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Legality of Western Military Intervention in Kosovo (1999)

BACHELOR THESIS

Author: Artūrs Šavdins
LL.B. 2014/2015 year student
Student number B012095

SUPERVISOR: *Kristaps Tamužs*
Visiting Professor

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2018

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INTRODUCTION

Topic:

Legality of Western military intervention in Kosovo (1999)

Hypothesis:

As a rule, unilateral humanitarian intervention without consent of the state concerned is illegal under international law. However, there can be exceptional circumstances where such intervention is justified.

Executive Summary:

The research focuses on the legitimacy of humanitarian interventions, and I will use the case of Kosovo to prove my hypothesis.

On the 24th of March 1999, NATO started the air campaign against the former Federal Republic of Yugoslavia. The UN Security Council had not authorized this operation, and it was the first time when NATO used military forces against a sovereign state that did not pose a direct threat to any of the member of the NATO alliance.

The legal implication of NATO's intervention in Kosovo was the introduction of the UN Responsibility to Protect (RtoP) framework, which allows for the use of collective armed force to stop gross violations of human rights in the case of humanitarian crises.

This study analyses the legality of NATO's military intervention in Yugoslavia because it set forth the first precedent of forced intervention of a group of states without UN authorisation, while giving rise to a new legislative practice, namely, the Right to Protect (RtoP).

The study shows that NATO's intervention in Yugoslavia was unlawful because by that time international law had not envisaged any justification of forced intervention by uninvited parties to resolve internal conflicts. The military intervention in Kosovo was unauthorized by the UN and was by no means caused by any open threat to NATO's member states. The intervention in Kosovo resulted in drastic changes in the geographical map of Europe, which were beneficial to NATO as it established its first military base in the Balkan region.

Unilateral humanitarian intervention without consent of the state concerned is still considered to be illegal under international law, unless intervention is carried out in line with the principles outlined in the UN Right to Protect framework or is authorised by the UN in case there is an open threat that the internal conflict may harm any other country. In order to avoid accusations in unjustified intervention for pursuing own national goals, a country or a union of countries must comply with international laws and seek the UN authorisation.

Research Goal and Objectives:

The main **goal** of the thesis is to examine the criteria for NATO's intervention in Kosovo in terms of their compliance with the norms of international humanitarian law.

In order to achieve the above goal, the following **objectives** were set:

- to discuss the goals and methods of preventive diplomacy;
- to outline norms of international law that relate to use of force by external actors to stop mass killing in a conflict area;
- to provide historical background to Kosovo's war conflict and the legal framework that was applied by NATO to justify humanitarian interventions in Yugoslavia; and

- to analyze whether NATO's military actions in Kosovo could be considered lawful under international law

Research Question:

Were NATO's military actions in Kosovo justifiable and legal under international law?

Research Methods:

The study was conducted on the basis of analysis of international laws, national legislation of Yugoslavia, briefing papers by major international authoritative bodies, including the United Nations, as well as books and periodical publications covering the debate of the Western military intervention in Kosovo (1999).

Contents:

The Bachelor Thesis consists of three chapters.

The first chapter describes the nature of violent conflicts and dwells upon the concept of humanitarian intervention as a military tool of preventive diplomacy.

The second chapter contains some historical and factual background leading to NATO's campaigns in Kosovo as well as provides a legal framework and justification advanced by the members of the NATO alliance for the military actions in Yugoslavia.

The third chapter critically questions whether international law envisages a right for the use of force in humanitarian interventions by states that have not been asked for assistance to stop an internal conflict and were not authorised for it by the UN Security Council, which will help provide an answer to the research question.

Finally, the conclusion are made based on all the research findings.

1. INTERNATIONAL LAW ON DIPLOMATIC MEDIATION AND HUMANITARIAN INTERVENTION IN CASE OF INTERNAL CONFLICTS

*"Each state pursues its own interests, however defined, in ways it judges best. Force is a means of achieving the external ends of states because there exists no consistent, reliable process of reconciling the conflicts of interest that inevitably arise among similar units in a condition of anarchy."
-- Kenneth Waltz¹*

Humanitarian intervention is widely considered to be one of the most debated issues in modern international law and diplomacy. There is a large body of research and evidence in the unacceptability of both inactivity and unreasonable interference in national conflicts that prove that each of these approach has its own advantages and drawbacks.

On the one hand, every sovereign state is guaranteed independence in making decisions regarding its policies and interests, without being subject to any pressure from beyond. As defined in the West's Encyclopedia of American Law, sovereignty encompasses "the supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers are derived; the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference"².

On the other hand, it is impermissible for the international community to ignore univocal violation of human rights in mass murder. As set by the Universal Declaration of Human Rights (UDHR), proclaimed by the United Nations (UN) General Assembly on 10 December 1948, "Everyone has the right to life, liberty and security of person." (Article 3); "No one shall be held in slavery or servitude." (Article 4); and "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (Article 5)³.

The above human rights tend to be severely violated in internal conflicts, although each sovereign state may not only enjoy the privileges of sovereignty but must also bear responsibility for the protection of its citizens' rights in compliance with its international obligations⁴. To protect human rights and maintain international order in case of an armed conflict, common efforts must be pooled by international organizations (IOs), regional organizations (ROs) and non-government organizations (NGOs) to unequivocally condemn violence and to methodically resolve the conflict that, for any reason, cannot be stopped by inner forces⁵.

¹ Kenneth Waltz, *Man, the State, and War: A Theoretical Analysis* (New York: Columbia University Press, 2001), p.238.

² *West's Encyclopedia of American Law* (San Francisco: Thomson Gale, 2010), pp.258-259.

³ Universal Declaration of Human Rights (UDHR) (10 December 1948), accessed February 12, 2018, <http://www.un.org/en/universal-declaration-human-rights/>.

⁴ Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), p.407.

⁵ Michael Lund, *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy* (Washington, D.C.: United States Institute of Peace Press, 1999), p.7.

1.1 Causes of Violent Conflicts

There is no doubt that, in extremely violent conflicts, humanitarian intervention is necessary to avert further escalation of the armed conflict and to prevent its probable spillover across the national borders. Yet, care must be taken with identifying the interests of all the parties involved in a conflict, including those of the actual powers supporting the conflicting sides.

Kaufman suggests that the main reason of internal conflicts is rise of nationalism that leads to ethnic confrontation whereby local people holding different social beliefs summarized in their group's myth-symbol complex begin to oppose other local groups based on language, race and religious affiliation⁶.

Genocide and mass killing of ethnic and religious minorities take place when the ideology of racial superiority that seeks to justify technologies of mass killing, such as gas chambers or intercontinental missiles, become fixed in national policies and legislation and supported by the majority of the population⁷.

Conflicts can also be started by state or non-state actors engaged in national liberation movements⁸. A war of independence (rebellion, revolt, insurgency or revolution) is usually fought by the rebelling nationality that often uses guerilla warfare to establish a separate sovereign state.

Rogers also adds terrorism (in the form of state terrorism, sub-state terrorism or terrorism from below) as a major cause of human suffering in the world⁹. Terrorists' victims are threatened with violence or killed to gain public attention and to create extreme anxiety and instill fear in the targeted community. The long-lasting "Global War on Terror" against the al-Qa'ida sub-state movement and the like shows how difficult it is to combat terrorist organizations once they gain substantial control over a region and manage to spread their destructive ideology among population.

As Acuto indicates, "an international crisis is the abrupt enhancement of disruptive relations as a result of a perceived threat to the system or to the lives of those who compose it"¹⁰. As the above examples of ethnic conflicts, genocide and terrorism show, the threat to the system and the subsequent attack against the perceived enemy can arise on various grounds. Buzan suggests that violent conflicts arise when any of the following sectors appear to be threatened (see Table 1):

Sector	<i>Main concern</i>
Military	The interplay between the armed offensive and defensive capabilities of states and states' perceptions of each other's intentions.
Political	The organizational stability of states, systems of government and the

⁶ Stuart J. Kaufman, "Ethnic Conflict," in *Security Studies: An Introduction*, ed. Paul D. Williams (Abingdon: Routledge, 2008), p.200.

⁷ Adam Jones, "Genocide and Mass Killing," in *Security Studies: An Introduction*, ed. Paul D. Williams (Abingdon: Routledge, 2008), p.186.

⁸ Kenneth Watkin, "21st Century Conflict and International Humanitarian Law: Status Quo or Change?" in *International Law and Armed Conflict: Exploring the Faultlines*, ed. Michael N. Schmitt and Jelena Pejic (Leiden: Martinus Nijhoff Publishers, 2007), p.268.

⁹ Paul Rogers, "Terrorism," in *Security Studies: An Introduction*, ed. Paul D. Williams (Abingdon: Routledge, 2008), pp.171-174.

¹⁰ Michael Acuto, "Diplomats in crisis," *Diplomacy and Statecraft*, 22 (2011): p.526.

	ideologies that ensure their legitimacy.
Economic	Access to the resources, finance and markets necessary to sustain acceptable levels of welfare and state power.
Societal	The sustainability and evolution of traditional patterns of language, culture as well as religious and national identity and custom.
Environmental	The maintenance of the local and the planetary biosphere as the essential support system on which all other human enterprises depend.

Table 1. Causes of conflicts arising from threats to sectors (Buzan, 2016)¹¹

It is also essential to understand that the nature of violent conflicts is changing. In contrast to old wars fought before the end of the twentieth century, contemporary violent conflicts are highly decentralized, have civil rather than interstate nature, deploy terror and guerrilla tactics instead of fighting on battlefields, use military strategies of population control rather than capturing new territory, utilize private armies and criminal gangs instead of professional soldiers or conscripts, and are of lower density but with higher magnitude of brutality against civilians¹². Importantly, conflicts these days most often rely on external rather than internal financing.

Indeed, the growing body of research proves that today's intrastate conflicts often imply foreign involvement. Crises have never been homogenous, but modern crises are becoming increasingly complex due to globalization. Today's armed conflicts involve more states and a wider array of non-state actors, which is why the resolution of internal crises seemingly caused by local political tensions often lies in another dimension, namely, that of international relations and politics¹³.

Of course, a violent ethnic conflict may begin because of clashes between nations populating the same territory, as it is happening now between Sunni Muslims, Alawites and Kurds in the Syrian civil war. But the examples of the 1947-1989 Cold War between the powers in the Eastern Bloc and the Western Bloc and of the ongoing confrontation between the US allies and Russia's allies prove that interests of opposing groups in states already involved in hot wars are often backed up by the actual interests of the two (and now even more) superpowers.

Therefore, in order to resolve a conflict by diplomatic means, it is necessary to understand not only the reasons of a conflict, but also the way in which the structure of the international system incites violent conflict outbreaks.

Political theory distinguishes three structures of international system:

- unipolar system (with one preponderant power);
- bipolar system (with two major centers of power dominating politics); and
- multipolar system (with power distributed among a large number of roughly equal countries)¹⁴.

¹¹ Barry Buzan, *People, States & Fear: An Agenda for International Security Studies in the Post-Cold War Era* (Colchester: ECPR Press, 2016), p.107.

¹² Sinisa Malisevic, "The Sociology of New Wars? Assessing the Causes and Objectives of Contemporary Violent Conflicts," *International Political Sociology* 2 (2008): p.98.

¹³ Edward Avenell and David Hastings Dunn, "Crisis Diplomacy," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), p.463.

¹⁴ Joseph S. Nye, *Understanding International Conflicts: An Introduction to Theory and History* (London: Pearson, 2007), p.37.

Looking at the structure of the international system (and the perceived position of own state in it), it is possible to predict the behaviour of states and their propensity to war. In a unipolar system, states tend to balance against the hegemon or a rising state that eventually challenges the leader. In a multipolar system, wars may occur but they are limited in scope because alliances are flexible. Much larger conflicts, even global wars, occur in bipolar systems where alliances become more rigid¹⁵. The following example illustrates how this principle works in practice.

After World War II and especially during the Cold War, diplomacy became "total in its objectives and subject matter."¹⁶ Regardless of their stance in the war, international partners had to collaborate to effectively deal with industrial, social and technological matters, which attained a diplomatic dimension precisely because of their internationalization. And all nations mostly cooperated, pursuing the common goal of ensuring international *security*, which, as rightfully remarked by Harold Lasswell in 1936, is "unavoidably political; that is, it plays a vital role in deciding who gets what, when, and how in world politics"¹⁷.

The confrontation of the USSR and the USA as two victorious superpowers, however, led to the foundation of the North Atlantic Treaty Organization (NATO) as an intergovernmental military alliance between several North American and European countries in 1949. From the beginning, NATO has advocated for stronger trans-Atlantic cooperation between its member states to ensure collective defense, peace and security. And, given the military organization's strictly anti-USSR foundation goal, this naturally led to the emergence of a bipolar international system.

After the collapse of the USSR in 1991, the USA became the hegemon, and the unstoppable advancement of US-led NATO further into the Eastern Europe, closer to the borders of Russia, in the past quarter of the century aimed to demonstrate the US superpower to the whole world. If previously NATO claimed that its advancements to the East served to protect its member states primarily from Iran and North Korea, in February 2018 US Secretary of Defence, James Mattis, openly declared that now the main US defense policy targets, in line with the new National Defence Strategy, are complimented with Russia and China as "revisionist powers" seeking "to create a world consistent with their authoritarian models"¹⁸. As Mattis stated, "We will continue to prosecute the campaign against terrorists that we are engaged in today, but great power competition, not terrorism, is now the primary focus of U.S. national security"¹⁹.

Taking into account the numerous ongoing conflicts in the Middle East, Asia, Africa and Eastern Europe and the actual beneficiaries in these conflicts, it can be argued that the international tensions fuelled by the "great power competition" will likely escalate into an all-out war again. The mounting confrontation of the forces in the conflicts in Syria, Iran and

¹⁵ Joseph S. Nye, *Understanding International Conflicts: An Introduction to Theory and History* (London: Pearson, 2007), p.38.

¹⁶ Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy: Its evolution, theory and administration* (London: Routledge, 2011), p.185.

¹⁷ Harold Lasswell, cited in Paul D. Williams, "Security Studies: An Introduction," in *Security Studies: An Introduction*, ed. Paul D. Williams (Abingdon: Routledge, 2008), p.1.

¹⁸ Idrees Ali, *U.S. military puts 'great power competition' at heart of strategy: Mattis* (19 January 2018), Reuters, accessed 5 March 2018, <https://www.reuters.com/article/us-usa-military-china-russia/u-s-military-puts-great-power-competition-at-heart-of-strategy-mattis-idUSKBN1F81TR>.

¹⁹ Idrees Ali, *U.S. military puts 'great power competition' at heart of strategy: Mattis* (19 January 2018), Reuters, accessed 5 March 2018, <https://www.reuters.com/article/us-usa-military-china-russia/u-s-military-puts-great-power-competition-at-heart-of-strategy-mattis-idUSKBN1F81TR>.

Yemen, for instance, clearly demonstrates that local and regional conflicts are not run without the interference of major superpowers.

The current preventive diplomacy tools, like economic sanctions or military drills, do not appear to bring positive outcomes for re-establishing peace in crisis areas. Nor do the current anti-diplomatic practices, including withdrawal of consulates and diplomatic corps, refusal to take notice of each other's arguments on important issues in international organisations, and in general antagonistic talks between the existing and rising superpowers, which is a sign of a deep crisis in international relations²⁰.

1.2 Goals and Methods of Preventive Diplomacy

Of all tools that can be applied in international conflict management, diplomacy appears to play the most important role since it involves negotiations between the disputing parties with the help of competent and knowledgeable intermediaries²¹. As an effective preventive tool of conflict management, diplomatic engagement was institutionalized by the Congress of Vienna and later enshrined in the Charter of the UN under Chapter VI on pacific settlement of disputes.

More specifically, Article 33 of the UN Charter establishes that the parties to any continuing dispute that endangers international peace and security shall seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Security Council's role is to call upon the parties to settle their dispute by such means if necessary²².

During negotiations, the conflicting parties pursue each other to combine divergent positions into a joint decision, which, importantly, has to be a positive-sum outcome²³. Meanwhile, mediation is different from other forms of diplomatic engagement in that there is a third party that steps in to improve communication, include or exclude negotiators, design negotiation processes, offer alternatives, formulate workable agreements and seek compromise by means of rewards and threats²⁴.

Non-coercive diplomatic engagement through arbitration, mediation or negotiations may be needed when the conflicting parties cannot find common ground altogether, but it is possible only when parties agree to resolve the confrontation, abiding by protocols and principles of international law, justice and order²⁵.

Unfortunately, as history shows, mild diplomatic intervention does not always help to stop conflicts that got out of control (e.g. genocide against minorities practiced by a major force or an oppressive authority in a conflict area). Crisis diplomacy is used to resolve an internal

²⁰ Corneliu Bjola and Markus Kornprobst, *Understanding International Diplomacy: Theory, Practice and Ethics* (London: Routledge, 2013), p.205.

²¹ Karin Aggestam, "Diplomatic Mediation," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), p.220.

²² UN Charter (26 June 1945), accessed February 12, 2018, <http://www.un.org/en/sections/un-charter/un-charter-full-text/>.

²³ William Zartman, "Diplomacy and Negotiation," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), pp.207.

²⁴ Karin Aggestam, "Diplomatic Mediation," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), p.221.

²⁵ William Zartman, "Diplomacy and Negotiation," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), pp.207-210.

conflict that brings about an abrupt systematic change, reaches a turning point and poses a high risk of war²⁶.

As its name suggests, preventive diplomacy is deployed to prevent disputes between conflicting parties to avoid escalation of an ongoing conflict into a full-fledged war. Lund specifies that preventive diplomacy is "[a]ction taken in vulnerable places and times to avoid the threat or use of armed force and related forms of coercion by states or groups to settle the political disputes that can arise from the destabilizing effects of economic, social, political and international change."²⁷

According to Lund, preventive diplomacy consists of non-military and military approaches²⁸. Since this study analyses whether the NATO's intervention in Kosovo's conflict in 1999 entailed military rather than merely humanitarian character, it is important to understand which tools are usually used for which purposes. Non-military tools of preventive diplomacy, for example, may include coercive and non-coercive diplomatic measures, neither of which presupposes the use of armed force.

Coercive diplomatic measures range from diplomatic sanctions (withholding of diplomatic relations, recognition as state, or membership in multinational organisations), moral sanctions (condemnations of violations of international law), economic sanctions (trade barriers, tariffs, restrictions on financial transactions, embargos, etc.) to war crimes trials and tribunals. Non-coercive diplomatic measures may include international appeals (moral suasion to conflicting parties to urge accommodation), fact-finding missions, observation teams, on-site monitoring (of instance of violence, human rights abuses), propaganda (directed at violators of international principles), third-party mediation and diplomatic consultations, arbitration and adjudication, conciliation or concessions (reciprocal gestures by the opposed parties), different mechanisms of peaceful settlement of disputes; and other measures that induce parties' cooperation.

Humanitarian intervention belongs to the military approaches of preventive diplomacy, used when non-military diplomatic tools have been exhausted. In order to understand whether the NATO's intervention in Kosovo's conflict in 1999 abode more with the principles of preventive diplomacy or war, it is necessary to know that even military approaches of preventive diplomacy do not envisage unrestrained use of armed force. Instead, there may be arms control regimes, embargos, non-aggression agreements, pre-emptive peacekeeping forces, establishment of demilitarised zones and *non-offensive* defence force postures. There can also be *threat* of use of force in the form of deterrence policies or security guarantees, applied to restore and maintain local or regional balances of power²⁹.

In Jakobsen's view, coercive diplomacy, whereby diplomatic negotiations are accompanied by military threats or limited force, is "as old as the institution of diplomacy"³⁰. Although it is widely believed that use of force may be a sign of diplomatic failure, many famous diplomats

²⁶ Edward Avenell and David Hastings Dunn, "Crisis Diplomacy," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), p.463.

²⁷ Michael Lund, *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy* (Washington, D.C.: United States Institute of Peace Press, 1999), p.i.

²⁸ Michael Lund, *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy* (Washington, D.C.: United States Institute of Peace Press, 1999), p.204

²⁹ Michael Lund, *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy* (Washington, D.C.: United States Institute of Peace Press, 1999), p.203.

³⁰ Peter Viggo Jakobsen, "Coercive Diplomacy," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), p.476.

have claimed that persuasion must be backed up by "a big stick" (following Theodore Roosevelt's policy: "speak softly, and carry a big stick."). Jakobsen cites UN Secretary General Kofi Annan who once said: "if diplomacy is to succeed, it must be backed both by force and by fairness".

Jakobsen offers the following comparison of diplomacy, non-military and military coercion and war (see Table 2):

Dimension	<i>Diplomacy</i>	<i>Military coercion</i>		<i>Full-scale war</i>
		<i>Coercive diplomacy</i>	<i>Compellence / Coercive war</i>	
Instruments	Persuasion, positive incentives, assurances	(Military) threats and/or symbolic use of force, assurances	Military threats and use of limited force	Decisive and brute force
Purpose	Peaceful settlement of disputes	Obtaining compliance without escalation	Obtaining compliance without defeating the enemy	Imposing compliance through military defeat
Requirements for success	Adversary cooperation and overlapping interests	Adversary cooperation and overlapping interests	Adversary cooperation and overlapping interests	Control: adversary cooperation and common interests are not required

Table 2. Comparison of diplomacy, coercion and war (Jakobsen, 2016)³¹

As Table 2 shows, coercive diplomacy seeks to establish cooperation rather than impose controls even if it involves use of limited force. When decisive force is used, like it was used by NATO in Kosovo's conflict in 1999, this shall no longer be viewed as diplomacy or military coercion; rather, it shall be recognised as a full-scale war, especially taking into consideration that the NATO intervention was done without a UN mandate.

1.3 Legal Implications of Humanitarian Intervention

Humanitarian intervention is permitted only for the purpose of self-defense in response to an armed attack or in case of massive and sustained abuse of human rights³². Chapter VII in the Charter of the UN relates to the preventive and enforcement measures against a state that must be taken by the international community in case of a conflict that poses threats to peace and can be regarded as an act of aggression.

Under Article 39 of the UN Charter, it is the task of the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations on the maintenance or restoration of international peace and security³³.

³¹ Peter Viggo Jakobsen, "Coercive Diplomacy," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), p.477.

³² Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), pp.224-227.

³³ UN Charter (26 June 1945), accessed February 12, 2018, <http://www.un.org/en/sections/un-charter/un-charter-full-text/>.

Articles 41 and 42 establish definite measures that can be taken by the international community to restore peace in a war conflict. The measures that do not involve the use of armed force may include partial or complete interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations (Article 41). If these measures do not lead to a desired result, then more drastic measures can be taken to stop the conflict, for example, demonstrations, blockade or the deployment of air, sea, or land forces of Members of the United Nations (Article 42)³⁴.

The UN Charter also protects the right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations (Article 51). Importantly, measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council. And if the Security Council decides undertake additional measures to maintain or restore international peace and security as well, this right can be exercised in line with the UN Charter³⁵.

In accordance with Article 46 of the Charter of the UN, decisions on the application of collective armed force are made only by the UN Security Council with the assistance of a specially formed Military Staff Committee³⁶. This means that humanitarian intervention must be authorized by the UN Security Council to be conducted within a legal framework.

The UN Security Council has to coordinate its actions with the International Criminal Court that investigates war crimes and prosecutes war criminals³⁷. Adjudication and arbitration can also take place in the International Court of Justice and arbitration panels³⁸. Because the five permanent members of the UN Security Council, namely, France, the Republic of China, Russia, the UK and the US, have veto power, the UN can be regarded a limited collective security organization if it acts alone³⁹.

It is necessary to distinguish between the following modes of military intervention to provide for legality of a state's interference in another state's affairs:

- unilateral intervention (carried out by one intervenor without asking for permission);
- bilateral intervention (based on an agreement between the intervenor and the country in which the intervention is made);
- plurilateral intervention (conducted by an ad hoc group of countries or a security alliance);
- regional intervention (carried out by a regional organization); or
- multilateral intervention (i.e. UN sanctioned operation by collective international forces)⁴⁰

³⁴ UN Charter (26 June 1945), accessed February 12, 2018, <http://www.un.org/en/sections/un-charter/un-charter-full-text/>.

³⁵ UN Charter (26 June 1945), accessed February 12, 2018, <http://www.un.org/en/sections/un-charter/un-charter-full-text/>.

³⁶ UN Charter (26 June 1945), accessed February 12, 2018, <http://www.un.org/en/sections/un-charter/un-charter-full-text/>.

³⁷ Chris Brown with Kirsten Ainley, *Understanding International Relations* (Basingstoke: Palgrave Macmillan, 2005), pp.215-217.

³⁸ Karen A. Mingst and Margaret P. Karns, *The United Nations in the 21st Century* (Abingdon: Westview Press, 2012), p.141.

³⁹ Karen A. Mingst and Margaret P. Karns, *The United Nations in the 21st Century* (Abingdon: Westview Press, 2012), p.143.

⁴⁰ Bjorn Hettne and Fredrik Soderbaum, "Intervening in Complex Humanitarian Emergencies: The Role of Regional Cooperation," *The European Journal of Development Research* 17 (2005): p.454.

It is usually unilateral and most plurilateral interventions that lack legality in view of the norms of international humanitarian law.

Peacekeeping can serve as an effective coercive diplomatic alternative to secure peace before a full-fledged humanitarian war is started. If preventive diplomacy aims to resolve disputes before violence breaks out, peacemaking and peacekeeping are resorted to during the conflict with the purpose to halt it and to prevent its recurrence in the near future (para.20 of the UN Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping)⁴¹.

Peacekeeping is an action that, legally, lies between peaceful settlement of a conflict (Chapter VI of the UN Charter) and military enforcement (Chapter VII of the UN Charter)⁴². The UN peacekeeping, for example, involves military personnel without enforcement powers, which is responsible for the observation of ceasefires and separation of forces by establishing buffer zones after the war. Its main goal is to open and guard food and medical supply lines, create safe heavens as well as protect aid workers and refugees.

Peacekeeping differs from humanitarian war in that it takes place at full consent of all the states concerned, implies impartial procedures and uses military force only as a last resort and in self-defense or in defense of the mandate⁴³. Peacekeeping missions are generally conducted by the UN peacekeepers (Blue Berets) or by other military organizations, like NATO or EUFOR RCA.

In summary, the issue of humanitarian intervention has to be approached very accurately as there must be a balance between national sovereignty, protection of human rights in violent conflicts and maintenance of international order by diplomatic means. The examples of intervention in Chapter 1 have shown that unilateral interference in national conflicts without a UN mandate can be as dangerous as the international community's inactivity. The international law as well as principles of preventive diplomacy covered in this chapter have demonstrated that there is a set of accepted procedures and measures, including negotiations, third-party arbitration, sanctions and pre-emptive peacekeeping missions that need to be taken first to resolve a conflict without the use of international armed force or with the use of limited armed force.

Importantly, the discussion of the application of international law for humanitarian purposes in Chapter 1 has suggested that the NATO's intervention in Kosovo in 1999 contained more military measures than it would be deemed allowable in accordance with the principles of preventive diplomacy. Moreover, given that the NATO's intervention was also unauthorized by the UN Security Council, it can be concluded that it was unlawful under international law. The following chapter provides a historical background to Kosovo's conflict and points out the NATO's actions that exacerbated the conflict by increasing suffering among the civil population.

⁴¹ United Nations (17 June 1992) An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping, accessed February 26, 2018, <http://www.un-documents.net/a47-277.htm>.

⁴² Karen A. Mingst and Margaret P. Karns, *The United Nations in the 21st Century* (Abingdon: Westview Press, 2012), pp.157-158.

⁴³ Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2003), p.266.

2. HISTORICAL BACKGROUND AND LEGAL FRAMEWORK OF NATO'S INTERVENTION IN KOSOVO'S CONFLICT

2.1 NATO's Interventionist Policy

*"We are coming to realize that foreign operations in today's world call for a total diplomacy. ... American ambassadors can no longer be content with wining and dining, reporting, analyzing and cautiously predicting."
-- Chester B. Bowles⁴⁴*

In today's increasingly complex security environment, crisis diplomacy has become a widely applied practical strategy. NATO, for instance, views crisis diplomacy as one of its fundamental security tasks that can be carried out by means of both military and non-military tools to resolve conflicts of political, military or humanitarian nature⁴⁵.

NATO reserves the right to use any appropriate measures to intervene in violent conflicts, should the organization decide that they "could pose a threat to the security of the Alliance's territory and populations"⁴⁶. In accordance with the North Atlantic Treaty of 4 April 1949, an armed attack against any one of the states in Europe or North America would be considered an attack against them all and should be immediately repulsed by collective force⁴⁷.

In pursuing its organizational goals, NATO generally complies with UN rules and international laws, intervening in international conflicts as a peacekeeping force on the basis of UN mandates and often joining the UN peacekeeping forces that are already present in the conflict area. UN Resolution 908 (1994), for example, authorized US-led forces to take "all necessary measures" to extend close air support in defense of UNPROFOR personnel in Croatia⁴⁸. NATO's mission in Kosovo following the adoption of the UN Security Council Resolution 1244 on 10 June 1999 is also regarded to be one of such UN authorized peacekeeping operations.

The 11-week NATO's aerial bombardment of Yugoslavia in the period from 24 March till 10 June 1999, called *Operation Allied Force*, nevertheless, was done without a UN mandate. NATO justified its military intervention as a humanitarian war that had to be fought "to end the ethnic cleansing and repression of human rights perpetrated by the government of the Federal Republic of Yugoslavia" after diplomatic negotiations failed⁴⁹. Yet, this case created a dangerous precedent of the military organization's unauthorized forced intervention into a country that did not pose any open threat to its member states, and this precedent had taken place before the RtoP initiative was proposed.

The following subchapter discusses Kosovo's case in greater detail.

⁴⁴ Chester B. Bowles, cited in Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy: Its evolution, theory and administration* (London: Routledge, 2011), p.185.

⁴⁵ NATO (27 February 2018) *Crisis Management*, accessed March 2, 2018, https://www.nato.int/cps/en/natolive/topics_49192.htm.

⁴⁶ NATO (27 February 2018) *Crisis Management*, accessed March 2, 2018, https://www.nato.int/cps/en/natolive/topics_49192.htm.

⁴⁷ The North Atlantic Treaty (4 April 1949), accessed February 15, 2018, https://www.nato.int/cps/ic/natohq/official_texts_17120.htm.

⁴⁸ Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), p.226.

⁴⁹ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), p.3.

2.2 Kosovo's Case (1999)

*"From the start the Kosovo problem has been about how we should react when bad things happen in unimportant places."
-- Thomas Friedman⁵⁰*

2.2.1 Historical Background of the Conflict

The Socialist Federal Republic of Yugoslavia was one of the states that quickly disintegrated after the collapse of the USSR. After the death of Yugoslavia's President Josip Broz Tito in 1980, the central government lost the ability to mediate multi-ethnic conflicts. The rise of nationalism led to the breakup of the country into five states: Serbia and Montenegro, Croatia, Slovenia, Macedonia, Bosnia and Herzegovina⁵¹.

After Croatia and Slovenia declared independence from Yugoslavia in 1991, ethnic clashes took place between Serbs and Croats in Croatia. Ethnic Serbs created their own state Republic of Serbian Krajina in Serb-populated regions and resisted the Croatian forces who wanted to return the region back under Croatian jurisdiction.

After Macedonia declared independence in 1991, US forces were deployed under the UN mandate to monitor Macedonia's northern borders with the Republic of Serbia. After the Yugoslav Army refused to abandon its military base at the Straza Mountain, the UN Security Council adopted Resolution 721 (27 November 1991) to establish peacekeeping operations in Yugoslavia.

The worst ethnic fighting, however, occurred between Serbs, Croats and Muslims in Bosnia, the most heterogeneous region of the former Yugoslavia. Immediately after Bosnia and Herzegovina declared independence in spring 1992, Bosnian Serbs declared independent the Serbian Republic within Bosnia where Muslims constituted 44%, Serbs 31% and Croats 17% of the population.

While Bosnia and Herzegovina's independence was recognized by the West, Serb-led Federal Republic of Yugoslavia was expelled from the UN, although it claimed that it should be a sole legal successor to the Socialist Federal Republic of Yugoslavia. Summer 1992 witnessed the first reports of ethnic cleansing whereby Bosnian Muslims were killed or driven away from the area of their inhabitancy. In winter 1992-1993, Serb forces were found to block UN humanitarian convoys that were directed into the conflict area to help suffering Muslims. In spite of their protests, some Bosnian cities were declared by the UN as safe areas for Muslims.

After Bosnian Serb parliament rejected Vance-Owen Peace Plan that proposed to divide Bosnia along ethnic lines, Croats fighting with Muslims against Serbs began their own ethnic cleansing campaign. In autumn 1993, Bosnian army made territorial gains against Croatian separatists, and in summer 1994, it captured territory around Bihac. When Serbs recaptured the region around Bihac in autumn 1994, NATO bombed runways of Serb-controlled airport in Krajina in retaliation. Serbs held more than 300 UN troops hostage.

On 11 July 1995, the UN safe area Srebrenica in Eastern Bosnia was taken by Serbs, as a result of which 6000 Muslim men were killed in the worst massacre in Europe since the World War

⁵⁰ Thomas Friedman, cited in Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (London: Pluto Press, 1999), p.5.

⁵¹ Joseph S. Nye, *Understanding International Conflicts: An Introduction to Theory and History* (London: Pearson, 2007), pp.158-160.

II. In August-September 1995, Croatian forces recaptured Krajina from Serbs and made local Serbs flee from massive ethnic cleansing. NATO attacked Bosnian Serbs from air.

In November 1995, all three parties - Bosnia, Serbia and Croatia - sign the Dayton Peace Accord to stop the Bosnian war. NATO's peacekeeping forces were sent to Bosnia.

According to the Independent International Commission on Kosovo, the fact that the Dayton negotiations did not include Kosovo as a separate region played a crucial role in future conflict escalation. The Dayton Peace Accord formally legitimized Kosovo as part of the Federal Republic of Yugoslavia, and Germany even repatriated 130,000 Kosovar Albanians. The Kosovar Albanians realized that Kosovo was off the current international agenda and that, from now on, violent resistance among Kosovars was seen as the only politically realistic path to independence⁵².

Thus, two years later, in 1996, the Kosovo Liberation Army (KLA), which was founded in 1991, made as an insurgency against Belgrade, following the long-lasting nationwide restrictions for Kosovar Albanians to have public work, to teach children in their language and to read newspapers or watch television in Albanian. The restrictions were clearly discriminatory based on ethnicity and language, taking into account the fact that, according to 1991 census conducted in the Federal Republic Yugoslavia, 82% of Kosovo population were Albanians and 10% Serbs⁵³.

The escalating conflict was observed and reported upon by many NGOs, including Human Rights Watch, Mercy Corps, Amnesty International, human rights groups in Kosovo and in Belgrade such as the Humanitarian Law Foundation and the Yugoslav Red Cross. Some NGOs called for a UN protectorate, for example, the UN Peoples Organization, the Transnational Foundation in Sweden, the Helsinki Citizens Assembly and the Minnesota Advocates for Human Rights. The involvement of some other NGOs was more profound: for instance, the *Comunita di Sant'Egidio* negotiated the education agreement in 1996, whereas the Open Society Foundation of Belgrade (OSF) supported a parallel education system to foster dialogue among Albanians and Serbs⁵⁴.

Yet, in 1998, the President of Serbia Slobodan Milosevic sent troops to Kosovo and rejected international involvement to resolve the conflict. The reports on the internal armed conflict in the period from February 1998 till March 1999 in Kosovo abounded in details of crimes committed by both parties of the conflict. The Serb forces and authorities were found to have killed civilians, including dozens of women and children, attacked the fleeing civilians, attacked and restricted humanitarian workers, made arbitrary arrests and detentions, restricted the media, and initiated forced disappearances. Reported KLA abuses focused predominantly on abductions of Serbs, Roma and collaborating Albanians, excessive use of force, arbitrary detentions, disappearances and extra-judicial executions⁵⁵.

The escalation of the internal armed conflict had significant consequences. Before the Drenice/Drenica violence and the Yugoslav police brutality against the peaceful student protests in Prishtina/Pristina, support of the KLA was minimal. The KLA had no political

⁵² Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000), p.59.

⁵³ Adam Roberts, "NATO's Humanitarian War over Kosovo," *Survival* 41 (1999): p.120.

⁵⁴ Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000), p.60.

⁵⁵ Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000), pp.69, 72.

programme, official representation or international recognition; it had no control over military forces of any significance either. But the reports of massacres in Drenice/Drenica and Prishtina/Pristina suddenly made the KLA the main driving force of national liberation in the eyes of the majority of Kosovar Albanians. As soon as the KLA claimed growing political power, support for the LDK party's non-violent parallel state strategy diminished⁵⁶.

After Yugoslav authorities rejected an external peacekeeping force in line with the Rambouillet Accords on 23 March in Paris, NATO began airstrikes throughout Yugoslavia. The phased air operation, called *Operation Allied Force*, was initiated by NATO's Supreme Allied Commander Europe (SACEUR) Gen. Wesley Clark⁵⁷. NATO had been present in the region as a peacekeeping force already since January 1999 to ensure ceasefire between the parties of the conflict. It is important to note here that at that moment NATO installed the peacekeepers by force without obtaining the UN authorization.

The NATO's unauthorized military intervention in the period from 24 March till 10 June 1999 was accompanied by many aggravating crimes as well. Apart from the fact that the intervention itself was unlawful under international law since there was no UN mandate for it, there were cases of crime against civilians committed by NATO forces. In the beginning, the primary goals of the air forces from thirteen NATO Member States that participated in the operation (Belgium, Canada, Denmark, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States) were airfields, command and control sites, barracks and headquarters of the special police to neutralize the Yugoslav air defense system. However, later NATO launched strategic attacks to cut the Yugoslav army and MUP (Ministry of Interior) forces off their military-industrial infrastructure, supply routes and resources, including news media, which could not but hurt civilians⁵⁸.

Throughout the operation, the air attacks by NATO significantly increased not only in terms of goals but also in terms of intensity. The rate at which targets were hit increased from initial eight hours per day to twenty-four hours per day. By the end of the conflict, NATO had attacked over 900 targets, flying a total of 37,465 sorties. Although NATO claimed that all precautionary measures had been taken to minimize civilian casualties, Human Rights Watch reported that 489-528 Yugoslav civilians were killed in the ninety separate incidents in *Operation Allied Force*⁵⁹. The deaths resulted from attacks on a range of targets, under different circumstances and from a variety of munitions. The people were killed in Serbia, Montenegro and Kosovo, with up to 60 percent of the total number of deaths being in Kosovo. A third of the incidents were a result of attacks on targets in densely populated urban areas.

The Kumanovo Treaty signed on 9 June 1999 in Kumanovo, Macedonia, concluded the Kosovo war as the Yugoslav forces agreed to withdraw from Kosovo. In accordance with this treaty, Kosovo was placed under UN-mandated administration and under the military protection of a NATO-led international peacekeeping force Kosovo Force (KFOR).

⁵⁶ Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000), p.70.

⁵⁷ Human Rights Watch (2000) *The Crisis in Kosovo*, accessed 10 May, 2018, <https://www.hrw.org/reports/2000/nato/Natbm200-01.htm>.

⁵⁸ Human Rights Watch (2000) *The Crisis in Kosovo*, accessed 10 May, 2018, <https://www.hrw.org/reports/2000/nato/Natbm200-01.htm>.

⁵⁹ Human Rights Watch (2000) *The Crisis in Kosovo*, accessed 10 May, 2018, <https://www.hrw.org/reports/2000/nato/Natbm200-01.htm>.

In 2001, the UN Supreme Court based in Kosovo maintained that during the Kosovo conflict more than 13 thousand people were killed or went missing, with over 1.2 million Kosovo Albanians being displaced and over 200 thousand non-Albanians fleeing the region.

In May 1999, the UN war crimes tribunal indicted Slobodan Milosevic as war criminal, but his trial in the Hague would take place only in 2002.

In 2003, the Federal Republic of Yugoslavia was officially renamed Serbia and Montenegro. In 2006, however, Montenegro became an independent nation, and Serbia became the legal successor of Serbia and Montenegro.

The Republic of Kosovo declared independence from Serbia in 2008, gaining recognition from more than a hundred states worldwide. Kosovo remains a disputed territory till present, as Serbia has not recognized it as an independent state. Serbia has recognized the administration of Kosovo's elected government but it continues to claim the territory as its own Autonomous Province of Kosovo and Metohija.

2.2.2 Legal Framework Underlying Military Intervention in Kosovo (1999)

According to NATO, the 1999 military intervention in Kosovo was determined by the escalation of conflict between Serbian military and police forces and Kosovar Albanian forces during 1998⁶⁰. The clashes between the conflicting parties that year resulted in the deaths of over 1 500 Kosovar Albanians and forced 400 000 people from their homes.

On 28 May 1998, NATO set out two major objectives to resolve the crisis in Kosovo:

- to help to achieve a peaceful resolution of the crisis by *contributing to the response of the international community*; and
- to promote stability and security in neighboring countries, especially Albania and the former Yugoslav Republic of Macedonia⁶¹.

UN Security Council **Resolution 1199 (1998)** of 23 September 1998 condemned "the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties"⁶². The resolution indicated that the conflict had already led to the displacement of over 230,000 persons from their homes, many of whom fled to Albania, Bosnia and Herzegovina and other European countries as a result of the use of force in Kosovo. Up to 50,000 of refugees were estimated to have no shelter and other basic necessities.

Therefore, Resolution 1199 (1998) required that all parties, groups and individuals should immediately cease hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, and that there should be established meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership. Both parties of the conflict were required to take immediate steps to improve the humanitarian situation and to reduce the risks of the impending humanitarian catastrophe. The dialogue between the parties was to be entered immediately, without preconditions and with international involvement"⁶³.

⁶⁰ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), p.124.

⁶¹ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), p.124.

⁶² UN Security Council, *Resolution 1199 (1998)*, (23 September 1998), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf>.

⁶³ UN Security Council, *Resolution 1199 (1998)*, (23 September 1998), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf>.

Resolution 1199 (1998) recalled **Resolution 1160 (1998)** of 31 March 1998, which condemned "the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army or any other group or individual and all external support for terrorist activity in Kosovo" and called for a meaningful dialogue on political status issues between the authorities in Belgrade and the leadership of the Kosovar Albanian community⁶⁴. Besides the dialogue, the resolution required withdrawal of the special police units and cessation of action by the security forces affecting the civilian population, access to Kosovo for humanitarian organizations and representatives of Contact Group and other embassies, return of OSCE long-term missions as well as organisation of a mission to Kosovo by the United Nations High Commissioner for Human Rights⁶⁵.

Since the above requirements set forth in Resolution 1160 (1998) had not been met, Resolution 1199 (1998) repeatedly required the cessation of action by the security forces affecting the civilian population and withdrawal of the special police units, continuous international monitoring in Kosovo by the European Community Monitoring Mission and diplomatic missions accredited to the Federal Republic of Yugoslavia as well as facilitation of the safe return of refugees and displaced persons to their homes, in agreement with the UN Refugee Agency (UNHCR) and the International Committee of the Red Cross (ICRC)⁶⁶.

After a further deterioration of the situation in Kosovo, despite the above US Security Council resolutions, the NATO Council authorized **Activation Orders** for air strikes on 13 October 1998. The orders were meant to support diplomatic measures undertaken to make the Milosevic regime withdraw forces from Kosovo, to end the violence and facilitate the return of refugees to their homes. After President Milosevic agreed to comply, the air strikes were called off⁶⁷.

On 24 October 1998, the UN Security Council adopted **Resolution 1203 (1998)**, which condemned "all acts of violence by any party, as well as terrorism in pursuit of political goals by any group or individual, and all external support for such activities in Kosovo, including the supply of arms and training for terrorist activities in Kosovo", being "deeply alarmed and concerned at the continuing grave humanitarian situation throughout Kosovo and the impending humanitarian catastrophe"⁶⁸. While calling for a dialogue between the conflicting parties, the resolution also asked Member States and international organizations to make available personnel to the OSCE Verification Mission in Kosovo and provide adequate resources for humanitarian assistance in the region in line with the United Nations Consolidated Inter-Agency Appeal for Humanitarian Assistance Related to the Kosovo crisis.

In accordance with Resolution 1203, the OSCE established a Kosovo Verification Mission (KVM) to observe compliance on the ground, while NATO established an aerial surveillance mission and a special military task force to assist the OSCE deployed in the former Yugoslav Republic of Macedonia. These steps did not help resolve the conflict, and on 30 January 1999

⁶⁴ UN Security Council, *Resolution 1160 (1998)*, (31 March 1998), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/090/23/PDF/N9809023.pdf>.

⁶⁵ UN Security Council, *Resolution 1160 (1998)*, (31 March 1998), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/090/23/PDF/N9809023.pdf>.

⁶⁶ UN Security Council, *Resolution 1199 (1998)*, (23 September 1998), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf>.

⁶⁷ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), p.125.

⁶⁸ UN Security Council, *Resolution 1203 (1998)*, (24 October 1998), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/321/21/PDF/N9832121.pdf>.

NATO's Contact Group principally agreed to use air strikes if required, issuing a warning to both sides in the conflict⁶⁹.

During negotiations in Rambouillet near Paris from 6 February to 18 March 1999, the Kosovar Albanian delegation signed the proposed peace agreement, but the Serbian delegation did not. Immediately afterwards, Serbian military and police forces intensified operations against the ethnic Albanians in Kosovo, moving extra troops and tanks into the region, and on 20 March, the OSCE KVM was withdrawn from the region, facing insurmountable obstruction from Serbian forces. After President Milosevic refused to stop attacks on the Kosovar Albanians under the threat of imminent NATO air strikes, on 23 March the order to carry out air strikes was given⁷⁰.

Although there was a public debate on the legality of NATO's actions, there was no denouncement of them on the part of the UN Security Council. The only resolution on Kosovo's conflict that was adopted by the UN Security Council during the intervention was **Resolution 1239 (1999)** of 14 May 1999. The resolution expressed grave concern at the humanitarian catastrophe in and around Kosovo and reminded that all Member States urgently needed provide humanitarian assistance in accordance with:

- the Charter of the United Nations;
- the Universal Declaration of Human Rights;
- the international covenants and conventions on human rights;
- the Conventions and Protocol relating to the Status of Refugees;
- the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977; and
- other instruments of international humanitarian law⁷¹.

The above pieces of international law, together with the mentioned UN resolutions, formed the main legal framework underlying the international community's intervention in Kosovo's conflict.

On legal grounds, NATO-led international peacekeeping force, the KFOR, entered Kosovo on 11 June 1999, two days after the signing of the **Kumanovo Treaty** on 9 June 1999 in Kumanovo, Macedonia, and one day after the adoption of **Resolution 1244 (1999)** by the UN Security Council. The resolution was adopted on 10 June 1999 by 14 members, with China abstaining from, but not vetoing, the resolution.

With the adoption of Resolution 1244 (1999), the UN Security Council recalled its resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998, 1203 (1998) of 24 October 1998 and 1239 (1999) of 14 May 1999, admitting that "there has not been full compliance with the requirements of these resolutions"⁷².

Resolution 1244 (1999) primarily aimed to "to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes."

To ensure peace in the war-torn region and the safety and security of international personnel to be deployed there under Chapter VII of the Charter of the UN, Resolution 1244 (1999) called

⁶⁹ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), pp.125-126.

⁷⁰ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), p.126.

⁷¹ UN Security Council, *Resolution 1239 (1999)*, (14 May 1999), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/143/75/PDF/N9914375.pdf>.

⁷² UN Security Council, *Resolution 1244 (1999)*, (10 June 1999), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf>.

for an immediate end to violence and repression in Kosovo and for a phased withdrawal from Kosovo of all military, police and paramilitary Yugoslav forces. The resolution permitted a return to Kosovo of an agreed number of withdrawn Yugoslav and Serb military and police personnel, decided on the deployment of international civil and security presences in Kosovo, under United Nations auspices and, notably, authorized UN Member States and relevant international organizations to establish the international security presence in Kosovo⁷³.

In accordance with Resolution 1244 (1999), the responsibilities of the international security presence deployed in Kosovo included deterrence of renewed hostilities, demilitarisation of the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups, establishment of a secure environment for refugees and displaced persons, ensuring public safety and order until the arrival of the international civil forces, monitoring borders as well as protection of the freedom of movement⁷⁴.

Meanwhile, the responsibilities of the international civil presence in line with Resolution 1244 (1999) included promotion of the establishment of substantial autonomy and self-government in Kosovo, support of the consolidation of Kosovo's local provisional institutions, facilitation of a political process of determining Kosovo's future status in line with the Rambouillet accords (S/1999/648) and the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement, thereby legitimising Kosovo's right to autonomy. International civil forces also provided humanitarian and disaster relief aid, helped with reconstruction of key infrastructure, protected human rights by assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo as well as helped maintain civil law and order, including the establishment of local police forces⁷⁵.

Thus, NATO's presence in Kosovo *after the adoption of Resolution 1244* was lawful as it was authorized by the UN Security Council and was carried out in full compliance with the provisions of Chapter VII of the Charter of the UN.

In summary, Kosovo's long-lasting conflict was mainly caused by ethnic intolerance and confrontation between the Yugoslav government and local Kosovar Albanian forces that strove for independence. The conflict could be stopped neither by internal forces nor by the international community, which did not recognize the strength of the KLA and overestimated the official Yugoslav elite's ability to restrain the conflict without excessive use of force that led to one of the greatest humanitarian catastrophes in Europe after World War II.

NATO's unilateral decision to military intervene in Kosovo in 1999 should be regarded unlawful by international law because it was unauthorized by the UN and because it led to a big number of deaths among civilians. The example of NATO's intervention, covered at length in Chapter 2, demonstrates that both international law and the rule of law set by the strongest military power may have flaws that prevent the international community's timely intervention in war conflicts and exacerbate human suffering in war-torn regions. The following chapter analyses the NATO's interventionist policy against the norms of international law and describes the consequences of Kosovo's conflict resolution for international and humanitarian law.

⁷³ UN Security Council, *Resolution 1244 (1999)*, (10 June 1999), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf>.

⁷⁴ UN Security Council, *Resolution 1244 (1999)*, (10 June 1999), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf>.

⁷⁵ UN Security Council, *Resolution 1244 (1999)*, (10 June 1999), accessed 3 March 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf>.

3. ANALYSIS OF THE OBJECTIVITY OF THE CRITERIA FOR HUMANITARIAN INTERVENTION IN KOSOVO

3.1 Adherence of the USA to the Rule of Law in International Affairs

*"We stand today at a unique and extraordinary moment... Today that new world is struggling to be born, a world quite different from the one we've known. A world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak... America and the world must support the rule of law -- and we will."
-- George Bush⁷⁶*

Yoram Dinstein is one of the most prominent scholars studying international law applicable to war conflicts. His areas of interest include the *jus ad bellum* (the law of resort to the use of armed force); the *jus in bello* (the law of armed conflict that regulates the deployment of armed force); and international human rights⁷⁷. Referring to Dinstein's works, Murphy argues that it is in these three areas that the USA has repeatedly demonstrated inability (or reluctance) to adhere to the rule of law in international affairs⁷⁸.

The United States has often proclaimed its support for the rule of law in international affairs. George Bush's quotation in the beginning of the chapter is one of US presidents' declarations on the USA's responsibility for global peace and justice and support of the rule of law in international affairs. Perhaps, the reason why some countries' actions in war conflicts are often debatable is the problem of terminology (here, "the rule of law") and interpretation of existing legislation, which sometimes has self-contradictory provisions.

So far, the rule of law principles have been explicitly laid down by Richard H. Fallon. The rule of law is claimed to serve three main purposes:

- 1) protect against anarchy and the Hobbesian war of all against all;
- 2) ensure that people know in advance the legal consequences of various actions and plan their steps accordingly; and
- 3) guarantee against official arbitrariness⁷⁹.

Taking into account the above purposes of the rule of law, Fallon has worked out five elements that constitute the rule of law:

- a) capacity of legal rules and standards to guide people in the conduct of their affairs (to comply with law, people must understand it);

⁷⁶ George Bush, *Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit*, (11 September 1990), The American Presidency Project, accessed 2 April 2018, <http://www.presidency.ucsb.edu/ws/?pid=18820>.

⁷⁷ John F. Murphy, "Is US Adherence to the Rule of Law in International Affairs Feasible?" in *International Law and Armed Conflict: Exploring the Faultlines*, ed. Michael N. Schmitt and Jelena Pejic (Leiden: Martinus Nijhoff Publishers, 2007): p.197.

⁷⁸ John F. Murphy, "Is US Adherence to the Rule of Law in International Affairs Feasible?" in *International Law and Armed Conflict: Exploring the Faultlines*, ed. Michael N. Schmitt and Jelena Pejic (Leiden: Martinus Nijhoff Publishers, 2007): p.197.

⁷⁹ Richard H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97 (1997): pp.7-8.

- b) efficacy (people must obey, and be guided by, law);
- c) stability (to plan and coordinate actions over time, people must be guided by reasonably stable law);
- d) supremacy of legal authority (everyone should be equal before law: the law should rule officials and ordinary citizens); and
- e) impartial justice (courts should follow fair procedures in law enforcement)⁸⁰.

Perfectly realised, the rule of law would then have the following characteristics:

- guiding people in the manner consistent with the originally intended and understood meaning of the directives devised by legitimate, democratically-accountable lawmaking authorities;
- comprising intelligible rules that bind citizens, governmental officials and judges alike;
- interpreted in line with publicly accessible norms and commonly accepted reasoning; and
- conforming to legitimate public purposes and shared principles of political morality⁸¹.

When any of the above elements of the law is not satisfied, the rule of law cannot be completely realized, but it still could be approximated rather than abandoned altogether to preserve justice and order.

As pointed out by Tamanaha, most laws are followed most of the time, but the most powerful states may disregard international law, for example, by leaving international organizations if it is believed to be in their national interest at any given time (including the preservation of the regime in power). "Realpolitik remains a predictable mainstay of international law," argues Tamanaha⁸². And while certain subjects, especially relating to commerce, have recently been treated remarkably more compliant with transnational laws, other subjects, like human rights, are perceived to have a more symbolic meaning and are often respected less.

As Waldron succinctly remarks, the rule of law is often cited by media and exploited by political opposition as a matter of reproach to the regime, as a benchmark of political legitimacy⁸³. The ideal of the rule of law is allegedly deployed to protect democracy, human rights and free market economy, but one may only guess what real goals are pursued by those who claim that a society may be in a crisis of the rule of law because claims about the breach of the rule of law are varying from case to case, often being, again, self-contradictory in form.

As history shows, the principle of the rule of law is not always applied fairly by lawmakers or interpreted correctly by parties, especially in war conflicts. Since the 1990s, the Western coalition headed by the USA and its NATO allies has significantly altered the interpretation of the normative framework that regulates global affairs⁸⁴. Being the dominant global military, political and economic force, the USA, under the disguise of collective NATO forces, has

⁸⁰ Richard H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97 (1997): pp.8-9.

⁸¹ Richard H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97 (1997): p.38.

⁸² Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), p.128.

⁸³ Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43 (2008): p.3.

⁸⁴ Srdjan Cvijic, "Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo," *German Law Journal* 8 (2007): p.58.

intervened in domestic affairs all over the world by using unlimited force contrary to the norms set out in the UN Charter that regulate actions in humanitarian crises.

The very existence of the United States as the superpower immediately after the World War II secured its strong support of the rule of law concept in international relations. As the predominant authority in world affairs, the USA had a so-called "automatic majority" in the UN and exerted overriding influence in major international institutions, using an opportunity to participate in the development of law compatible with its national interests⁸⁵. With the passage of time, however, the USA gradually began to lose the control over the international legal process as other superpowers were rising and together with the third world states became a majority in the UN. It has led to a situation today where the UN Security Council, for example, is often unable to maintain international peace because there would not be unanimity of view among its permanent members⁸⁶.

In many cases since the 1990s, the USA has acted unilaterally, which increases a chance of arbitrary, or even unlawful, decisions. Allott explains the US role of the "world's policeman" as a result of its ruling elite's desire to spread democracy and capitalism in most countries, which, they believe, will produce an orderly world, capable of self-ordering and self-improvement⁸⁷. All the USA has achieved by this policy is bigger alienation from the countries in many parts of the world that have directly experienced the "policeman's" unrelenting pressure:

On issue after issue, the United States has found itself increasingly alone, with one or a few partners, opposing most of the world's states and peoples. These issues include UN dues; sanctions against Cuba, Iran, Iraq, and Libya; the land mines treaty; global warming; an international war crimes tribunal; the Middle East; the use of force against Iraq and Yugoslavia; and the targeting of 35 countries with new economic sanctions between 1993 and 1996⁸⁸.

Notably, the USA interferes in domestic affairs of regions that are strategically important, which means that geo-politics and geo-economics play a more important role in the US interventionist policy than alleged extreme human rights violations. The US tactical approach to the oil-rich Middle East has severely destabilised the region and increased resentment towards the superpower. During his presidency, George Bush himself openly stressed the importance of diversifying US oil supplies and securing oil resources⁸⁹. The US invasion of Iraq in 2003 was allegedly done in the name of fighting a global war against terror and stopping the spread of weapons of mass destruction, but many academics disapprove of the intervention and point to its drastic consequences, namely, the collapse of the Iraqi state, a violent civil war,

⁸⁵ John F. Murphy, "Is US Adherence to the Rule of Law in International Affairs Feasible?" in *International Law and Armed Conflict: Exploring the Faultlines*, ed. Michael N. Schmitt and Jelena Pejic (Leiden: Martinus Nijhoff Publishers, 2007): p.199.

⁸⁶ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), pp.2-3.

⁸⁷ Philip Allott, "The True Function of Law in the International Community," *Indiana Journal of Global Legal Studies* 5 (1998): p.391.

⁸⁸ Samuel P. Huntington, cited in John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004), p.4.

⁸⁹ Caroline Kennedy-Pipe, "American foreign policy after 9/11," in *US Foreign Policy*, ed. Michael Cox and Doug Stokes (Oxford: Oxford University Press, 2012), p.379.

and tens of thousands of deaths⁹⁰. The war on terror challenged many accepted legal norms, including the prohibition on torture⁹¹.

Kosovo also has a significant strategic location in the Balkans, serving as a link between central and southern Europe and having access to the Adriatic Sea and the Black Sea. After the Kosovo war, NATO established its headquarters for KFOR's Multinational Battle Group East (MNBG-E) in camp Bondsteel near Ferizaj in the eastern part of Kosovo. With the facilities for up to 7,000 soldiers, camp Bondsteel is now the largest US base in the Balkans⁹².

The USA's frivolous interpretation of the rule of law in international affairs shall not be ignored. As highlighted by Harel and Sharon, the violation of moral rules in extreme cases is not so atrocious as their principled or rule-governed violation⁹³. There must be a clear distinction between acts performed under the direction of principles or rules and unprincipled, context-generated acts. When the USA or the NATO's alliance claim that they have the *right to break* the international law under whatever circumstances, the very fact of such a claim shall sound alarming for the international community.

According to Tamanaha, this discrepancy with interpreting and abiding by international law can be explained by conflicting views on traditional and modern understandings of law⁹⁴. The traditional view maintains that law is limited by principles of reasoning and is designed on the basis of community norms clearly stipulating the good and right. Meanwhile, the instrumental view entails only means-ends reasoning: once an end has been decided upon, law can be used in any way possible to advance the designated end, without limit. Instrumentalists suppose that as long as the formal or procedural requirements of law are met, there can be no legal objections against using law for morally terrible purposes (e.g. justifying torture to combat terrorism, which would be unacceptable in accordance with a principled law).

Both the US President George Bush (on 11 September 2001) and the UK Prime Minister Tony Blair (in July of 2005) proclaimed that the rule of law was optional for liberal democratic societies and was in general a dispensable luxury that could be discarded in times of emergency⁹⁵. These examples prove that international law can be a means to an end if a powerful interventionist insists on it.

As one can see, in many interventions, the US decisive, albeit unlawful, actions were not denounced by the international community; in some cases, like in the Libyan conflict, they even led to new regulations *justifying* the invader's use of force. For instance, the dispute over the legality of the no-fly zones (NFZ) in Iraq, proclaimed by the USA, UK and France after the Gulf War of 1991, provided the legal contours of a doctrine of humanitarian intervention that was adopted afterwards⁹⁶. Importantly, the unilateral interpretation of UN Security Council's

⁹⁰ Toby Dodge, "US foreign policy in the Middle East," in *US Foreign Policy*, ed. Michael Cox and Doug Stokes (Oxford: Oxford University Press, 2012), p.218.

⁹¹ Caroline Kennedy-Pipe, "American foreign policy after 9/11," in *US Foreign Policy*, ed. Michael Cox and Doug Stokes (Oxford: Oxford University Press, 2012), p.381.

⁹² Camp Bondsteel, *Global Security*, accessed March 6, 2018, <https://www.globalsecurity.org/military/facility/camp-bondsteel.htm>.

⁹³ Alon Harel and Assaf Sharon, "Dignity, Emergency, Exception," in *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law*, ed. Pierre Auriel et al. (Cham: Springer International Publishing, 2018), p.101.

⁹⁴ Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006), p.219.

⁹⁵ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), p.1.

⁹⁶ Srdjan Cvijic, "Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo," *German Law Journal* 8 (2007): p.58.

resolutions and the use of force by these countries took place by bypassing the UN Security Council altogether. These practices continued in the 1998 bombing of Afghanistan and Sudan within the *Operation Infinite Reach*. NATO's aerial bombardment of Yugoslavia from 24 March till 10 June 1999 within the *Operation Allied Force* was also done without a UN mandate, but was eventually approved by UN Security Council's Resolution 1244, which *redesigned* Chapter VII of the Charter of the UN by giving a mandate to the international civilian administration and NATO-led military force from June 1999.

Given the USA's leading role in international affairs, there must be a fine balance in the country's foreign policy strategy, especially when it concerns compliance with norms of international law. Adherence to the rules of law by *all* actors is undoubtedly the only prerequisite of order and security on international arena.

3.2 Compliance of NATO's Justifications for Intervention in Kosovo with Rule of Law Principle and Norms of International Law

According to Roberts, NATO's military intervention in Kosovo was unique from several perspectives. Firstly, the intervention was the first sustained use of armed force by the NATO alliance in its 50-year existence. Secondly, it was the first time when destructive armed force by a major player was used without UN Security Council's authorisation, albeit in line with its resolutions. Thirdly, it was the first major bombing campaign to stop crimes against humanity within the borders of a state. Finally, it was the first bombing campaign that, without land operations, resulted in a change of policy by the target government⁹⁷.

Although in its account of procedures and laws followed prior to the 1999 Kosovo intervention NATO mentions various UN Security Council resolutions⁹⁸, none of these resolutions, except Resolution 1244 (1999) of 10 June 1999, authorised use of force by a military organisation.

As explained in Chapter 2.2.2, UN Security Council Resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998, 1203 (1998) of 24 October 1998 and 1239 (1999) of 14 May 1999 on Kosovo's conflict raised the questions of the necessity to stop violence by internal forces (the Serbian military and police forces and Kosovar Albanian forces) and called for assistance from Member States and international organizations, like the Red Cross or OSCE, in monitoring and the provision of humanitarian aid.

From the above perspective, the NATO military intervention in Kosovo from 24 March till 10 June 1999, called *Operation Allied Force*, was unlawful under international law as it was done without a UN mandate. This coincides with the traditional view on the rule of law, which, as described in Chapter 3.1, is limited by principles of reasoning and is designed on the basis of community norms clearly stipulating the good and right. In line with this traditional view, whatever provisions the UN Charter sets out, they must be obeyed without questioning.

NATO claims that its military intervention in Kosovo pursued the important goal of ending the ethnic cleansing and repression of human rights perpetrated by the government of the Federal Republic of Yugoslavia⁹⁹. NATO calls its actions in the former Yugoslavia as extension of "the culture of dialogue and cooperation on security issues":

⁹⁷ Adam Roberts, "NATO's Humanitarian War over Kosovo," *Survival* 41 (1999): p.102.

⁹⁸ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), pp.124-126.

⁹⁹ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), p.3.

Increasingly, through the work of the NATO-led forces supporting the peace process in Bosnia and Herzegovina and in Kosovo, this culture is influencing the process of reconciliation between communities and is helping to lay the groundwork for future cooperation in the much troubled Balkan region.¹⁰⁰

Ending the humanitarian crisis in the Balkan region was one of NATO's priorities in the 1990s. However, according to Aust, humanitarian intervention is permitted only for the purpose of self-defense in response to an armed attack or in case of massive and sustained abuse of human rights¹⁰¹. Moreover, humanitarian intervention must be:

- necessary (with no viable alternative);
- limited to the immediate purpose (without any reprisals, retribution or exemplary or punitive attacks); and
- reasonable and proportionate to the threat or the force used against it¹⁰².

One of counterarguments for NATO's aerial bombing of Kosovo is that it was not done for the purpose of self-defense in response to an armed attack against one of its member states (which is one of the premises of collective security at NATO). But NATO argues that it intervened in Kosovo's conflict to stop massive and sustained abuse of human rights (ethnic cleansing)¹⁰³. If one analyses the characteristics of the aerial bombing as a means to stop the abuse of human rights, then it can be argued whether the bombing saved lives or increased human suffering even further (i.e. whether it was reasonable and proportionate to the threat), which is likely to be the latter. There is also a doubt that the military operation was limited to the immediate purpose as it lasted for eleven weeks.

With regard to the necessity in NATO's measures, it can be stated that other viable alternatives of non-coercive diplomatic measures, suggested by Lund, had been used indeed but unfortunately without success. There were international appeals, fact-finding missions and observation teams, third-party mediation, arbitration, adjudication, commissions of inquiry, mechanisms of peaceful settlement of disputes and political incentives to induce parties' cooperation¹⁰⁴.

The most serious objection against NATO's intervention in Kosovo, however, is the number of deaths among civilians caused by its aerial bombing. If initial air attacks were justified by NATO as a means to destroy the Yugoslav air defence system, then further strategic attacks on wider Yugoslav military-industrial infrastructure, supply routes and resources, including news media, do raise a question of proportionality of intensified intervention to the actual threat. Without doubt, it was obvious for NATO that intensification of air strikes on a larger territory would eventually lead to a bigger number of civilian deaths.

According to Massa, both the high number of casualties and the circumstances in which they occurred (people were attacked during daylight in public places) gave rise to the question whether the NATO forces had committed war crimes and should be held criminally responsible for their actions before the International Criminal Tribunal for the Former Yugoslavia

¹⁰⁰ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), p.12.

¹⁰¹ Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), pp.224-227.

¹⁰² Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), p.228.

¹⁰³ NATO, *NATO Handbook* (Brussels: NATO Office of Information and Press, 2001), p.3.

¹⁰⁴ Michael Lund, *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy* (Washington, D.C.: United States Institute of Peace Press, 1999), p.204.

(ICTY)¹⁰⁵. As mentioned in Chapter 2.2.2, NATO's aerial bombing campaign led to the deaths of 489-528 Yugoslav civilians who were killed in the ninety separate incidents during the *Operation Allied Force*.

However, on 2 June 2000, the Prosecutor of the ICTY, Carla del Ponte concluded "that there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign"¹⁰⁶. While acknowledging that some mistakes were made by NATO, the Prosecutor nevertheless announced that "there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign." The decision by the Prosecutor of the Tribunal not to investigate NATO's war crimes has generated strong criticism among the majority of scholars who argue that the Prosecutor's decision was based on political rather than legal considerations.

Despite the above arguments, it may also be argued that UN Security Council's procrastination in taking decisive measures against the conflicting parties in Kosovo might have been to blame as much as NATO's UN unauthorized aerial bombing. It must be remembered that Resolution 1244 (1999) of 10 June 1999 was adopted by 14 members out of 15, which means that the international community overwhelmingly agreed that common effort had to be pooled to end violence in the region by any forces if the internal forces were unable to do it for such a long period of time (the 1998-1999 conflict in Kosovo was the second serious escalation of the ethnic conflict in the region in the decade). A question remains why *four preceding unsuccessful* resolutions had not been enough for the UN Security Council to intervene into the conflict more substantially already in March 1999.

Moreover, taking into account the eventual redesign of Chapter VII of the Charter of the UN to enable the international military forces' intervention for humanitarian purposes, it may be argued that the international law at the moment of the NATO's unauthorized intervention had certain flaws. If one analyses the flaws in line with Fallon's elements of the rule of law, it turns out that Chapter VII of the Charter of the UN in March 1999 lacked efficacy (for the community to obey it, it must provide effective guidance).

Obviously, a certain cut-off period shall be set in the UN Charter for the subjects of the UN Security Council resolutions to implement what is ordered. If they do not comply with the orders and violence proceeds, more drastic measures, including military force, must be taken by the international community to stop it. Then all other elements of the rule of law, especially capacity of legal rules and standards to guide people in the conduct of their affairs and supremacy of legal authority, are likely to be respected by all countries as well.

3.3 Introduction of Responsibility to Protect (RtoP) Norm in International Law after Kosovo's Case

In 2005, World Summit introduced the Responsibility to Protect (RtoP or R2P) principle to be kept to by all governments "to protect populations from genocide, war crimes, ethnic cleansing

¹⁰⁵ Anne-Sophie Massa, "NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?" *Berkeley Journal of International Law*, 24 (2006): p.611.

¹⁰⁶ Anne-Sophie Massa, "NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?" *Berkeley Journal of International Law*, 24 (2006): p.611.

and crimes against humanity"¹⁰⁷. The RtoP norm was initiated after the failure of the international community to stop the atrocities committed in the Balkans and Rwanda in the 1990s¹⁰⁸.

In particular, para.138 of the 2005 World Summit Outcome Resolution stresses that:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability¹⁰⁹.

Again, the 2005 World Summit Outcome Resolution underlines that collective action in line with the RtoP policy can be taken only through (i.e. authorized by) the UN Security Council. As put forward in para.139 of the resolution:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity¹¹⁰.

Use of force, nonetheless, remains one of the most controversial topics in international law. Use of force is lawful within a state to restore peace and security when deployed consistently with international human rights obligations and the law of armed conflict, and when a state sends forces to another state at its request to restore order¹¹¹.

Despite managing to mitigate tensions in war regions, use of force in humanitarian intervention is harshly criticized as invoking RtoP infringes sovereignty and territorial integrity¹¹². According to *A Dictionary of Diplomacy*, humanitarian intervention is "inconsistent with the norm of state sovereignty" altogether because it implies external actors' interference in domestic affairs and calls into question the legitimacy of using some instruments during the intervention, such as propaganda, embargo, bombing and the use of ground forces¹¹³.

¹⁰⁷ United Nations (14-16 September 2005) *2005 World Summit Outcome*, accessed January 14, 2018, https://web.archive.org/web/20050929095839/http://www.un.org/summit2005/presskit/fact_sheet.pdf.

¹⁰⁸ UN Office on Genocide Prevention and the Responsibility to Protect (2018) *Responsibility to Protect*, accessed January 14, 2018, <http://www.un.org/en/genocideprevention/about-responsibility-to-protect.html>.

¹⁰⁹ UN General Assembly (15 September 2005) *2005 World Summit Outcome Resolution*, accessed February 11, 2018, [http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005\(1\).pdf](http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf), p.31.

¹¹⁰ UN General Assembly (15 September 2005) *2005 World Summit Outcome Resolution*, accessed February 11, 2018, [http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005\(1\).pdf](http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf), p.31.

¹¹¹ Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), p.224.

¹¹² Jennifer Mei Sze Ang, "Fighting the Humanitarian War: Justifications and limitations," in *Routledge Handbook of Ethics and War: Just war theory in the twenty-first century*, ed. Fritz Allhoff et al (Abingdon: Routledge, 2013), p.171.

¹¹³ G. R. Berridge and Alan James, *A Dictionary of Diplomacy* (Basingstoke: Palgrave, 2001), p.136.

The above argument, however, can be refuted by the actual failure of the state to perform its primary function when mass killing unfolds, that of protection of its citizens' rights. As clearly outlined in the RtoP core principles by the Independent International Commission on Intervention and State Sovereignty (ICISS):

- A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
- B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect¹¹⁴.

In order to avoid accusations of unlawful and unjust intervention, humanitarian forces must ensure that RtoP efforts are taken only to prevent an internal conflict, to react to large scale loss of life or ethnic cleansing with appropriate coercive measures and to rebuild the community after the intervention¹¹⁵.

The following principles of RtoP that justify humanitarian intervention in case of extreme crises have been modified from the just war doctrine:

1. The primary intention for intervention must be to halt or avert human suffering.
2. Intervention can only be justified when every non-military option has been explored.
3. The scale, duration and intensity of the military intervention must be kept to a minimum.
4. In halting or averting human suffering, consequences of interveners' action should not be worse than the consequences of their inaction¹¹⁶.

3.4 A Need for Balance in Strategies of Armed Conflict Resolution

One of the key points in international conflict management is the understanding of strategies applied by states to achieve their foreign policy goals. There are two schools of thought in relation to the meaning of crisis diplomacy. The first school regards crisis diplomacy as a strategy to peacefully resolve a confrontation to avoid full-fledged war, whereas the second one views preventive diplomatic measures as exercises in winning, as a means to make the enemy capitulate and to further one's own ambitions¹¹⁷.

Manufacturing crises through "revolutions" is one of the most widely practiced tactics to pursue the second strategy. As it could be seen in the Libyan conflict and can now be witnessed in the Syrian conflict, revolutions are manufactured by the real beneficiary's gaining advantage from some political tensions in the region¹¹⁸. Mahatma Gandhi and Ho Chi Ming can be mentioned

¹¹⁴ Independent International Commission on Intervention and State Sovereignty (ICISS) (December 2001) *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, accessed March 1, 2018, <http://www.responsibilitytoprotect.org/ICISS%20Report.pdf>, p.xi.

¹¹⁵ Independent International Commission on Intervention and State Sovereignty (ICISS) (December 2001) *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, accessed March 1, 2018, <http://www.responsibilitytoprotect.org/ICISS%20Report.pdf>, p.xi.

¹¹⁶ Independent International Commission on Intervention and State Sovereignty (ICISS) (December 2001) *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, accessed March 1, 2018, <http://www.responsibilitytoprotect.org/ICISS%20Report.pdf>, p.xii.

¹¹⁷ Edward Avenell and David Hastings Dunn, "Crisis Diplomacy," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), p.464.

¹¹⁸ Edward Avenell and David Hastings Dunn, "Crisis Diplomacy," in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou et al. (London: SAGE Publications, 2016), p.465.

as other examples of crisis makers seeking radical change through the manufacturing of international crisis.

Perhaps, the second strategy should be considered one of the worst diplomatic measures as it does not seek to reduce the tension between the conflicting parties. On the contrary, the opposing party, often consisting of armed militants, is supported by all possible means to overthrow the legitimate power, which is always in the interests of the actual superpower standing behind the protesters.

As the result of the Libya's Arab spring shows, a superpower's assistance in a group's revolutionary attempts to manufacture a crisis to challenge legitimacy or the status quo seldom leads to peace in the region. After the replacement of the Gaddafi government with the National Transitional Council (NTC), some militias refused to disarm and cooperate with the NTC, which led to a second civil war in Libya¹¹⁹.

Sometimes, crisis manufacturing in one particular region creates an even more dangerous violent force that is able to bring terror to the wider international community. The roots of the terrorist organization ISIS (The Islamic State of Iraq and the Levant or the Islamic State of Iraq and Syria), for example, are in the Sunni terror group al Qaeda in Iraq (AQI), which acted against the Shiite-dominated government that replaced Saddam Hussein after he was toppled by the US-led forces in 2003¹²⁰.

Since the USA plays a leading role in international relations, it is important to analyze which foreign policy this country will pursue in the future. After the USA's defeat in Iraq and Afghanistan, there was a commonly held opinion among foreign policy experts that the subsequent US administrations would become more cautious with interventions¹²¹. Yet, the recent proxy war between the USA and Russia in Syria (and especially the bombing of Syria on 13 April 2018 by the USA, UK and France without UN authorization) as well as military confrontations between the USA and North Korea and China in the form of perpetual military drills have demonstrated that US foreign policy is still directed towards achieving goals and protecting national interests by all possible means, regardless of the rising warfare costs, illegality of military actions, worsening country's image and any drastic consequences that will obligatory follow.

The ongoing decline of the US power against the background of the rising new great powers, most notably China, are likely to be further accompanied by war conflicts¹²². Some experts warn that in 2018, when the US militarism and protectionism have achieved their apogee (since even the US allies in the EU are economically punished, facing high tariffs in trade with the USA), the US economic and military confrontation with major players in the global arena has never brought the world closer to an outbreak of a new global war¹²³. Skillful diplomacy, based on a thorough consideration of the interests of all parties and on the moral weighing of

¹¹⁹ Al Jazeera, *Libyan forces raid militia outposts* (24 September 2012), accessed March 5, 2018, <https://www.aljazeera.com/news/africa/2012/09/2012923221126439787.html>.

¹²⁰ Jason Hanna, *Here's how ISIS was really founded* (13 August 2016), CNN, accessed March 5, 2018, <https://edition.cnn.com/2016/08/12/middleeast/here-is-how-isis-began/index.html>.

¹²¹ Anatol Lieven, "The future of US foreign policy," in *US Foreign Policy*, ed. Michael Cox and Doug Stokes (Oxford: Oxford University Press, 2012), p.393.

¹²² Christopher Layne, William Wohlforth, and Stephen G. Brooks, "US decline or primacy? A debate," in *US Foreign Policy*, ed. Michael Cox and Doug Stokes (Oxford: Oxford University Press, 2012), pp.409-410.

¹²³ Ray Dalio, *More on Trade and Other Wars* (9 April 2018), LinkedIn, accessed April 9, 2018, <https://www.linkedin.com/pulse/more-trade-other-wars-ray-dalio/>.

immeasurable costs in the case of a global war, is the only hope for a peaceful resolution of superpowers' rebalancing now.

It has to be remembered that while the first approach to diplomacy as a means for peaceful conflict resolution regards successful any suitable option that allows to avoid war, the second approach permits the exploitation of high-risk strategies to enforce the enemy's capitulation. The only restraining factor taken into account in the second approach is the ratio of gains to losses. Such a strategy should be viewed counterproductive for maintaining international security and order, which is to be protected by diplomats¹²⁴.

Overall, it can be concluded that violent conflict resolution should comprise a thorough understanding of the conflict origin and all its players' interests as well as a weighed diplomatic toolset that will allow first to contain the conflict within its borders and minimise losses from it among the locals until the conflict outlives itself or until more outright intervention for the sake of peace is made. Such a careful approach does require certain trade-offs on the part of all the parties involved. As Williams highlights:

The essence of skilful crisis management lies in the reconciliation of the competing pressures which are inherent in the dual nature of crises... Crisis management requires that policy-makers not only recognize the inherent dilemmas, but that they are willing and able to make the difficult trade-offs that are required¹²⁵.

The present paper discussing the peculiarities of humanitarian intervention in Kosovo (1999) demonstrates how hard it is sometimes for diplomats to insist on timely adequate trade-offs to stop a violent conflict that has already led to huge losses among the civilians and military forces and has a potential to spill over the borders of one particular state.

In summary, both the norms of international law and the principle of the rule of law upon which it is based regulate how the international community can intervene in internal war conflicts when local forces cannot or do not want to resolve the conflict on their own. Preventive diplomacy is the first step in trying to help the conflicting parties to establish meaningful dialogue and end the conflict. However, when tools of preventive diplomacy are exhausted, it is essential for the international community to take decisive steps to stop human suffering in a war-torn region.

Humanitarian intervention involves use of limited armed force that is authorized by the UN to restore and maintain order in the war region as peacekeeping force. Before Kosovo's conflict, international law envisaged a UN mandate as the only permissible tool for a third party to intervene in a war conflict which does not directly pose threat to a country. The problems of finding a consensus among UN Member States as well as overreliance of NATO on its own strengths and rules in Kosovo's conflict have shown that international law may need changes to protect human rights more effectively. The RtoP initiative aims to be one of such positive recent changes, although care must be taken to ensure that its norms are not applied to infringe national sovereignty or pursue own foreign policy goals.

¹²⁴ R. P. Barston, *Modern Diplomacy* (Abingdon: Routledge, 2013), p.4.

¹²⁵ Phil Williams, "Crisis management from Cuba to Sarajevo," in *New Thinking About Strategy and International Security*, ed. Ken Booth (London: Routledge, 1991), p.146.

CONCLUSION

The present research has examined the legal and diplomatic implications for the Western military intervention in Kosovo's conflict (1999). An overview of literature on humanitarian crises and preventive diplomacy as well as the analysis of international law and humanitarian law and of the UN Security Council's resolutions related to the conflict has allowed the author of the paper to draw the following conclusions.

Importantly, the Western humanitarian intervention in Kosovo in 1999 should be analysed from the point of view of both the rule of law and norms of international law.

On the one hand, NATO's aerial bombing of Kosovo from from 24 March till 10 June 1999, called the *Operation Allied Force*, could be regarded unlawful under international law as it was done without a UN mandate. The UN Security Council authorised the deployment of security international forces in Kosovo only on 10 June 1999 by adopting Resolution 1244 (1999). Adherence to this opinion is determined by the traditional view on the rule of law which states that compliance with law is a requirement for everyone as law is always limited by principles of reasoning and is designed on the basis of community norms clearly stipulating the good and right.

Humanitarian intervention is allowed only in case there is a threat of an attack or if this measure can end mass abuse of human rights. NATO insists that the *Operation Allied Force* was held to stop ethnic cleansing when other measures of preventive diplomacy had been exhausted. Here one might argue over the proportionality of the reciprocal measure and over the fact whether it was limited to the immediate purpose, taking into account that the aerial bombing lasted for eleven weeks and must definitely have increased, not reduced, the suffering of the population under the attack. Also, it must be taken into account that NATO's aerial bombing campaign led to a big number of deaths among civilians, which can be considered war crimes and should be prosecuted accordingly.

On the other hand, one should also take into consideration that before the adoption of Resolution 1244 (1999) there were four unsuccessful resolutions, which demonstrated a total inability of the conflicting parties to resolve the conflict by themselves. The UN Security Council's procrastination in taking more decisive measures than mere expressions of grave concerns on paper led to a situation when other countries, namely, NATO Member States took responsibility to end the conflict by military intervention. The fact that Resolution 1244 (1999) was adopted almost unanimously (by 14 members out of 15) shows that the international community was really ready to intervene into the conflict to stop violence in Kosovo.

In addition, it has to be taken into account that the humanitarian intervention first by NATO without a UN mandate and then by international peacekeeping forces authorised by the UN has given the necessary result: the conflict was ended. In legal terms, the intervention has led to changes in the Charter of the UN and to the introduction of the Responsibility to Protect (RtoP) norm in international law that now allows the international community to legally protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity in countries which are unable to resolve conflicts on their own.

There are still areas in international law which need to be addressed to prevent violent conflicts in the future. For example, there should be a balance between humanitarian intervention and the right to sovereignty of a state. There should also be provisions in the Charter of the UN with regard to a set period of time in which the subjects are permitted to implement the UN Security

Council's orders under the threat of more drastic measures. The main principle guiding the changes in legislation must be order and protection of human rights.

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