

POLITICKÉ VEDY / POLITICAL SCIENCES

Časopis pre politológiu, najnovšie dejiny, medzinárodné vzťahy, bezpečnostné štúdiá / Journal for Political Sciences, Modern History, International Relations, security studies

URL časopisu / URL of the journal: <http://www.politickevedy.fpvmv.umb.sk>

Autor(i) / Author(s): Kristína Janková
Článok / Article: UN SC Resolutions and Humanitarian Intervention in Kosovo
Vydavateľ / Publisher: Fakulta politických vied a medzinárodných vzťahov – UMB Banská Bystrica / Faculty of Political Sciences and International Relations – UMB Banská Bystrica

Odporúčaná forma citácie článku / Recommended form for quotation of the article:

JANKOVÁ, K. 2015. UN SC Resolutions and Humanitarian Intervention in Kosovo. In *Politické vedy*. [online]. Roč. 18, č. 4, 2015. ISSN 1335 – 2741, s. 97-126. Dostupné na internete:

<http://www.politickevedy.fpvmv.umb.sk/archiv-vydani/2015/4-2015/kristina-jankova.html>.

Poskytnutím svojho príspevku autor(i) súhlasil(i) so zverejnením článku na internetovej stránke časopisu Politické vedy. Vydavateľ získal súhlas autora / autorov s publikovaním a distribúciou príspevku v tlačenej i online verzii. V prípade záujmu publikovať článok alebo jeho časť v online i tlačenej podobe, kontaktujte redakčnú radu časopisu: politicke.vedy@umb.sk.

By submitting their contribution the author(s) agreed with the publication of the article on the online page of the journal. The publisher was given the author's / authors' permission to publish and distribute the contribution both in printed and online form. Regarding the interest to publish the article or its part in online or printed form, please contact the editorial board of the journal: politicke.vedy@umb.sk.

UN SC RESOLUTIONS AND HUMANITARIAN INTERVENTION IN KOSOVO

Kristína Janková*

ABSTRACT

The issue of humanitarian intervention has been for a long time a very hot topic not only in the area of international law, but also in state practise as well. These two fields do not always pursue the same direction when dealing with gross violations of human rights and the problem of pursuing national interest enters the game as well. This paper deals with the concept of humanitarian intervention based on the just war theory and liberal approach underlining the significant role played by international and regional organisation in the area of human rights protection. The paper examines the role of the UN, especially the UN SC and its resolutions in deciding on humanitarian intervention, which many times indicate the dangerous situation, however, were not followed by the one under Chapter VII that would justify the use of all necessary means. This was the case also during Kosovar war. Following the international failure in Bosnia and death of 8000 Muslim men in Srebrenica, Kosovo became next area where identity and religious differences contributed to civil war between nationalistic Serbs and Kosovar Albanians fighting for independence. The war in Kosovo represents a milestone in the area of peace-making, peacekeeping or peacebuilding when the multinational force established under NATO's flag bombed the area without the UN SC approval, thus violating international law. However, in this case the role of mass human rights abuses enters the game and provides ethical justification for such action.

Key words: UN SC resolutions, humanitarian intervention, use of force, sovereignty, Kosovo, human rights violations

Introduction

The debate on humanitarian intervention is a “veteran” in international law and international relations debate. Since early 1990s, this term arises every time the gross violations of human rights are happening. One of huge “cases” of

* Mgr. Kristína Janková is a Ph.D. student at the Institute of European Studies and International Relations, Faculty of Social and Economic Sciences, Comenius University in Bratislava, Mlynské luhy 4, 821 05 Bratislava, Slovak Republic, e-mail: kristina.jankova@gmail.com.

humanitarian intervention was Rwanda, where even the UN peacekeeping troops were not able to prevent the disastrous genocide between Tutsi and Hutu. In that time, the international community (meaning mainly the UN system) was criticised due to insufficient action and later by inaction during the 100 days of the genocide. Meanwhile, the disintegration of Yugoslavia took place accompanied by strong nationalist movements, expressions and manifestations. The disagreement of Serbs with the dissolution resulted in Srebrenica massacre where around 8000 Bosnian Muslims were killed. In this respect, the international community was criticised again as it did not prevent such a horrible event.

However, these are not the only cases of gross human rights violations. The fact is that similar situations happened all around the world. The key premise of humanitarian intervention is the international response to crises, caused either by conflict or by natural disaster; however, the element of massive human suffering should be present. The key actor in this area is the United Nations. Not only due to its role in human rights protection, but also due its monopole of using force in international relations, because humanitarian intervention stands on the cross road of international law practise and the ethical / human rights principles.

The procedural rules required for humanitarian intervention do always encompass the United Nations Security Council (UN SC) resolution under Chapter VII, enabling the use of all necessary measures to ensure international peace and security. However, in order the resolution to be approved and adopted, the Permanent Five must either vote for or abstain from voting, or in other words, they cannot use their veto power. The second organisational problem arises while preparing the intervention. Mass human rights violations demand rapid reaction, however, this is not always the case. Not always there are troops nearby or troops that are willing to intervene. When considering the moral or ethical requirement, the most important for us is the national interest that has to be avoided in order to truly tackle the situation for the right purposes and right intention.

The concept of humanitarian intervention became focus of several core authors in international law – **Christine Gray**, **Christine Chinkin**, **Fernando Téson**, **Peter Hilpold** or **Bruno Simma**. However, on the humanitarian intervention one can look also from the side of international relations (IR) theory, as did **Michael Walzer**, **Jennifer Welsh**, **Nicolas W. Wheeler**, **Simon Chesterman**, or **James Pattinson**. The debate encompasses several legal as

well as political dilemmas such as whether there exist right to intervene or there is a new norm emerging in international system on unilateral military intervention. **Gray** (2008) argues that despite the growing weight of human rights doctrine, international law is still dominated by rights and duties of sovereign states. Despite generally acceptable knowledge that there exist only two legal justifications, she emphasizes the will of states to accept the use of force also in case pro-democratic intervention and in pursuing the right to self-determination. **Chinkin** (1999), on the other side deals with the application of human rights law and significantly emphasize the necessity and proportionality test when undertaking any military operation. She argues that the duty of intervener is not to make the situation worse for the threatened population. Nevertheless, she also condemns the selective approach of great powers when undertaking humanitarian intervention, since there are lot of places dealing with gross violations of human rights and ethnic cleansing, which should be as well targeted by the international community. **Fernando Téson**, arguing quite the opposite way, is a great proponent of right to unilateral humanitarian intervention in case the force is used in defence of fundamental human rights because then it does not constitute a violation of the purpose of the UN. Many authors refer to the relationship between humanitarian intervention and norm of non-intervention, as the basic principle of international law. **Peter Hilpold** (2001) doubts the positive effect of shift from lawfulness to moral legitimacy. He argues it can lower the barriers to go to war without UN SC resolution, resulting in great powers to ignore the international law (more). On the other side, he states that state practise is moving from Hegelian state-centred system towards Kantian community oriented model, thus confirming real change the humanitarian intervention is bringing to the area of international relations and international law. Whether or not the UN SC authorisation is really necessary to obtain was the object matter of **Bruno Simma** (1999), who notes that unauthorised intervention will still remain in breach of international law. However, it is necessary to explore the mutual relationship between this illegality and all circumstances and efforts that were undertaken in order to deal with situation in proper way. He also finds the Kosovo intervention "close to the law" when NATO tried to follow and link its efforts to the UN SC resolutions.

When looking at the debate from IR theory, **Walzer** states that humanitarian intervention threatens the state sovereignty and also the autonomy necessary for the natural, although painful, emergence of free, civilised politics (1992). However, the main idea of humanitarian intervention, and later the doctrine of

Responsibility to Protect is the changing nature of sovereignty. Sovereignty as responsibility is the proponent and basic stone of **Jennifer Welsh** book *Humanitarian intervention and International Relations* (2004), where she argues why is humanitarian intervention still controversial issue. Based on pluralist critique, she states that the effect of such intervention mainly rests in the relaxing norm of non-intervention. However, she stresses the necessity in non-military operationalisation of sovereignty and responsibility, what she later evolves in her articles on R2P and in the position of Special Advisor to Secretary General on Responsibility to Protect. Besides **Welsh**, **Wheeler** (2000) focused on sovereignty as responsibility too, however, from constructive point of view targeting humanitarian intervention as developing norm. Despite the 1990s, effect on undertaking humanitarian intervention both **Welsh** and **Wheeler** advocate the influence of 9/11 on tendency of states to use force to protect humanitarian values. However, **Wheeler** (2003) critically looks at the war on terror when observing the marginalisation of the debate strictly on legitimacy. He supports the international law because otherwise the great power could ignore all the norms and rules, thus opposing arguments of **Simon Chesterman** (2001), who is considered to be negativistic about humanitarian intervention, moreover, about the push forces behind it. Despite the fact that he actually proved the weakness of the unilateral humanitarian intervention argument, he is criticised for his sympathy towards Russia. He argues that the repression of Kosovar Albanians did not constitute a threat towards peace and security, thus any action of the UN or NATO was illegal and illegitimate. The question then who should intervene became core for **James Pattinson** (2010), who developed moderate instrumentalist approach and argues that the actor who possess most legitimacy has a duty to intervene applying legitimacy as continuous variable rather and dichotomous.

The paper analyses the NATO intervention in Kosovo in 1999. The core part is devoted to the analysis through the UN SC resolutions that provide adequate basis for understanding the situation as well as intervention. The paper seeks to answer the questions: *What was the role of UN SC resolutions in NATO intervention in Kosovo? What are the implications of intervention in Kosovo?* I argue that UN SC resolution provided a legitimate basis for NATO's action by defining the situation as a threat to international peace and security and by repeating the possibility of next step, which only the actual intervention can be since all other tools and measures were exhausted. Despite calls from academics and policy-makers, Kosovo intervention became a precedent and a

milestone in the area of humanitarian intervention.

The paper will firstly focus on the institutional side of the research dealing with the UN as a principal body and the role of resolutions in its organisational and decision-making structure. Later on, the concept of humanitarian intervention will be analysed from two perspectives –international law focusing on use of force provisions; and from the IR perspective represented by just war theory, legality-legitimacy gap and the sovereignty – human rights conflict. These dilemmas will be then analysed on the case of already mentioned intervention in Kosovo. Despite the paper might discuss possible way of bypassing the need of UN SC authorisation, at the end, recommendations will be proposed for more proper way of dealing with practise of humanitarian intervention.

This paper is an aspiration analysis comparing what the state of art is and what it should be. In the end, proposals and recommendations are made in order to achieve the desired state.

1 Provisions of International Law concerning humanitarian intervention

The United Nations (hereinafter UN) is international organisation that emerged after the Second World War with the task to maintain peace and security all over the world. The basic document of the UN is the Charter of the UN consisting of preamble and nineteen chapters dealing with the organisational structure, fundamental principles, use of force, and judicial organs of the UN. We are mostly interested in the chapters V, VI, VII and VIII dealing specifically with the SC, peaceful settlement of disputes, action with respect to threats to the peace, breaches of the peace and acts of aggression and the regional arrangements.

1.1 Action through resolution

The UN expresses its opinions, ideas, recommendations and vision through the resolutions that can be defined as “formal expression of the opinion or will of United Nations” (United Nations Security Council). The resolutions can be signed either by the General Assembly (hereinafter GA) or the Security Council. The value of the SC resolution is higher because of the primary responsibility in the area of maintaining peace and security and because of exclusive power the undertake actions under Chapter VII meaning using all the necessary means for

maintaining peace and security.

It is known that the SC resolution is the only way of legal justification of armed intervention, or simply said use of force except the self-defence¹. Nevertheless, during the Cold War, when the SC was incapable of action because of often use of veto power, the GA resolution "Uniting for Peace" was adopted, stating that:

"...if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations;"

UN GA Resolution 377- Uniting for peace

The "Uniting for Peace" was adopted during the Korean War, when the situation in Security Council as well as in international environment escalated very much. Based on the presumption that the UN should act when it is needed, as defined by the UN Charter, the power conflict between Permanent Five should not prevent it from action. The General Assembly (hereinafter GA) took on the subsidiary responsibility, when SC is not able to take an action. The resolution has spread the competences of GA in the area of maintaining

¹ However, also in case of self-defence, the Security Council has to be acknowledged of the armed response.

international peace and security to actual practice of this responsibility. Through this resolution, the GA can overrule any SC veto. Nevertheless, this resolution is still against the Charter, which says that the SC should approve any use of force and that GA does not have such a power. It refers to the exclusive power of the SC that could not be overruled. Yet, we have now another legal conflict. Despite the fact that GA adopted the “Uniting for Peace”, the resolution is not legal; moreover, it contradicts the UN Charter. Although we can doubt the legality of the resolution, its reasoning was ethically legitimate enough. It could be very good solution how to disregard the intra-SC-interest-problems while keeping the action legitimate. The resolution was used only 12 times, but the emergency meetings are being held also today. From 1956 there were already ten emergency sessions – during the Suez Crisis (1956), during the Soviet invasion to Hungary (1956), because of crisis in Lebanon, Congo, Six Day War, Soviet invasion in Afghanistan, Israeli-Palestinian conflict, occupation of Namibia, Israeli occupation of Golan Heights and the last again because of Israeli-Palestinian conflict (UN GA).

1.2 Use of force

In the world's history, the use of force was common, wars occurred even before Christ and no one expressed doubts in this regard back then. Later on, there were several concepts of war and the use of force like ‘power creates law’, ‘just war’ and, after the Westphalian peace, there emerged the concept of ‘justified war’ saying that only states can wage a war (Krejčí, 2001, p. 358). It also raised the ethical problem of the effort to define the just war in strict legal terms (ibid).

The rules regarding the use of force as defined by the UN Charter are maybe the most important rules the international politics has (Matlary, 2005, p. 5). Generally, the use of force and the threat of use of force are prohibited, not only in terms of the UN Charter (Art 2, 39, 42, 51), but also as the message of the Nuremberg trials (Krejčí, 2001, p. 358).

Nowadays, the use of force is used as a defensive measure, as a punishment of the inhuman act. There are two legal justifications for the use of force – way of sanction authorised by the UN SC and self-defence, whether individual or collective. There is a third category of the use of force- national liberation wars whose emergence is closely connected with the decolonisation area and right to self-determination. These wars can be considered the civil

wars and as such are applicable to intra-state conflict and not inter-state or international conflict, which requires the cross border element. It is necessary to underline to role of the SC when the peace is threatened and only SC can decide upon the use of armed action. One might consider it as a limited freedom of sovereign states to decide upon the use of force. Nevertheless, because of that there is the exception of self-defence. The aim of the use of force is to punish aggression, defend an attack and to protect innocent people (non-combatants). Given the UN fundamental principle of peaceful settlement of disputes and articles in Chapter VI and VII, it is clear that the use of force is the last way of solving the conflict. UN shall proceed to such action only after exhausting all non-military measures, such as diplomatic negotiations (with or without mediator), economic or diplomatic sanctions.

The UN Charter distinguishes between unilateral and multilateral use of force. It prohibits the unilateral use of force with the exception of Art. 51 dealing with self-defence. The UN can authorise a regional organisation to lead the operation, but again, it must be upon the decision of the UN. No state, no group of states and no organisation can undertake an armed operation without the authorisations by the UN SC when the operation does not fall into the category of self-defence. Self-defence is the main justification of violation of the Art. 2(4) of the Charter. It has to have form of countermeasure (not attack); it has to be temporary and cannot lead to unlawful conduct. When relying on the action of self-defence, the necessity and proportionality test has to be conducted, whether the action is necessary and whether the consequences will be proportional to the armed attacks.

Even though the UN should lead the post-war construction, there were four 'policemen' to guarantee the security. Based upon the notion of collective security, the Cold War was the period of defining and limiting the collective security. It was the alliances that were providing the stability, since during the Cold War the collective system established by the UN failed and the Permanent members became Permanent Rivals. Therefore, the unilateral action has been accepted when it was necessary for the human welfare. The UN's poor capability in solving the conflict was designed by its 'neutral' humanitarian tasks and omissions like Rwanda, Somalia and Srebrenica (Wedgwood, 2000, pp. 351-352).

Considering the multilateral use of force, meant as collective security system for the maintenance of international peace and security established by the UN Charter, Chapter VII is important in particular. In this case, when it is not

undertaken as an act of self-defence, the UN mandate is necessary. The legal multilateral use of force can be undertaken only under the UN mandate and is mostly in the form of the UN missions. However, there are also missions under the auspices of the UN, but lead only by one or two countries – as it was the case of INTERFER in East Timor. This name indicated the slightly different position of the mission. This multilateralism is understood only in the positive sense. If there was an illegal action by several countries, however lead by one or two, it would not be called the multilateral one but coalition of willing. Multilateralism is encompassing the mandate from legitimate authority.

The previous state practise indicates, however, that the UN is not the only legitimate authority. Despite its exclusive legal powers, the intervention of regional organisations gathering several countries is considered multilateral. In this respect, it is important to decide whether states are considered the only actors in international environment. If we considered also international or regional organisations as actors in international area, than the action of one organisation can be regarded as unilateral. Even though the actions of such arrangements are limited by the UN, these organisations were acting unilaterally in history without significant consequences for themselves – NATO in Kosovo or ECOWAS in Liberia and Sierra Leone – both of them were later recognised as legitimate and thus justified ad-hoc. Today, the unilateral use of force is connected mainly with terrorism and pre-emptive or preventive wars. Despite this being the hot topic, there are no legal revisions currently taking place to review this type of action justified by Art. 51.

In January 1999, the UN Secretary General **Kofi Annan** was asked what was necessary for the intervention. Annan stated, “normally a UN SC resolution is required” (Simma, 1999). This statement was then considered by the Allies as a legitimate justification for the launching of Operation Allied Force in Kosovo. After the NATO bombing and several resolutions ignored by Yugoslav authorities, the Resolution 1244 called for stabilisation of Kosovo. As far as the NATO airstrikes provoked different reaction, the International Independent Commission on Kosovo was established to review and asses the attack. The Commission declared the attack illegal, but legitimate, and stated that Kosovo shall never be considered as a precedent in using force. Despite the effort, it does represent the precedent and there is no article on humanitarian intervention, use of force or gross human rights violation that does not mention the Kosovo crisis. Moreover, Kosovo crisis is a cornerstone of the debate on humanitarian intervention.

Humanitarian intervention can be defined in the framework of an ethical obligation of intervention when suffering of the people is happening, or simply said when the human rights are violated. It is an “armed intervention in another state, without the agreement of that state, to address (the threat of) a humanitarian disaster, in particular caused by grave and large-scale violations of fundamental human rights.” Den Hartogh, 2001, p. 8). Similar definition was provided also by **Holzgreffe and Keohane** (2003) or **Wil Verwey** (1998). Humanitarian intervention carries out the idea that “the threat or use of force can lead to a restriction in the escalation of violence and can even encourage agreement between conflicting parties” (Domagala, 2004, p. 7). However, humanitarian intervention requires several conditions to be fulfilled. From the legal perspective, humanitarian intervention should take place as a response to gross human rights violations, war crimes, crimes against humanity, or genocide. It presupposes the deployment of military forces meaning coercive measures.

2 Humanitarian intervention – International Relations Perspective

When conceptualising the humanitarian intervention, we should take into consideration three aspects, each of them providing a piece of puzzle.

2.1 Just War theory

The theoretical basis of humanitarian intervention lies in the concept of just war. With its roots in Middle Ages, the just war theory continues to play a significant role in academic field. Nowadays, several professionals, most importantly Michael Walzer, have developed the theory substantially. Just war theory is following the *jus ad bellum* (justification of the use of force) and *jus in bello* (conduct during war). It provides six conditions under which the intervention can be undertaken. Firstly, the war should be waged as a last resort after all peaceful means were exhausted. Secondly, the war should be waged by a legitimate authority. The war should be waged under just cause and right intention, referring mainly to redress human suffering, or injury, or self-defence. It should also have a reasonable prospect for success in order to establish peace. Last, but not least, the attacks should be proportionate towards situation and military force should be used only when necessary (Walzer, 1977). These six conditions refer mainly to legitimacy and legality of the use of force, thus *jus*

ad bellum. When considering the jus in bello dimension, we can add the condition of clear distinction dealing with the conduct on civilians or prisoners of war. Today we can compare this to principles of Geneva Conventions representing a cornerstone of contemporary international humanitarian law. Just war theory precludes, however, that military operation pursues only national interest. The question is, whether it is so important if the intervention helped the situation at the end. It is quite impractical and irrational to hope for intervention of great powers without any national interest if they may have interest in almost every part of the world. Therefore, **Coates** argues for improved scrutiny of just cause coexisting parallel with national interest (Coates, 1997, p.162).

2.2 Legality – Legitimacy gap

When discussing the humanitarian intervention, especially referring to the report of Independent Commission on Kosovo, we should distinguish between legal intervention and legitimate intervention. This struggle became centre of several academic debates. Legitimacy is very broad term, referring to especially to lawfulness, covering justifications of an action. We might argue that there are different types of legitimacy, such a legal legitimacy meaning legality, although emphasizing the justification. Legitimacy, on the other hand, may apply to political or military lawfulness. Still, after almost 16 year, the debate on legal and political/military legitimacy is not finished. We can state that according to the human rights principles and the Responsibility to Protect doctrine, the political legitimacy is very necessary for the humanitarian intervention. The legal legitimacy is represented mostly by the condition of legitimate authority. However, neither in this point, the legitimacy is specified. We do not know whether regional organisation (such as NATO or the EU) is sufficient legitimate authority, or only the UN can be considered, as far as the UN SC has the exclusive competence to use force legally. Definitely, there are several political justifications for military deployment involving the human rights. As might be clear, one of them is the relatively new concept of human security. Human security can be defined as an “emerging security agenda, where the point of reference is the individual person and his or her right to personal security” (Matlary, 2005, p. 91). According to **Greppi**, human security can be called also an effective protection of human beings (Greppi, 2008, p. 85). Despite the fact that there are still many countries focused on the state security (USA, Russia), the concept of human security has been becoming more and more popular.

Birth of this concept can be dated into the 1990s, when Canada began to work with Norway on human security as a means to provide protection against threats that could harm the person including land mines, small arms, light weapons or child soldiers. Human security is nowadays a common term in security policy, which develops the individual's own physical security and integrity (Matlary, 2005, p. 23). Later on, the report of ICISS as well as Barcelona and Madrid Report strengthened the concept.

In 2001, the International Commission on Intervention and State Sovereignty founded by Canadian government issued a report Responsibility to Protect (hereinafter R2P), which incorporated the modified military intervention for humanitarian purposes and introduced a new guideline for conflict management and specified the role of the state as well as that of the international community (meaning especially UN member states). The report itself recalls the concept of human security and establishes three phases of crisis management – prevention phase, reaction phase and the phase of rebuilt. One of the core ideas of R2P was introducing **Cooper's** concept of conditional sovereignty making the protection of civilians the state's primary role. If the state fails, then the international community is legitimised to protect the people instead, meaning that it violates the non-intervention norm and state sovereignty (ICISS 2001). The R2P is perceived as an improved concept of humanitarian intervention, recalling the conceptual roots; however, it does entail several important additional issues that make R2P unique document protecting the receiving country based especially on human security paradigm. Nevertheless, before we analyse this implication, we rather introduce and conceptualise the humanitarian intervention.

2.3 Human rights vs. State Sovereignty

State sovereignty has been for a long time viewed as a one of the primary concepts in international law, evidenced also by the Art. 2(1) and partially also by Art. 2(4) and Art. 2(7) of the UN Charter. Principle of non-intervention in territorial integrity was many times reason for overlooking serious human rights violations and breaches of international law.

During the history, especially in the post-Cold War period, stressing the importance of state to protect its citizens and values like democracy, rule of law or human rights, implied also modifications to the concept of sovereignty. These values can be suggested as condition for state to enjoy its sovereignty and this

is how the term 'conditional sovereignty' emerged. Conditional sovereignty is another concept together with human security that is characteristic for the nowadays perception of responsibility of state. They behave like norms from conceptual point of view, even if they are not law. They represent rather moral values and practices than the legal norms.

Human rights, on the other side, gained their importance mainly during 1990s during conflicts in Yugoslavia and Africa (Rwanda, Congo, Somalia). They triggered completely new thinking in the international law. The Westphalian concept of sovereignty began to change in more human one, with global ethical values prevailing over national interest and state sovereignty in its initial meaning.

Hence, the human rights doctrine is incompatible with the notion of state sovereignty (Bianchi, 2002, p. 267). It comprises of idea that states can no longer disregard universally accepted standards of human rights protection by invoking sovereignty. However, it might cause many ambiguities in the system. As we already mentioned, sovereignty is one of the, if not even *the*, pivotal terms in international law. Followed by non-intervention principle, it has been hard to push the intervention (like in case of East Timor, where the Asian states referred to the non-intervention principle for excuse of their abstention). Human rights doctrine changed this perception and became the crucial justification for the intervention. **Hilpold** states that human rights based intervention is contrary with principle of non-intervention (Hilpold, 2001, p. 437). Nevertheless, human rights violations are nowadays the source of legitimacy and they often push the civil society to act. Media coverage contributes with pictures of dead children, damaged houses and raise dissatisfaction.

The point is that UN Charter, as well as other documents regarding the use of force and its justifications are very vague when it comes to their wording. The documents leave lot of free space of defining the 'threat to peace and security'. This fact was made intentionally, to deal with each case separately. However, one might think that there would be a document legitimizing and legalizing the action when it comes to gross human rights violations. At the moment though, there is not such a legal and enforceable document and thus is there still the chance for atrocities not to be prevented, halted and punished.

As we have already pointed out, the human rights proved to be the impulse for the changed perception of traditional Westphalian concept, mostly as a result of Kosovo intervention, failure to intervene in Rwanda and tragic conflict in Bosnia and Herzegovina, including the massacre in Srebrenica. The debate

about the humanitarian intervention as a rising concept, inability of SC to react and struggle between two already basic concepts – sovereignty and human rights – was spreading. It was all included in **Kofi Annan's** Millennium report in 2000:

"If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica--to gross and systematic violations of human rights that offend every precept of our common humanity? ... We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict. Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle - not even sovereignty - can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished."

(Annan, 2000)

The then Secretary-General commented on the primary role of state is protecting people and that sovereignty cannot prevail over human rights and humanity. He stressed the moral duty of the SC and the entire international community to protect these values. The main result of the debate of humanitarian intervention and the report of **Kofi Annan** was the creation of International Commission on Intervention and State Sovereignty, established by Canadian government. Its task was to conceptualise humanitarian intervention in comprehensive manner and to find a global consensus. In 2001, the Commission released a report called *The Responsibility to Protect* (Payandeh, 2010, p. 472).

3 NATO intervention in Kosovo 1999

The territory of Western Balkan has been for a long time the centre of ethnic conflicts and constraints. When ethnic minorities started to claim some kind of independence, the struggle strengthened and it broke out in Slovenia first, then Croatia, followed by Bosnia and Herzegovina and events like Srebrenica. The area of Kosovo was the last 'war' in Yugoslavia with final solution of NATO airstrikes that falls into our research interest the most.

The crisis in Kosovo is generally known, but for the next analysis, it is necessary to provide some facts and information about the relevant circumstances. The crisis arose from the ethnic conflict between Serbs and Kosovar Albanians accompanying by public discrimination on the daily basis, and refusal to acknowledge the autonomous status of Kosovo. This culminated mainly in 1990s, when the Albanians were persecuted and many of them forced to flee their homes. Ironically, Belgrade in that time strongly promoted immigration of ethnic Serbs in Kosovo. In 1998, Serb policy joined this struggle and the situation got even worse. Kosovar Liberation Army (KLA) and Yugoslav army caused lot of damage and suffering. There were several calls to ceasefire, followed by arms embargo. After the resolutions 1160 and 1199 and the warning of NATO to use force, the situation improved a bit, but after the events in Racak - followed by killings in Rogovo and Rakovina (KVM, 1999), the situation culminated again and NATO warnings resumed (Simma, 1999, p. 8). In the end of January, **Kofi Annan** was asked on the preconditions of the intervention to Kosovo. His answer "normally a UN SC resolution is required" indicated that this would not be the case. As it turned out, he was right in his presumption. The NATO air bombing in the end of March without UN mandate was the event of the year and became a hot topic in international law. The detailed history of the crisis can be very well followed by the SC UN resolutions, except the time of NATO bombing, when there was a long pause in the SC activities.

3.1 Kosovo crisis through the eyes of UN resolutions

We can ask why the UN was involved in the crisis at all, given the fact that it was an internal conflict. After the events during Bosnian war, the international community was afraid of repeating genocide and human suffering. After non-compliance with the resolutions, the UN SC was forced to adopt new ones mainly requesting to put an end to fighting and promoting diplomatic solutions. As we will see, until the conflict intensified in 1998 and got to the critical phase,

the international community was not so active in resolving the crisis, hoping for conflict parties to solve it alone. In 1998, there were three fronts that were involved in the crisis solution – UN SC, OSCE with its Verification mission and the US with **Richard Holbrook** in the front and his role in communication with **Slobodan Milosevic**. As far as there is lot to say, we will proceed with examining the resolution by resolution adopted by the UN SC to provide complex insights on the happening in Kosovo crisis, simultaneously with activities of the international community. This process brings together the situation from time point of view, from point of view of the internal conflict and the view of international community actions.

As it was already said, the territory of Yugoslavia was for a long time a centre of ethnic tension. The Kosovo conflict became obvious in the beginning of 1990s, when the CSCE mission was sent to the area. After refusing the mission to continue, the UN adopted the *Resolution 855 of 9 August 1993*, which was mostly dealing with the refusal of CSCE (today OSCE) mission² by Yugoslav authorities. The mission represented the preventive diplomacy and the UN called upon the authorities to reconsider the refusal and to allow the mission to continue and even strengthen its mandate and powers. It also calls upon authorities to monitor the mission and guarantee its security and safety.

For five years, the UN was completely quiet, and after the situation worsened, the UN responded with the *Resolution 1160 of 31 March 1998* to call “Yugoslavia immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions indicated in the Contact Group statements of 9 and 25 March 1998”, underlining the use of peaceful means, finishing the violence of Kosovar Albanians and stressing the Helsinki accords, asking for the return of the OSCE

² The then CSCE mission in Kosovo, Sandzak and Vojvodina started in 1992. Its mandate was not renewed again. For several years, the OSCE had no mission there, but in 1998 it the “largest and most challenging OSCE operation - the Kosovo Verification Mission (KVM) was to verify the Federal Republic of Yugoslavia’s compliance with UN Security Council Resolutions 1160 and 1199. The aim of the KVM was to check the ceasefire, monitor movement of forces, and promote human rights and democracy-building. After culmination of the fights, the mission withdrawn and was in June 1999 replaced by transitional OSCE Task force for Kosovo. Today, the OSCE is operating in Mission in Kosovo from 1999 as an integral part of the UNMIK where it has taken the “leading role in matter relating to institution and democracy building and human rights and rule of law” (OCSE. Mission in Kosovo. Mandate [online] [quoted 1.12.2015]. Available under <http://www.osce.org/kosovo/105907>).

mission and political dialogue as the basis for the solution. Indirectly, the UN supported autonomy of the Kosovar Albanians followed by the report of the Contact Group. The main purpose consisted of arms embargo and creation of committee of SC including all members of the Council and, what we are chiefly interested in, the SC “emphasizes that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures“. In the next *Resolution 1199 of 23 September 1998*, for the first time the term ‘humanitarian catastrophe’ was mentioned as a description of the situation raised by Secretary-General. The document also states that this situation constitutes a ‘threat to peace and security in the region’. The wording of this resolution was stricter and many times the usual ‘calls upon’ was replaced by ‘demands’. This resolution is the one “on the situation in Kosovo” and again promotes political dialogue and cessation of fighting. What was new, was the ‘political solution of Kosovo’, the EC Monitoring Mission, Kosovo Diplomatic Observer Mission and the resolution dealt also with the issue of refugees – as guaranteed rights and return back home after the cease of fighting. The UN also calls upon the responsibility the Federal Republic of Yugoslavia has for the use of force and for the security of diplomatic staff, international and non-governmental humanitarian workers, and that they cannot be the subject of the use of force. Among other topics, the full cooperation with International Tribunal for the Former Yugoslavia was demanded, and the UN underlined the need of justice for those who were involved in mistreatment of civilians and damage of property. Once again, the resolution ends with promise of “further action and additional measures to maintain or restore peace and stability in the region”, if the demands of the resolution would not be fulfilled. Together with the statement of situation constituting threat to peace and security, the promise of further action could have meant the use of force, or simply the military humanitarian intervention. However, in that time it was clear that Russians would not support resolution that would authorise the use of force. The next month was full of actions – mainly from the NATO side and the USA. **Javier Solana’s** speech from 9 October warned the international community that NATO would be ready to use force in Yugoslavia. He provided several reasons why: the non-compliance of FRY with the UN SC resolutions (especially resolutions 1160 and 1199); referring to the situation in Kosovo as humanitarian disaster; no concrete measures undertaken towards peaceful solution of the crisis; non-expecting of enforcement action by the UN SC due the Russia’s veto; and the clear

statement that the crisis constitute threat to peace and security meaning legitimate grounds for an action. One might think that FRY paid the great attention to this warning, because the diplomatic effort by **Richard Holbrooke** led to ceasefire and signing of two agreements – one involving the OSCE verification mission and NATO air verification mission, latter consisting of ending the crisis by political solution till 2 November.

Based on these agreements, a month later the SC resumed its actions by adopting *Resolution 1203 of 24 October 1998* – a verification resolution was accepted stating the OSCE verification mission and NATO air verification mission would monitor the implementation of resolutions 1160 and 1199. The resolution repeated all important points mentioned in previous resolution, underlining the dialogue with international involvement, responsibility for the safety of diplomatic and humanitarian staff and demands to both sides to follow the conditions stated in previous resolutions.

The next resolution - *Resolution 1207 of 17 November 1998* – was mainly focusing on the incapability and no will of Yugoslav authorities to execute arrest warrants and to cooperate with International Tribunal for Former Yugoslavia, referring to Resolution 827 on the establishment of this tribunal. This was the last resolution before the airstrikes. The bombing started on 24 March 1999 and lasted for eleven weeks. The very first resolution concerning Kosovo dealt with the status of refugees in *Resolution 1239 of 14 May 1999*. Yet, another almost half-a-year-pause in the UN actions is obvious. During this time, most of the debates were happening on the NATO grounds exclusively. After FRY accepted the peace plan on 3 June 1999, the *Resolution 1244 of 10 June 1999* was accepted in order to stabilise Kosovo and monitor the situation. In particular, its main purpose was the establishment of Special Representative Office, international civil and security presence, and preparing Kosovo for self-governing. The basic condition was the end of the hostilities and withdrawal of military presence from Kosovo. The security presence's role was to stabilise the situation from the military side – ensure the withdrawal, prevent of the return of the military forces, demilitarisation of Kosovo Liberation Army, securing the environment and supervising the situation. On the other side, the civil presence's task was to create and interim administration under the UN governance, where the inhabitants could enjoy autonomy within the FRY – this administration fulfilled its role as the transitional administration. During this time, the basic institutions should have been rebuilt, the infrastructure reconstructed, humanitarian and disaster relief provided and the elections should have been

prepared. All this matters should have been in conformity with the Rambouillet accords³, known as the final settlement of the Kosovo crisis.

These resolutions – especially 1160 and 1199 – were indicating that these were not last words said by the international community, and were later used as an indirect authorisation of the NATO intervention, since normally the wording would continue with using all necessary means. However, in that time it was clear the Russians would not agree on the use of force and China would abstain. Simply said, there was no political will to intervene, the Security Council was not unified – France, USA and UK were in favour of intervention, and Russia and China were against. In the case of Kosovo, however was also the 'uti possedetis principle'⁴ used as another justification of non-intervention. Therefore, there was no space left for Albanians to claim independence (Hilphold, 2001, p. 439). The power of veto became an obstacle in this case. According to the author, it is opportune to ask why the GA Uniting for Peace resolution was not used, when the SC was incapable of action due to the veto

³ Rambouillet agreement is final draft of the proposed Interim Agreement for Peace and Self-Government in Kosovo reached at Rambouillet on the 23 February 1999. It consists of eight chapters – Constitution; Police, Civil and Public Security; Conduct and Supervision of Elections; Economic Issues, Implementation I; Ombudsman; Implementation II and Chapter VIII. Generally, the agreement refers to the function of Kosovo in an autonomous regime, so far under UN governance. It proposes division of powers, institutions, areas where Kosovo can act for itself. It stresses out the important role of OSCE in police, civil and public security in order to monitor and supervise the law enforcement. Also is suggests the creation of several committees, i.e. Central Elections Commission (under the OSCE), Claim Settlement Commission (to decide on disputes arising from relocation of ownership) or Joint Military Commission. Chapters V and VII deal with the implementation. Chapter V is dealing with the public and legal side that should be under the heading of OSCE and the EU, whereas the Chapter VII is dealing with the military implementation, based on which KFOR created and NATO was established as the 'ruler' and was given many powers as well as obligations. It has also authorisation to take all necessary action to help to ensure the compliance. KFOR has also right to respond promptly, using military force of required. It has absolutely control over Kosovo airspace (Rambouillet agreement)

⁴ This principle was clearly explained by the ICJ in case Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), ICJ Judgment, 22 December 1986, saying that: *Uti possedetis* is "general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. It's obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power". In other words, it says that at the end of the conflict, the territory remains to the possessor – in this case Albanians had no right to let the territory for themselves, because the boundaries within the federation were not considered the boundaries for the newly created states.

of Russia. According to Chesterman, there was a proposal to go to the GA, but it met certain doubts and no will, because the 2/3 majority of votes were not expected. In addition, the question of GA as the right body to deal this issue within was raised – it is not so flexible, once the GA refuses the proposal, you are stuck with this decision, if it agrees, it might not mean sufficient legitimacy. (Chesterman, 2002, p. 296). As far as the both bodies of the UN were off any action, NATO took over the initiative and intervened.

3.2 Pause in the UN, actions of NATO

After the 1160 and 1199 resolutions not having expected impact, **Solana** as the NATO Secretary-General let himself to be heard that NATO did not see any reason not to intervene, even with the use of force, since the factual and legal conditions were sufficient (Hilphold, 2001, p. 440). Of course, the legal side was not backed by the UN Charter, but at least it “seemed initially to provide an important contribution to a peaceful solution of the problem” (Hilphold, 2001, p. 440).⁵ In February 1999, NATO deployed 20 000 – 30 000 troops into Kosovo, already authorised by **Solana** to carry out the airstrikes of FRY, would it not be willing to negotiate. As far as the FRY did not accept the plan of the Contact Group and it began an enormous action taking Kosovar Albanians from their homes, on 24 March, based on the decision of **Javier Solana**, the air strikes started without UN authorisation. It lasted for eleven weeks and as it was already said, the peace plan was accepted on 3 June. In hindsight, it seems like Security Council regained the primary role in the crisis after the peace plan was signed and the NATO bombing was cut off. Since the UN did not even mention the intervention in any resolution, one might think that it agreed with it. According to **Hilpold**, however, this cannot be seen as consent (Hilpold, 2001, p. 441). On the other side, after the attacks, Russia proposed a resolution that would condemn the NATO intervention. However, only three countries voted for this proposal – Russia, China and Namibia (Alex J. Bellamy and Nicolas J. Wheeler, 2008, p. 13). This behaviour can be considered as a kind of support of what NATO has done. In our opinion, the UN never really agreed or refused the

⁵ I would also doubt the term ‘peaceful’ here, since NATO targeted public places and strategic places that could be hardly called ‘peaceful solution’. Let’s say quick and useful solution. But who knew at that time, what it would have looked like?

intervention because it realised its own incapability of action. The Secretary-General, **Kofi Annan**, later let himself to be heard that the NATO intervention was necessary and it helped to end the crisis. When we look the rhetoric of NATO, we always see reference to the UN regarding the Kosovo crisis. NATO was trying to convince the outside world that it acted upon the decision of the UN, as a final decision of the UN resolutions. As said by the German Foreign Minister, NATO actions followed “sense and logic” of UN resolutions, therefore acted legitimately, if not legally (Simma, 1999, p. 12).

If the UN would have judged the intervention, other states can judge the UN publicly for inaction in this case despite referring to the primary role of the SC in maintaining peace and security also in resolutions concerning Kosovo. The Security Council in this case did not fulfil its responsibilities and, although illegally, were transferred by NATO to NATO. The question we are asking is: Who is responsible? Yugoslavia felt itself as a victim of the NATO airstrike and so pushed the intervention on ICJ. For ICJ it meant the same decision ten times.

3.3 International Court of Justice cases: Yugoslavia vs. NATO MS (1999)

When considering the NATO attack on Kosovo, the UN authorisation is clearly missing. The issue ICJ faced, therefore, is the ‘legality of the use of force’. Yugoslavia in 1999 accused Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, UK and USA. The court decided only in 2004, therefore Serbia as well as Montenegro as legal successors of Federal Republic of Yugoslavia are included as one of the parties. We will use the case of Yugoslavia vs. Belgium to point out several important issues related to analysed topic (Legality of Use of Force (Serbia and Montenegro v. Belgium), 2004).

Serbia in these cases argued that since this was internal conflict, the Article 2(4) cannot be used for justification on NATO use of force; quite to the contrary, it is its clear violation. Serbia claimed that NATO intervened in the internal affairs of Yugoslavia by bombing and equipping the KLA – meaning the violation of Article 2(4) and Article 2(7) of the UN Charter. Serbia states, that NATO was driven by geopolitical reasons and that there exists no precedent in the international law for humanitarian intervention. We are not sure what kind of geopolitical reasons could NATO have to intervene, risk lives of the soldiers for country or territory which has nothing to offer, but ethnic struggle. Of course, the

intentions could be to prevent the spread of the conflict and the idea upon which the conflict has arisen, but we really doubt that this could be considered as a geopolitical reason. Serbia refused also the collective self-defence justification under Article 51 because it did not attack anyone outside.

On the other side, the arguments of NATO were based on customary international law and on prevention of ongoing humanitarian catastrophe – which was confirmed also by the UN resolutions. NATO pointed out, that there was state of necessity⁶, since the war was getting bigger and crueller, and even could spread to other countries (mainly on the north – Macedonia, Albania and Romania). State of necessity can be considered as a legal justification for the action, since it is grounded in ARSIWA. Next point NATO used, was the Article 52 of the UN Charter where there is stated that there is nothing in the Charter that would preclude regional organisations from actions for maintaining peace and security. Two problems, however, arise – one is that NATO is not a regional organisation, it is based upon military and security cooperation and there is no regional sense to be found. This has been clarified also by the former NATO Secretary-General **Willy Claes** to UN Secretary-General (Simma, 1999, p. 10). The second problem is that right in Article 53 there is stated that when such a regional arrangement would like to undertake an action, it must be authorised by the UN. Considering the Article 2(4), NATO defended itself by referring to the humanitarian intervention based on humanitarian grounds whose aim was not to affect the sovereignty of Yugoslavia. The unsuccessful resolution to condemn to

⁶ The 'state of necessity' may be a circumstance precluding wrongfulness in the parlance of state responsibility. As far as the Art 25 of ARSIWA is referring to essential interest, an interesting question is whether essential interest may include events that do not have a direct impact on the state claiming to act under necessity. In this sense, Belgium was arguing against Serbia, claiming that "necessity is the cause which justifies the violation of a binding rule in order to safeguard, in face of grave and imminent peril, values which are higher than those protected by the rule which is breached." International Court of Justice. 1999. Belgium's Oral Pleadings (Serb. & Mont. v. Belg.), CR 99/15 (May 10, 1999) [online], [quoted 1.12.2015] available under <http://www.icj-cij.org/docket/files/114/4617.pdf>. Although referring explicitly to (draft Article 33) Article 25, the Belgian advocate provided the court with a definition of necessity where "values" is substituted for "essential interest." However, both of the narratives address interventions for humanitarian purposes "such as saving the lives of nationals or foreigners threatened" or interventions in cases of "grave and imminent danger ... simply to people." (Addendum to Eighth Report on State Responsibility by Mr. Roberto Ago, [1980] 2 Y.B. INT'L L. COMM'N 51, [paragraph] 53, U.N. Doc. A/CN.4/318/ADD.5-7)

bombing plus the following Resolution 1244 were clear signs of de facto consent or reconciliation with the intervention. The fact that the bombing successfully ended the ethnic cleansing and killing was in favour of ad hoc legitimisation.

After such an argumentation, the Court's decision would mean a great step in international law and in use of force norm. However, as already the ICJ has the habit of deciding upon its jurisdiction, it has done so this time too – upon the claim of Belgium. The ICJ found out that Serbia and Montenegro were not members of the UN in time of application, therefore not State parties to the Statute of the ICJ. Therefore, there is no necessity to decide on preliminary objections filled by plaintiffs. Even though the Court did not have to state or claim anything, it finally recalls that the parties “remain in all cases responsible for acts attributable to them that violate the rights of other States” (Legality of Use of Force (Serbia and Montenegro v. Belgium), 2004).

Since each of the defendants was a member state of NATO, the decisions are all the same. In all cases, the ICJ ruled that it has no jurisdiction to decide on these cases. Yet, these debates about this intervention stood in the centre of attention in international area. Because of all the possible justifications but evident legal gaps in the system, also the *International Independent Commission on Kosovo* was established to provide a complex report on the intervention.

3.4 International Independent Commission on Kosovo Report

According to International Independent Commission on Kosovo, there are several implications that can be used in the future to cope better with similar situation. The commission focused on Kosovo from two points of view – factual and analytical. In the first part, the Commission dealt with each phase of the crisis – emerging, pre-intervention period, intervention as such and post-intervention period. It provides exhaustive factual background that could easily replace the historical sources, since it is a legal document. In the second part, the Commission analyses the conflict from diplomatic dimension, from the side of international law (focused mainly on the concept of humanitarian intervention), it examines also the role of IOs and media.

Regarding the diplomatic dimension, the Commission stressed out the need for developing preventive diplomacy and concluded that some diplomatic effort was presented around 1992 and 1993, but the dismissal of Kosovo from Dayton

negotiations made Kosovar Albanians 'mad' and they then tried to get some attention through resistant groups. In 1998 it was even harder to push diplomatic (meaning peaceful) solutions due to the **Milosevic** attitude, until the **Holbrook – Milosevic** agreement was signed, and the Serbian side calmed down. However, it was used by KLA to return the attack. As a consequence, the conflict further escalated because of Serbian police units. The only diplomatic language that was useful or successful was the language of threat, which is against the Charter, since the threat might be taken equal to the use of force.

The report then shifts to the regional dimension – stating that the integration and cooperation in the framework of the EU should be promoted. Finally, it reflects on the future of Kosovo, its position in international environment, where the biggest problem is considered the clause in peace agreement where the autonomy must be given to Kosovo, and at the same time the territorial integrity of Serbia and Montenegro must be respected. In this respect, the Commission suggests the 'conditional independence'⁷.

What was indeed surprising is that Commission believed that Russia's diplomatic effort was a great plus in the whole process, although its veto in the resolution authorising the use of force was the main reason for NATO going into Kosovo.

Regarding the structural issue, Kosovo crisis showed the poor funding of UNHCR, weak cooperation between military, humanitarian and police units and generally weak preparedness for similar situation. This is more connected with the conflict management, which has developed quite well, especially in the EU, whose capabilities are used in several missions (like in Somalia).

This intervention brought a new stream in legal literature suggesting new stance towards the concept of humanitarian intervention (Hilphold, 2001, p. 437). When using the statement of the Commission, the NATO airstrike were illegal, but legitimate. Nevertheless, NATO underestimated the situation and the Serbs themselves. Therefore, NATO had to broaden the scope of their targets to include also strategic ones, and therefore risk civilian lives. The Commission underlines that the gap between legality and legitimacy must be closed. It

⁷ This means "expanding the autonomy and self-government promised by 1244 in order to make Kosovo effectively self-governing outside the FRY, but within an international framework" (Kosovo report, p.9). The international community would be responsible for Kosovo and guarantor of initial security and the protection of minority rights and would also integrate Kosovo into an effective stability pact.

proposes to define principles that would guide the intervention intentions, most probably in the form of Declaration. Among these principles, these three would be the most important and have to be fulfilled:

- Suffering of civilians should be present, either due to the human rights violations or due to the breakdown of government
- The crucial driving force should be the protection of civilians
- Necessary calculation of chances to end the humanitarian catastrophe.

The report has several interesting final statements that started the debate about the reform of UN SC to avoid the indirect support for organisations like NATO in unilateral interventions, or about the Western interventionism. However, even if the rules for humanitarian intervention would be clearly stated, still the prevention phase must be the priority for the international community. All possible peaceful means must be exhausted – as in the Kosovo case – and only then the intervention can be considered as a next step.

Generally, the Commission does not regard the NATO attack neither success nor failure. The failure rests in the fact that NATO could not prevent Kosovo and people from suffering and from humanitarian catastrophe, since the murders, rapes and similar crimes were most often happening during the eleven-week bombing. The commission claims that the airstrikes were not the reason, but it 'prepared' an appropriate environment for them to happen. Another event that does not accomplish its intended purpose was that **Milosevic** remained in power and the strict rule continued in Serbia (or it even worsened?). Finally, the people of Serbia were the biggest losers. Kosovo is even today the area where nobody knows what will happen. Surroundings of Kosovska Mitrovica still represent a threat of similar attacks that occurred in the 1990s.

Conclusions

We have provided all the necessary information considering the Kosovo crisis, the behaviour of the UN, attitude of NATO, final solution, Report of IICK concluding the intervention illegal, but legitimate and the sequel on the ICJ that decided that it cannot decide the case. Such decisions are quite often visible in the jurisdiction of ICJ. It seems like two most important actors in international law – the UN and ICJ are very limited in their actions and so could seem to be incapable of making strict and important decisions. There also seems to be the feeling that although the issues of international humanitarian law are of

enormous importance, its enforceability is too weak and therefore no strict rules can be followed. The ICJ and the UN deal with each case / situation individually, according to the world-order situation.

Nevertheless, this intervention is considered as a milestone in perception of the international environment. This perception shifted from 'Hegelian' state-centred system towards 'Kantian' community-oriented model (Hilpold, 2001, p. 437), where the latter emphasizes the core role of fundamental rights and freedoms and opens a new chapter of the concept of legitimacy. Or, in other words, shift from traditional sovereignty oriented system towards human rights oriented system.

The Rambouillet agreement is a sign that international community has tried to use all possible peaceful means and that the NATO airstrikes were that of the last solution. Although it is necessary to add that **Milosevic** was unwilling to take any steps towards an agreement, so the Western allies had to use kind of coercive means. The Rambouillet involved a clause enabling KFOR to use all the necessary means if FRY would not comply with the provisions. If the Rambouillet had been signed in the pre-airstrikes-period, the consent of the UN would not have been necessary when using force, since there had been the consent of FRY for such actions (Simma, 1999, p. 13).

We can conclude that most of the international rules were followed. It was the UN in cooperation with other organisations (especially OSCE and NATO) that decided on actions against FRY. The international community tried all the peaceful means of settlement, although in this case Richard Holbrooke played the significant role through submitting and negotiating the Rambouillet agreement. The UN resolutions were aimed at further action, and the situation in Kosovo was referred to as a threat to peace and security. The only act that is missing is the authorisation resolution of the SC to use all necessary means to stop the killings and solve the crisis in Kosovo. Due to the Russia's veto, the NATO took over the initiative and intervened. The following silence of the UN about the intervention and **Annan's** speech more-or-less condemning the attack seems legitimate when considering this particular intervention. However, it was said clearly by the international community that the Kosovo case must not have become the precedent of unauthorised intervention based on the humanitarian grounds. The point was to always involve UN resolution and the SC as such. This approach is in conformity with the approach of Responsibility to Protect. Nevertheless, one cannot forget about the veto power that can be again a rationale for unauthorised intervention.

Regarding the legality vs. legitimacy struggle, in this case the latter is prevailing and builds on the whole process of UN resolutions and NATO attack as a last resort and the support of community of state. We cannot forget about the human rights violations that constitute a main reason for humanitarian intervention as a threat to peace and security. However, this does not mean that lawfulness is not important anymore. The case-by-case approach is needed when dealing with situations when humanitarian intervention can be undertaken. The main aim should be to avoid the malfunction of Security Council, which is about to be proposed in next lines. However, the resulting action/inaction should be outcome of both legal arguments as well as moral arguments based on human rights doctrine. The notion of sovereignty and non-intervention clause did not hinder the intervention to happen as far as it cannot be used as a justification for non-using force in order to pursue humanitarian purposes. We would like to refer to the concept of conditional sovereignty that became another ad hoc justification, since it does not empowers state authorities to kill and torture its citizens. Subsequent arrest of **Milosevic** clearly indicates the basis for Responsibility to Protect concept.

Based on these arguments and outcomes of author's analysis it is possible to conclude that in its current form the UN Charter is not reflecting the needs of current international system. Secondly, current practices of the ICJ are reflecting the fear of ICJ to decide on another precedent. Finally, the current direction of the intervention norm is requiring change in decision-making in the UN, exercise of veto power or change of the UN Charter. UN Charter is hard to apply it in today's world, which is different from world in 1950. As far as author is concerned, the permanent members group of the SC should expand (to include Germany and Japan because they are economically, as well as socially developed, and Brazil, India and United Arab Emirates, because they are leaders in their regions, Canada because is biggest peace power and one African country - Nigeria or South Africa as the most developed countries on the continent). At the same time, the right to veto should be cancelled. The vote should be based on 2/3 or 3/4 majority of SC non-permanent members as well as permanent members. Therefore, if there were twelve permanent members, and the system of 3/4 majority would be accepted, the minimum votes for accepting use of force would be nine. The combination of countries as non-permanent members would not be so dependent on continent representation and policy affiliation and the number would increase to sixteen to make it divisible by four. The five permanent members were given the veto power because they helped

to win the Second World War. However, since 1950 there were lot of conflicts, lot of ignorance to human rights violations confirmed by the different judicial and non-judicial authorities and the UN did not fulfil properly its role of an international organisation whose primary task is to maintain peace and security. With the further development of the R2P, also responsibility not to use veto emerged which motivates P5 countries to abstain from voting rather than to veto the resolution dealing with gross human rights violations.

Second option of how to avoid the malfunction of SC is to transfer the competences to the General Assembly, de facto authorise the Uniting for Peace.

Nevertheless, the R2P calls upon all states to focus on preventive actions in order to minimize future intervention, since this constitutes the main purpose of R2P.

References:

- BELAMY, A. – WHEELER, J. 2008. *Humanitarian Intervention in World Politics*. [online] Available at: <<http://cadair.aber.ac.uk/dspace/bitstream/handle/2160/1925/Wheeler,%20Bellamy.pdf?sequence=1>> [Accessed on 17 April 2013].
- BIANCHI, A. 2002. Ad-hocism and the Rule of Law. *European Journal of International Law*, Vol. 13. No. 1 (pp. 263-272).
- Case concerning Legality of Use of Force - Serbia and Montenegro v. Belgium. (International Court of Justice 15. December 2004).
- COATES, A.J. 1977. *The Ethics of War*. Manchester: Manchester University Press.
- DEN HARTOGH, G. 2001. Humanitarian intervention and the self-image of the state. In: Arend Soeteman ed., *Pluralism and Law*. Kluwer, Dordrecht/Boston/London (p. 107-132), [online] Available at: <<http://dare.uva.nl/document/5217>> [Accessed on 29 November 2013].
- DOMAGALA, A. 2004. *Humanitarian Intervention: The Utopia of Just War? The NATO intervention in Kosovo and the restraints of Humanitarian Intervention*. Sussex European Institute Working Paper No 76.
- GRAY, CH. 2008. *International Law and the Use of Force (Foundations of Public International Law)*. 3rd edition. Oxford: Oxford University Press.

- GREPPI, E. 2008. Some Reflection on the Challenges which International Humanitarian Law Has to Face in Contemporary Armed Conflicts. *International Peace Operations and Humanitarian Law* (pp. 83-86). Roma: International Institute of Humanitarian Law, Sanremo.
- HILPOLD, P. 2001. Humanitarian Intervention: Is There a Need for a Legal Reappraisal? *European Journal of International Law*, Vol. 12, no. 3 (pp. 437-467).
- HOLZGREFE, J.L. - KEOHANE, R.O. 2003. *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*. Cambridge: Cambridge University Press.
- CHESTERMAN, S. 2001. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press.
- CHESTERMAN, S. 2002. Legality versus Legitimacy: Humanitarian Intervention, the Security Council and the Rule of Law. *Security Dialogue*, vol. 33, SAGE Publications, (pp. 293-307).
- CHINKIN, C. 1999, "Kosovo: A 'Good' or 'Bad' War?" *American Journal of International Law* 93, (pp. 841-847).
- INTERNATIONAL COMMISSION ON INTERVENTION AND STATE RESPONSIBILITY. 2001. *Responsibility to Protect*. Ottawa: International Development Research Centre.
- INTERNATIONAL INDEPENDENT COMMISSION ON. 2001. *The Kosovo Report*. New York: Oxford University Press.
- KREJČÍ, O. 2001. *Mezinárodní politika*. Praha: EKOPRESS.
- MATLARY, J. H. 2005. *Value and Weapons: From Humanitarian Intervention to Regime Change?* Oslo: University of Oslo and the Norwegian Institute of International Affairs.
- NATO. 1999. *Rambouillet Agreement*.
- OSCE. *History of the OSCE engagement in Kosovo*. [online] Available at: <<http://www.osce.org/kosovo/105907>> [Accessed on 2 December 2015].
- OSCE KOSOVO VERIFICATION MISSION. 1999. *KOSOVO/KOSOVA: As Seen, As Told*. Warsaw: OSCE Office for Democratic Institutions and Human rights.
- PATTISON, J. 2010. *Humanitarian Intervention and the Responsibility To Protect: Who Should Intervene?* Oxford: Oxford University Press.
- SIMMA, B. 1999. NATO, the UN and the Use of Force: Legal Aspects. *European Journal of International Law*, vol. 10 (pp. 1-22).
- TESÓN, F. 1997, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., New York: Transnational Publishers Inc., Irvington-on-Hudson.

UNITED NATIONS. 1945. *Charter of the United Nations*.

UN GENERAL ASSEMBLY. *Emergency Special Sessions*. [online] Available at: <<http://www.un.org/en/ga/sessions/emergency.shtml>> [Accessed on 15 April 2013].

UN SECURITY COUNCIL. *Resolutions adopted by the Security Council in 1990*. [online] Available at: <<http://www.un.org/en/sc/documents/resolutions/1990.shtml>> [Accessed on 17 April 2013].

UN SECURITY COUNCIL. *Security Council Resolutions*. [online] Available at: <<http://www.un.org/en/ga/sessions/emergency.shtml>> [Accessed on 15 April 2013].

VERVEY, W. D. 1998 Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective', in Jan Nederveen Pieterse (ed.), *World Orders in the Making*, London: Macmillan Press Ltd.

WALZER, M. 1977. *Just and Unjust Wars*. New York: Basic Books.

WALZER, M. 1992, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed., New York: Basic Books.

WEDGEWOOD, R. 2000. Unilateral Action in the UN System. *European Journal of International Law*, vol. 11, no. 2 (pp. 349-359).

WELSH, J. 2004. *Humanitarian Intervention and International Relations*. Oxford: Oxford University Press.

WHEELER, N. J. 2000. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press.

WHEELER, N. J. 2003. 'Humanitarian Intervention after September 11', in Anthony Lang (ed.). 2003. *Just Intervention*. Georgetown: Georgetown University Press.

LIST OF RESOLUTIONS

UN GA Resolution 377 - Uniting for Peace

UN SC Resolution 855 - Kosovo

UN SC Resolution 1160 - Kosovo crisis

UN SC Resolution 1199 - Kosovo crisis

UN SC Resolution 1203 - Kosovo crisis

UN SC Resolution 1207 - Kosovo crisis

UN SC Resolution 1239 - Kosovo crisis

UN SC Resolution 1244 - Kosovo crisis