introduced by the constitutional revision, Kosovan Albanians still felt as if they were second-class citizens compared with other ethnical groups in Yugoslavia because they were still *de facto* subordinated to the authority of Belgrade: while Serbia was granted the status of nation and, thus, considered a republic, Kosovan Albanians were instead recognized as a nationality; thus they kept the status of Serbian province. Feelings of grievance were disclosed on the streets and led to episodes of violence among the population, such as the student protests begun in March 1981 when Kosovar Albanian students of the University of Pristina claimed the recognition of Kosovo as a republic within Yugoslavia.

1.7. Milošević

The situation started to escalate quickly under the legislation of the Serbian President Slobodan Milošević, whose rise to power is deemed to have begun with his speech in Kosovo Polje in 1987²⁵. He was a Yugoslav politician formerly from Serbia, and his political career started in Serbia as a supporter of communism through his election as Serbian President for redrafting the Federal Constitution in 1974, because of the marginalised role that Serbia was assuming in the last decades. The Serbian national cause resurrected after Tito's death in 1980 and Milošević embraced the purpose of a Serbian (re)unification with the inclusion of Kosovo as traditional territory and as the starting place of modern Serbia's national identity. The Kosovan government was in the hand of Serbia from 1981 to 1989, and the plan was deemed to remove autonomy from the country, starting a combined action of political nationalism supported by propaganda campaigns in the media. The deposition of the former Belgrade's party leader Dragisa Pavlovic was described by David Binder, a journalist in The New York Times, as an episode when: “Mr Milosevic accused Mr Pavlovic of being an appeaser who was soft on Albanian radicals. Mr Milosevic

²² *Ibidem*, Art. 248, paragraph 2.

²³ Đ. MIHAILO, *Anali Bibliografija*, Belgrade, 2009, p. 230–233.

²⁴ The Socialist Federal Republic of Yugoslavia Constitution, p. 37-38.

²⁵ P. AUERSWALD, *The Kosovo Conflict: A Diplomatic History Through Documents*, New York, 2000.

had courted the Serbian backlash vote with speeches in Kosovo itself calling for "the policy of the hard hand"²⁶. At the end of 1988, strikes occurred in Kosovo after the withdrawal of the country's autonomy from Serbia; on 23 March 1989, the process of suppression of state's autonomy was completed. As a response, the Albanian population organised itself independently in a virtual but parallel state guided by the leadership of Rugova, where schools, taxation and health services were provided autonomously from the moment when the Belgrade government cut off funds for Kosovan Albanians. Moreover, independent trade unions and new leadership were established to conduct the economic and political affairs of the province, the latter being composed mainly by Albanian intellectuals, such as professors and writers, the forerunners of the Democratic League of Kosovo (LDK) on 23 December 1989. Their leader was Ibrahim Rugova, a professor of Albanian literature and former student at the Sorbonne in Paris, who sought to solve the issue of Albanians in Yugoslavia because of the principle of self-determination.

1.8. Breakup of Yugoslavia ²⁷

The last decade of XX century saw the outbreak of the 1990s Balkan War, an international conflict that emerged in the aftermath of Tito's death in 1980, who was the previous autocratic leader of the Social Federal Republic of Yugoslavia and whose autocratic regime imposed on the country had led to a harsh repression of nationalist feelings by the Member States. The Socialist Republic was officially formed by six republics: Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro and Macedonia, plus Kosovo and Vojvodina, although the latter were considered two autonomous provinces. The death of Tito had opened a period characterised by the crisis of values and political ideologies, historically worsened by the gradual weakening of Eastern European states and the fall of the Berlin Wall in 1989, and the Serbian politician Milošević played a crucial role during the years following the death of Tito. At the beginning of the 1990s, the ruling political party in the country was the "League of Communists of Yugoslavia", composed by the six republics and the two autonomous provinces of Kosovo and Vojvodina included under the rule of Serbia. Supporters of Milošević threw large protests called "Rallies of truth", managing to overthrow the political leaders in Kosovo, in Vojvodina and in Montenegro, who were replaced with allies of Milošević. By doing so, Serbia created a "voting bloc" within the central bureau of the League, since four votes out of eight were associated with the political conduct followed by Serbia about keeping up with centralised control over the federation. Gradually, the reforms implemented through the so-called "anti-bureaucratic revolution" by Milošević's party reduced the powers of the autonomous provinces of Serbia, disrupting several massive protests among the Albanian population living in Kosovo. Not surprisingly, in February 1989 more than 130,000 Albanian miners in Kosovo started a hunger strike, pressing for preserving the

²⁶ D. BINDER, *In Yugoslavia, Rising Ethnic Strife Brings Fears of Worse Civil Conflict*, in *The New York Times*, 1 November 1987.

²⁷ K. TRANSCHEL, *The Breakup of Yugoslavia: Conflict in the Balkans*, New York, 2007.

autonomy so hardly obtained just a couple of decades earlier and this event inaugurated the heightening of ethnic relation between the Serbs and the Albanians of the area. Repercussions occurred immediately: in order to support the political stance of Kosovan Albanians, the Socialist Republic of Croatia and the Socialist Republic of Slovenia sided with them, openly criticizing the actions of Serbia and voicing Albanian' standpoints for adequate recognition, also combining a general dissatisfaction with the economic performance of Yugoslavia on the international market. During what would become the last meeting of the League of Communists, there was a heated debate between the Slovenian leader, Milan Kučan, and the Serbian leader, Slobodan Milošević, about the political structure of Yugoslavia: Kučan called for a higher degree of autonomy for individual republics, while Serbia wanted more unity and centralisation. The meeting ended with the Slovenian delegation leaving the congress in protests, and it was soon followed by the Macedonian and the Croatian delegation. The League of Communists of Yugoslavia was dissolved, and multi-party elections were held in all six republics for the first time. During the general elections held in 1990, the ethnic separatist parties won against the socialists for the first time in history, except in Serbia and Montenegro, where the party of Milošević and his allies won. Calls for national autonomy led to the declaration of independence by Croatia and Slovenia on 25th June 1991 which, however, were contrasted by Milošević and by his project of greater centralisation of power in the hand of the Federal leadership in Belgrade. The situation of Croatia was peculiar because the country's ethnic composition was predominantly Croats; nonetheless, a considerable portion of ethnic minority included Serbs, who were located on the border between Croatia and Bosnia-Herzegovina. For many Croatian Serbs, the newly elected government was causing severe concerns, considering that the last Independent State of Croatia during World War II was governed by the ultranationalist, fascist group “Ustaša”, guided by the Croatian lawyer Ante Starčević and allied with Germany and Italy against the Kingdom of Yugoslavia. The extremist group of Croats took part in the Holocaust, carrying out a genocide campaign against ethnic Serbs, so in 1990 many Serbs had still too vivid memories of the atrocities committed to their people occurred just half a century before, and many worried about the newly elected government in Croatia. In the Serbs-majority town of Knin, the local Serbs raised an uprising, blocking off critical roads throughout Croatia. Croatian Special Force helicopters were sent to resolve the rebellion by force. However, while *en route*, Yugoslav Army fighter jets flew alongside them, ordering to turn around or be shot down and they returned to base. This episode showed the gravity of the level of tension reached in the region: it was not just a moment of political disagreement, rather a rebellion assisted by the Yugoslav National Army, which supplied Serbs with weapons during the following months. An increasing number of Serb-dominated areas joined the rebellion, taking control of geographical areas where they were the dominant ethnicity, seeking to join Serbia. At the end of 1991, three main rebel groups declared themselves independent from Croatia. On June 25th, 1991, both Croatia and Slovenia officially declared their independence, and thus bringing into war also Slovenia as well. Two days after, the Ten-Days War became between Slovenia and the Yugoslav Army. After

those ten days of armed conflicts, under the sponsorship of the European Community, on 7 July 1991, the Brioni Agreement²⁸ was signed between Slovenia, Croatia and Yugoslavia. The document sought to open up discussions to resolve the tensions between parties peacefully: “Parties agreed that in order to ensure a peaceful settlement, the following principles will have to be fully followed: - it is up and only to the peoples of Yugoslavia to decide upon their future, - a new situation has arisen in Yugoslavia that requires close monitoring and negotiation between different parties: - negotiations should begin urgently, no later than 1 August 1991, on all aspects of the future of Yugoslavia without preconditions and on the basis of the principles of the Helsinki Final Act and the Paris Charter for a new Europe (in particular respect for Human Rights, including the rights of peoples self-determination in conformity with the Charter of the United Nations and with the relevant norms of International Law, including these relating to territorial integrity of States), - the Collegiate Presidency must exercise its full capacity and play its political and constitutional role, namely with regard to the Federal Armed Forces, - all parties concerned will refrain from any unilateral action, particularly from all acts of violence”²⁹. Despite that, the agreement was insufficient to stop the violence committed by the Yugoslav Army, which prepared a massive attack on Slovenia with tanks, air force and artillery. In order to proceed, Serbia was asked for the authorisation, but it refused, since ethnic Slovenes mainly composed the Slovenian population, so there was no high concern by the Serbian representatives if Slovenia had left Yugoslavia. On the other hand, the situation with Croatia was different, since a considerable portion of the Croatian population included people of Serbian ethnicity. In 1991 Croatia was led by Tudman, a leader who steamed from his insistence that he would: ”defend every inch of Croatia against Greater Serbian imperialism”, as a response to the wide success of the Croat-Serb rebels in securing key towns on the border regions, also supplied of equipment by the Central government of Federal Yugoslavia. After Macedonia too held a referendum for independence, on 27th August 1991 The European Community opened a peace conference in The Hague, commonly known as “Badinter Arbitration Committee”³⁰, to find a common ground of discussion among the member nations of the Federation to avoid a conflict, as well as deliberating fifteen opinions between December 1991 and January 1993 of consultative nature³¹. During the conference, Tudman reasserted the will of Croatia to be independent from the expansionist plans of Serbia, adding that it was also a right of the nation to declare its independence. Lord Carrington, who was at the head of the conference, in the attempt of mediating between Croatia and Serbia, inquired Milosevic if he would accept Croatian

²⁸ Brioni Agreement of 7 July 1991, on the establishment of a truce at the Ten Days War between Slovenia, Croatia and the Socialist Federal Republic of Yugoslavia.

²⁹ *Ibidem*.

³⁰ M. C. R. CRAVEN, *The European Community Arbitration Commission on Yugoslavia*, in *British Yearbook of International Law* 66, no. 1, 1995, p. 333- 413.

³¹ A. PELLET, *The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples*, in *European Journal of International Law* 3, no. 1, 1992, p. 178–185.

independence if it were subject to human rights of Serbs living outside of Serbia. After the positive answer by the Serbian leader, the final document was draft: it was declared that all six nations would have follow the path of independence. Surprisingly, Milosevic went back on his words, by asserting that such a solution was unacceptable. As Yugoslavia fell apart, Bosnia³² found its Parliament internally divided according to the ethnic composition of the population, consisted of Croats, Serbs and by a slim majority of Bosnians. When talks of separation took place in October 1991, the Bosnian Serbs representative Radovan Karadzic issued a stern warning to the Parliament of a civil war. On January 1992 the Serbs Bosnians held a referendum and declared the birth of the Republic of Srpska. By doing so, the main purpose was to remain a common state with Serbia and Montenegro, but the central government of Bosnia found it unconstitutional. It was substituted by the 29 February's independence referendum of Bosnia-Herzegovina from the Social Federal Republic, whose result, despite the boycott of Serbs Bosnians, declared the independence of the country with a 64% of the votes in favour. On 6 March 1992 the Bosnian Parliament proclaimed its independence from the Federal republic of Yugoslavia. Meanwhile, on January 1992, the European Union recognised Croatia and Slovenia as independent nations, and it was followed on April of the same year by the United States. Recognition for Bosnia-Herzegovina occurred on 6 April 1992. Those international recognition marked the *de facto* transformation from the Socialist Federal Republic to the Federal Republic of Yugoslavia, a rump state no longer able to claim control and unity over the other Republics. Led by Radovan Karadzic, the Serbs Bosnians opposed to the decision and, supported by the Yugoslav People's Army (often referred to as JNA), deployed the army in strategic locations and on 7 April in Banja Luka announced the detachment from Bosnia-Herzegovina. The declaration of independence combined with the targeting action of Serbs by Bosnian green berets caused the Republic of Srpska to declare their independence and to begin to secure their areas of influence, establishing Sarajevo as their capital. Every ethnic group organised itself in military formations and one of the bloodiest and most cruel conflict of the last decades took place. "The bloody wars of the last decade have left us with no illusions about the difficulty of halting internal conflicts - by reason or by force - particularly against the wishes of the government of a sovereign state. But nor have they left us with any illusions about the need to use force, when all other means have failed. We may be reaching that limit, once again, in the former Yugoslavia"³³. On 24 June 1992 the Bosnian authorities declared war, asking for equipment to the United Nation against Serbia. The war was characterised by brutality: soldiers and civilians were targeted alike, as it was an ethnic war: it led to ethnic cleansing, prisoner abuses and the massacres and mass rapes thousands of civilians by both sides. The sheer spectacle of complete disregard of human life had shocked the European community, and so when U.N. General Philippe Morillon arrived in the Bosnian enclave of Srebrenica in May

³² ESERCITO ITALIANO, *Bosnia Erzegovina 1995 – 2015*, in *Rivista Militare*, 2016, p. 3-7, available at: www.esercito.difesa.it/.

³³ Statement of the Secretary General Kofi Annan of 28 January 1999, on the situation of Yugoslavia and the intervention of NATO on the matter.

1993, he was desperately pressured by the people of the town to pledge his protection, and so hastily pledged it. The international community took part into the conflict promptly: on 21 February 1992, the Security Council approved Resolution no.743³⁴, which allowed the dispatch of the United Nations Protection Forces - UNPROFOR -, whose duty was to keep stability in the United Nations Protected Areas – UNPAs. On April 1992 the first peace keeping operations got to Croatia, in the meantime the Security Council imposed economic sanctions on Serbia and Montenegro through Resolution n°757³⁵. In addition, Resolution no.758³⁶, a French contingent was authorised to take control over the airport of Sarajevo, while on October 1992 a no-fly zone was imposed by Resolution no. 781³⁷ over all Bosnian lands. In 1995, the UNPROFOR included almost 40,000 Blue Helmets, members of 40 States: they were employed in assisting and refueling with humanitarian aids to the population, despite the massacre of over 8,000 Muslims in Srebrenica by the Bosnian Serb forces led by General Ratko Mladic. The continuous atrocities brought the attention of the United Nation, who tried to find a compromise by proposing an internal division of Bosnia-Herzegovina according to the three ethnical groups' area of living: Bosnian Serbs would have lost a fraction of their gains, but at the same time they would have resulted more solidified. The Markale Massacre in Sarajevo³⁸, 6th February 1994, drew the attention of NATO over the conflict, which demanded to Serbia in early 1994 to withdraw their heavy weapons down hills on the mountain around the city within ten days³⁹. Nonetheless, both Serbia and Russia saw NATO as overlooking their assessment: Boris Yeltsin, the first President of the Russian Federation, asked Karadzic to accept the ultimatum and, in return, Russian soldiers would enter the area. From mid-August 1995 a sequence of diplomatic activities was carried by, until 1st November 1995 the peace negotiations begun in Dayton: the parts were Alija Izetbegovic, the President of the Republic of Bosnia and Herzegovina, Franjo Tudman, President of Croatia and leader of the HDZ, Slobodan Milošević, President of the Republic of Serbia. German Chancellor Helmut Kohl, French President Jacques Chirac, UK Prime Minister John Major, U.S. President Bill Clinton, Spanish Prime Minister Felipe Gonzalez and Russian

³⁴ Resolution S/RES/743 (1992) of the U.N. Security Council of 21 February 1992, on the establishment of the United Nation Protection Force peacekeeping mission in the region.

³⁵ Resolution S/RES/757 (1992) of the U.N. Security Council of 30 May 1992, on the recognition of the failure by the Federal Republic of Yugoslavia in implementing Resolution 752.

³⁶ Resolution S/RES/758 (1992) of the U.N. Security Council of 2 June 1992, on solutions to find to solve the political situation in Bosnia and Herzegovina.

³⁷ Resolution S/RES/781 of the United Nation Security Council of 9 October 1992, on the establishment of the no-flight zone in Bosnia and Herzegovina, except for the UNPF and humanitarian assistance.

³⁸ J. KIFNER, *66 Die as Shell Wrecks Sarajevo Market*, in *The New York Times*, 6 February 1994, available at: www.nytimes.com.

³⁹ *Ibidem*.

Prime Minister Viktor Chernomyrdin witnessed the signature of the Dayton Agreement⁴⁰ among the formerly mentioned parties on 14th December 1995. The Dayton Agreement saw the establishment of a unified Bosnia-Herzegovina of two separate legal entities: Bosnia and Herzegovina, and the Republic of SRPSKA. Many disagreements nearly caused a deadlock, especially over the city of Sarajevo, but Milosevic cracked over Izetbegovic with the words: “You deserve Sarajevo; you stayed there through the siege and shelling”⁴¹.

1.9. War in Kosovo⁴²

Throughout the 1980s, Kosovo was one of the two autonomous provinces of the Socialist Federal Republic of Yugoslavia and it enjoyed somewhat autonomy within Serbia. Its population was composed roughly 90% by Muslim Albanians, while the left by Orthodox Serbians. Despite Kosovo had been part of Serbia since 1914, after Tito’s death this province experienced loss of autonomy because of Milosevic’s expansionist policy of Serbia, and years of new nationalism, which pushed the most of its resident to fight for independence from Serbia. As Milosevic came to power in 1989 as President of Serbia, the ethnic majority of Kosovo Albanians saw its rights and freedoms curtailed, up to the point that health and education for the Albanian population were precluded. During the conflict in Yugoslavia, also Kosovo rode the wave of independence, by declaring its independence on 7 September 1992. Anyway, it was not considered valid neither for Serbia, nor for the Western powers, and its declaration was ignored by all. Although the Yugoslav War did not influence the Kosovan situation that much, problems started to rise at its end, after Serbia and the new independent states of Croatia and Bosnia-Herzegovina signed the Dayton Agreement. The Kosovo Liberation Army (also known as KLA), formed in 1991, was an armed group of Kosovan Albanian guerrillas, who undertook a series of armed actions against the Serbian police forces in Kosovo with the aim of winning independence through force. The response from Milosevic, who had become President of Yugoslavia in 1997, was prompted: he sent more security forces in Kosovo to defeat the KLA actions. Brutalities were committed from both parts, yet the preponderance of force was on the Serbian security forces by reason of more units in the army. In virtue of increasing violence, the international community took care of the situation: on 31 March 1998, following the request of the Contact Group (whose members were the United States, the Russian Federation, the United Kingdom, Italy, France and Germany), the UN Security Council adopted Resolution no. 1160, which urged Yugoslavia (composed by Serbia and Montenegro, until the latter’s declaration of independence in 2006): “immediately to take the further necessary steps to achieve a political solution to the

⁴⁰ General Framework Agreement for Peace (also known as the Dayton Agreement) of 1 November 1995, on the peace treaty reached between Bosnia and Herzegovina and Yugoslavia. The Agreement also deals with the internal division of Bosnia and Herzegovina, establishing the Federation of Bosnia-Herzegovina and of the Republika Srpska.

⁴¹ R. COHEN, E. SCIOLINO, S. ENGELBERG, *Balkan Accord: The Play-By-Play 21 Days in Dayton: A Special Report.; In U.S. Eyes, 'Good' Muslims and 'Bad' Serbs Did A Switch*, in *The New York Times*, 23 November 1995, available at: www.nytimes.com

⁴² T. JUDAH, *Kosovo: War and Revenge*, New Haven, 2000.

issue of Kosovo through dialogue”⁴³, and to: “calls upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues”⁴⁴. Nonetheless, conflicts continued to intensify in mid-1998 and, to fight back the expanding presence of the KLA, the Yugoslav army targeted the Albanian civilian population: as reported by Franchini and Tzanakopoulos: “By the end of May 1998, 300 people were reported to have been killed, while refugee flows of 12,000 ethnic Albanians spilled into neighbouring Albania”⁴⁵. The alarming circumstances mobilise several bodies from several international institutions: border monitoring stations were established on the Kosovo-Albania border by the Permanent Council of OSCE⁴⁶. In September 1998, the UN Security Council adopted Resolution no. 1199⁴⁷: with it, the Council recognised the severe conflict that was going on in the region and it demanded for a ceasefire by both parts against the civilian population of Kosovo Albanians, as well as to the Federal Republic of Yugoslavia to: “facilitate, in agreement with the UNHCR and the International Committee of the Red Cross (ICRC), the safe return of refugees and displaced persons to their homes and allow free and unimpeded access for humanitarian organizations and supplies to Kosovo.”⁴⁸. Subsequently issuing the latest resolution, NATO delivered the “Activating Warning”⁴⁹, a statement which authorised NATO’s armed forces: “for both a limited air option and a phased air campaign in Kosovo” because of Milosevic’s non-fulfilment of his duties stated in Resolution n°1199. The Yugoslav president was able to negotiate an agreement with the Contact Group called Milosevic-Holbrooke, which was submitted to the UN Security Council and ratified as Resolution n°1203⁵⁰. According to it, the Yugoslav army would have left Kosovo to allow in the OSCE Verification Mission (KVM). However, despite those steps, the situation degenerated, and several actions of provocation occurred from both sides: on 15 January 1999, Serb forces attacked the village of Racak, killing 45 Kosovan Albanian civilians⁵¹. The event signed a turning point for the conflict because many western journalists and observers were there testifying

⁴³ Resolution S/RES/1160 of the United Nations Security Council of 31 March 1998, on the urgency of dealing peacefully with the tense situation in Kosovo, Art. 1.

⁴⁴ *Ibidem*, Art. 4.

⁴⁵ D. FRANCHINI, A. TZANAKOPOULOS, *The Kosovo Crisis (1999)*, in *International Law and the Use of Force: A Case-Based Approach*, Oxford, 2018, p. 594-622.

⁴⁶ Decision PC.DEC/218 of the Permanent Council of Organization for Security and Co-operation in Europe (also known as OSCE) of 11 March 1998, on the mission in Kosovo to set a frame for efficient and cooperative dialogue between Serbian and Kosovan authorities.

⁴⁷ Resolution S/RES/1199 of the United Nations Security Council of 23 September 1998, on the situation in Kosovo (FRY).

⁴⁸ *Ibidem*, Art. 4 (c).

⁴⁹ Statement to the press of the Secretary General of 13 October 1998, on the authorization by the North Atlantic Council to proceed with air strikes in Yugoslavia.

⁵⁰ Resolution S/RES/1203 of the United Nations Security Council of 24 October 1998, on the concerning humanitarian adversities occurring in Kosovo and on the need for a coordinated international common action.

⁵¹ Report S/1999/99 of the Secretary-General Kofi Annan to the Security Council of 30 June 1999, on the situation in Kosovo, p. 11-13.

and reporting the events on a global scale. As Yugoslav forces returned to Kosovo, they took back lots of KLA's previous conquered territories and a major portion of Kosovan Albanians were forced to flee their homes, south toward Albania. As a further attempt at negotiations, the Contact Group organised a peace conference in Rambouillet, France, in February 1999, and gave Serbia and Kosovo Albanians an ultimatum to find a peaceful agreement to end the conflict, otherwise they both would have faced military action. The Serbs rejected the deal, so NATO resolved to punish Milosevic and his army, and it began air strikes on military targets in Kosovo⁵² and throughout Serbia itself, under the name of "Operation Allied Force". Two days later, the Russian Federation, alongside with Belarus and India, proposed to the UN Security Council to qualify the NATO's intervention as a "violation" of the prohibition of the use of force⁵³. In the aftermath of an expansion of the bombing campaign by NATO, on 28 April 1999, the Federal Republic of Yugoslavia applied to the International Court of Justice against ten NATO Members, declaring that the country had been unlawfully subject of a violation of the prohibition of use of force and genocide, thus it requested provisional measures. As reported by Franchini and Tzanakopoulos: "The ICJ rejected the requests for provisional measures on 2 June 1999, on the basis that *no prima facie* jurisdiction existed with respect to any of the respondents"⁵⁴. On June 1999, after signing the Kumanovo Agreement, Serbia capitulated. Milosevic withdrew his forces from Kosovo to be substituted by UN soldiers. As Kosovan Albanian returned, tens of thousands of ethnic Serbs fled North to Serbia, and other nine years had to pass before Kosovo declared its independence officially, on 17 February 2008. Meanwhile, Milosevic was arrested in April 2001 and, under the U.S. pressure, the Yugoslav government was forced to extradite him. Soon after, in 2003, Yugoslavia changed from the Federal Assembly of Yugoslavia to the State of union of Serbia and Montenegro, even though Montenegro in 2006 held a referendum for its independence and separated from Serbia.

Chapter 2: The process of secession in Kosovo:

1. The international law's legal framework for secession of countries.

⁵² Report of Secretary General of NATO Lord Robertson of Port Ellen of 21 March 2000, on the air campaign conducted against Serbia as a consequence of non-compliance with humanitarian rights of President Milosevic.

⁵³ Report S/1999/328 of United Nation Security Council of 26 March 1999, concerning Belarus, India and Russian Federation: draft resolution.

⁵⁴ D. FRANCHINI, A. TZANAKOPOULOS, *The Kosovo Crisis (1999)*, in T. RUYSS, O. CORTEN, A. HOTFER (eds.), *International Law and the Use of Force: A Case-Based Approach*, Oxford, 2018, p. 597.

*1.1. States as subjects of International Law*⁵⁵

The definition of State and statehood is quite recent in history: in Middle Ages, and later, the primary holders of any form of power were the city-states and some little leagues of cities belonging to the same region. After the Napoleonic Wars and the Congress of Vienna on 1815, the political organisation embodied by the Nation-State form of government became the dominant one: compared with a city-state, a unified and sole holder of power could guarantee more stability and more control over a wider geographical area. The criteria to establish the concept of statehood were based on those assumptions above mentioned, and they were expressed in the 1933 Montevideo Convention. Also called “Good Neighbour Policy”, the Convention was signed to oppose the U.S.’ armed intervention in inter-American affairs, by setting out the definition, the rights and duties of a State. Article 1 lists all the characteristics required for starting a discussion over the definition of statehood, as it says that: “A state as a person of international law should possess the following qualifications: (a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter international relations with the other states”⁵⁶. The requirement of a permanent population does not consider relevant how the population came to live in a specific territory, as well as the size of a country’s population. The second requirement lists the necessity of having a defined physical territory, if not it is impossible to think about a State. A government here is understood as being effective, i.e. to be a government who is capable of granting law and order within a society, a necessary condition. The last requirement is the capacity of entering international relations: in the past, during the days of post-colonialism this requirement was a watershed for considering a country either still colonised or coloniser; today, however, it is not considered that relevant anymore. After having highlighted which are the requirements to meet by a foreign entity to acquire the position of statehood, it is necessary to look at the processes of recognition and independence needed within the international community. The concept of recognition is quite challenging to grab because there is a clear distinction to be considered between two legal approaches over the matter of whether recognition is required for a State rather than for a government. The declarative theory of recognition is the first, and it stays that recognition does not depend by the mutual acceptance by other international bodies but depends only whether an entity meets the requirements listed in the Montevideo Convention. The second is the so-called “constitutive theory”, which in a nutshell asserts that statehood exists if and only if an entity is recognised as such by the international community. It implies that, even if all requirements listed in the Montevideo Convention were met, it would be quite challenging for an entity to operate in the international legal system if already existing entities do not accept it. In Klabber’s words, “Recognition is, essentially, a political act: State X decides whether it recognises entity Y as a State, and may do so (...) because entity Y meets all requirements of statehood, but it may do so for different reasons, e.g. because it appreciates the government running entity Y”⁵⁷. Kosovo is

⁵⁵ J. KLABBERS. *International Law*, Cambridge, 2017, second edition.

⁵⁶ J. P. GRANT and J. CRAIG BARKER. *Encyclopaedic Dictionary of International Law*, Oxford, 2009, third edition.

⁵⁷ J. KLABBERS, *International Law*, Cambridge, 2017, second edition, p. 78.

experiencing problems within the international community due to lack of recognition by several countries, including its neighbours. The arguments from all sides are several: the U.S.A and the EU countries who recognised Kosovo's independence did so on the idea that a quick and peaceful solution was essential in the Balkans for more stability. On the other hand, the concerns raised are about the likelihood of creating an illegal precedent in the international political system, which could be seen as a wrongful example by minority groups looking for independence from the central entity. Countries like Sri Lanka and Cyprus' arguments on their lack of recognition are based on the assumption that the process of independence undertaken by Kosovo was illegal and it violated the Charter of the United Nations, which cherishes the unity and the sovereignty of States. Russia's position on the question seems quite straightforward, dictated by the necessity of standing up alongside with Serbia's decision of not recognising Kosovo's independent status.

1.2. Secession: what is it and how does it happen?

The word "secession" is used in the field of international law with the intent of describing "the action of withdrawing formally from membership of a federation or body, especially a political state"⁵⁸. It is possible to interpret the word "secession" by looking at two different perspectives: on one side, a secession is thought to occur through the break of any dependence linkage between two (or more) communities, without involving a geographical separation. Nonetheless, a more recent interpretation of the word "secession" involves the break between two (or more communities) within the same territory, with the aim of creating an independent political community. Kosovo followed the latter situation, by breaking its political and social ties with Serbia and acquiring territorial independence from Belgrade. Most of Kosovo's argument on independence is based on the concept of "self-determination": this term was introduced during the 19th century as the result of the idea that nations should be composed by a homogeneous group of people, sharing the same values, culture, language, etc. The definition of this *erga omnes* principle⁵⁹, as referred to by the international Court of Justice in East Timor case, is to fund in the 1966 Covenant on Civil and Political Rights, where Article 1, Part I, states that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"⁶⁰. Both the concepts are part of the international legal system, and a lot of debates have been raised during the past years around the numerous shades of secession processes. In the case of Kosovo, we are dealing with the case of a unilateral secession which has provoked a lot of frictions with Serbia and all those countries who sided with it. In this context the point of disagreement lies on the contrast

⁵⁸ Definition of "Secession" in British, noun (1), contributions in compilations and edited by Lexico Copyrights, S.v. "Secession", 2019, available at: www.lexico.com

⁵⁹ ICJ Judgement of 30 June 1995, *East Timor (Portugal v Australia)*, Rep. 90, paragraph 29.

⁶⁰ Resolution 2200A (XXI) of the United Nation General Assembly of 16 December 1966, on the International Covenant on Civil and Political Rights, Art. 1

between the right for every social group to self-determine their own political system, and the consequent process of erosion of power by a sovereign state whenever a minority group wants more room for its actions. According to the 2006 Serbian Constitution, Article 8, “The territory of the Republic of Serbia is inseparable and indivisible”⁶¹, while Article 182 declares that “there are the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija. The substantial autonomy of the Autonomous province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution”⁶². From this lecture, it is clear that Kosovo unilateral independence declaration was illegal under the Serbian Constitution. The UN Security Council and the European Union covered an important role as mediators between the two countries: the latter established in 2008 the EULEX, a mission launched in 2008 by the Common Security and Defence Policy of the European Union, whose purpose was to assist Kosovan authorities in establishing stable and independent institutions. The former, by implementing Resolution 1244 (1999), put the region under international control and made Kosovo’s independence been achieved *de facto*, after the NATO bombed Serbia in 1999. In addition, the International Court of Justice in its advisory opinion, asked on August 15th, 2008 by Serbian Foreign Minister Vuk Jeremic, on June 22nd, 2010 declared that “(...) The Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law”⁶³. (Art. 84, part A, section IV). Moreover, the Court addressed in Article 81 the claims made by some Member States on the legality of the declaration of independence of Kosovo by referring to previous cases. The Court pointed out that the determination of each situation depends on the occasion: “the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)”⁶⁴.

1.3. How did Kosovo independence take place⁶⁵

Following the abolishment of Kosovo’s autonomy as a province of Serbia in 1989, and after the breakup of Yugoslavia two years later, Kosovo lost its status as a federal entity within the Federal Republic, and thus deprived of rights similar to those of the other Republics. During the 1990s, Kosovans suffered from numerous discriminations and repressive actions from the Serbian government led by Milosevic: the political leader passed

⁶¹ Constitution of Serbia, Article 8, 2006.

⁶² *Ibidem*, Art. 182.

⁶³ ICJ Advisory Opinion of 22 July 2010, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, p. 403 Art. 84.

⁶⁴ *Ibidem*, Art. 81.

⁶⁵ M. RUSSELL, *Serbia - Kosovo Relations: Confrontation or normalisation?*, in *European Parliamentary Research Service*, 2019. Available at: www.europarl.europa.eu/.

laws which envisaged the exclusion of Kosovans from health, administrative and education system. The Kosovan leader Ibrahim Rugova reacted by endorsing a policy of resistance in the following years, meanwhile the Kosovo Liberation Army was formed, and it took over around 1998 by endorsing a series of armed reprisals against the Serbian governmental representatives. The Federal Republic of Yugoslavia found itself forced to displace its army in Kosovo to fight beside Milosevic's in an attempt to cease the Kosovan rebellion. In the month of June 1999, the international community stepped in: NATO proposed a peace agreement between the Albanian majority representation delegation and the Federal Republic of Yugoslavia during the proposing conference held in Rambouillet. The main purpose of the negotiation was to find a ceasefire between the two parts, but the contrasts raised from both sides. On one hand the Albanian majority could not accept any compromise involving any kind of subordination to the Serbian authority. On the other hand, Serbians could not accept any solution involving the independence of Kosovo from a political point of view, as then it was stated in Article 1 paragraph 1 "Kosovo shall govern itself democratically through the legislative, executive, judicial and other organs and institutions specified herein. Organs and institutions of Kosovo shall exercise their authorities consistent with the terms of this Agreement"⁶⁶. The lack of signature of the Agreement by the Russian and Serbian delegation pushed NATO in launching its bombing campaign against Yugoslavia in spring 1999. The reason behind the Operation Allied Force was, in the words of Professor Adam Roberts, "that there are some crimes so extreme that a state responsible for them, despite the principle of sovereignty may properly be the subject of military intervention"⁶⁷. The reaction over the Operation Allied Force was justified as a humanitarian intervention, and a lot of debates have sparked over this first case of use of armed force by NATO: it will be properly addressed later in this chapter. After 11 weeks of bombing, the Federal Republic of Yugoslavia withdrew its armed forces from Kosovo, which became a territory administrated by the United Nations: with Resolution no. 1244/1999⁶⁸, the Security Council "Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo", acting under the purposes of Chapter VII of the Charter of the United Nations. On 10 June 1999, the Administration Mission in

⁶⁶ Letter S/1999/648 from the Permanent Representative of France to the United Nation of 4 June 1999, on the Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, p. 9 Art.1 paragraph 1.

⁶⁷ A. ROBERTS, *NATO's "Humanitarian War" over Kosovo*, in *The International Institute for Strategic Studies*, vol. 41, no. 3, Autumn 1999, pp. 102-23

⁶⁸ Resolution S/RES/1244/1999 of the UN Security Council of 10 June 1999, on the deployment of international security presence on the territory of Kosovo, Art. 10.

Kosovo (UNMIK) was established, and it is still today performing its role of providing a reliable source of judiciary, executive and legislative power in Kosovo. The Resolution further established a NATO peacekeeping force called the Kosovo Force (KFOR) to help the administrative and security sectors of the new-born State. Over the years, Kosovo's desire for full independence grew and on 17 February 2008, the country declared unilaterally its independence from Serbia. The declaration contains a number of articles referring to the UN Security Council Resolution 1244 (1999). In Article 5 Kosovo fully accepted the presence of international bodies to supervise over the implementation of "a European Union-led rule of law mission". It also: "(...) invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities"⁶⁹. Moreover, in Article 8, Kosovo expressed its interest in taking part in the international law affairs by recognising that: "With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states"⁷⁰. Serbia found itself deprived of a geographical area which had been considered the heartland of the nation for centuries because of historical reasons. Despite the considerably high number of ethnic Albanians living in Kosovo and Metohija, the Serbian minority made its voice heard during the decision-making process, especially after 2008 under the political position taken by Belgrade. This is the reason why on 15 August 2008, Serbia presented a request to the International Court of Justice seeking an opinion on the lawfulness of the declaration of independence of Kosovo. As stated before, the Court ruled that the declaration of independence of Kosovo was done under lawful proceedings, in accordance with international law's principles. As a consequence of the divergent opinion between Kosovo and Serbia, from 2008 to 2015 the European Union mediated talks between the two governments: mediations brought to the conclusion of numerous agreements over the years, one of the most important being the Brussels Agreement signed on April 2013⁷¹. Within the framework of the Brussels Agreement, Serbia took a huge step forward on the normalisation of the diplomatic relations. The document was meant to integrate the Northern Kosovo municipalities, where Serbian majority live, into the national legal system, as well as providing some guarantees. Two examples are provided by paragraph 14 and 15, which provided neutrality from both sides in the respective political path and the

⁶⁹ BBC NEWS, *Full text: Kosovo declaration*, 17 February 2008 Available online: www.bbc.com.

⁷⁰ *Ibidem*, Art. 8.

⁷¹ Brussels Agreement of the First Agreement of principles governing the normalization of relations between Serbia and Kosovo of April 2013.

establishment for “An implementation committee (...) by the two sides, with the facilitation of the EU”⁷². During the past two decades, almost 33 agreements have been concluded between Kosovo and Serbia, even though their implementation has been and still is slow and incomplete, and this attitude has created several critical controversies. The topics over which agreements were concluded are different, and here I will report the situation over trade agreements as an example for showing how tense the situation is. According to the EU Parliament Briefing on Serbia-Kosovo relations, “since 2007, both Serbia and Kosovo have been committed to duty-free bilateral trade, as part of the central European free-trade area. A trade embargo between the two sides ended in 2011, when Serbia agreed to accept goods stamped 'Kosovo customs', with no national coat of arms or flag. In 2017, Serbia accounted for 12 % of Kosovo's foreign trade. However, in November 2018 economic relations ran into another obstacle: two weeks after imposing 10 % tariffs on imports from Serbia for the latter's campaign against international recognition of Kosovo, Pristina raised tariffs to 100 %, after Serbia allegedly blocked its bid to join Interpol. The measure is estimated to cost Serbia around €40 million a month in lost exports. Resisting strong EU and US pressure to drop the tariffs, Kosovo has pledged to keep them in place until it is recognised by Serbia; (it has since slightly softened its stance, demanding instead 'an international guarantee' of talks leading to mutual recognition)”⁷³.

2. Consequences of partial Kosovo's recognition ⁷⁴

In the words of Christian Hillgruber, “Recognition of a new state is an act that confers a status; as a result of recognition, the recognized entity acquires the legal status of a state under International law. In this sense, a (new) state is not born, but chosen as a subject of international law. Only when the new state has been recognized does it become a subject of international law, and this initially only with respect to the existing states recognizing it”⁷⁵. The European Union's criteria for recognising an independent State, especially after the dissolution of Former Yugoslavia, have assumed the aspect of those used for evaluating the capacities of States to enter into international relations within the EU's framework. From Slovenia and Croatia's declaration of independence from Former Yugoslavia to their recognition, the countries were treated as integral and constituent parts of the Yugoslav Federation. This evaluation granted to the civilian protection only for humanitarian reasons under international law during the Civil War, leaving out the protection granted by the prohibition of the use of force. When the German government during the Hague Peace Conference on Yugoslavia called for the “internationalisation” of

⁷²*Ibidem*, paragraph 15.

⁷³ Report (EU) PE 635.512 of the European Parliamentary Research Service of February 2019, on the EU's role in Kosovo-Serbia relations, p. 3. Available at: www.europarl.europa.eu.

⁷⁴ C. HILLGRUBER, *The admission of New States to the International Community*, in *European Journal of International Law*, no. 9, 1998, p. 491-509.

⁷⁵ *Ibidem*, p. 492.

the conflict, the doctrine of protection from the use of force became applicable under the principles of international law.

2.1. Kosovo's hybrid position

As mentioned before, today 102 States recognise Kosovo's independence. Kosovo's partial recognition can find reasons from different perspectives, being them political or legal. The legal effects of recognition of a sovereign entity by the international community has several consequences on several aspects: first of all, the documents of citizens of the new-born nation would be accepted as valid, thus all kind of acts performed in their country of origin would be recognised also abroad by other supranational entities. Secondly, it would be possible for Kosovo to enter with greater facility into international relations' dynamics, as well as becoming part of international organizations as Member State. Nonetheless, the partial recognition of Kosovo by Serbia and Russia, backed up also by China, has made difficult for the UN Security Council to reach some definitive decisions. Being both Russia and China two of the five permanent members of the Security Council, and being Russia a strong political ally of Serbia, decisions on the matter of Kosovo's administration are always threatened by the veto power of Russia and China. The hybrid status of Kosovo and the opposition of key countries within the Security Council are creating a lot of complications. An example is visible in the process for obtaining the UN membership. Article 4 of the Charter of the United Nations declares that: "1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council"⁷⁶. From the reading of Article 4, paragraph 1, it can be deduced that one of the requirements for obtaining the membership is to be a State ready to accept and to carry the obligations listed in the Charter. Recalling the definition of State mentioned in the present chapter, paragraph 1.1., the first obstacle for Kosovo is the statehood requirement. Member States who do not recognise Kosovo as independent argue their positions by relying on the fact that Kosovo acquired independence by committing a breach of international law. It follows that, under this perspective, the criterion of statehood is not met, thus Kosovo cannot be accepted as a member because is not considered a State. The second paragraph subordinates the acceptance of each candidature to a recommendation from the Security Council. This body is composed by 9 Member States, 5 being permanent (France, the UK, the USA, Russia, China), while the other 4's seats are chaired in rotation by the other MS. A decision to be valid during the voting session must be approved by the Security Council: this means that none of the 5 permanent members can vote against, otherwise the process would be blocked. It is clear

⁷⁶ Charter of the United Nations of 24 October 1945, Art. 4 paragraph. 1-2.

that Russia, being an ally of Serbia, and China, who urged for a definitive settlement of the situation of Kosovo⁷⁷, would use their veto power for any kind of decisions they would not consider appropriate to their views.

2.2. *Serbia and Russia v. European Union*

2.2.1. *Serbia and Russia*

From 2008 onward, several countries have recognised Kosovo as an independent country: as of November 2018, 108 Members of the United Nations have done it. Nonetheless, Cyprus, Greece, Spain, Slovakia and Romania, members of both the United Nations and the European Union, have not recognised Kosovo's independent status yet. The EU's position on the divergence of opinion is that "[it] welcomes the fact that, notwithstanding EU Member States' differing positions on Kosovo's status, the approach of diversity on recognition"⁷⁸. The case of Kosovo rises an important dilemma over the practise of recognition, which sometimes shifts from questioning the legality of its path toward independence to questioning the legality of recognising the act of secession. The EU memorandum on Resolution 1244 asserted that: "[g]enerally, once an entity has emerged as a state in the sense of international law, a political decision can be taken to recognise [sic] it"⁷⁹, hence recognition is not seen as a requirement for considering the condition of statehood legitimate and it takes place *de facto*. However, Serbia and Russia hold on the position that, since Kosovo's independence would alter the borders of Serbia without the latter's consent, legal recognition cannot occur. Moreover, the Serbian constitution itself does not leave space for any kind of territorial separation or autonomy. It can be said that Serbia and Russia are for *de jure* recognition. Nonetheless, Serbia and Russia's position may be contested: according to their reasonings, acts of secession between countries could occur only if both (or all) parts involved agree on it. If this would be the case, a considerable number of modern states could not be considered entitled to be defined legally as "State". On 31 March 2008, Russia declared the sending of military support to the Serbian minority living in North Kosovo for humanitarian purposes, bypassing the authorities' authorisations of the new-born government of Prishtina. By taking such decision, Russia implicitly declared its non-willingness to follow the Western countries' decision, led by the USA. From a political point of view, the contrasting position of Russia crushed with the USA position of recognising Kosovo as independent from Belgrade government. 2008 was the year of critical decisions to be taken by the Security Council on the issue of Iran and North Korea's nuclear power and possible disagreement over Kosovo's status would have jeopardise the coordinating actions required between those two giants of political

⁷⁷ H. XIN, *China urges continued effort to settle Kosovo issue via dialogue*, in *Global Times*, 20 November 2013, available at: www.globaltimes.cn

⁷⁸ Communication COM(2009) 534 of the Commission to the European Parliament and to the Council of 14 October 2009, on the fulfillment of Kosovo of its European Perspectives.

⁷⁹ Resolution S/RES/1244/1999 of the United Nations Security Council of 10 June 1999, on the deployment of international security presence on the territory of Kosovo.

relations on a global scale. Russia's position can be explained under several points of views: first of all, by recognising Kosovo as independent from Serbia, it would create a precedent in the international legal system where the Chechnya independent movement could refer to, and this possibility scares Russia which could lose additional territories where to exercise its political influence. A second reason is strictly connected with my latter point: during the early years of 1990s, the USSR dissolved, and the world experienced also the dissolution of its sphere of influence in Eastern Europe. Russia has always had interests in keeping a foot within the Western Balkans and its position was clearly shown during the years of the Socialist Federal Republic of Yugoslavia, and later in supporting Milosevic's decisions as a leader of the Federation. As Sonja Biserko pointed out: "With the change in international constellation and Russia's strong ambition to restore itself as a global power, Serbia became the Kremlin's strategic bridgehead in Europe, as well as the central "proving ground" for Russian public diplomacy and soft power"⁸⁰. An example of the consequences of years of influence of Russia over Serbia is the popularity that Vladimir Putin, the President of Russia, has acquired in Serbia. As a matter of fact, Serbian communication speakers consider him as the most outstanding supporter of the national interests of Serbia, especially in the matters regarding Kosovo. One of the key factors of the success of Mr. Putin in Serbia is the conviction that he has allowed Russia to get back on track. This incredible result has been perceived as the consequence of his "iron fist". At the same time, Belgrade is living under pressures exercised by the European Union on negotiating the status of Kosovo. The solution of the matter is seen necessary before proceeding with the completion of Serbia's request of becoming a Member State of the European Union. Russia is trying to block any type of change in Belgrade's government, as it is shown by the words of the Minister of Foreign Affairs of Russia, Mr. Sergej Viktorovič Lavrov: "Balkan countries should assess on their own the preconditions to the membership of the EU (...) its overt ultimatums about their choice between 'us' and 'against us' turns the Balkans into yet another battlefield in Europe"⁸¹.

2.2.2. *The European Union:*

The European Union and the countries who are also members of the United Nation Security Council are pushing Serbia for recognizing officially the independence of Kosovo. The main reason relies on the decision of supporting the right of self-determination of Kosovan – Albanians after the population experienced years of repressive acts conducted by the Serbian government. Those acts were the *casus belli* for NATO to start the bombing campaign against the FRY in 1999 until the NATO troops were able to enter the country and establish

⁸⁰ S. BISERKO, *The Kosovo Issue from Russia's perspective*, in D. L. PHILLIPS (ed.), *Threats and Challenges to Kosovo's Sovereignty*, Prishtina – New York, 2018, p. 76.

⁸¹ *Ibidem*, p. 82.

their military control, by putting Kosovo under its administration. In the following years, because of Russia's obstructionism, the occupying powers, which included France, Germany, the UK and the USA, were authorised to establish the Kosovo Force (KFOR). Nonetheless, the question of defining the status of Kosovo was never tackled officially. The EU and the USA negotiated with Serbia, believing that for Belgrade was more important becoming part of the European community rather than making demands over the control of Kosovo. Contrary to the EU predictions, Serbian nationalism spread and it overtook economic and trade interests. For this reason, the USA and the EU decided to support Kosovo's independence and, despite the refusal of Serbia, to establish a political entity to supervise Kosovo. Resolution 1244 was adopted by the Security Council on 10 June 1999, and it is the first international legal document mentioning the self-administration of Kosovo. As stated in art.3, the UNSC: "Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized"⁸². The coordination was mentioned in Art. 10, where it was decided that the UNSC: "Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo"⁸³. In Annex I it is mentioned that the reason for such establishment by the UNSC is motivated by reasons of establishing: "(...) an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA"⁸⁴. As a justification for its military intervention in the conflict, it is also interesting to notice that the resolution mentions the "international civil and security presence", without explicitly referring to the UNSC. This implies that there is no prohibition or obstacle to the mentor role that the EU would take over Kosovo. The Resolution envisaged the institution of the UNMIK (United Nations Interim Administration Mission in Kosovo), which is a mission planned to collaborate with the Kosovan governmental bodies.

⁸² Resolution S/RES/1244/1999 of the United Nations Security Council of 10 June 1999, on general resolutions for the conflict in Kosovo and the authorisation to deploy both civilian and military presence, Art. 3.

⁸³ *Ibidem*, Art. 10

⁸⁴ *Ibidem*, Annex I point 6.

3. Recent developments in the European area

On 10 April 2006, the Council of the European Union passed the Council Joint Action 2006/304/CFSP, on the establishment of an EU Planning Team (EUTP). By acting under the regards of Article 14 and Article 25, paragraph 3, of the Treaty on the European Union (TEU), the Council of the EU established a crisis management team in Kosovo “to provide technical advice as necessary in order for the EU to contribute to support and maintain the dialogue with UNMIK as regards its plans for downsizing and transferral of competencies to the local institutions”⁸⁵. Further intromission of the EU is seen in Article 2 about the tasks of the EUTP, such as: “6. Ensuring appropriate logistical support for a possible EU crisis management operation, including through the establishment of a warehouse capacity enabling it to store, maintain and service equipment, including transferred from other present or former EU crisis management operation, where this will contribute to the overall effectiveness and efficiency of the possible EU crisis management operation”⁸⁶. “7. Drafting and preparing threat and risk analysis, under the guidance of the EU SITCEN and the Council Security Office, for the various component parts of a possible EU crisis management operation in Kosovo and devising an indicative budget (drawing on the experience of OMIK and UNMIK) for the cost of security”⁸⁷. Furthermore, Article 6 places political and strategic control of the Political and Security Committee in the hands of the EUTP, who is going to act under the responsibility of the Council itself. During the Brussels European Council of 14 December 2007, “The European Council underlined that the negotiating process facilitated by the Troika between the parties on Kosovo's future status has been exhausted. In this context, it deeply regretted that the two parties were unable to reach a mutually acceptable agreement despite the Troika's comprehensive and good faith efforts, fully supported by EU Member States”⁸⁸. In addition, in accordance with the UN Secretary-General, the European Council agreed: “(...) that the status quo in Kosovo is unsustainable and, thus, stressed the need to move forward towards a Kosovo settlement, which is essential for regional stability. Such a settlement should ensure a democratic, multi-ethnic Kosovo committed to the rule of law, and to the protection of minorities and of cultural and religious heritage”⁸⁹. This document prepared the ground for the establishment of the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO. The mission was launched by the European Union with the aim of supporting Kosovan administration system, as well as helping to implement a judicial system capable of taking into account the ethnical multiplicity of the population for rightful legal decisions. From the very beginning, Serbia opposed the mission arguing that EULEX is a tool used by the EU to interfere even more in the Balkan region. Article 7 clearly delineates the opinion of the EU on the matter: “The Brussels European Council of 14 December 2007 underlined

⁸⁵ Joint Action 2006/304/CFSP of the Council of the European Union of 10 April 2006, on the establishment of an EU Planning Team regarding a possible EU crisis management operation on the field, Art. 1 paragraph 2, sub 2.

⁸⁶ *Ibidem*, Art. 2 paragraph 6.

⁸⁷ *Ibidem*, Art. 2 paragraph 7.

⁸⁸ Presidency Conclusion 16616/1/07 of the Presidency of the European Council of 14 February 2008, on the conclusions of the Brussels European Council of 14 December 2007, Art. 66.

⁸⁹ *Ibidem*, Art. 68.

the readiness of the EU to play a leading role in strengthening stability in the region in line with its European perspective and in implementing a settlement defining Kosovo's future status. It stated the EU's readiness to assist Kosovo in the path towards sustainable stability, including by means of a European Security and Defence Policy (ESDP) mission and a contribution to an international civilian office as part of the international presences”⁹⁰. Today the functions attributed to the EU within EULEX are reduced to two activities, which could be summed in: monitoring role and operating system. By monitoring activities, the EULEX safeguards the processes of the judicial Kosovan system since 14 June 2018, together with the duty of monitoring the prison system. Operation activities are limited to work alongside with the national police forces in granting public order and security, and to implement efficient programs of protection for war and political witnesses. On 22 July 2010 the International Court of Justice gave its advisory opinion over the conformity with international law of Kosovo’s self-declaration of independence. The request had been previously submitted by the Foreign Minister of Serbia Vuk Jeremić on 26 March 2008, since Serbia wanted to receive an opinion over the legality of the declaration being a breach of international law or not. The Court’s opinion is clearly expressed in section 84: “For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999”⁹¹. The Court expressed its interpretation also over the Security Council Resolution n°1244 (1999). “The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal *régime* which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis”⁹². On the matter whether the Kosovan government acted in breaching the assumptions listed in Resolution 1244, the Court held that: “Security Council resolution 1244 (1999) was essentially designed to create an *interim régime* for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement. In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. (...) By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo. Resolution 1244 (1999)

⁹⁰ Joint Action 2008/124/CFSP of the Council of the European Union of 4 February 2008, on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, Art. 7.

⁹¹ ICJ Advisory Opinion of 22 July 2010, *on Accordance with International Law of the Unilateral Declaration Of Independence In Respect of Kosovo*, paragraph 84.

⁹² *Ibidem*, paragraph 100.

thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo”⁹³. In order to further improve relations between the Serbian minority community in Kosovo on the north part of the country and the Albanian majority, the government of the two neighbouring countries signed an agreement on 19 April 2013 called Brussels Agreement. The main scope was to normalise the political relations between them. The 15 points present in the documents did not declare the recognition of Kosovo by Belgrade’s government, but it has been evaluated to be an historical turning point under the supervision of Mrs. Catherine Ashton, former High Representative of the Union for Foreign Affairs and Security Policy. The first point envisaged for “(...) an Association/ Community of Serb majority municipalities in Kosovo. Membership will be open to any other municipality provided e members are in agreement”, followed by point number 4, where it is declared that: “In accordance with the competences given by the European Charter of Local Self Government and Kosovo law the participating municipalities shall be entitled to cooperate in exercising their powers through the Community/Association collectively. The Community/ Association will have full overview of the areas of economic development, education, health, urban and rural planning”. The EU was entitled to cover the role of supervisor in the implementation of such agreement by point number 15. From a general reading, it is clear that the Agreement provided for a balanced distribution of autonomy for the Serbian minority living in Kosovo. Nonetheless, the police and the judicial powers would still be kept under the control of the government in Prishtina. Nowadays there is an extensive discussion over the effective implementation of the Brussels Agreement by Kosovo. On 17 December 2018 the Security Council met in New York⁹⁴ to discuss about some economic measures that Kosovo undertook in the commercial trades with Serbia. As reported by the Under-Secretary-General for peacekeeping Operations (DPKO) Mr. Jean-Pierre Lacroix, “(...) On 21 November, following Kosovo’s failed bid to join INTERPOL, the Government of Kosovo announced an increase in the tariff on goods imported from Serbia and Bosnia and Herzegovina from 10 to 100 per cent. (...) Belgrade, for its part, stated that Pristina had violated the Central European Free Trade Agreement and stressed that it would resume its involvement in the European Union (EU)-facilitated dialogue only once Pristina revokes the import tax. Key international partners, including the European Union, also urged the Government of Kosovo to revoke the tax.”⁹⁵. Moreover, few weeks later, Kosovo adopted: “(...) three laws, namely, the law on the Kosovo Security Force; the law on service in the Kosovo Security Force; and the law on the Ministry of Defence. The laws do not change the name of the Kosovo Security Force, which would require a constitutional amendment, yet they provide for

⁹³ *Ibidem*, paragraph 114.

⁹⁴ Report S/PV.8427 of the European Parliament of 17 December 2018, on document S/2018/1111 sent by President Vučić, on the recent political and economic development in Kosovo.

⁹⁵ *Ibidem*, p. 2

substantial changes to be implemented over a period of time to the mandate, role and strength of the Kosovo Security Force”⁹⁶. Belgrade’s government denounced the provisions “as an act of political aggression against Serbia and the violation of resolution 1244 (1999)”⁹⁷. During the discussion the President of Serbia, Mr. Aleksandar Vučić, claimed to be “(...) very worried, concerned about and even a bit afraid of and for the future not only of my people and our country, Serbia, but of the entire region”. He also affirmed that, from the Serbian point of view, that: “Serbia has invested huge efforts and great endeavour in maintaining the peace, tranquillity and stability of the entire region of the Western Balkans. We have done everything that we could have done, refraining from responding to different types of provocation from Pristina”, and accused Kosovo that it did not fulfilled its obligations stated in the first 6 points listed in the Brussels Agreement. “Kosovo has failed to put that into action and has no intention to do so in the future”. President of Kosovo, Mr. Hashim Thaçi, argued the establishment of the army as: “a direct function of capacity-building that will make our country better able to contribute to local security and beyond. Our aim is to shift the paradigm from a country that has been a consumer of security to one that becomes a contributor to peace and stability.”. From December 2018, discussions over further agreements between Kosovo and Serbia have been postponed by both sides. The decision of Kosovo to impose a 100% import tariff on Serbian goods caused the resignation of 4 mayors of Kosovan Serbs municipalities as a sign of protest. The main concern of the world community is that this disagreement would render void decades of diplomatic efforts for stabilising relationships in the Balkans. Moreover, there is also the intention of avoiding the rise of extreme-right movements who will bring additional instability, maybe another conflict between different ethnic minority groups.

Chapter 3: NATO and the International Tribunal

1. NATO intervention

1.1. The use of force

The ban of the use of force is the most important rule in international law (following some scholars). Before there was the distinction between international law to be applied in times of peace and international law to be

⁹⁶ *Ibidem.*

⁹⁷ *Ibidem.*

applied during war: war seen as a means to settle disputes and therefore it was considered to be a part of international law to be faced with a different approach from the whole framework of international legal actions. In 1899 and 1907 two conferences took place in the Netherlands with the idea that the use of force had to be limited in international law, and the treaties signed were lately collected in a series denominated “Hague Conventions”. These treaties were universal in the frame of the early XX century, and for the first time they concerned with fundamental issues within international legal framework. The issues addressed referred to the establishment of norms on the behaviour to adopt during conflicts, towards belligerents and civilians, as well as drafting a major frame for endorsing peaceful settlements of disputes during armed conflicts. The main ideas highlighted in the conventions are:

1. Ban of use of force: the main purpose of the declarations was to discourage Member States participating in the conference from using force to solve inter-states’ tensions. As a matter of fact, the convention wanted to encourage the use of peaceful means for the settlement of disputes, since it would be impossible to oblige any State to use peaceful means instead of war for resolution of conflicts. The crucial turning point was that States decided to insert in their future treaty some provisions on settlement of disputes: according to them, if any dispute would arise concerning the application of any treaty, those disagreements ought to be submitted to an arbitration body or to other peaceful dispute-settler. The Convention for the Pacific Settlement of International Disputes established the creation of a Permanent Court of Arbitration: “With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention”⁹⁸; “The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special Tribunal”⁹⁹.

2. Codify rules to apply in case of war: if States eventually would go to war, then there must be some rules to be respected in the conduct of hostilities, on how to treat prisoners and on which types of munitions are admitted. These rules already existed but they had never been codified. Some examples are reported in Article 7 of the 1907 The Hague Convention, where it is stated that: “the Government into whose hands prisoners of war have fallen is charged with their maintenance. In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them”¹⁰⁰. It is also clarified in article 22 that: “The right of belligerents to adopt means

⁹⁸ Convention (I) for the Pacific Settlement of International Disputes of 29 July 1899, Section I Chapter II Art. 20.

⁹⁹ *Ibidem*, Art. 21.

¹⁰⁰ Convention (IV) on Regulations concerning the Laws and Customs of War on Land of 18 October 1907, Section I Chapter II Art. 7.

of injuring the enemy is not unlimited”¹⁰¹. This norm puts an end to the belief that there are clear limits to the ways a state is allowed to conduct hostilities during both international armed conflicts and non-international armed conflicts. Until 1899 there were no obligations of such nature, each State could choose war over peaceful means and the respect of behaviour norms were not mentioned; from 1899 on, it was decided not to take away the freedom of countries to decide to go to war but rather to limit the use of force or, more precisely, to highly recommend countries to do so. Treaties among countries work on the assumption that *pacta sunt servanda*, i.e. obligations undertaken by one entity must be fulfilled. Consequently, the parties must apply the terms of the provisions expressed in the Conventions: instead of going to war, other peaceful solutions should be undertaken. The Conventions also introduced the positive obligation to submit disputes to an arbitration court, meanwhile introducing the negative obligation to use peaceful means. On 28 June 1919 the League of Nations Covenant was founded by President Woodrow Wilson in the aftermath of First World War during the Paris Peace Conference. The aim was to establish a peacekeeping international institution through the common action of Member States to prevent further conflicts to outbreak. The Council was composed by a restricted number of members and was established for settlement of political disputes. The Permanent Court of International Law was established by both Article 13 and 14. “The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement. (...) For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.”¹⁰². From this moment a distinction between political disputes (which do not deal with international law – e.g. use of territory, sovereignty) and legal disputes took place. On one hand, in case of political disputes, such as a breach in the Covenant, Member States of the League were obliged to submit the matter to the Council and also to wait for the recommendation of the Council. In case of compliance with the recommendation the result would be the protection by the League. War was allowed only if the two parties decided not to comply with the recommendation of the Council or when one party declared war on the other which did not comply with the recommendation. On the other hand, in the case of legal disputes about arbitration would occur, States needed to submit it to the Arbitral Court; if there was no arbitration obligation, then the dispute had to be submitted to the Permanent Court of International Justice. As stated in Article 14: “The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory

¹⁰¹ *Ibidem*, Section II Chapter I Art. 22

¹⁰² Covenant of the League of Nations of 28 June 1919, on the restriction to the recourse to war. Article 13.

opinion upon any dispute or question referred to it by the Council or by the Assembly.”¹⁰³. A further element of innovation is to be found in Article 16, which called for sanctions in case of non-compliance of the Covenant by any of its Member State: “Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not”¹⁰⁴. 1949 saw the signature of the Geneva Conventions, another fundamental step toward the establishment of an international framework of behaviour on the conduction of hostilities. The four Conventions dealt respectively with: amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwreck members of armed forces at sea, the treatment of prisoners of war and the protection of civilian persons in time of war. Common Articles present in the second Covenant establish that the Conventions apply to any international armed conflict, either between two or more contracting parties, whether the conflict is recognized as a “war” or not. Moreover, they also apply to cases of occupation, even if not resisted by force. The third Convention is worth mentioning for being the document which declared that: “The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention”¹⁰⁵. 8 June 1977 saw the application of the Additional Protocol (I) to the Geneva Conventions of 1949, concerning with the protection of victims during international armed conflicts. The definition of “international conflicts” was broadened as to include situations: “(...) in which peoples are fighting against colonial domination, alien occupation or racist regimes are to be considered international conflicts”¹⁰⁶. Since the 1950s, this has been the dominant form of conflict. Among the many issues raised by this new type of conflicts is the one of the status of the guerrilla fighters, particularly as to whether they are entitled to the prisoner of war status on capture. The Geneva Convention III identifies combatants as those: “(...) wearing a fixed and distinctive sign recognizable at a distance (...), carrying their arms openly”.¹⁰⁷ Additional Protocol (I) on the other hand identifies combatants (or rather freedom fighters in this context) as those: “carrying their arms openly during each military engagement”¹⁰⁸. This creates a sort of internal conflict between the Conventions and its protocols: this is a case where the protocol

¹⁰³ *Ibidem*, Article 14.

¹⁰⁴ *Ibidem*, Article 16.

¹⁰⁵ Geneva Convention (III) of 12 August 1949, on the Treatment of Prisoners of War, Art. 10.

¹⁰⁶ Additional Protocol (I) to the Geneva Conventions of 12 August 1949, on the protection of Victims of International Armed Conflicts on 8 August 1977, Art. 1(4).

¹⁰⁷ Geneva Convention (III) on the Treatment of Prisoners of War of 12 August 1949, Art. 4(A).

¹⁰⁸ Additional Protocol (I) to the Geneva Conventions of 12 August 1949 on the protection of Victims of International Armed Conflicts on 8 August 1977, Art. 43(1).

extends the effect of the Geneva Conventions but, at the same time, it expressly clarifies that such extension of legal effect has no effect on the legal status of the parties to the conflict or of any occupied territory. Additional Protocol (II) can be considered an addition, not a replacement, of Common Article 3 of the Geneva Conventions, since the fields of application are slightly different: Common Article 3 applies to any armed conflict not of international character occurring in the territory of a contracting party, without defining that term. Additional Protocol (II)'s scope is narrower, since it applies to the same type of conflict if it occurs between the state's armed forces and either dissident armed forces or other organized armed groups. Furthermore, to apply Additional Protocol (II), the groups in question must be under responsible command and exercise sufficient control over a part of the state's territory, that they are able to carry out "sustained and concerted" military operations and are able to implement the provisions of the protocol. Such qualifications ensure that the protocol only applies to conflicts of a certain degree of intensity: as proof of this, application to internal disturbances such as riots or isolated acts of violence is expressly excluded. The requirement of territory control, in particular, has made it so that the protocol is more likely to apply to types of civil war where the insurgents gradually acquire control of greater portions of state territory. The International Committee of the Red Cross recognises that the failure to observe rules regarding the use of force, also known as *jus ad bellum*, governed by the UN Charter's ban on use of force, should not lead a failure to observe any rules in the conduct of war, such as the *jus in bello*. Consequently, the law of armed conflict applies to all sides of all parties involved in a conflict, regardless of whether a party violated the *jus ad bellum* to start to war. This is the idea of equality of belligerents, better expressed by Mr. Hays Parks at a briefing on the Geneva Conventions held at the US Department of Defence on Monday, the 7 of April 2003: "The four 1949 Geneva Conventions specifically state in there that it doesn't make any difference who started the war, who is the party who was first off or what have you; that in any case, the conventions will apply. That's to sort of keep people from saying, 'well, he started it, and therefore, I don't have to follow the law of war.' Regardless of who started the conflict, each side has an obligation to follow the law of war"¹⁰⁹. Today the United Nations Charter bans the use of force in any possible situation and it has made the ban one of its core beliefs. Article 2 of the United Nation Charter states that: "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"¹¹⁰. The idea of promoting peaceful means to solve disputes is also expressed in this statement: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"¹¹¹.

1.1.1. The Security Council and the maintenance of International Peace and Security

¹⁰⁹ B. WHITMAN, W. HAYS PARKS, P.R. PROSPER, *Briefing on Geneva Convention, EPWs and War Crime*, 7 April 2003; on the same matter, E. CRAWFORD and A. PERT, *International Humanitarian Law*, Cambridge, 2015, p.31.

¹¹⁰ Charter of the United Nations of 26 June 1945, on the purposes and principles of the United Nations, Chapter I, Art. 1, paragraph 4.

¹¹¹ *Ibidem*, paragraph 3.

The composition and the role of the Security Council of the United Nations is defined in Chapter V of the Charter. Article 23 establishes that: “(...) The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council”¹¹², while Article 27 states that: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”¹¹³. For the purpose of our analysis, it is important to mention Chapter VI and Chapter VII of the UN Charter. The VI deals with the power of the Security Council to settle disputes in a peaceful way, such that the Security Council can only adopt recommendations. Chapter VII is used in case that the Security Council should consider necessary to solve a dispute in a non-peaceful way. Moreover, it includes a crucial section in the clarification of the role of the Security Council on its intervention in the international affairs, by authorising it to the use of non-peaceful means in some cases if it seems to be necessary¹¹⁴. In the same chapter, articles 40, 41 and 42 deal respectively with provisional measures, *i.e.* those non involving the use of force and those instead involving the use of force. However, it is within article 37 that it is possible to find the duty to refer the dispute to the Security Council. Article 39 ensures that the Security Council is the governmental body who 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 and 42, to maintain or restore international peace and security. There is a preliminary requirement to be met by the Security Council in order to adopt resolutions concerning Chapter VII, and it relies in article 39: the Security Council can decide what measures to take if it qualifies the situation object of the resolution as either a threat to peace, or as a breach of peace or as an act of aggression. Only in the framework of Chapter VII, the Security Council can take binding decisions. However, it is the Security Council itself to qualify the situations according to art. 39, because in the article we only have a list of the situations in which the Security Council can act, but it is on the discretion of the SC to define them. Because of the veto power of the permanent members, the Security Council has not yet qualified a situation as an act of aggression. However, thanks to wide interpretation of the concept of “threat” to the peace, the Security Council was able to adopt important resolutions during the past decades to deal with conditions of conflicts. The breach of peace is defined when a situation of peace is interrupted because a war started, regardless of which state declared war first. Both states contributed to the escalation of violence that generated the war. Therefore, the Security Council can act in the framework of Chapter VII, even without having to establish if there was responsibility of one of the parties. The condition of threat to the peace is not clearly defined within the UN

¹¹² Charter of the United Nations of 26 June 1945, on the purposes and principles of the United Nations, Chapter V, Art. 23, paragraph 1.

¹¹³ *Ibidem*, Art. 24, paragraph 1.

¹¹⁴ Charter of the United Nations of 26 June 1945, on the purposes and principles of the United Nations, Chapter VII, Art. 42.

Charter. Despite that, there is a list of situations that have come to be recognised as such during the decades through the practise of the Council. One of these occurs when internal conflicts within a State degenerated in international conflicts: there may be refugees moving across borders, the regional area can be affected by a domestic conflict, and a general frame of violence could endanger to further escalation of violence among a greater number of States. Gross violations of human rights constitute a threat to the peace too: for instance, Resolution 1333 (2000) against Afghanistan was adopted by the Security Council even if there was no international conflict or breach of peace.

1.2. International Criminal Court and the four “core crimes”

In the aftermath of World War II, it was decided by the winning countries to set up tribunals to deal with the atrocities committed by the Nazis that presented innovative characteristics compared to the traditional post-war tribunals. Before this conflict, it was of common use by the winning countries to set up trials led by different national courts, even to take foreigners to trial. By the second half of 1945, a long series of trials were held in Germany in the city of Nuremberg, with the aim of judging the crimes committed by the higher-profile members of the political, economic and judicial German leadership. Those trials were lately named “Nuremberg Trials”. The first held was the International Military Tribunal, who could be considered an important groundbreaker in the field of international criminal law. Its innovative international footprint and its extended jurisdiction introduced new important delineations of the international crimes and it opened the door to the discussions over the personal jurisdiction. The Nazi leaders were persecuted on three main crimes: war crimes, crime of aggression and crimes against humanity¹¹⁵. Except for the first category, crimes against humanity and crime of aggression were difficult to deal with, being that the first time a court discussed on such matters as an activity not contemplated and not accepted during war time. The most innovative category was, in fact, the section on the crimes against humanity, defined as: “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated”¹¹⁶. Controversialities arose especially by the enunciate of the last line of the paragraph: for the first time ever, the freedom of states to treat their own citizens as they saw more fit was limited by international law if a crime is committed “whether or not in violation of domestic law of the country where perpetrated”¹¹⁷. The crime of aggression represents a different case in several aspects: first of all, no shared agreement was reached by the contracting parties during the initial negotiations. It did not come by surprise, since it is perfectly understandable that while an act of aggression always

¹¹⁵ Charter of the International Military Tribunal of 14 November 1945, on the establishment of IMT and on the definition of international crimes, Section II, Art. 6.

¹¹⁶ *Ibidem*, paragraph C.

¹¹⁷ *Ibidem*.

involves the use of force, on the other hand some acts that involve the use of force could be more acceptable than others, and thus been justified as an act of self-defence. Despite that, during the 2010 Kampala Conference the participant States reached a common agreement on the definition of an act of aggression as: “(...) the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”¹¹⁸ and as an act when occurs: “(...) the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations (...)”¹¹⁹. Further problem is constituted by the role of the UN Security Council: by acting under Chapter VII of its Charter, the Security Council is the international body that must first the existence of an act of aggression. Therefore, a prosecutor must wait until the Security Council define it as such through common agreement of its Members. Only after having obtained the identification, the prosecutor can start investigations *proprio motu*¹²⁰.

Subsequently, the International Criminal Court came to have jurisdiction on a fourth crime also, which lately became part of the list of the three above mentioned “core crimes”: genocide. Right after the Holocaust, in 1948, the Allied Powers held the “Genocide Convention”: during it, the participants defined the crime of genocide as: “(...) any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such : (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group”¹²¹. The main criteria to distinguish a general killing of people from a genocide crime relies on the *dolus specialis*, i.e. on the specific intent by an entity to kill targeted people “(...) with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”¹²². The definition is highly debated in the legal field, since it seems to leave out the “mass killings” crimes, as it occurred in the case of the Philippines. An example is the killing of almost 8,000 Muslims by the Serbian authorities in Srebrenica in 1995: the event was considered by the International Court of Justice¹²³ as a crime of genocide.

1.3.NATO intervention in Serbia – Kosovo Conflict

¹¹⁸ Amendments C.N.651.2010.Treaties-8 to the Rome Statute of the International Criminal Court of 11 June 2010, on the definition of the act of aggression, Article 8 bis, n°1.

¹¹⁹ *Ibidem*, n°2.

¹²⁰ Amendments C.N.651.2010.Treaties-8 to the Rome Statute of the International Criminal Court of 11 June 2010, on the definition of the act of aggression, Article 15 bis, n°6.

¹²¹ Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, adopted by the General Assembly on the United Nations on the definition of the crime of genocide, Art. 2.

¹²² *Ibidem*.

¹²³ ICJ Judgement of 26 February 2007, *on the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*.

The NATO intervention in the Yugoslav War and then, later, in the Kosovan conflict, signed a moment of highly debated controversies over the legal basis required for conducting such actions. The international law's formal system does not have the exclusivity in generative power's field. However, in the world's history, there is not any precedent to the NATO bombing air campaign conducted in Serbia and this lack creates some uncertainty. At the same time, the role of State's practice is still crucial to shaping international legal norms, since any final arbiter of international disputes or specific sources of norms is absent. Without any doubts, it can be said that the Kosovan War has marked an end to the classical conduction of actions by the Security Council on the matter of the use of force. Before the late 1990s, the position of the Security Council was of adapting all its legitimated and necessary operations, which envisaged the use of force, within circumstances of threat. Therefore, its actions were justified by the need of guaranteeing common interstate defence. Moreover, the peculiar case of Kosovo seems to have given rise to the possibility of allowing the use of force by NATO for cases of humanitarian violations, in order to protect minorities or portions of the population from being targeted by a State. After 20 March 1999, Serbian and Yugoslav forces kept intensifying attacks against civilians and their properties, as well as against combatants. As a result, in the same period, almost 200,000 Kosovar Albanians were displaced either internally or in neighbouring countries and Western Europe. The targeting of civilians connected (even only supposedly) to members of KLA, and the type of brutalities committed by the Serbian and Yugoslav authorities were violent enough for justifying the forceful intervention of NATO within the conflict. Moreover, despite the attempts of the international community to act as mediators in the dialogues between Serbia and Kosovo, a compromise was not reached. Although the Kosovans signed the Rambouillet Agreement, Belgrade did not accept the provision allowing the intervention of NATO within national territories to guarantee the observance of the agreement. An additional reason for justifying the intervention of NATO relies upon the urgency to oppose to the so-called "Operation Horseshoe", an allegedly ethnic-cleaning plan set up by the Serbian government implemented against the Kosovar-Albanian majority in Kosovo. The United States President Bill Clinton justified the intervention of NATO on the ground of several factors, being the prevention of humanitarian critical circumstances, to preserve the reliability of NATO itself and to maintain an almost stable equilibrium in Eastern Europe¹²⁴. Between 1998 and 1999, the UN Security Council had passed several resolutions and had warned Serbia of its unlawful means of coercion: acting under Chapter VII, the Council passed Resolution 1160, which imposed the economic sanction of embargo on Yugoslavia until: "[Yugoslavia cooperates in a constructive manner in] (a) begun a substantive dialogue in accordance with paragraph 4 above (...), (b) withdrawn the special police units and ceased action by the security forces affecting the civilian population; (c) allowed access to Kosovo by humanitarian organizations as well as representatives of Contact Group and other embassies; (d) accepted a mission by the Personal Representative of the OSCE Chairman-in-Office for the Federal Republic of Yugoslavia that would include a new

¹²⁴ Press Release (1999)040 of NATO of 23 March 1999, on the position of NATO on Kosovo.

and specific mandate for addressing the problems in Kosovo, as well as the return of the OSCE long-term missions; (e) facilitated a mission to Kosovo by the United Nations High Commissioner for Human Rights”¹²⁵. Moreover, the Security Council referred to its intention to find a solution to the situation in Kosovo on the assumptions of “ (...) territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo, and expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration”¹²⁶. Through Resolution 1199, the Council gave notice of its concerns on the: “(...) excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes”¹²⁷. Because of it, the Council demanded all parties to “immediately cease hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe”¹²⁸ in order “(...) to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo”¹²⁹. Indeed, the Security Council had authorized the use of force in Kosovo in the framework of Resolution 1203¹³⁰, being “(...) deeply alarmed and concerned at the continuing grave humanitarian situation throughout Kosovo and the impending humanitarian catastrophe, and re-emphasizing the need to prevent this from happening”¹³¹. Further reason to find an explanation to NATO’s involvement without the approval of the Security Council relies within Article 53 of the United Nations Charter. This article refers, as an exception, to enforce actions under regional arrangements and/or by regional agencies outside of the previous approval by the Security Council only when it is necessary to take: “(...) measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a

¹²⁵ Resolution S/RES/1160 (1998) of the United Nations Security Council of 31 March 1998, on the imposition of embargo on Yugoslavia, Art. 16.

¹²⁶ *Ibidem*, Art. 5.

¹²⁷ Resolution S/RES/1199 (1998) of the United Nations Security Council of 23 September 1998, on the call for meaningful dialogues between the belligerent parts.

¹²⁸ *Ibidem*, Art. 1.

¹²⁹ *Ibidem*, Art. 3.

¹³⁰ Resolution S/RES/1203 (1998) of the United Nations Security Council of 24 October 1998, on the request of endorsement by the Federal Republic of Yugoslavia and Serbia of previous resolutions, Art. 9: “(...) in the event of an emergency, action may be needed to ensure their safety and freedom of movement as envisaged in the agreements referred to in paragraph 1 above”.

¹³¹ *Ibidem*, preamble.

state”¹³². An example to be remembered on this matter is the conduction of complicated peacekeeping operations in Africa: in Liberia and in Sierra Leone the interventions were conducted without the explicit authorisation of the Council before the action. However, they were lately evaluated as having received the authorisation implicitly. The purposes of multilateral action are several, for example to prevent (un)intentionally rapid escalation of violence by States or third parties, or to appeal to a broader communitarian body of norms to regulate what is happening. Form the USA’s point of view, the maintenance of the Council’s authority is important, especially in matters of international security. Supposing that the authority deriving from NATO’s opportunity to hold arguments in favour of any mission requiring the use of force would fail, the importance of the USA’s position as Permanent Member of the Security Council would be compromised globally. Aside from regional security, humanitarian intervention is the strongest motivation used by NATO to justify its armed interference within the Balkans. Today international law’s *erga omnes* principle forbids any kind of violations of human rights and the breach of humanitarian law from a State toward its citizens. It also calls for any State to intervene whenever those situations occur, to respond and to put an end to those wrongful actions through nonforcible countermeasures and actions. However, the conflict in Kosovo raises the debate about whether international law’ principles envisage for exceptions to justify the use of force by a collective or individual body, with the purpose of ending breaches of humanitarian laws. However, an exception to the use of force in case of humanitarian intervention will not be found in the Charter of the United Nations; besides, “humanitarian intervention” is not defined either. This lack gives space to a higher number of cases to be labeled under this description according to each country’s personal discretion. An example is shown by the military intervention of India in East Pakistan during the civil war of 1971 to allegedly protect the ethnical minority of Bengali. India’s decision was condemned by a great majority of the General Assembly, because it was plausible that the interests of India were going beyond the mere humanitarian protection. Usually the humanitarian intervention has been justified by intervening States basing their reasons on some allegedly requests of the government concerned. Nonetheless, as it is perfectly perceivable, humanitarian intervention might leave space for other political reasons for intervention, such as a stronger control from State A over State B’s territory. NATO’s interpretation of the label “humanitarian intervention”, for instance, includes the “moral obligation” to intervene via the collective actions of some of its Members also because of the flood of displaced that were moving toward other neighbouring nations. By doing so, the aim was to prevent further critical humanitarian situations also in other countries. NATO’s intervention may have created a precedent for a new settlement of general international law, by offering different perspectives of discussion. On one hand, it could be argued that by assigning a more direct involvement of the United Nations within the protection of humanitarian law, its legitimacy could increase and a more powerful organisation could be used as a deterrent for future breaches of general international law. On the other hand, a discussion on morality might be opened, on the

¹³² Charter of the United Nations of 26 June 1945, on the arrangements of the regional arrangements, Chapter VIII, Art. 53.

assumption that the United Nations was founded to prevent further conflicts after the Second World War by peaceful means of resolution of tensions. The aim of granting international security and human rights are listed in Article 2 of the Charter, and the use of force might violate those fundamental principles of the international organisation. Article 51 also envisages a permissive interpretation of the use of force if justified for purposes of self-defence: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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”¹³³. Besides, NATO’s cross-border operation was anticipated by multiple similar situations, all justified by the humanitarian interventions: just thinking about the USA, there are several cross-border missions that were undertaken in various Central and South America’s countries. However, the case of NATO is peculiar for the interplay of both legal and political reasons: according to the UN Charter, interventions shall be authorised through the positive vote of three-fifth of the Council’s members, plus the absence of veto from the five Permanent Members. By referring to chapter 2, paragraph 2.2. of this thesis, the positions of the five Permanent Members were opposed: on one side the United Kingdom, the USA and France (supported by the great majority of the European Union’s States) were in favour of independence of Kosovo, while on the other side Russia and China supported the stance of Serbia of keeping the integrity of the country as such. Someone might suppose that the armed intervention of NATO took place without waiting for the official authorisation by the Security Council because worried about the (almost predictable) negative outcome from the voting session. While someone would support the breach of international law by justifying it as necessary for ending a humanitarian crisis, in is also true that the interpretation of the wording “humanitarian crisis” is so broad that it could create a precedent in international law and be used by different States for justifying intrusions in foreign affairs for a personal advantage.

2. United Nations Security Council’s answer to the NATO’s intervention

The International Contact Group, composed by France, Germany, Italy, Russia, the UK and the USA, was the first international response to the Kosovan conflict, previously it dealt with the Bosnian War. Despite all the efforts, the Group was not highly cohesive, as it is shown by the failure of concluding the Rambouillet Agreement between Kosovo and Serbia. Among the six statements issued by the Contact Group between 1998 and 1999, on 8 July 1998 it declared that: “the overall situation in Kosovo remains tense. The Contact Group noted with deep concern that, despite vigorous efforts undertaken by the members of the Contact Group, the prospects of a peaceful settlement have deteriorated since the Contact Group’s meeting in London on June 12, 1998. Although the primary

¹³³ Charter of the United Nations of 26 June 1945, on the purposes and principles of the United Nations, Chapter VII, Art. 51.

responsibility for the situation in Kosovo rests with Belgrade, the Contact Group acknowledges that armed Kosovo Albanian groups also have a responsibility to avoid violence and all armed activities. The Contact Group reiterated that violence is inadmissible and will not solve the problem of Kosovo: indeed, it will only make it more difficult to achieve a political solution. The Contact Group stressed its condemnation of violence and acts of terrorism in pursuit of political goals, from whatever quarter”¹³⁴. The critical situation was subject to the concern of the UN Secretary General Kofi Annan, actively involved in finding a solution to end the conflict. Some scholars would consider parts of his statements to have provided NATO with basis for proceeding, despite the fact that the Council has never explicitly authorised the use of force, as mentioned in Chapter VIII of the Charter. Moreover, the direct and passionate involvement of the Secretary General in the affair, alongside with his role played as member of the European Union and of the NATO, could reinforce such view. Nonetheless, because of China and Russia’s resistance to the military intervention, the Security Council seems unluckily to have been in the position of allowing NATO to intervene with a UN permission. Despite the several and continuous calls for a peaceful settlement of disputes, together with the condemnation of all Serbian and Yugoslav’ violent actions permitted by the government, the Council worked together with the International Contact Group. The two bodies recognised the need for keeping dialogues open between all parties, while ceasing immediately hostilities and maintaining a cease-fire on Kosovan territories. In addition, they kept pushing for an immediate improvement of the humanitarian conditions of the population to avoid humanitarian casualties. After signing Resolution 1203¹³⁵, the Council welcomed the agreement concluded on 15 October 1998 in Belgrade between the Federal Republic of Yugoslavia and NATO, providing for the establishment of complementary verification mission by OSCE with a new air mission over Kosovo. Nonetheless, the October Agreement failed to be rightfully implemented, and the situation led the Security Council to express its concerns on the rapid escalation of violence and degradation of the humanitarian conditions. From a juridical perspective, the UN expressively prohibits the threat of the use of force “(...) against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations”¹³⁶. The wording of Article 2(4) of the UN Charter was clarified in a subsequent declaration of the General Assembly on the interpretation of non-intervention behaviour expected by the Member States. “No State or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and

¹³⁴ Statement of the Contact Group of 8 July 1998, on the meeting held in Bonn on the critical positions of Kosovo and Serbia’s governments.

¹³⁵ Resolution S/RES/1203 (1998) of the United Nations Security Council of 24 October 1998, on the request of endorsement by the Federal Republic of Yugoslavia and Serbia of previous resolutions,

¹³⁶ Charter of the United Nations of XXXX, Art. 2, paragraph 4.

cultural elements, are in violation of international law”¹³⁷. From this lecture, it is possible to derive the conclusion that the United Nations should have condemned the NATO intervention because of several reasons: first, NATO acted without the Security Council’s authorisation to conduct any armed intervention, despite its subordination to the Council. Indeed, as the scholar Joyner states: “(...) the members of the United Nations have delegated the use of force to (...) the UN Security Council, the primary and authoritative role in the resolution of international disputes. In doing so, the UN member states, including those comprising NATO, have taken upon themselves binding obligations under international law to respect the terms of the UN Charter and its established procedures for bringing collective force to bear on situations of threats to international peace and security”¹³⁸. Secondly, the widespread violations against the population did not stop totally with and after the intervention of NATO. The choice of conducting an airstrike operation may be contested on the assumption that during the bombing operation casualties occurred also among Kosovo Albanians, and the overall military operations were undertaken for debilitating the forces of Serbia and of the Socialist Federal Republic of Yugoslavia. Indeed, the removal of the OSCE observers gave a further gate-away to the Yugoslav army to perpetrate violence against civilians. The answer given by the UN Security Council following the NATO intervention was uncertain: on one side, politicians as the Secretary General Kofi Annan condemned the interference of the international community via the use of force. During different discussions, a great components of the international community expressed its opposition. On 24 March 1999, disagreements were expressed during the Security Council’s meeting by Belarus, China, Cuba, India, Namibia, Russia and Ukraine, alongside with the Federal Republic of Yugoslavia¹³⁹. The non-conformity of NATO to the UN Charter’s doctrine was expressed in the Final Document released at the end of the Non-Aligned Movement (NAM)’s XIII Ministerial Conference. In addition, Russia, India and Belarus proposed a draft resolution to the Security Council on March 1999 demanding: “an immediate cessation of the use of force against the Federal Republic of Yugoslavia and urgent resumption of negotiations”¹⁴⁰. However, the draft resolution was overcome by a three to twelve voting session. Another example of the blurred position of the Security Council lies within Resolution 1244, where it requested that: “The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment (...)”¹⁴¹. It seems that the Council provided NATO with an *ex post facto*

¹³⁷ Declaration A-7RES/2625 (XXV) of the General Assembly of the United Nations of 24 October 1970, on the proclamation and clarification of general principles of international law concerning cooperation among States, section on the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.

¹³⁸ D.H. JOYNER, *The Kosovo intervention: Legal Analysis and a more Persuasive Paradigm*, in *The European Journal of International Law*, vol.13, n°3, Oxford, 2002, p. 600-601.

¹³⁹ Meeting S/PV.3988 of the United Nations Security Council of 24 March 1999, on the expression of opinions over NATO’s actions in Kosovo.

¹⁴⁰ Draft Resolution S/1999/328 of the Russian Federation, India and Belarus of 26 March 1999, on the cessation of the use of force in the Federal Republic of Yugoslavia, Art. 1.

¹⁴¹ Resolution S/RES/1244 of the United Nations Security Council of 10 June 1999, Annex II, Art. 4.

authorisation, and in any part of the resolution is possible to find a condemnation. Yet, it might be argued that such lack could be unlikely be seen as a consent to act.

3. International Criminal Tribunal for former Yugoslavia:

3.1 Trials and crimes related to Kosovo.

During the Kosovo War crimes were widely perpetrated, despite it lasted shorter than the other Balkan conflicts. In order to deal with the atrocities committed during war time, together with the humanitarian emergency caused by the displacement of thousands of Kosovo Albanians, the international community decided to establish two institutions to assign jurisdiction for war crimes: one is the International Criminal Tribunal for the former Yugoslavia, while the second is called “64-Panels”, called as such by the name of the regulation that established it. The International Criminal Tribunal for the former Yugoslavia (ICTY) was the same that dealt with cases occurred during the break-up of the Socialist Republic of Yugoslavia in Bosnia and Herzegovina by Serbian authorities. It was established in 1993 by Resolution 827 of the Security Council on 25 May, acting under Chapter VII motivated by restoring peace and international security, and it has jurisdiction over four main crimes: breach of the Geneva Conventions on humanitarian laws, violation of the laws of war, crimes against humanity and genocide (the latter being explained previously in this same chapter). The Tribunal is composed by the Office of The Prosecutor (OTP), the Chambers and the Judges. The Prosecutor is a person nominated by the Security Council to investigate on alleged crimes and to collect evidences. The Prosecutor who first brought the attention to Kosovo was the Chief Prosecutor Justice Louise Arbour, especially after the intensification of violence and after the Council passed Resolution 1160, which condemned the use of force by Serbia against Kosovo and it imposed an embargo on the Federal Republic of Yugoslavia. During the same days, the Council authorised the Prosecutor to start gathering information on the humanitarian crisis and on the incidents that may fall under the Tribunal’s jurisdiction. Resolution 1203 was a step forward officialising the role of the Tribunal to judge the situation: “[The Security Council]calls for prompt and complete investigation, including international supervision and participation, of all atrocities committed against civilians and full cooperation with the International Tribunal for the former Yugoslavia, including compliance with its orders, requests for information and investigations”¹⁴². According to the Prosecutor, the discussions and negotiations on peace conducted during the first months of 1999 did not bring to any peaceful solution or change, thus signing the failure of the attempts of dialoguing. Surprisingly, the Prosecutor of the ICTY addressed an indictment directly to high-profile Serbian politicians, among them resulted also Slobodan Milosevic. By referring to Article 7(1) of the Statute of the Tribunal, it accused the men of holding individual criminal responsibility: “for the crimes alleged against him in this indictment under Articles

¹⁴² Resolution S/RES/1203 (1998) of the United Nations Security Council of 24 October 1998, on the authorisation of the ICTY to investigate on alleged crimes in Kosovo.

3, 5 and 7(1) of the Statute of the Tribunal. The accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of these crimes. (...) The purpose of this joint criminal enterprise was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province. To fulfil this criminal purpose, each of the accused, acting individually or in concert with each other and with others known and unknown, significantly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him”¹⁴³. It further accused them of having deported Kosovo Albanians internally displaced and to have committed crimes against humanity, chargeable under Article 5 of the Statute of the Tribunal. As said before, the mandate of the International Criminal Tribunal for the Former Yugoslavia was established by Resolution 827, preceded by Resolution 808. In the latter, issued in 1993, there was the request to the UN Secretary General to draft a Statute for an international tribunal which would have had jurisdiction over the severe violation occurred during the break-up of Yugoslavia. After some exchanges of opinion between the Secretary General and the Council, it was decided to establish the International Tribunal under the action of the Security Council, by referring to Chapter VII of the UN Charter. Despite some critics against the Security Council, believed to have exceeded its powers since Chapter VII does not authorise for such decisions, the establishment of the mentioned International Tribunal was addressed by Article 41 of the UN Charter, the norm which gives broad powers on the measures believed to be more appropriate to solve threats of international security and peace. The second body that dealt with the judgement of crimes occurred in Kosovo is the “64 Panels” Court. This body was established following the decision of the UN Interim Administration Mission in Kosovo (UNMIK) to design a judicial organ to determine responsibilities of perpetrators composed by domestic and international judges. The decision to operate in such manner was justified by two reasons: on one hand, the national Kosovan judicial system would have been strengthened through the support of international judges, while at the same time the international prosecutors could take up cases that the ICTY could not work on, as a result of the lack of mandates. Article 2 establishes that: “Upon approval of the Special Representative of the Secretary-General in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate: (a) An international prosecutor; (b) An international investigating judge; and/or (c) A panel composed only of three (3) judges, including at least two international judges, of which one shall be the presiding judge, as required by the particular stage at which the criminal proceeding has reached in a case”¹⁴⁴. Moreover: “Upon designation by the Department of Judicial Affairs, in accordance with the present regulation, international judges and international prosecutors shall have the authority to perform the functions of their office throughout Kosovo”¹⁴⁵. The decision to create a hybrid court

¹⁴³ Second Amended Indictment of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-99-37-PT, on individual criminal responsibility, point 16.

¹⁴⁴ Regulation 2000/64 of the UN Interim Administration Mission in Kosovo of 15 December 2000, on assignment of international judges/prosecutors and/or change of venue, Art. 2 paragraph 1.

¹⁴⁵ *Ibidem*, paragraph 2.

can also be analysed on the perspective that the Kosovo Albanians needed to operate in a judicial environment which envisaged independence and that could present itself as an alternative to the Serbian judicial authorities. Amnesty International expressed its opinion on the efficiency of this hybrid court in 2008, and it was a negative one¹⁴⁶. Deep concern was expressed in evaluating the inadequate preparation of the international judges selected as members of the panels in dealing with cases of sexual violence and in prosecuting individuals accused of breaching international humanitarian and human right law. Other structural problems were reported by Amnesty International, mainly addressed in pointing out the failure of providing Kosovo with an adequate judicial system.

¹⁴⁶ Report EUR/70/001/2008 of Amnesty International of January 2008, on the failure to improve Kosovo judicial System.

Conclusion

The analysis concluded within this final dissertation is that the NATO operation conducted in 1999 during the Yugoslav War should have been considered illegal under international law system. This so because, by keeping under scrutiny Chapter VII of the UN Charter, the articles enunciated should be read contextualised in the historical era when they were emanated. 1950s were the years right after the Second World War, and the United Nations was established with the aim of creating an institution to guarantee a more prudent and less aggressive form of governance over a macro-region of the world to prevent other global conflicts. As much as these norms may be imperfect in their formulation and/or in their application, they may be interpreted as giving no limits on a possible application for forceful intervention in cases of humanitarian crisis. However, a proper system of intervention in such cases has not been formulated yet, and the sole interpretation of a single State or of a group of States will not be sufficient enough to be supported by international legal basis. Moreover, the design of the United Nations Security Council has been established in a way that it can provide solutions to highly tense situations through diplomacy and other influential means. Of course, in the future changes in the legal procedural structure of the international organization should be implemented, and this improvement will be accompanied by a progressive accumulation of experience in managing those situations. This analysis, however, brings out an additional point of reflection, especially when the general international diplomatic relationships' strategy is the one of the United States. The humanitarian intervention through forceful means could be justified under the perspective of guaranteeing a long-term stable political and legal position of the nation of intervention. Nonetheless, there is no legitimisation found in Article 51 of the UN Charter, either on individual or on collective self-defence. The scope of the United Nations and of the Security Council of providing for international peace and security should be supported by all nations, both members and non-members, and the forceful intervention for humanitarian purposes should be established on this perspective, with the adequate limits to avoid the risk of using it as a justification for personal/nationalistic scopes. As a matter of fact, the possibility of institutionalising the international humanitarian intervention seems to be possible within the organs of the United Nations, and it will even bring equality on which cases should or could be applied. This change will only happen if there would be more pressure by institutions, accompanied by further perception of the validity of the doctrine of humanitarian intervention. In conclusion, it can be affirmed that the military intervention of NATO was unlawful from an international law perspective, because it did not receive the authorisation to proceed, and its actions were not contemplated within the Charter of the United Nations. The international community should condemn the NATO intervention in Kosovo, because it violated established principles of international law and its action might be taken as a legal precedent and emulated by other States or organizations for undertaking unilateral interventions. Such a system may generate chaos and uncertainty within the international legal equilibrium among communities, resulting in disorders and a general comeback to a violent Hobbesian "State of nature".

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RIASSUNTO IN LINGUA ITALIANA

Il conflitto in Kosovo, sorto nel febbraio 1998, è una tragica parte della storia contemporanea dell'area europea. Da una parte si trova la maggioranza Kosovo-Albanese, richiedente l'indipendenza, e dall'altra la Serbia che lotta per mantenere lo *status quo* integrità della nazione serba.

Lo scopo di questa tesi è di analizzare i diversi aspetti legali e pratici correlati alle vicende sviluppatesi attorno al conflitto kosovaro e l'interazione avvenuta sul piano giuridico e politico a livello internazionale. Questo verrà fatto considerando anche l'intervento armato della NATO e il coinvolgimento del Consiglio di Sicurezza delle Nazioni Unite, i quali hanno svolto un ruolo chiave nella direzione degli equilibri politici e legali tra le varie fazioni.

Le tensioni culturali e sociali nella regione dei Balcani ha origini molto antiche, e il significato politico e tradizionale della regione del Kosovo è storicamente accertata sin dalla "Battaglia della Piana dei Merli" del 15 giugno 1389. Lo scontro armato si svolse tra le forze Serbe, guidate dal principe Lazar Hrebeljanović, e l'esercito invasore degli Ottomani al seguito del sultano Murad I, concludendosi con la sconfitta dell'armata serba nonostante le numerose perdite da ambo le parti. Il sentimento di patriottismo, di grandezza e il senso di appartenenza ad un'unica popolazione fece in modo tale da rendere la Battaglia della Piana dei Merli l'evento storico che segna la nascita dell'identità culturale della Serbia, e la suddetta pianura divenne un luogo dall'enorme rilevanza storica per la nazione, che nel corso dei secoli arriverà ad inglobarla all'interno dei suoi confini nazionali. L'inizio dell'inclusione del Kosovo all'interno della Serbia avvenne verso l'inizio del 1400 ed ebbe luogo tramite vari tentativi (anche coercitivi) di integrazione sociale e politico tra la popolazione serba e la maggioranza albanese; le prime diatribe socio-culturali tra le due popolazioni iniziarono quando il Kosovo divenne parte dell'Impero Ottomano (dal 1455 al 1912) e la componente albanese, di religione musulmana e sostenuta dai turchi musulmani, iniziò ad ottenere uno status sociale più elevato rispetto ai serbi, di religione cattolica. Sentimenti nazionalisti iniziarono ad emergere da ambo le parti, e ciò portò alla creazione della Lega di Prizren albanese nel 1878, la quale portò avanti una vasta campagna di massacri compiuti contro la popolazione serba alla fine del XX secolo. Il 1900 vide lo svolgimento di due conflitti principali svolti nella penisola Balcanica che sconvolsero gli equilibri socio-politici nell'intera area: dall'8 ottobre 1912 al 30 maggio 1913 si svolse la Prima Guerra Balcanica, che vide come protagonisti la Lega Balcanica, composta dai regni di Bulgaria, Grecia, Serbia e Montenegro, contro l'Impero Ottomano. La Seconda Guerra Balcanica invece ebbe luogo dal 29 giugno al 10 agosto 1913, e vide il regno di Bulgaria attaccare i suoi ex alleati della Lega Balcanica. I due conflitti e i trattati di spartizione dei territori tra le varie nazioni ebbero considerevoli ripercussioni sugli equilibri geo-politici della penisola per il secolo a venire: il ruolo di potenza mediatrice ricoperto dalla Russia venne visto come fallimentare dalla Bulgaria, la quale decise di rivolgersi maggiormente ai paesi membri della Triplice Alleanza come alleato in Europa.

Questa decisione lasciò la Serbia come unico potenziale alleato per la Russia, la quale voleva mantenere un piede all'interno della politica dei Balcani. Inoltre, un'ulteriore conseguenza delle guerre balcaniche fu la presa di coscienza da parte dell'Impero Austro-Ungarico delle mire espansionistiche della Serbia e del Montenegro verso l'Albania. Il governo di Vienna iniziò una serie di conflitti armati contro i serbi e i montenegrini che portarono ad un aggravamento delle relazioni politiche tra questi paesi; questa politica di ostilità fu uno dei motivi che spinsero l'Impero Austro-Ungarico a competere contro la Serbia, intensificando le posizioni nazionalistiche che portarono allo scoppio della Prima Guerra Mondiale. L'unificazione dei paesi della penisola balcanica avvenne nel 1929 con la fondazione del Regno di Jugoslavia, alla cui guida del governo venne posta la dinastia regnante serba dei Karadjordjević. La creazione di un regno indipendente venne accolta e supportata da molte potenze internazionali, tra cui il Presidente degli Stati Uniti Woodrow Wilson nei suoi "14 Punti", un discorso nel quale incoraggiava tale decisione sulla base del rispetto della teoria dell'autodeterminazione di ogni popolo.

Nonostante ciò, ci furono vari risentimenti provenienti dalle varie popolazioni: i più insoddisfatti furono i Kosovo-Albanesi, i quali videro i loro territori suddivisi in tre distretti differenti nonostante il desiderio conclamato di voler essere integrato nel neonato Stato di Albania, seguendo i principi della teoria dell'autodeterminazione e l'intento di voler unificare all'interno degli stessi confini politici le popolazioni aventi le stesse caratteristiche culturali. Terminata la Seconda Guerra Mondiale, il Consiglio antifascista di liberazione popolare della Jugoslavia fondò la Repubblica Socialista Federale di Jugoslavia sul modello della costituzione sovietica del 1936. Vennero stabilite sei repubbliche socialiste federali, con l'aggiunta delle due regioni indipendenti della Serbia: la Vojvodina e il Kosovo. Intorno agli anni '50 la Repubblica, guidata dal maresciallo Tito, cercò di allontanarsi dall'ideologia staliniana e perseguire una politica maggiormente occidentale: nel 1953 la Jugoslavia firmò il Patto Balcanico con la NATO per prevenire un'ulteriore espansione dell'URSS e ricevere dei finanziamenti economici.

Tuttavia le tensioni tra i Kosovo-albanesi e i serbi continuarono sottoforma di numerosi scontri armati: per evitare le persecuzioni da parte del governo di Belgrado, in Kosovo si crearono gruppi di "kaçak" (ribelli), animati da sentimenti di patriottismo e desiderosi di ottenere indipendenza e libertà dalla Serbia. Nel 1974 la Commissione Centrale del Partito Comunista passò la riforma costituzionale che garantì al Kosovo maggiore indipendenza, la possibilità di stabilire una propria amministrazione, un'assemblea e un potere giuridico indipendente.

Purtroppo, questi cambiamenti vennero applicati con scarso successo e i kosovari continuarono a essere trattati come cittadini di seconda classe rispetto alla controparte di nazionalità serba: nel mese di marzo del 1981 gli studenti universitari kosovari si riunirono a Pristina, la capitale della regione, e iniziarono una serie di proteste in piazza. L'ascesa al potere del Presidente serbo Slobodan Milošević segnò la fine dell'autonomia del Kosovo a causa delle sue mire espansionistiche nazionali. Durante il conflitto jugoslavo, che vide la dissoluzione dello stato federale, anche il Kosovo decise di cavalcare l'onda del nazionalismo, dichiarando la propria indipendenza dalla Repubblica della Serbia il 7 settembre 1992. La risposta di Milošević, divenuto Presidente della Repubblica

Federale di Jugoslavia, composta dall'odierna Serbia e Montenegro, fu violenta e diede il via ad una serie di scontri armati.

La comunità internazionale tentò di mediare tra i due belligeranti: il Consiglio di Sicurezza delle Nazioni Unite emanò le risoluzioni n° 1160 e n°1199, con le quali richiese la cessazione degli scontri armati per dare spazio ad un dialogo diplomatico tra le parti. Dati gli scarsi risultati del tentativo di mediazione diplomatica, la NATO emanò il "Activating Warning", con il quale dichiarò l'autorizzazione a procedere all'uso della forza in territorio bellico.

A seguito del rifiuto delle autorità serbe di scendere a compromessi con le autorità di Pristina e la mancata firma dell'Accordo di Rambouillet nel febbraio del 1999, la NATO decise di procedere all'operazione "Forza Alleata", la campagna di bombardamenti aerei in Kosovo contro gli obiettivi serbi. La Serbia capitolò nel mese di giugno 1999 a seguito della firma dell'Accordo di Kumanovo: Milosevic ritirò le proprie armate dal Kosovo che vennero sostituite dai soldati delle Nazioni Unite. Nell'aprile del 2001 Milosevic venne arrestato ed estradato dal governo jugoslavo. In seguito, nel 2003, la Jugoslavia prese il nome di Unione Statale di Serbia e Montenegro, una confederazione che sopravvisse fino al 2006, quando i due stati decisero di separarsi definitivamente. Il 17 febbraio 2008 il Kosovo dichiarò la propria indipendenza, nove anni dopo la fine degli scontri armati con la Serbia. Il conflitto in Kosovo ha aperto diverse diatribe nell'ambito del diritto internazionale sui vari aspetti legali della vicenda: una di queste è la denominazione di stato di per sé, dal momento che sussistono opinioni divergenti all'interno della comunità internazionale circa il riconoscimento o meno del Kosovo come stato sovrano e indipendente.

Il mancato riconoscimento da parte di vari stati, tra cui la Serbia, la Russia e la Cina, crea non pochi attriti tra le nazioni, specialmente nel contesto operativo del Consiglio di Sicurezza delle Nazioni Unite: paesi come Cipro e lo Sri Lanka, per esempio, argomentano la loro posizione di non riconoscere il Kosovo come stato indipendente dati i presupposti illegali attraverso i quali si è svolto il processo di secessione dalla Serbia, mentre quest'ultima, sostenuta dalla Russia e dalla Cina, si appella al principio di integrità nazionale, al fine di evitare di creare un precedente legale al quale potrebbero appellarsi in futuro altre minoranze etniche in altri paesi. La Serbia infatti, a seguito della risoluzione 1244 che stabilì la presenza della Missione delle Nazioni Unite per l'Amministrazione provvisoria in Kosovo (UNMIK), si vide privata dell'area geografica considerata il cuore della nazione e dell'identità serba e decise di richiedere alla Corte Internazionale di Giustizia un parere consultivo circa la legalità della dichiarazione di indipendenza del Kosovo.

La risposta della Corte fu positiva: si affermò infatti che la dichiarazione di indipendenza si era svolta seguendo i principi del diritto internazionale. Nell'aprile 2013 venne firmato l'Accordo di Bruxelles, il cui scopo era quello di integrare maggiormente i municipi del Kosovo del Nord a maggioranza serba nel sistema legale nazionale. Le conseguenze derivate dal riconoscimento del Kosovo hanno reso il paese un ibrido, dal momento che ad oggi sono

102 gli stati che lo riconoscono come indipendente dalla Serbia, e gli effetti legali del riconoscimento della sua indipendenza ha diversi risvolti dal punto di vista burocratico. Date le posizioni divergenti all'interno del Consiglio di Sicurezza stesso, le Nazioni Unite non hanno raggiunto una decisione finale a riguardo. Da una parte la Serbia e la Russia sostengono che il processo di indipendenza del Kosovo ha avuto luogo illegalmente, dal momento che la costituzione serba non prevedeva situazioni di separazione o autonomia territoriale. Dall'altra, gli Stati Uniti e l'Unione Europea sostengono l'indipendenza kosovara seguendo la teoria dell'autodeterminazione dei popoli. Per questo motivo, all'interno della risoluzione 1244 venne menzionata l'amministrazione autonoma del governo del Kosovo.

Durante il mese di aprile del 2006 il Consiglio dell'Unione Europea ha emanato l'Azione Comune 2006/304/PESC, riguardante l'istituzione di un gruppo di pianificazione dell'Unione Europea (EUTP Kosovo) per poter fronteggiare le operazioni dell'Unione in caso di gestione di crisi istituzionali. In seguito, data l'insostenibilità della posizione legale del Kosovo, il Consiglio Europeo nel dicembre del 2007 ha più volte sottolineato la necessità di trovare una soluzione comune che potesse rispecchiare le volontà delle parti coinvolte: questa posizione della comunità europea è alla base dell'implementazione della missione EULEX in Kosovo, la quale si occupa di supportare il sistema amministrativo, giudiziale e legislativo del Kosovo garantendo la presenza di esperti in materia legale-amministrativa.

Le funzioni oggi attribuite alla EULEX sono state notevolmente ridotte a due: la prima è la funzione di monitoraggio delle attività giuridiche kosovare, mentre la seconda fa riferimento al sistema operativo dei programmi di sicurezza e delle operazioni svolte dalle forze armate nazionali. L'intervento armato della NATO è stato altamente contestato da vari enti internazionali, poiché si è ricorsi alla forza al fine di cessare le violenze commesse da parte dei serbi nei confronti del Kosovo: le norme che regolano gli scontri armati sono presenti all'interno del diritto internazionale già dall'inizio del XX secolo a seguito delle Conferenze dell'Aja tenutesi nel 1899 e nel 1907, la cui ideologia cardine era la delineazione di norme legali che potessero regolare gli scontri tra nazioni e il comportamento delle parti belligeranti nei confronti dei civili e dei prigionieri di guerra.

Inoltre, venne stabilita la Corte permanente di arbitrato, un organo giuridico il cui scopo era quello di facilitare il ricorso immediato per dispute internazionali in caso di impossibilità di risolvere dispute legali per vie diplomatiche. Il ruolo ricoperto dal Consiglio di Sicurezza dell'ONU in caso di conflitti e risoluzione di dispute internazionali è stabilito all'interno del Capitolo V della Carta delle Nazioni Unite. Inoltre, Capitolo VI della Carta si occupa di risolvere le dispute in maniera pacifica, quindi prevede che il Consiglio di Sicurezza adotti unicamente delle raccomandazioni. Il Capitolo VII invece contiene le norme comportamentali che il Consiglio deve adottare in caso di risoluzione di contese internazionali tramite mezzi non pacifici, ed è solo operando all'interno del suddetto capitolo che il Consiglio può adottare delle decisioni. Questo può avvenire, tuttavia, solo dopo aver

definito l'evento oggetto della risoluzione come una minaccia alla pace, una violazione della pace o un atto di aggressione.

Quest'ultima in verità non presenta una chiara e concisa definizione di quale possa essere una situazione classificabile come "atto di aggressione", né tantomeno sussiste una definizione del concetto di "minaccia alla pace"; questa mancanza a livello legale crea i presupposti per un'interpretazione piuttosto soggettiva della classificazione degli eventi, ed un esempio è riportato dall'azione della NATO nel conflitto tra Serbia e Kosovo attraverso l'operazione di bombardamento.

Come conseguenza, il coinvolgimento della NATO ha dato luogo alla possibilità di autorizzare il ricorso alla forza allo scopo di prevenire o interrompere situazioni di violazioni umanitarie per proteggere minoranze etniche o frazioni di popolazioni vittime di pulizie etniche da parte di uno stato.

L'autorizzazione nasce dallo svolgimento dell'operazione "Horseshoe", un piano di pulizia etnica condotto dal governo serbo contro i kosovo-albanesi residenti in Kosovo. Un'altra motivazione per giustificare l'intervento armato della NATO senza una precedente esplicita autorizzazione del Consiglio di Sicurezza consiste nell'interpretazione dell'articolo 53 della Carta delle Nazioni Unite: secondo quest' articolo, a delle istituzioni governative regionali composta da più Stati-Membri (come la NATO) è permesso intervenire senza la suddetta autorizzazione solo in caso di situazioni nella quali vengono effettuate una serie di politiche aggressive all'interno o nei confronti del medesimo stato. Dato che non esiste una definizione ben delineata ed esplicita che possa specificare una situazione di "emergenza umanitaria", le critiche principali rivolte alla NATO sono quelle di aver creato un precedente legale al quale, in futuro, altri stati o confederazioni di essi potrebbero fare riferimento per un intervento arbitrario all'interno di conflitti nazionali, anche solo per perseguire i propri interessi.

Durante la guerra in Kosovo sono stati perpetrati numerosi crimini che hanno reso necessaria la creazione del Tribunale penale internazionale per l'ex Jugoslavia. Quest'istituzione ha come scopo quello di giudicare i crimini perpetrati principalmente da Milosevic e dai suoi alleati politici, che non solo hanno violato le leggi umanitarie stabilite nella Convenzione di Ginevra, ma anche le leggi di guerra stabilite durante le Convenzioni dell'Aja. Un'altra accusa è quella di aver perpetrato crimini contro l'umanità e genocidio nei confronti dei kosovo.albanesi. In conclusione, può essere affermato che l'operazione condotta dalla NATO nel 1999 possa essere considerata una violazione del diritto internazionale, dal momento che è stato violato il sistema di autorizzazioni che il Consiglio di Sicurezza deve garantire secondo la sua natura di organo *super partes*.

Un miglior sistema di intervento dovrebbe essere formulato in maniera tale da evitare un possibile coinvolgimento di parti terze all'interno di un conflitto non giustificato da motivazioni sostanziali, ma solo per un proprio tornaconto personale.

A mio parere, è un passo necessario onde evitare il crollo degli equilibri legali internazionali che farebbero precipitare gli Stati all'interno di uno "stato di natura" hobbesiano.