

Sovereignty, law and democracy versus power politics

by Prof Dr phil Dr hc Dr hc Hans Köchler*



Prof Dr phil Dr hc Dr hc Hans Köchler
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I shall discuss the topic in the following respects: (I) The concept and history of sovereignty; (II) the “integral definition” of sovereignty and, related to it, the question of whether it is possible to transcend power politics; (III) normative contradictions, and their consequences, in the Charter of the United Nations; and (IV) the question “quid nunc?” (what now?), namely how to conceptualize a fundamental reform of the current international system.

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Coordinator of the *International Committee for Palestinian Human Rights (ICPHR)* (since 1988); Member of the Advisory Council of the *International Movement for a Just World (Malaysia)* (since 1997); Member of the International Advisory Panel of the *Center for Civilizational Dialogue* at the University of Malaya (Kuala Lumpur) (since 1997); Member of the International Advisory Council of the *Committee for a Democratic United Nations*, Germany (since 2003); Member of the International Advisory Board of “Youth for the Alliance of Civilizations”, an initiative of the *Islamic Conference Youth Forum for Dialogue and Cooperation* (since 2007).

Köchler has been the organizer of major international conferences in the fields of transnational co-operation, democracy, human rights, terrorism, inter-cultural dialogue, and conflict resolution.

Through his research and civil society initiatives, Professor Köchler made major contributions to the debates on international democracy and United Nations reform, in particular reform of the Security Council. In 1985, he organized the first colloquium on “Democracy in International Relations” on the occasion of the 40th anniversary of the United Nations in New York. His work has influenced the discourse on the dialogue of civilizations (a term which he used for the first time in 1972).

Speech delivered in German language to the readers of *Zeit-Fragen*.

Thus, one might say that both the *internal* as well as *external* sovereignty of the state is derived from the sovereign status of the subject. The state is not an *end in itself*.

I Concept and history of sovereignty

Sovereignty is a pivotal notion when it comes to a proper understanding of the *rule of law* and *democracy*, and to an adequate conceptualization of the related issues of international politics. In the international (i.e. inter-governmental) context, sovereignty is generally regarded in connection with equality. Article 2, Paragraph 1, of the Charter of the United Nations, which sets out the principles binding upon all member states, uses the term “sovereign equality”.

State sovereignty is indeed a cornerstone of modern international law even if it is increasingly being eroded in the wake of present-day globalization. In the modern context, the main aspect is that of *popular* sovereignty. Unlike in earlier centuries, sovereignty is not some metaphysical quality that would be particular to the state and on the basis of which its agents are empowered to rule in an undisputed (“sovereign”) manner. If – in the modern context of democracy and the rule of law – it is to have any meaning at all, sovereignty is ultimately nothing but the expression of the unalienable dignity of the human

“I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education. This is the true corrective of abuses of Constitutional power.”

Thomas Jefferson (1820)

priate. In the context of (international) *law*, it must obviously be understood as a *normative*, not as a *descriptive* term – a point, which, almost a century ago, *Hans Kelsen* made in his classical work “The Problem of Sovereignty and the Theory of International Law” (1920). When I say that one must not conceive of sovereignty as a purely descriptive notion, I mean that it cannot be interpreted in terms of the *actual power* (i.e. in relation to the power potential) of a state. If it were understood in this (descriptive) sense, only the great powers would actually be “sovereign”, and all other small and medium-sized countries would not. In actual fact, sovereignty is to be defined in a normative sense, i.e. with respect to the *legal status* of a country in the inter-governmental (international) context. The actual *ability* of a state to project its power internationally and, thus, act in a “sovereign” manner (in the true sense of self-determination) – its external power potential, so to speak – is not to be confused with the *principle* of sovereignty itself.

The dignity of man, which is the basis of popular sovereignty, can philosophical-ly also be deduced from the conception of *Immanuel Kant*, and in particular from his understanding of man as a subject with an autonomous will. According to *Kant*, autonomy “is the property that the will has of being a law unto itself,” which implies that man may never be made the object of someone else’s will. This makes evident that sovereignty and human rights are intrinsically linked.

The analysis of the concrete *application* of the principle in the framework of interstate relations is a further important step in the clarification of the notion. In the UN Charter, sovereignty is defined according

International Covenant on Civil and Political Rights

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Source: <http://www.un.org/en/documents/charter/chapter1.shtml>

person, whether as an individual or member of a community. According to this approach, popular sovereignty is at the very roots of democracy. Especially here in this country [Switzerland, ed.], this is rather obvious and requires no further explanation. At the same time, popular sovereignty is also the source and foundation of international law as a system of rules that govern the relations between states.

In order to avoid a common misunderstanding, a brief remark on the semantics of the concept of “sovereignty” seems appro-

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to the principle of *equality*. This implies the principle of *reciprocity* – in the sense of the classical dictum that my freedom is limited, or “defined”, by the freedom of the other. (The Latin phrase “*de-finitio*” literally means to draw the borders.) Accordingly, it would be self-contradictory to claim freedom of action for oneself while denying it to all the others. This is evidently also true for the state as a collective of citizens, organized by law. As is the case with absolute freedom, *absolute* sovereignty is a contradiction in itself. (Again, the semantics of the Latin term “*ab-solutum*” [literally: detached] may help to clarify the issue; a state that understands sovereignty in this sense sees itself as being “detached” from all other states.) Under this assumption, one state would place itself above of all the members of the international community – which is exactly how the state was conceived of in the era of absolutism.

In the face of this doctrinal legacy, it must be stressed that the philosophical basis of the principle in the modern context is the “non-objectivability” (*Unvergegenständlichkeit*) of man as a person. This corresponds to Immanuel Kant’s concept of the subject in his “Metaphysics of Morals” or “Critique of Practical Reason”, but also to the personalist approach of Karol Wojtyła (the philosophy professor who became Pope John Paul II) who coined the term “irreducibility” to describe the impossibility to reduce the subject to the status of a mere object.

I shall now briefly deal with the history of sovereignty, or the interpretation of this principle in the different political constellations. It is an undeniable fact, almost trivial to state, that international relations have always been shaped by *power politics*. Until rather recently, this was mostly a policy characterized by an absolute, or *exclusive*, understanding of sovereignty. As Kelsen has convincingly demonstrated in the above-mentioned book, in such a framework, the norms of international law are only valid in regard, or subordinated, to the respective domestic legal system. Such an interpretation inevitably leads to the problem of mutually exclusive assertions of sovereignty. The German term *Souveränitätsanarchie* (“anarchy among sovereign states”) aptly describes the political and legal consequences that have plagued international relations through the centuries up to the present day. This absolute and exclusive understanding of sovereignty means that each state is the sole “master”, or creator, of legal norms, and that not only the norms adopted by other sovereign states, but those of international law in general, are valid only insofar as they are “reaffirmed”, or re-enacted, in the

domestic legal system. It goes without saying that this interpretation of sovereignty also includes the absolutist notion of a “right to war” according to which the ruler of a sovereign state, in the exercise of that very sovereignty, has the prerogative to use force against other states, and that he may do so without giving any reasons (or justifications). This *jus ad bellum*, as it is referred to in traditional international law doctrine, merely requires the observance of certain procedures such as a *declaration of war* before the actual commencement of hostilities. Interestingly, in our era, where international law doctrine does not anymore

text, “free of morals” means that states understand their actions according to the dictum that “states have no permanent friends, only permanent interests”, which implies that the latter may constantly change. Consequently, and regardless of any principles, whether moral or legal, what a state has to constantly be aware of is that “he who is my biggest enemy today can be my best friend tomorrow or the day after,” and vice versa. Even a cursory look at the history of international relations will produce a myriad of examples. The decisive factor, however, is that the competing powers hold each other in check, a process

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recognize such a right, states that nonetheless wage war would usually not declare it as such. The *jus ad bellum* (right to war), understood as a consequence and corollary of sovereignty, is not to be confused with the “*jus in bello*”, literally “the right in war”. The latter concept refers to the legal principles that govern the use of force once war has been waged. The current term is “international humanitarian law”.

In the context that I have described here, the dynamics of relations between

that eventually, though not necessarily in a peaceful way, may lead to something like a *balance of power*. Such a constellation of relations between sovereign states can be *multi-polar* – namely a system with more than two players – or possibly *bi-polar*, as was the case in the decades after World War II, in the era of the Cold War.

We must also be aware that the traditional, or “absolutist”, understanding of sovereignty produces threats to peace and peoples’ rights that are particularly challenging

The assertion of a divine right of the absolute ruler was eventually replaced by an approach that defined the *res publica* as community of citizens, and not of mere “subjects” (in the sense of subordinates, i.e. as people subjected to the will of an absolute ruler). According to the paradigm of popular sovereignty, the citizen is indeed a free and autonomous subject (in the Kantian sense), a sovereign actor in the respective community (*res publica*), who decides for himself how the state should be constituted and who should be its representatives.

states is characterized by a power struggle between sovereign actors that can not in any way be decided, or resolved, on the basis of *principles* (namely legal norms). Ultimately, it is the “law of the jungle” that counts, differences are fought out on the battlefield. It seems to be a historical fact that the competition for power between sovereign states almost always has been considered an area free of morality, something that is aptly described by the German word *Realpolitik* (that also has become a standard English term in international relations theory). In such a con-

in a situation where there is no balance of power. In such a *unipolar* constellation, or hegemonic order, one state alone can determine the guidelines to be followed by all other states. That state’s supremacy will almost be beyond challenge should the difference between its actual power, particularly its military potential, and the power of the closest competitor become so wide that, due to a collective state of mind based on fear and intimidation, the former feels “empowered” to command obedience from

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all the others. In such a constellation of supremacy of power, states have almost never been able to resist the temptation to regard themselves as guarantors of global order, and to communicate this self-image rather aggressively. In recent years, this has been most obvious in statements of US leaders who repeatedly spoke of their country as "the indispensable nation". In the unipolar context, such a claim to ideological supremacy may easily lead to an attitude that is tantamount to restricting or calling into question the very sovereignty of smaller or weaker states – a kind of generalized "Brezhnev Doctrine". (During the latter period of the Cold War, the Brezhnev Doctrine of "limited sovereignty" applied to the then Soviet Union's relations with her allies.) It goes without saying that this kind of a quasi-missionary self-interpretation of a state's role excludes any critical analysis of its real hegemonic status. It is rather typical of the *logic power* that a state actor who not only effectively places himself above the law, but at the same asserts this factual privilege as a consequence of his sovereignty, consequently tries to impose his will on the entire world.

Undeniably, under specific circumstances, a hegemonial power structure may also ensure *order* and *stability*. This is especially evident when power relations are sharply defined and the difference between the power of the preponderant state and the assembled power of the rest of the world is very large. However, it is equally clear that hegemony, as a constellation of an extreme imbalance of power relations, also carries the risk of *tyranny*. The hegemon's excessive and arbitrary freedom of action not only limits but negates the freedom of all other international actors. It is moreover a historically proven fact that a hegemon is not in any way prepared to acknowledge this state of affairs. For such a state, to overcome the state of denial and confront the social and political consequences of hegemonial rule is often a painful process. Finally, it is obvious that hegemony will also provoke resistance and rebellion, which may, in the long term, lead to regional, eventually global, instability. The time may come when the "lesser" states or peoples will no longer be prepared to accept a constellation that is essentially detrimental to their aspirations and interests.

Looking back in history, we can say that efforts have been made more than once at "taming" sovereignty, in the sense of limiting the excesses of power politics. These were mainly calls for the general recognition and enforcement of ethical restraints in the exercise of sovereignty. A case in point is the so-called *Holy Alliance Treaty* of 1815. After the end of the Napoleonic Wars,

the victorious rulers of Russia, Austria and Prussia (joined by France in 1818) solemnly declared "their fixed resolution, both in the administration of their respective States, and in their political relations with every other Government, to take for their sole guide the precepts of that Holy [Christian/H.K.] Religion". (It is worthy of note, though only a marginal historical detail, that the Papal State never joined the Holy Alliance.)

One could also mention here conventions of international humanitarian law (*jus in bello*) that were adopted in the 19th and early 20th century with the aim of mitigating some extreme consequences of the sovereign exercise of power, or of unbridled power politics. These include the *Geneva Conventions of 1864 and 1906* (precursors to the *Geneva Conventions of 1949*, which,

cation of international norms was not free of contradictions and marked by many setbacks. I shall later deal with the most serious problem in that regard, namely a – yet unresolved – *normative contradiction* in the *Charter of the United Nations Organization* created in 1945.

II The integral definition of sovereignty (or: is it possible to transcend power politics?)

This brings me to the second part of my considerations, namely the question whether it is at all possible to go *beyond* power politics in the sense characterized above. Can we indeed imagine an international system that transcends an absolute understanding of sovereignty?

The understanding of the concept as

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after the dramatic experience of the Second World War, for the first time codified the norms of international humanitarian law in a comprehensive sense). One could also mention here the *Convention with Respect to the Laws and Customs of War on Land (Hague Convention IV)*, adopted in 1907 and entered into force in 1910, which, even if in a still rudimentary form, tried to curtail the most severe excesses of the use of military force.

In retrospect, one can say that all these intergovernmental initiatives were morally understandable efforts at a "legal taming" of war. Their basic intention was to minimize the inhumane effects of war through the binding formulation of principles and the enactment of regulations with respect to the treatment of the wounded and of prisoners of war, the protection of the civilian population and, more generally, the extent and nature of the use of armed force.

The crucial point in terms of legal theory and philosophy, however, is that all these treaties did not call into question the very source of the problem, namely the sovereign right to war, the *jus ad bellum*. They were merely concerned about linking the exercise of this right to some higher, so to speak humanitarian, standard, hence the name "international humanitarian law" for the body of norms that was traditionally referred to as the "laws of war" (*jus in bello*). Only the ban on the use of force in relations between states in the 20th century brought about a real *paradigm shift*. I refer here to the *Kellogg-Briand Pact* of 1928, named after the foreign ministers of France and the United States who had negotiated this treaty. One must not overlook, however, that the subsequent process of codifi-

being rooted in the notion of *popular sovereignty* is of crucial importance for what I would like to describe as *transformation* of sovereignty towards a global order of peace that is just and democratic. This will also help demystify a concept that, through the centuries, was defined in the sense of some abstract, metaphysical or God-given, quality that would provide legitimacy to the state's exercise of power.

A process of rethinking has already begun in the course of the Enlightenment of the 18th century. One might also refer, in this regard, to Rousseau's "*Contrat social*" of 1762. The assertion of a divine right of the absolute ruler was eventually replaced by an approach that defined the *res publica* as community of citizens, and not of mere "subjects" (in the sense of subordinates, i.e. as people subjected to the will of an absolute ruler). According to the paradigm of popular sovereignty, the citizen is indeed a free and autonomous subject (in the Kantian sense), a sovereign actor in the respective community (*res publica*), who decides for himself how the state should be constituted and who should be its representatives. This "domestic" autonomy of the citizen is also the foundation of sovereignty in terms of the state as international actor. Thus, one might say that both the *internal* as well as *external* sovereignty of the state is derived from the sovereign status of the subject. The state is not an *end in itself*. As *res publica*, it exclusively serves the realization of the rights of its citizens on the basis of reciprocity. Etatism is an outdated doctrine. Only the sovereignty of the people and not some form of hereditary authori-

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ty or "metaphysical" proclamation is seen to legitimise the actions of the representatives of the state. In such a system, the representative is not *master* but *servant* of the people (which is the literal meaning of the Latin word "*minister*").

What are the political and legal implications of this concept of sovereignty in the present context? **First**, the state is to be organized democratically at the *domestic* level. In the ideal case, this would mean "direct democracy". (Strictly speaking, the combination of these two words is a pleonasm since the Greek term "democracy" means rule of the people, not over the people or in their name only. Reversely, the term "indirect democracy" would be self-contradictory.) **Second**, the system of *international* relations must account for and ensure the legal equality (not to be confused with factual equality) of all people as citizens. This can only be achieved through the recognition and implementation of the principle of "sovereign equality" of states according to Article 2 (1) of the UN Charter. The legal equality of states follows from the legal equality of all people. In this context, it is absolutely essential to distinguish between *normative* (legal) and *factual* level. States are very different in terms of territorial size, number of people, wealth, power, military potential, etc. These differences nonetheless do not alter the fact of equality in the legal sense (or, with regard to the individual, in the sense of the universality of human rights).

In terms of legal doctrine, the notion of equality is certainly consistent with modern democratic discourse. However, when it comes to *democracy* and the *rule of law* in the present international system, the devil rests in the detail. Acknowledging the sovereignty of states in the sense of legal equality indeed implies the acceptance of *universal* rules that govern relations between states. Accordingly, this requires a democratic process of decision-making in the sense of "one state, one vote". This, however, is not the actual state of affairs. Today, as in past centuries, it is the laws of power politics, not the rule of law, that determine how the international community deals with crucial issues such as the use of force between states. Furthermore, when it comes to the respect for the sovereign equality of states and, consequently, for the rules of democratic decision-making between states, international treaties and the statutes of organizations created by sovereign states are often *incomplete* and *contradictory*. This has also been the predicament of organizations such as the United Nations Organization, which, as a result, has simply been rendered ineffective.

Charter of the United Nations – Preamble

Signed in San Francisco, on 26 June 1945

We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and

security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,— have resolved to combine our efforts to accomplish these aims.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations. [...]

Source: <http://www.un.org/en/documents/charter/preamble.shtml>

We must not delude ourselves about the status quo at the beginning of the 21st century. The global order is still a precarious one. It is characterized, and hence rendered unstable, by a practice of the unilateral use of force. Though it is officially based on the noble ideas of *freedom* and *equality* of citizens and states alike, this order actually is the product of a barely restrained competition for power between sovereign states – and it is only a few states that count. The "Purposes and Prin-

ciples" of the *Preamble to the United Nations Charter* have mostly remained dead letter. Since the end of the Cold War's bipolar balance of power between East and West, i.e. since the 1990s, the situation has become even more serious. The *checks and balances* that the UN Charter was meant to provide for international decision-making are effectively only applicable to the interaction between a few privi-

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Charter of the United Nations (Excerpt)

Chapter I: purposes and principles

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
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.

Source: <http://www.un.org/en/documents/charter/chapter1.shtml>

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leged states, and have further been largely rendered inoperative due to the actual lack of a power balance.

III Normative contradictions and their geopolitical consequences

In the third part of my analysis I shall first deal (A) with the implications of this state of affairs for the doctrine of international relations and, subsequently, (B) with the effects on world politics. The recent revelations about the global espionage activities of the *National Security Agency* (NSA) of the United States may give a hint as to the relevance and urgency of the questions.

(A) *The theory of international relations* (as basis for an adequate interpretation of the facts of international realpolitik):

In spite of all the assertions to the contrary by the self-appointed guardians of the international rule of law, (legal) doctrine is still subordinate to power, namely the "national interests" of states. We cannot take at face value the proclamations of those states that nowadays pose as "international community" (essentially the US and her allies). The most obvious and poignant example of the influence of power politics in the legal domain appears to me to be the Charter of the United Nations. After all, this is the first truly *universal* organization of states (the League of Nations in the colonial period did not meet that standard), which is aimed at ensuring durable peace between all countries on the basis of *freedom* and *justice* for all peoples – if one believes the words of the Preamble. However, the actual *wording* of the respective principles, standards and procedures in the Charter falls back even behind what was achieved in the Covenant of the League of Nations, an organization that had failed due to the pressures of realpolitik in the period after World War I. Though the Covenant of the League, which was adopted as part of the Treaty of Versailles (a decade before the Kellogg-Briand Pact), did not outlaw war as such, it at least required unanimity for all decisions on the central issues of war and peace. In this sense, the principle of equality did apply to the members of the Council of the League of Nations. This is a striking difference to the Charter of the United Nations. The latter indeed contains a general prohibition of the use of force, including the threat of force (Article 2, Paragraph 4), which appears to be a progressive step in the development of international law. However, the principle of sovereign equality of states, which is also enshrined in the Charter (Article 2, Paragraph 1), is valid only with excep-

As already stated, each of the five permanent members of the Security Council is in a position to prevent coercive measures against itself, should it decide to use armed force against another state, occupy its territory, etc. A permanent member thus may act *with virtual impunity*, in a risk-free environment of power politics outside of international law. One of the most dramatic examples in recent history was certainly the invasion of Iraq by the United States in 2003.

tions – and thus not valid at all. (If a general notion is "defined" by way of restriction, the principle as such does no longer make sense.) This normative contradiction, or inconsistency, also means an erosion of the international ban on the use force and, ultimately, the restoration of *jus ad bellum*, the right to wage war, which well-meaning idealists tended to dismiss as an outdated relic from the European era of *Souveränitätsanarchie* ("anarchy among sovereign nation-states"). Why is this normative conflict so serious? I shall try to explain the issue in three brief points:

1. Article 2, Paragraph 4 of the UN Charter prohibits the threat or use of force in international relations. The right to *individual* and *collective* self-defence in case of an armed attack (Article 51) is, so to speak, the logical exception from the general ban. We have to be aware, however, that the term "collective self-defence" is rather vague – a lack of legal precision that may open the door to coalition wars in the tradi-

2. Chapter VII of the Charter of the United Nations establishes and defines the competence of the Security Council to enforce the prohibition of the use of force. It authorizes the Council to take coercive measures, including the use of armed force, in cases of threats to the peace, or breaches of the peace, by member states. However, in any such case, the Security Council must first, according to Article 39, explicitly *determine* the existence of a breach of or threat to the peace, or of an act of aggression. Once the Council has adopted a Chapter VII resolution, based on such a determination, that resolution is, obviously, legally binding upon all member states and United Nations bodies. Even the International Court of Justice, which is part of the United Nations sys-

The US Secretary of State in the period after World War II, *John Foster Dulles*, once bluntly stated: "The Security Council is not a body that merely enforces agreed law. It is a law unto itself." This implies that it actually stands *above* (international) law. Even if this may appear highly anachronistic at the beginning of the 21st century, the Council – due to certain statutory provisions – can in reality act like a sovereign ruler in the era of absolutism.

tion of Europe's great power era. Recent history of the United Nations testifies to this questionable state of affairs. One of the problems here is arbitrariness in the *interpretation* of the law, namely concerning the actual extent of a "permissible" use of force. This has been particularly obvious in the collective use of force against Iraq in 1991, which, though "authorized" by the Security Council, had all the semblance of a coalition war. Furthermore, it is

tem, does not possess the authority to review coercive measures of the Security Council – something which is highly problematic in view of the separation of powers, an essential principle of the rule of law. The US Secretary of State in the period after World War II, *John Foster Dulles*, once bluntly stated: "The Security Council is not a body that merely enforces agreed law. It is a

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law unto itself." This implies that it actually stands *above* (international) law. Even if this may appear highly anachronistic at the beginning of the 21st century, the Council – due to certain statutory provisions – can in reality act like a sovereign ruler in the era of absolutism. Also as regards the previously mentioned competence under Article 39 (to determine the existence of a threat to or breach of the peace in a specific situation), there exists effectively no authority under the UN Charter that could review such an assessment as to its accuracy and appropriateness. As it were, the Security Council may dogmatically determine any and every situation – no matter what the circumstances actually are – as falling under Article 39, and consequently impose coercive measures – whether in the form of partial or comprehensive sanctions, or the use of armed force. The Council's margin of discretion is virtually unlimited. Under the statutory framework of the UN, there is no possibility whatsoever of an external review of such determinations. This became drastically obvious after the Council established international criminal tribunals (for the former Yugoslavia and Rwanda) by way of coercive measures under Chapter VII, whereby crimes committed in the past were interpreted as threat to the peace (something which can only relate to the future) according to Article 39.

3. One of the most serious problems affecting the legal status and credibility of the United Nations as such results from the decision-making rules of Article 27 of the Charter. This provision entitles the Council's five permanent members, in fact the victorious powers of World War II, to veto and block *any* decision on coercive measures (including and up to the use of armed force), and to do so without giving any reasons. Moreover, Paragraph 3 of this same article implies that a country's (actually self-evident) obligation to abstain from voting if it is a party to the dispute in question shall not apply in decisions under Chapter VII. Ironically, this obligation applies nonetheless for non-binding resolutions of the Council under Chapter VI ("Peaceful settlement of disputes"). We are dealing here with a statutory monstrosity, which means that in decisions that are ultimately of the nature of *recommendations* a permanent member of the Security Council will be under an obligation to abstain from voting when it is itself party to the conflict, whereas, when it comes to *binding* decisions

on the enforcement of the prohibition of the use of force, such an obligation does not apply for a state that is party to a conflict. This means that a state with the status of a permanent member may conduct a war of aggression and at the same time prevent the imposition of sanctions

of Justice [ICJ] of the United Nations) reveals another interesting fact of power politics. According to Article 13(b), the Security Council may "refer" to the court a "situation" in any country whose officials or officers are suspected of having committed war crimes or crimes against

This means, as a consequence, that the *jus ad bellum* (the right to wage war) – which was abrogated by the Kellogg-Briand Pact of 1928 – has been reintroduced through the back door. Thus, one of the most substantial developments in the doctrine of international law appears to have been reversed.

against itself in the Security Council. What else if not this duplicity demonstrates the logic of power politics? *Cordell Hull*, another US Secretary of State of the World War II era, who had played a key role in the drafting of the UN Charter, admitted in his memoirs with disarming frankness that the victorious powers of the Second World War would never have agreed to the creation of a body with such enormous powers as the Security Council if they themselves had not been exempt from the Council's coercive measures. ("... our government would not remain there a day without retaining the veto power.") To make a long story short (in the logic of the great powers): "*quod licet Jovi, non licet bovi.*" ["What is allowed to Jupiter is not allowed to the ox."]

(B) This brings us to the political realities that result from these regulations. As already stated, each of the five permanent members of the Security Council is

humanity, or to carry out, or have carried out, a war of aggression. Due to this provision, the ICC would essentially have jurisdiction for the prosecution of international crimes anywhere in the world, irrespective of whether a country is a member of the Court or not. This, however, only applies in the cases where the Security Council has acted in the exercise of its coercive powers under Chapter VII of the Charter, which brings up the issue of virtual immunity for officials of permanent member states who may be responsible for the commission of international crimes. It means, for instance, that no American politician or military officer will ever be held accountable for possible crimes committed during the invasion of Iraq in 2003, unless a domestic US court decides to prosecute. The supreme irony of power politics lies in another fact, however. The provision of Article 13(b) of the Rome Statute on the Council's right of referral, by way of a

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in a position to prevent coercive measures against itself, should it decide to use armed force against another state, occupy its territory, etc. A permanent member thus may act *with virtual impunity*, in a risk-free environment of power politics outside of international law. One of the most dramatic examples in recent history was certainly the invasion of Iraq by the United States in 2003.

The statute ("Rome Statute") of the International Criminal Court (ICC) (not to be confused with the International Court

binding resolution, of a "situation" to the International Criminal Court implies that a country that is a permanent member of the Security Council, but has not ratified the Rome Statute (and this is the case for three out of five permanent members), nevertheless may use the Court for its own purposes. Those countries whose officials enjoy total impunity at the international level (since their governments can use the veto power at any moment

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to prevent a referral) may bring to justice officials of states that are actually not members of the Court. It is exactly the Security Council member states with the most powerful militaries – the United States, Russia and China – that are not members of the International Criminal Court.

What does all this mean in terms of the modern doctrine of international law? I would like to emphasize four different aspects:

1. International law is *not (yet) law* in the strict sense. As I have tried to explain, it is exactly in the most serious cases of violations of international law that sanctions (enforcement measures) are not available, or in fact not possible. If we follow the definition of Kelsen, norms for which there exist no general enforcement procedures are not legal norms, but at best moral principles. In the unipolar environment since the 1990s, the phenomenon characterized as “policy of double standards” has indeed become a characteristic feature of this “extrajudicial” state of affairs.
2. The prohibition of the use of force (Article 2 [4] of the UN Charter) is not worth the paper it’s printed on because it is “implemented” according to the earlier mentioned Roman dictum “*Quod licet Jovi, non licet bovi*”. The norm is effectively inapplicable to those member states that would principally (because of their great power status) have to ensure that it is enforced, namely the five permanent members of the Security Council. Under Article 24(1) of the Charter, the international community confers upon the Council “primary responsibility” for the maintenance of international peace and security. Those very states on which it depends, because of their veto privilege, whether an enforcement action can actually take place or not are de facto exempt from the application of those provisions. They can revel in the immunity of power politics.
3. This means, as a consequence, that the *jus ad bellum* (the right to wage war) – which was abrogated by the Kellogg-Briand Pact of 1928 – has been reintroduced through the back door. Thus, one of the most substantial developments in the doctrine of international law appears to have been reversed.
4. Finally, this state of affairs means that the principle of the sovereign equality of states is actually not valid because five states, specifically named in the Charter, enjoy a special privilege thanks to which they may, on the one hand, neglect or violate with impunity the sovereignty of all other states and,

on the other hand, define and exercise their own sovereignty in a totally arbitrary, absolutist, manner.

Thus, in spite of all assurances to the contrary by the self-proclaimed guardians of the international rule of law, at the beginning of the new millennium we are still dealing with the consequences of *Souveränitätsanarchie* (“anarchy among sovereign states”). As I said at the beginning,

It is for these reasons why all international actors should support the interpretation of sovereignty in the sense of *equality* of all states in the normative sense – in clear distinction from the term’s exclusivist meaning.

this fact weighs especially heavily under the conditions of a *unipolar* order – in a constellation where there is no separation of powers, neither in *statutory* terms (in the UN Charter) nor in terms of *actual politics* (which would require a genuine competition for power between comparable actors). A functioning system of a “separation of powers” requires a global “balance of power”.

IV Quid nunc?

What are the prospects of international relations under these circumstances? It is an undeniable fact that the normative contradictions in the UN Charter have prevented the world organization from fully realizing its mandate, which the Preamble describes, in almost poetical words, by reference to the ideals of justice, equality and peace in the interest of all peoples. This deplorable state of affairs should be reason enough for the international community – and I do not refer here only to the Western states that nowadays pretend to speak on behalf of all – to take on the task of *reforming*, in a fundamental way, the system of intergovernmental relations. Dignified co-existence of citizens in a multitude of sovereign states is only possible if the core elements of sovereignty are (1) fully acknowledged, or integrated, in international treaties, and (2) implemented in *political reality*. (The latter must not be confused with “realpolitik”; what I mean here is the *actual implementation* of the principle of sovereignty in politics.) I would like to stress again that I understand the notion of sovereignty in an integral sense, comprising the sovereign status of the *citizen* with his inalienable rights as well as, derived from it, that of the *state* representing the citizen.

In spite of this being a mere vision under the actual circumstances, we need to begin with measures of reform right now. The global legitimacy crisis, expressed in an increasing rejection of the excesses of

power politics by the world public, leaves no other choice. A fundamental reform will have to include, *inter alia*:

1. **The elimination of the conceptual contradictions in the Charter of the United Nations:** Specifically we are talking about the “veto right”, a notion that, remarkably, is nowhere to be found in the text of the Charter and only implicitly referred to in Article 27(3). This rule, which is so openly at variance with the United Nations philosophy of *partnership* between states, more than any other illustrates the necessity of reforming the Charter in the direction of greater consistency among its basic principles. Only such a measure will ensure that the sovereign equality of states (Article 2[1]) will become a core organizing principle (or system principle) of the United Nations.
2. **The democratization and “legal structuring” of international relations,** in general and special terms, but first and foremost involving the United Nations Organization and large regional entities such as the European Union: With respect to the UN this means that, according to what I said earlier, the Security Council must not be above or beyond the law. Furthermore, the role and the competences of the International Court of Justice need to be strengthened so that it would be in a position – similar to a supreme court – to also review the lawfulness of binding resolutions of the Security Council. While the International Court of Justice should be better integrated into the UN system, the International Criminal Court, on the other hand, should be released from the grip of the Security Council as regards the latter’s authority of referrals of situations and deferrals of investigations or prosecutions according to Articles 13 (b) and 16 of the Rome Statute respectively. This court is not part of the United Nations system. It was created in 1998, several decades after the foundation of the UN, and is legally completely independent from this organization.
3. **The creation of intergovernmental cooperation structures at regional level,** and not only in Europe: A perti-

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nent example is ASEAN, the Association of Southeast Asian Nations. Such a development could be an important step towards the formation of a *multipolar* world order. In that regard, the so-called BRICS countries (Brazil, Russia, India, China, South Africa), though not being a *regional* bloc, can play a pivotal role. If there is to be a real chance for reforming the United Nations Organization in a fundamental way, it will not come about within a constellation and mindset of unipolar rule but under conditions of a new balance of power.

Why, one might ask, are changes of the Charter only possible if there is a new balance of power? We must be aware of the drawback, or stumbling block, of any statutory reform of the United Nations Organization. According to Article 108 of the Charter, any, even the slightest, amendment requires the consent of the five permanent members of the Security Council. Why, one might further ask, would a country voluntarily renounce the special status (namely the veto privilege) that comes with permanent membership? We have to take account of the "logic of power" according to which no state will relinquish privileges, as scandalous and unjustified as they may be, without a political reason, that is, if there is no concrete benefit from such a step. This is even more so if, as in the cases of the UK and France, the state concerned actually no longer is a great power. Only a change of the global power constellation that leads to genuine multipolarity might convince the privileged actors that the *political price* for maintaining the status quo (that has existed since 1945) will be higher than the *benefits* from the preservation of their special status. Admittedly, this is a depressing insight. However, a comprehensive (not merely cosmetic) reform requires an adequate political framework. Mere emphasis on legal principles and the need to be consistent (i.e. to avoid contradictions between those principles) will not really impress political leaders. Reformist idealism will come to nothing unless one is prepared to take into account the laws of *realpolitik*.

In conclusion, I again would like to refer to the circumstances and conditions that are crucial for the exercise of sovereignty. The notions of "democracy" and "law", especially "rule of law", only make sense as *universal* principles. Consequently, they will also have to be applied at the *interna-*

tional, not only at the *domestic*, level. A position that insists on a *lex privata*, a privileged status, for certain states fits into the outdated mindset of feudalism. The modern approach is oriented towards partnership and peaceful coexistence, values that have their basis in universal human rights and the idea of equality of all human beings. Not only in *human rights* issues, but also, and precisely, in matters of *democracy* – as a legal form of political organization – should the international community avoid what has famously been called a "policy of double standards". One cannot preach de-

ideologically reinterpreted in favour of an absolutist mindset according to which one state declares itself as "indispensable nation" (*Madeleine Albright*, 1998).

In conclusion, I would like to sum up my approach with three maxims or imperatives:

(1) A state's claim to sovereignty at the international level is only justified if this includes recognition of the sovereign status, namely the inalienable rights, of each citizen of that state. This implies a call for **domestic democracy**.

(2) In relations between states, the concept of national sovereignty is only mean-

A fundamental reform will have to include, inter alia: [...]

The creation of intergovernmental cooperation structures at regional level, and not only in Europe: A pertinent example is ASEAN, the Association of Southeast Asian Nations. Such a development could be an important step towards the formation of a *multipolar* world order. In that regard, the so-called BRICS countries (Brazil, Russia, India, China, South Africa), though not being a *regional* bloc, can play a pivotal role. If there is to be a real chance for reforming the United Nations Organization in a fundamental way, it will not come about within a constellation and mindset of unipolar rule but under conditions of a new balance of power.

mocracy *domestically* and at the same time act as a dictator *internationally*. This seems to be the foreign policy dilemma particularly of the United States. In their recent history, in fact up to the present time, they often claimed for themselves the right to change the political system of other countries according to their own values and ideology. If considered necessary, the US version of "régime change" also included the use of force in violation of the UN Charter. Apart from its normative inconsistency, this interventionist policy has also proven to be counter-productive in concrete political terms. Not only did it destabilize the targeted countries and regions, it often created risks of new wars.

It is for these reasons why all international actors should support the interpretation of sovereignty in the sense of *equality* of all states in the normative sense – in clear distinction from the term's exclusivist meaning. The process of rethinking that the humanist philosophers of the 18th century initiated should not be reversed, or

ingful and legitimate if it is interpreted and implemented according to the principle of equality. This implies a call for **international democracy**.

(3) As a consequence of the autonomous status of the subject, the right to equality is inherent in the principle of sovereignty. This right has to be considered as basis of every legal order, whether domestic or international. Law without equality in the application of its norms is not law but despotism. This implies a call for the **international rule of law**.

Resulting from the notion of sovereignty, these maxims or imperatives – domestic democracy, international democracy, and international rule of law – are *jointly* indispensable for a just world order and for a dignified coexistence among peoples and states in the sense of the topic you invited me to speak about. I thank you for your attention. •

(Translation *Current Concerns*)