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## ON THE CONCEPTS OF HUMANITARIAN INTERVENTION AND PREVENTIVE SELF-DEFENCE \*

*Two particular concepts emerged which should present legal grounds for new approaches of the superpowers. These are: 1) the concept of humanitarian intervention and 2) a new approach to self-defence, as an exception to the prohibition of the use of force.*

*Such concepts cannot be accepted particularly because they oppose to the basic principles of contemporary international law.*

*How can we react then to severe human sufferings, i.e. in situations where peace and security are at stake? Well, it is understood – through the United Nations! They are created for it. Until other solutions emerge (for instance, for the transformation of the international community into a superstate), reactions can only be multilateral – through the Security Council. Even then the solution should be sought primarily in the non-military measures, and especially in the collective states' actions.*

**Keywords:** *use of force, humanitarian intervention, preventive self defence (use of force), effective international law, UN Security Council*

### I. INTRODUCTION

Contemporary international law is based on the Charter of the United Nations and the principles founded upon it. Although they were originally contractual in nature, these principles became part of general international customary law, hence binding to all. Special significance is given to the principle of peaceful resolution of international disputes and the principle regarding the prohibition of threat and use of force. These are, among others, comprised within Art. 2/3-4 of the UN Charter.

In fact, the historical contribution of the UN Charter is comprised in the prohibition of the use of force itself. Even if, in earlier days, the international legal order allowed states to resort to force (*jus ad bellum*) under certain conditions and for the protection of their own interests, that right was revoked after World War II. What is more, the threat of force itself was prohibited<sup>1</sup>. Delivered at the mo-

\* The author's viewpoints are not shared by the *Adrias* editorial board.

<sup>1</sup> As a reminder, according to the UN Charter, the use of force has been permitted only in two cases – either in the event of individual or collective self-defence from the armed assault (Art. 51 of the UN Charter) or in the event of measures undertaken by the UN based on section VII

ment of the general social sobriety – on the foundations of the fresh wounds left by WWII and on the memories of WWI<sup>2</sup> atrocities - the prohibition of threat and use of force was a great accomplishment for all of mankind.

Although force was placed beyond the law in that way, practice demonstrated that the states (at least some of them) were not prepared to renounce force as one of the instruments of their foreign policy. Wars occurred even after 1945, and the UN, paralysed by the discord between its most important member states, was often unable to prevent or restrain them.

Various conflicts taking place in that period were deemed as a crude and tragic inevitability, as an integral part of the “cold war”. All in all, an incomparably lesser evil in relation to the possible open conflict between different parts of the divided world. The main task was to avoid a new world war. In the light of that, the two superpowers, generally speaking, tolerated certain actions of the opposite side (truth be told, providing its opponents with weapons), and they did also not demonstrate a complete determination to restrain conflicts between the minor third states, because they tended to use those events for their political purposes.

That happened during the “Cold War”. However, the war ended and the world hoped that the times of discord were over, and that common interests, understanding and co-operation would prevail eventually. Unfortunately, these expectations were soon failed.

Among other things, the superpowers were not ready to give up the use of weapons when it suited their interests. Quite the contrary. However, in these new conditions, in the situation when the “Iron Curtain” and the enemies behind it no longer existed, more than ever there occurred the need to present the world and their own public with more or less acceptable argumentation for military expeditions outside their own borders.<sup>3</sup> In other words, either the use of force was to be abolished (and they were obviously not ready to do so) or a way had to be found to subsume such actions under what is acceptable under contemporary international law.<sup>4</sup>

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of the Charter for the maintenance and the establishment of international peace and security. As a third and final exception to the prohibition of threat and use of force, the UN Charter (Art. 53, 107) provides for the coercive measures against former enemy states (states that were enemies with any of the signatory states of the Charter during WWII), however those regulations were long abandoned.

<sup>2</sup> It is necessary to remind ourselves that the Charter begins with the following words: «We, the peoples of the United Nations, determined to save future generations from the scourge of war, which has, twice in our lifetime, brought untold sorrow to mankind...».

<sup>3</sup> In the Cold War era these questions were not asked, or at least not in that manner. Many things could have been justified by the use of coercive measures for the protection from «the Communist menace» or «the Western Imperialism». Actually, «restoration of order» in its interest sphere (for instance, interventions for the preservation of *status quo*) is deemed as an aspect of self-defence (from actual or imaginary assaults of the opposing party).

<sup>4</sup> We must agree with those who notice that: «with the end of the Cold War the argument of interventionism most used by the USA vanished into thin air. Nobody believes anymore that

In that sense, two particular concepts emerged which should present legal grounds for new approaches of the superpowers. These are: 1) the concept of humanitarian intervention and 2) a new approach to self-defence, as an exception to the prohibition of the use of force.

## II. HUMANITARIAN INTERVENTION

### 1. Concept

The possibility of collective action for humanitarian reasons, the so-called «intervention of humanity» (*intervention d'humanité*), is connected primarily to the 19<sup>th</sup> century and the military actions of the European powers, the members of the so-called Saint Alliance, against Turkey, justified by the necessity to prevent the suffering of the Christian peoples in the Balkans.

In the 20<sup>th</sup> century, in conformity with the principle of non-intervention, this practice was widely abandoned. Still, even after the UN Charter prohibited the use of force, there were at least dozen examples of the use of force under the pretence of humanitarianism. However, those were isolated cases real motives of which were of a different nature. Therefore these actions were either highly condemned or were not supported by the wider international community.

When the bloc division disappeared, expectations of a better, more just and more democratic world emerged. In such a climate, certain authors and politicians, as well as non-governmental organisations<sup>5</sup> started to advocate more openly the idea that a classic concept of state sovereignty was overcome, and that, in cases where the citizens of a certain country were made victims of a serious breach of human rights by their governments, intervention by an international factor or even by a certain state is allowed, even through military actions. The term “new interventionism” was coined. This question was addressed by everyone, each from their own perspective: legal authors, politicians, diplomats, philosophers, activists of numerous mentioned non-governmental organisations etc.<sup>6</sup>

Discussion on permission, and even the necessity of humanitarian interven-

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Washington has to send marines or overthrow governments in order to fight the Soviet expansionism. According to that, the creators of the USA politics needed new justifications for their interventionist policy, which was always led by the less noble motives». See: Shalom S.R.: Protecting Americans Abroad: Pretext for Intervention, p. 1. [www.zmag.org/ZMag/articles/Shalominterven.html](http://www.zmag.org/ZMag/articles/Shalominterven.html).

<sup>5</sup> There is, for instance, the Human Rights Watch, which advocates the recourse to so-called humanitarian interventions under certain conditions. More about it in Roth K.: War in Iraq: Not a Humanitarian Intervention, Human Rights Watch World Report 2004, <http://hrw.org/wr2k4/3.html>.

<sup>6</sup> For this sake this paper will not address only the referential works of the legal science, but also the wider spectrum of sources.

tion reached the UN as well. What is more, it was advocated on many occasions by the highest officials of the Organisation, among which by the UN Secretary General at the time, Kofi Annan.<sup>7</sup>

Among other matters, the doctrine “Responsibility to Protect” was launched<sup>8</sup>. Namely, as a response to the requests of the UN Secretary General Kofi Annan, the government of Canada together with a group of large foundations established the International Commission on Intervention and State Sovereignty<sup>9</sup> which delivered a report in 2001 named “Responsibility to Protect”.<sup>10</sup> It formulated a new doctrine basic meaning of which amounts to the attitude that the sovereign states are obligated to protect their own citizens from the unavoidable catastrophes – mass murders, rapes, hunger – but if they are unable or unwilling to do so, the responsibility should be given to a wider community of states. This «responsibility» implies three concrete responsibilities: to prevent, to react and to ensure.<sup>11</sup>

The UN Secretary General Kofi Annan established his Commission in 2002 – “a group of wise men” at a high level who published their own report in 2004<sup>12</sup> and who advocate the possibility of intervention under certain conditions, even a forceful one, for humanitarian reasons.

But, what exactly is implied under humanitarian intervention? Even though it is widely discussed, there is no general definition. In fact, it could be argued that there are as many definitions as there are authors. Differences are great particularly because of the fact that those who give their own definitions often simultaneously tend to provide conditions under which (in their opinion) such intervention would be allowed.

To comprehend it better, we will expose, in a simple manner, the basic ele-

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<sup>7</sup> Kofi Annan stated on 9 September 1999, among other things, that the sovereignty of states can be overpowered by humanitarian intervention in the event of extensive breach of human rights. He invited the members of the United Nations to unite for the creation of a more efficient policy – up to the use of armed forces – in order to terminate the mass murders and crying breaches of human rights.

<sup>8</sup> See: Secretary-General’s Address to mark International Human Rights Day (8.12.2006), <http://www.un.org/apps/sg/printsgstats.asp?nid=2351#>, p. 1; Котляр В.С.: Концепция ответственности за защиту как проект кодекса проведения гуманитарных интервенций), *Международное публичное и частное право*, 3/2005, <http://www.spbpravo.ru/comm.php?id=776>.

<sup>9</sup> This body is also known as the Evans-Sahnoun Commission (after the surnames of its co-presidents: *Gareth Evans, Mohamed Sahnoun*).

<sup>10</sup> The Responsibility to Protect, *Report of the International Commission on Intervention and State Sovereignty*, December 2001, 91 pp. <http://www.iciss.ca/pdf/Commission-Report.pdf>.

<sup>11</sup> The Responsibility to Protect: *op. cit.*, p. VIII.

<sup>12</sup> A more secure world: Our shared responsibility, *Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change*, UN doc. A/59/565 (2004), <http://www.un.org/secureworld/report.pdf>.

ments most often indispensable for a humanitarian intervention to occur. We are talking, therefore, about situations which differentiate it from some other similar phenomena.<sup>13</sup>

1. *Character of the action.* – Although in principle humanitarian intervention could be understood in a wider sense, as any intervention, even through non-violent means, today we mostly perceive under that name such a measure which is undertaken through armed force. Some tend to subsume the threat of force under humanitarian intervention, for humanitarian reasons. In any case, it is generally considered that a peaceful intervention, for instance through peaceful protests, diplomatic notes etc. is not comprised within this concept.

2. *Reasons.* – Although the mere name of these concepts reveals the fact that the intervention for humanitarian reasons is at issue, there is no general consensus what the concept stands for – what concrete, necessary and substantial reasons are required to take these measures into consideration in the first place. The most often requirement is that a certain state has a massive breach of basic human rights (especially mass murders and genocide), i.e. that there is a substantial breach of international humanitarian law. However, while there is talk of saving human lives on the one hand, on the other hand reasons for intervention are understood much more liberally, to the extent that the intervention should be resorted to in the event of other substantial breaches of human rights as well. Also, while one group of people thinks that an intervention is justifiable for the sake of *terminating* the breach of human rights and humanitarian law, others do not refrain from saying that it should be resorted to for the sake of *preventing* such a breach (therefore, even before the breach occurs). According to that, even though at first sight it may appear that among the supporters of the humanitarian intervention doctrine there is a consensus on this issue, in fact there are some serious differences which may appear to be (if this doctrine were accepted) of great practical significance, with substantially different consequences.<sup>14</sup>

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<sup>13</sup> Cfr: Kolb R.: Note on humanitarian intervention, *Affaires courantes et commentaires - Current issues and comments*, [http://www.icrc.org/Web/eng/siteeng=.nff/htmlall/5LPKFQ/\\$File/irrc\\_849\\_kolb.pdf](http://www.icrc.org/Web/eng/siteeng=.nff/htmlall/5LPKFQ/$File/irrc_849_kolb.pdf), pp. 119-121; Grimstad K.: Humanitarian Intervention, Historical, Legal and Moral Perspectives, <http://web.uct.ac.za/depts/pbl/grimstad.pdf>, pp. 4-6.

<sup>14</sup> Cfr: Paunović M.: “Humanitarna intervencija” kao zloupotreba načela zabrane upotrebe sile u međunarodnom pravu (“Humanitarian intervention” as the abuse of the prohibition of the use of force principle in international law), *Jugoslovenska revija za međunarodno pravo* 1-3/1999, p. 149; Федоров А.: Гуманитарная интервенция – новая тенденция в современном мире, *Contemporary Issues 1999*, <http://newsletter.iatp.by/ctr2-7.htm>, p. 1; Simons C.P.: Humanitarian Intervention: A Review of Literature, <http://www.ploughshares.ca/content/WORKING%20PAPERS/wp012.html>, p. 2; Grimstad K.: *op. cit.*, p. 2; Kolb R.: *op. cit.*, p. 119; Corell H. (Under-Secretary-General for Legal Affairs, The Legal Counsel of the UN): To intervene

3. *No approval of the respective state.* - In some parts of literature there is an emphasis that humanitarian intervention is at issue only when there is no consent of the state being intervened. If it gave its consent, there is no need for the concept of humanitarian intervention.

Actually, if intervention occurred at the invitation or consent of the state at issue, it is rather the question of some form of military or similar co-operation or aid, than of the classic concept of intervention. The other thing is that international practice is familiar with too many examples where intervention occurred at the invitation of the puppet or anti-people regime – not for humanitarian reasons, but for the preservation of government, for the preservation of a certain country's affiliation to a particular sphere of interest etc.

4. *The UN mandate.* – There are great differences of opinion on the issue whether humanitarian intervention can be undertaken solely on the grounds of the mandate given by the UN Security Council or if it is, under certain conditions, legal even without it.

There is no doubt that a certain part of the international community thinks that in particular cases the Security Council, driven by humanitarian reasons, is entitled to undertake or order military action in a certain country. With such an approach, the Security Council decision is considered not only a necessary precondition for legally permissible interventions but also one of its fundamental elements which distinguish it from similar phenomena. Many people think that only an intervention like that would be legitimate, therefore they limit this term to such actions.

Others, however, see humanitarian intervention as any military action against another state, undertaken for humanitarian reasons. Hence, even such an action undertaken with or without the obtained UN mandate<sup>15</sup>. Finally, there is the third view of humanitarian intervention - it is considered to be only that military action undertaken by a state or a group of states *without* the mandate given by a competent international organisation or one of its bodies – primarily (though not exclusively) by the UN Security Council. It is explained by the fact that when

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or not: The dilemma that will not go away, *Conference on the Future of Human Interventioni*, Durham, 2001, p. 2, <http://www.un.org/law/counsel/english/duke01.pdf>; Holzgrefe J.: The Humanitarian Intervention Debate, in: Holzgrefe J., Keohane R. (eds.): *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge University Press, 2003, p. 18; Иноземцев В.: Гуманитарные интервенции: Понятие, задачи, методы осуществления, *Космополис*, 1/2005, <http://www.polit.ru/research/2005/04/29/intervenstia.html>, стр. 5; Bello W.: Humanitarian Intervention – Evolution of Dangerous Doctrine, *Znet*, [www.zmag.org/content/showarticle.cfm?ItemID=9592](http://www.zmag.org/content/showarticle.cfm?ItemID=9592), p. 1.

<sup>15</sup> See for instance: *Humanitarian Intervention: Legal and Political Aspects*, Danish Institute of International Affairs, Copenhagen, 1999, p. 11; <http://www.dupi.dk/www.dupi.dk/htdocs/en11240.ssi>.

there is the permission of the Security Council, the intervening states have legal grounds for their action; hence there is no reason to call upon the doctrine of humanitarian intervention<sup>16</sup>. A special term is introduced for the intervention undertaken without the permission of the UN Security Council – they are referred to as *unilateral*.

5. *Impartiality*. - It can often be heard that humanitarian intervention is only the use of force undertaken for the protection of *foreign* citizens (and not the citizens of the intervening state), which puts an emphasis on some kind of impartiality (objectivity) of these measures<sup>17</sup>.

In connection with that, some sources underline that it should be taken into account that humanitarian intervention is to be distinguished from a violent action undertaken by the state for the protection of its own citizens abroad. A typical example is a situation where the citizens of the respective state are held hostages abroad, and the local government (the territorial state) is not prepared or not able to act. In such cases the intervening state does so in favour of its citizens, so that there is a close connection between the state and the persons it wants to protect. In the event of humanitarian intervention, however, a state or a group of states always intervenes in favour of the foreign citizens, because of the alleged brutalities that were committed and continue to appal the human conscience.

A number of authors, however, do not distinguish these two cases, and do not set these prerequisites, i.e. in their opinion the term *humanitarian intervention* implies military action for the purposes of protecting the “endangered population” (with no note on citizenship), i.e. for the sake of “saving lives of a certain group of people” “whether they are foreign or local citizens”.<sup>18</sup>

## 2. Reasons in favour of permissibility and preconditions for the justification of humanitarian intervention

1. Advocates of the permissibility of a violent action for the protection of basic human rights in a foreign state refer to various arguments. We will mention here the most common ones.

First and foremost it is mentioned that, in the century we have just entered, the international community must not be indifferent towards violent and especially mass breaches of human rights, particularly when it comes to such phenomena as genocide, ethnic cleansing, massacres etc. Furthermore, it is mentioned that great human sufferings and bloodsheds cannot be tolerated anymore wherever they

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<sup>16</sup> Cfr: Simons C.P.: *op. cit.*, p. 2; Grimstad K.: *op. cit.*, p. 2; Kolb R.: *op. cit.*, p. 119.

<sup>17</sup> Cfr: Kolb R.: *op. cit.*, p. 119; Holzgreffe J.: *op. cit.*, p. 18.

<sup>18</sup> Cfr: Kegli Č.V. Jr., Vitkof J.R.: *Svetska politika - trend i transformacija*, Beograd 2004, p. 388; Paunović M.: *op. cit.*, p. 149.

may occur, even if within a certain society. In that context, it is often mentioned that new genocides and atrocities like the ones in Rwanda, Srebrenica and Darfur etc. must never again be allowed.

Furthermore, it is emphasised that the contemporary international law is based on the abandoned principles residing in the logic that the state is the basis of everything. However, in these times of universal globalisation, the sovereignty of states, which is starting to recede more and more anyway, ceases to be the absolute value.<sup>19</sup> It is noted that the state, sovereignty of which basically resides in the summary rights of its citizens, is obligated to protect them. If it is not capable of attending to its obligations, the government loses its sovereign power. In connection with that, it is emphasised that many contemporary states are unable to guarantee basic human rights to people under their jurisdiction and some states even explicitly infringe them, which might have been tolerated once, but not in our time. Consequently, we come to the attitude that under certain conditions, state's main imperative (protection of its citizens' rights from foreign influences) gives way to universal human values (protection of personality against breaches of fundamental rights).<sup>20</sup>

Even among the UN high-ranking officials<sup>21</sup> it can be heard that the state's sovereignty cannot be interpreted like it was in the past, and that today the states are considered to be the institutions which need to be of service to citizens, and not vice versa.<sup>22</sup> Among other things, the UN Secretary General of the time, Kofi Annan, pointed out that in the nineties of the past century internal wars prevailed, which did not erase borders as much as they destroyed people – they led to the killing of 5 million people. In his opinion the creation of a new concept of security is in motion after all those conflicts. If earlier security amounted to the protection of a territory from foreign attacks, today it includes the protection of all of mankind and actual people from interstate violence. In addition to that, sometimes the states themselves execute violence towards their own citizens which they are obligated to protect under humanitarian law.<sup>23</sup>

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<sup>19</sup> On these issues see, among others: Jackson J.H.: Sovereignty – Modern: A new Approach to an Outdated Concept, *American Journal of International Law*, 4/2003, pp. 782-802; Bartelson J.: The Concept of Sovereignty Revisited, *European Journal of International Law*, 2/2006, pp. 463-474.

<sup>20</sup> Hoffman S.: The Politics and Ethics of Military Intervention, *Survival*, 4/1996, p. 35; cited according to: Бордачев Т.: Проблемы безопасности, *Московский центр Карнеги*, том 3, 1998, стр. 4, <http://www.carnegie.ru/ru/print/55703-print.htm>.

<sup>21</sup> See Annan K.: Two concepts of sovereignty, *The Economist*, 18.9.1999, <http://www.un.org/News/oss/sg/stories/printarticle.asp?TID=Type=Article#>. See also the text of H. Corell, Assistant of the UN General Secretary for legal issues - Corell H.: *op. cit.*, p. 3.

<sup>22</sup> In this matter the Westfall Treaty of 1648 is usually referred to, although this concept was introduced by the Peace of Augsburg in 1555.

<sup>23</sup> Annan K.: We the Peoples: The Role of the United Nations in the 21<sup>st</sup> Century, *IV. Freedom from fear*, par. 193-194, 210, <http://www.un.org/millennium/sg/report/full.htm>.

In favour of the concept of humanitarian intervention it is to be taken into account that intervention is a tool used for fighting the world chaos, since internal conflicts and violence are prone to spilling over borders together with the sea of refugees, and the neighbouring states can be directly drawn into the internal conflicts.<sup>24</sup>

Since it is obvious that this concept has no foothold in contemporary international law, efforts have been made to create it.

In this sense, attempts have been made to reread and reinterpret the UN Charter. In that respect, it is considered that the regulations of the Charter regarding the prohibition of threat and use of force must be interpreted in connection with other regulations of the Charter, especially with those concerning the protection of fundamental human rights, as well as with those concerning the measures available to the Security Council for the maintenance or establishment of peace and security.<sup>25</sup>

Besides that, attempts have been made to demonstrate that the regulation from Art. 2/4 of the Charter determining the obligation of the member states to refrain from “threat or use of force against territorial integrity or political independence of any state”, leaves an open possibility for the use of force in other situations (among other things, for the protection of human rights). Such interventions are legal according to those authors, because their objective is not a violation of “territorial integrity or political independence of the states”<sup>26</sup>.

The efforts of the UN Secretary General’s Assistant for legal issues, Hans Corell, are interesting for many reasons. After he concludes that, for various reasons, other methods of ensuring this concept of legal grounds are not possible;<sup>27</sup> he suggests that the institution of necessity be used. In his view, humanitarian intervention should be treated in the same way as necessity is in internal legal orders. Naturally, necessity is not codified, but its nature is such that it can be identified when it occurs. In his opinion, relevant issues should be considered from that perspective by the Security Council.<sup>28</sup>

In addition to that, it is indicated that no novelty has been discovered, since the acts of humanitarian intervention were often used in the past, especially in the 19<sup>th</sup> century.<sup>29</sup> Some authors even claim that the right to humanitarian interven-

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<sup>24</sup> Hoffman S.: *op. cit.*, p. 35.

<sup>25</sup> Corell H.: *op. cit.*, pp. 3-4.

<sup>26</sup> On the mentioned attitudes about the right to humanitarian intervention see: Bull H. (ed.): *Intervention in the World Politics*, 1984, ch. 7.

<sup>27</sup> He presents his view on why this issue cannot be resolved by modifications of the UN Charter, codifications outside the Charter, recourse to the “Uniting for Peace” Resolution, solutions through mediation of regional organisations.

<sup>28</sup> Corell H.: *op. cit.* pp. 5-8.

<sup>29</sup> In favour of this attitude he refers to the well-known examples such as interventions of: France

tion at that time was some kind of customary law. In connection with that, there has been a direct allusion to the fact that such a custom has perhaps been revived even today. As confirmation of that, it is mentioned that after 1945 and the adoption of the UN Charter, there were about ten cases of the use of force for “humanitarian” reasons, and without the mandate granted by the Security Council; and it consequently appears that they were deemed permissible or at least not strongly opposed by the international community.

Finally, there are even some paradoxical ideas that the legalisation of the concept of humanitarian intervention should reduce the number of conflicts by *discouraging* wars fought for other motives.<sup>30</sup>

2. Even those who vigorously advocate the idea that it is essential to recognise the right of humanitarian intervention (some even talk about the duty to intervene) notice that some strict limitations must be introduced in order to avoid potential abuse of that right; particularly because “the privilege of the strong” (of powerful states) is at issue.

Many situations are listed here as conditions under which humanitarian intervention should be allowed, and these are again, interpreted differently by different people. Although it is rather difficult to generalise, it is to be noted with reserve that it is basically required:<sup>31</sup>

- that a severe breach of fundamental rights in a given country is established; a breach of large proportions threatening the substantial loss of human lives;
- that a serious threat is established justifying military intervention (i.e. that there are no other alternatives to save endangered human lives);

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and Great Britain in Greece (1827), Great Britain, France, Austria, Prussia and Russia in Syria (1860); European forces against Turkey in Crete (1866), in Bosnia (1875), Bulgaria (1877) and Macedonia (1887); USA in Cuba (1898) etc.

<sup>30</sup> Goodman R.: Humanitarian Intervention and Pretexts for War, *American Journal of International Law*, 1/2006, pp. 107-141. Also available at: [www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanHumanitarianInterventionPretextsforWar.pdf](http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanHumanitarianInterventionPretextsforWar.pdf). See particularly: pp. 2, 5, 11-12, 36, 42-43.

<sup>31</sup> Cfr. For instance: Cassese A.: *International Law*, Oxford University Press, 2001, pp. 315-316; Cassese A.: *Ex iniuria ius oritur: Are We Mowing towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, *European Journal of International Law*, 1/1999, pp. 23-30, <http://www.ejil.org/journal/Vol10/No1/com.html>; The Responsibility to Protect: *op. cit.*, pp. 31-37; A more secure world: Our shared responsibility, *op. cit.*, pars. 203-208, pp. 57-58; Duke S.: The State and Human Rights: Sovereignty versus Humanitarian Intervention, *International Relations* 2/1994, pp. 30-32, 43-44; Charney J.I.: Anticipatory Humanitarian Intervention in Kosovo, *American Journal of International Law* 4/1999, pp. 838-839; Simons C.P.: *op. cit.*, pp. 15-23; Roth K.: *op. cit.*, pp. 2-10; Shalom S.R.: *op. cit.*, p. 2; Coady C.A.J.: The Ethics of Armed Humanitarian Intervention, *Peaceworks*, United States Institute of Peace, 2002, pp. 24-31, <http://www.usip.org/pubs/peaceworks/pwks45.html>.

- that there is a clear objective (to terminate the severe breach of human rights);
- that military intervention is used as a last resort (when all other i.e. peace-keeping and non-violent means have been already exhausted, and there is a need for emergency action);
- that there is a ratio between the (forceful) means used and objectives (so that the duration and the intensity of the military action be at a reasonable level and not in excess);
- that there is a proportion between objectives and consequences (i.e. it is necessary to determine whether there is a reasonable possibility to use military intervention to improve the situation and not exacerbate it);
- that the intervention is collective (executed by many and not just one state);
- that the intervention is executed at the right moment (at the moment of severe breach of human rights and not later – just in order to punish the responsible ones);
- that the intervener provides reliable evidence that what he does is in the interest of humanitarian issues (and not for selfish reasons); etc.

Certain authors and politicians list some other requirements which are sometimes mutually exclusive. Thus, for instance, a part of them requires it to be a venture undertaken on the grounds of the decision (order or consent) of the UN Security Council or other competent international body as a precondition for the legality of humanitarian intervention. Their opponents mean by humanitarian intervention only the appropriate actions undertaken without the mandate of the Security Council.

Common to the majority of authors is the insistence that the criteria upon which humanitarian intervention is based, whichever they may be should apply equally to all states, and not only to developing countries. In other words, one of the preconditions is that this practice be consistently applied to all states, irrespective of their size and power.

### 3. Review

Does contemporary international law permit the undertaking of violent actions marked as humanitarian intervention? If it does not, should it be changed in any way? In other words, to what extent (if any) are the arguments of those advocating this concept justifiable? We will attempt to give brief review of some most important aspects.

We will deal here only with the so-called unilateral interventions, i.e. those undertaken by a certain state or a group of states on its own initiative, without the mandate from the UN Security Council. We will address the issue of permissibil-

ity of humanitarian intervention on the grounds of the Security Council decision later on.

### 1) Legal permissibility

The answer to the first question (whether humanitarian intervention is in conformity with the effective international law) should by all means be negative.<sup>32</sup> Even though humanitarian intervention is mentioned in some parts of the literature and in some political documents, it is not recognised by contemporary international law.

In addition to that, it is not provided for in the UN Charter as one of exceptions to the general prohibition of the use of force.

There should not be anything disputable. Art. 2/4 of the UN Charter can be interpreted only as the complete prohibition of the use of force.<sup>33</sup> In addition to that, that interpretation can be found in many documents of the UN General Assembly, such as the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965),<sup>34</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), Definition of Aggression (Resolution 3313/1974), Declaration on the Peaceful Settlement of International Disputes (1982) etc.

According to that, each “unilateral” humanitarian intervention is prohibited by contemporary international law. In the light of that, all attempts to forcefully implement that concept in the framework set by the contemporary international law are bound to fail in advance.

In connection with that, the aforementioned *new interpretations of the UN Charter* according to which the obligation to prohibit the use of force applies only to such measures by which territorial integrity and states` sovereignty are violated, must be deemed at least as highly arbitrary. This is because in Art. 2/4

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<sup>32</sup> Cfr: Shaw M.N.: *International Law*, Cambridge University Press 2003, pp. 1045-1046; Henkin L., Pugh R.C., Schachter O., Smit H.: *International Law – Cases and Materials*, St. Paul, Minn, 1993, pp. 931-934.

<sup>33</sup> Just to be reminded, it states that “In their international relations, all members refrain from threat and use of force against the territorial integrity or political independence of each state, or from acting in any other manner inconsistent with the purposes of the United Nations.”

<sup>34</sup> This document adopted by the UN General Assembly with 109 votes “in favour” and just 1 abstained (Great Britain), already in the provision 1 states that: “No State has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural entities, are condemned.”

of the Charter it is stated in the same tone “or in any other manner inconsistent with the purposes of the United Nations”. Since the most important purpose of the United Nations (Art. 1 of the Charter) is “to maintain international peace and security”, it is logical that every breach of the international law is automatically opposed to UN objectives.<sup>35</sup>

The idea of permissibility of humanitarian intervention cannot be defended even by the claim that such *international legal custom* exists. This is true for many reasons. Firstly, even if it once existed, such custom no longer exists. Obviously, for a reason.

However, it all points to the fact that the so-call right of intervention for humanitarian reasons did not exist even in the past as an international legal custom. There were certainly some actions which were disguised in such a manner, but it is difficult to talk about the “general practice” (*usus*) even with all the will in the world. This is particularly so because interventions were undertaken only by certain great powers and against weaker states. Moreover, it would be virtually impossible to prove the other, psychological element (*opinio juris sive necessitatis*), indispensable for the creation and existence of every international legal custom, including this one. Humanitarian interventions against Turkey and some other countries had grounds not only in international legal customs, but in the international treaties by which such resolutions were forced upon those states as well.<sup>36</sup>

In addition to that, general circumstances were basically different than now. International law of the time did not clearly define the concept of fundamental human rights and freedoms and how to determine when they are severely violated. Therefore the decision on humanitarian intervention could not reside in the established norms and principles, but it depended on the current understandings, moods and balance of forces. It is more important that, at the time, the states` right to go to war was acknowledged as a legal means for the protection of relevant interests. States were free to go to war at their own discretion, for reasons they deemed justified. They did not require any international legal custom on the right of humanitarian intervention for that. Hence it could be said at best that humanitarian interventions were never, not even in the 18th and 19th century, generally accepted, but just that they were not prohibited by the international law of the time.

But even if an international legal custom existed earlier regarding the right to a so-called humanitarian intervention, it would not be effective today because it would oppose basic regulations of the UN Charter and the most important prin-

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<sup>35</sup> Akehurst M.: *A Modern Introduction to International Law*, London 1984, pp. 219-220.

<sup>36</sup> France was, for instance, delegated the right of protection of Catholics (religious minority) in 1740 in Turkey, and later on the same right was awarded to Austria as well. On the other hand, the protection of the Eastern Orthodox Christians in Turkey (in the Balkans) was assumed by Russia, based on the peace treaties in Kuchuk-Kainarji (1774) and Adrianople (1829).

ciples of contemporary international law on the prohibition of the threat and use of force, hence with the *jus cogens* norms. In this matter, it would not be easy to prove *usus*, let alone *opinio juris* today. In any case, even those advocating the legalisation of the concept of humanitarian intervention, admit that since 2000 (hence in recent times) at least 133 states (with about 80% of the world population) rejected the idea of unilateral humanitarian intervention by either individual or collective acts.<sup>37</sup>

Furthermore, quite the opposite international legal custom is currently in force – on the prohibition of intervention. Even the International Court of Justice concluded that (especially in the case of *Nicaragua vs. USA, 1986*) international customary law does not allow for unilateral humanitarian interventions, and that, on the contrary, “the principle of non-intervention derives from customary international law.”<sup>38</sup> Therefore, no dilemmas should exist on that subject.

Finally, it is to be noted that even the attempts to legalise the use of force for humanitarian purposes with reference to the institution of *necessity* are futile. Even though there are other arguments, it is sufficient to notice in that sense that the right of *necessity*, which is essentially a general legal principle, cannot be grounds for the breach of norm on prohibition of the use of force, which is not just a *jus cogens* norm, but one of basic principles (hence foundations) of contemporary international law.

According to what was said here, military intervention without the mandate from the UN Security Council is forbidden under contemporary international law. It not only contradicts the principle of the prohibition of the use of force, but it also opposes many other important principles of contemporary international law, such as: *pacta sunt servanda* principle (the extent to which the UN Charter and other relevant treaties are violated), the principle of states' sovereignty and the principle of non-intervention in international relations.

## 2) Matters of principle

In order not to be accused of strict formalism, we will attempt to observe the whole issue from different aspects. Hence, even if we abandon entirely the legal domain (even though: “*dura lex, sed lex*”), there is a whole set of other objections principled in nature.

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<sup>37</sup> Goodman R.: *op. cit.*, p. 3, footnote 7; p. 7.

<sup>38</sup> Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), Judgment of 27 June 1986, pp. 133-135, par. 246, p. 126, <http://www.icj-cij.org/docket/files/70/6503.pdf>.

First of all, it is to be noted with reason that whenever there is a conflict between peace as the greatest world value and some other values, among which are human rights, the advantage should always be given to peace. However imperfect peace may be, war is always a worse alternative. It opens the Pandora box releasing various evils which usually cannot be observed at first.

It has already been emphasised that not even the advocates of humanitarian intervention can agree on its definition, or on its context and the elements it is composed of. Thus, logically, not even on the conditions under which it could be permitted. Somebody could argue that this is not the reason to abandon the idea itself, but on the contrary it is necessary to increase the efforts to reach general consensus on these issues. However, such an attitude would be unrealistic. There is a whole set of phenomena on which the deciding parties cannot or would not agree – there is for instance the definition of ethnic minorities, terrorists etc.<sup>39</sup>

The so-called unilateral humanitarian intervention is one of those phenomena. Even if it were to be recognized as legal, it would be difficult to reach consensus on its elements and conditions under which it can be resorted to, and especially on the issue whether those conditions are fulfilled in the specific case. In other words, there is always an actual risk that everyone would comprehend these issues the way it suits them, hence arbitrarily.

Because of that, even if it should be legally permitted, the concept of humanitarian intervention would not only lead to legal uncertainty, legalisation of the use of force, it would also represent an inexhaustible source of various abuses. What would in that case prevent the use of force of one state against the other? All it takes is for the state willing to intervene (and that is logically a more powerful state) to state that a mass and severe breach of human rights exists or is directly bound to happen in the state where it wants to intervene. In addition to that, today, in these times of technological and communicational upsurge which more than ever enables various information and media manipulations, it is becoming easier to fabricate “evidence” of human suffering and killings, to denigrate a certain government and make one’s own, as well as the international public prone to the idea that it is necessary to resort to force in order to prevent grave atrocities.<sup>40</sup> We have already witnessed how easily the states (and especially the Third World countries) are marked as “renegade states”, “axes of evil”, and their leaders as enemies of mankind, evil-doers, “war lords”, “butchers”, “executioners”, “cannibals” etc. Once the scene is set in that manner, nobody asks what the real picture

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<sup>39</sup> There is still no generally accepted definition of ethnic (national) minorities – and that is the prerequisite for the actual enjoyment of their guaranteed rights. It is no coincidence either that there is no general definition of terrorism and terrorists - starting from their political and ideological positions, the states see in the perpetrators of basically identical acts terrorists in one situation, and fighters for freedom in the other.

<sup>40</sup> The term «CNN syndrome» has already found its place in literature.

is. It is easy to justify the breach of national sovereignty on that basis, hiding the real interests and objectives of the intervening state.<sup>41</sup>

However, practice shows that none of the interventions undertaken under the flag of humanity was “humanitarian” in true sense. Quite the contrary. All known cases from the past indicate that the states intervened under humanitarian pretences to cover their true (political) objectives. Interventions were as a rule executed in a way that implied a major or minor breach of humanitarian law, including the established war crimes and crimes against humanity.

In addition to that, even if it were determined that a certain state’s regime is incompetent to carry out its duties (resulting in chaos) or is excessively violent, it is difficult, if not impossible, to determine which regime should replace it. It is not enough to simply send out the troops and win the war. The intervening state cannot simply overthrow a government and walk away. It should supervise the transformation into a better state. And its own model does not necessarily need to suit the local conditions and requirements. It is easy to say that a democratic society should be built, but who can decide what true democracy stands for and how it should be achieved? The establishment of a new (better) regime is connected to other challenges. It should, as a matter of fact, last for a while, perhaps several years, and the tolerance of the local population is always limited. Each foreign army, even if it is welcomed at first, becomes the occupying force the minute it wins. It means that the longer it remains there, the larger resistance it will face. This inevitably leads to the estrangement from the local population and a greater violence.<sup>42</sup>

With these general views, the claims of the advocates of humanitarian interventions that the role of the states is receding more and more and that human rights are becoming universally important, are of little significance. It is indisputable that the states’ sovereignty is eroding more and more.<sup>43</sup> But it is a process developed with the consent (or at least, without objection) of the states themselves.

Perhaps a superstate (a global state) or some state-continent etc. are yet to be created in our century. It is not up to us to deal with it here. However, until such

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<sup>41</sup> It is repeated with reason that the electronic mass-media which play the central role in the new international legal process are not international officials, but profit organisations. In the market rat race, they are concerned with gaining bigger ratings. That affects their motives and priorities. And that means that their reports do not necessarily depict the real picture. Therefore mass-media cannot replace the international institutional decision-making process. See: Reisman M.W.: Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention, *European Journal of International Law*, 1/2000, p. 18.

<sup>42</sup> Reisman M.W., Arsanjani M.H., Wiessner S., Westerman G.S.: *International Law in Contemporary Perspective*, New York 2004, pp. 259-260.

<sup>43</sup> See: Krivokapić B.: *Međunarodno pravo: koreni, razvoj, perspektive*, Beograd 2006, pp. 163-170. and the referential literature.

changes occur, states' sovereignty cannot be questioned. This is so due to the fact that sovereignty is a foundation stone of international order and to the fact that the mere consistent upholding of sovereignty and non-intrusion principles ensures protection and preservation of smaller states and world peace.

In the light of that, very interesting are the claims, even if not entirely accurate, that the state as a unique guarantor of the independence of social groups and personality from foreign pressures is still a lesser evil than foreign intrusion, even if it violates their rights.<sup>44</sup>

But if the possibility of foreign intrusion is ever to be accepted in principle, such action would imply numerous dilemmas, dangers and possible snares.

1. The first concrete question is: when should an intervention occur? It does not suffice to say the intervention should occur in order to prevent the potential loss of human lives. It is a factual question which is seen in different ways by different parties. In addition to that, there is a risk that people could pass from thinking that an intervention is justifiable in order to prevent bloodshed, to the attitude that it can be used to prevent the events not yet occurred, even to the view that it is permissible to intervene for a severe breach of other fundamental human rights (an election theft for instance?), misleading or return of democracy etc. Hence, the risk that these moments would be understood arbitrarily cannot be avoided.

2. In practice, who can humanitarian intervention be undertaken against? Answer: "against anyone in severe breach of human rights" is far from truth.

The requirement that the practice of humanitarian intervention be consistently carried out in respect to all states, should ensure a certain credibility of the whole idea. But, within the realms of reality, can one imagine humanitarian intervention against a superpower? Certainly not!

In that respect, the objects of humanitarian intervention could only be small and medium states, which inevitably means selectivity, and, we would not be exaggerating if we say, it would mean turning the whole idea into tools for imposing one kind of neo-colonialism. Actually, it all points to the fact that, if the right to humanitarian intervention were to be legalised, it would mean that in similar situations states could resort to various solutions – depending on whether the regime in a given country is favoured by a respective superpower. A decision on whether an acceptable situation is at issue (for instance legitimate measures for fighting terrorism) or terrible atrocities requiring determined action would depend on that. However, it means that it all comes down to political and not legal decisions and qualifications.

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<sup>44</sup> Gamba V.: Justified Intervention?: A View from the South, in Reed L., Keyser C. (eds.): *Emerging Norms of Justified Intervention*, Cambridge 1993, pp. 115-125, cited according to: Бордачев Т.: *op. cit.*, стр. 4.

After all, history offers numerous pieces of evidence on the fact that the standpoint of the superpowers depended solely on their present political interests. A good example is that what happened with Turkey. England changed its standpoint on that issue many times in the 19<sup>th</sup> century, taking only into account its political interests and not the real reasons for the protection of human rights in Turkey. When it wanted to weaken Turkey, it advocated humanitarian intervention. The opposite case was when Turkey favoured its interests, and then England changed its standpoint from the core and objected to the interference into the internal affairs of the sovereign state of Turkey.<sup>45</sup>

In the light of that, a fact that should be taken into account is that recently the USA and its allies, calling upon humanitarian reasons, have undertaken armed actions and were at real wars against several states and overlooked exactly the same drastic or worse breaches of human rights on other territories. So, for instance, there were no measures undertaken in the case of humanitarian crises in certain states of South America, among others in Columbia.<sup>46</sup> This was so besides the fact that there was evidence that several thousands of people get killed each year. When in East Timor at the beginning of the 1999 atrocities escalated (there are claims that thousands of people were killed and about 750 000 were expelled from their homes) the USA did not react.<sup>47</sup> Also, during the aggression of the NATO against SR Yugoslavia (1999), Turkey used force against the Kurdish people for hundredth time (17 000 soldiers accompanied by tanks and planes) and not on its own territory but in neighbouring Iraq! It, however obviously bothered no one.<sup>48</sup> A particularly interesting is the question why was there no intervention in Rwanda (1994), when it was known in advance what was going to happen? And this was during the UN mission there.<sup>49</sup> Reactions followed only after the end of genocide where, as it is considered, about 500 000-800 000 Tootsis and Hutus were killed.<sup>50</sup> There are currently some new statements threatening to shed a whole new light on this event.<sup>51</sup>

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<sup>45</sup> More on the subject: Bartoš M.: *Međunarodno javno pravo*, I. knjiga, Beograd 1954, pp. 394-395.

<sup>46</sup> Although it had one of the worst records of human rights in the world, Columbia has been throughout the years one of the principal beneficiaries of the USA military aid. Chomsky N.: *Humanitarian Intervention* (2000), p. 1, <http://www.zmag.org/sustainers/content/2000-07/05chomsky.htm>.

<sup>47</sup> *Ibid.* <http://www.zmag.org/sustainers/content/2000-07/05chomsky.htm>

<sup>48</sup> See: Krivokapić B.: *NATO agresija na Jugoslaviju – sila iznad prava*, Beograd 1999, p. 19.

<sup>49</sup> We are talking about UNAMIR (United Nations Assistance Mission for Rwanda), founded in October 1993, and based on chapter VI of the UN Charter for the enforcement of the peace agreement. When violence occurred, not only did the Security Council not reinforce this mission, but it reduced its military officials from 2548 to merely 270!

<sup>50</sup> More on the subject: Krivokapić B.: *Međunarodni krivični tribunal za Ruandu*, *Jugoslovenska revija za međunarodno pravo*, 1/1997, pp. 73-89; Orrego A.J.: *The Rwanda crisis Role of the International Community*, (1995), pp. 1-15, <http://www.grandslaes.net/doc/2521.pdf>.

<sup>51</sup> See: Black A.: *Hotel Propaganda – What Really Happened in Rwanda in 1994*, *Mayday Mag-*

After all, even if it wants to intervene in all situations of crisis, no state, not even a group of states has unlimited economic, military, human or other potential. It means that even if there were readiness to intervene each time an opportunity appeared, it would simply be impossible. And especially when the one intervening should take into consideration potential great losses in its own ranks.

The supporters of humanitarian intervention consider that if it is not possible to intervene at every opportunity, it is better to at least do it when the possibility occurs (and save at least those people).<sup>52</sup> However moral and humane these comments may sound, they are of little use. The issue here is not that it is better to feed at least one hungry person than not to feed anyone. The question is about resorting to violent measures – hence, armed conflict with everything it implies. And that means that someone would (local population, and the intervening soldiers themselves) have to pay the price. In addition to that, selective “justice” and this kind of “humanity” is often worse than injustice. Here then another logic applies, which will be well understood by criminal experts: it was said for a reason that it is better to leave ten culprits unpunished, rather than convict an innocent one by mistake.

3. The next question is: who is allowed to intervene? Even if an armed intervention for humanitarian reasons is permitted, who would be allowed to intervene in practice? The answer to that would be “everyone” (provided that all other conditions are met). But is it so?

Can the military intervention of Lebanon and Monaco be envisaged against the USA for violation of human rights? Or an attack of Albanian and Danish parachutists on Tianamen square in order to prevent new conflicts between the Chinese government and their opposition? Or a blockade of Great Britain’s coast by the war ships of Argentina because of the situation in Northern Ireland? Certainly not.

The intervener should, logically, be militarily superior from the state it is intervening against, and wealthy enough to afford the expenses of such an endeavour. That is certainly not the case with developing countries. Rather, in the first place are the world superpowers.

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*azine*, <http://hamilton.indymedia.org/newswire/display/542/index.php>. Author, among other things, states that it was the overthrow of the regime that occurred in Rwanda, and that the riots were initiated by the Tootsi tribe of which 10 000 were previously infiltrated in Kigali and 30 000 more, armed and assisted by the USA and Great Britain, entered the country from Uganda; he refers to the investigation results (*Hourigan Report*) which determined that the shooting down of the plane of the Rwanda president (which instigated the conflicts) was not executed by the Hutus, but by the opposing side; etc.

<sup>52</sup> As the former Secretary General of the UN noticed: “The fact remains that we cannot protect people everywhere, it cannot happen that we do not act when we are capable of acting. Armed intervention must always be the last resort, however, in the event of mass murders we must act upon it”. Annan K.: *We the Peoples... op. cit.*, par. 219.

The whole idea of the right to humanitarian intervention comes down to the fact that the so-called “asymmetric requirement in international law”, which is solely aimed at the weak by the powerful.

Thus, it comes as no surprise that the main advocates of the concept of humanitarian intervention are the USA and other developed states close to them. This is so because they perceive themselves as the ones deciding where and when to intervene. It is not only about military, economic and other power of those countries. This concept relies on the assumption that the states in question are champions of democracy and human rights, which, as such, have the moral right and obligation to ensure that the people around the world enjoy at least a similar level of fundamental rights and freedoms. But, are these states morally entitled to such a role?

Let us remind ourselves of several situations. Although unquestionably responsible for the formulation and adoption of numerous important international instruments from the human rights subject-matter, when it comes to their own obligations, the USA takes an entirely different standpoint. As an example, the USA signed the International Human Rights Pact (1966) only eleven years after (in 1977), and ratified the International Pact on Civil and Political Rights on 8 June 1992 (hence 26 years later!), and it has not yet signed the International Pact on Economic, Social and Cultural Rights! And we are talking about the most important documents in this subject-matter, which have 160, that is 156 member states.<sup>53</sup>

It is also surprising that the USA did not ratify a politically undisputable international agreement such as the UN Convention on the Rights of the Child (1989), which is an agreement with the biggest number of members – as high as 193. The only two states that did not ratify it are Somalia and- the USA!<sup>54</sup> Mostly everything is known of the USA support of various international *ad hoc* criminal tribunals and at the same time, of its strong objection against the permanent International Criminal Court.<sup>55</sup>

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<sup>53</sup> Status on the day 15/4/2007, according to the UN data: <http://untreaty.un.org/>.

<sup>54</sup> Status on the day 15/4/2007, according to the UN data: <http://untreaty.un.org/>.

<sup>55</sup> The USA turned from the most vigorous advocate of international (*ad hoc*) criminal courts into the biggest opponent of the permanent International Criminal Court. The main objections of the USA government are that the operation of the Court could jeopardise national sovereignty of the country in question on the one hand, and on the other hand, there is the fear of politically motivated trials. These objections are demonstrated in various ways: by withdrawing the signature from the Court Statute (2002), by threatening to impede the operation of the Security Council, by signing bilateral agreements with many states about the non-extradition of the USA citizens to the Court, and even by passing a special law (*American Service Members' Protection Act*, 2002) which, among other matters, provides for the prohibition of the American military aid to the states which ratified the Rome Statute (with possible exceptions) and empowers the president of the USA to use military force to liberate American military officials held by the Court.

Once again, acknowledging their improvement of human rights in the world, it should be noted that the USA is, for instance, not only one of the few states that still practice capital punishment (128 states today have legally or *de facto* abolish capital punishment, and only 69 kept it), but by the number of executions in 2005 (60) hold fourth position – behind China, Iran and Saudi-Arabia.<sup>56</sup> After all, when we are talking about practice, we need only remind ourselves of Guantanamo, secret CIA prisons all over the world, proofs of torturing and molesting their prisoners, that the USA has the biggest percent of prisoners in the whole world, etc.

Do the superpowers then have the moral right to determine when and where serious breaches of human rights occur; especially those that necessarily imply resort to weapons? What makes them better than other states?

4. The issue of proportion presents a problem, i.e. how to ensure that an intervention envisaged as a reaction against one evil does not turn into a much greater evil. Previous examples show that interventions usually led to the worsening of the situation, which comes as no surprise. Once the war (an armed intervention) begins, there is a latent danger that the escalation of conflicts may occur. It should not be forgotten that the state which is subject to intervention can be helped by its allies. Many other blood shedding wars started at first as relatively small, “surgically precise” interventions and seemingly “harmless” actions. The conflicts started for allegedly humanitarian reasons, usually had no humanitarian outcomes.

According to that, even if it is insisted upon with reason, it is difficult to fulfil the famous Hippocratic principle “*primum non nocere*” (first, do no harm) in practice. In fact, practice shows that not even a relative peace was established in any of the regions where humanitarian interventions occurred. Usually, foreign interference only changed the balance between the conflicted parties.<sup>57</sup>

5. There are other problems as well. Among other things, it has already been noted that insistence on the right of humanitarian intervention can encourage militant opposition in a country or various separatist movements to knowingly provoke the government to make severe breaches of human rights, so that the foreign interference occurs which would enable a successful realisations of their goals. That danger is noted and acknowledged even by the advocates of humanitarian intervention, as well as the former UN Secretary General Kofi Annan.<sup>58</sup>

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<sup>56</sup> The executions took place in only 18 more states in the world that year. Data obtained from: Amnesty International, *Facts and Figures on the Death Penalty*, <http://web.amnesty.org/pages/deathpenalty-facts-eng>.

<sup>57</sup> Иноземцев В.: *op. cit.*, стр. 6.

<sup>58</sup> See: Annan K.: *We the Peoples: ...*, *op. cit.*, par. 216-216.

### 3) Several examples from practice

It has already been mentioned that there is no general consensus even among the supporters of humanitarian intervention on whether it implies action for the protection of their own citizens or, on the contrary, only for the protection of foreigners (citizens of the state subject to intervention). Therefore we will lay out several known examples for both cases, with the clear intention of pointing to their most important ambiguities and controversies.

1. In the past the superpowers often undertook armed interventions in the weaker states justifying it with the protection of their own citizens. A military action of eight great powers at the time is often cited. It was undertaken in China, as the answer to the Boxer Uprising and the related mass murders<sup>59</sup> and to the jeopardising of foreign diplomats' lives. However, although its objective was to save the foreigners in Beijing, the action of the international coalition<sup>60</sup> was in fact undertaken to terminate the uprising. It could even be said that it was a punitive expedition of colonial powers.

The invasions of other states' territories for the alleged protection of one's citizens have happened recently as well. That is particularly the practice of the USA. We will mention here only few examples.<sup>61</sup>

In 1975, the revolutionary government of Cambodia seized the American commercial ship "Mayaguez" with 40 crew members for entering their territorial waters. Although the Cambodian government soon sent a peaceful notice announcing that it would release the ship and its crew, the USA resorted to military intervention. Result: in a basically unnecessary action; for the alleged rescuing of the lives of 40 American civilians, 41 American soldiers were killed and 50 more were wounded. Losses on the Cambodian side were even greater. Mere luck saved the crew members from being killed in the action undertaken for their "rescuing".

All the weaknesses of the humanitarian interventions can be seen in the examples of the few military interventions justified by reasons of humanitarian nature, which were not a mere realisation of some hidden political objectives. That is the case with, for instance, invasion of Israeli commandos on the *Entebe* airport in Uganda (1976) for the rescuing of passengers – hostages in a hijacked plane landed at that airport. In that action, undertaken without consulting the Uganda

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<sup>59</sup> It is considered that over 200 foreigners and thousands of Chinese Christians were murdered.

<sup>60</sup> Of Japan, Russia, Great Britain, France, USA, Germany, Italy and Austria-Hungary. At the beginning with 20 000 soldiers, and later on that number increased to about 50 000.

<sup>61</sup> For such examples see: Shalom S.R.: *op. cit.*, pp. 2-9; Ronzitti N.: *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, Martinus Nijhoff Publishers, 1985.

government, the commandos managed to free the hostages, killing all the hijackers, 13 Uganda soldiers and 3 hostages. Even if the legal illegitimacy of this operation were overlooked, there is still the question whether it could have been executed differently, without unnecessary casualties.

The problems which can occur are demonstrated in the famous *Larnaca incident* which took place in 1978. The Egyptian commandos, who flew in by a military plane (which was granted landing by the Cypriot government) forcefully intervened against the terrorists who hijacked the plane, which resulted in the exchange of fire between Egyptians and the Cyprus National Guard. As a result, the Cypriot government arrested the terrorists, but several Egyptians and Cypriots were killed and wounded in that chaos which resulted in a dispute between the two states.<sup>62</sup>

One of the well-know cases from recent history is the US invasion of Grenada in 1983. This was justified by Washington in the first place by the need to protect the lives of about 1 000 American citizens (medical students), which would, allegedly, have been jeopardised due to the riots occurring in that country. The real reasons for the intervention were, however, of deeper nature, which can be seen in the fact that this action was simulated during a military exercise staged two years before,<sup>63</sup> that the American troops occupied the entire island (and those parts where there were no American citizens) and remained there even after the evacuation of all American citizens<sup>64</sup> and the fact that they did not only secure the American citizens, but they also overthrew the government of Grenada at the time. In the armed conflicts almost 100 people (unnecessarily) lost their lives – 49 citizens of Grenada, 29 Cubans (who were there as military advisers or workers)<sup>65</sup> and 19 American soldiers. Several hundreds of people were wounded. In addition

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<sup>62</sup> See: Casesse A.: *International Law*, *op. cit.*, p. 314.

<sup>63</sup> It were military maneuvers called «Amber and the Amberines» that took place in the Caribbean in 1981 which basically came down to the hypothetical liberation of the American hostages in the state of «Amber» and the establishment of a friendly government. On that and various moments depicting the falsehood and the absurdity of the reasons used to justify the invasion (it has been claimed, among other things, that Cuba could have used the airport at issue to bombard Puerto Rico – and it is closer to Cuba than to Granada!) see: Shalom S.R.: *op. cit.*, pp. 9-16.

<sup>64</sup> In this case the USA in fact tried to justify its action by humanitarian reasons and the need to ensure its own security (for the construction of the civil airport in Granada which, according to Washington, was supposed to be used for military purposes of USSR and Cuba). Thus, the combination of arguments on the necessity of humanitarian intervention and the so-called preemptive self-defence was at issue here. The emphasis on the fact that the intervention resulted from the invitation of the British General Governor, due to the collapse of the local government, was one of the arguments for intervention. However, it is not only disputable whether he had the constitutional right to do so, but there are many claims that his invitation was subsequent to the already proceeding intervention.

<sup>65</sup> It is considered that there were about 50 Cuban military advisors and 700 workers.

to that, the American occupation led to a severe violation of human rights on the island (unlawful arrests, limitations on the right to assemble, censorship etc.). The entire action was in fact undertaken to overthrow the left wing regime in Granada, and especially to prevent the existence of a triangle whose bases would be Cuba, Nicaragua and Grenada. The aim was to execute the first victorious military action (which, considering the balance of powers, could not fail) after the American failure in Vietnam. Strictly political reasons were at issue. Lives or welfare of American students were not at stake at any time (except perhaps at the time of their “rescuing”). Many of them did not want to be evacuated in the first place.<sup>66</sup>

2. Many of those who advocate the concept of military intervention consider that it applies only to the actions undertaken for the protection of foreign citizens – in the first place the citizens of the state subject to intervention. It is used in order to emphasise the impartiality and high level of morality of such endeavours. However, practice is far from these ideals. Only several cases will be shown here.

Some renowned authors list the French occupation of Lebanon and Syria (1860-1861) as the only true case of humanitarian intervention before WWII. It was undertaken to prevent the massacre of the Maronite Christians by the Druses.<sup>67</sup> In this incident more than 11 000 of Maronite Christians were killed in only four weeks and 100 000 more were exiled. In connection with that, it is noted, however, that the British government took these incidents reservedly, calling upon the fact that the initial provocations were instigated by the Christians, who have been preparing the attack on the Druses months before. In any case, while the European troops were allocated, violent events were practically over and the troops were soon withdrawn.<sup>68</sup>

Bearing in mind that the Spanish-American War (1898-1899) is cited even today as an example of the true humanitarian intervention when the USA freed Cuba from the Spanish terror, the literature shows a completely different perspective. This is so if we take into account that at the same time the USA imposed upon Cuba an amendment to its Constitution (*the Platt Amendment*) allowing the USA to intervene and that for the following half of century the USA dominated the island.<sup>69</sup>

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<sup>66</sup> More on the subject, with the 20 years distance: Zunes S.: The US Invasion of Grenada: A Twenty Year Retrospective, *Foreign Policy in Focus*, [www.globalpolicy.org/empire/history/2003/10grenada.htm](http://www.globalpolicy.org/empire/history/2003/10grenada.htm).

<sup>67</sup> Brownlie I.: *Principles of Public International Law*, Oxford 1995, p. 565.

<sup>68</sup> See: Franck T.M., Rodley N.S.: After Bangladesh: The Law of Humanitarian Intervention by Military Force, *American Journal of International Law*, 2/1973, p. 282; Greenwood Ch.: Intervention, [http://www.idrc.ca/en/ev-28493-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-28493-201-1-DO_TOPIC.html), p. 2.

<sup>69</sup> Shalom S.R.: *op. cit.*, p. 1.

Armed interventions for the alleged protection of foreign citizens have occurred recently as well. However, there was always a doubt behind the true intentions of the interveners, and there was always that debatable question of what was achieved and what the price of it was (mostly among the local population).

So, for instance, the USA alone intervened several times referring to humanitarian reasons. Here we will list only several most recent examples.

Among other things, the NATO aggression on SR Yugoslavia (1999) was justified by humanitarian reasons – the need to protect the Albanian population from the alleged Serbian repression, although the real reasons were of an entirely different nature and were mainly within the domain of geopolitics.<sup>70</sup> In reality, certain states assisted the creation and operation of UÇK (Kosovo Liberation Army) first financially, then by weapons, equipment and so on. As a result of that the response of Serbian security forces against numerous terrorist attacks committed by the members of that organisation (series of murders, abduction of civilians, assaults on police officers etc.) was characterised as a terror of Serbian government on Albanian population. Although the USA and its allies were well acquainted with the actual circumstances (witnessed later on by the reports of the German Ministry for Foreign Affairs),<sup>71</sup> the situation was used for the harsh pressuring of the SR Yugoslavia, and the consequent attack of the 19 NATO members against it.<sup>72</sup> Result: in a savage bombarding of not only Kosovo, but of the entire country, according to the statistical data of the state bodies, 1002 members of Yugoslavia Army and Serbian police and about 2500 civilians were killed, while 10 000 were wounded;<sup>73</sup> SR Yugoslavia underwent severe material damage at the time; a large number of citizens lost their homes, jobs and finally a sea of refugees was set in motion – the exact ones that the NATO allegedly wanted to protect. In addition to that, severe ecological consequences occurred in the region (particularly due to the use of ammunitions loaded with depleted uranium), and damaging consequences were brought upon international law as well (the example is given of its unpunished violation). Instead of preventing the alleged humanitarian catastrophe, a true tragedy of all citizens of Yugoslavia was caused, and especially of those residing in Kosovo. But, the consequences of the intervention were largely felt after the termination of these actions (after the NATO forces entered) – over 250 000 of the non-Albanian citizens of Kosovo were exiled from their homes;

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<sup>70</sup> More on the subject: Krivokapić B.: NATO agresija na Jugoslaviju..., *op. cit.*, pp. 22-42.

<sup>71</sup> On that subject see: Krivokapić B.: NATO agresija na Jugoslaviju..., *op. cit.*, pp. 31-33; and especially Mitić M.: Nemački pogled na jugoslovensku krizu, Beograd 2005.

<sup>72</sup> See the interesting review of Noam Chomsky written 2 years after the end of the NATO intervention: Chomsky N.: A Review of NATO's War over Kosovo, *Z Magazine, April-May 2001*, <http://www.chomsky.info/articles/200005-hm>;

<sup>73</sup> Obeležena godišnjica bombardovanja NATO (Marking of the anniversary of the NATO bombing), «Politika» from 25 March 2007, p. 6.

from 10 June 1999 (the day the NATO troops entered) to 9 August 2003 there were 6 535 attacks of Albanian extremists registered where 1201 people were killed, 1328 wounded and 1146 abducted.<sup>74</sup>

It has already been forgotten that in 2001 the USA used the compassion of the entire world in 2001 due to the tragic events of 11 September (terrorist acts killing 3000 people) in order to invade Afghanistan. Even though it was officially said that it had been executed within the framework of the war on terrorism (in order to capture the Al-Qaeda leaders), another objective of the intervention was immediately emphasized – the overthrow of the repressive Taliban government through democratic means. On the basis of that the USA managed to ensure the participation of several other NATO members. But, what was really achieved?

Instead of being protected, the civilians became casualties of the American bombings and military actions. According to some assessments, from 7 October 2001 to 31 June 2002 almost 3500 of them were killed. In addition to that, as a result of foreign interference, a political and humanitarian situation emerged which was by far worse than the one under the Taliban government, who after all managed to provide a relatively decent and peaceful life and basic security for their people. Afghanistan became a narco-state. The production of poppy, which was significantly reduced under the Taliban government, experienced an incredible upsurge after foreign troops entered the state. While the Taliban regime until 2001 reduced the cultivation of poppy to only about 8000 hectares, only a year later this plant used for the production of heroin covered already 74 000 hectares of the land, and in 2006 all 400 000 hectares. It is reliable data obtained via satellite shots. According to the data received by the UN Office on Drugs and Crime (UN-ODC), during 2006 the production of unprocessed opium in Afghanistan reached 6100 tons – 90% of the overall world production. This amount can be used for the production of 600 tons of heroin, which is by 30% higher from the global demands.<sup>75</sup> As time goes by, it is more obvious that actually the strategic goal of the entire endeavour was to ensure the military presence of the USA in Southeast Asia, for the control over Middle East and Central Asia rich in oil and energy.<sup>76</sup>

The most recent example – the invasion on Iraq (2003) is one of the best and the most tragic ones. The main reasons used by the USA and its allies to justify the invasion, was the claim that Baghdad was in possession of and in the process of developing weapons of mass destruction, which is prepared to use against other states, i.e. concede to Al-Qaeda and other terrorist organizations. However, when it became obvious that these claims were unfounded (it was later admitted

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<sup>74</sup> Statistika stradanja (Casualties statistics), "Politika" from 24 March 2007, p. 5.

<sup>75</sup> Opijumski tango u Avganistanu (Opium tango in Afghanistan), «Politika» from 10 April 2007, p. 4.

<sup>76</sup> Bello W.: *op. cit.*, p. 3.

after futile efforts to find some evidence by the USA and Great Britain); then instead of that, they stated that Saddam Hussein was a tyrant who had to be overthrown in order to ensure normal life to the suffering people of Iraq. Hence, when other arguments fell through, aggression on Iraq was retroactively justified by humanitarian reasons – intervention suddenly transformed from a “self-defence” to a “humanitarian” one.<sup>77</sup>

Everything occurring in Iraq from 2003 until today had little to do with human rights and humanity; hence it is noted with reason that calling upon humanitarian reasons is entirely inappropriate in this case. Saddam’s regime is, as it appears, really responsible for heinous atrocities (for instance when tens of thousands of Kurdish people were killed in 1988). But all those crimes happened in the past. At the time of the attack on Iraq (without the mandate of the Security Council – therefore violating the UN Charter) no mass murders occurred nor the Iraqi government executed repression as it had been doing decades before.<sup>78</sup> The situation in Iraq at the time when foreign troops executed invasion, was not so exceptional that it required foreign military interference, and even if it were, such a measure would not be the only solution. In fact, even with the rhetoric of Washington and London, the attack on Iraq in 2003 cannot be qualified as humanitarian intervention. It is admitted even by those who advocate this doctrine.<sup>79</sup>

It is obvious that attack on Iraq was not undertaken for humanitarian reasons. The central issues were oil and intention to overthrow the disobedient regime.<sup>80</sup> The least important were the interests of Iraqi people, whose opinion mattered to no one. In addition to that, not only was the intervention undertaken without the Security Council’s consent, but it was undertaken in a way that took little account of international humanitarian law. To confirm that, it would suffice to remind ourselves that in certain battles (for instance for Fallujah) the Americans used inhumane chemical weapons (white phosphorus); there are claims from the American ranks themselves that during the battle for the Baghdad airport, they resorted to some kind of tactical nuclear weapons etc. The public is familiar with episodes such as the torturing of war prisoners in Abu Gharaib prison; existence

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<sup>77</sup> See the reasons for the attack on Iraq given by the president George Bush, and American and British Secretaries of Foreign Affairs Condoleezza Rice and Jack Straw in: Reisman M.W., Arsanjani M.H., Wiessner S., Westerman G.S.: *op. cit.*, pp. 253-254.

<sup>78</sup> It could be argued that the intervention was necessary so that Saddam Hussein and other culprits would be punished, at least later on. However, in that case it is not humanitarian intervention anymore, but some sort of a punitive expedition. But even those who usually support this concept are against intervention for the sake of punishment of the culprits.

<sup>79</sup> Roth K.: *op. cit.*, pp. 5-6.

<sup>80</sup> It is interesting to note that very recently the American experts have discovered new oil fields in the west Iraq, and the reserves of about 100 billion barrels. If these assessments are accurate, Iraq is bound to become the second largest oil field, just after Saudi Arabia. See: Progon Iračana (Persecution of the Iraqis), «Politika» from 22 April 2007, p. 2.

of secret prisons and torture centres organised by new Iraqi authorities (the British troops have recently invaded such a centre by mistake),<sup>81</sup> obvious breaches of fundamental rights of Saddam Hussein and the other accused in the process against them, followed by a brutal execution of the former Iraqi president and his closest associates etc.

Even though during the previous regime Iraq was not the most favourable place to live, it was still a stable country, which is now facing downfall. According to some assessments, (among others that of «*Human Rights Watch*»), during the quarter century of Saddam's government about 250 000 Iraqis were killed, and during only 4 years of occupation, the number of dead ranges from 150 000 to 750 000.<sup>82</sup> According to data provided by the UN High Commissioner for Refugees (UNHCR), in 4 years of war about 3,9 million Iraqis were forced to leave their homes, of which 1,9 million were relocated internally and about 2 million escaped to neighbouring countries, primarily to Syria and Jordan.<sup>83</sup>

It is no coincidence that the Iraqi people themselves, faced with chaos, death, lack of order, security and personal safety as well as those fiercely opposing Saddam's regime, publicly state that "things were better before",<sup>84</sup> that "now people are acting the same way as in Saddam's era, maybe even worse".<sup>85</sup>

After all, that was confirmed by the UN Secretary General at the time, Kofi Annan, although at the very end of his mandate in his last interview for the BBC at the beginning of December in 2006, when he stated that Iraq was facing a civil war and that the Iraqi people were in a worse position than at the time of Saddam Hussein. Annan stated with reason: "If I were an average Iraqi obviously I would make the same comparison, that they had a dictator who was brutal but they had their streets, they could go out, their kids could go to school and come back home without a mother or father worrying, "Am I going to see my child again?".<sup>86</sup> Al-

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<sup>81</sup> See: Tajno mučilište u Basri (Secret torture chamber in Basra), «Politika» from 6 March 2007, p. 3.

<sup>82</sup> The actual number of casualties is unknown. In 2006 the American president George Bush delivered his estimate of about 30 000 killed, but that was disputed all over the world. Among other things, the current Minister of Health in Iraq gave the estimate of about 150 000 dead, and there are even estimates that amount to as many as 943 000 dead! More on the subject: Bandow D.: The Painful Death of Humanitarian Intervention, November 3, 2006, p. 4, <http://www.antiwar.com/bandow/?articleid=9951>.

<sup>83</sup> The Iraq Situation, <http://www.unhcr.org/cgi-bin/tehis/vtx/iraq?page=news&id=462621bb4>.

<sup>84</sup> This was stated by a certain Kadim al-Jabouri, one of key participants in the tearing down of the Saddam Hussein's monument. See: Irački lom (The Iraqi downfall), «Politika» from 10 April 2007, p. 1.

<sup>85</sup> This was stated by I. Alawi, chosen by the Americans to be the first prime minister after the overthrow of Saddam Hussein. Cited according to: Bandow D.: *op. cit.*, p. 6.

<sup>86</sup> Kofi Annan interview: Text, *BBC News*, 4.12.2006, p. 2, [http://news.bbc.co.uk/2/hi/in\\_depth/6205056.stm](http://news.bbc.co.uk/2/hi/in_depth/6205056.stm).

though the so-called “hindsight” is at issue here, (why were these words not heard before?), it depicts not only the present situation in Iraq, but a common place for all similar situations.

Instead of liberation from dictatorship, Iraq faced a nightmare. Contrary to claims of the highest structures of the American administration that they will transform it into a profusion of stability and democracy, Iraq turned into a source of regional instability and a synonym for pain and suffering. However, those nightmares extended to conquerors as well - in 4 years 3242 American soldiers, 134 British soldiers and 124 soldiers from other countries pertaining to the Coalition forces were killed,<sup>87</sup> and many more were wounded (about 30 000); several cases were reported of sexual violation of women allocated throughout the American forces – by their fellow-soldiers and superiors;<sup>88</sup> this action was widely condemned within the international framework but as well by experts, intellectuals and activists of the very states engaged in Iraq.<sup>89</sup> There is a critical perception of this war in the eyes of the public of the USA itself.<sup>90</sup>

3. The aforementioned examples indicate at least three common traits of similar actions: 1) they were undertaken contrary to the basic rules of the contemporary international law (they represented the acts of aggression); 2) there was no real motive for such drastic measures and 3) in the end casualties and generally negative consequences exceeded by far the potential victims (if any) had the action not been undertaken.

In addition to that, all examples from history show that no such action was ever motivated by philanthropy or other selfless reasons. There lies one of the basic reasons why such practice is prohibited and even abolished in the 20<sup>th</sup> century. Although, occasionally, some armed interventions occurred which were justified by humanitarian reasons, their true (political) background usually became apparent soon. Today, when war is declared an international crime, support of the humanitarian intervention doctrine would not only mean a major step back, but it would breed more possibilities for various abuses, and especially for the realisation of selfish interests of superpowers to the detriment of minor (weaker) states. History has, after all, taught us that that was always the case in similar situations.

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<sup>87</sup> U Iraku poginula 3.242 američka vojnika (In Iraq 3 242 American soldiers killed), «Politika» from 27 March 2007, p. 3.

<sup>88</sup> Silovanje po komandi (Rape by command), «Politika», 23 March 2007, p. 30.

<sup>89</sup> See, among other readings: Simpson G.: The War in Iraq and International Law, *Melbourne Journal of International Law*, vol. 6, 1/2005, pp. 167-188, [http://mjil.law.unimelb.edu.au/archive/2005\(1\)/07Simpson.pdf](http://mjil.law.unimelb.edu.au/archive/2005(1)/07Simpson.pdf).

<sup>90</sup> Currently 59% respondents think that it was wrong for the USA to enter that war, and ¾ suggest the congressmen should demand that the American troops withdraw from Iraq. Cited according to: SAD u Iraku: gubici rastu, podrška opada (USA in Iraq: increasing losses, decreasing support), «Politika» from 7 March 2007, p. 3.

Practice show us that humanitarian goals are not achieved through violent methods, but on the contrary, more sufferings are caused. Finally, to all that has been said so far, we need to add that each so-called humanitarian intervention makes way for another similar action, at the other end of the world.<sup>91</sup> At the same time, it means attack on the present international law and the established system of relations.

In fact, many things point to the fact that the national sovereignty of the states cannot be forcefully violated (not by invasion nor by destabilisation), even when it is believed that a state's regime is systematically violating fundamental human rights. "Getting rid of a repressive regime or a dictator is the responsibility of the citizens of a country."<sup>92</sup>

Hence, even though the supporters of humanitarian intervention are trying to justify such actions and present them as legitimate, even desirable sometimes,<sup>93</sup> no unilateral armed interventions are and cannot become acceptable (undertaken without the UN Security Council decision). It cannot be affected by referring to humanitarian, moral or similar reasons.<sup>94</sup>

#### 4. Conditions of permissibility

So, can one intervene for humanitarian reasons?

Yes, but only through non-violent means. Everything else is in opposition to the entire international legal order built for generations. And that order and its solutions are the way they are for a reason.

First of all, when a humanitarian catastrophe is likely to occur, certain pre-emptive measures can and should be undertaken – mediation, offer of good services, aid etc. Then there is a whole set of incentive and similar measures which

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<sup>91</sup> "In other words, the road to Iraq would have been more difficult without the humanitarian intervention in Yugoslavia in the 1990's." - Bello W.: *op. cit.*, p. 2.

<sup>92</sup> Bello W.: *op. cit.* p. 1. This author, who is a professor in the Philippines, emphasises the fact that even in the period of the strictest regime of president Marcos, the antifascist movement did not think for a second to ask the USA to do their work.

<sup>93</sup> It is interesting to note that some international non-governmental organisations dealing with the protection of human rights accept that in certain cases (extreme situations that cannot be delayed) intervention is possible even without prior sanctions of the UN Security Council. This is just to avoid that a permanent member of the Council vetoes the delivering of the positive decision. See: Roth K.: *op. cit.*, p. 9.

<sup>94</sup> This is something that many legal authors, as well as intellectuals and peace activists agree with around the world and in the USA. Among other readings, see the following reviews: Lobel J., Ratner M.: *Foreign Policy in Focus*, 1/2000, pp. 1-3, <http://www.fpif.org/pdf/vol5/01ifhum.pdf>; Finnemore M.: *Paradoxes in Humanitarian Intervention*, 2000, 21 pp., [www.socsci.uci.edu/gracs/research/working\\_papers/martha\\_finnemore\\_humanitarian\\_intervention.pdf](http://www.socsci.uci.edu/gracs/research/working_papers/martha_finnemore_humanitarian_intervention.pdf); Isbister R.: *Humanitarian intervention: ethical endeavours and the politics of interest*, 15 pp., [http://www.isisuk.demon.co.uk/0811/isis/uk/hiproject/no1\\_paper1.html](http://www.isisuk.demon.co.uk/0811/isis/uk/hiproject/no1_paper1.html); Bandow D.: *op. cit.*, 8 pp.

can be used by international organisations and certain states (the promise of admission to an international organisation, if the existing state is improved, the promise of technical help, loan etc.). There is a large number of other political means of influence, such as various forms of diplomatic interventions, conditioning the giving of loans, threats of terminating military aid and co-operation etc. When international organisations are at issue, in the first place the United Nations, there are other measures at their disposal, such as conditioning the admission to the membership, and as a last resort there is the introduction of sanctions, such as suspension of membership rights, exclusion from membership, termination of diplomatic relations, isolation etc.<sup>95</sup> Sanctions can be imposed directly upon the leaders of the state in question (freezing accounts abroad, prohibiting travel to other countries etc.). The list of peaceful, non-violent and yet efficient means of interventions for humanitarian reasons is long and gets longer by the day.<sup>96</sup>

Hence, even if a state is in systematic breach of human rights, the appropriate response is not to send commandos to overthrow the governing regime, but it is a combination of an entire array of measures and sanctions permitted under international law.

It is obvious that such intervention would exceed the framework of what is usually implied by humanitarian intervention. This is because it is not executed by weapons. But precisely because of that has good chances of success.

But what happens with military intervention for humanitarian reasons? If such an action without the mandate granted by the Security Council (unilateral intervention) is illegal, what about the possibility that the Security Council executes or orders such measures?

Art. 2/7 of the UN Charter prohibits the Organisation itself to “to intervene in matters which are essentially within the domestic jurisdiction of any state”. However, it is indisputable that in our time the issues of fundamental human rights and freedoms have exceeded the state borders. On the other hand, the mentioned regulation has a sequence – it contains an exception enabling the United Nations to interfere with the internal conflicts which endanger world peace. In such and only such situations, the Security Council would, after establishing the breach or endangerment of world peace and security, have the right to order coercive meas-

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<sup>95</sup> These sanctions, however, have to be carefully thought through so that they do not affect the already suffering population instead of the regime they are aimed at. Illustrative example of a pernicious action is the UN sanction against the former Republic of Yugoslavia and especially against Iraq. For Iraq see: International Law and Interventionism in the «New World Order», Madrid 2000, especially these reviews: Halliday D.J.: Economic Sanctions on the People of Iraq: First Degree Murder or Manslaughter? (pp. 15-22); Al-Qaysi R.: The Legal and Humanitarian Actions of the United Nations against Iraq Pursuant to the Gulf War (pp. 23-100) i Al-Bayoumi A.: Sanctions, Strikes and «Oil-For-Food» Program: *Humanitarianism of the New World Order* (pp. 107-125).

<sup>96</sup> More on the subject: The Responsibility to Protect: *op. cit.*, pp. 29-31.

ures, referring to Chapter VII of the Charter. It means that it can, when it finds it necessary, order the use of armed forces.

However, even if it decides to do so, the Council would actually only use the responsibilities and rights granted by the Charter. The armed action which would occur on the Security Council order would be undertaken *for the breach of international peace* and not for the *breach of human rights* as such. Such a situation could only cause the Council to reconsider this issue. But only if on the basis of all information it is concluded that in a given situation there is an endangerment or breach of world peace and security, the Council could order the measures in question. Therefore, from the legal standpoint, no new institution is at issue here, but one of the situations that, as the Council establishes, pose a threat to peace or breach of international peace and security. Even if in political documents, media etc. such an action would be characterised as “humanitarian intervention”, in fact it would not mean anything. The Security Council has no right to order coercive measures, and especially armed actions solely on the basis of human rights.

On the other hand, the fact remains that since recently the Security Council has started to interpret its competences in a much broader manner. By Resolution 688 (1991), in point one, it condemned “the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas” and estimated that its consequences “threaten international peace and security in the region”. The Council, using Resolution 794 (1992), concluded a year later with regards to the situation in Somalia that a “human tragedy caused by the conflict in Somalia... constitutes a threat to international peace and security”.<sup>97</sup> However, it would be wrong to conclude that the Security Council can resort to coercive measures, based on section VII of the Charter, whenever there is a severe breach of human rights.

Although in fact the Security Council on several occasions characterised severe violations of human rights as a threat to world peace, such qualification can be accurate, but not always. In other words, we are not certain that the Council would (especially considering the fact that “the honeymoon” of its permanent leading members is, as it appears, ending, and new cold war is in sight) continue to be willing to do so. Strictly legally speaking, the Security Council will be entitled to order armed interventions for humanitarian reasons in situations which do not objectively jeopardise world peace, if and when the Charter is altered in that direction. And for now, as it seems, it is not prepared for it.

It should be borne in mind that the Council contains only 15 representatives out of 192 UN members. Can we, even if hypothetically, exclude the possibility that the Security Council is not acting in an objective manner, but by a dictate or an agreement of great powers? And then order an armed action against a state,

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<sup>97</sup> Read the texts of the mentioned Security Council resolutions at [www.un.org/Docs/scres/](http://www.un.org/Docs/scres/).

even if there is no breach of human rights within it? Is that not possible? Anyway, it has already been noted that, after the collapse of the bipolar balance of powers, the Security Council began transforming into an instrument for the promotion of strategic interests of the sole great power.<sup>98</sup>

And is it conceivable for the Council (even if it had such authorisation) to order an armed humanitarian intervention against a superpower? Certainly not! Firstly, it would be impossible to make such a decision because of the veto of the state in question (if one of five permanent Council members is at issue). However, even if they adopt such a decision, it would basically mean the beginning of WWII and no reasonable person would agree to it. Hence, bearing in mind its composition and way of deciding, it must be taken into account that the Council decisions on humanitarian (armed) interventions could be rather arbitrary and more a result of compromises achieved through satisfaction of selfish interests of the leading actors (the great powers) than the result of some objective perception.

To conclude, the present situation is that humanitarian intervention, i.e. the foreign interference through military action due to humanitarian reasons, if tolerable at all, can be permitted only in extreme situations and solely on the basis of the UN Security Council decision delivered because in this case the Council established that there is a breach or endangerment of international peace and security.

Even if at a certain moment the competences of the Security Council expand in the sense of the right to decide on whether to intervene by force *for purely humanitarian reasons*, at least four conditions should be met previously: 1) enlargement of the Council, so that it can represent worthily the international community; 2) such decisions should be delivered by a qualified majority; 3) if the present right of veto is not to be abolished, then at least the permanent Council members should be denied the right to use it when deciding on these issues; and 4) armed humanitarian actions should be reserved exclusively for the permanent UN forces specialised in such interventions. This is all due to the simple truth that the more the intervention is excluded from the partial interests of actual states, especially the superpowers, the greater the chances are that it will be just and accepted as legitimate by the conflicted parties and the international community.<sup>99</sup>

### III. PREVENTIVE SELF-DEFENCE

(Pre-emptive use of force)

Problem of the potential right of the state to a so-called pre-emptive self-defence has been known from ancient times. Although in the meantime this issue

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<sup>98</sup> Köchler H.: The Use of Force in the New International Order: On Problematic Nature of the Concept of "Humanitarian Intervention", in: International Law and Interventionism in the "New World Order", Madrid 2000, pp. 127-128.

<sup>99</sup> Coady C.A.J.: *op. cit.*, p. 26.

has lost its importance (because the UN Charter prohibits the use of force), it has become current again in our time.<sup>100</sup>

Firstly, a certain terminological difference must be emphasised which cannot be recognised in many languages, but it is present in Anglo-Saxon military and political terminology. The difference is made between preventive self-defence in the sense of the pre-emptive strike or attack (*pre-emptive strike, pre-emptive attack, pre-emptive self-defence*) at the time of the forthcoming conflict and preventive war (*preventive self-defence, preventive war*).<sup>101</sup> This differentiation became particularly important after 2002 and the turnover in the American security strategy.

1. *Pre-emptive strike*. – There is an understanding according to which the right to self-defence implies, among other things, the right to defend oneself from the attacks not yet begun, but is unquestionably bound to occur very soon if not immediately. It is considered that in such a situation (for instance if the enemy piled up his troops at the border with the obvious intention to use them for attack) it is permitted to forestall the enemy by attacking him in order to gain certain military advantage. Hence, some think that, under certain conditions, the attack undertaken to prevent the forthcoming attack of the opponent or to decrease its damaging consequences presents one aspect of legitimate self-defence. Conditions under which this kind of self-defence is permitted were formulated by the American Secretary General Webster in 1842, in his correspondence with his British colleague, on the occasion of a famous dispute concerning the destruction of the “Caroline” ship by the British (*Caroline case*).<sup>102</sup> In his view, such self-defence is justified only if three conditions are met: 1) that there is “a direct and inevitable danger, which leaves no possibility of choice or time to reflect”; 2)

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<sup>100</sup> On various aspects of that issue see, among other things: Ackerman D.M.: International Law and the Preemptive Use of Force Against Iraq, *CRS Report for Congress*, April 11, 2003, <http://www.dean.usma.edu/departament/law/lawandterr/Preemptive%20Use%20Force%20Iraq.pdf>; Byers M.: Iraq and the «Bush Doctrine» of Pre-Emptive Self-Defence, <http://www.crimesofwar.org/print/expert/bush-Byers-print.html>; Champion S.: Anticipatory (Pre-emptive) Self-defence: The Need for a Modern Approach, <http://www.usafa.af.mil/jscope/JSCOPE05/Chamoion05.html>; Currie D.E.J.: «Preventive War» and International Law After Iraq, [http://www.globelaw.com/Iraq/Preventive\\_war\\_after\\_iraq.htm](http://www.globelaw.com/Iraq/Preventive_war_after_iraq.htm); Dworkin A.: Iraq and the «Bush Doctrine» of Pre-Emptive Self-Defence, <http://www.crimesofwar.org/print/expert/bush-introBush-print.html>; Ghista G.: Pre-Emptive Invasion and International Law, <http://www.globalresearch.ca/PrintArticle.php?articleId=1477>, Котляр В.С.: Право на превентивную самооборону и современное международное право, *Государство и право* 10/2005, стр. 75-83; Welsh S.C.: Preemptive War and International Law, <http://www.cdi.org/news/law/preemptive-war.cfm>.

<sup>101</sup> See for instance the dictionary of military terminology of the USA Department of Defense: DOD Doctrine of Military Terms, <http://www.dtic.mil/doctrine/jel/doddict/data/p/index.html>.

<sup>102</sup> For the *Caroline case* including the texts of correspondence between the Secretaries of Foreign Affairs of the two states Webster and Lord Ashburton, see: Harris D.J.: *Cases and Materials on International Law*, London 1979, pp. 676-677.

that the action undertaken on this basis is not «unreasonable or excessive», and 3) that the action is “limited by the need of self-defence and preserved within its framework”.

In the opinion of many, these rules are accepted as a part of the international customary law. The need to meet all these conditions (in order to speak of the measures of self-defence before the attack in the first place) was confirmed in the Nurnberg judgment in 1946. Dismissing the defence claims that the German attack on Norway in 1941 was an act of self-defence, undertaken in order to forestall the invasion of the Allies, the International Military Tribunal established that the pre-emptive action on the foreign territory is justified only “in the event of forthcoming and inevitable necessity of self-defence, which leaves no possibility of choice of means or a moment to reflect”.<sup>103</sup> Hence, under conditions formulated by Webster in the «Caroline case».<sup>104</sup>

Many, in the first place the Anglo-Saxon politics and doctrine, consider this rule valid in our time as well. In connection with that, it is emphasised that it cannot be expected from a state which will inevitably be struck by aggression to peacefully await the attack and only then start to backfire. This is, particularly in our times, due to the lethal and destructive power of modern weapons. The realisation that in particular cases pre-emptive strike is permitted, found its place in the aforementioned Commission report founded by the UN Secretary General of the time, Kofi Annan.<sup>105</sup>

As proof that the right to this aspect of self-defence has become in a way a part of the international customary law, a case from the practice is often cited – the attack of Israel on Egypt which instigated the so-called Six-Day War (1967). Calling upon the fact that Egypt gathered its troops in the Sinai district, Israel characterised its action as defensive, justifying it with the necessity to forestall the attack against its own territory. It was widely accepted around the world. Even the Security Council and General Assembly of the UN refused proposals to convict Israel for aggression. Instead, the Council adopted the Resolution 242 (1967) inviting Israel to withdraw from the occupied territory and at the same time seeking the termination of all states of warfare and the confirmation of territorial integrity and the right of each country of the region to live in peace.<sup>106</sup>

However, the fact that the conception of pre-emptive self-defence is represented in the Anglo-Saxon military, political and even legal literature, does not

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<sup>103</sup> Nirnberška presuda (The Nurnberg judgement), Beograd 1948, p. 71.

<sup>104</sup> In connection with the mentioned attitudes of the Nurnberg judgement, it has to be taken into account, among other things, that they refer to the state (attack on Norway) prior to the implementation of the UN Charter.

<sup>105</sup> A more secure world: Our shared responsibility, *op. cit.*, par. 188, p. 54.

<sup>106</sup> Resolution 242 (1967) of 22.11.1967, <http://www.un.org/documents/sc/res/1967/scre67.htm>.

mean that it is generally accepted. In fact, if such a solution was deemed reasonable in the past, after the adoption of the UN Charter and the general prohibition of the use of force, it is no longer acceptable. Strictly speaking, no pre-emptive violent actions undertaken for the sake of defence against attacks not yet occurred, are in line with the present international law. Moreover, according to Art. 2 of the Definition of Aggression (Resolution of the UN General Assembly 3314/1974) the instigation of the use of military force presents *prima facie* evidence of the execution of aggression.

In addition to that, the possibilities of abuse are numerous. Is it not real to expect that the aggressive state, through manipulations of intelligence data, false analyses etc. knowingly fabricates the factual state in order to attack another country by referring to the necessity of pre-emptive self-defence and go unpunished?

The aforementioned example from the 1967 Six-Day War, which gained a completely different perspective in the light of new discoveries, demonstrates that the actual danger is at issue. Namely, since recently it has been emphasised that the State Department documents from which they have recently (in 2004) removed the tag of confidentiality, indicate that Israel did not attack Egypt in order to prevent the attack against its own territory, but to assume power over the territories in question. The attack was executed even though Tel Aviv had reliable data that Egypt was not going to attack (the president of Egypt, Naser, guaranteed the American president Johnson he would not make the first attack, justifying the gathering of the troops by the intention to prevent the reoccurrence of 1956).<sup>107</sup>

The problem with this conception can be observed in another example. If Iraq struck first on February 2003, when it was clear that the attack of the “Coalition of the Willing” was going to be launched, how would Washington and London see it? As an act of self-defence? Or as aggression? The answer is self-imposed. But it really points to the fact that this conception should be the privilege of the powerful states exclusively.

When it comes to possible abuses, it should be especially taken into account that in practice the state which executed or is ready to execute this kind of “pre-emptive” strike will not hold necessary to present any tangible evidence to prove that its safety is truly directly endangered. It will most probably only call upon its intelligence sources and “verified information”, and will refuse, “for security reasons”, to present concrete information on the nature of danger and its sources (not to “reveal” or “jeopardise” its intelligence agents). In other words, it will most often present the world public only with its own beliefs that it is exposed to immediate danger.

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<sup>107</sup> See: Smith G.F.: *Deadly Dogma #1 Strike «First»*, Excerpt from “*Deadly Dogma: How Neo-conservatives Broke the Law to Deceive America*”, Institute for Research Publishing, 2006, Chapter 1 (pp. 29-36), [http://www.irmep.org/dd\\_ch1.htm](http://www.irmep.org/dd_ch1.htm), pp. 2-5.

However, even if we are to put aside all presented arguments, does anyone even consider the fact that the respective government (which decides on such a step) could genuinely be mistaken and start a war as a result of that? In other words, it would lead to the occurrence of the actual conflict instead of the possible one, with all its tragic consequences. But how can someone be certain that the attack will actually occur? That the other side is not simply clinking with its weapons? Or that it will not refrain from the attack at the last moment?

Finally, the restriction that these actions are possible only in particular situations, although logical, has no actual meaning. Every exception has the tendency to turn into a rule.

2. *Preventive self-defence.* – According to the aforementioned, pre-emptive (thwarting) self-defence is not permitted even from the standpoint of international law, not for a matter of principle nor from the standpoint of the known practice. However, not only did they not abandon the idea, but on the contrary they advocated the attitudes which would, roughly speaking, under the pretences of pre-emptive self-defence legalise acts which represent aggression according to the international law.

The matter of fact is that since recently the idea of pre-emptive self-defence is comprehended in an utterly different way. Unlike the attacks whose preconditions for the direct emergence of war seek to weaken the opponent's strike (*pre-emptive strike*), preventive self-defence tends to be institutionalised (legalised) as the use of force undertaken on the basis of a belief that military conflict, even if it is not forthcoming, is inevitable and its delay presents great risk. Hence, in this case, no forthcoming opponent's attack is at issue, but the goal is, as explained, to prevent the *possible* attack in the *future*.

Until recently the most well-known example of argumentation from those aspects regarding the attack on other states (although without the formulation of the doctrine itself) is again connected to Israel, which bombarded and destroyed the nuclear reactor built in Iraq in 1981. Tel Aviv justified this action by the fact that Iraq, which was at war three times with Israel, contests the very existence of the state of Israel and that it developed a nuclear programme to create nuclear weapons to destroy Israel. The UN Security Council, however, unanimously and strongly condemned Israel's military attack, "in clear violation of the Charter of the United Nations and the norms of international conduct", called upon Israel to refrain in the future from any such acts or threats thereof, determining that Israel is required to pay the appropriate indemnity.<sup>108</sup> Hence, this attempt of extending the right to self-defence did not succeed.

However, during the last several years the USA made use of this idea and tried to develop a new concept which tends to alter essentially the classic understanding of right to self-defence.

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<sup>108</sup> Resolution 487 (1981) of 19 June 1981, <http://www.un.org/Docs/scres/1981/scres81.htm>.

After the infamous terrorist attacks on the USA on 11 September 2001, the government decided to undertake a series of measures. Some of them were not disputable at all, but a number of them stem from the framework provided by international law. Generally speaking, it can be noted that the USA (concerned for its own safety, and aware of the possible dangers, primarily terrorist attacks), instead of using the right way to engage in removing the causes of these phenomena, are more prone to seeking a solution in the domain of the use of force. Special significance is granted to the fact that Washington on 20 September 2002 came forward with a new official strategic concept named "The USA National Security Strategy."<sup>109</sup> The strategy resides in the assumptions of an indisputable military power of the USA, unilateral actions, pre-emptive military strikes, claims that in the war against terrorism no distinction would be made between the terrorists and their accomplices and the attempts to ensure "democracy, freedom and security" throughout the world.

Referring to the necessity of the fight against terrorism, this new concept unambiguously determined that the USA assumes the right to resort to the use of force at its own discretion, in the guise of preventive self-defence. The United Nations are mentioned in the Conception, contained in 31 pages, only twice and in a very marginal way, and the Security Council is not mentioned at all.<sup>110</sup>

This new approach is sometimes defined as a "search for unilateral, independent approaches in relation to the threats against the American security which advocates military attack on aggressive opponents before they attack the USA, in order to thwart their aggression".<sup>111</sup>

Washington's standpoint is that in new circumstances the so-called "doctrine of intimidation" no longer suffices, and that it is especially inefficient against the enemy who is too irrational to be intimidated by a potential retribution.<sup>112</sup> Thus "the fight must be transferred onto the enemy's territory, his plans must be thwarted and it is indispensable that the worst threats be confronted before they even occur". This attitude implies a swift first strike carried out in order to defeat the opponent before he can organise the counter strike for retribution. In simple words, this means advocating pre-emptive wars against other states.<sup>113</sup>

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<sup>109</sup> The National Security Strategy of the United States of America, September 2002, <http://www.whitehouse.gov/nsc.html>. A radical turnover in the politics of Washington was indicated in fact in the speech of president Bush to the cadets of the West Point Military Academy (1 June 2002).

<sup>110</sup> The UN was first mentioned when there was word about the USA's attachment to such a reliable and stable institution as the OUN, and the second time when the co-operation of the USA with the UN was at issue regarding the help to rebuild Afghanistan.

<sup>111</sup> Kegli Č. V. Jr., Vitkof J.R.: *op. cit.*, p. 707.

<sup>112</sup> That is how the Bush administration, among other things, explained the need for the pre-emptive strike against Iraq claiming that it was necessary to prevent the regime of Saddam Hussein to get hold of weapons of mass destruction which would be used against the USA and, on the other hand, because of the irrational behaviour of the Iraqi dictator, there was no other solution except for the invasion on Iraq.

<sup>113</sup> Kegli Č. V. Jr., Vitkof J. R.: *op. cit.*, pp. 707-708.

Hence, official Washington, and with it a part of the doctrine,<sup>114</sup> emphasise and in many ways tend to defend the idea of such use of force as an aspect of (preventive) self-defence. The coerced use of force is mentioned in order to prevent the enemy strike which would denote certain harsh and irretrievable losses and consequences (especially as a result of the potential use of weapons of mass destruction).

However, it was mentioned before that the contemporary international law does not allow pre-emptive strikes; not even in the situation of a forthcoming attack. It is clear then that no so-called self-defence from the attack which *might occur* some day can be legal.<sup>115</sup>

This conception, with all aforementioned, is not acceptable also for moral or various other reasons. It does not specify any objective criterion used to determine the existence of a threat; it rejects a collective approach when estimating a certain situation and leaves the decision on whether the threat truly exists to the interested government (in this case to the USA government). Among other things, it would enable many abuses, marginalise the role of the UN Security Council and have the inevitable tendency of the ever expanding use in practice (of various states) etc.

It appears that the creators of the new American conception imply that the right to this kind of preventive self-defence is reserved exclusively for the USA. However, there are no exclusive rights. If one country can do it, so can the others. The American conception caused the swift response of Russia. The statements on the state of preparedness to execute preventive strikes on the terrorist bases in any part of the world, without asking for anyone's permission, were uttered during the last couple of years by the Russian Minister of Defence Ivanov and his deputy Balujevskij.<sup>116</sup>

In fact, it is rather clear that the idea of preventive self-defence can lead to international chaos. It enables complete freedom to resort to force, especially when

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<sup>114</sup> See for instance: Arend A.C.: International Law and the Preemptive Use of Military Force, *The Washington Quarterly* 2/2003, 2003, pp. 89-103, [http://www.twq.com/03spring/docs/03spring\\_arend.pdf](http://www.twq.com/03spring/docs/03spring_arend.pdf); Feinstein L., Slaughter A.-M.: A Duty to Prevent, *Foreign Affairs*, 1/2004, pp. 136-150; Sofaer A.D.: On the Necessity of Pre-emption, *European Journal of International Law* 2/2003, pp. 209-226; Benvenisti E.: The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies, *European Journal of International Law* 4/2004, pp. 667-700.

<sup>115</sup> Majority of authors agree with that; see, among other readings: Bock A.: Preventive or Pre-emptive War?, <http://www.antiwar.com/bock/b091002.html>; Bothe A.: Terrorism and the Legality of Pre-emptive Force, *European Journal of International Law* 2/2003, pp. 227-240; Chomsky N.: Preventive War "The Supreme Crime", <http://www.informationclearinghouse.info/article4416.htm>; Long B., Pitts Ch.: War, Law and American Democracy, 5 pp., [http://www.opendemocracy.net/democracy-americanpower/war\\_law\\_4028.jsp](http://www.opendemocracy.net/democracy-americanpower/war_law_4028.jsp), and the referential literature cited there.

<sup>116</sup> Котляр В.С.: *op. cit.*, стр. 82.

dealing with disobedient regimes. As one author noticed, it is an open season on anyone who disagrees with you.<sup>117</sup>

The aforementioned report of the Kofi Annan Commission, although it permits under certain circumstances pre-emptive strikes as an aspect of self-defence, it also opposes the broadening of the notion of self-defence. It is explicitly stated that even when there are serious arguments in favour of the pre-emptive military action, substantiated by good evidence, they should be passed on to the UN Security Council, which, if it deems necessary, can approve of such measure. In the report it is noted that “the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinctive from collectively endorsed action, to be accepted.”<sup>118</sup>

The following imaginary example demonstrates the potential consequences. If by any case this strategy were in force immediately after WWII, it would mean that then the USA had the right to attack the USSR to prevent it from becoming a nuclear power (in order to protect itself from a potential nuclear attack by the USSR in the future). We know now that such attack and “preventive self-defence” never occurred. Fortunately.

But we have another, unfortunately real example, in front of our eyes. The USA and Great Britain attacked Iraq in 2003, allegedly because they had reliable sources stating that it produces weapons of mass destruction, which it intends to use on the USA and its allies. No concrete evidence was presented, but that was enough to proclaim Iraq a “renegade state”, part of the “axis of evil” with aggressive intentions towards the USA, stockpiling weapons of mass destruction and posing a constant threat to the USA.<sup>119</sup>

However, after the Alliance invaded Iraq, it was definitely confirmed that these claims were unfounded, which was consequently admitted by the governments of the related states. Even four years later the USA and Great Britain did not withdraw from Iraq, the population of which lives in horror and suffering on a daily basis. Instead of a tolerable life under dictatorship, the country is now in complete chaos, misery and desperation.<sup>120</sup>

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<sup>117</sup> Foster Ch.: International law: another casualty of the Iraq war?, *Contemporary Review*, August 2003, [http://www.findarticles.com/p/articles/mi\\_m2242/is\\_1651\\_283/ai\\_107897404](http://www.findarticles.com/p/articles/mi_m2242/is_1651_283/ai_107897404), p. 1.

<sup>118</sup> A more secure world: Our shared responsibility, *op. cit.*, pars. 189-191, pp. 54-55.

<sup>119</sup> Charlesworth H.: Is International Law Relevant to the War in Iraq and its Aftermath?, p. 2, <http://www.globalpolicy.org/empire/un/2003/1029charlesworth.pdf>.

<sup>120</sup> Preventive self-defence was the essential argument for the attack on Iraq. In addition to that, the interventionists tried to give their own interpretation of the Security Council resolutions, especially 678/1990, 687/1991 and 1441/2002 claiming that those resolutions provide the grounds for military action. This interpretation is, however, unacceptable, and this was confirmed by the Security Council itself. And finally when the first two arguments failed, the doctrine of humanitarian intervention was used, as was previously mentioned.

With all the aforementioned, the doctrine of preventive self-defence does not resolve the essence of the problem. The attack on someone else's territory (for instance the rocket attack on the alleged terrorist camps, military facilities etc.) is by all means an act of aggression. Even if we leave that aside, violence does not solve anything. Violence breeds violence. Instead of the killed ones, some other opponents will come (among others, the terrorists) which will with greater determination and ruthlessness continue with their predecessor's cause.

Lastly, if we were to remain in the domain of the basic practical thinking – who can guarantee that the attack, would be undertaken in accordance with this doctrine, on the one hand spare the innocent lives (civilians) and still be efficient enough. If the civilians get caught up in the mass sufferings in the so-called humanitarian interventions, we should not delude ourselves that they would do worse in these «self-defence» actions. On the other hand, even if they appear to be efficient, the attack would only slow down the production of the weapons of mass destruction, and, after the attack, it would be more difficult to monitor the process of production of those weapons and locate the spots where the production takes place. Naturally, the destruction caused by the “pre-emptive” strike of the USA would cause the increase of animosity towards the USA, which would substantially increase the problems that the USA is trying to deal with.<sup>121</sup>

Finally, it is noted for a reason that the fact the USA, on its march to Iraq, did not call upon the reasons for a “preventive defence” exclusively, but it tried (though in vain) to find some sort of a foothold in the Security Council resolutions, witnesses that the USA itself is not certain when it comes to its doctrine.<sup>122</sup>

In fact, many things point to the fact that the doctrine of preventive self-defence had an infamous failure in practice. It caused tragic consequences firstly for the Iraqi people, but for the attackers and the entire international community as well. With the increasing number of casualties in the Alliance ranks, the increase in the discontent of public opinion is noted in the USA, as well as the decrease in the reputation of the USA, and the public manifestation of its diminishing power and influence in various part of the world.<sup>123</sup> On the other hand, there has been an increase in the mutual lack of confidence among superpowers and a huge concern of small and medium states. The war in Iraq did not decrease, but on the contrary it increased global risk of international terrorism.<sup>124</sup>

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<sup>121</sup> See: Speed R., May M.: Dangerous doctrine, *Atomic Scientists*, [http://www.thebulletin.org/print.php?art\\_ofn=ma05speed](http://www.thebulletin.org/print.php?art_ofn=ma05speed), pp. 6-7.

<sup>122</sup> Currie D.E.J.: *op. cit.*, pp. 5-6; Glennon M.J.: Why the Security Council Failed, *Foreign Affairs*, 3/2003, pp. 16-35.

<sup>123</sup> Kolodziej E.A.: Getting beyond the Bush Doctrine, *Center for Global Studies*, University of Illinois *Occasional Paper 5*, December 2006, pp. 2-3, [http://www.cgs.uiuc.edu/resources/occasional\\_papers/bushdoctrine.pdf](http://www.cgs.uiuc.edu/resources/occasional_papers/bushdoctrine.pdf).

<sup>124</sup> Long B., Pitts Ch.: *op. cit.*, p. 3.

#### IV. CONCLUSION

States that are strong enough, and especially the most powerful ones, can always resort to force unpunished. And no one can prevent them from doing so. Not only because the permanent members of the UN Security Council exonerated themselves in advance by the power of veto, but also because of the common fact that the enforcement of the collective measures against a power state would mean a massive conflict and an almost inevitable overall doom. And nobody wants that.

However, in this new political reality some states wish to step outside the framework created by the international law, and simultaneously create an illusion that they are moving within the legal boundaries. In the situation where there is no Cold War anymore, which could have explained and justified many things, the ways are sought which could, at an opportune time, enable a new manoeuvring space by creating several new exceptions to the prohibition of the threat and use of force. Being aware of the prohibition of the use of force, the states tend to justify their actions in a way and avoid being stigmatised as aggressors.

In that context, the concepts of the (unilateral) humanitarian intervention and preventive self-defence seem especially appropriate. This is the case because they can be made acceptable in the eyes of an ordinary man, and of the internal and external perception by different forms of media and other influences. By invoking the principles of humanitarianism and legitimate right to self-defence, there is a tendency to ensure sufficient amount of freedom of action. What is more, there is a tendency to gain consent, affection and recognition for concrete undertakings from the rest of the world (humanitarian intervention), i.e. solidarity and understanding from the majority of the international community (preventive self-defence).

Such initiatives, however, cannot be accepted particularly because they oppose to the basic principles of contemporary international law. These principles result from a long-lasting evolution and are not what they are by pure coincidence. In addition to that, these concepts would in fact represent the “asymmetric rights” of the superpowers, and used only against small and medium states in practice. Common logic suggests that, should the right to a unilateral humanitarian military intervention or the right to “preventive self-defence” be legalised, soon nobody would be able to control the situation.

Actually, many things point to the fact that in this case it is all about using small steps to legalise the use of force. Understandably, only in the hands of those capable of using it, i.e. of those who are powerful enough.<sup>125</sup>

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<sup>125</sup> Some ten years ago, long before the terrorist attack on 11/9/2001, Madeleine Albright, the USA ambassador in the UN at the time, who became the USA Foreign Secretary later on, stated in a very straightforward manner that the USA will act «multilaterally, when we can, and unilaterally, when we must.»

The proclaimed necessity of engagement to make the world a better place for living, unfortunately amounts to the actions aimed at adapting that exact world to their own views and needs. Two important slogans – on the protection of human rights and on the fight against terrorism – are actually just pretences used to unskillfully disguise the attempt to legalise force. Therefore it is not uncommon that in practice the concepts of “humanitarian intervention” and “preventive self-defence” are usually combined. More and more examples support this, among which the most illustrative ones are attacks on Granada and Iraq, already mentioned in this paper.

In reality, however, some ulterior motives are hidden behind it, such as the overthrow of the disobedient regime,<sup>126</sup> realisation of one’s own strategic and other interests (access to natural resources, obtaining of military bases etc.). In any case, we must agree with those who claim that the rule of non-intervention is essentially connected to the rule that the states have the right to sovereignty and that the suggestions to abolish that rule actually intend to abolish the states’ right to independence and construction of the world order on an entirely different basis.<sup>127</sup>

In case the initiatives at issue managed to impose themselves, it would not only represent the throwback to international relations based on plain force (and by that to endless wars as well), but it would depict the establishment of such a system of international relations which would be under a complete control of the most powerful ones, and would rest upon a whole different (new?) international law.

The concept of humanitarian intervention (by this we refer primarily to the idea of permissibility of the so-called unilateral interventions) and the doctrine of preventive self-defence tend to impose some sort of a review of the rule prohibiting the use of force.<sup>128</sup> In other words, there has been an attempt to interpret international law in another way, to enrich it with new, but in fact old and obsolete institutes.<sup>129</sup>

However, although the truth remains that things change, even the international law, one must agree with those who notice that the reinterpretation of the international law must not in any case be the prerogative of a privileged minority

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<sup>126</sup> Additional reading: Simpson G.: *Velike sile i odmetničke države*, Beograd 2006; Kindzer S.: *Svrgavanje: pučevi, revolucije i invazije (Kako je Amerika menjala režime, od Havaja do Iraka)*, Beograd 2006; Chomsky N.: *Rogue States*, *Z Magazine*, April 1998, 15 pp., <http://www.chomsky.info/articles/199804-htm>.

<sup>127</sup> Bull H. (ed.): *op. cit.*, pp. 184-187.

<sup>128</sup> For the moral aspect of this issue, see among others: Coady C.A.J.: *op. cit.*; Holzgrefe J.L., Keohane R.O. (eds.): *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge University Press 2003; Vuković D.: *Moralno pravo na vojnu intervenciju*, *Sociologija* 1/2000, pp. 69-84.

<sup>129</sup> Cfr: Carty A.: *The Iraq Invasion as a Recent United Kingdom «Contribution to International Law»*, *European Journal of International Law* 1/2005, pp. 143-151.

that has the control over the Earth's resources, but a sovereign right and responsibility of a global community of states and their peoples.<sup>130</sup> It should by all means develop towards the best interests of the entire international community.

With all that has been said, the attempt to impose new aspects of exceptions to the prohibition of the use of force has already manufactured several other adverse consequences. It has become obvious that for this ("humanitarian") or that ("preventive") reason, virtually every state can be the subject to attack. At the same time, the North Korea case demonstrated that the best way to fight constant pressures and threats is to develop – nuclear weapons! After the confirmed nuclear trial, North Korea suddenly became less exposed to various public attacks, pressures and threats. If Saddam had a nuclear arsenal, would he have ended the way he did? That is, unfortunately, a guideline to other states to develop their own nuclear potentials as soon as possible in order to ensure their own peace. It is all, however, leading to a general competition in (nuclear and similar) armament, hence towards a drastic increase of the potential conflicts. Just as in the theatre, "the rifle hanging on the wall in Act I, fires in the last Act", the accumulation of weapons tends to be used.

Therefore, the attempts to legalise all new exceptions to the prohibition of the use of force are not only in collision with the contemporary international law, but are also unacceptable because they lead to new conflicts and wars; hence to human misfortune and suffering. Who needs it?

How can we react then to severe human sufferings, i.e. in situations where peace and security are at stake? Well, it is understood – through the United Nations! They are created for it. Until other solutions emerge (for instance, for the transformation of the international community into a superstate), reactions can only be multilateral – through the Security Council. Even then the solution should be sought primarily in the non-military measures, and especially in the collective states' actions.<sup>131</sup>

In that particular case we must agree with the opinion of the Commission formed by Kofi Annan, which noticed that the Security Council was sufficiently empowered according to section VII of the UN Charter to deal with all security challenges; especially with the conclusion that the real tasks are not to find alternatives for the Security Council, but to ensure the ever better performance of the Council's role.<sup>132</sup>

*(Translated by Ana Mršić)*

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<sup>130</sup> Köchler H.: *op. cit.*, p. 141.

<sup>131</sup> See: Murphy S.D.: International Law, the United States, and the Non-military «War» against Terrorism, *European Journal of International Law* 2/2003, pp. 347-364.

<sup>132</sup> A more secure world: Our shared responsibility, *op. cit.*, par. 198, p. 56.

## Sažetak

### **O koncepcijama humanitarne intervencije i preventivne samoobrane**

U novoj političkoj realnosti pojedine države žele iskoračiti izvan okvira koji su stvoreni međunarodnim pravom, a da pri tome stvore privid da se kreću u granicama prava. U situaciji kada više nema hladnoga rata, kojim se mnogo toga moglo objasniti i opravdati, traže se načini da se, kada se to smatra oportunistički, omogući novi manevarski prostor, tako što bi se stvorilo nekoliko novih izuzetaka od zabrane uporabe sile i prejetnje silom. Svjesne zabrane uporabe sile, države pokušavaju da na neki način opravdaju svoje akcije i da izbjegniju situaciju u kojoj mogu biti žigosane kao agresori.

U tome kontekstu, koncepcije (unilateralne) humanitarne intervencije i preventivne samoobrane, čine se kao posebno pogodne. Zato što se, naročito raznim oblicima medijskoga i drugoga utjecaja, mogu učiniti prihvatljivima u očima običnoga čovjeka, a time i domaćega i svjetskoga javnog mnijenja. Pozivanjem na načela humanosti i legitimnog prava na samoobranu nastoji se osigurati dovoljna sloboda akcije. Štoviše, želi se za konkretne pothvate pridobiti suglasnost, simpatije, pa i priznanje ostatka svijeta (humanitarna intervencija), odnosno solidarnost i razumijevanje što većega dijela međunarodne zajednice (preventivna samoobrana).

Autor smatra da se takve inicijative ne smiju prihvatiti. Već i zbog toga što su u suprotnosti s osnovnim načelima suvremenoga međunarodnoga prava, koja su rezultat dugotrajne evolucije i nisu slučajno takvi kakvi su. Uz to, te bi koncepcije zapravo predstavljale «asimetrična prava» velikih sila, a u praksi bile uporabljene samo protiv malih i srednjih država. Pri tome prosta logika sugerira da, ako bi se ozakonilo pravo na unilateralnu humanitarnu oružanu intervenciju, odnosno pravo na «preventivnu samoobranu», ubrzo nitko ne bi mogao nadzirati situaciju.

Mnogo toga ukazuje da se tu radi o pokušajima da se na mala vrata ozakoni uporaba sile. Razumije se, samo u rukama onih koji mogu da je upotrijebe, dakle dovoljno moćnih.

Ako bi se inicijative o kojima je riječ uspjele nametnuti, to ne samo da bi predstavljalo povratak na međunarodne odnose zasnovane na goloj sili (a time i na beskonačne ratove), već bi značilo uspostavljanje takvog sustava međunarodnih odnosa koji bi bio pod punom kontrolom onoga tko je najjači, a počivao bi na drugačijem (novome?) međunarodnome pravu.

Pokušaji ozakonjenja novih izuzetaka od zabrane uporabe sile ne samo da nisu u skladu sa suvremenim međunarodnim pravom, već su neprihvatljivi i zbog toga što vode novim sukobima i ratovima. A to znači i ljudskoj nesreći i patnji. Kome to treba?

Kako onda da se reagira na teška ljudska stradanja, odnosno u situacijama kada se procjenjuje da su ugroženi međunarodni mir i sigurnost? Razumije se –

preko organizacije Ujedinjenih naroda! Ona je zbog toga i stvorena. Sve dok se ne nađu neka druga rješenja (na primjer, nakon prerastanja međunarodne zajednice u neku nad-državu), reakcija može biti samo multilateralna – preko Vijeća sigurnosti UN. Čak i tada rješenje treba tražiti prvenstveno u nevojnim mjerama, posebice u kolektivnim akcijama država.

**Ključne riječi:** Uporaba sile, humane intervencije, preventivna samoobrana, primjenjivo međunarodno pravo, Vijeće sigurnosti Ujedinjenih naroda