

Vladimir-Đuro Degan,
Professor Emeritus of the University of Rijeka

OBSERVER MISSIONS AND PEACE-KEEPING OPERATIONS IN CROATIA, BOSNIA-HERZEGOVINA, AND KOSOVO

This paper deals with the collective security system as provided in Chapters VI, VII and VIII of the UN Charter. Observer missions and peace-keeping operations have no explicit legal basis in the text of the Charter. They have developed in practice. Each of them is based on decisions either by the Security Council, or sometimes even by the General Assembly.

The second part of this article is consecrated to the UN Protection Forces (UNPROFOR) in Croatia and Bosnia-Herzegovina. In spite of its name, and although equipped with armed weapons, the UNPROFOR was in fact a concealed observer mission. It had no mandate for peace-keeping, that what was expected from it by the Croatian public. It did not halt the crimes against civilians in the four parts (UN-PA-s) of Croatia occupied by Serbs. Neither did it ensure the return of displaced persons to their homes, what was necessary to create the conditions for the free and democratic elections in these Croatian areas endowed with the "special status".

The deception was much higher with the UNPROFOR in Bosnia-Herzegovina. From originally an observer mission like that in Croatia, it was latter on entrusted with the peace-keeping, but never with a clear mandate sufficient for performing its rapidly expanded duties. It was never authorized to use force beyond that required in self-defence, and in order to secure the transportation of humanitarian aid. For instance, the city of Sarajevo was surrounded by the Serbian troops from April 1992 to September 1995 with enormous sufferings of civilians, thus even longer than the siege of Leningrad during World War II. The genocide in Srebrenica that happened in June 1995 was not prevented, although there were sufficient weapons, but not the will to do that. Therefore, that peace-keeping mission in Bosnia-Herzegovina was a fiasco for the UN, the same as that in Somalia in 1993.

After a review of crimes committed by the Serbian authorities against the Albanian majority population in Kosovo, in Spring 1999 ensued the NATO bombing action on the territory of the Federal Republic of Yugoslavia. Due to the opposition by Russia and China, that enforcement action was not authorized by the UN Security Council under Chapter VII of the UN Charter. This article deals in particular with the problem whether in a situation of extreme necessity which dictates the deterrence of a worst evil, a humanitarian intervention by armed forces is under the present international law legitimate.

Keywords: *Collective security; United Nations; Enforcement measures; Measures not involving the use of force; Observer missions; Peace-keeping operations; UN-PROFOR; NATO.*

The activities of observer missions and peace-keeping operations within the collective security system as established in the UN practice after the World War II constitute an important part of recent Croatian history and history of some other Successor States of the Former Socialist Federal Republic of Yugoslavia. Nevertheless, students of some Croatian Faculties of Law and attendees of the Zagreb Diplomatic Academy learn almost nothing about it. Politicians and diplomats, as well as journalists as opinion-makers have even less knowledge of these important legal matters. Consequently, our public has been rather frustrated by the UN actions, which were otherwise also encumbered with insufficient and inadequate decisions of the Security Council and with reluctance of the so-called “international community” to confront the situation in these territories between 1991 and 1999.

I - COLLECTIVE SECURITY SYSTEMS

Collective security systems are based on complex and long-term legal commitments of their Member States to a collective action in case somebody tries to endanger the maintenance of international peace and security. They were established on the values of a given age. These systems, *inter alia*, set out obligations of the States in pacific settlement of international disputes in order to prevent conflicts, and also obligations concerning a collective action of their Member States under previously provided conditions.

Throughout the history three such systems were exercised with varying success in order to maintain European and world peace. They were: the Holy Alliance (1815-1830), the League of Nations (1919-1946), and the United Nations established by the 1945 Charter.¹

The UN Charter laid down six principal and a cluster of subsidiary organs, as well as UN specialized agencies. According to the Charter, the three principal UN organs are important for the collective security system.

1. The *Security Council* is politically the most important organ. It is an executive organ of the UN with the powers to adopt instant, legally binding decisions for all Member States of this world organization. It consists of five permanent Member States as laid down by the Charter (the United States of America, the current Russian Federation, the United Kingdom of Great Britain and Northern Ireland, China and France), and 10 non-permanent members elected by the General Assembly for a term of two years. However, no obligatory decision may be adopted by the Security Council within its competence if it is vetoed by any of the permanent Members.

¹ For more see – V. Đ. Degan: *Međunarodno pravo i međunarodna sigurnost*, Sarajevo 1982, pp. 13-39.

The Security Council does not have general competence. The principal competence – and responsibility – of the Security Council is the maintenance of international peace and security (Article 24(1) of the Charter). When it establishes itself the existence of any threat to the peace, breach of the peace or act of aggression in any part of the world (Chapter VII of the Charter), it may, besides recommendations, also bring binding decisions for all or only some Member States.

2. The *General Assembly* is the only plenary and democratic organ of the UN in which each Member State is represented by one vote. In contrast with the Security Council, it has general competence and may discuss any matter within the framework of the Charter, including the matters of the maintenance of international peace and security. However, contrary to the Security Council, it may in principle merely adopt recommendations for the Member States and other UN organs.

3. The *UN Secretary-General* may bring to the attention of the Security Council any matter which he thinks may threaten the maintenance of international peace and security. However, he has not often used this power. In dispute settlements he performs functions vested in him by the Security Council or the General Assembly.

Occasionally, the Secretary-General may take independent actions to settle disputes threatening international peace. He may offer his good offices or mediation activity to parties to a dispute discretely, or even secretly. If he should so decide, he is to proceed within the frameworks of previously adopted resolutions of the Security Council or the General Assembly. If his action turns out to be successful, the achieved dispute settlement may be subsequently approved by one of these organs.

It should also be pointed out that the Secretary General may not exercise his powers and responsibilities successfully unless he enjoys political confidence of each of the five permanent Member States of the Security Council.

*

The UN collective security system is laid down in Chapters VI, VII and VIII of the Charter. The parts thereof refer to: pacific settlement of disputes (Chapter VI), action with respect to threats to the peace, breaches of the peace, and acts of aggression (Chapter VII), and regional arrangements and agencies (Chapter VIII). The most important role in this system is the role of the Security Council, while the General Assembly has a subsidiary role. These mechanisms shall be briefly outlined below.²

² For a number of cases referring to the practice of the UN organs see – NGUYEN QUOC DINH: *Droit international public*, Patrick Daillier et Alain Pellet, 7e édition Paris 2002, pp. 842–853, 989–1021.

*

Pacific settlement of disputes according to Chapter VI of the Charter. The Charter uncommonly separates this procedure from the one in Chapter VII, and sets out completely distinct powers of the Security Council therein.

According to the Charter, the parties to any dispute shall, first of all, seek a solution of their own choice. If the negotiation or any other means of settlement should fail, they have an obligation to refer their dispute with such characteristics to the Security Council (Article 37(1)). Under Chapter VI of the Charter, the Security Council is entitled to keep under its control any dispute that is likely to endanger the maintenance of international peace, but it may only make recommendations to the parties concerned. In order to exercise its functions under Chapter VI, but also with Chapter VII, the Security Council is politically required to obtain an agreement by its five permanent Member States. In former times, when this cooperation did not exist, it was unable to carry out its responsibilities in many critical situations.

If none of the permanent Members blocks its action, the Security Council utilizes all available diplomatic means to settle disputes. Deliberations in public are accompanied by negotiations conducted behind the scenes and efforts made to persuade all parties to find a solution to their dispute, even by means of blackmail, and especially threats implying that enforcement action shall be taken against the party that refuses to adopt the solution offered under Chapter VII of the Charter. Thereby, in order to resolve a conflict, the Security Council sometimes imposes the terms of the dispute settlement to the parties concerned.

Thus the differences with respect to the powers of the Security Council under Chapters VI and VII of the Charter have become obliterated in practice, because the process of dispute settlement serves to maintain or restore international peace and security.

*

(b) *Chapter VII of the Charter.* In contrast to its powers in Chapter VI, if the Security Council establishes the existence of any threat to the peace, breach of the peace or act of aggression anywhere in the world, then under Chapter VII it may adopt binding decisions, in addition to recommendations, for all or only some UN Member States, as it may decide. As pointed out above, it is politically required that all five permanent Members take action in mutual agreement. As a consequence, if any of them is itself an aggressor State, or if an act of aggression has been committed by any other state under its protection (e.g. Israel in Lebanon in 2006) the Security Council has no power to carry out its primary responsibility for the maintenance of international peace and security. Then the result is the blockade of the UN collective security system, as it happened, for instance, in the

Kosovo case. In 1999 NATO conducted a bombing action in the territory of the Federal Republic of Yugoslavia, including Kosovo, on its own, and without any authorization of the Security Council. Similarly, in 2003 the United States and the United Kingdom carried out an armed intervention in Iraq, which is still lasting, in order to overthrow Saddam Hussein's regime.

In absence of a blockade of the permanent Members, this organ may order to the UN Member States two types of measures.

*

Measures not involving the use of armed force. The Security Council has a wide range of measures it may employ to give effect to its decisions. It may call upon all UN Member States, or only some of them, to apply such measures. They may be of economic, political or any other nature, and include: "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (Article 41)

Since the mid 1960s the Security Council has been increasingly imposing such measures by its decisions under Chapter VII of the Charter, for instance: against the racist regime in Rhodesia (1966-1980); against Iraq during the Kuwait invasion from 1990 to 2003; against Libya from 1992 to 1999; in the territory of the Former Yugoslavia from 1992 to 1996; against Liberia since 1992 and Haiti since 1993, etc.

At the beginning of an internal conflict without a designated aggressor the Security Council almost automatically imposes a general and complete embargo on all deliveries of weapons to the affected country.

The Security Council may also impose economic sanctions upon a hostile party that involve prohibition of business transactions and freezing of the assets of the state concerned and its overseas companies; prohibition of air transportation with this country; blockade of its ports and merchant ships in foreign ports, etc. All UN Member States are legally bound to implement the above measures, unless they have been exempted by the Security Council.³

The weakness of economic and other non-violent measures lies in their long-term effectiveness. Moreover, they only affect the civilian population of the state concerned (including the minorities who may merely be victims of its oppressive regime), and not the power-holders who are determined to extend their aggressive and criminal politics. They are certainly not a means of rapid termination of extended international crimes these power-holders are responsible for.

³ All generally recognized states in the world are currently members of the UN, with the only exception of the Vatican City State.

*

(ii) *Enforcement action*. Where the Security Council feels that the measures short of armed force would be inadequate, or if they have already proved to be inadequate, it may take “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

There have only been three differently established enforcement actions conducted on the following occasions: (a) in South Korea, the UN reaction to the North Korean invasion (1950-1953); (b) during suppression of the separatist mutiny in the Congolese Province of Katanga (currently Shabl) (1963); and during suppression of the invasion of Kuwait by Iraq at the beginning of 1991. Only the latter was conducted in accordance with the provisions in Chapter VII of the Charter, because it was a joint action of all permanent Members of the Security Council. A more thorough description is thus required at this point.

On the same date of the Iraqi invasion of Kuwait on 2 August 1990 the Security Council adopted Resolution 660 unanimously, thereby condemning the invasion and calling for immediate and unconditional withdrawal of Iraq. According to Resolution 662 of 9 August the Security Council declared that the purported Iraqi annexation of Kuwait was null and void. All states and international organizations were called upon to refrain from any action or dealing that may be interpreted as an indirect recognition of the annexation.

Nevertheless, aware of Iraq's unsatisfactory compliance with the foregoing and some other resolutions and measures, the Security Council adopted Resolution 678 on 29 November 1990, thereby allowing Iraq one final opportunity to withdraw from Kuwait and comply with all resolutions. Thereby it also authorized Member States co-operating with the Government of Kuwait (in exile) to “use all *necessary means* to uphold and implement Security Council Resolution 660 and all subsequent relevant resolutions and *to restore international peace and security in the area*.” This formula was its authorization for a military intervention.

The given deadline expired on 15 January 1991. The day after a coalition of states under the leadership of the United States undertook an enforcement action by land, air and naval forces and inflicted a military defeat on Iraq. It expelled all Iraqi forces from Kuwait and temporarily occupied a portion of the Iraqi border territory. Despite the defeat, Saddam Hussein managed to remain in power in Baghdad. This action was taken under the supervision of the Security Council, but not under its command. On 16 January 1991 its Military Staff Committee ceased to have any actual responsibility.

This example has shown that mutual cooperation between the five permanent Members of the Security Council renders the enforcement action feasible under Chapter VII of the Charter. It is also rendered feasible despite a lack of con-

cluded agreements between all UN Members on availability of their contingents of armed forces to the Security Council, as provided by Article 43 of the Charter. Hence, an intervention may be undertaken pursuant to Article 42, independent of Article 43.

*

(c) *Chapter VIII of the Charter.* In regard to the use of armed forces of military alliances or *ad hoc* coalitions in foreign countries, Chapter VIII of the UN Charter is explicit: “The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken ... without the authorization of the Security Council ...” (Article 53(1))

The above wording would imply that the enforcement action by such forces (e.g. the bombing action of NATO forces in the territory of the Federal Republic of Yugoslavia in 1999), without any prior authorization of the Security Council, would be in contradiction with the UN Charter. Then it would be evaluated in conformity with the criteria laid down in the Definition of Aggression according to the Resolution of the General Assembly in 1974. Under such circumstances this action may be treated as an act of aggression.

*

The above provisions of the Charter have remained a legal framework for actions of the international community until the present day. Nevertheless, during sixty years of practice they have been continuously developed. The international action has sometimes suffered spectacular failures, particularly when actions of the permanent members of the Security Council were discordant.

Collective actions that may be taken within or outside the UN can be divided into: (i) observer missions; (ii) peace-keeping operations, and (iii) enforcement actions under Chapter VII of the Charter outlined above.

The first two types may not be attested by the wording of the Charter, although observer missions could, nevertheless, be subsumed under Chapter VI of the Charter. Some authors characterize peacekeeping operations, established in practice, as “Chapter VI *bis* of the Charter”. Their provisions are likely to be entered into the wording of the Charter on the occasion of its first thorough revision.⁴

⁴ In 1993 UN Secretary General Boutros Boutros-Ghali published an extensive document entitled *An Agenda for Peace*. Therein he sought to categorize types of actions taken or supposed to be taken by the UN. *Preventive diplomacy* is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts, and to limit the spread of the latter when they occur. For this purpose some endeavours are recommended such as fact-

When deploying observer and peace-keeping missions in an area, the UN organs and the missions alike adhere to three principles: (i) prior consent of hostile parties (whether in internal or international conflict); (ii) impartiality toward all parties; and (iii) the non-use of force (other than in self-defence). Therefore, these actions are distinct from those taken by the Security Council under Chapter VII of the Charter.

Observer missions dispose with a relatively small number of personnel. Their duty is to monitor and report to those they have been deployed by. Their officers are unarmed, or have only light arms for personal use. They are incapable of physical resistance against any unlawful conduct of the parties in conflict.

Very early the Security Council and the General Assembly started to deploy such missions in some parts of the world to supervise compliance with and execution of a resolution or a cease-fire agreement between hostile parties.

The first UN observer mission was deployed in 1947 in Greece, engulfed in civil war at the time, according to General Assembly Resolution 109. The observers supervised the Greek side of the border to detect arms and ammunition arriving for Greek rebels from the neighbouring countries (especially Yugoslavia). The mission lasted until 1954. However, the uprising was suppressed much earlier after Yugoslavia, following its conflict with the Soviet Union in July 1949, had closed its border with Greece and thus in fact betrayed the rebels whom it had actively assisted and encouraged before.

In 1948 according to Security Council Resolution 50 military observers were deployed in the then Palestine to supervise the interim cease-fire achieved the same year. The same year according to Security Council Resolution 47 observers were deployed in India and Pakistan to supervise the cease-fire in Jammu and Kashmir. This observer mission, to the best of our knowledge, is still lasting. Similarly, there are observer missions in many other parts of the world nowadays. Some of them also involve Croatian Army officers.

Peace-keeping operations involve the UN armed forces that are established between the hostile parties in such a way that the recurrence of a conflict would

finding, good services and good offices and good faith missions. *Peacemaking* is action to bring hostile parties to agreement, essentially through such peaceful means as those set out in Chapter VI of the Charter of the United Nations. Finally, *peace-keeping* is the deployment of a UN presence in the field. In other words, these are the mentioned observer and peace-keeping missions. *Peace building* is action to identify and support structures which will tend to strengthen and solidify peace. *Peace enforcement* is *peacekeeping* without the consent of the parties in conflict, and is conducted in accordance with the provisions in Chapter VII of the Charter. However, this world's organization suffered a fiasco during Boutros-Ghali's mandate (1992-1997), in, *inter alia*, Bosnia-Herzegovina since 1992, also including the massacre in Srebrenica in 1995, in Somalia in 1993, and in Rwanda, where between half a million and 800,000 civilians were killed between 6 April and 17 July 1994.

be made possible only if these forces were attacked, which, in turn, would reveal the aggressor. However, this distinction is not rigid. A former observer mission may subsequently be authorized as a peace-keeping mission.

The British and French military intervention in the area of the Suez Canal in Egypt and the concomitant occupation of the Sinai Peninsula by Israel between October and December in 1956 induced the first urgent extraordinary session of the General Assembly according to its Resolution “Uniting for Peace” in 1950. According to Resolution (998-ES-I) of 4 November 1956, the General Assembly, with the “consent of the nations concerned”, established “an United Nations Emergency Force” (UNEF).

The first “Blue Helmets” thus came into being. This armed formation, composed of several different national contingents (including the ones of the Former Yugoslavia) was assigned to supervise the cease-fire and withdrawal of Israeli forces from the Sinai Peninsula, and deployed on the Egyptian side of the border with Israel to prevent future armed conflicts of the two parties. These forces were performing their mission of separation there until their withdrawal upon the Egyptian request on 19 May 1967, prior to the “Six Day War”. In that war Egypt, Jordan and Iraq suffered a severe military defeat, whose consequences are still remaining.

These peace-keeping missions were followed by many others in different parts of the world, including in the territory of the Former Yugoslavia. Besides the separation of hostile parties, these missions also aim to reconcile tensions in the territory. However, they may also obtain many other different assignments during their mandate: to exercise interim administrative functions in an area (e.g. in Cambodia, or Croatian Podunavlje); to supervise the compliance with the agreements on human rights and repatriation of refugees; to supervise elections; to train local police forces; to control peace treaties; to supervise troop withdrawal agreements and demilitarized (demobilized) zones; to assist in mine removal actions, etc.

Therefore, these armed peace-keeping missions are considerably distinct from the enforcement action of UN forces that are deployed in a territory under Chapter VII of the UN Charter, but which are nevertheless established against an aggressor in an international or internal conflict.

II - OBSERVER MISSIONS AND PEACE-KEEPING OPERATIONS IN THE TERRITORY OF THE FORMER YUGOSLAVIA

During the open attacks of the Former Yugoslav People’s Army in Croatia (in Vukovar, other Podunavlje areas, and Western Slavonia), a general and complete embargo was imposed on all deliveries of weapons to Yugoslavia by Resolution 713 of 25 September 1991, which was not lifted until the end of 1995. This non-selective measure soon proved to be counterproductive. It was mitigating for the

Serbian side in the conflict that had unlawfully seized the largest quantities of weapons of the Former Yugoslav People's Army, and aggravating for its victims who often did not have any means of defence. Consequently, the embargo, in fact, merely prolonged the conflict in Croatia, and particularly in Bosnia-Herzegovina.

Previously, in accordance with the Brijuni Agreement of 7 July 1991 an unarmed observer mission was *inter alia* also established by the CSCE (originally the Conference on Security and Co-operation in Europe, but currently the Organization for Security and Co-operation in Europe) with its headquarters in Zagreb. Initially, it only supervised the cease-fire in Slovenia. However, after escalation of the triumphal invasion of the Yugoslav People's Army, particularly in Western Slavonia and Croatian Podunavlje, it increased its personnel and on 1 September expanded its observation activities to Croatia, as well. Comparable to other observer missions, it supervised the state of affairs and submitted reports to its superiors. Nonetheless, it could not resolve the conflict, and neither could it prevent crimes, e.g. the crimes in Vukovar, which caused feelings of frustration in Croatia. This mission was subsequently authorized by the same Security Council Resolution 713 of 25 September 1991 which imposed the embargo on all deliveries of weapons to Yugoslavia.

When the first Croatian Constitutional Law on the Rights of Ethnic and National Communities was adopted at the beginning of December 1991, there was still hope that it would be possible to implement its provisions in good faith. It was believed that, after the UN forces had been deployed in the occupied territories, it would be feasible to ensure peaceful repatriation of all refugees and afterwards, after free and multiparty elections in municipalities with a special status (i.e. with the Serbian majority), to establish all self-governing bodies together with the local police, with proportionate participation in power of both Serbian and the Croatian population. However, none of the above came true.

Following the Sarajevo Cease-Fire Agreement in Croatia of 2 January 1992, the Security Council established the "United Nations Protection Force" (UNPROFOR) according to Resolution 743 of 21 February the same year. This armed, but essentially an observer mission was to be of an interim character, until the negotiations resulted in conflict settlement. These forces were deployed in four Croatian zones seized by the Serbs at the time (UNPAs), i.e. in Eastern and Western Slavonia, and Krajina, which was divided into the north and the south zones. This entire region was to be demilitarized. The Serbian militia weapons were to be stored and supervised by UNPROFOR, and the Yugoslav People's Army and the Croatian National Guard were obliged to leave the territory.

Nevertheless, the function of these forces was not to prevent crimes, but to supervise the cease-fire and safeguard humanitarian relief convoys. They were not allowed to use weapons for purposes other than self-defence. Therefore, UN-

PROFOR completely failed to protect non-Serbian civilians, to demilitarize the region, and, most of all, to enable repatriation of refugees to their former homes. These weaknesses were subsequently even more evident in Bosnia-Herzegovina, while the peace-keeping operations in Somalia suffered a complete failure in 1993.

In subsequent months the UNPROFOR mandate was territorially extended. By Resolution 762 of 30 June 1992 UNPROFOR was authorized to monitor the areas still under the Yugoslav People's Army control in southern Croatia. By Resolution 779 of 6 October the same year it assumed a new responsibility for monitoring of the Yugoslav People's Army withdrawal from the vicinity of Dubrovnik, and the demilitarization of the Prevlaka Peninsula. Accordingly, throughout its activities in Croatia and despite being armed, UNPROFOR in fact had an observer mission mandate.⁵

*

The situation in Bosnia-Herzegovina deteriorated long before, but especially after the results of the independence referendum of the country were published on 6 March 1992. They were followed by an open aggression of the Yugoslav People's Army.

Resolution 757 of 30 May 1992 demanded that any elements of the Croatian Army still present in Bosnia and Herzegovina act in accordance with paragraph 4 of Resolution 752 of 15 May 1992. They should have been withdrawn or placed under the authority of the Government of Bosnia and Herzegovina in Sarajevo.

However, this resolution only imposed economic and other sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro). By this and subsequent resolutions the Security Council gradually introduced increasingly more severe economic sanctions upon the Federal Republic of Yugoslavia (Serbia and Montenegro), including the suspension of business transactions and air transportation (Resolutions 752, 757 (of 30 May) and Resolution 787 (1992)). They were extended to the territories controlled by the Serbian forces in Bosnia-Herzegovina and Croatia, concurrently with freezing of assets of the Federal Republic of Yugoslavia and its overseas companies, and blockade of its ports, as well as merchant ships in overseas ports (820 (1993)).⁶

⁵ An extensive overview of different Security Council's resolutions concerning the UNPROFOR mandate in the territory of the Former Yugoslavia is provided in -- Malcolm N. SHAW: *International Law*, Fourth Edition, Cambridge University Press 1997, pp. 868-872.

⁶ After the Dayton Peace Agreements had been signed, these measures against the Federal Republic of Yugoslavia in accordance with Resolution 1022 of 22 November 1995 were first indefinitely suspended (except temporarily with respect to the Republika Srpska in Bosnia-Herzegovina), only to be terminated by Resolution 1074 (1996).

Never before in history had the Security Council ordered more severe sanctions upon any country. However, they did not induce the Government in Belgrade and the Serbian side in Bosnia-Herzegovina to restrain from their aggressive politics.

According to Resolution 758 of 8 June 1992 military observers were deployed in Sarajevo by stronger UNPROFOR forces. Thus UNPROFOR also obtained the observer mission mandate in parts of Bosnia-Herzegovina.

Under Chapter VII of the Charter, in Resolution 770 of 13 August 1992 the Security Council called upon all states to “take nationally or through regional agencies or arrangements all measures necessary” to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina. The phrase “all measures necessary” permits in the UN terminology the resort to force. Under Chapter VII of the Charter the enforcement action thus seemed to be imminent.

Resolution 776 of 14 September 1992 authorized the augmentation of the UNPROFOR mandate and strength in Bosnia-Herzegovina to protect humanitarian relief convoys and convoys of released detainees if requested by the International Committee of the Red Cross. However, in the Secretary General’s Report approved by the Security Council, it was noted that the normal peace-keeping rules of engagement would be followed by UNPROFOR so that force could be used in self-defence only, particularly where attempts were made to prevent the carrying out of the mandate. Nevertheless, this new resolution made no mention of either Chapter VII of the Charter, or “all measures necessary”. Thus, owing to Secretary General Boutros-Ghali UNPROFOR was degraded to a peacekeeping mission. Consequently, its mandate became insufficient for the performance of the assigned tasks, and, moreover, it had not been sufficiently clearly set forth either.

Further stage of development of the UNPROFOR’s role involved the adoption of the 2”no-fly” bans imposed on military flights over Bosnia and Herzegovina and occupied parts of Croatia, which covered flights by all fixed-wing and rotary-wing aircrafts, by Resolution 781 of 9 October 1992. By Resolution 816 (1993), adopted under Chapter VII of the Charter, the ban on military flights was reaffirmed. At the request of the UN Secretary-General the no-fly zone was enforced by aircraft from NATO. A “double key” system was put into operation under which decisions on targeting and the use of NATO airpower were to be taken jointly by UN and NATO commanders and the principle of proportionality in response to violations was affirmed. The double key in effect implied a double-veto.

Previously, Resolution 815 (1993) established several “safe areas” in Bosnia-Herzegovina with a majority Moslem population, but completely surrounded by Serbian forces. Although Chapter VII of the Charter was referred to in this reso-

lution, it was cited only in the context of the security of UNPROFOR personnel. Hence, in the enforcement of the “safe areas” UNPROFOR personnel was also authorised to use force only to protect themselves.⁷

Although UNPROFOR tried to remain neutral in this conflict and retain confidence of all parties – it was not authorized to respond to the civilian massacre committed with artillery shells in Sarajevo – in the Spring of 1995 relations between the Serbian side and UNPROFOR started to deteriorate rapidly. The Serbian side breached the Sarajevo No Heavy Weapons Arrangement, which precipitated symbolic NATO air strikes of some of its positions in the vicinity of Goražde.

Subsequently, the Serbian side captured several hundred UNPROFOR members and held them hostage, while some of them were kept physically tied up around Serbian military facilities as a live bulwark against potential strikes. After these hostages had been released, the Serbian forces occupied the UN protected area in Srebrenica, killed about eight thousand men, and forced all other Moslem population into exile. The NATO forces launched severe air strikes only afterwards and destroyed all Serbian means of communication in several days.

Previously, all Croatian zones, except the Podunavlje zone, were liberated during the “Flash” and “Storm” operations. Also in Bosnia-Herzegovina the Croatian and the Bosnian sides liberated vast territories, and consequently the Serbs lost their military supremacy. The Cease-Fire Agreement, concluded on 12 October 1995, was the first agreement the Serbian side complied with.⁸

As a consequence of the Dayton Peace Agreement initialled on 25 November 1995, in accordance with the Security Council’s authorization by Resolution 1031 UNPROFOR in Bosnia-Herzegovina was replaced by a multinational implementation force under the name of IFOR (subsequently SFOR). These forces no longer represented a UN peace-keeping mission, but their actions were authorized by the Security Council, and thus complied with the provision in Chapter VIII of the Charter. The UN International Police Task Force was also set up there to carry out local police related training and assistance missions.

⁷ At the request of the UN Secretary-General, NATO established 3 kilometre ‘total exclusion zones’ around the safe areas, but the Goražde ‘military exclusion zone’ was 20 kilometres wide. The Sarajevo ‘heavy weapons exclusion zone’ was 20 kilometres wide, wherefrom all heavy weapons needed to be evacuated. These zones were to be enforced by air strikes if necessary, but any such decision was to be brought in accordance with the double key system.

⁸ Previously, in March 1995, the UN peace-keeping operations were restructured in the entire region. UNPROFOR had only stayed in Bosnia-Herzegovina before it was phased out at the end of the year. UNCRO (the United Nations Confidence Restoration Operation) was established in the territory of Croatia and it was operational in Podunavlje. In Macedonia a small military observer mission was established under the name of UNPREDEP (the United Nations Preventive Deployment Force), which is currently also operational there.

The UN peace-keeping operation in Bosnia-Herzegovina failed largely due to territorial aggression and occupation by heavily armed Serbian forces. The arms embargo required deployment of the UN armed forces with a clear mandate under Chapter VII of the Charter, as was the case in suppression of the Iraqi aggression against Kuwait.

From an interim observer mission UNPROFOR was transformed into a peace-keeping mission, but without a sufficient mandate. It was practically never authorized to use force beyond that required in self-defence. A large fleet of NATO countries blocked the Montenegrin coast in the Adriatic, but in front of its very eyes the oil was entering into the Federal Republic of Yugoslavia over Albania by land. In the autumn of 1991 the mere presence of a single aircraft carrier in front of Dubrovnik, if it had been sent there, would have most likely prevented the siege of the city, the fall of Vukovar and the tragedy in Bosnia-Herzegovina, and subsequently in Kosovo.

The NATO combat aircrafts were constantly leaving their bases in Italy and flying over the territory of Bosnia-Herzegovina and the occupied Croatian territories, but were completely useless until August and September 1995. Even the decisive air strike on Serbian facilities might not have followed, if the remaining safe areas and NATO's complete fiasco had not been at stake. The UNPROFOR mandate was always extended as a result of some traumatic events, in which the UN Secretary General and some permanent Members of the Security Council did not want to recognize the actual aggressor.

*

The Kosovo situation should be considered from that aspect. Notwithstanding the expectations of the Albanian side, the Dayton Agreements did not affect the position of this province at all. Albanians, who were exposed to many persecutions and unlawful murders since the revocation of Kosovo's autonomy in 1989, replaced their passive resistance with an armed rebellion.

The Kosovo Liberation Army was established in 1996, but its more severe conflicts with the Yugoslav Army and the Serbian police began in 1998.⁹ The Serbian side retaliated with mass crimes against Albanian civilians. In Resolution 1199 of 23 September 1998 the Security Council recorded the displacement of over 230,000 persons from their homes, 50,000 of whom were estimated to be without any shelter and other basic necessities. It was the first wave of refugees who came to Northern Albania, Macedonia and Bosnia-Herzegovina. There were civilian massacres, also of women and children, including the massacre in the village of Račak.

⁹ However, it should be emphasized that unlike the Chechen rebels, the Kosovo Liberation Army never took any terrorist or other violent actions outside this province.

At the end of 1998 the ethnic cleansing of the Albanian population and destruction of their houses were suspended for a while, and the Federal Republic of Yugoslavia consented to evacuate a larger number of its own military and police troops from this province. By Resolution 1203 of 24 October 1998 the Security Council authorized the OSCE Verification Mission and the NATO Air Verification Mission.

The Rambouillet Treaty, which the Serbian side refused to adopt, provided a peace-keeping mission, predominantly composed of the European NATO Member States' troops, provided further on that the Yugoslav Army and the Serbian police left that region, except the border units toward the third countries. The negotiations were conducted under the protection of the Contact Group. If they had succeeded, the mission would most likely have been approved by the Security Council. It would probably also have included the forces from the Russian Federation, such as SFOR in Bosnia-Herzegovina. But this peace-keeping mission was also to assume civilian power, before democratic organs and new multi-ethnic police were constituted.

The NATO enforcement action, previously unauthorized by the Security Council, followed after the Serbian side had refused to accept a pacific settlement that was in its favour (wide autonomy of Kosovo within Serbia, with substantial assurance of Serbian minority rights).

Concurrently with the NATO operation that started on 23 March 1999, the massacre of Albanian civilians began, who were exiled from Kosovo to an unprecedented extent. About 750,000 refugees must have been exiled to Albania, Macedonia, Montenegro and Bosnia-Herzegovina that year. Their personal documents were destroyed at the border. This action must have been previously planned and was then conducted accordingly. More than a half of the Kosovo population were exiled from their homes, and many houses were reduced to rubble. Thus Milošević must have wanted to establish a numerical balance between Serbs and Albanians in this "Serbian" province.

The legality of the NATO operation should be briefly addressed at this point. The United States and Britain believe that the two Security Council resolutions on Kosovo adopted in 1998 contain indications similar to Resolution 668 of November 1990 with respect to Iraq, which allegedly provide authorization for an enforcement action. However, to avoid its prevention by the Russian and the Chinese veto, it would be more legally appropriate if a new resolution on this intervention had been adopted under Chapter VII of the Charter.

The international community in fact was faced with new challenges in this case. The peace-keeping mission with the approval of the Security Council and the consent of the Belgrade Government may only have observed ethnic cleansing and other international crimes, and would not be authorized to prevent and sanc-

tion them. Thus the peace-keeping forces and their commanders may also be held personally co-responsible for their indirect participation (complicity) in the crime of genocide in accordance with Article 4(3e) of the Statute of the International Criminal Tribunal for the Former Yugoslavia. Namely, even today some French and British UNPROFOR generals in Bosnia-Herzegovina may objectively be attributed with this responsibility: although they may have expected what was to happen, they did not take any actions to prevent the crime of genocide after the fall of Srebrenica in the summer of 1995.

At the end of the 20th century it was difficult for the Antifascist Coalition inspired by the principles of the Atlantic Pact of 1941 to stand idly and watch a larger repetition of crimes similar to the Nazi crimes in Second World War. Regardless of these humanitarian concerns, which should not be underestimated under any circumstances, these systematic and mass international crimes resulted in a large number of displaced and exiled innocent people. They caused destabilization in the neighbouring countries and required enormous provision of material expenses by the international community.

In the opinion of the author of this paper, if it is impossible to achieve the same goal by any other means, the situation of this kind imposes a necessity of an intensive enforcement action as a last resort. Under such extreme circumstances in order to deter greater atrocities, an organized enforcement action of NATO forces would be justified by the legal principle that does not exclude a humanitarian intervention, even if it was not approved by the Security Council owing to disagreement among the permanent Members due to their own internal political reasons.¹⁰ However, the wording of the UN Charter does not provide for an armed humanitarian intervention of this kind under extreme circumstances.

The enforcement action resulted in international administration over Kosovo. Nevertheless, this administration is no longer established on the humanitarian intervention, but on its acceptance by the Federal Republic of Yugoslavia reaffirmed by a new and comprehensive resolution of the Security Council, Resolution 1244 of 10 June 1999. Some significant provisions of this resolution were adopted under Chapter VII of the UN Charter and are legally binding.

After Serbia had lost its control over Kosovo, some Albanians committed crimes, plundered and burnt houses, and also killed civilian Serbs and Romanians. These acts may have been acts of sheer retaliation, acts committed by criminal groups, or acts instigated by some criminal policies.¹¹

¹⁰ See also – V. Đ. DEGAN: “Intervencija NATO snaga protiv Savezne Republike Jugoslavije: Pravna analiza”, *Politička misao* 1999, No. 4, pp. 79-99.

¹¹ Veton Suroj, an Albanian intellectual, believed “organized fascism” was in the background of these crimes, and thus exposed himself to threats of his fellow countrymen.

We, Croats, and other intellectuals from the Former Yugoslav countries were confronted with the same “bitter taste of victory”. We won in self-defence and in fight for bare survival, and preserved the independence of Croatia (and subsequently also Bosnia-Herzegovina). Nonetheless, there was somebody who, on our behalf, plundered, committed violence, interned and killed civilians. First, they were the so-called “adversaries”, but subsequently the assets of fellow countrymen were also plundered. The fact that among the perpetrators of these crimes there were only few real war heroes or real war victims is of little consolation. These people were mostly cowards in every respect. Any sensible man would wish these individuals be brought to justice, if not in their own country, then in the international community.

III - LESSONS TO BE LEARNED

The UN observer and peace-keeping operation in Croatia and Bosnia-Herzegovina failed mainly because territorial aggression and occupation by heavily armed Serbian forces and the arms embargo required deployment of the UN armed forces with a clear mandate under Chapter VII of the Charter, as was the case in suppression of the Iraqi aggression against Kuwait.

Taking into account the practice of these observer and peacekeeping missions in other parts of the world as well, then their success in general depends on their mandate and the territorial circumstances they are deployed under. If the animosities persist, and hostile parties have not been separated, then the peace-keeping forces cannot impose peace. They cannot deter crimes against civilian population either, because they are allowed to use force only in self-defence, and need to be impartial toward all parties and enjoy confidence of all. Therefore, the armed forces deployed in a peace-keeping mission will fail if they need to impose peace by force and deter crimes, and take an enforcement action foreseen in Chapter VII of the Charter.

*

Finally, some observations need to be made at this point from the legal point of view. Students of some Croatian Faculties of Law and attendees of the Zagreb Diplomatic Academy do not learn anything about the above-mentioned. Politicians and diplomats, as well as journalists being opinion-makers, have even less knowledge of these important legal matters.

Some bad examples from Croatian practice may be put forward. During conclusion of the Brijuni Agreement in the beginning of July 1991, the then member of the SFRY Presidency Stjepan Mesić was convinced that the unarmed OSCE

observers (“ice-cream makers”) would immediately also undertake their mission in Croatia. Although its headquarters were in Zagreb, its functions were initially only performed in Slovenia, where OSCE supervised the Yugoslav People’s Army withdrawal from Slovenia. Only following many subsequent tragic events, the mission’s functions were expanded to the territory of Croatia on 1 September 1991, where they lasted until deployment of the UNPROFOR forces.

When in the beginning of 1992 Cyrus Vance assumed the function of a UN mediator, he managed to mislead both President Tuđman and Serbian President Milošević. Tuđman rightly expected that the UN forces would efficiently deter crimes in the UNPA zones, and that they would primarily ensure the return of all refugees to their homes and thus provide conditions for free elections in municipalities with the Serbian majority.

While Milošević accepted this mission, his intention was to create a situation that still exists in Cyprus, or e.g. South Ossetia and Transdniestria. He declared that UNPROFOR would defend Serbs from Croats, referring to the occupied territories. He believed that afterwards he would continue to bargain to achieve a political solution. He dismissed the findings of the Badinter Arbitration Committee claiming they were allegedly unlawful.

Vance deceived both of them. Although armed, and despite its name (the United Nations Protection Force), this mission in Croatia was an observer mission, and not a peace-keeping mission. As above-mentioned, it did not interfere in the conflict and crimes committed, but rather strove to retain confidence of both hostile parties. Croatia needed the “Flash” and “Storm” operations to liberate its territories by itself in 1995. But during the process all plundering and crimes against the remaining Serbian civilians should have been deterred at any cost.

At that time the Croatian side acted in the state of necessity, which was misused by foreign negotiators. The decisions were brought subsequently outside Croatia under the assumption that they had been *a priori* accepted by it.

However, the situation is not completely the same with regard to the current dispute between the European Union and Croatia. When on 4 June 2004 in Brussels our State Secretary Hidajet Biščević communicated the decision of the Parliament on deferred implementation of the Ecological and Fisheries Protection Zone with respect to the EU Member States, in presence of the Italian and the Slovene Secretaries, he should not have signed anything, including the *agreed minutes* of the meeting.

After he had done it, the Union Presidency brought a conclusion of the meeting on 17 and 18 June that year whereby the Union “welcomes the agreement between Italy, Slovenia and Croatia achieved on the trilateral meeting on 4 June 2004”. In that situation, our Ministry should have submitted a brief note to the Union Presidency. Therein it should have been written that the trilateral agreement was not achieved at this meeting, as it would necessarily imply the same

obligations of Italy and Slovenia alike, and would be subject to ratification of the Parliament in accordance with Article 133 of the Constitution of the Republic of Croatia. This short unilateral statement would render the conclusion of the Union Presidency legally inopposable in respect to Croatia.

For small countries, it is better to have predictable politics. However, even though at the time the Croatian Government did not desire to challenge the beginning of negotiations with the Union, the consequences of its silence cannot be avoided easily.

It will be long before our legal councillors thoroughly master different legal implications of different types of unilateral acts by States, as well as opposable situations that may appear or be avoided, and even longer before their superiors, diplomats and politicians, take their potential warnings seriously.

(Translated by Hrvoja Heffer)

Sažetak

Promatračke misije i mirovne operacije u Hrvatskoj, Bosni i Hercegovini i na Kosovu

Ovaj se članak bavi sustavom kolektivne sigurnosti prema glavama VI., VII. I VIII. Povelje Ujedinjenih Naroda. Promatračke misije i mirovne operacije nemaju eksplicitnu pravnu osnovu u tekstu Povelje. Oni su se razvili iz prakse. Temelje se na odlukama Vijeća sigurnosti, a ponekad čak i Opće skupštine.

Drugi dio ovoga članka posvećen je zaštitinim snagama UN-a (UNPROFOR-u) u Hrvatskoj i Bosni i Hercegovini. Unatoč svojem nazivu i naoružanju, UNPROFOR je u suštini bio prikrivena promatračka misija. Nije imao mandat za mirovnu operaciju, koji je hrvatska javnost od njega očekivala. Nije zaustavio zločine protiv civila u četiri dijela Hrvatske (UNPA zonama) koje su bile okupirale pobunjeničke, paravojne i dobrovoljačke srpske postrojbe. Nije ni osigurao povratak prognanika njihovim kućama, što je bilo nužno za stvaranje uvjeta za slobodne i demokratske izbore u ovim hrvatskim područjima kojima je dodijeljen „poseban status“.

Mnogo je veća obmana bila s UNPROFOR-om u Bosni i Hercegovini. Izvorno promatračkoj misiji poput one u Hrvatskoj kasnije je povjerena ona mirovna, ali nikada s jasnim mandatom koji bi bio dovoljan za obnašanje dužnosti koje s postajale sve veće. Nikada nije bila ovlaštena uporabiti silu osim za potrebe samoobrane ili osiguravanja prijevoza humanitarne pomoći. Primjerice, grad Sarajevo bio je opkoljen srpskim trupama od travnja 1992. do rujna 1995. uz golema stradanja civila, što je bilo duže i od opsade Lenjingrada u Drugome svjetskom

ratu. Nije bio spriječen genocid u Srebrenici koji se dogodio u lipnju 1995., iako je oružja bilo dovoljno, ali ne i volje da se to učini. Stoga je ta mirovna misija u Bosni i Hercegovini bila UN-ov fijasko, kao i ona u Somaliji 1993. godine.

Nakon zločina koje su srpske vlasti počinile protiv većinskoga albanskog stanovništva na Kosovu, u proljeće 1999. uslijedila je NATO-va akcija bombardiranja na teritoriju Savezne Republike Jugoslavije. Zbog oporbe Rusije i Kine, Vijeće sigurnosti UN-a nije odobrilo tu akciju prema glavi VII. Povelje UN-a. Ovaj se članak posebice bavi problemom je li u krajnje nužnoj situaciji koja nalaže sprječavanje najgorega zla, humanitarna intervencija oružanih sila pravovaljana prema današnjemu međunarodnome pravu.

Ključne riječi: Kolektivna sigurnost Ujedinjenih naroda, prisilne mjere, mjere koje ne uključuju uporabu sile (oružanih snaga), promatračke misije, mirovne operacije, UNPROFOR, NATO