

Prof. dr. sc. Vesna Barić Punda,
Law Faculty, University of Split

(IM)PERMISSIBILITY OF HUMANITARIAN INTERVENTION with special reference to NATO's action against the Federal Republic of Yugoslavia in 1999

In this paper the author considers permissibility, i.e. impermissibility of the use of force in international law due to enormous human rights violations (massive crimes against civilian population, ethnic cleansing) within borders of a particular country, as well as viewpoints of scholars in international law on humanitarian intervention, with special consideration of air strikes of NATO armed forces (without any prior authorization of the Security Council) against different targets in Yugoslavia in 1999, and the UN role in maintenance of international peace and security.

Keywords: *human rights violations, humanitarian intervention, international law, UN, NATO*

Let God Almighty...charitably condescend to enlighten the mind and soul of the people of this city, so that they may live honourably, without causing injury or damage to other people, so that everybody may enjoy the same rights, and so that due justice, whereby the world is generally governed according to the legal order, may be administered even-handedly...

And indeed, it is of their own free will that every day people let unfettered greed, the enemy of peace that does not respect God's charity, give rise to disputes, conflicts and disagreements among nations, so that the world could not be governed properly if justice did not curb its constant onslaught...

From the preface and introduction to the Statute of the Town of Split (1312), 2nd (revised) edition, Književni krug, Split, 1987.

I

The maintenance of international peace and security is a fundamental aim of the Collective Security System which is based on, among other things, the complex obligation of states to take concerted action. The legal framework of the UN Collective Security System¹ is regulated by Chapters VI (*Pacific Settle-*

¹ It was preceded by the collective security systems provided by the Holy Alliance (1815-1830) and by the League of Nations (1919-1946).

ment of Disputes), VII (Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, and VIII (Regional Arrangements) of the UN Charter. Under general international law the threat or use of force is forbidden.² This principle is of an imperative character. However, there are two exceptions: Article 51 of the Charter relating to individual or collective self-defence³, and Article 39 whereby the Security Council determines the existence of any threat to the peace, breach of the peace, or act of aggression and makes recommendations, or decides what measures shall be taken in accordance with Articles 41⁴ and 42⁵, to maintain or restore international peace and security. According to Article 53(1) the Security Council, where appropriate, utilizes such regional arrangements or agencies for enforcement action under its authority, but no enforcement action is to be taken under regional arrangements or by regional agencies without the authorization of the Security Council. Therefore, the cooperation of all five permanent members of the Security Council is an essential political proviso. If this condition is not fulfilled, the entire collective security system is blocked up.

² According to Article 2(4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(7):

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

³ Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

⁴ Article 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may 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.

⁵ Article 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have 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. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Thus, the Council is politically the most important body of the United Nations which has not only authority but also primary responsibility for the maintenance of international peace and security.⁶

In the UN Charter there are no rules concerning the use of force on grounds of an urgent humanitarian need – in order to prevent mass crimes against a civilian population, ethnic cleansing or serious offences against human rights in the territory of a state, since the framers of the Charter focused their attention exclusively on the prevention of armed conflicts among states (such as the ones that gave rise to World War Two) and of acts of aggression. It is clear that at its inception it was not intended for it to cope with crisis involving large scale violations of human rights within a given state's boundaries.⁷ Thus, modern international law forbids humanitarian intervention. Under Article 2(7) of the Charter, nothing contained in the present Charter authorizes the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, except in the case of the application of enforcement measures provided under Chapter VII.⁸ However, this high threshold, limiting the application of national and international law, is gradually becoming lower. Gross violations of human rights, which are now dealt with by international agreements adopted after the UN Charter, can never again be considered exclusive questions of national law and therefore beyond the jurisdiction of the UN system. Therefore it is particularly important to mention the Report of UN Secretary-General Kofi Annan on the activity of the Organization, presented on 20th September 1999 at the last session of the General Assembly in the 20th century. The report points out that:

State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation.

In the context of the by-gone tragic events (Rwanda, Kosovo) it states:

While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community. It has

⁶ Article 24 (1):

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

⁷ F. Francioni, Of War, Humanity and Justice: International Law after Kosovo, *Max Planck Yearbook of United Nations Law*, Vol. 93, 4 (2000), p. 107.

⁸ In order to understand the principle of non-intervention in the internal jurisdiction of a state it is necessary to return to the time when the Charter was adopted. It was written by the winners of World War Two. It should be remembered that the legal experts in those times regarded the genocide of German Jews as exclusively a matter of domestic rather than international law.

cast in stark relief the dilemma of what has been called humanitarian intervention: on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences. The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests – universal legitimacy and effectiveness in defence of human rights – can only be viewed as a tragedy.

Therefore, the challenging fundamental task of the Security Council and the United Nations as a whole is

... to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand.⁹

II

The NATO armed forces, without a previous permission by the Security Council,¹⁰ launched air raids on various targets in Yugoslavia on 24 March and ended them by official order on 20 June 1999. Those air raids were preceded by massive violations of human rights and crimes against the civilian population in Kosovo and a mass exodus from Kosovo.¹¹ The intervention was not conducted

⁹ Report of the Secretary-General on the Work of the Organization, G.A.O.R., 54th Sess., 4th Plen. Mtg., A/ 54/1, 20 September 1999, pp. 1-3. <http://www.un.org/news/Press/docs/1999/19990920.sgsm7136.html>

¹⁰ No official permission was given, but at the press conference held by UK Minister of Defence G. Robertson in London on 25 March 1999, a day after the air raids began, the expression *support* was used:

*...NATO's action has received support inside the UN Security Council from the United States, France, Argentina, Slovenia, Malaysia, Gambia, Bahrain, the Netherlands and Gabon. Outside of Russia and China, only Namibia disagreed with the military action in the Security Council, and in the wider United Nations we know of only opposition from India and understandably Belarus and the Former Republic of Yugoslavia itself. – Quoted in: M. Dixon, R. McCorquodale, *Cases & Materials on International Law*, fourth edition, Oxford, 2003, p 547. Among the NATO states, the UK was the foremost supporter and promoter of the doctrine of humanitarian intervention, claiming:*

...that the interpretation of Article 2(4) has changed over time; that international law in this field has developed to meet new situations...

*...when faced with an overwhelming humanitarian catastrophe which a government has shown it is unwilling or unable to prevent or is actively promoting, the international community should intervene – See: M. D. Evans, *International Law*, Oxford, 2003, pp. 595-597.*

¹¹ The reality of the human rights violation in Kosovo before and after the intervention is documented in: OSCE Reports, Kosovo/Kosovo – Human Rights in Kosovo: As Seen, As Told. Volume I, October 1998-June 1999, Part III: The violation of human rights in Kosovo.

or authorized on the basis of the regulations provided in Chapter VIII of the Charter. The Security Council adopted particular resolutions on Kosovo in 1998,¹² but they do not (contrary to the opinion of the USA, the UK and France) contain any elements which would, as in the case of the Security Council's Resolution 678 (of 29 November 1990) concerning Iraq, provide a formula for permitting the use of force.¹³ Resolutions on Kosovo did not in any way, explicit or implicit, authorize the use of force as a measure by which the humanitarian catastrophe would be stopped. Formally, armed intervention without permission granted by the Security Council is a forbidden act of aggression against a sovereign state.

The intervention set in motion an avalanche of general interest on the part of the academic and professional public for a whole range of questions about which even today, after five years, discussions still continue. The international community has not reached a consensus on this matter. In the science of international law the use of force on grounds of an extreme humanitarian need is defined as *humanitarian intervention*.¹⁴ As a matter of fact, the point at issue is the use of force as an

<http://www.osce.org/kosovo/documents/reports/hr/part1/ch4.htm>

¹² RES/1160 of 31 March 1998; RES/1199 of 23 September 1998; RES/1203 of 24 October 1998.

¹³ According to this Resolution the states that cooperated with the government of Kuwait (in exile) were authorized: "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area..."

¹⁴ On humanitarian intervention see: **I. Brownlie**, *International Law and the Use of Force by States*, Oxford, 1963, pp. 338-342; *Principles of Public International Law*, sixth edition, Oxford, 2003, pp. 710-712; **J. I. Charney**, *Anticipatory Humanitarian Intervention in Kosovo*, *American Journal of International Law*, Vol. 93, 4 (1999), pp. 834-841; **C. M. Chinkin**, *Kosovo: A "Good" or "Bad" War*, *American Journal of International Law*, Vol. 93, 4 (1999), pp. 841-847; **V. Đ. Degan**, *Intervencija i međunarodno pravo (Intervention and international law)*, *Zbornik Pravnog fakulteta u Rijeci*, 4 (1983), pp. 169-200.; *Humanitarian intervention (NATO action against the Federal Republic of Yugoslavia in 1999)*, u: L. C. Vohrah et al. (eds.), *Man's Inhumanity to Man*, 2003, pp. 233-260.; **M. Dixon**, **R. McCorquodale**, *Cases and Materials on International Law*, fourth edition, Oxford, 2003, pp. 546-557.; **V. Dimitrijević**, **O. Račić**, **V. Đerić**, **T. Papić**, **V. Petrović**, **S. Obradović**, *Osnovi međunarodnog javnog prava (Fundamentals of Public International Law)*, Belgrade, 2005, pp. 274-277; **R. Etinski**, *Application of Law in The Case of NATO Military Intervention Against the FR of Yugoslavia*, *Jugoslovenska revija za međunarodno pravo*, Vol. 46, 1-3, Belgrade, 1999, pp. 44-52; **Malcolm D. Evans**, *International Law*, Oxford, 2003, pp. 595-599; **T. M. Franck**, *Legitimacy after Kosovo and Iraq*, in: V. Crnić-Grotić, M. Matulović (eds.), *International Law and the Use of Force at the Turn of Centuries*, Rijeka, 2005, pp. 69-85; **F. Francioni**, *Of War, Humanity and Justice: International Law After Kosovo*, *Max Planck Yearbook of United Nations Law*, Vol. 93, 4 (2000), pp. 107-126; **M. Geistlinger**, *The attack on SRJ – an attack on Public International Law*, *Law and Politics*, Vol. 1, N°4, 2000, pp. 397-408; **R. Higgins**, *Problems and Process – International Law and How We Use it*, Oxford, 2003, pp. 245-253; **J. L. Holzgrefe**, **R.O. Keohane** (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge, 2003; **B. Krivokapić**,

answer to widespread and grave violations of human rights, which are, according to Vukas, constantly present throughout the history of the human race. Christine Chinkin is very critical of favouring the commitment to humanitarian values:

...the commitment to human rights that humanitarian intervention supposedly entails does not mean equality of rights worldwide. The human rights of some people are more worth protecting than those of others. Military intervention on behalf of the victims of human rights abuses has not occurred in, inter alia, Sudan, Afghanistan or Ethiopia. It was woefully inadequate and delayed in Rwanda....Such selectivity undermines moral authority...

The case of Kosovo may have highlighted the continuing chasm between human rights rhetoric and reality. It does not resolve the way this can be bridged.

These are the reasons for the following conclusion:

Finally, the Kosovo intervention shows that the West continues to script international law, even while it ignores the constitutional safeguards of the international legal order. The instances since 1990 that are most frequently cited as evidence that humanitarian intervention is evolving as a doctrine of post-Charter international law were initiated by the West and involved action in non-Western states (Iraq, Somalia and Haiti).¹⁵

In the analysis of different views on the permissibility or impermissibility of the so-called humanitarian intervention it is necessary to define the concept itself. According to Degan:

Međunarodno pravo – koreni, razvoj, perspektive (International Law – Sources, Development, Perspectives), Belgrade, 2006, pp. 213-221; **S. Murphy**, Humanitarian Intervention: The United Nations in an Evolving World Order, 1996; **G. Nolte**, Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten, 59 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 4 (1999), pp. 941-960; **M. Paunović**, “Humanitarna intervencija” kao zloupotreba načela zabrane upotrebe sile u međunarodnom pravu (“Humanitarian intervention” as an abuse of the principle of prohibition of the use of force in international law), Jugoslovenska revija za međunarodno pravo, Vol. 46, 1-3, Belgrade, 1999, pp.149-159; **D. Petrova**, Eastern Europe After Kosovo – The War and the Human-Rights Community, East European Constitutional Review, Vol. 8, 3 (1999); **F. Rigaux**, Aspects historiques de l’intervention “humanitaire”: une leçon qui demeure, in V. Crnić-Grotić, M. Matulović (eds.), International Law and the use of force at the turn of centuries, Rijeka, 2005, pp. 207-219; **O. Schachter**, The Right of States to Use Armed Force, Michigan Law Review, Vol. 82, 1984, pp. 1620-1646; **B. Simma**, NATO, the UN and Use of Force: Legal Aspects, European Journal of International Law, Vol. 10, 1 (1999), pp.1-22; **J. Verhoeven**, L’intervention d’humanité: un “pouvoir”? in V. Crnić-Grotić, M. Matulović (eds.), International Law and the use of force at the turn of centuries, Rijeka, 2005, pp. 221-238; **R. Wedgwood**, NATO’s Campaign in Yugoslavia, American Journal of International Law, 4 (1999), pp. 828-834.

¹⁵ C. M. Chinkin, Kosovo: A “Good” or “Bad” War, *American Journal of International Law*, Vol. 93, 4 (1999), pp. 846-847.

*Humanitarian intervention (intervention d'humanité) is itself an armed action undertaken under exceptional circumstances by a State or a group of States against a Government of a foreign State which is continuously committing widespread atrocities and other international crimes against its own population. Its purpose is to stop the crimes.*¹⁶

Holzgrefe and Keohane define humanitarian intervention as:

*...the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.*¹⁷

Paunović thinks that “humanitarian intervention” is:

*...a coined term according to which a state or a group of states may intervene in the affairs of another state if that state does not observe the generally adopted principles of humanitarian law, and especially for the purpose of saving the lives of a particular group of people who are endangered by the state in which the intervention is to take place or whom the state in question is not able to protect, irrespective of whether they are foreign nationals or its own citizens.*¹⁸

The concept of the right of humanitarian intervention has been formulated in many different ways. The most comprehensive investigation of opinions representing the views of the majority of experts in international law was published by Martin Dixon and Robert McCorquodale in their already mentioned study *Cases and Materials on International Law*. First of all, the starting point should be the view that prevailed at the time the operation was conducted (1999). I. Brownlie reminds us that:

¹⁶ V. Đ. Degan, Humanitarian intervention (NATO action against the Federal Republic of Yugoslavia in 1999) in L.C.Vohrah *et al.* (eds.), *Man's Inhumanity to Man*, 2003, p.238.

¹⁷ J. L. Holzgrefe, R.O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge, 2003, p. 18.

On the concept of *intervention of humaneness*, from which the concept of *humanitarian intervention* evolved see: V. Dimitrijević, O. Račić, V. Đerić, T. Papić, V. Petrović, S. Obradović, *Osnovi međunarodnog javnog prava (Fundamentals of Public International Law)*, Belgrade, 2005, p. 275.

¹⁸ M. Paunović, “Humanitarna intervencija” kao zloupotreba načela zabrane upotrebe sile u međunarodnom pravu (“Humanitarian intervention” as an abuse of the principle of prohibition of the use of force in international law), *Jugoslovenska revija za međunarodno pravo*, Vol. 46, 1-3, Belgrade, 1999, p. 149.

*...there was little or no authority and little or no state practice to support the right of individual States to use force on humanitarian grounds in international law. The legal situation may be different in cases where the Security Council or a regional organization takes such action in accordance with the provisions of the Charter. State practice has been overwhelmingly hostile to the concept of intervention on such a selective and subjective basis.*¹⁹

First of all, therefore, two questions must be answered. *First*, does intervention have a legal basis or framework in the UN Charter and in international law? And *second*, if it does, may the bounds of permissibility be crossed in the last extremity, where all ethical and humanitarian preconditions are satisfied, and can intervention be considered just, humane and moral and therefore a valid reason for amending the system of the Charter into a new and more flexible system (according to some writers, *a system more appropriate to the occasions of widespread and gross violations of human rights*)? In order to provide an answer to the first question one should first state the following: on the one hand, the UN Charter system of collective security is ineffective²⁰ (it often ended in fiasco, the most serious instance was the internal conflict in Somalia, 1992-1995), antiquated, maladjusted to new international relations and situations, and on the other hand, there are no legal grounds for permitting the use of force for humanitarian purposes. The legal right of humanitarian intervention is not in harmony with the United Nations Charter. Brownlie and Apperley are clear about it:

*...There is no sufficient evidence of the existence of a legal right for States, whether acting individually or jointly, to use force for humanitarian purposes. The alleged right is not compatible with the United Nations Charter. Thus it is not surprising that the sources of international law covering a period of 40 years fail to provide any substantial support for the legality of humanitarian intervention.*²¹

¹⁹ I. Brownlie, *Principles of Public International Law*, sixth edition, Oxford, 2003, p. 711.

²⁰ Fourteen years ago Rudolf warned about a new phenomenon in international relations, i.e. *the non-functioning of the mechanism of collective security because of the bizarre autarchy of states*. – D. Rudolf, *Postignuća i utopije (Achievements and Utopias)*, Zagreb, 2005, p.210.

²¹ I. Brownlie, C. Apperley, Kosovo Crisis Inquiry: Memorandum on the International Law Aspects, 49 *International and Comparative Law Quarterly*, 878 (2000), pp. 886-894. In his book from 1963 Brownlie emphasizes:

It must be admitted that humanitarian intervention has not been expressly condemned by either the League Covenant, the Kellogg-Briand Pact, or the United Nations Charter. Indeed, such intervention would not constitute resort to force as an instrument of national policy. It is necessary nevertheless to have regard to the general effect and the underlying assumptions of the juridical developments of the period since 1920. In particular it is extremely doubtful if this form of intervention has survived the express condemnations of intervention which have occurred in recent times or the general prohibition of resort to force to be found in the United

According to Geistlinger,

*NATO attack on FRY was neither legal nor legitimate, nor can it be justified under present public international law. It must be considered as an attempt to revolutionarily amend the United Nations Charter.*²²

At this point the opinion of Franck must be mentioned:

I have tried to sketch the conceptual skein of my theory of legitimacy, at least insofar as it may have relevance to developments in Kosovo and Iraq. I suspect that there is a widespread sense of unease about the state of Charter-based international law applicable to war as a result of those two recourses to force. Has practice made the rules obsolete?

To paraphrase Kant: in this aspect of international law – the right to use force – what is true in practice is also likely to be true in theory. Put another way, the question is whether the Charter rules pertaining to the use of force have become indeterminate, through contemporary usage and perception, so as to have forfeited their legitimacy.

*Law's legitimacy is not preserved by refusal to entertain rule-change, and change can come about in various ways. As long as the process results in a common acknowledgment of the reformed rule's universal application and of its specific content, change-through-practice will not undermine a rule's legitimacy.*²³

The answer to the *second* question seems more complex. Although the violation of particular rules and principles at a particular moment may be the only possible alternative in the name of a more just order in the international community, in practice it is not certain that doubt will not be cast on consistency in the commitment to humanitarian values. The linkage of the legally impermissible with feelings of humaneness and morality has always been a privilege of the powerful. O. Schacter concludes:

States strong enough to intervene and sufficiently interested in doing so tend to have political motives. They have a strong temptation to impose a political solution in their own national interest. Most governments are acutely sensi-

Nations Charter. – See: I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963, pp. 338-342, quoted in M. Dixon and R. McCorquodale, o. c., p. 547.

²² M. Geistlinger, The attack on SRJ – an attack on Public International Law, *Law and Politics*, Vol. 1, 4 (2000), p. 397.

²³ T. M. Franck, Legitimacy after Kosovo and Iraq, in V. Crnić-Gročić, M. Matulović (eds.), *International Law and the Use of Force at the Turn of Centuries*, Rijeka, 2005. p. 72, p.79.

*tive to this danger and show no disposition to open article 2(4) up to a broad exception for humanitarian intervention by means of armed force.*²⁴

A relevant statement of international law on intervention regarded as a manifestation of political force and power is contained in the judgment of the International Court of Justice in the Corfu Channel Case. The Court ruled that the measures taken on 12 and 13 November 1946 by the British Royal Army to clear mines in the territorial sea of Albania were acts which violated Albania's sovereignty and which were contrary to international law. Such acts represent a *new and special application of the theory of intervention*. The Court confuted the British argument that the intervention was not contrary to the rules of international law and pronounced against *the alleged right of intervention*:

*The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.*²⁵

Not even today, after six decades, have any substantial changes been effected in international law. It is even less certain that the use of force (individually or jointly) in some regions or in some situations in the world will not be a demonstration of force and power, with the humanitarian motivation used only as an excuse for action. Then, we can only speak of the domination of politics over law. It is for this reason that the United States, in spite of all criticism levelled at the system of collective security, are still the only institution which truly represents and must represent the international community as a whole. In the mentioned report of 1999, Kofi Annan asks a warning question:

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?

²⁴ O. Schachter, The Right of States to Use Armed Force, *Michigan Law Review*, Vol. 82, 1984, pp. 1629.

²⁵ *Corfu Channel Case (U.K. v. Albania) ICJ Reports 1949*, p. 35.

His conclusion could perhaps be an answer to all questions concerning these dilemmas:

The Charter is a living document, whose high principles still define the aspirations of peoples everywhere for lives of peace, dignity and development. Nothing in the Charter precludes a recognition that there are rights beyond borders.

Indeed, its very letter and spirit are the affirmation of those fundamental human rights. In short, it is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era; an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.²⁶

Franck's view is as follows:

Whether or not all, or, at first only some, of the permanent members formally agree to such an up-dating of the practices, the rules are changing. After Kosovo, it is clear that when a large preponderance of states are convinced that a muscular rescue is necessary and urgent, they will not much cavil at action being taken by a coalition of the willing whose bona fides is demonstrable and generally acknowledged. Change may occur through negotiated agreement or by patterns of conduct that skirt the rules. Either is likely, eventually, to achieve normative reform.²⁷

III

All discussions concerning permissibility or impermissibility of NATO's intervention in 1999 on grounds of widespread and grave violations of human rights are in fact discussions about a conflict between international law and international reality. Regardless of the degree of development of international law or the degree of recognition of its principles at a given time, these principles are skirted or violated in concrete international relations. International law may forbid the application of force, but it has not yet succeeded in changing power relations among states or in eliminating all other reasons which give rise to the use and abuse of force.²⁸ According to Francioni there are four entirely different views on NATO's intervention:

²⁶ Report of the Secretary-General, 1999, pp 2-3.

²⁷ T. M. Franck, *o. c.*, p 79.

²⁸ V. Đ. Degan, Intervencija i međunarodno pravo (Intervention and international law), *Zbornik Pravnog fakulteta u Rijeci*, 4 (1983), p.169.

According to the *first* view, the intervention should be regarded as lawful because of the overarching importance of human rights in contemporary international law and of the obsolescence of the United Nations monopoly on the authorization of force with the attendant blocking power of the veto by one of the five permanent members. However, there are few contemporary writers who acknowledge humanitarian intervention as an exception to the principle of prohibition of the use of force in international relations. Francioni holds that this view would open the flood gates to unilateral interventions, thus making the well intended objective of justice and human rights depend on the policy decision of a handful of powerful states.

The possibility of dangerous *boomerang effects* would not be excluded either. That is why Akehurst pays attention to the following:

*...claims by same states that they are entitled to use force to prevent violations of human rights may make other states reluctant to accept legal obligations concerning human rights.*²⁹

According to the *second* view, the armed intervention is destitute of any legal justification in the law of the Charter and in customary international law, thus amounting to an act of aggression. Such intervention is considered to be a basic criterion for defining aggression under UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.³⁰ It is a crime against the international peace and involves international responsibility. According to Francioni, this standpoint, although technically correct, rests too much on the *status quo* and on the comfortable cold war notion that non-defensive use of force is always impermissible without Security Council authorization.

In the Serbian science of international law the views are unanimous: NATO's intervention in SR Yugoslavia was an act of aggression.³¹ Especially interesting

²⁹ Quoted in M. Dixon and R. McCorquodale, *o. c.*, p 548.

³⁰ Article 3 (b) defines (among other things) the following as an act of aggression: *Bombardment by the armed forces of a States against the territory of another State or the use of any weapons by a State against the territory of another State.* Articles 2 and 3 define different forms of the use of force and different acts and actions that shall be regarded as *aggression*.

³¹ See: **M. Mitić**, Agresija NATO na Jugoslaviju – negacija međunarodnog prava (NATO aggression against Yugoslavia – negation of international law), *Jugoslovenska revija za međunarodno pravo*, Vol. 46, 1-3, Belgrade, 1999, pp. 77-88; **M. Starčević**, Agresija NATO protiv Jugoslavije i međunarodno humanitarno pravo (NATO aggression against Yugoslavia and international humanitarian law), *Jugoslovenska revija za međunarodno pravo*, Vol. 46, 1-3, Belgrade, 1999, pp. 135-148; **B. Krivokapić**, Agresija NATO na Jugoslaviju – grubo kršenje normi unutrašnjeg prava država agresora (NATO aggression against Yugoslavia – gross violation of the internal law norms of the aggressor states), *Jugoslovenska revija za međunarodno pravo*, Vol. 46, 1-3, Belgrade, 1999, pp. 89-109; NATO Aggression Against Yugoslavia – Wanton Violation of

are the views of M. Šahović. He examines NATO's armed intervention from a legal versus a political standpoint or, one could say, from an international versus a Yugoslav perspective:

The character and consequences of NATO's armed intervention are well known. Carried out without the consent of the Security Council, it represents a flagrant breach of the UN Charter and of the prohibition of the threat or use of force as one of the fundamental norms of international law....

Contemplated in a political sense, however, from our Yugoslav perspective, it can be regarded as one of the consequences of the general strategic orientation of Milošević's regime, which from the beginning of the Yugoslav crisis in 1991 saw the use of armed force as the main instrument for solving problems of vital importance to the country without, moreover, taking any account whatsoever of the current degree of development of the organized international community and international law.³²

He explains Krivokapić's negative answer to the question whether or not the institution of the right of humanitarian intervention should be introduced into the international law of 21st century:

...Today when war has been proclaimed an international crime and when the UN Charter forbids not only the use of force but also the threat of force, an inclination towards the doctrine of humanitarian intervention would open a very wide spectre of space for different kinds of abuse, and particularly for the promotion of selfish interests of the major world powers at the expense of smaller (weaker) states. Indeed, history teaches us that this is how it has always been in similar situations.³³

The *third* view is ambiguous: while it recognizes that the Kosovo armed intervention constituted a breach of international law, particularly the law of the Charter, it concludes that compelling moral and humanitarian justifications make it a case of only "minor" use of force involving no breach of *jus cogens* and, certainly, no case of aggression. This view separates *necessary* humanitarian in-

All the Relevant International Documents, *Yugoslav Law 1/1999*; G. Perazić, NATO i države članice kao strane u sukobu u agresiji na SR Jugoslaviju (NATO and the member states as parties in conflict in the aggression against SR Yugoslavia), *Jugoslovenska revija za međunarodno pravo*, Vol. 46, 1-3, Belgrade, 1999, pp.124-134; Z. Vučinić, *Međunarodno ratno i humanitarno pravo (International Martial and Humanitarian Law)*, Belgrade, 2006, pp. 69-72.

³² M. Šahović, *Uloga Evropske unije u jugoslovenskoj krizi i odnos prema SR Jugoslaviji (Role of the European Union in the Yugoslav Crisis and Relations with SR Yugoslavia)*, Belgrade, 2000, p. 14.

³³ B. Krivokapić, *Međunarodno pravo – koreni, razvoj, perspektive (International Law – Sources, Development, Perspectives)*, Belgrade, 2006, pp. 216-217.

intervention from a potential breach of the norms of *jus cogens*. The conclusion is absurd and unacceptable: where the use of force is an answer to a humanitarian need, it is *less* contrary to international law. Francioni therefore asks whether one can *reasonably maintain that the NATO onslaught on Yugoslavia was a “minor” breach of the norm prohibiting the use of force*, and adds:

*...if words still have a function in identifying legal concepts, frankly, I do not see how we can use the term “minor” to describe such massive use of force and its impact on the law of the Charter and customary international law.*³⁴

The *fourth* view holds that the NATO air campaign in Kosovo was an international wrongful act under traditional rules of international law on the use of force, but maintains that such traditional rules are undergoing progressive erosion in order to accommodate the emerging view requiring “positive” action to stop extensive violations of human rights that shock the conscience of humankind. Does this mean that the provisions of the Charter could be applied in a different way from the one conceived and created six decades ago? If today some provisions of the Charter (for instance, those concerning guardianship) are not applicable any more, then the argument of this view is persuasive and, in some parts, quite logical.

With respect to this view, Francioni points out:

*It may be risky to re-invent an idea of international justice that is opposed to the Charter and to anchor its future development to such a shaky spot as the Kosovo crisis. In any case it is too early to draw conclusions in terms of ex post legalization of the intervention. There is no evidence yet of a widespread acceptance of its legality by the international community as a whole.*³⁵

At the end of Francioni’s classification of the juridical opinions on the NATO intervention in 1999, it seems necessary to point out the view advocated by Charney:

...the Kosovo intervention reflects the problems of an undeveloped rule of law in a morally dangerous situation. It was actually an “anticipatory humanitarian intervention”.... Such intervention, like “anticipatory self-defence”, is a particularly dangerous permutation of an already problematic concept. Although many will share the view that the intervention was morally just in light of subsequent developments, it presents an unfortunate precedent.

Charney adds the following:

Perhaps the example of Kosovo may stimulate the development of a new rule of law that permits intervention by regional organizations to stop these crimes

³⁴ F. Francioni, *o. c.*, pp.111.

³⁵ See F. Francioni, *o. c.*, pp.110-112.

*without the Security Council's authorization, while limiting the risks of abuse and escalation. That is the task for the future.*³⁶

IV

Although it is a fact that after the humanitarian catastrophe in Kosovo in 1999 international law is faced with new challenges so that this may really be the beginning of a new era resulting in an exception from the general prohibition of the use of force, which will be grounded on the moral imperatives of saving the lives of innocent victims, at present it is impossible to accept the view according to which international law ought to be simply ignored whenever it is an obstacle to achieving goals of justice and humaneness. According to T Franck, the few writers who explicitly acknowledge the right to use force as extraordinary measures for preventing a humanitarian catastrophe *either ignore the conditions for the formation of new principles of customary law or, on occasion, propose that the requirement of opinio juris be relaxed.*³⁷ Dixon and McCorquodale think that Franck *has expressed the following carefully conditional opinion* about the right of humanitarian intervention believing that *a customary law is "beginning to take form"*:

*...A modern customary law of humanitarian intervention is beginning to take form which may condone action to protect lives, providing it is short and results in fewer casualties than would have resulted from non-intervention.*³⁸

B. Simma confirms that the prohibition of the use or threat of force as a universal principle of *jus cogens* is binding upon states individually and as members of international organizations such as NATO as well as upon the organizations themselves. Therefore, the use of force without the Security Council's permission is not in accordance with the UN Charter. Yet, he expresses a more moderate view:

...Alliance made every effort to get as close to legality as possible by, first, following the thrust of, and linking its efforts to, the Council resolutions which did exist and second, characterizing its action as an urgent measure to avert even greater humanitarian catastrophes in Kosovo, taken in a state of humanitarian necessity.

³⁶ J. I. Charney, Anticipatory Humanitarian Intervention in Kosovo, *American Journal of International Law*, Vol. 93, 4 (1999), p. 841.

³⁷ T. Franck, *Recourse to Force*, 2002, p 191, quoted in I. Brownlie, *o. c.*, p. 712.

³⁸ M. Dixon, R. McCorquodale, *o. c.*, p. 549.

And he admits that there are really:

*“hard cases” in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law.*³⁹

State practice as an argument proposed by those writers who support humanitarian intervention is unconvincing, particularly after the armed action against Yugoslavia for urgent humanitarian reasons in Kosovo. Dixon and McCorquodale argue that:

*...There can be no doubt that the United Nations Charter can be modified by the congruent practice of the Member States crystallising as a new principle of customary law. But there is a burden of proof upon proponents of a change in the customary law. The central point is the absence of evidence of a change of view by majority of States.*⁴⁰

It is therefore especially important to mention the 23rd annual meeting of ministers of foreign affairs of Group 77 in New York on 24 September 1999, three months after the end of NATO's armed action against SR Yugoslavia, which resulted in a *Ministerial declaration* stating in Article 69 that the right of humanitarian intervention was not recognized. Article 69 states:

The Ministers stressed the need to maintain clear distinctions between humanitarian assistance and other activities of the United Nations. They rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law.

In Article 70 the following is also stated:

*...They noted that the response of international community to humanitarian emergencies was neither sufficient nor geographically balanced...*⁴¹

The fact that this opinion was expressed by 132 states (among them, 23 Asian, 51 African, 22 Latin American and 13 Arabian states)⁴² cannot be ignored, since it is the practice of states that ought to be a stronghold for recognising the right of humanitarian intervention. State practice has only known a few real cases of humanitarian intervention in the last two hundred years.⁴³

³⁹ See: B. Simma, NATO, the UN and Use of Force: Legal Aspects, *European Journal of International Law*, Vol. 10, 1(1999), pp.22.

⁴⁰ M. Dixon, R. McCorquodale, *o. c.*, p 551.

⁴¹ Ministerial declaration, p. 14.- <http://www.g77.org/doc/Decl1999.html>

⁴² Data from I. Brownlie, *o. c.*, p 712.

⁴³ On the cases of real humanitarian intervention see: V. Đ. Degan, *Humanitarian intervention*

V

The existence of the right to intervene on humanitarian grounds is denied or criticized by a large majority of contemporary writers who put forward the following arguments: a) intervention is not in accordance with international law, b) in state practice, in the past, the right of intervention was abused in the majority of cases, c) today, state practice does not support the right of particular states to use force for humanitarian reasons⁴⁴, d) danger that the conflict might escalate, e) intervention will never be applied in a consistent manner,⁴⁵ f) humanitarian motives (predetermined goals) are never in harmony with the consequences of intervention,⁴⁶ and g) the use of force should not be a decisive instrument for protecting human rights or for preventing their violations (such violations should be prevented systematically, and not only checked by striking back).

With respect to the last two arguments attention should be paid to the pronouncement of the International Court of Justice in the dispute between Nicaragua and the United States because of military and paramilitary activity in and against Nicaragua. Although the Court took account of the fact that in 1985 the United States Congress accused Nicaragua of human rights violation, it decided that:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not

(NATO action against the Federal Republic of Yugoslavia in 1999) in L.C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man*, 2003, pp. 244-246.

⁴⁴ According to Degan:

...new alternative practice should become permanent, continuous and uniform so as to give rise to a consensus on the existence of a general legal awareness (opinio juris) that intervention is permissible under a new rule of public international law. – V.Đ. Degan, *Intervencija i međunarodno pravo* (Intervention and international law), *Zbornik Pravnog fakulteta u Rijeci*, 4 (1983), p.198.

⁴⁵ This is actually the argument of uneven power relations. States that support the right of humanitarian intervention in the territory of other states never assume a reciprocal obligation to tolerate the intervention of other states in their own territories. Intervention must be applied consistently, irrespective of region or nation because, as emphasized by K. Annan in his Report of 20 September 1999, *after all, humanity is indivisible*. In reality, humanitarian intervention is possible only against smaller and, perhaps, middle-ranking states. It is difficult to imagine, even in theory, a situation where for humanitarian reasons, out of extreme necessity, force could be applied against a powerful state. Humanitarian intervention seems probable exclusively in situations of uneven relations, since the intervening state always has to be more powerful than the state against which measures are taken.

⁴⁶ NATO's intervention against Yugoslavia, according to Krivokapić's investigation, resulted in a humanitarian, economic, ecological and institutional catastrophe as well as interethnic intolerance. See B. Krivokapić, *o.c.*, p. 218-219.

*be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.*⁴⁷

In his aforementioned report K. Annan holds that in reality the use of force on humanitarian grounds is in each case a result of failure in the prevention of crimes against humanity. Therefore it is the obligation of the international community to develop and improve its ability to prevent violations of human rights. He argues for a transition from *a culture of reaction to a culture of prevention*, since it is doubtless that:

*Even the costliest policy of prevention is far cheaper, in lives and in resources, than the least expensive use of armed force.*⁴⁸

We may support some of these arguments and refute others, but there can be no quarrel with the logic of the criticism levelled at the argument about the abuse of the right of humanitarian intervention, which is explained in detail by R. Higgins:

...Many writers do argue against the lawfulness of humanitarian intervention today. They make much of the fact that in the past the right has been abused. It undoubtedly has. But then so have there been countless abusive claims of the right to self-defence. That does not lead us to say that there should be no right of self-defence today. We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made. The role of norms is the achievement of values for the common good.

Nor am I persuaded by another, related argument sometimes advanced – that humanitarian intervention should be regarded as impermissible, because, in the international legal system, there is no compulsory reference to impartial decision-makers, and states finish up judges in their own cause. There are a

⁴⁷ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment, *ICJ Reports 1986*, pp 134-135.

⁴⁸ Report of the Secretary-General, 1999, p. 4.

*variety of important decision-makers, other than courts, who can pronounce on the validity of claims advanced; and claims which may in very restricted exceptional circumstances be regarded as lawful should not a priori be disallowed because on occasion they may be unjustly invoked.*⁴⁹

Since humanitarian intervention is not expressly regulated by a rule of international law, in the debate about it Degan takes as a starting point the conflict between international law and international reality, a conflict between the normative and the real, quoting Rousseau:

*...There has always been certain discord between the statement of norms that ought to regulate international relations (the principle of restraint or non-intervention) and the state of practice which, on the other hand, manifests itself in the frequency of interventions. Any study of this matter must take as its mainstay this duality of imperfection in international relations.*⁵⁰

Therefore, the *de lege ferenda* conditions that exclude *the faultiness of intervention* could be as follows:

- a) systematic, repeated and large-scale international crimes must have been committed by a State's authorities or with their compliance, against their own population,
- b) any such situation must itself be a "threat to the peace",
- c) in these exceptional circumstances, an organization of States which undertakes a humanitarian intervention not authorized by the Security Council, acts in the general interest,
- d) no State participating in the intervention should benefit from the action,
- e) a collective intervention by several States should be preferred to the intervention by a single State acting in the name of others or of an organization of States,
- a) in the enforcement action no international crimes must be committed, especially not against civilians and other protected persons.⁵¹

According to Evans there has to be *convincing evidence* of:

- a) extreme humanitarian distress on a large scale, requiring urgent relief,
- b) it must be objectively clear that there is no practical alternative to the use of force to save lives,

⁴⁹ See R. Higgins, *Problems and Process – International Law and How We Use it*, Oxford, 2003, pp 247-248.

⁵⁰ Quoted in V. Đ. Degan, *o. c.*, p. 170.

⁵¹ V. Đ. Degan, *Humanitarian intervention (NATO action against the Federal Republic of Yugoslavia in 1999)* in L. C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man*, 2003, pp. 248-250.

- c) any use of force should be proportionate to achieving the humanitarian purpose and carried out in accordance with international law,
- d) the military action must be likely to achieve its objectives,
- e) any use of force must be collective.⁵²

When all these conditions are fulfilled, Degan rightly puts a new and difficult question whether an intervention satisfying all the above criteria is, according to general international law, a legal obligation of the intervening states, or their right, or simply a possibility.

VI

Finally, it should be concluded that owing to the overarching importance of human rights in modern international law and because of the obsolescence of the Security Council monopoly on the authorization of force with the blocking power of the veto, even in 21st century, by one of the five permanent members, the right of humanitarian intervention is still one of the most sensitive legal and political questions for the international community which has not yet reached a consensus about it. Therefore any discussion or effort with an aim to formulate an answer is a real challenge and also a contribution to the science of international law.

Will a firm commitment to humanitarian purposes alone be sufficient for the institution of humanitarian intervention to be introduced into international law? Should the principles of humanity and of the protection of human rights have priority over the principle of prohibition of the use or threat of force? The answer is complex because the entire structure of humanitarian intervention has so far been tarnished by the application of a dual standard in some humanitarian disasters in the world. Humanitarian motivation has not always been sincere. It has often served as an excuse for achieving geopolitical and military-strategic goals. In such situations international law can really return to the time before the use and threat of force were prohibited. This is why discussions about this important question seem indispensable and useful, and why the United Nations must, in spite of all their weaknesses, continue to be the only international organization within which the mechanism of force may (even where the highest humanitarian values are in question) be set in motion. Kofi Annan has explained why this is so:

Because, despite its limitations and imperfections, it is testimony to a humanity that cares more, not less, for the suffering in its midst, and a humanity that will do more, and not less, to end it.

We will succeed only if we all adapt our Organization to a world with new actors, new responsibilities, and new possibilities for peace and progress.

(Translated by Mirjana Bonačić)

⁵² Malcolm D. Evans, *o. c.*, p. 597.

Sažetak

(Ne) Dopustivost humanitarne intervencije

U Povelji Ujedinjenih naroda i suvremenom međunarodnom pravu nema pravnog uporišta (izvora) o dopustivosti uporabe sile kako bi se spriječili masovni zločini protiv civilnog stanovništva, etničko čišćenje ili umanjile teške povrede ljudskih prava unutar granica neke države. Formalno, svaka prijetnja silom ili uporaba sile kao sredstva kojim bi se zaustavila humanitarna katastrofa nedozvoljeni je čin. S druge se pak strane, velika i sustavna kršenja ljudskih prava koja su propisana i regulirana međunarodnim ugovorima (donijetim poslije Povelje) ne mogu više smatrati isključivo pitanjima unutrašnjega prava. O tome može li se u krajnjoj nuždi kada su ispunjeni uvjeti moralne, etičke i humanitarne prirode prijeći granicu dopustivosti i intervenciju smatrati pravednom, humanom i moralnom u znanosti međunarodnog prava nema konsenzusa. Povezivanje onoga što je pravno nedopustivo sa osjećajem humanosti i predanosti humanim vrijednostima oduvijek je bio privilegij samo moćnih. Državama koje su pokazivale dovoljno interesa za oružanu intervenciju humanitarni motiv je vrlo često bio samo isprika za akciju i uglavnom nije bio u suglasnosti s posljedicama intervencije. Stoga praksa država danas ne daje podršku pravu pojedinih država na uporabu sile zbog humanitarnih razloga. Pravo na humanitarnu intervenciju i u 21. stoljeću ostaje jedno od najsenzibilnijih pravno političkih pitanja međunarodne zajednice, zbog sveprisutne važnosti ljudskih prava u suvremenom međunarodnom pravu s jedne strane i zbog zastarjelog monopola Vijeća sigurnosti nad odobravanjem uporabe sile - s blokirajućim vetom pet stalnih članica - s druge strane. Ujedinjeni narodi bi uz sve svoje slabosti i dalje morali ostati jedina struktura unutar koje može biti pokrenut mehanizam uporabe sile.

Ključne riječi: Kršenja ljudskih prava, humane intervencije, međunarodno pravo, Ujedinjeni narodi, NATO