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[BACK TO THE THEORY OF HUMANITARIAN INTERVENTIONS...]
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\(^2\) Among most recent affiliations of Prof. Sean Murphy has been the Membership (Counselor) at the Kosovo Delegation at the ICJ case of the "Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo"
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Annex. Abbreviations

CSTO – Collective Security Treaty Organization
HI – humanitarian intervention
NATO – North Atlantic Treaty Organization
P5 – Permanent members of the UN Security Council (Russia, France, United Kingdom, China and United States)
PMF – peace-making forces
UK – United Kingdom
UN – United Nations
UNGA – United Nations General Assembly
UNSC – United Nations Security Council
US – United States
INTRODUCTION

A. Opening remarks

The role and place of peace-keeping and humanitarian intervention in the post-Potsdam world order deserves careful research and study, especially when such operations are currently undergoing a period of rapid growth. Among the factors that are pushing forward such a rapid growth of the so-called “war for viable peace” are, first of all, the unprecedented importance attached to the innate and inalienable human rights issues, which lie on the bottom of the "humanitarian intervention” theory. Even if the growing number of non-UN authorized interventions is totally unlawful, as some scholars would argue, it requires careful study at least from the perspective to understand the global security trends of last decade and make assessments for mid-term future. The well-known peace-keeping operations of certain countries or ad hoc coalitions put a big question mark over the effectiveness of existing international legal system and will sooner or later become a basis for the update of the international law. For instance, if there were clear-cut legal regulations, perhaps Darfur province of Sudan would not stay untouched after Kosovo (1999) or Iraq (2003) would not have experienced all the horrors of military interventions due to, inter alia, the alleged human rights violations.

At present, the failure of weak states to meet their constitutional, as well as universal (international) obligations to protect human rights, ensure good governance and sustainability causes quite a number of acute humanitarian crises and challenges because of mass and flagrant violations of those rights. Some powers – the United States, Russia, the EU and other states impose strong sanctions on these "undemocratic" states which, in turn, constitute a valid reason for interference in the domestic affairs of these states, in a breach of Article 2(4) of UN Charter (hereinafter – “Charter”). The proponents of this doctrine would cite other norms of international law as a justification. The different approaches to this notion can best be described with the specific environment where it appears to be the intersection of international law, political science, moral dimension and international affairs.

Of course, having all the necessary goodwill and humaneness, it is obvious that no any individual sovereign state is capable to solve the humanitarian crises all over the world on its own, if UN appears to be paralyzed with major disagreements among P5 states (China, France, Russia, United Kingdom, United States). In the so-called post-Potsdam system of international relations the United Nations, according to its Charter's Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression), is the "primary" (but not the only!?) legitimate body to initiate a coercive actions in the name of the maintenance of peace. In the meantime, current international order embraces some organizations and states that may prevent most of the crises. Among many concepts such as peacekeeping, peace-making, peace-building and peace enforcement, which are being applied by the UN

3 By February-2010 the number of total personnel deployed on UN missions worldwide had risen to above 100.000 in 15 missions currently in the fields. Apparently, nearly all of the operations contain peace-building options in their schedule.

4 The opinions whether there is an established/emerging doctrine of humanitarian interventions or not – are extremely different among the scholars. For the sake of this study we claim that there is such a doctrine, and moreover – an emerging consensus of international community that failed/failing states should be kept under primary attention and been addressed when slipping to humanitarian crisis, even without UNSC authorization, through the efforts of the "coalition of the willing”.

5 In the introduction the notions of peace-keeping, peace-making and peace-enforcement are used as synonyms. The definitions and the essence of these terms are explored in the Chapter I.
authorization, there is a tendency to name other patterns of transboundary military operations as *humanitarian intervention*, if there is a sovereign state acting unilaterally or "a coalition of the willing" operating without a *proper and timely mandate* from UN Security Council (hereinafter - UNSC).

Thus, UN remains the sole source of international legalization of all instances of the transboundary use of force. International law is quite accurate to comply with the regime of non-interference and respect for sovereignty – the basics of UN-based international order. Article 2 (4) of the Charter states that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…”6 As it was mentioned above, the only 2 cases where use of force is applicable are described at articles 51 (right of self-defense) and Chapter VII of the Charter.7

In the meantime, it is widely recognized that genocide, ethnic cleansings and grave and systematic human rights violations, described at appropriate UN Conventions and other pillars of international law have become the factors pushing other states (mostly - democratic) to initiate a "humanitarian intervention", having in mind the basic assumption that bold linkage exists between human rights protection and international peace.8 This commitment does not have any binding expression in international law, but *it rests upon the high level of development of the international community*. Some scholars argue that multilateral interventions of democratic states in the name of the *just cause* are legitimate, at least politically. Martha Finnemore, for instance, claims that “…humanitarian military intervention now must be multilateral to be legitimate” [9; p. 176].

While most European states and U.S. often argue human rights supremacy over sovereignty, the “global South, with strong support from China and … Russia – remains… deeply attached to the principle of sovereign equality [of states]” [10, p.164-165]. The so-called Global South rejects any right to HI, saying that the UN Charter does not foresee such activities beyond UNSC resolutions. Many states in the Developing world and Southern Hemisphere oppose the right of HI seeing it likely to be used as a pretext for imperialism [11; p.9]. In 2000, when the doctrine was still emerging after Kosovo experience, the Non-Aligned Movement issued a Declaration, “reject[ing] the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law”.12

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7 The clearest expression of a non-discriminatory approach to all similar cases of aggression, for instance, is the case of "The Republic of Nicaragua v. United States of America" (Case Concerning Military and Paramilitary Activities In and Against Nicaragua, 1986), which was listened to the International Court of Justice in 1986. Then the court found that the U.S. violated international law by supporting the rebels against the Nicaraguan government, mining the Nicaraguan ports. The court also decided to pay reparations to Nicaragua.
9 For instance, that linkage lies at the foundations of Universal Declaration of Human Rights, 1948.
11 Mats Berdal, «Building Peace After War”; The International Institute for Strategic Studies, 2009 (New York, Routledge publications)
12 Matthew Waxman, "Intervention to stop genocide and mass atrocities", Council on Foreign Relations Special report no. 49, October 2009
13 Declaration of the South Summit, Havana, Cuba, Apr. 10-14, 2000
http://www.g77.org/Docs/Declaration_G77Summit.htm
Many authors, and Professor Sean Murphy from George Washington University among them, argue that several fundamental human rights (right to life, prohibition of torture, genocide and slavery, as well as the principle of non-discriminatory domestic policies) are *erga omnes* obligations, i.e. all States are obliged to comply with them in relation to each other. Murphy goes further with the same arguments and says that “To date… the notion of a “duty to intervene” by the United Nations, regional organizations, or states does not appear present in international law… while this duty exists in the national laws of many countries” [15]; pp. 295-296]. As a good example, Murphy brings the case for “duty to rescue” that appears to be present in national laws, though this kind of universal moral obligations are not present in international law in any straightforward way.

During the Cold War period (1945-1990) the superpower rivalry did not give much room to either of superpowers to initiate unilateral interventions elsewhere. All the conflict resolution operations underwent the clear mandate of UN Security Council. Those "Blue Helmets" did not have the mandate to solve the crisis, but they used to play a role of a “watchdog” without any active involvement. They "contributed" only to the stagnation of the conflict, supervising only the truce and reporting to UNSC. These consent-based operations, which were the traditional way of UN-led peacekeeping in Cold War era, have been mostly associated with Chapter VI. Again, trying to shift the terms and applying to, perhaps, the ultimate source - Boutros-Ghali’s report (1992), we find certain definitional difficulties and ambiguities, which are set on the bottom of our research objectives. The report defines Chapter VI operations as peacemaking, whereas another UN Report of 2008 operates with the term of “traditional peacekeeping” to address UN-led efforts (including on-the-ground personnel) under Chapter VI. This creates certain confusion, which we are going to illustrate in the 1st Chapter of the study. Any contribution to improve these definitional deadlock, besides the scientific meaning, plays an important practical role. A specific system describing the necessary environment for each type of intervention will ease the decision-making process in UNSC and will adopt system-based approach, rather than case-by-case assessment of each crisis, which is time- and resource-consuming, which, in the end, leads to tragedies of delay.

The core scope of this study is to discuss the pros and cons in the sovereignty vs. human rights and "Responsibility to Protect", or R2P, debate. The purpose of this study is to examine the legal background of HIs with case studies between 1999-2008, to assess the R2P policy developments in the mid-term future. With this in mind, the last chapter will offer some recommendations on R2P policy for the years to come. Summarizing the introduction, the central «why» question for this research is rather simple in wording than for answer. *That is, what are the basic criteria to choose the right cases to intervene and others to refrain from? Why should international community, by and large, support military actions against Saddam Hussein and Milosevic, but remain idle in Rwanda and Sudan (Darfur). And, in general, how can the human rights protection be reconciled with the state sovereignty. Does “sovereignty” assume “responsibility”? Is it limited somehow or absolute with regards to domestic politics? The objective of the research is to show the emerging doctrine and legal traditions behind the HI practices in*

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13 To the best of my knowledge, so far the most comprehensive and most comprehensive writing on HI doctrine has been “Humanitarian Intervention: The United Nations in an Evolving World Order” by Professor Sean D. Murphy, published in 1996. This contribution enjoys many quotations from this book, as well as is has been enriched by Q&A-style meetings with Professor Murphy.
1990s and till Russian so-called HI in South Ossetia in August 2008, which tends to be the main case study.

B. Restrictive guidelines and the objective

Some authors consider that even the threat of force or economic sanctions and other coercive, non-military measures towards the “target state” to improve its internal politics or “international behavior” are certain forms of intervention. Those sources also rank the delivery of humanitarian aid as forms of HIs. This paper will not discuss such cases so as not to miss the actual research topic. Instead, this study refers to HIs as the subsequent use of military force to be a central feature to determine the nature of the operation. The main issue here will be to show the transformation of international law and the practical attitude to those legal regulations by pivotal or like-minded states, who initiate the HIs. In parallel, the case studies will illustrate how the legal transformations have an effect upon so-called “realpolitik”, and what is the future of “Responsibility to Protect” (R2P) policy. The HI’s definition given here briefly describes it as a military action without UN SC authorization. Those with UN authority will be one of the operations within the “peace triangle”.

In order to keep the study focused and not waste attention and space for covering wide range of cases, the research is primarily built upon cases between Kosovo operation (1999) and resuming with the so-called August War (also called “Five Day War”) in the Caucasus. The latter will be studied with more in-depth. However, this study does not reflect over "firing process" itself, but rather elaborates on the surrounding issues of the pre-intervention "environment of crisis", and the ultimate political measures needed to be adopted after the active phase of war is finished. The scope of this research does not include assessing peace-building measures in any of the cases. However, it’s obvious that the next step after successful implementation of HI and as soon as peace is established (in comparative terms), nation-building should begin, since the alternative is slipping into anarchy as a result of political vacuum.

Whilst the main idea behind the study is focused on the HI practices between 1999-2008, it also seems to be ineffectual without at least basic considerations of the previous track and will result in losing the linkage between “generations” of peace operations. Thus, we do not intend to re-tell the whole history from UNEF I and onwards, but rather to show the (a) environment and (b) the dynamics that have resulted in the HI and, in wider terms, R2P doctrines. Certain properties of those cases will be extracted to show the general dynamics from “Westphalian sovereignty” towards the supremacy of so-called “universal values od democracy and human rights”. The issue whether the UN should be waging war in support of its values lies at the heart of the ongoing debate whether peacekeeping should be of Westphalian or a post-Westphalian nature. [18; p.162] While professor Lise Howard from Georgetown University proposes to study peacekeeping exclusively with success-stories in order to understand its nature and essence best, this study will concentrate more on UN failures to show that unilateral or regional arrangements play a crucial role to impose international security and stability, when UNSC, to say the least, is unable to react positively due to great power rivalry [19; pp. 5-7] The latest employment of HI doctrine – South Ossetia – will be considered with more attention as the main case study. It is also beyond the scope of this research to assess or compare fundamental ethical norms and principles with regards to international law.

18 Alex J. Bellamy, Paul Williams, Stuart Griffin, “Understanding Peacekeeping”, Polity Press 2004
This contribution will discuss the process in the background of making the decision to resort to war, i.e. initiate a HI as the last available option to bring viable peace to target-state (entity). Naturally, the aftermath is also tremendously important to be analyzed, but the core subject for this particular paper is the intervention itself, as a separate “institution”.
CHAPTER I: THE ENVIRONMENT OF CRISIS AND TOOLS TO CURE IT.

Core questions here are the followings: is there any checklist to describe a humanitarian crisis? Based on this, definitions will be offered to finalize the clear conditions when HIs are applicable to solve the crisis. The main questions to address here: when (i.e. at what phase of the crisis) to intervene legitimately? Under what circumstances the legality is feasible? This Chapter will summarize all the definitions of both UN-led and non-UN peace operations in order to illustrate key differences with regards to HI, and wrap up a working definition for the HI theory.

The definitional quandary

It might come to one’s mind that there is no real difference how to call either of actions authorized under VI and VII Chapters of UN Charter. Just the opposite, this study claims that clear-cut definition of cases is an absolutely necessary precondition to go further with the action in either of capacities. There is not only a legal background to be questioned, but also more practically – the legal mandate of those missions and their composition largely depend on such careful wording, i.e. the decision-making body’s resolution (UNSC, regional organization, individual state) and its interpretations.

Being a highly disputable notion among academicians, as well as politicians and states, HI has numerous definitions and each of them describes it either in the light most comfortable for the given author/state, or designed to fit only for the given case. Meanwhile, all these definitions have several commonalities – human rights violations, ethnic cleansing and genocide, failing/failed statehood and, in recent years, abuse of absolute executive authority over the minorities or whole nation – shall essentially be there as a background of intervention. These are the main causes where HI practice becomes applicable legitimately, moving the dispute only within legal frameworks. Nearly in all HI cases a coercive measure (use of military force) by third parties is prescribed, although some authors tend to exclude military measures, relying only on early warning and preventive diplomacy tools. This very sensitive issue of using military force overseas along with other coercive measures need a special attention since it is obvious that handling conflicting parties in a timely manner will be effective only with military involvement and nothing else.

At this point, it is important to underscore, that today not the legitimacy, but overall legality of unilateral HI is being disputed by governments and within the academic community. For instance, the most fierce opponents of the theory - Russians say that “in fact, a flock of predators (i.e. NATO) pounced on the fraternal Yugoslavia”, calling the Kosovo intervention as totally illegal use of force.20 Drifting from the theory to practice, as any other action/inaction in the international arena, HI requires a specific argumentation, justification and a comprehensive definition. The notions of “threat of peace”, “breach of peace”, “aggression”, “responsibility to protect” (R2P) and others play a crucial role. Different estimations of “threat” are a matter of the policy of particular state, while peace until very recently was generally perceived as “absence of war”. Perhaps, in order to understand what is there within UN and non-UN peace operations the wider definition of peace should be addressed first.

Nowadays the “absence of war” does not necessarily assume peace by default. Some authors argue that not the great power rivalry but “pathological weakness of states” is the primary source of threat for

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20 "Гуманитарная интервенция" НАТО началась с Белграда", March 24, 2009
http://www.vesti.ru/doc.html?id=266718
international peace and security [21; p.3]. This is quite a wide interpretation, but rightfully true. Moreover, any estimation of “threat” will be a political one, based on the party’s interests for making it. Likewise, the term “peace” is also notoriously relative and subjective [22; p.150]. Alternative and not less comprehensive definitions of peace are offered by Brian Lepard [23; pp.150-152].

Today, for instance, no one can imagine Russia bombarding Germany or consider any “hot” war between France and United States. Instead, the fragile statehoods around the world constitute certain threats and challenge the UN-based status quo and thus - international security and stability. This idea is quite close to a liberal theorist John Ikenberry from Princeton University, who writes that “…today’s conflicts are less likely to come from great power conflict than from the proliferation of civil wars and ethnic conflict” [24; p. 87-90]. The same approach to the nature of today’s conflicts presents the “Millennium report” of UN Secretary General Kofi Annan, stating that "the majority of wars today are wars among the poor".25 This is why the ultimate outcome of international interventions is generally considered to prepare all the necessary capabilities for “a responsible government” to emerge. However, this general strategy aimed at the "regime change" is regarded as an aggression towards the core principles of state sovereignty – the norm of unconditional authority over domestic politics. But before defining the crime of aggression and the "aggression" at all, we need to elaborate more on the notion of "[domestic] peace" and thereto the threats and breaches to the peace. This seems truly as a vicious circle, since these issues are closely interlinked. The latter point is crucial since the UNSC is authorized to refer to Chapter VII actions only under the existence of "threat to the peace, breach of the peace, or act of aggression" (Article 39). However, since the crime of aggression yet cannot be addressed in the ICC in any comprehensive manner,26 in a practical level UNSC authorizes transboundary uses of military force only in cases of "threat to the peace" and "breach of the peace".

Going back to the threat assessment, a question pops-up if the respect of human rights constitutes an essential component of the definition of peace [i.e. domestic political stability]. Sometimes, even if it is hard to assess large-scale human rights violations as threat to peace (national, regional or international), it is obvious that long time policies of that kind are quite capable to turn the state into anarchy, which is primary source to instability and wars. For instance, the UNSC Resolution 794 (1992) links the human rights violations in Somalia with the consequences to regional peace. Thus, the cross-border effects of human rights violations at home become obvious and hard to deny. This is completely a new feature in international relations that appeared in early 1990s. For instance, Lepard comments that the drafters of the UN Charter focused primarily on the aggression and coercive threats between states, and did not explicitly authorize the use of military force to end human rights violations within the states [27; p.151].

21 J.Covey, M.Dziedzic and L.Hawley, “The Quest for Viable Peace”, United States Institute of Peace, 2005
25 "We, The Peoples…", millennium report by UN Secretary General, 2000 (A/54/2000)
26 On 11 June 2010, the Review Conference of the Rome Statute concluded in Kampala, Uganda, after meeting for two weeks. The Conference adopted a resolution by which it amended the Rome Statute so as to include a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime. The actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. The Conference based the definition of the crime of aggression on United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, and in this context agreed to qualify as aggression, a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter.
Similarly, "international peace" in the Article 39 should be understood as the "absence of interstate war" according to the common opinion of the prominent legal scholars [28, pp.151-152]. On the political level, it has already become undeniable that human rights have gained much importance and its gross violations not only cannot, but simply are no more domestic business of a state, being reviewed as threats to regional peace and stability (cases of Rwanda, Haiti, Kosovo, etc) [29; p.156]. Meanwhile, there are also cases where the human dimension pops-up only in the aftermath of the intervention itself, as other justifications prove to be inefficient alone. For example, the pretexts of interventions in Afghanistan (2001) and Iraq (2003) at the outset did not include any references to the human rights violations in those totally undemocratic regimes of Talibian movement and Saddam Hussein. Nor the government officials of leading powers, neither the academic community have put any linkage between the security threats coming from Baghdad and Kabul and human rights violations before the intervention or during the active phase of the campaign. Moreover, it is worth to agree with Russian expert Fyodor Lukyanov, who says that the "…campaign of 2003 (i.e. war against Iraq, H.N.) became the peak of American domination in the international politics, and the beginning of its sunset". The failure of finding WMDs in Iraq and inability to fight guerillas in both wars have put forward the humanitarian dimensions of the conflicts in order to justify the open-ended deployments of coalition forces on the ground, thus transforming the initial causes of war, at least in the case of Iraq. With this objective situation in mind, these assessments can only be of political nature, since the crisis management is being done by politicians, not by lawyers.

The answer to this should be found with the retrospect beginning with the first patterns of peacekeeping efforts by UN. Still at the wake of UN history, as prescribed in the Charter, the Founding Fathers began to elaborate over practical meanings of Article 24 and Chapter VII that entitled UNSC with the "primary" responsibility to maintain Yalta-Potsdam world order. Although the birthday of peacekeeping disputed, but generally it refers to the names of UN Secretary General Dag Hammarskjöld and Canadian PM Lester Pearson, who offered the deployment of first-ever emergency forces – UNEF I - to secure the ceasefire on the ground. The mandates of early, or traditional, peacekeeping operations were rather narrow – to supervise the truce and freeze the conflict in place, while comprehensive solution was nearly always impossible due to great power rivalry. An ideal example of such peacekeeping missions is, as mentioned, UN Emergency Forces (UNEF I) - the first Untied Nations peacekeeping force – established in 1956 with clear mandate “to secure and supervise the cessation of hostilities, including the withdrawal of the armed forces of France, Israel and the United Kingdom from Egyptian territory and, after the withdrawal, to serve as a buffer between the Egyptian and Israeli forces and to provide impartial supervision of the ceasefire". Another example comes with the United Nations Peacekeeping Force in Cyprus (UNIFICYP), established in 1964, to prevent a recurrence of fighting between the Greeks and Turks in the island. In general, this traditional peacekeeping was concerned and can prove to be effective if parties had reconciled to the need for international involvement to achieve a negotiated solution to the conflict. So, if peacekeeping occurs only with the consent and the cooperation of the sides, HI is being employed without any prior inquiry from the target-state authorities, since they are considered by the interveners as non-existent locally and criminal in the central/federal level (case of Serbian president Milosevic, and local structures in Kosovo province). Although, the "silent consent" of those to be saved from widespread death and deprivations obviously should be secured, otherwise the very foundations of HI would be ironically shaky.

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30 Федор Лукьянов, Маленькая бедоносная война, 2 августа 2010 http://www.globalaffairs.ru/redcol/Malenkaya-bedonosnaya-voyna-14952
32 J.Covey, M.Dziedzic and L.Hawley, “The Quest for Viable Peace”, United States Institute of Peace, 2005
Still, with all the disadvantages, the traditional peacekeeping seems to be the most well-established UN feature that could occur in the Cold War era. Having the initial consent of the sides, these missions used to be deployed in the field when the peace was already established and there was a need to contribute to the furthering of a peace process by monitoring armed forces withdrawal from the conflict area, delivering of reconstruction aid and other peaceful measures. In other words, if we look at the concept of “peacekeeping” even just in terms of morphology, it brings us to a conclusion that an intervention primarily requires a “minimum peace” for the international community “to keep”. They might be even lightly armed, but the “blue helmets” needed to stay away from engaging into conflict directly. Thus, peacekeepers gave a “breathing framework” to diplomats to finalize the peace accords. They were just and only “reporters” for appropriate UN bodies if any element of peace accords is being violated by either of sides. However, this was the traditional understanding of the peacekeeping operations till 1989.

Probably starting from the mission in Namibia, 1989, they began to undertake more complex mandates, including also administering the general elections. There is an ongoing discussion among scholars whether or not to distinguish several “generations” of UN peacekeeping, considering the scope of mandate they have been undertaking since 1956. Presenting a “generational approach”, Professor Steven Ratner from the University of Michigan Law School argues that a new era of peacekeeping began with this mission, and puts the definition for that “new peacekeeping” as “UN operations, authorized by political organs or the Secretary-General, responsible for overseeing or executing the political solution of an interstate or internal conflict, with the consent of the parties (emphasis by H.N.).”[33; p.17]. Ratner describes the changing nature of operations and notes that “today’s peacekeeping operations combine elements of peacemaking and peace-building… as well as aspects of preventive diplomacy to avoid spreading of conflict”[34; p.16]. He gives a very brief and to-the-point explanation of these concepts defining peacekeeping as an action “freezing the conflict in place” in order to open some space for peacemaking as a sort of diplomacy-in-action during the cease-fire with the mediators trying to solve the conflict by peaceful means. The nature of those operations indeed changed over the years. Until the end of the Cold War peacekeepers only were standing in the middle of the battlefields between the conflicting states, as in the case of Egypt and Israel (UNEF I), thus addressing only interstate, international conflicts.

Since the Namibia operation in 1989 the nature of actions had been steadily evolving. The character of operations became more and more complex, including civilians for public administration, government personnel, reconstruction and election matters [35; p.16]. Those second generation operations addressed intrastate crises, thus, case-by-case amending the notion of non-intervention.

Those supporting the generational approach to peacekeeping obviously can argue that the present-time generation has increasingly blurred the boundaries between conflict prevention, peacemaking, peacekeeping, peace-building and peace enforcement operations. The UN report on peacekeeping operations (issued 2008) suggests a very clear cut view.[36; pp. 18-19]. William Durch, for instance, offers 4 types of peace operations based on the characteristics: traditional peacekeeping, multidimensional peace operations, peace enforcement and humanitarian interventions. Some alternative labels are offered by several other authors – calling those operations “robust peacekeeping” or “wider peacekeeping”[38, pp.

38 Alex J. Bellamy, Paul Williams, Stuart Griffin, “Understanding Peacekeeping”, Polity Press 2004
[128-133]. With the missions content had changed, however, the background remained the same. As Bellamy notes the “wider peacekeeping doctrine retained traditional peacekeeping’s “holy trinity””, including the need for lasting consent as a prerequisite of ultimate importance for successful operation.\textsuperscript{39} As mentioned in the UN GA Resolution 46/182 (1991), “The sovereignty, territorial integrity and national unity of States must be fully respected… Humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.” Some authors rightfully mention that the initial consent at some degree grants an excuse to violate the \textit{jus gentium} norms of non-intervention, sovereignty and equality among states \textsuperscript{40}, whereas there is no need to think about consent when HI is at stake, which will be shown below. Steven Ratner gives enormous importance to “consent” saying that it “defines the starting point for the new peacekeeping, for it determines the role the UN will play in executing a political settlement” \textsuperscript{41}. At least, coming to the terms and definitions, we should primarily cite the ”An Agenda for Peace” report.

Comprehensive definitions to UN peace operations became necessary after UNSC obtained flexibility for action after one of the great adversary’s (i.e. the USSR) disappearance. The definitions were requested by UNSC and later on best presented by former Secretary-General Boutros Boutros-Ghali in his well-known report “An Agenda for Peace”.\textsuperscript{42} By recognizing the end of Cold War, Secretary-General gave rather a general framework for UN and described what must be the features of preventive diplomacy, peacemaking, peace-keeping and peace-building in the new era. In the report, he drew special attention to human rights issue, presenting the cornerstone of conflict resolution in the “requirement for … commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic”, arguing that “the time of absolute and exclusive sovereignty … has passed” \textsuperscript{43}. Others are more accurate, saying “…in the contemporary world the legitimacy of sacred authority, whether religious or secular, has become problematic” \textsuperscript{44}. To understand Boutros-Ghali’s views on the issue, the definitions given in the report should be reviewed carefully.

First of all, he defines peacemaking as an “action to bring hostile parties to agreement, essentially through […] peaceful means”, based on Article 33(1), which sets forth all the available means of peaceful settlement. In other words, as truce is being maintained while conflict in general is still there, diplomatic efforts should contribute to lasting resolution. Another UN Report argues that peacemakers do not necessarily need to be armed, i.e. such negotiators as envoys, non-governmental groups or regional organizations can also play on that ground \textsuperscript{45}. Perhaps a best example could be the French President Nicolas Sarkozy’s efforts in times of August War as a matter of “shuttle diplomacy” between Russia and Georgia.

As soon as the cease-fire is negotiated and established, speaking with UN terms, peacekeeping operation can start “to assist in implementing agreements achieved by the peacemakers” \textsuperscript{46}. Boutros-Ghali refers to this as a “deployment of a UN presence in the field, hitherto with the consent of all the parties.

\textsuperscript{39} Alex J. Bellamy, Paul Williams, Stuart Griffin, “Understanding Peacekeeping”, Polity Press 2004
\textsuperscript{40} Brian D. Lepard, “Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions” Pennsylvania State University Press, 2002.
\textsuperscript{44} Ariel Colonomos, “Contradictions of the “just war” doctrine in the post-Cold War period”; ed. by Gilles Andréani, Pierre Hassaner, “Justifying War?: From Humanitarian Intervention to Counterterrorism”, published by Palgrave Macmillan, 2008
concerned”, involving UN military, police and civilian personnel [47; para. 20]. United Nations Interim Force in Lebanon (UNIFIL), deployed in 1978, will be the most accurate case to mention. UNIFIL did not have the mandate to solve the causes of conflict but just to monitor the Israeli withdrawal. The war again erupted in 2006 with peacekeepers in a standby mode.

The peacemaking and peacekeeping serve as a preface for the peace-building. The latter, as defined by Boutros-Ghali, “[is an] action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict” [48; para. 21]. Mats Berdal appears to be more specific, defining peace-building as a means of “providing a secure environment, stabilizing governing structures and ensuring the uninterrupted flow of basic, life-sustaining services” [49; pp.95-96]. Four pillars of successful peace-building should include: establishing sustainable and accountable governance structures through legitimate political institutions and participatory processes; restoring the rule of law and justice; promoting social and economic recovery and development and arranging the resettlement of IDPs and refugees [50; p.25]. Very often this mission is being mandated by UNSC, which has proven highly effective so far in various crisis corners of the world.

Beginning with the operation Desert Storm, mandated by UNSC resolutions 660, 661, 665 and 678, a practice of peace enforcement operations began. Authorized by the provisions of Chapter VII, the coalition of First Gulf War effectively restored international peace and security, initially having determined “a breach of international peace and security” within first hours of the invasion. 51 A very simple definition can be extracted here by saying that

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\text{peace enforcement is a transboundary use of military force as well as other coercive measures (blockade, embargo), authorized by UNSC, to restore international peace and security in situations that are recognized as threat to peace, breach of the peace or act of aggression.}
\]

In order to rescue from the definitional trap, UN Report (2008) offers a slight difference between “robust peacekeeping” and peace enforcement under Chapter VII: “Robust peacekeeping involves the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict. By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military force at the strategic or international level, which is normally prohibited for Member States under Article 2(4) of the Charter, unless authorized by the Security Council.”[52; pp. 34-35] What is interesting, the approaches of both Russian and Atlantic authors are the same here, calling peace enforcement operations as the most radical, extreme pattern of peacekeeping, employed without the consent of the belligerents.53 In a very nutshell, timing is the main difference between the so-called robust or wider peacekeeping and the traditional operations. While the traditional patterns of peacekeeping happen after the ceasefire is concluded and there is no active insurgency, the business of robust operations take place either in the absence of such agreement, or in situations when the

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49 Mats Berdal, «Building Peace After War”; The International Institute for Strategic Studies, 2009 (New York, Routledge publications)
Truce is too fragile and prone to collapse (e.g. UNPROFOR). And secondly, the newest generation peacekeeping happens mostly in intra-state conflicts (Bosnia, Rwanda, Sierra Leone). The fact of being authorized by UNSC is very crucial here, since it’s one of the main differences with regards to the HI theory. For example, Russia did not declare war to Georgia during the Five Day War. Instead, it announced about transporting additional army units to the peacekeeping forces in South Ossetia in order to “enforce Georgian authorities to peace”, marking the goals of the operation as use of force in self-defense of peacekeeping forces and protect civilians. Of course, if authorized by UNSC for the Russian peacekeepers to change the mandate, it would become a peace-enforcement operation under international law. But in the absence of any UN authorization (in fact no one even cared to secure it) this operations was best suited under HI theory. The other difference, of course, lies within the timing of operation – since Chapter VII resolutions are invoked only in case of factual evidence of a breach of peace, and it does not apply a preventive deployment feature to preserve peace and stability before the crisis emerges to an actual war.

With this in mind, by and large, the international law developed only 3 distinct forms of interventions under clear mandate of UN, with the purpose of restoring stability in the target area (state or region): peace-making, peace-keeping and peace-building (while peace enforcement standing alone in the corner as a direct and often brutal use of force under Article 42 of the Charter), even though they are not present in any form in any convention, treaty or other multilateral agreements. They constitute a certain kind of conceptual triangle ("peace triangle"), which shows the means and ways to enforce or achieve peace and stability in war-torn societies, save a failing state and fragile statehood, stop ethnic cleansings, etc. under the provisions of UN Charter. All 4 terms represent sets of tools to achieve the generally narrow understanding on the “absence of war” and beyond, accompanied by the cooperation among all international actors and are based on freedom, independence, respect for human rights and equality. If the principles of UN-led traditional peace operations were consent, impartiality, and minimum use of force (the "holy trinity"), the modern patterns are more multidimensional and the mandates are often well-beyond the known definitions, now labeled as “wider [robust] peacekeeping”. One can observe certain type of inertia or even neglect here, but it is more like a result of absence of any comprehensive doctrine on the matter.

Mission and mandates of operations can transform within the triangle, depending on the actual developments of the landscape in the given country. The situation in East Timor beginning from 1999 and

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54 http://korrespondent.net/world/548390
onwards constitutes a great example of that. Along with the changing situation, the mandate of UN Transitional Administration in East Timor (October 1999)\textsuperscript{55} was accomplished with the referendum of independence and United Nations Mission of Support to East Timor (UNMISET) emerged in May 2002. After 3 years in place, the latter was replaced with the UN Office in East Timor (UNOTIL), responsible for supporting the capacity development of critical state institutions. After all, these installations failed to create functioning statehood in East Timor and UN Security Council established a new “multidimensional, integrated UN peacekeeping operation”\textsuperscript{56} UNMIT, under UNSC resolution 1704 (August 2006) after a major political crisis broke out in April-May 2006, as a result of “still fragile security, political and humanitarian situation”.\textsuperscript{57}

Figure 2: Circles of UN-led peace operations (Source: UN Report, 2008)

Another scheme is offered by the UN Peacekeeping Operations report (2008), giving rather a comprehensive understanding of what stages the UN-led peace operations can undergo in order to eliminate the conflict and fight its root causes. The measures, described here theoretically (Figure 2), should follow one another, each of them laying the grounds of success for the next one, since obviously peace-building will not be effective after failed military operation. Thus, in short, all these operations are mutually reinforcing in nature. However, as UN Report finds, they “rarely occur in a linear or sequential way”.\textsuperscript{58}

All the above-mentioned patterns of UN-led peace operations are widely based on consent of the local authorities, which keeps the peacekeepers away from directly engaging into the internal conflict, so as not to break the universal norm of non-intervention into domestic affairs of states. Whilst initial “consent” clears the path for action, it also gives the impression that the peacekeepers and local authorities act hand-in-hand, each of them investing whatever it has – legality/legitimacy and capabilities to act. Perhaps here

\textsuperscript{55} UNTAET had a legal mandate to “administer the territory, exercise legislative and executive authority during the transition period and support capacity-building for self-government.” The mission had “overall responsibility for the administration of East Timor and was empowered to exercise all legislative and executive authority, including the administration of justice”. \url{http://www.un.org}

\textsuperscript{56} \url{http://www.un.org/en/peacekeeping/missions/unmit/}


we find the most striking difference between these peace operations and HIs, when interveners actually engage, as a third party, in fierce fights to secure peace, without any UN mandate behind.

*Above these 4 kinds of missions, so well developed by relevant international experience and in accordance with international law with its conventions and charters, the newly re-born doctrine of humanitarian interventions (HIs) has been emerging in a case-by-case fashion since 1990s.* Of course, there are some voices against this approach. For instance, Dr. Lise Howard from Georgetown University speaks about "shift of terms" in recent times, proposing not to invent any new words to describe what has already been done by UN.⁵⁹ Ultimately, "….there is nothing surprising in the experience that new terms tend to be discarded as mere fashion by intellectuals"…⁶⁰ This study strongly disagrees with this assumption, since the core difference between, i.e. UN-led peace enforcement operations (Chapter VII) and HI is that the latter is not authorized by UN, and happens exclusively *after UN failure* to address the humanitarian crisis elsewhere. On the other hand, peace-enforcement operations are most often undertaken by UNSC in case of the breach of the peace or an act of aggression by the target state. Whereas HI mostly deals with intra-state conflicts, where on the highest level the concern of the interveners is the establishment of sustainable peace within society, by eliminating any kind of abuse of human rights and freedoms, including freedom of elections – by organizing elections in the subsequent peace-building phase of the *stabilization and reconstruction operation*. In essence, peace-enforcement very much looks like HI, but the substantial difference is still there – the issue of mandate. The peace-enforcement operations are clearly authorized by UNSC (e.g. Gulf war against Iraqi aggression in Kuwait), whereas HI is generally about unilateral or regional arrangements, without UN share at least at the initial stage of transboundary operation (Kosovo). Shortly, this paper will not dare to suggest any major breakthrough in understanding HIs. This research does not pretend to prove the primacy of military means and coercive approaches, neither it supports the interventions theory by neglecting the norm of sovereignty. But rather this is an attempt to stand over the shoulders of previously available theories and concepts in order to look ahead to the future of R2P policy and the major dilemmas around it. This is an attempt to construct a theory of HIs enriched with both political and strategic approaches, as well as international law behind it.

Perhaps all this have been long emerging even during the Cold War, but only with the 1990s this became a genuine issue on international agenda. The UNSC Resolution 688 (April 1991) about repressions of Iraqi civilian population was among the very first attempts of UN to equate massive human rights violations to its duties and responsibilities under the Charter for the maintenance of international peace and security.⁶¹ Back to that time, it was a unique case when UNSC recognized that human rights abuses might become those very consequences which threaten international peace and security in the region.⁶² In the meantime, even recalling the Article 2 (7), UNSC adopted a Chapter VII resolution which put a great breach to the Cold War-era politics when non-interference in internal affairs and sovereignty were absolute rights of states. First Gulf War was a collective "Chapter VII operation" which, of course, contributed to the new understanding of most terms around the peace operations in the new era, but did not represent a pattern for future HIs. Another good example of the same linkage came with UNSC Resolution 787 (1992), which established that the situation in Bosnia and Herzegovina, inter alia, the ethnic cleansings and human sufferings “constitute[s] a threat to the peace”.⁶³ Another example, the civil war that erupted in Sudan in 2003, in the words of the United Nations, "has spilled into neighbouring

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⁵⁹ Personal interview, conducted on March 23, 2010
Chad and the Central African Republic”.  

Of course, these were the cases where UNSC employed all its available resources to meet her own responsibilities adequately and in a precise manner. But unfortunately there also happened other instances, like in Bosnia, where deployed missions failed themselves variety of reasons to be blamed. Additionally, a question appears here if extremism or extreme patterns of ethnic nationalism are threats to regional security or not, since several present-time regional crises had initially been fueled by secessionist entities (the cases of Georgia, Moldova). Having said this, it is still an open question if any unilateral action to fight the extremism overseas can become lawful without UNSC mandate.

Here we should recall, that UN Charter entitles the Security Council with “primary responsibility for the maintenance of international peace and security” (Article 24), but not the "only" and "exclusive” one. In a wider sense, this would mean that regional organizations or the same UNGA can enforce peace operations at their neighborhood, for example, if the authorities of target-state asked for that, or the developing conflict endangers their own security. With this in mind, some will argue that such kind of interpretations of the Charter will lead to international anarchy. For instance, Secretary General Kofi Annan noted that "unless the UNSC is restored to its preeminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy” [65; p.221]. As state practice shapes the theory in the international relations, as well as international law, the Kosovo operation seemed to be either the beginning of the end, or the prelude to the coming anarchy. What comes to the UNGA, as a body to mandate peace operations, a brilliant example is the General Assembly Resolution 377, the "Uniting for Peace" resolution, where in an unambiguous way the member-states established that “…if the Security Council … fail[ed] to exercise its primary responsibility for the maintenance of international peace and security … the General Assembly shall consider the matter immediately with a view to making appropriate recommendations for collective measures, including … the use of armed force when necessary.”  

Another UNGA Resolution 37/10 of 15 November 1982, also known as Manila Declaration on the Peaceful Settlement of International Disputes recognized the right of UNGA to discuss any situation that endangers international security, acknowledging the sovereign equality of states and reminded on the “importance of maintaining and strengthening international peace and security [among states] … irrespective of their political, economic and social systems or levels of economic development”, thus putting the comprehensive peace and Westphalian-style stability in international relations above anything else.  

Other 2 resolutions that are closely tied with the notion of are Resolution 43/51 of 5 December 1988 (Declaration on the Prevention and Removal of Disputes…), and Resolution 44/21 of 15 November 1989 (Enhancing International Peace, Security and International Cooperation).

Facing the UNSC failure to address the crisis due to political disagreements within P5, – certain pivotal states prove to be ready to grab “the reason” (i.e. the justification) of escalating crisis with human rights widespread violations and act unilaterally, in face of UNSC failure. Blaming the UNSC for inaction (in ineffective response, or failure to actually proceed with adopted resolution) lies behind the theory of HI, where those, who believe the R2P exists, advocate for unilateral action in order to make peace through the war. On the flip side, this doctrine (no matter you believe it exists or not) once again becomes a silent call for UNSC reform, to make its policies sound, relevant and appropriate. In fact, US-led hegemony and unilateral military and other coercive undertakings all over the world badly harm the UN image and

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64 UN News Centre, July 31, 2007  

65 Quoted by Alex J. Bellamy, Paul Williams, Stuart Griffin, “Understanding Peacekeeping”, Polity Press 2004  
authority, as the only universal organization legally capable to use force. Essentially, after Iraq War started in 2003, in September the same year during the UNGA annual summit Secretary-General Kofi Annan called upon all parties for “radical reform of the world body”. 68 However, the reform still pending, but some changes, at least in our focus-area, has taken place indeed. The UN Peacebuilding Commission’s (PBC) establishment in 2005, by both the UNGA and the UNSC in their respective resolutions A/60/180 and 1645 was an attempt to strengthen this vision of UN supremacy in the issues that essentially believed to be under UNSC mandate. Berdal concludes that “UN is likely to remain a key player in the field [of peacebuilding efforts] for the foreseeable future” 69; pp. 135-136] Once PBC established, a certain agenda was brought before it as “(1) bringing together all of the relevant actors, including international donors, the international financial institutions, national governments, troop contributing countries; (2) marshalling resources and (3) advising on and proposing integrated strategies for post-conflict peacebuilding and recovery and where appropriate, highlighting any gaps that threaten to undermine peace” 70

With this debate in the background, HI theory lacks to secure common support also because of the absence of any comprehensive definition (both in literature and in international law) and proper understanding of real causes and means of HIs.

1.2 Humanitarian intervention (HI)

The practice of HIs is not a new one, and have been successfully employed, for example, by Russian and Austro-Hungarian Empires to wage wars against Ottomans to release the Christian nations of Balkans, Greece and Armenia from its hard yoke. But as Bryan Hehir notes, “the present status is strikingly different from the past.” 71; pp. 29-30].

At first hand, we should try to extract the meaning of the term, since putting side by side such words as “humanitarian” and “intervention” causes fierce debates among most scholars. As Murphy notes, the meaning of the word “humanitarian” is quite broad and commonly describes a wide range of activities of governmental and non-governmental actors, seeking to improve the status of individuals and contribute to their well-being [72; p.8]. Russian scholar T.Bordachev, in turn, challenges the definition of interventionism, and argues that any kind of intervention is more about an attempt of “fundamental influence on the internal affairs of another state, without its consent”. 73 He notes that intervention involves a bold violation of state sovereignty, while the terms of ”peacekeeping” and “humanitarian” characterize actions to maintain international peace and security instead of waging war; and thus, he notes, they are controversial. 74 Just to mention in the margins, this approach is quite common in Russian literature. For instance, the same T.Bordachev speaks about 3 distinct definitions of HI, according the number of aims and problems the interveners face in the target-state. Thus, he defines the first type of

68 Secretary-General Kofi Annan, “Address to the General Assembly”, Sept. 23, 2003
69 Mats Berdal, «Building Peace After War”; The International Institute for Strategic Studies, 2009 (New York, Routledge publications)
70 http://www.un.org/peace/peacebuilding
intervention as shaped with purely humanitarian aspects such as delivery of humanitarian cargoes.\textsuperscript{75} This is what the author names as “the Red Cross approach”. The second type closely follows this by creating certain “security neighborhoods” (or safe havens) around the concerned area for the secure passage of humanitarian assistance; or, as it was in case of Northern Iraq shortly after the Gulf War, imposing non-fly zones to protect minorities (Kurds and Shiites in Iraq). The last one seeks a more comprehensive solution to the emerging humanitarian disaster and goes further with the efforts, apparently becoming wider as a “crisis management” issue. Here the interveners face great challenges, beginning with the one of creating new government structures with “rule and law”. This form of intervention provides more about real occupation of the state, rather than just presence of international peacekeepers.\textsuperscript{76} Another approach, offered by Murphy, distinguishes 3 types of HIs: UN-authorized, regional (under the authority of a regional organization) and unilateral [\textsuperscript{77}; pp. 11-14].

The semantic load of both words represents, at first sight, a political oxymoron, invented to serve certain political and strategic interests. Authors, who argue this, often ask how can military interventions of foreign troops into a sovereign state claim to have humanitarian mission if they cause new human sufferings as a result. A well-known moralist professor Tony Coady says that if “the expression [humanitarian intervention, H.N.] refers to the primary motive for the intervention … it might be better to call it altruistic intervention” [\textsuperscript{78}; pp. 11-13]. Coady's irony has, of course, nothing to do with the realpolitikly made decisions of those pivotal states. Still lacking the clear-cut legal background, Chevallier notes that "…an intervention would only be legitimate if the reasons, both stated and hidden, are solely to protect populations at risk. But unfortunately, real life is much more complex". This is more likely to be true, but, of course, the idea of "pure intentions" cannot be denied at all, since international relations are not totally immoral. What we should do, is to acknowledge that hardly any government in the world would put the lives of its soldiers at risk if there are no vital interests for its national security at the specific target-state. For instance, when Hutu militia forces killed 10 Belgian peacekeepers, Belgium ordered an immediate withdrawal of all its forces from Rwanda, despite it was evident that the poorly-equipped mission would suffer more from this withdrawal. UN military contingents (missions) are completed in a strictly voluntary basis and the international law does not provide any other mechanisms to counter acts of national egoism except for making political statements condemning the "indifferent country." And thus, undertaking transboundary operations is always "a mixture of self-interested and slightly less selfish motivations". In contrast with UN, the NATO, for instance, has its own regular, mobile army units ready to engage in a campaign with a relatively short notice.

In the scholarly literature there is a great bunch of different definitions of HIs, but neither of them is universally recognized and more or less comprehensive. First and foremost, before even going further to definitions, it might be useful to understand what kind of action HI is itself. Arguably, the HI is not a war of aggression since it does not have the general goal to conquer the nation, or its territory – the whole or in part, neither seeks to subordinate its economy, as it happens in traditional wars. In other words, the interveners do not seek to jeopardize either territorial integrity or political independence of the target-state, but try to keep it in line with its international obligations to respect human rights. (Obviously, this happens without any harm to the Article 2(4) of the Charter [\textsuperscript{79}; p.151], which will be elaborated over in

\textsuperscript{75} In the scope of this study, delivery of humanitarian cargoes is set under the term of “humanitarian assistance”, which has nothing to do with intervention.

\textsuperscript{76} Бордачев Т.В. "Новый интервенционизм" и современное миротворчество / Моск. обществ. науч. фонд. - М.: МОНФ: ИЦНиУП, 1998. - 158 с. - (Монографии / Моск. обществ. науч. фонд; N 5)


\textsuperscript{79} Fernando Teson, Humanitarian Intervention: An Inquiry into Law and Morality. Irvington-on-Hudson: Transnational Publishers; 1997
the next Chapter). HI proponents call it to be a "policing operation". The fact is that there is no any comprehensive division line between the two concepts, but rather a membrane based more on feelings and political agenda than on the law. For the sake of this study we will put an invisible bridge between "war" and "policing" depending on whether the interveners declare war beforehand or claim to protect human rights in the target-state resorting to use of force. Disagreeing with this approach, professor Coady treats intervention as "an act of war, whether war is ‘declared’ or not…. [since] intervention frequently has all or most of the behavioral features of war." [80; pp. 15-16]. Even if following this opinion, at least some difference between "aggressive war" and HI should be offered. Theorists often apply to the Roman norm of jus ad bellum. Very often the “just war” doctrine, where the HI theory can comfortably be suited, is employed as a justification “by emphasizing the fact that the intervention will have positive effects not only on a local or regional level, but, through a domino effect, on an international scale” [81; p.71-72].

Well before the genocide begun, the UNSC Resolution 812 (1993) acknowledged that "the fighting in Rwanda [had] consequences regarding international peace and security” and did actually nothing to restore the peace. Now looking back to the situation in Rwanda and UNAMIR’s inaction, J. L. Holzgrefe asks what the international community should have done to prevent the massacre. He defines HIs as: "the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending the widespread and grave violations of the fundamental human rights of individuals other than its own citizens without the permission of the state within whose territory the force is applied" [82; p. 18]. In a very nutshell, this definition strictly excludes the war in South Ossetia as an instance of HI, since the absolute majority of citizens have Russian IDs.

Sean Murphy gives a wider definition for HIs, which is the most commonly cited one among all others:

"Humanitarian intervention is the threat or use of force by a state, group of states or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights" [83; pp.11-12]

Another political scientist, Bhikhu Parekh, estimates HI as "an act of intervention in the internal affairs of another country with a view to ending the physical suffering caused by the disintegrations or gross misuse of authority of the state, and helping create conditions in which a viable structure of civil authority can emerge". [84; pp. 49-69]. Sir Adam Roberts from the British Academy offers another wording, where he puts special attention to the notion of “consent” from the target state saying that HI is “…a military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants” [85; pp. 425-426].

As most often the U.S. acts as a pivotal state in the humanitarian crises, some authors, for instance, tend to name the interventions being "humanitarian" considering the absence of any immediate threat to U.S. strategic interests by any given crisis and its active engagement. The use of force, according to this

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84 Bhikhu Parekh, ‘Rethinking Humanitarian Intervention’, International Political Science Review, Vol 18, No 1, 1997
interpretation, happens because "[American] moral sense and human sensibilities are being massively assaulted" by those grave and widespread human rights abuses [86, p.4].

Having various definitions for foreign military interventions into sovereign states on the grounds of protecting human rights and their dignity, we will offer the following definition, which appears to embrace the case as a whole:

*Humanitarian intervention is a transboundary use of force without appropriate UN mandate and the consent of target authorities, authorized by a regional security organization or undertaken unilaterally to stop human sufferings, with subsequent change of the political regime and political landscape, including the punish of those guilty, and secure more peace in the target-province/state.*

However, this definition is still far away from being comprehensive, and does not dare to be, but it is rather well-packed to become a working one as a basis of discussion here.

It is important to highlight that the term of HI is used here to describe the nature, the pushing point behind the decision to intervene, whereas the contents of the peace operations may vary case-by-case. At best, the priorities of action during the invasion should be: *intervention – restoring order – humanitarian assistance – legitimization of new government after elections – withdrawal.* HI is only the name and essence of the military operation, describing at best one of its driving motives. Other activities must follow without any further due to keep the momentum of building sustainable peace in the war-torn society. This means that while HI is the "brand name" of the intervention, at some point peace/nation-building measures will begin to establish a sustainable government, economy and rule of law, which will turn the operation into the phase of peace-building and so on. This is why the clearest lesson of the 1990s is the urgent need to establish the rule of law from the outset of a peace mission, and next the establishment of *legitimate* political economy becomes an essential factor to deal with [87; pp. 56-57]. Thus, it is presumed that interveners should have their, at least, draft programs for DDR measures, building up the collapsed (failed or criminal) state authorities, judicial and police systems, as well as make available, within shortest possible timeframe, the life-sustaining services to the population. Of course, preparing the grounds for building sustainable economy should be addressed, too. On paper, the UNSC recognized that adequate and timely funding for DDR measures is critical to the successful implementation of a peace process. Alternatively, that situation is capable to grow even worse than it was before the intervention, as we clearly see in the cases of Iraq and Afghanistan. *For instance, the well-known "Vietnamese syndrome" may galvanize if one-time combatants are unable to find "a proper place under the sun", after sacrificing, in their opinion, their lives in the name of the Motherland.* Picking up the Iraqi case, Berdal concludes that “ill-planned demobilization of the Iraqi armed forces in May 2003 was a contribution to the unchecked growth of post-invasion criminal violence…” [89; pp. 58-60]. In fact, when the coalition of states, headed by United States, made a not-so-wise decision to rule out all the soldiers of Iraqi army, it pushed the latter in the arms of those, who opposed to any transformation in Iraq and rejected American presence at all, though some of the soldiers probably had been ready to contribute to the reconstruction process. When those organized and trained fighters joined the "staunch adversaries" of American intervention, having already lost their social status and identity, the result thus became quite

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87 J.Covey, M.Dziedzic and L.Hawley, “The Quest for Viable Peace”, United States Institute of Peace, 2005
88 Statement by the President of the Security Council; S/PRST/2000/10
89 Mats Berdal, "Building Peace After War"; The International Institute for Strategic Studies, 2009 (New York, Routledge publications)
predictable: "a significant number of them sided with the opponents of the transition process" [96; pp.95-96]. Figures show, that around 80% of the violence in Iraq (2005) was the share of organized crime [91, p. 59]. On the other hand, of course, interveners should act in accordance with the ongoing circumstances which not always are in line with the draft strategies. However, ill-planned actions cannot be blamed to changing environments and thus be justified since the intervening powers must foresee all possible scenarios and have advance-planning mechanisms. In any case, the very first things in the long to-do-list of peacekeepers should be to create legitimate police forces to establish rule of law and order, and legitimate judicial system to give the legal background. These are indeed the most important foundations for viable peace to emerge after the war is finished, ceasefire concluded and former belligerents disarmed and carefully demobilized. As Bellamy notes, "illegitimate or biased policing is often one of the major immediate causes of violent conflict [to break up again]". [92; p. 241]

Having this in the background, we contend that the nature of intervention is shaped by the kind peace that interveners fight for. This means that literally everything depends on the agenda, i.e. the interveners want the regime change, stop civil war, end up the political crisis or fight the ethnic cleansings in a breakaway province. This follows a genuine statement made by U.S. Deputy Secretary of Defense Paul Wolfowitz at Munich Conference in 2002 that “the mission has to determine the coalition, not the other way around”. The ad-hoc coalition that is being made under each given circumstances, perhaps, should be best described with the term "coalition of the willing", a military grouping composed beyond UN authorization. The term was coined by U.S. president Clinton in an interview on June 5, 1994; assessing the possibility of sanctions against North Korea. The same description was used later by George W. Bush in 2002 to bring together another coalition for Iraqi campaign in 2003. A set of questions shape the nature of the coalition of the willing: (a) the after-war capacities of the interveners and local government; (b) the responsible body for conducting new elections (if planned so) and, the last but not least, (c) who’s to charge the guilty for war crimes, crimes against peace and crimes against humanity (national court, as it was in Iraq, or international tribunal, as in the case for Yugoslavia). The last point is first time ever being discussed in this research with an objective to see whether the justice carried out internationally is an add-on to the legitimacy/legality issue or not.

It sounds corny, but Kosovo is still the best pattern to illustrate the decisive meaning of the mission in order to assemble a better coalition. Murphy argues that “Kosovo incident … is probably the strongest precedent to date in favor of the legality of humanitarian intervention” [95; pp.3-4]. Moreover, it is often referred to be “a learning laboratory” for the new type of interventions. The coalitions assembled around seem to be the “closest to ideal” for successful peace-implementation strategies at all. Professor Mats Berdal from King’s College (London) goes even ahead and names not only Kosovo, but also all the Balkans region as a “peace-building laboratory”, considering the missions that region had faced since early 1990s [96; p. 12-13] In Kosovo the operating coalitions were the followings:

- Political coalition, the Balkans Contact Group (led by France)

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91 Mats Berdal, «Building Peace After War”; The International Institute for Strategic Studies, 2009 (New York, Routledge publications)
92 Alex J. Bellamy, Paul Williams, Stuart Griffin, “Understanding Peacekeeping”, Polity Press 2004
93 Paul Wolfowitz speech at Munich Conference on European Security Policy, Feb. 2, 2002
96 Mats Berdal, «Building Peace After War”; The International Institute for Strategic Studies, 2009 (New York, Routledge publications)
Military coalition, KFOR (by United Kingdom)
Relief coalition (by UNHCR)
Rule of law coalition (by UN Department of Peacekeeping Operations). UN was required to exercise the sovereign prerogatives of a state for the first time ever.
Democratization and capacity-building coalition (by OSCE)
Reconstruction and development coalition (by War Crimes Tribunal)
Donor coalition (by the G8) [97; p.60-61].

This proved to be the ideal framework. However, in recent-time cases such as Iraq and South Ossetia the interveners experienced major lack of support from UNSC, not to say international isolation and the above-shown scenario did not work out. Very often the absence of consensus within the UNSC makes it unable to act in any effective fashion, thus making room for alternative sources of authority to make relevant decisions on international security matters. With the UNSC deadlocked by the Russian and Chinese veto threats, NATO intervened into Kosovo and Serbia, "and a number of ex post facto statements from various states and state-sponsored commissions claimed that the intervention, though not strictly legal, was nevertheless legitimate" [98; p.9]. Mats Berdal's conclusion is the same: "NATO's military action in Kosovo [was] broadly legitimate though technically illegal" [99; p. 192]. In the words of George Friedman from Stratfor think tank, "this transformed NATO from a military alliance into a quasi-United Nations". 100

This has also pushed to think about alternative strategies for successful missions. The other disturbing point about these 2 examples was the lack of consensus among international key players. Of course, this is not to cancel the role of UN in bringing the target-state back into international order. To invade and shoot at everyone is one thing, but the post-conflict disarmament, reconstruction and development from the "ground zero” costs a lot of efforts and needs lots of investment of knowledge and financial resources. That is why the UN’s role is critical in peacekeeping missions - as a respected and legitimate authority on post-conflict administration of territories (countries). The whole complexity of post-intervention management should include projects such as nation-building alongside with state-building activities – to set the minimum required basis for sustainable development of newly emerging state. As Ratner writes, the phenomenon of nation-building “…began decades ago, when the UN participated in nation-birthing through assistance in colonial self-determination…” [101; p.206].

However, in search of a better answer to the humanitarian crises under the "umbrella" of UNSC inaction, Chevallier appeals to the option of collective decision-making, since "there is less likelihood of being collectively mistaken" [102; pp.87-89]. Perhaps applying to this very logic, then-U.S. Secretary of State Madeleine Albright – "Clinton administration's chief hawk on Bosnia" in the words of Ivo Daalder103 - argued that NATO did not need explicit authorization from the UNSC to act in Kosovo, since the North

97 J.Covey, M.Dziedzic and L.Hawley, “The Quest for Viable Peace”, United States Institute of Peace, 2005
98 Matthew Waxman, "Intervention to stop genocide and mass atrocities", Council on Foreign Relations Special report no. 49, October 2009
Atlantic Council (NATO's governing body) was comprised of only democratic states and making decisions based on consensus, which made it as legitimate as UNSC [104; p.222]. Murphy suggests that the core question in the overall debate about HI concerns about current status of the United States in international affairs [105; pp. 11-12]. Additionally, one of the burdens to find alternatives to UNSC for legal and legitimate use of force for humanitarian concerns hits the wall of uncertainty – i.e. how to distinguish 3 different patterns of UNSC inaction, whether it a) opposes any non-UNSC mandated intervention in general, b) it rejects use of force as a way of crisis management; or c) the resolution doesn’t give any certainty and leaves large rooms for follow-up debates among stakeholders? The most common example refers to UNSC resolutions 1160, 1199, 1203 and 1244 about the situation around Kosovo, where, as claimed, despite no authorization was given to NATO to go on with airstrikes, “they contained a substantial measure of justification for that action” [106; pp. 295-296]. For example, post-factum Russian delegation denied that they had in mind anything about military action when voting in favor of the resolutions. In the same time, everything again depends on the interpretation of the texts in resolutions. Comparing to the UNSC resolutions during the first Gulf War and pre-operation 4 resolutions for Kosovo – one might probably see no difference among them, as far as all of them make clear references to Chapter VII. Some authors interpret the language used in the resolutions as a full justification of NATO air strikes in Yugoslavia [107; pp. 295-298]. This is a quite wide interpretation, since the paragraph 7 of the resolution did not address to any particular international organization, leaving room for further debates and ambiguity. In a search to move forward, for instance, Covey, Dziedzic and Hawley suggest that any UN transitional authority, an executive authority established on the ground, should have the authority to interpret appropriate UN resolutions in a single and accepted way, “to determine the meaning of the mandate and interpret its obligations to the parties” [pp. 62-63].108 As it seems, this will clear away all the ambiguities of the mandates.

Nevertheless, as international law naturally stands beyond politics, the Article 53 of the Charter proclaims that "...no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...". Fundamentally speaking, the opponents of the HI doctrine are concerned that all the problems on ethnic grounds within a state should be settled through the adoption of sound policies by the domestic government itself, without protracting foreign states. They assume that “human rights against sovereignty” policy promotes hegemonism under the pretext of human rights [109; pp. 183-184]. Those who strongly advocate for HI coined a new term to show the horror of inaction: “inhumanitarian non-intervention”.110 Some authors, and Berdal among them, while strongly supporting the norm of non-intervention, also write that "in certain circumstances, the protection of basic human rights may override that principle". [111; p. 192]. Still, today it is true that NATO's Kosovo operation is yet the best pattern of humanitarian intervention in terms of positive results achieved, often

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104 Alex J. Bellamy, Paul Williams, Stuart Griffin, "Understanding Peacekeeping", Polity Press 2004
108 J.Covey, M.Dziedzic and L.Hawley, “The Quest for Viable Peace”, United States Institute of Peace, 2005
110 Simón Chesterman, "Just war or just peace?: humanitarian intervention and international law”; Oxford University Press, New York 2001
called “a learning laboratory”. One of the determinants of success, compared to UN deployments - when all other conditions being equal - HI has got a very important advantage: it can not only be mandated, but also deployed and begin the peace enforcement or counter insurgency within shorter timeframes. To fill this gap, the Brahimi panel report urged to, at first, define "rapid and effective deployment capacities" within 30 days after UNSC resolution and two more months in case of multidimensional peacekeeping operation. [112; para. 91]

Operations in Kosovo, Iraq and South Ossetia and the contrasts between them show the absence of general consensus to the questions “when/where and how” to intervene even if there are some evidences of large-scale human sufferings and/or failure of state to meet her international obligations. And therefore, HI can obviously be drawn at the edge of being evaluated as a war of aggression at the beginning of the operation, in terms of international law, since it breaks the Article 2(4) of the Charter. Additionally, whatever justification is at stake, the Article 5 of the Definition of Aggression affirms, that “no consideration of whatever nature… may serve as a justification for aggression”. As everywhere in international law, the opposite is also available to prove, as those in favor of HI bring the argument enshrined in the Article 7 of the same resolution, which, making reference to the Charter, says that “nothing in this Definition… could in any way prejudice the right to self-determination, freedom… of peoples forcibly deprived of that right… particularly peoples under colonial and racist regimes or other forms of domination”. Thus, two basic values of international law – freedom and human rights vs. state sovereignty appear to be in conflict, which, presumably, is left for the states to make final decisions in the absence of any prescription how to act by default. The key point - if the HI has the right to exist or not - lies, inter alia, in the ongoing debates where/who should make the final decision to undertake HI. Two different answers emerge: Russia, China and some other states on ad hoc basis insist on UNSC primary and peremptory role without any reservations, while U.S. and her allies sometimes are in favor of making the deal behind the UNSC. The issue of the decisive voice about HI are divided the same way: UNSC by a resolution, or any regional organization (generally speaking – the NATO) or U.S. either unilaterally or with a small coalition assembled. The unilateral peace operations of last decade prove that even in case of U.S. vacancy, the “coalition of the willing” should secure at least its blessing to implement what has been decided in a smooth and successful way. Otherwise, noting the slight difference between alleged HI and war of aggression, their actions will most probably be evaluated as an aggression, which will lead to certain inflictions towards the “criminals”. A best example is the "PR war" against Russia during the days of Georgian wars in 2008 at the American and European media. In wider terms, it is important to elaborate more on the crime of aggression to understand the situations when it becomes applicable.

1.3 HI vs. crime of aggression

The major point to discuss in this paragraph is whether HI is an aggressive war against a sovereign country, or an attempt by a state or coalition of states to stop grave human rights violations and hold the governor of the target-state responsible for crimes against humanity, as part of its international obligations. As a whole, this paragraph contends that sovereign power in domestic politics is limited by responsibility before the international community.

Back to 1950, the UN International Law Commission published a report containing the principles of

114 Even though NATO is generally perceived to be a regional organization but it has never applied to the UN to be recognized as a regional arrangement – in its legal meaning.
international law recognized in the charter of the Nürnberg Tribunal. In the report the crime against peace was defined as «Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances». In another words, the Charter of the International Military Tribunal (IMT) at Nürnberg designated a "war of aggression" as a crime against peace, while the IMT for the Far East, the Tokyo Tribunal, similarly defined as a crime against peace "a declared or undeclared war of aggression".

The UN Charter-framed international law recognizes military acts between states valid and lawful only in case there is unambiguous UNSC resolution appealing to Chapter VII, or a state is claimed to employ use of force in self-defense under Article 51. All other instances of coercive actions are (or potentially can be) defined as acts of aggression. Noting this, HIs clearly turns out of the UN-led “peace triangle” and any other Chapter VII mandate, thus becoming a matter of fierce debates both politically and legally.

International law offers some definitions for the crime of aggression and all of them appoint to nearly the same jus cogens norm: sacred nature of state authorities and non-interference into domestic affairs. The legal acts list includes UN Charter Article 2(4), General Assembly’s declaration on Principles of International law (1970), and, finally, General Assembly’s Resolution 3314 on the Definition of Aggression (1974). The same approach pops-up in other UN relevant official documents. The latter, as already touched upon above, frames the notion of aggression in very broad terms as «…use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations». Having these instances under consideration (sovereignty, territorial integrity or political independence), according to Charter Article 39 still the UNSC is to «…determine the existence of any threat to the peace, breach of the peace, or act of aggression…». Unless this is done, aggression can be used only in political frameworks, which is being done in the contributions of many scholars.

Going back to legal terms, as the UNGA defined at its earliest stages (1946), aggression is a crime of individual accountability, and so either the target-state’s authorities or the statesmen having adopted a politically-driven decision to use military force are to face international justice. The Article 5(1) of the ICC Rome Statute lists the crime of aggression under the jurisdiction of this Court. However, the exercise of that jurisdiction depends on the next paragraph, Article 5(2), which provides that the Court “shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime”. Murphy gives a very brief prescription how to solve this mess, writing that “…it will not seem very credible for the ICC to argue that an act of humanitarian intervention falls outside the scope of its crime of aggression”. And here we arrive at a place, where policy becomes closely connected with the international law. For instance, UNSC has hardly ever used the term

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117 Charter of the International Military Tribunal for the Far East art. 5(a).

118 Article 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.


120 Articles in UN Charter Chapter IV recognize the importance of General Assembly, but Security Council is considered to have primary role with respect to international disputes, peace and security maintenance issues. Hence, formally the General Assembly resolutions don't have any serious impact to the international law.

«aggression» to determine any transboundary use of force since WWII, be that North Korean invasion to South in 1950, or even Saddam Hussein’s war against Kuwait which, instead, was characterized as “breach to international peace” in the adopted resolutions. And, as far as seeking ICC jurisdiction to label a transboundary use of force as an act of aggression at one point requires a UNSC resolution applying to the Court, it becomes more and more impossible to address that crime in the ICC [122; pp.20-21]. The Assembly of States Parties of the ICC has created a Special Working Group on the Crime of Aggression in 2002 to discuss the definition, elements, and jurisdictional conditions of the crime of aggression. As noted above, the Review Conference of the Rome Statute took place in Uganda in June 2010. The actual exercise of jurisdiction is still subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. [123] Legal dimension of the issue makes it clear that HI fully falls under the definition of the crime of aggression, as phrased in the UNGA resolution, even though HIs initially are not aimed at creating more instability in the target area, but rather the opposite, which opens the floor for fierce debates. What many scholars fail to deliberately separate – rather because of their specific research objectives rather than intentionally - the debates going on in two different layers of international relations – political and legal approaches. Thus, if, for instance, NATO airstrikes in Yugoslavia initially were labeled as an act of aggression by Russia and China (mentioning only P5 states), politically speaking there was a huge demand from the oppressed Albanian minority of Kosovo to engage militarily, thus making the intervention totally legitimate for those who were experiencing ethnic cleansings directly. On a later stage, to make the case crystal justified from legal perspective either, the alleged war criminals (Milosevic and others) were brought to ICTY.

Concluding, as we have already elaborated over both the terms of all peace operation patterns and the definition of the nature of coercive measure itself – the other important question remains untouched - WHEN an intervention – should be the case! Next paragraph will try to figure this out.

The environment of humanitarian crisis [124]

After the horrors of WWI both the emerging “international community” and the states themselves began to think how to escape bloody wars in the future. Although the idea of Briand-Kellogg Pact got the Nobel Peace Prize (1929), it proved unable to stop future wars and conflicts. On the wreckages of the post-WWII world, the UN was founded, in words of its Charter, “to save succeeding generations from the scourge of war”. However, the bellum omnium contra omnes of Hobbes became even more institutionalized and the Cold War-style proxy wars acquired even more clear-cut rules of the game. What significantly transformed during those times, compared to XIX century – an unspoken consensus emerged that active war should be a measure of last resort. In order to go forward with this common understanding – the international humanitarian law, i.e. the Rules of Geneva, emerged and was enriched with various conventions and additional protocols to prevent more active wars and, in case they erupt, to regulate its rules. With the mosaic of humanitarian law being put together, the beginning of 1990s appeared to be the threshold when fundamental human rights were seen not only as a formal international obligation of governments, but also as certain legal and political responsibilities of governments. With the

124 This paragraph will not touch what kind of governance system should be established to be not only legally feasible but also a legitimate one as a result of state-building efforts, leaving that issue for another study to be done. Instead, only the pushing factors behind the intervention are at stake.
only superpower remaining on the surface, it became available to solve those crises not only politically - which proved highly unsuccessful or even impossible at Cold War – but also militarily, wherever/whenever necessary. The legal responsibilities in the form of criminal charges at international ad hoc tribunals became to fulfill the new order. The only remaining obstacle to finalize that doctrine appeared to be the absence of common understanding of 2 main questions: a) which values are to be called universal; and b) [after the first one got the answer] where is the Rubicon's riverside making military intervention inevitable? In other words, the absence or the declining character of A to the limits of B supposed to shape the environment of crisis which the international community, headed by the United States and its like-minded ad hoc allies, should have to ensure. The defeat of Saddam Hussein's aggression in Kuwait and limiting his power to violate human rights of Kurdish population of Iraq, together with U.S. intervention in Mogadishu in December 1992 caused "the international euphoria about building a new world order" [125; p. 1]. However, that cheerfulness was not justified as the genocides in Bosnia (Srebrenica) and Rwanda happened a while later. The never-ending atrocities in Sudanese province of Darfur in modern times prove those cases still have not been lessoned. Altogether, the above-mentioned issues became under the magnifying glass of international scientific community – both in political and legal dimensions, trying to understand the re-shaped phenomena of XIX century in new fashion.

The burdens of common legal understanding of the humanitarian crisis, in a very nutshell, implied a clear-cut distinction between natural/moral and legal/civil rights, which yet has not been established. Ironically, the legal debates so far have been unable to produce comprehensive outcomes because of the political undergrounds. Since the only remaining superpower – the United States – was itself a democracy with liberal economy, the so-called "Clinton doctrine"126 acquired the strategic vision towards two elements: a) ethnic cleansings must be stopped elsewhere by all means, including active war; and b) democracy and market economy values should be promoted internationally as a practical implementation of liberal peace theory. The "Western" understanding of the mission and scope of peacekeeping is, among others, "spread[ing] liberal democracy thus reducing the likelihood of war between (and within) states" [127; p.11]. In other words, this kind of "…peace-support aims to promote liberal democracy and enforce a post-Westphalia conception of the liberal peace" [128; pp. 184-185]. Of course, the critics to his doctrine often and not mistakenly point at the U.S. inaction in Rwanda in 1994, where Clinton Administration did literally nothing to stop the obvious genocide.

Going once more back to the "Clinton doctrine", we should stress that the philosophical issue whether UN or any other international institution has the legitimacy to build particular type of governance (liberal) during the transitional period – a type that is not universally adopted, for some authors tends to be crucial [129; p.238]. The theory generally rests upon the observation that democratic governments hardly ever wage wars against each other, or internally – advocate for inter-ethnic hatred and commit ethnic cleansings. This theory apparently goes beyond U.S. domestic political discourse, though it will be premature to assume it's universally appreciated. As offered by the report of UN Secretary General, "the biggest deterrent to violent conflict is the promotion of sustainable human development and a healthy democratic society…" [130; para. 15] which is again built upon the democratic peace theory. Moreover, the

126 “Democracies don’t attack each other… Ultimately the best strategy to insure our security and to build a durable peace is to support the advance of democracy elsewhere". (U.S. President Bill Clinton in the State of the Union Address: New York Times, 26 January 1994)
127 Alex J. Bellamy, Paul Williams, Stuart Griffin, "Understanding Peacekeeping", Polity Press 2004
128 Alex J. Bellamy, Paul Williams, Stuart Griffin, "Understanding Peacekeeping", Polity Press 2004
129 Alex J. Bellamy, Paul Williams, Stuart Griffin, "Understanding Peacekeeping", Polity Press 2004
130 Report of the Secretary-General on the implementation of the report of the Panel on United Nations peace operations; Report A/55/502; 2000.
UNGA Resolution 337 (2003) emphasized that “peace and development are mutually reinforcing”. A further explanation, offered by Hegre, is that states who trade with each other tend not to fight, since war is costly and irrational. From our perspective, for instance, warlords, autocratic regimes or other non-democratic entities are much easy to start wars than those who at least show some minimum will to build democratic state. This is not to undermine the importance of national interests in the international relations and especially considering the willingness of states to preserve peace, e.g. democratic Serbia after Milosevic is still absolutely strict and firm to return Kosovo under its jurisdiction, but no bellicose statements can be heard from Belgrade. Or another example – along with the disappearance of last democratic institutions in Azerbaijan the leadership of that country has been making far more "calls of war" to win back Nagorno Karabakh.

In fact, the environment of humanitarian crisis, put in other words, might be expressed as the pushing factor behind the ultimate need to intervene as soon as it is acknowledged as being such by the pivotal state or the coalition of the willing. The list of those human rights that should be secured as an international obligation of states (governments) is enshrined in relevant international/multilateral treaties (for example, OSCE Helsinki Final Act) and UN conventions (Covenant on Civil and Political Rights). In general, they represent universal civil rights (freedom from any kind of discrimination, freedom of movement, speech, faith, media, political pluralism and participation) as well as natural human rights (life, dignity, freedom from forced medical experiments, etc). A UN Report on peacekeeping (2008) offers a very well-packed wording on, for example, post-conflict environment:

“The State’s capacity to provide security to its population and maintain public order is often weak, and violence may still be ongoing in various parts of the country. Basic infrastructure is likely to have been destroyed and large sections of the population may have been displaced. Society may be divided along ethnic, religious and regional lines and grave human rights abuses may have been committed during the conflict, further complicating efforts to achieve national reconciliation” [133; p. 22].

The focal point is still to define – being cynical enough - HOW MANY and TO WHAT EXTENT these rights need to be neglected to assemble a legitimate justification to intervene into domestic affairs. Claiming that "justifications of war … refer to the number of casualties that the conflict will provoke, or has already caused” [134; p.72] obviously means again to get back to the essentials of Machiavellism, while the main concept of HI itself impersonates high moral and humane values of international community, or at least, has got those among other mixed motives, as already mentioned several times here.

What our understanding of HI suggests, the transboundary operation should start between the initial signs of emerging humanitarian crisis and state failure up to the actual moment of inter-ethnic clashes and civil war proves to be the next step, at the latest. The “moment X” of intervention, of course, is a matter of political decision within the “coalition of the willing”, if it is assembled, or within the government of the state that is a pivotal shareholder in that specific geopolitical area and announces its readiness to undertake R2P policy. Very often the UNSC is not flexible enough to find the consensus among members, while the humanitarian crisis in the given state is emerging, with a certain threat to expand

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131 UNGA Resolution 337 (A/57/L.79), adopted 18 July 2003  
132 Alex J. Bellamy, Paul Williams, Stuart Griffin, "Understanding Peacekeeping", Polity Press 2004  
http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf  
beyond its own frontiers. For the sake of this study in order to describe the environment that determines the urgency of intervention, the following quadrangle would be useful (Figure 3).

![Quadrangle](image)

**Figure 3: Main prerequisites (checklist) for taking action**

Geopolitical component of intervention, however, is also very much important to mention. Thinking in realpolitik terms, of course, the geopolitical component is quite significant. The most striking example of this is the Operation Uphold Democracy in Haiti by U.S. and its allies and “criminal omission” in Rwanda in 1994, perhaps, only because P5 states did not have enough national interests in Rwanda at stake. Given "neither the means, nor the mandate to accomplish the mission" [\(^{135}\); p. 137], UNAMIR took no action to prevent the genocide. Secondly, it's naturally very important to recognize the sides in the conflict and in the main course identify the stance of central government in the chaos, i.e. if government appears to fight the humanitarian catastrophe and failing statehood with all available means, or it is sided with one of the parties and acts with prejudice towards the other side(s). For instance, when the war in majorly Armenian-populated region of Nagorno Karabakh (South Caucasus) in early 90’s broke up, Armenia waited until central government in Baku sent troops to fight the ethnic clashes in the region instead of acting as an impartial judge. This very fact forces Armenia to intervene unilaterally to Nagorno Karabakh, without any UNSC sanction, in order to save local Armenian population from ethnic cleansings and provide security. Nowadays, the constantly heard military rhetoric from Baku only strengthens Armenia’s legitimacy to have regular army troops in Nagorno Karabakh.

Summing up, there is still a major debate that looms over any kind of definition of humanitarian crisis: shall it be a political or a legal in its elf? The answer to this question will outline what kind of peace should be established as a result of intervention.

The question whether HI is unlawful or not – might have different and even mutually excluding answers. The interveners often apply not to the law, but rather to the reason why they commit a transboundary military operation. That reason is always the same: to save the people from widespread death and sufferings, and secure an environment where people can live in dignity and develop. All states in the world agree upon the need of positive development and international idyll. Nothing is problematic until the moment when the adversaries of the theory approach their understandings of what is included in the "universally recognized human rights", i.e. how to distinguish the gross violations of human rights in the breach of international obligations from the politically-driven assessments. Albeit the international community has got the wide consensus that all human beings, without prejudice to their race, beliefs and form of political governance and economic system, should live in "Liberté, Égalité, Fraternité"\(^{136}\) in dignity and "in the pursuit of happiness"\(^{137}\) – the environment where all this is possible is a matter of

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\(^{135}\) Alex J. Bellamy, Paul Williams, Stuart Griffin, "Understanding Peacekeeping", Polity Press 2004

\(^{136}\)  "Liberty, equality, fraternity" – the motto of French Revolution, 1789.

\(^{137}\) Motto of American revolution, from the Declaration of Independence, 1776
fierce debates among scholars and states. It's obvious that the answer to this question is absolutely different in Chinese, Indian, Russian, Pakistani and American approaches. Despite of this, the United States, United Kingdom and other states of Western Europe – as the main drivers of UN-led and unilateral peace operations – also at the hand of Bretton Woods institutions, lead the target-states to the liberal-democratic system of governance, often not paying attention to the local specifications. For instance, the democracy for Iraq at the moment means a couple of terrorist blasts a day, with over 30 reported dead. Altogether, this constitutes fierce debates among P5 members, as well as in wider international community both about when/where/how to intervene and who should authorize/undertake the peace operation. While UN-led operations are still available to discuss at the UNSC and find the common ground, this issue concerns humanitarian interventions in a wider sense, initiated unilaterally or in the ad hoc coalition beyond UN authorization. In short, while U.S. and her allies advocate for unilateralism in case of UNSC failure, Russia and China in most cases strongly oppose it. Subsequently, this controversies lead to the paralyzed UNSC and either the coalition of the willing emerges to address the crisis with the use of force, or the UNSC endorses a limited mandate for a peace operation which falls short to solve the conflict. The history around the failed UNAMIR operation [138; p. 139] and a follow-up French intervention to Rwanda totally post-factum is a sad example of this.

Another major driving force for humanitarian interventions is the common belief, perhaps with practical background, that domestic instability and political vulnerability, fueled by large-scale human rights violations, at some point transfers the instability to the neighboring nations, thus having regional and international implications. Going back to the UN, obviously throughout the Charter the “maintenance of international peace and security” coexists with the more amorphous notions of “threat to the peace” and “breach of the peace” where due to the absence of the word “international” – peace might, perhaps, be understood in a two-fold manner – both in international and in national, domestic dimensions. At certain point, the domestic unrest constitutes a “breach of peace”, which is under direct responsibility of UNSC to preserve.139 These provisions provide large rooms for different interpretations. It is right here when U.S. and European allies accuse the non-democratic states for disrespects of human rights and freedoms, embodied in the Conventions and international treaties where they are signatories, they also state that those are domestic obligations but also have international dimension. Lepard, for instance, draws our attention at the fact that "peace and human rights within all countries are considered [as] matters of international concern"[140; p.162]. This creates certain ambiguity in terms of classifying domestic political unrest, usually caused by inter-ethnic clashes and human rights abuses, in a failing state as threats to regional and hence – to international peace. This represents a bold linkage between national and international situations. All in all, today it seems impossible to find a purely internal conflict/crisis that does not have implications towards at least regional security agenda. On the flip side, labeling states as being “powerless”, or in other words – “failing” - carries certain threats of biased approach. In order to escape this challenge – the UN Peacebuilding Support Office (operates within the UN Secretariat) submits twice-yearly early-warning analyses to the Peacebuilding Commission to help it in organizing its work”[141; p.142].

With this in mind, still it is too equivocal and politically-motivated approach to assess what laws and rights "need to be" abused to become the threshold triggering the international community to intervene

138 Alex J. Bellamy, Paul Williams, Stuart Griffin, "Understanding Peacekeeping", Polity Press 2004
139 The notion of "peace" has a unique place in the articles and essence of UN Charter. Along with the articles, recognizing the UNSC primary responsibility for the maintenance of international peace and security, other instances appear where only "peace" is there, without any qualifying adjective, and thus making it applicable to domestic unrest, too.
141 Mats Berdal, «Building Peace After War”; The International Institute for Strategic Studies, 2009 (New York, Routledge publications)
(whether with the authority of UNSC or not) in the domestic affairs of a state. The only solution to this uncertainty – to extract the similar patterns of former interventions, including the indictments to the "criminal" authorities, charges made by the prosecutors and the international community and proven during the international tribunal proceedings. This will be the list of crimes, which has an international criminal responsibility with universal jurisdiction. In the margins we should recall, that the international responsibilities and obligations – no matter political or criminal – is a relatively new phenomenon in the international agenda, since the Cold War rivalry did not give such a room due to obvious reasons. A good, but sad examples could be named as of the "criminal inaction" of the international community in the face of genocidal regime of Pol Pot in Cambodia, or the regime of apartheid in South Africa. The latter faded away only after the disappearance of the Soviet threat in the early 1990's.

Like in many other spheres of international relations, the notion of humanitarian crisis and the ways to overcome it, including by means of active war, has got a new meaning in early 1990s. Not only the victory against the aggression of Saddam Hussein in Kuwait, but also establishing non-fly zones within sovereign territory of Iraq showed both the emerging supremacy of US, and the new rules of the game. Those new rules came forward, for instance, with UNSC Resolution 787 (1992), which established that the situation in Bosnia and Herzegovina, inter alia, the ethnic cleansings and human sufferings “constitute[s] a threat to the peace”. Thus, human rights protection domestically was legally tied with the notion of international peace. Later on, the establishment and proceedings of ad hoc tribunals created such an atmosphere where the grave violations of human rights and freedoms became a crime with universal jurisdiction and part of international obligations of states. Of course, this did not cancel the national interests of the states, since such regimes as Sudan/Darfur and Libya are still flourishing, at the help of certain governments both in East and the West. The geopolitical component of UN deployments and even HIs, besides the humanitarian grounds, becomes evident when some mandates, for instance, remain ill-completed while others require even selection from the list of countries that announced their readiness to contribute troops. Perhaps as a response to many critics, the Brahimi Report called on creating “on call list of about 100 military officers”, to make more rapid response to the threats to international security [142; para. 117d].

The opposite is also true. In the modern world, the issues on purely humanitarian grounds obviously are less likely to result in active military confrontation between/among adversaries. Instead, territorial claims and subsequent inter-ethnic clashes based on that are most often used as pretexts of war. All in all, it's important to explore which particular causes are used more often as “justifications” for resorting to war, as a last measure towards the fulfillment of foreign policy goals of state A (intervening) at the expense of state B (target-state). The points that enable justifications for transboundary military operations, i.e. aggression towards another state’s sovereignty, are well described in the literature. [43] Right here is the crossing line of political and legal assessments for the environment of the humanitarian crisis. That environment is sometimes more about perceptions than the reality how it is. To describe the crisis environments as a whole and in all complexity a certain set of issues must be kept at stake: (a) political context, (b) historical settings and psychological climate, (c) violence, insecurity and crime; and (d) political economy of war and peace [144; p. 30]. Perhaps, the list of indictments at the international criminal tribunal is the best illustration to what extent those rights need to be violated for the international community (UN or ad hoc coalition) to enact an intervention. Thus, essentially, the environment of humanitarian crisis for the future interventions can be characterized by the criminal charges that most probably will be due after crisis resolution. That is the whole list of crimes against

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143 See, for example, Ryan Goodman, "Humanitarian intervention and pretexts for war", American Journal of International Law, Vol. 100:107, 2006
144 Mats Berdal, «Building Peace After War”; The International Institute for Strategic Studies, 2009 (New York, Routledge publications)
humanity and crimes against peace that the criminal authorities of the target-state or the specific area (region, breakaway province) will most probably be charged by an ad hoc international criminal tribunal. Having the UNSC resolution, mandate, charter, experience and cases in already established tribunals – Rwanda, Yugoslavia, Sudan, DRC – we can extract not only the common charges, but also formulate those circumstances that create common understanding of the environment of crisis. Right next to those charges, since July 2002, we have the Rome Statute of ICC enforced, which also defines those crimes, also adds that, for instance, national courts cannot proceed with the cases of crimes against humanity. Speaking over this, it's important to mention, that the term "crime against humanity", in the absence of the notion "genocide", appeared in the international political and legal vocabulary on May 24, 1915, when the Entente states issued a joint declaration, characterizing the atrocities against Armenians in Ottoman Empire. In addition, it was suggested that Turkey should be held accountable for those crimes.

Briefly summarizing this chapter, it worth mentioning that at least the crimes listed in the Rome Statute of ICC – genocide; crimes against humanity; war crimes and the crime of aggression – together with intervener's national interests at stake - are considered as legal justifications for intervention. Obviously, the large-scale human rights abuses are the "necessary" legal background, justifying humanitarianism and the intervention itself. For instance, with the «TV images of impoverished families set to spend a freezing winter in plastic shelters» (so-called "CNN effect") the international community, namely the NATO countries, decided to engage in employing diplomacy to find a solution to the emerging humanitarian crisis in Kosovo province of Serbia, which ended up with military intervention to those territories. Besides the political component of these evaluations of the situation in different countries by pivotal states/group of states, mentioning these crimes under ICC jurisdiction as primary (or even main) legal justifications to intervene overrunning the norms of sovereignty and non-intervention. The establishment of institutionalized international court – the ICC – with emerging jurisdiction was resulted by "[the] blossoming of sui generis jurisdictions and ad hoc tribunals" (Sierra Leone, ICTY, ICTR and others). ICC is blessed to become a universal court for wrongdoings in 4 areas of unlawfulness. However, as Garapon writes, so far "international criminal law does not depoliticize, but it re-politicizes" the overall process for the legal justice to happen, "provid[ing] a space for a new type of political action" .

145 Rome Statute of ICC
146 Text of the declaration
CHAPTER II: [IL]LEGAL BACKGROUND

2.1 Legal status of humanitarian interventions

With a narrow and straightforward interpretation of the UN Charter and other relevant multilateral treaties of international law makes it obvious that current international legal regime prohibits any kind of threat or use of force against any sovereign state (Articles 2(4) and 2(7)), unless with proper UNSC mandate. On the other hand, well recognizing how things are in reality, this paragraph questions the reason to preclude HI from the international law and declare it unlawful, since sometimes it is the sole way to protect nations from their legal (but illegitimate) perpetrators, i.e. undemocratic governments. Thus, this chapter will combine international law regulations with so-called “realpolitik” patterns in contemporary international order. The history around HI is quite well written in numerous books and other contributions by established scholars, and this research does not intend to bring anything new about the pure historic developments. However, it is important to have it here to make the research fully-packed.

Back to the times before the collapse of the Soviet Union and the fall of Berlin Wall it was too hard to imagine that either of the two global powers will have any success by sending troops to a third country to bring sustainable peace and more stability. That was unimaginable just because of the philosophy of “Great Rivalry”. So-called Potsdam-Yalta order did not provide any consensus about the basic “components” of human rights and any pattern of violations measurement. Therefore, all the Cold War peace operations traditionally were associated with Chapter VI with consent-based nature, aimed at freezing the conflict as it was. An ideal example to illustrate that, of course, is the UNEF I mission (November 1956 - June 1967). In other words, during the Cold War “rules of the game” required sovereignty, non-intervention into internal affairs and self-determination to become absolute principles of international order. When the Warsaw Pact was self-dissolved and Iron Curtain fell, the only victorious side - the United States and allied powers - radically changed the former perceptions of “threat” and "challenge" for NATO. Just a month before the de jure demise of Soviet Union, in November 1991, NATO members met in Rome and adopted “The Alliance's New Strategic Concept”. The Rome Summit, 1991, declared that “the monolithic, massive and potentially immediate threat … has disappeared” and, naturally, the security challenges and risks needed to be re-shaped and re-orientated.

Back those times, the new Concept was quite honestly written: “Risks to Allied security are less likely to result from calculated aggression against the territory of the Allies, but rather from the adverse consequences of instabilities that may arise from the serious economic, social and political difficulties, including ethnic rivalries and territorial disputes, which are faced by many countries in central and eastern Europe”. To this end, the sub-regional military organization that was created for collective self-defense purposes only

150 The issue of terrorism here is put aside so as not to lose the actual scope of the research. But in the very nutshell we need to mention that terrorism, unless being allegedly state-sponsored, is only a business of non-governmental agents of international relations. This research addresses only violations caused by the government under fragile or failing statehood. Terrorism is considered to flourish only in certain regions of a state, therefore a joint action (and consent) with the legitimate government is required to stop this practice. This very often falls under UN mandate, since terrorism is a global threat, but, for instance, the Kosovo issue was a threat only for regional security and stability in Balkans.

151 UNEF I served as a buffer between the Egyptian and Israeli forces, providing “impartial supervision of the ceasefire”, as written in the official statement by UN. UNEF was withdrawn in May-June 1967, at Egypt's request. Only days after their pushback the so-called Six Day war started.


(under Article 51 of UN Charter) was transformed into a mechanism for peace-enforcement and humanitarian interventions at the territories of her “special and legitimate interests”, literally – all around the world.

The end of the Cold War brought a new debate among the followers of legalist paradigm and those who insist on the primacy of politics in international relations, and particularly – conflict resolution [154; pp. 326-328]. The correlation between the international law and realpolitik of the “civilized” powers (or we should say - "stability providers") largely depends, and has always depended, on the specific neighborhood of troubled region/area and its national interests at stake. The reactive action in Albania (Operation Alba, April 1997) and omission earlier in Rwanda (1994) are very obvious facts.

Although the great ideological rivalry now seems to be overcome by the demise of one of the adversaries, but the much anticipated "end of history", the way it was predicted by Fukuyama,155 did not come and liberal democratic values did not give the expected benefits. Considering the sources that human rights record is extracted from (mainly US-based human rights organizations, such as Amnesty International, Freedom House, Helsinki Committee for Human Rights, Human Rights First, Human Rights Watch), one can question the credibility as well as impartiality of estimations, especially when some countries are labeled to be "rouge states" by default, whatever they do.

The demise of Soviet Union, most importantly, kicked off new and wider interpretations of UN Charter and other Conventions, particularly the *jus cogens* norms of non-intervention in domestic affairs, sovereignty, non-use of force and peaceful settlement of disputes. The human rights issues were brought on the top of international agenda by US presidents beginning with Bill Clinton. Professor Brian Lepard, for example, picks up the Article 1(3) of the UN Charter,156 Articles 55 and 56, and claims that (in combination with several other points), “in some cases military intervention in defense of these norms may be legitimate, and perhaps even required, under international law”[157; pp. 4-6].

Since the end of the Cold War peacekeeping missions have been changing their spirit and essence, as the common understanding of *peace, war and sovereignty* itself has had great metamorphosis. For instance, with the latter, there are plenty of definitions for sovereignty – those who refuse to amend the term in Westphalia meaning fiercely fight with the others who see it more as a responsibility before citizens. Whatever the pros and cons of the sides are, the evidences of last decade show that along the globalization taking place, the meanings and characteristics of independence and sovereignty has transformed into something still not in certain nature. In other words, the transformation of concepts is the point where all sides are on the same page. Perhaps, most important aspect is the meaning of sovereignty. Some authors define this "tricky concept" as being "independent from any outside authority". [158; p. 12]. That change routed the following path from HIs to the "war on terror" after 9/11 and R2P policy after the 2005 UNGA relevant report was published. Although the idea of establishing an international legal doctrine of HI has generally foundered, the normative principle of the R2P has emerged in its place – as a political, rather than legal concept [159; p.10]. In recent times, so-called "stabilization and reconstruction”

155Francis Fukuyama, " The End of History?", The National Interest, 1989  
156“*To achieve international co-operation in …promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.***”  
159Matthew Waxman, "Intervention to stop genocide and mass atrocities", Council on Foreign Relations Special report no. 49, October 2009
operations are at stake, considering Iraq and Afghanistan.

In order to assemble the whole canvas of provisions of international law concerning the right of HIs (if it exists), the first step should naturally be to identify those documents and materials which will be referred to. The Article 38 of the Statute of International Court of Justice genuinely determines those sources of contemporary international customary law very precisely:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. …. judicial decisions and the teachings of the most highly qualified publicists of the various nations…

Although some scholars disregard this, the state practice since 1991– as one of the main sources of international law (b) – evolved in a way paying more attention to universal human rights rather than Westphalian sovereignty, and tremendously emerged with Kosovo operation in 1999. As we will argue that HI has become a customary right of states after the decade-long practice of humanitarian interventions. The Kosovo war is the starting point where all forthcomings still draw “inspiration”. Then-Secretary of State for Defense of UK Lord Robertson, (later on a NATO Secretary General), said the statement by UN Secretary General Kofi Annan arguing that “there are times when the use of force may be legitimate in the pursuit of peace” created “moral imperative” and “legal justification” behind the NATO air strikes against Yugoslavia. In fact, and this study claims that all the theory of HI seems to be a justification to act whenever the given state's development undergoing an unsupervised path, capable to change the status quo.

In a very nutshell, the legal background of HIs, inter alia, rests upon the Universal Declaration of Human Rights (1948) which declaratively links the inherent human dignity with the notion of peace in the world, saying they are closely interconnected. Other life-sustaining, landmark UNSC resolutions include:


Although there are no specific articles on peace operations in UN Charter, the legal background at large can be extracted from Chapters VI (pacific settlement of disputes), Chapter VII (enforcement) and Chapter VIII (regional arrangements). The well-known four Geneva conventions of 1949 and their two Additional Protocols of 1977 are also out there.

Of course, some will argue that international order is still the same, and based on the status quo emerged after WW2 with strong commitment of major players to follow non-intervention into domestic affairs and sovereignty as a binding mechanism of international relations. To have the full image of the development, perhaps we need to assess the patterns since 1991 where, facing the obvious crimes against humanity on

161 UN Press Release SG/SM/6938; March 24, 1999. [http://www.globalpolicy.org/component/content/article/190/38800.html](http://www.globalpolicy.org/component/content/article/190/38800.html)
162 Secretary of State for Defense, the Rt. Hon. George Robertson, MP, “Kosovo – Some Preliminary Thoughts”, Ministry of Defense, June 29, 1999
the ground, P5 was unable/unwilling to react and enforce peace – whereas the HI emerged basically on these failures.

As numerous legal scholars point out, the international legal system is consent-based and states in fact are bound to comply with only those rules to which they have consented. And the irony of the present time international order is, that it seems like some states have withdrawn their consent from this particular norms envisaged in Articles 2(4) and 2(7) or UN Charter. Even though no official statements have been made in this regards, it's obvious that countries like US, UK or other allies do not seem to be restricted with those norms in their foreign policy undertakings, including, for example, the Iraq war of 2003. Even paying no attention to the state practice during the Cold War, blaming it to the great power rivalry, from 1991 and onwards we have numbers of cases when group of states, primarily those of Western Europe and United States, have neglected this norm by initiating military interventions, perhaps legitimately, but unlawful, to some volatile regions. Elaborating further on the legitimacy of the non-intervention norm, set by Article 2(4), Thomas Franck still in 1987 wrote that "the wide disparity between the norms it (i.e. Article 2(4)) sought to establish and the practical goals that nations are pursuing in defense of their national interest". Later on he concluded that following the U.S. invasion in Iraq the norm of non-intervention "died again, and, this time, perhaps for good". As a professor of international law from Fletcher School Michael Glennon writes, non-intervention is not "a rule embraced by the international community as a whole", hence it “is not an international law”

Trying to re-invent the legality behind HIs many scholars quote Article 1 of UN Charter, which establishes the purposes of UN as “to maintain international peace and security, and ...to take effective collective measures for the prevention and removal of threats to the peace”, as well as “…to achieve international co-operation in solving international problems of ... humanitarian character”. Although these provisions are quite political in nature, enough to be discerned from law, but still these are also the essential parts of the spirit of UN Charter as Chapter VII is. Limitations come from Articles 2(4) and 2(7) which underscore the sovereignty-centered design of UN Charter. Derek Bowett, one of original scholars behind UN peacekeeping, wrote that Article 2(7) bars the deployment of peacekeepers to restore internal political order, regardless of any circumstances. Norms of “refrain[ing] … from the threat or use of force against the territorial integrity or political independence of any state” and prohibiting “to intervene in matters which are essentially within the domestic jurisdiction of any state” put a great obstacle before responding to political/military crises wherever they happen. On the other hand, from the legal perspective, still back in 1923 the Permanent Court of International Justice in the Nationality Decrees Issued in Tunis and Morocco case stated with “hefty dose of legal realism”:

“The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations”.[169; p.32]
From the political standpoint, international relations have never been petrified and transformations of old perceptions take place quite often. The same happens with the some ambiguous norms of UN Charter and subsequent Conventions. The notion of consent, for example, was often concerned between 1950’s and 1990’s when UNSC was adopting Chapter VI resolutions to deploy troops in-between hostile states. Of course, if there is consent of adversaries, it becomes easier for UNSC, or whatever responsible and credible organization or ad hoc coalition of states, to deploy peacekeepers, thus not harming the norms of non-intervention and political sovereignty of states.

The ideal example, again, is UNEF I, deployed with the consent of Egypt and Israel, and kicked off by G.A.Nasser in 1967. An official report of UN DPKO still declares that peacekeeping operations have traditionally served and continue to be guided in a consent-based manner, since, as it is claimed, “the absence of such consent UN [troops] risks becoming a party to the conflict” [170; pp.31-32; 36]. This obviously shows that the UN policy, in general, hasn’t changed since 1956, when consent-based deployment on Egyptian-Israeli border didn’t play any role, but rather was wiped out from the ground in 1967, enabling another bloody war a week later. Of course, consent-based operations are there to somehow jump over Articles 2(4) and 2(7), and enable the interveners (UN or non-UN) to neglect state sovereignty by the “consent” as legalization for actions. On the other hand, consent used to be an essential component on deployment, since peacekeeping was essentially invented to address inter-state, regional conflicts and separate the sides by an “impartial observer”, while the adversaries negotiating the peace agreements around the table. But now with the change of international order, the nature of conflicts also faced tremendous changes, perhaps, the most notable of them – conflicts being more of an intra-state character. Thus, it’s highly uncertain who can give its consent to the UN deployment in case one of the sides is the ruling government and the other side is the self-proclaimed authorities of breakaway region fighting for their independence. For sure, the only case when the central government is ultimately interested to engage peacekeepers will be with the agenda to use them to crack down the independence movement. But in case this rebellion is legitimate in the eyes of “fighting minority” everything will become much more difficult with regards to the mandate and consent for international peacekeeping mission. The best pattern for this may be the case of Kosovo, and the draft plans for engaging peacekeepers in Nagorno Karabakh – within the soviet borders of Azerbaijan (de facto between Armenia and Azerbaijan today).

Summing up this paragraph, it’s worth mentioning that the legal background of HI is far more shaky than we would like it to be. The cornerstone of the debate is the character of universal human rights and freedoms – as being a responsibility of governments before international community of states, or just an internal business among citizens and their leadership. The main argument of those advocating for the R2P and HI will be the point that as far as the human and civil rights are enshrined in relevant international treaties and conventions of international law therefore the responsibilities of breaking the rules of the game should also be international either. And as soon as the P5 veto-powers meet strong disagreements within UNSC, the pivotal powers take the decision to act with the sole agenda to put an end to mass violations of human rights, including ethnic cleansings and genocide.

2.2 The role of ICC

The end of the WWII and the victory of Allied Powers opened up question where and how to try the leaders of Nazi Germany and Imperial Japan who committed crimes against peace and humanity. The
solution came with ad hoc Nuremberg and Far East (Tokyo) tribunals. But later, in 1948, the need for permanent international court was first recognized by UN General Assembly. The idea of International Criminal Court (ICC) became real in 2002 with mandate to try individuals rather than states and “to hold them accountable for the most serious crimes of concern to the international community - genocide, war crimes and crimes against humanity, and, eventually, the crime of aggression”. Court’s jurisdiction extends only to crimes that occurred after its entry into force. The only ambiguity about ICC jurisdiction is about cases on aggression, since it is included as a crime within the Court’s jurisdiction (Article 5(1)(d) of the Rome Statute), but a comprehensive regulation must first be adopted among States Parties about (a) definition of aggression and (b) the conditions under which the Court could exercise its jurisdiction (Article 5(2) of the Rome Statute). In June 2010 a conference of state-parties of the ICC got together in Kampala, Uganda and amended the Rome Statute, adding a common definition to the crime of aggression and other useful tools, which eventually will enter into force not earlier than 2017. Professor Murphy perfectly describes how hard it is to proceed with any amendment for the Rome Statute, the cornerstone for ICC. Unfortunately, ICC has not yet become the comprehensive platform to decide on legal matters about international relations on a global scale since yet 43% of states are not acceded to the Statute. Nor even the major powers, such as China, Russia or US, which are more likely to be engaged in future HIs worldwide, fall inside jurisdictions of ICC, which makes the court very limited to take cases. The responsibility and accountability of governors before the international community, particularly in the dimension of ensuring human rights and liberties, is a new notion, having a rapid growth nowadays. Previously, states used to be accountable only to a certain degree before other countries (more precisely – to the emperors, not the nations) for their deeds. The degree of responsibility has always been measured by their cumulative power, since the interventions were more about securing their own national interests and push their imperialistic policies, at the first place, rather than help the suffering nations/people, which was, probably, not in the 1st place when considering the military options. A good example we have with the atrocities towards Christian nations of Ottoman Empire in XVII-XX centuries, where only Sultan’s weakness provoked Tsarist Russia or Austro-Hungary to extend their hands to help Greeks or Armenians. Nowadays, with the establishment of ICC the notion of responsibility gained new sound and the court holds the leaders accountable before all international community. Citing the calculations of a most competent entity – the Stockholm International Peace Research Institute (SIPRI), in 2008 close to 60 multilateral peace operations involving 190,000 military and civilian personnel was deployed worldwide. Since the primary motive for HI is the establishment of sustainable and more or less democratic statehood (government), the desirable outcome of the military action should be the exile of the governor (dictator in shape) from the state. The latter should be tried an international tribunal which is to examine his crimes against peace and humanity, if any. With the development of ICC any abuse of unlimited, sovereign authority within the state should not remain solely under jurisdiction of its courts since in that kind of undemocratic orders courts are hardly independent. In the meantime, it will also be naïve to assume that any kind of criminal court/tribunal will serve purely to the goal of achieving the truth and sentencing the guilty. All international criminal jurisdictions (from Nuremberg to ICC) "were actually created on the initiative of governments, not by lawyers… They were created by political powers for political reasons,

173 Continuing atrocities against Armenians in Ottoman Empire resulted in Genocide in 1915-1923, which is still recognized only by 25 states around the world, including Russia and France.
174 Of course, ICC’s jurisdiction is not absolute, since it has “access” to the crimes committed after July 1, 2002, and its jurisdiction over the crime of aggression is yet to be established by the states-parties.
not merely for humanitarian motives” [176; pp. 197-198]. Even if so, Murphy claims that the ICC in some ways “…could be an ideal surrogate for a deadlocked Security Council”, because its composition is similar to the UNSC, except for the veto power of any of 15 judges [177; p.14]. In the same time the author believes that ICC will face political pressure from states or broader global community to condemn any HI that is either popular or largely tolerated, or the interveners are generally supportive of the ICC including major financial support [178; p.25]. In general, the international community’s sentiments towards any nation do not necessarily mean legal ground for tolerating injustice. For example, the Kosovo case was not in line with any legal regulation for transboundary military operation, and the sentiments of relative majority sounds more like an «excuse», in terms of international law. As an "excuse" for unlawful action (in terms of international law) Murphy brings outcomes of 2 votes in United Nations, where Russian proposed resolutions condemning NATO action were defeated 12 against 3 (SC) and 11 to 24 (human rights commission). But nevertheless, the contemporary international order is built upon consensus of all major actors to preserve status quo after the WWII, but such action, though being right in humanitarian sense, but are completely violating the international law.

In general, there are 3 ways of submitting cases to the ICC: a) by a state that is party to the Rome Statute and adopted the jurisdiction of the Court, b) by the prosecutor based on the information gathered from various sources. However, this option is conditioned by an authorization requirement of the Pretrial Chamber of ICC. And the 3rd way (c) to kick off the process is a resolution from UNSC. In sum, latter 2 options naturally politicize, again, the purely legal process. Additionally, the ICC “will intervene only when the national courts have shown neither the capacity nor the will to exercise jurisdiction” which [national courts failure] is often the case when we speak about states/state-like entities on the verge of the collapse or actually collapsed. [179; p. 206]

With the ICC still speeding up as a criminal court with universal jurisdiction, with certain cases still pending at the chamber, it’s becoming much more important to look at the recent time patterns of armed humanitarianism to evaluate the degree where ICC can be useful in the future. With this regard, the case of South Ossetia and Abkhazia – two Georgian breakaway provinces – and the war in August 2008 are a good case to elaborate over.

In August 2008, to be cynical, a very interesting precedent happened at the periphery of Europe, in South Caucasus. The former metropolis – Russia – invaded into Georgia, with the declared intention to "stop the mass atrocities, ethnic cleansing and genocide of Ossetian people". The Russian ambassador to the United Nations Vitaly Churkin, speaking to the Security Council those days, compared the situation in South Ossetia to Srebrenica. Officially, the Russian "excuse" for military invasion was purely within the frameworks of R2P policies. "Russia cannot look at it with folded hands", as one of the Russian experts paraphrased the initial justifications for waging war from Kremlin. However, being cynical, the losses from all sides did not meet the political threshold of labeling these war crimes as attempts of seriously planned mass atrocities or genocide by comparing it to Srebrenica massacre. The South Ossetians spoke of 365 persons killed, which probably included both servicemen and civilians \[180\]; para. 1. Whatever was the draft agenda of the Georgian leadership, there are no clear evidences that a genocide had been planned against Ossetians.

Many authors already have published great contributions analyzing both the background and consequences of the so-called "Five Day War". Among them, Zakharov and Areshev, \[181\] series of publications by Russian ex-president Vladimir Putin's adviser Andrey Illarionov, \[182\] "A Little War that Shook the World" by Ronald Asmus and many others. All in all, this conflict showed great importance of PR and timely information coverage from the field in terms of creating better images of belligerents. Many authors, including Charles King from Georgetown University, claim that "Georgia dominated on the PR front. Within hours of the Russian intervention, the Georgian government began sending hourly e-mail updates to foreign journalists". \[183\] Even Russian sources and authors confirm their defeat in the information war \[184\]; p. 23

The background, i.e. preparations for war on both sides, as well as the war itself has been the subject of many good publications elsewhere. To make the full picture in short, it's quite justified to say that both sides have been long preparing for the war. From Georgian side, in our opinion, that was sort of an "Anti-Kosovo" operation, trying to win back their sovereignty over the breakaway provinces of Abkhazia and South Ossetia, with a very strange codename: "Clear Field". \[185\] The operation was to be succeeded under the guise of the Olympic Games. Meanwhile, the "enemy" – Russia – was in a limbo: too many experts were persistent about an alleged "duality of power" in the Kremlin. Georgians accused Russian leadership for preparing the military invasion in advance and thus provoking the war. For instance, a good argument with this popped up in April 2008, when then Russian President Vladimir Putin issued a Decree ordering his Cabinet to establish “special relationships” with the South Ossetian government and to open a representative office of the Russian Foreign Ministry in Tskhinvali. This act de facto recognized the


\[181\] В.Захаров, А.Арешев, "Кавказ после 08.08.08: старые игроки в новой расстановке сил", Москва, Изд-во "Квадрига", 2010 – 272 стр.


\[184\] В.Захаров, А.Арешев, "Кавказ после 08.08.08: старые игроки в новой расстановке сил", Москва, Изд-во "Квадрига", 2010 – 272 стр.

independence of South Ossetia from Georgia, and can be freely considered as a pretext of war.  

Beyond this debate on pretexts of war, what is important in terms of the subject of this research, are the justifications from Russia about the reasons pushing the resort to war. There are two official positions, and both of them appeal to different norms of international law. First one is about sending additional peacekeeping troops for "the maintenance of the mandate". The second and a wider accepted one is about protecting Russian citizens in South Ossetia, of which there were 96% of the total population. During the 1st discussions at UNSC, Russian ambassador V. Churkin stated, that Russia did not employ the concept of R2P, but rather applying to the Article 51, the right of self-defense, since there were attacks on Russian peacekeepers.  

In the meantime, Ambassador Churkin applied to another norm, however unrecognized by the majority of states but well-backed by the international practice, the doctrine of humanitarian interventions. "We could not take the sin of "second Srebrenica", declared Ambassador in the UNSC hearings. Whatever were the real, objective backgrounds of the military clash and the war in Georgia, this statement and all the comments around it prove that the so-called Five-Day War was a pattern of humanitarian intervention, framed by the assumption that particularly Russian inaction in South Ossetia could lead to mass atrocities and genocide. At least at the breakout of the conflict and military encroachment Russian authorities – both civil and army – tirelessly arguing that the operation, called "peace enforcement", had the sole mission of stopping ethnic cleansings and mass atrocities. No one spoke about Article 51 at the beginning. As mentioned above, that is an "ideal" case of humanitarian intervention, as it was understood under the case of Kosovo, and, as Russian envoy to UN noted, would result in "second Srebrenica" in case of inaction. The Kremlin-friendly TV station Russia Today aired the headline ―Ossetia Genocide‖ for a whole day then. The president of the Constitutional court of Russia argued that Georgia committed "an act of genocide". Of course, this is a one-sided view from Kremlin, as Georgian and American perspectives on this are quite the opposite. The latter have been accusing Russia of occupying Georgian territories. True, Russians not only invaded into a sovereign country, even though there was no Georgian sovereignty over those territories for years since early 1990s, but later that same month recognized the breakaway regions' independence from Georgia. That case was a clear violation of international law, particularly jus cogens norm of territorial integrity and inviolability of frontiers, the same way as Kosovo in 1999. One of the differences between South Ossetia and Kosovo is the fact that Kosovars then were citizens of Serbia, but not the subjects of any other country. With Ossetia the case was a bit different. Beginning early 2000s Russian authorities have been granting Russian citizenship to the people in the breakaway regions of Georgia, thus artificially creating grounds for future legitimate interventions. And, as soon as the time came, the president of the Constitutional court of Russia argued that the decision of president to resort to transboundary use of military force is employed in line with the Article 61 of the Constitution, which entails that "Russian Federation shall guarantee its citizens protection and patronage outside its boundaries".  

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186 Russian Federation: Legal Aspects of War in Georgia  
http://www.loc.gov/law/help/russian-georgia-war.php  
187 Война в виде исключения - кто и когда имеет право на гуманитарную интервенцию?  
188 Война в виде исключения - кто и когда имеет право на гуманитарную интервенцию?  
190 Валерий Зорькин , "Пройти по лезвию бритвы"; "Российская газета" - Федеральный выпуск №4727 от 13 августа 2008 г.;  
http://www.rg.ru/2008/08/13/zorkin.html  
191 Валерий Зорькин , "Пройти по лезвию бритвы"; "Российская газета" - Федеральный выпуск №4727 от 13 августа 2008 г.;  
http://www.rg.ru/2008/08/13/zorkin.html
Elaborating further over the legal aspects of the Five-Day War, for instance, Zakharov and Areshev argue that the background included many documents of international law, but more importantly "the will of the people of South Ossetia and Abkhazia" who, as argued, demanded Russian invasion [192; p.28].

However, the military incursion was a challenge to regional status quo, which shook not only the regional states, including Turkey, but also provoked United States and European Union to take action. At the expense of French active mediation, with President Nicolas Sarkozy taking care of the shuttle diplomacy himself, reached the establishment of ceasefire and non-use of force commitments from both sides. At the words of Sarkozy himself, that was "a triumph of European diplomacy". In the same contribution, French president called the conflict a result of "ill-considered Georgian military intervention in the lawless province ... and tough and disproportionate response of Russian side". On August 12 the Russian president officially declared that the "operation to enforce Georgia to peace finished". So far, Russia rejects to sign a bilateral agreement on non-use of force with Georgia, claiming that it has never been a party to the conflict, but a pivotal state which has stopped the ethnic cleansings in Georgian breakaway regions in the August War. Instead Kremlin points at the need similar need to conclude similar bilateral agreements with South Ossetia and Abkhazia authorities. This very pattern is yet another fact how Russia feels about this war, claiming its power as a guarantor of regional security, and nothing more. Georgian authorities evaluate this step to be a de facto recognition of the sovereignty of breakaway regions.

As it seems, this war, together with a similar operation in Abkhazia, another Georgian breakaway region, Russia did its best, among humanitarian justifications, to secure an opportunity to engage in Georgian politics in the future, whatever the ruling elite will be. We will call it "strategic ensuring". This case also proved that Russia is deeply involved in other secessionist conflicts in fSU area, such as Transdnistria and Nagorno Karabakh, and in fact is an integral part to both the conflict and its settlement.

Ironically, this operation was the Russian answer to the West with its business in Kosovo conflict, while the West itself proved not to be interested in fueling tensions with Russia. The Extraordinary Summit of NATO (August 19) in Brussels demonstrated that European states lack the willingness to contradict Russian interests and there is no readiness, in the name of small Caucasus country Georgia, to block the Russia-NATO Council. Alternatively, a Georgia-NATO Council was created for the further development of those relations. In fact, what Georgia could win out of this war is the internationalization of the de facto conflict with Russia regarding the breakaway provinces. Respectively what Russia lost – it became a party to the internal conflicts of Georgia. Here we have the main contradiction with the HI theory, which says the pivotal state or the coalition of the willing, ideally, shall not have any national interests at stake, and on the contrary – shall act with the sole and primary motive to stop ethnic cleansings. A bold bullet under the Georgian position put the OSCE CiO Alexander Stubb who declared that "Russia is a party to the conflict, and this should be reflected when [...] peace talks begin". Thus, at least on behalf of OSCE, the international community began to consider Russia directly involved in the conflicts. This simply wiped away one of the official justifications about combating the attacks on the peacekeepers in Tskhinvali, which Russians claimed to be an aggression on the mandate of the peacekeepers. This broke

192 В.Захаров, А.Арешев, "Кавказ после 08.08.08: старые игроки в новой расстановке сил", Москва, Изд-во "Квадрига", 2010 – 272 стр.
195 http://interfax.ru/politics/txt.asp?id=26711
the Russian strategic plans to remain the only peacekeeper on Georgian soil and "manage" the peaceful settlement. In other words, the war pushed Russia into the conflict, acting in the best interest of one party, Ossetians, breaking another rule of the "holy trinity" – impartiality. The bombardment of the Gori city in Georgia-proper, and de facto occupation of the cities of Poti, Gori, Senaki, and Zugdidi\(^{198}\) broke the general obligation of the minimum use of force and put an end to Russian role of legitimate peacekeeper. As a reminder, Russian peacekeepers had been present in both enclaves with Georgia’s consent 15 years earlier.\(^{199}\)

However, there are clear evidences that the war/conflict was planned well before it erupted; at least Turkey and Azerbaijan were notified about it in advance. Three days before the war, August 5, an explosion at a pumping station near the city of Erzincan in Eastern Turkey was reported which stopped pumping oil through the BTC pipeline. Despite the PKK terrorist organization assumed responsibility for that,\(^{200}\) though another indirect linkage between the war and BTC operation is out there: the pipeline was restarted on August 26,\(^{201}\) the day when President Medvedev signed a decree to recognize South Ossetia and Abkhazia independence. Later on, on bilateral agreements with the local Ossetian and Abkhaz leadership, Russian military bases were established there. The U.S., European Union and all the rest of the world, except for Belarus, Nauru and Nicaragua considers these forces as occupational.\(^{202}\)

Beyond the political justifications for the transboundary use of military force, it's in the focus of this research to look closely at the legal dimension of the post-conflict developments. Specifically, still during the "hot war", on August 10, the Commissioner for Human Rights in Russia (Ombudsman) Vladimir Lukin argued that an international criminal ad hoc tribunal should be established to prosecute "those responsible for the destruction of thousands of residents of South Ossetia".\(^{203}\) However, Georgians were faster and on August 13 an appeal was submitted to the Hague Tribunal with a claim against Russia, accusing it of "ethnic cleansing on its territory." According to the Secretary of National Security of Georgia Alexander Lomaya, “The claim was immediately accepted”.\(^{204}\)

In order to understand this point better, we should carefully consider the Rome Statute which has certain territorial jurisdiction. In 1990s when this issue was on the agenda, the majority of states argued that a universal jurisdiction for the crimes of Article 5 will be a better solution. However, the United States insisted on jurisdiction only in the territory of state-parties acceding to the Rome Statute.\(^{205}\) As a result of long consultations, a compromise solution was reached, making the "hands" of The Hague as long as follows:

- if the person or criminal State, joined the Court;
- if the alleged crime was committed in the territory of a member country;
- If a case is referred to the Court at the decision of UNSC.

Thus, legally, the Georgian claim was not perfect, even if not to look at its content. So, if Georgia ratified the Statute in 2003, Russia only signed it in 2000, but no ratification yet occurred. Discounting options


\(^{203}\) RFE/RL, 10/08.2008. [http://www.svobodanews.ru/content/transcript/460101.html](http://www.svobodanews.ru/content/transcript/460101.html)


(a) and (b), it will be difficult to imagine that Russia, as a permanent member of UNSC will give approval to such sanctions. As a result, however, the ICC will not have the opportunity to move forward with this claim unless Russia ratifies the Rome Statute, making it impossible for international law to have its say in the dilemma.

Whatever the legal background of both the pretexts and actual results of the war, the political and geopolitical consequences are much stronger and more important in terms of emerging, new world order. If the Kosovo operation, without any appropriate UNSC mandate, was the NATO response to a humanitarian disaster with obvious geopolitical implications, the Five-Day War was a Russian response to the same cause. Of course, scholars and politicians can point at numerous commonalities and differences, but both politically and legally these 2 crises specifically, and other patterns of humanitarian interventions between Kosovo and S.Ossetia, call for timely amendments to international law, the UNSC and ICC jurisdiction. As the South Ossetia case was not proceeded at The Hague, the Kosovo case at International Court of Justice gave a substantial legal answer, in that specific instance (as of Article 51 or the ICJ Kosovo ruling), what was more preferable in terms of new, emerging world order – human rights or the norm of inviolability of borders and territorial integrity. The ICJ in its ruling established that a unilateral declaration of a secession has become a legal norm, mentioning that the unilateral declaration of independence of Kosovo did not violate the general international law.

Newly recognized states, such as East Timor (universally) and Kosovo (65 plus states), South Ossetia and Abkhazia (4 states so far), as well as unrecognized entities (Nagorno Karabakh, Palestine) – have all been established as a result of mass atrocities and grave human rights violations imposed against its inhabitants. The historical perspective into the patterns of humanitarian interventions and peacekeeping operations shows that the first ones are much more efficient in terms of securing a ceasefire between belligerents and restoring the opportunities for sustainable development of newly established statehoods. In these terms, the pattern of HI in Nagorno Karabakh conflict from Armenia (1992-94) and now growing discussions about a future peacekeeping operation in the NKR comes under attention.

3.2 Some Thoughts on Peacekeepers in Nagorno-Karabakh

Once more, while elaborating on the Nagorno-Karabakh conflict, perhaps we should not start by drawing all the obvious advantages of peace against war, and/or present the “status quo” against any type of grassroots-level cooperation. This would mean doing the same as fiercely proving that being healthy and wealthy is much better than being sick and poor.

With the major peace initiative in the Caucasus — the Armenian-Turkish rapprochement —falling apart on April 22, 2010 as Armenia legally suspended the ratification process blaming Turkey for setting preconditions, the viable peace process on Nagorno-Karabakh has become a target for greater attention.

http://untreaty.un.org

207 Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion) - Advisory Opinion - Advisory Opinion of 22 July 2010; http://www.icj-cij.org

208 The paragraph was published at Caucasus Edition online journal of conflict transformation.

http://caucasusedition.net; July 1, 2010

209 The “Nagorno-Karabakh conflict” or “the Armenian-Azerbaijani conflict around Nagorno-Karabakh” or other similar wordings do not absolutely reflect the whole mosaic and tough background of this ethnic conflict and its present. From our perspective, the better term, which will also illustrate the established frameworks for the peace process, is “unresolved dispute over the legal personality of de facto independent entity.” The same goes legitimately true about “partly resolved” South Ossetia and Abkhazia conflicts. For the sake of this contribution, to
Moreover, on April 23, the Azerbaijani leadership warned that, “Armenia cannot achieve anything in the region without a solution to the Karabakh conflict” and declared that its army was ready “to hit any target on the territory of Armenia.”

Even before this, the Russian-Georgian five-day war was a real alarm to the Nagorno-Karabakh peace process. It broke out in a relatively short period of time — nearly 30 days of extensive militaristic build-up and bellicose statements won an excuse in early August for Georgia to try getting back the breakaway province with coercive measures and for Russia - the legal pretext to invade Georgia proper. That showed how explosive the region is, no matter what programs and soft-power projects are carried out by the United States or European Union. When this short but bloody war upset the poorly established status quo in the South Caucasus — on the outskirts of Europe — the expert community seriously began to consider fostering peace efforts in the regional conflicts in a more comprehensive manner. The deployment of robust peacekeeping forces is perhaps one of the most established tools available in the hands of the international community.

The following year, in early August 2009, when the international community remembered the August War, then-ambassador of Azerbaijan to Moscow Polad Bülbüloğlu made a very interesting statement, later reiterated by others in Baku, which was not in line with the common language of Azerbaijani officials: “If the recent initiatives don’t bring tangible results and the peace agreement isn’t achieved, peace enforcement measures [against Armenia] will be the right of Azerbaijan, and we should employ it.”

Despite all the follow-up commentaries made, this statement was not merely a political one but had obvious legal meaning, which now needs to be explored. Perhaps this had been used as an add-on to a regular rhetoric, as discussed above. Still it has additional meaning as well, and the statement comes as a reminder that at some point, the lands surrounding Nagorno-Karabakh will probably host peacekeepers who will, similar to UN traditional Cold War-era peacekeeping operations, stand between the adversaries — Nagorno-Karabakh and Azerbaijan — and try to secure the truce while parties will finally shape the “Big Deal” (i.e., comprehensive political solution and legal accords with regards to the conflict). While the “Big Deal” is still a dream, which unfortunately doesn’t seem achievable in the mid-term perspective, deployment of peacekeeping forces, if it happens, will be dislocated on a permanent basis.

Furthermore, obviously this deployment will have its consequences on the developments around the Iranian nuclear dossier, which is a high priority in the international security agenda. The recent developments in the Nagorno-Karabakh peace process, or, to put it more precisely, absence of any viable developments may, at first sight, kick off the issue of peacekeeping forces deployment, unless the patience of the international community gets “dog-tired.” Although with this in mind, if someone really wants to see any achievement of the OSCE Minsk Group, it worth noting that, despite all the bellicose statements, the parties are conscious enough not to violate the 1994 cease-fire with serious steps. Of course, this “no war — no peace” situation is not what we deserve. In the past few years, the mediators have made optimistic statements claiming the real breakthrough is not so far off or even that we are on the verge of a breakthrough. But no breakthrough so far has been achieved. In fact, the irony is that the international mediators — the key players in the South Caucasus — do not unambiguously warn the sides that resumption of war is totally unacceptable and risky.

Instead, underscoring the commitment to peaceful resolution through negotiations has little effect, considering the growing magnitude of warlike statements. Of course but unfortunately, a new war, truly,

frame the discussion in a scholarly nature, the following neutral, but right wording will be used in the text:
“Nagorno-Karabakh peace process.”


is the most straightforward way to solve the problem. Hopefully, the sides of the conflict do not and will not consider this option seriously, taking into account the obviously tragic outcomes of such a “solution.” With this in mind, Armenian President Serzh Sargsyan’s idea “to sign an agreement not to use force” sounds not so well thought out by the addressee and the international community.\(^2\)

In a nutshell, the peace enforcement that the Azerbaijani leadership was referring to did not fall under UN Charter’s Article 51 (the right of self-defense), since the peace process under the auspices of the OSCE is an internationally recognized “chamber” for this conflict and is still not cancelled or exhausted. That means the international community at least disputes the right of the Nagorno Karabakh people for self-determination which means, as it is in the case of the Palestinian people, the nation fighting for their independence are recognized as subjects of international law. Thus, any military campaign against Karabakhi people would constitute _trans-boundary_ use of military force without the proper UN Security Council mandate, which is under Chapter VII (threats to peace) and would, sooner or later, directly or indirectly engage the Russian-led Collective Security Treaty Organization, or CSTO (Armenia), and NATO (Turkey).

With regards to the peacekeepers, obviously the deployment and its mandate should pass UN authorization under Chapter VI. The forces will most probably be lightly armed to act only in self-defense and in defense of the mission’s mandate. And the core component of the forces should include civilian and police personnel for the sake of state-building efforts after the refugees’ return. There is nothing new to be invented in the mission and the mandate since Nagorno-Karabakh, at large, is not a unique case in itself. Yet one of the core questions is — who will be mandated, in other words subcontracted to contribute forces? A couple of exceptions immediately arise. Armenia has announced several times that it would not allow for Turkish soldiers on Karabakhi soil. Considering the Iranian and Russian factors, official NATO forces are also a no-go. Another regional security organization, the CSTO, has recently (March 18) signed an agreement with the UN that will enable it to be authorized by the UNSC to manage peace operations. Theoretically, the CSTO can deal with Karabakh more easily in case Azerbaijan joins it as a member. This will not be, at least, disputed by Iran, which definitely will have its say in the deployment issue.

Right now, the only legal way to move forward is with the OSCE mandate, which is the only framework legally authorized to deal with this peace process. The legal part of the issue, in other words the mandatory deployment of peacekeeping forces in the conflict zone, was established under the CSCE/OSCE Budapest Summit in 1994, right after the bloody phase of the war ended with a cease-fire agreement in May. A year later, on August 10, 1995, the OSCE Chairman-in-Office created a post of his Permanent Representative that was assigned with the duty to “assist the High Level Planning Group in planning an OSCE peace-keeping operation in accordance with the Budapest Summit Decisions”.\(^3\)

In a very limited manner the OSCE special envoys conduct a regular monitoring of the contact-line between the armed forces of Nagorno-Karabakh and Azerbaijan. With a certain degree of reservation, this can be labeled as traditional-type peacekeeping, which, despite its lack of permanence on the ground, keeps the sides alarmed of cease-fire violations and creates the basis for a peace process. The OSCE monitors operate as the international community’s “watchdogs,” which has its positive impact on the process. Of course, this limited supervision would be fruitless if the sides — Nagorno-Karabakh and Azerbaijan — will not be able to determine a peaceful resolution.

In any case, no matter who will be mandated to act as a real, on-the-ground peace-builder in Nagorno-Karabakh, the efficiency in the wider context will be determined and conditioned by the readiness of the governments to be bound by the international community’s rules of the game. However, considering the

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\(^2\) Euronews interview, March 19 2010. [http://www.euronews.net/2010/03/19/serzh-sargsyan-turkey-has-no-moral-right-to-blame-us-about-anything-or-to/](http://www.euronews.net/2010/03/19/serzh-sargsyan-turkey-has-no-moral-right-to-blame-us-about-anything-or-to/)

scores of bellicose statements at this stage, showing absolute unavailability of the sides to move forward with the comprehensive solution, in the absence of any readiness to compromise, any peace operation can turn into a catastrophe. Moreover, the absolute majority of experts dealing with the issue are certain that faced with the warlike rhetoric of Azerbaijan, the international community is unable to give security guarantees to the Nagorno-Karabakh population after some of the regions of the “security belt” will be handed to peacekeepers and, subsequently, to Azerbaijan. In the worst-scenario case if the war will again burst out in Nagorno Karabakh, again Armenia will be forced to use its available military resources to combat the regular army units offensive against 150,000 population of Nagorno Karabakh. As it was in the early 1990s, if Azerbaijan will be the aggressor once again, Armenian military participation will fit into the frames of humanitarian intervention, with quite a common agenda to save the people from mass atrocities and the challenge of ethnic cleansings.

On the flip side, the efficiency of the Blue Helmets will be totally conditioned by the mandate they will get and the set of compromises the sides will be ready to handle. If the latter will be absent, no matter what mandate and force composition, it will either fail in the mid-term perspective while keeping the “peace,” or will silently watch how the adversaries shoot at each other, without being authorized to engage, as had been the case with the UN-authored operations. One can turn to the cases of DRC, Rwanda, or Sudan as examples of this occurring in the past. Hopefully, we will not see this happening again, especially in such a volatile region.
CONCLUDING REMARKS

We are living in times when human rights value much more than the sovereignty of states. There are even scholars who are fully doubtful about the concept of sovereignty nowadays, saying that all countries are interdependent (e.g. Zbigniew Brzezinski, Amitai Etzioni). This pushes them to elaborate further and argue that thus human rights protection, as a universal norm enshrined in various conventions of international law, has reached certain universal importance as a result of states interdependency. Overall, the Universal Declaration of Human Rights (1948) and other important treaties of international law, mentioned in the research, have been giving some room for maneuver for states that have sponsored the publication of the Report of the International Commission on Intervention and State Sovereignty called "Responsibility to Protect" in 2005.214

Another justification for HI is the globalization and allegedly decreased importance of state boundaries. In the era of Globalization, as it is assumed by acknowledged academicians, as well as endorsed as a policy by certain states, the Article 51 of the UN Charter (the right of self-defense) appears to have wider interpretation than it used to have before. As it was, for instance, in case of the intervention in Afghanistan (2001), the US and allied powers claimed to employ the right of self-defense while combating international terrorism threat, emerged more radically after 9/11 terrorist attack. Obviously, with the international relations becoming more and more intense, and states more and more interlinked both in political and economic terms, a simple step-away from generally recognized international or even domestic behavior is capable to fuel a large-scale regional unrest. This has been illustrated in numerous UNSC resolutions about conflicts in Africa, former Yugoslavia and elsewhere. That’s why some states claim to employ the provision of Article 51 about the legitimate right of self-defense when initiating the intervention. Studies show, that the US has generally interpreted its and other state's authority to use force more broadly than many of its allies, especially with regards to self-defense…"[215: p.9]. As Professor Frederic Kirgis mentioned,216 the US National Security Strategy (2002) underscored that "as a matter of common sense and self-defense, America will act against […] emerging threats […] before they are fully formed",217 thus justifying any kind of preventive military action whenever and wherever it needed. For instance, prior to the Iraq invasion, at a press conference president Bush put it clearly: "…when it comes to our security, if we need to act we will act. And we really don’t need the UN approval to do so".218 Perhaps this point including, Berdal concludes that "the United States has given unilateralism a bad name" [219: p. 182]. Trying to "overrule" US unilateralism the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change published a report in 2004, concluding that “the language of Chapter VII is inherently broad enough, and has been interpreted broadly enough” for the UNSC to act well before any crisis transforms to actual war [220; pp.63-64]. Despite all the unilateral actions taken by the United States, UN is still alive, and, as Berdal rightfully shows, the clear-cut telling indication of this is

215 Matthew Waxman, "Intervention to stop genocide and mass atrocities", Council on Foreign Relations Special report no. 49, October 2009
the number of UN-led field operations since 2003 – 7 new peacekeeping operations have been authorized by the UNSC \[221; p. 186\].

All in all, these discussions once again put at stake the notions of “sovereignty” vs “responsibility” and “human rights”. For instance, Kirgis argues that although “Nation-States have long been jealous of their sovereignty”, now, probably due to the major changes in the international relations, a new interpretation of Article 2(7) emerges where “the scope of "domestic jurisdiction" has gradually been whittled down”.\[222\] Of course, UN is more likely to try to keep UNSC’s universal authority over international military undertakings and other coercive actions. The above-mentioned report continues the traditional line of maintaining UN supremacy, by saying that “…if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to” \[223; p.76\]. However, the report does admit that there is an “emerging norm of a collective international responsibility to protect [when there are] serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.” \[224; p.79\] As Kirgis noted, thus the Panel “endorsed not only the Security Council's authority to take action in such instances, but also its responsibility to do so”, which seems to be a tremendous development in its approach for recent times.\[225\]

However, none of the intervening nations – the United States, Russia or others – have ever tried to rule out the authority of the UNSC. On the contrary, the major international consensus has emerged that the UNSC not only should be preserved, but also the composition and perhaps the decision making system should be amended. As it has been shown in the study, namely the inability of the UNSC to react to the humanitarian crises elsewhere has powered some pivotal nations to think alternative strategies primarily to save human lives, but also preserve their own interests for the sake of realpolitik. Whatever the critics may say, this study does not have a delusion or a wrong belief of pure and humane character of the international relations and alleged friendly relations among states. But those international relations are mixtures of good intentions and national interest, which, in turn, shortly can be named as realpolitik. As the patterns of HI since Kosovo operation often repeat, there is no sense to keep on excluding it from the international law as a benign neglect of this emerged norm produces wrong results. With the rise of humanitarianism, it should be included properly into the international law, or, the best alternative, the UNSC should be made more flexible in terms of reacting to humanitarian crises any corner of the world. Unless it is regulated by international custom and laws, pivotal states and ad hoc coalitions would abuse the theory for the sake of their own national interests, as it was in the case of Georgian wars in 2008. Whatever will be the final assessment of the UNSC P5 states in the long-run, for the mid-term perspective the HI will remain the sole exit strategy for pivotal states to act as a preemptive force to make legitimate, but technically unlawful justice. The HI doctrine also pushes stronger for reform and improvements in UN system, and particularly the enlargement of Security Council. However unlawful, but both the

outcomes of Kosovo (1999) and Georgian wars (2008) prove that the timely enforcement of the right of self-determination is the best pattern stop the mass atrocities and build up available capabilities for sustainable development of the nations and, in long-term perspective, friendly relations between states, which may come with the trade and economic relations facilitation between former rivalries by the Bretton Woods institutions.
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