



Humanitarian Intervention in the Context of Modern Power Politics

by

Hans Köchler

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**Is the Revival of the Doctrine of the "Just War"
Compatible with the International Rule of Law?**

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(I) The concept of humanitarian intervention and its historical background

The concept of humanitarian intervention is nothing new – it has long been part of the inventory of European power politics. Early legal philosophers like Hugo Grotius (*De jure belli ac pacis*, 1625), Emer de Vattel (*Le droit des gens*, 1758), and Samuel Pufendorf (*De jure naturae et gentium*, 1694) already upheld – more or less vaguely – the natural right of each people to resort to arms against the tyranny of a neighbouring state. However, a specific doctrine of humanitarian intervention was developed only in connection with Europe's Oriental policies during the 19th century. During this time, an elaborate doctrine of humanitarian intervention (*intervention d'humanité*) evolved which was applied to provide a kind of *moral* justification for the repeated interventions of European powers on the territory of the Ottoman Empire. This moral justification, in turn, was supposed to give those actions a semblance of *legal validity* – armed interventions such as the French expedition in Syria (1860) demanded justification not merely in general *moral*, but in specific *legal* terms as well. Hence, the concept of "legitimate intervention" was created.

One of the basic criteria justifying intervention, according to the definition of this concept, was that a government – though acting within the limits of its "sovereign rights" – violate the *droits d'humanité* (rights of humanity), whether by measures contrary to the interests of other states, or by "excesses of injustice and cruelty" that deeply injure European-Christian morals and civilization.¹ This criterion was formulated in relation to the European powers' action during the events in Bosnia-Herzegovina and Bulgaria (1875-1877). Indeed, the "right of intervention" was claimed by the European powers for a series of interventions on Turkish-controlled territory, whether in Greece (1826), Syria (1860), Crete (1866, 1894), Armenia (1896), or Macedonia (1905). A "law of solidarity" was postulated that was based on the notion that states are not isolated entities, free to act in whatever manner within the confines of their sovereignty, but members of a higher "community of nations" (*société des nations*), as explained at the time by Léon Bourgeois.² The persistent interference of the European powers in the internal affairs of the Ottoman Empire found a kind of ideological

¹ Criterion formulated by A. Arntz: "Lorsqu' un gouvernement, tout en agissant dans la limite de ses droits de souveraineté, viole les droits de l'humanité, soit par des mesures contraires à l'intérêt des autres États, soit par des excès d'injustice et de cruauté qui blessent profondément nos mœurs et nôtre civilisation, le droit d'intervention est légitime." (Text published in G. Rolin-Jaequemyns, "Note sur la théorie du droit d'intervention, à propos d'une lettre de M. le professeur Arntz," in: *Revue de droit international et de législation comparée*, vol. 8 [1876], p. 675.)

² *Pour la société des nations*. Paris: E. Fasquelle, 1910.

expression, or legitimization – that of those powers' self-declared concern –, in the *Treaty of Berlin* of 13 July 1878. In this agreement concluded between the major European powers and Turkey, the former authoritatively obliged the Sublime Porte to apply specific legislative and administrative measures in areas within its own jurisdiction.³ In fact, they established a regime of permanent control over the internal administration of the Ottoman Empire in order to guarantee, as they claimed, a minimum standard of rights, in particular "religious freedom," to the citizens under Turkish rule.⁴ With this treaty, *intervention d'humanité* became a basic element of "public law" regulating Europe's relations with Turkey.⁵

The doctrine of humanitarian intervention remained an integral part of the European powers' conduct of foreign policy from this time until the First World War. In a diplomatic note addressed to the Sultan of Morocco, the European powers, signatories of the *General Act of Algeciras* (1906), demanded of the Sultan in September 1909 to stop the alleged practice of "cruel punishment" and "d'observer à l'avenir les lois d'humanité."⁶ In his comprehensive analysis of the doctrine and practice of humanitarian intervention during the 19th century, Antoine Rougier has aptly described the theory as a doctrine "qui reconnaît pour un droit l'exercice du contrôle international d'un État sur les actes de souveraineté intérieure d'un autre État contraires 'aux lois de l'humanité', et qui prétend en organiser juridiquement le fonctionnement."⁷ This theory implies, as stated by Rougier, that whenever the "human rights" of the population of a given state are violated by its very government, another state or group of states has the right to intervene in the name of the so-called "international community" (*Société des nations*), thus temporarily substituting their own sovereignty for that of the state against which the intervention is directed.

This early doctrine of "limited sovereignty" claimed to be inspired by purely humanitarian motives, while in reality the European powers of the time had their own "imperial" agenda vis-à-vis the Ottoman Empire. Far from qualifying as disinterested *actio popularis*, humanitarian intervention in its actual practice in the 19th century was dictated by the geopolitical interests of the then European powers. Those powers, in the course of their own colonial rule, violated each and every humanitarian principle they proclaimed to uphold

³ *Treaty between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey*. [Berlin] July 13, 1878. See the provisions of Art. XIII concerning Crete.

⁴ See esp. Art. LXII ("In no part of the Ottoman Empire shall difference of religion be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil or political rights ...").

⁵ For details see Antoine Rougier, "La théorie de l'intervention d'humanité," in: *Revue générale de Droit International Public*, vol. 17, n. 1 (1910), pp. 468-526, esp. p. 475.

⁶ Quoted in Antoine Rougier, "MAROC. – La question de l'abolition des supplices et l'intervention européenne [Communication de M. Antoine Rougier]," in: *Revue générale de Droit International Public*, vol. 17 (1910), p. 99.

and resolved to enforce vis-à-vis the Sublime Porte. While respect for the rights of the Christian minorities was emphasized for the territories under Turkish rule, and the acts of sovereignty of the Turkish Sultan were effectively put under foreign control in the name of "humanity," the European colonial powers accepted no such standards of humanity in their treatment of the populations they considered as "barbarian" at the time. This early "policy of double standards" was veiled in the metaphysical and moral teachings of Christianity. The Eurocentrism of the 19th century implied an assumption of superiority over all other religions and cultures. The common principles of humanity were defined on a dogmatic religious basis, with the *droit commun de l'humanité*, the "common right of humanity," being described along the parameters of the Christian religion. Thus, the powers of Europe acted as a kind of self-appointed "ministère public au nom de l'humanité."⁸ The self-declared guardians of humanity failed, however, to define the normative principles on which their right to intervene was based. They also failed to demonstrate that their interventions – which they justified with the help of the concept of "intervention d'humanité" – were purely, or at least primarily, motivated by their concern for the human rights of the population in the country targeted by an intervention, and not dictated by specific geopolitical interests.

The self-declared humanitarian mission of the European powers of the 19th century and their arrogance vis-à-vis non-Christian nations – often referred to as "barbarian," resembling the attitude of the Crusades of the Middle Ages – may be better understood when placed in the specific historical context. The treaty concluded in 1815 that became known as the *Holy Alliance* is at the roots of the *European ideology of supremacy* in the religious, moral and cultural fields that characterized the European concert up to the First World War. In their treaty concluded in Paris, 14-26 September 1815, the Emperor of Austria, the King of Prussia and the Emperor of Russia 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 Religion, namely the precepts of Justice, Christian Charity, and Peace, which, far from being applicable only to private concerns, must have an immediate influence on the councils of princes, and guide all their steps, as being the only means of consolidating human institutions and remedying their imperfections."⁹ In Art. I of the treaty, the signatories proclaimed a spirit of *fraternity* based on the words of the Holy Scriptures, and professed, in Art. II, "to consider themselves all as

⁷ Antoine Rougier, op. cit., p. 472.

⁸ This formulation is used by Antoine Rougier to illustrate the moral exclusivity and self-righteousness of those who apply this doctrine: op. cit., p. 479.

members of one and the same Christian nation." They declared, in Art. III, the *universal mission* they reserved for their alliance by acknowledging "how important it is for the happiness of nations, too long agitated, that these [Christian] truths should henceforth exercise over the destinies of mankind all the influence which belongs to them ..." The Alliance – which was later joined by the King of France and the Prince Regent of England – openly equated the "destinies of mankind" with those of the Christian nations.

The religious fervour and dogmatism behind this proclamation shaped the European powers' self-righteous policies and in particular their imperialist strategies vis-à-vis the non-Christian world. It is no wonder that powers which solemnly proclaimed "to protect Religion, Peace, and Justice" (Art. I of the *Act of the Holy Alliance*) resorted to the use of force against third parties when those supreme values were being threatened according to their own interpretation, and that they ignored the sovereignty of other states in the name of higher moral values – later to be referred to as principles of "humanity" –, as defined by them. The Holy Alliance, as the embodiment of Eurocentrism in its most extreme form, necessarily produced the spirit of self-righteousness and moral arrogance that characterized the European powers' dealings with the rival Ottoman Empire. In ideological terms, it paved the ground for the later doctrine which replaced *Christianity* with *humanity* and which claimed to legitimize mere acts of power politics as actions to preserve the very principles of humanity.

The doctrine of *humanitarian intervention* was the natural outflow of the European powers' tendency to camouflage imperialist interests by lofty religious "precepts" as documented in the Act of the Holy Alliance. This strategy is obvious in Prince Metternich's defensive statement, according to which the "Holy Alliance was not an institution for the suppression of the rights of nations." In Metternich's words, the Alliance "was solely an emanation of the pietistic feelings of the Emperor Alexander and the application of the principles of Christianity to politics."¹⁰ However, it has been the iron law of power politics since the beginning of inter-state relations that the real motives of political action are concealed by an emphasis on values and principles which are generally acceptable. Economic or political interests are justified through the proclamation of values, irrespective of whether the state actors believe in these values or not. The lessons learned from 19th-century European imperialism should be sufficient to demonstrate the intricate link between ideological (religious, moral, humanitarian) legitimation and the actual interests behind political action. A

⁹ See "Text of the Holy Alliance," in James Harvey Robinson and Charles Beard (eds.), *Readings in Modern European History*, vol. 2. Boston: Ginn and Company, 1908, pp. 354-355.

¹⁰ Quoted in *The Catholic Encyclopedia*, vol. VII (1910): article "Holy Alliance" by Martin Spahn, online version 1999 at <http://www.newadvent.org/cathen/07398a.htm>.

measure which, in "humanitarian" terms, is qualified as intervention to protect the rights of Christian minorities etc., may in reality – i.e. in terms of power politics and of the *real* motives of the respective intervention – be intended to contain the power of a strategic competitor. This becomes all the more obvious when one takes into account that the respective intervening powers did nothing to enforce those very humanitarian principles within their borders or in the colonial territories under their rule.

It is no surprise that the doctrine of humanitarian intervention was criticized by the legal scholars of the time – not only because of its lack of precision in regard to the definition of specific "humanitarian" values (or basic human rights), but also in view of its inconsistent practice according to the dictates of power politics. In his comprehensive legal evaluation of the concept of humanitarian intervention, Antoine Rougier rightly observed "qu'il est pratiquement impossible de séparer les mobiles humains d'intervention des mobiles politiques et d'assurer le désintéressement absolu des États intervenants."¹¹ For 19th-century legal theorists it was clear that the *practice* of humanitarian intervention was one of double standards and that the "respect of human rights" was only an *accessory* motive of intervention among others. Based on the application of the doctrine in the cases mentioned above, critical legal evaluation reached the conclusion that the respective intervening powers acted as *judges in their own case*. In the absence of any international division of powers, they themselves decided on the criteria of application of the doctrine – much like the veto powers in today's Security Council.¹² Those criteria were usually dictated by the prevailing constellation of *interests*, not by lofty humanitarian principles.¹³ Because of the non-existing division of powers between the authority (state entity) executing an intervention and the authority formulating the criteria of applicability on a case-by-case basis, action was taken by a state (or a group of states) only where its own interests were at stake.

The "humanitarian practice" vis-à-vis the Turkish Empire made it particularly clear to the international observer that intervention in the name of humanity implied the imposition of a specific – but not necessarily universal – concept of humanity, namely that of the intervening power, upon the country against which the action was directed and which may have been governed by a different value system and a different perception of that which is "human." The unavoidably *Eurocentric* orientation and the direct link to the hegemonial

¹¹ "La théorie de l'intervention d'humanité," loc. cit., p. 525.

¹² See our analysis of the structure of the Security Council: *The Voting Procedure in the United Nations Security Council. Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations*. Studies in International Relations, XVII. Vienna: International Progress Organization, 1991.

¹³ "Dès l'instant que les puissances intervenantes sont juges de l'opportunité de leur action, elles estimeront cette opportunité au point de vue subjectif de leurs intérêts du moment." (Rougier, op. cit., p. 525.)

interests of the European powers of the 19th century made the concept of humanitarian intervention suspicious in the eyes of legal theorists from the very beginning. The use of the concept was challenged by those who identified it as a tool of power politics. In the period of joint European action against non-European rulers before the First World War, the concert of European powers claimed vis-à-vis their supposed adversaries or competitors a *right to intervene* "in the name of humanity." It is obvious that this Eurocentric strategy corresponded to a situation of *fundamental inequality* in terms of power and control of resources between Europe and the rest of the world (apart from the United States), in particular the countries and nations under colonial rule. If one takes into consideration the unequal constellation of power under which humanitarian intervention was practiced, and if one further considers its inconsistent application in a 19th-century "policy of double standards," it is no exaggeration to state that the doctrine of humanitarian intervention is part of the ideological legacy of European imperialism. This evaluation corresponds to the contemporary critique of the concept in terms of legal philosophy, as briefly referred to above.

Why, then, is a concept so directly linked to the period of imperial power politics of the 19th century and so clearly discredited – in the eyes of contemporary critics – by a rather open policy of double standards, suddenly being revived with much aplomb at the beginning of the 21st century? What are the factors that make acceptable in the present context of international politics the remarkable *renaissance* of a doctrine which was once discredited as contradictory in its application and as violating basic principles of international law? Are we witnessing a rebirth of moral consciousness in regard to the conduct of politics – as was supposed to have inspired the Act of the Holy Alliance of 1815 –, or is the humanitarian intervention of the 21st century just a corollary to a system of *hegemonial politics* which, in its intricate mechanisms related to the prevailing unipolar power structure, resembles the Eurocentric order of the 19th century? We will try to answer this question later, because if the *unipolar* power structure is perceived to be the common denominator, new light is shed on the "humanitarian element" of politics insofar as it accompanies power politics in an "imperial" framework, whatever the specific historical circumstances may be. But first we must briefly take account of the development of international law in the course of the 20th century, so as to be able to evaluate the nature of this sudden revival – or "rehabilitation" – of a 19th-century concept in the 21st century's environment of power politics, prematurely declared as a "New World Order."

(II) The development of international law and the prohibition of the use of force in the 20th century

During the 20th century the doctrine of humanitarian intervention underwent profound changes, particularly in the period after the First World War, following the collapse of the old European order of the 19th century. A geopolitical change of similar magnitude occurred again at the end of the 20th century, exactly in the years since 1989, as a result of the collapse of the post-war order.¹⁴ It remains to be seen whether the "ideological reorientation" – in terms of the doctrine of international law and of the conception of international legality (the "rule of law") – that happened at the end of the Cold War will be as far-reaching as the one that took place at the end of World War I. It is of special interest to look into the structural similarities between these two obvious reorientation processes, as major "paradigm changes" in world politics. After the catastrophe of the First World War, which forever ended the old imperial European order, the effective abrogation of the *jus ad bellum* – with the banning of the use of force in international relations – was seen as a major advancement of international law. Although the *Hague Conventions* of 1899 and 1907¹⁵ introduced – for the first time in a systematic legal manner – humanitarian principles into the conduct of warfare (*jus in bello*) and led to the creation of the body of international humanitarian law,¹⁶ the right to wage war, as a corollary to national (often imperial) sovereignty, was not in itself put into question. The *jus ad bellum* was merely tamed through the development of norms of *jus in bello* (i.e. international humanitarian law). To have the right to declare war against another sovereign entity, irrespective of moral or legal considerations, was still considered a basic element of

¹⁴ The term "post-war" refers here to the Second World War.

¹⁵ Esp. the *Convention on the Pacific Settlement of International Disputes* adopted on 29 July 1899, the *Convention with Respect to the Laws and Customs of War on Land* adopted on 29 July 1899 (First Hague Conference, "Second Hague Convention of 1899"), and the *Convention with Respect to the Laws and Customs of War on Land* adopted on 18 October 1907 (Second Hague Conference, "Fourth Hague Convention of 1907"). For details of the Second Hague Convention of 1899 see Rudolf Laun, *Die Haager Landkriegsordnung. Textausgabe mit einer Einführung von Rudolf Laun*. Wolfenbüttel-Hannover: Wolfenbütteler Verlagsanstalt, 3rd ed. 1947.

¹⁶ Foremost among those rules figures the so-called "Martens Clause" formulated in the Preamble to the Second Hague Convention of 1899 and restated in the Preamble to the Fourth Hague Convention of 1907. It established, for the first time, a body of norms of *jus cogens* to be respected in the course of military conflict, by stating that the civilian population as well as the combatants "remain under the protection and empire of the principles of law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."

sovereign rule. In Carl Schmitt's theory, formulated after the First World War, this right was perceived to be the *constitutive element* of politics (of the "political") as such.¹⁷

However, the catastrophe of the World War had woken up international public opinion and made legal theorists realize the devastating consequences of an *absolutely posited* state sovereignty. What has been aptly described, in German terminology, as *Souveränitätsanarchie* – anarchy among sovereign states as a result of the unrestrained exercise of that very sovereignty – had become the most serious threat to international peace and security, indeed to the survival of mankind, and was perceived as such by a growing number of scholars, diplomats and politicians. The codification of a norm banning the use or threat of the use of force in relations between states through the *Kellogg-Briand Pact* of 1928 was seen as a major achievement on the way to creating a new transnational order of peaceful co-existence among nations. In Art. 1 of the Pact, signed at Paris on 27 August 1928, the High Contracting Parties solemnly declared "that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another."¹⁸ This principle has now become an intrinsic part of the body of *jus cogens* of general international law.

While the Third Hague Convention of 1907 limited the arbitrariness of the conduct of warfare by introducing an obligation to formally *declare war* before the commencement of hostilities,¹⁹ the Covenant of the League of Nations established for the first time a *partial prohibition* of war. Article 10 of the Covenant clearly prohibits wars of aggression and threats of aggression against members of the League.²⁰ Articles 12 and 15 of the Covenant make the right to conduct war conditional upon the preceding effort of pacific settlement²¹ and determine that no war can be conducted against a unanimous decision (not including the votes of the parties to the dispute) of the Council of the League of Nations.²² These procedural

¹⁷ Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien*. Berlin: Duncker & Humblot, 1963 (reprint 1987).

¹⁸ *Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy*, signed at Paris on 27 August 1928, proclaimed after ratification on 24 July 1929.

¹⁹ "The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form of either a reasoned declaration of war or of an ultimatum with conditional declaration of war." (Art. 1 of the *Convention Relative to the Opening of Hostilities* of 18 October 1907, "Third Hague Convention of 1907".)

²⁰ "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."

²¹ Art. 12: The Members of the League "agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council."

²² Art. 15: "If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League shall agree that they will submit the matter to the Council. ... If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of

restrictions of the right to conduct war brought about a departure from the previous doctrine of *bellum justum* towards a doctrine of *bellum legale*, without abolishing the *jus ad bellum* as such. It was only the Kellogg-Briand Pact that finally and without reservation abolished the right to wage war except in self-defense.

The banning of the use of force, equivalent to the unequivocal abrogation of the *jus ad bellum*, logically implies another basic norm of international law, namely that of non-interference in the internal affairs of another state. The philosophical justification for this principle had been worked out well before the era of 19th century imperialism. In his treatise *Zum ewigen Frieden* ("On Eternal Peace," 1795), Immanuel Kant identified the rule of non-interference as one of the basic conditions of a peaceful international order.²³ According to Kant, the right of another people to conduct public affairs independently is based on the philosophical concept of *autonomy* (in the original Greek sense of the sovereignty of the individual and collective will)²⁴ the respect of which he considered indispensable to a general normative order between states.

Although the order of peace as represented by the League of Nations was not of durable nature, with the whole system collapsing in the conflagration of the Second World War, the abrogation of the *jus ad bellum* was upheld during the reconstruction of the international system since 1945. The United Nations Charter incorporates the principle earlier formulated in the Kellogg-Briand Pact and explicitly stipulates in Art. 2 (4) that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ..." In the period after World War II – as in that after World War I – the recognition of this principle was seen as a major step towards an international order of peace and prosperity for all nations. During the Cold War period, characterized by an order of bipolarity, respect for this principle *effectively* prevented the outbreak of a major confrontation between the two rival superpowers. The restriction of

the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report." It is noteworthy that the Covenant of the League of Nations, in regard to the rules of decision-making about issues of war and peace, adheres to higher standards of fairness and due process than the later Charter of the United Nations. The provisions of Art. 27 of the UN Charter exempt the permanent members of the Security Council, in the case of their own involvement in a dispute, from the obligation to abstain from voting on compulsory measures outlined in Chapter VII. See the author's analysis: *The Voting Procedure in the United Nations Security Council*. Studies in International Relations, XVII. Vienna: International Progress Organization, 1991.

²³ *Zum ewigen Frieden. Ein philosophischer Entwurf*. Königsberg: Friedrich Nicolovius, 1795. See his "preliminary article 5": "Kein Staat soll sich in die Verfassung und Regierung eines anderen Staats gewalttätig einmischen."

²⁴ On the autonomy of the will in Kant's practical philosophy see esp. his *Critique of Practical Reason* [Kritik der praktischen Vernunft]. New York-Toronto: Macmillan, Maxwell Macmillan, 3rd ed. 1993, Book I, Chapter 1, § 8.

national sovereignty resulting from *mutual recognition* of the inadmissibility of interference in internal affairs became a generally accepted principle of international law. The constraints to great power rule inherent in the norm of the non-use of force in relations among states were considered as basic condition for a stable balance of power among international actors who would otherwise have tried to establish by force an *order of priority* (or *international hegemony*) – as was usual procedure in the era of imperial nation-states. In this normative context, other rules of international law – including the principles of human rights – are only valid insofar as they are compatible with the basic norm of the non-use of force and the subsequent norm of non-interference in internal affairs.

The General Assembly of the United Nations has gone one step further in advancing this normative order of *peaceful co-existence* – which is *negative* in its structure in the sense of *excluding* aggression – towards a *positive* order of peaceful co-operation among all nations (i.e. states). In the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*,²⁵ the General Assembly codified an elaborate set of rules of "peaceful international behaviour" of states.²⁶ This declaration can be seen as the culmination of the efforts within the post-war (World War II) international system to create a *normative framework* which would make the idea of peaceful co-operation, based on respect for one another's sovereignty, a general trait of international law and thus would finally obligate all states to adhere unreservedly to the non-use of force and non-interference in internal affairs. In this document, the mutual recognition of sovereignty is seen in a *positive*, not in a *negative*, sense.

However, this post-war system of international law, as represented by the United Nations Charter and the related legal instruments and resolutions, contained a basic normative contradiction in regard to the banning of the use of force and the abrogation of the *jus ad bellum*. The imperial legacy of European international law was not completely abolished by the victors of World War II, the drafters of the UN Charter. In conformity with the iron law of power politics, they could not resist the temptation to write into the Charter their privileged position after the end of World War II. In terms of the procedural rules of international law, they "eternalized" the power balance of 1945.

This legacy of power politics in the UN Charter becomes obvious in the following way: The Charter's ban on the use of force in international relations (Art. 2 [4]) is related to

²⁵ General Assembly resolution 2625 (XXV) of 24 October 1970.

²⁶ See Milan Šahović (ed.), *Principles of International Law Concerning Friendly Relations and Cooperation*. Belgrade: Institute of International Politics and Economics, 1972.

unilateral actions of states or groups of states. Article 2 (7) clearly states that this interdiction "shall not prejudice the application of enforcement measures under Chapter VII." According to the provisions of Chapter VII of the Charter, the United Nations Organization, represented by the Security Council, reserves for itself the right to resort to armed force "as may be necessary to maintain or restore international peace and security." (Art. 42) According to the procedural rules of the UN Charter, the *collective* use of force – derived, in principle, from the existence of the elementary right of self-defense – is the only exception (apart from the very right of self-defense in case of an armed attack)²⁷ to the principle of the non-use of force in international relations. This right, however, cannot be seen in the sense of a traditional *jus ad bellum* because it relates to measures of defense against those members of the international community who violate the principle of the non-use of force. Collective defense, based on strict procedural rules, against "any threat to the peace, breach of the peace, or act of aggression" (Art. 39), cannot be qualified in the same normative sense as the act against which it is directed. In this sense, counter-measures against aggression cannot be defined as acts of warfare for which a *jus ad bellum* (in the sense of unrestricted sovereignty of state action) could be claimed. Those acts are to be qualified as based on a *right of resistance* against the violation of the international rule of law. Because of their collective nature, they exclude – at least *ideally* – any arbitrariness on the part of those resorting to force in acts of self-defense of the international community.

As we have explained elsewhere in more detail,²⁸ this collective use of force – the only exception from the general ban of Art. 2 (4)²⁹ – is regulated, in the UN Charter, in a *discriminatory* manner favouring the great powers of 1945 and thereby reintroduces "through the back door" special rights equivalent to the earlier-abrogated *jus ad bellum*. Because of the provisions of Art. 27 of the Charter, the exercise of the right of defense against acts of aggression – which is generally reserved for the Security Council and not the General Assembly – is put under the exclusive control of the five permanent members of the Council which are, more or less, identical with the victors of World War II. According to Par. 3 of Art. 27, decisions on all matters other than those of procedural nature require the "concurring

²⁷ "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." (Art. 51)

²⁸ See *The Voting Procedure in the United Nations Security Council*, esp. Chapter V: "The specific abuse of the veto for reasons of power politics," pp. 27ff.

²⁹ The clause at the end of the paragraph banning the use of force – "or in any other manner inconsistent with the Purposes of the United Nations" – does not relativate the general interdiction. As explained by Bruno Simma, it is not designed to give room for any exceptions from the ban on the use of force, "but rather to make the prohibition watertight." ("NATO, the UN and the Use of Force: Legal Aspects," in: *European Journal of International Law*, vol. 10 [1999], p. 3.)

votes of the permanent members." This means that a group of member states is granted a special *veto privilegium* which allows it to determine the Security Council's course of action on issues of international peace and security, in particular on collective enforcement measures including the use of armed force, on the basis of Chapter VII. The obligation, also formulated in Art. 27 (3), that "a party to a dispute shall abstain from voting" – a regulation dictated by the principles of fairness and impartiality – relates *only* to decisions under Chapter VI (*Pacific Settlement of Disputes*) and Art. 52 (3) (*pacifical settlement of local disputes*). This clause does *not* apply to decisions under Chapter VII (including the use of armed force), which are binding upon all member states (unlike those adopted under Chapter VI which are of non-binding nature). Excluding from the obligation to abstain from voting exactly those cases in which a permanent member may itself be committing breaches of the peace or acts of aggression, grants *virtual impunity* to the aggressor. By virtue of its special veto right, a permanent member may block any decision on collective enforcement measures. A permanent member may be tempted to use this privilege exactly in the case when it or one or more of its allies has committed the act of aggression against which the Security Council is supposed to take adequate measures. This means that the "international rule of law" can be enforced only vis-à-vis the weak (i.e. the non-permanent members of the Security Council and the other UN member states), but never against the interests of the strong. This makes the rule of law, in its very essence, meaningless. In regard to the five permanent members of the Security Council, the force of law has been replaced by the law of force. And as history amply demonstrates, when force creates law it is always according to specific (national) *interests*, not according to generally accepted (international) *norms*. This is essentially what we mean when we refer to the "eternalization" of the power balance of 1945 by means of the UN Charter and in particular the procedural rules of the Security Council.

The history of the United Nations Organization has given ample proof of the supremacy of (great) power politics over the international rule of law. By granting *virtual immunity* from prosecution to exactly those members of the international community who, because of their special status as permanent members of the Security Council, have a special responsibility for the preservation or restoration of international peace and security, the UN Charter has introduced a kind of *operative* (or implicit) *jus ad bellum* in favour of a small group of states. The right to block any enforcement action or counter-measure when their own "vital interests" are at stake – or to prevent measures against their own acts of aggression – is tantamount to a special (undeclared) right to breach the peace or to wage war whenever the interests of the respective state so dictate. This undeclared, implicit (or factual) *jus ad bellum*,

hidden in the procedural rules of Art. 27 (3), constitutes the most fundamental *normative contradiction* of the legal framework of the UN Charter and makes the general provisions of Art. 2 (4) and Art. 2 (7) almost meaningless – or obsolete. In spite of all the idealistic rhetoric in regard to the United Nations' mission of peace, progress and development (see the Preamble of the Charter), the procedural rules of Art. 27 have effectively paralyzed the organization in many cases where acts of aggression were committed by or threats to world peace emanated from permanent members or their allies. This predicament of the United Nations Organization has profoundly demoralized the "international community" of those countries which do not enjoy the status of permanent members. In a sense, the advancement of international law (as described above in regard to the banning of the use of force since after World War I) was not a consistent and continuous process. The UN Charter itself is fundamentally flawed because of the hidden reintroduction of a factual *jus ad bellum* as a special privilege enjoyed by the most powerful countries of the "international community," the permanent members of the Security Council.³⁰

In the general doctrine of international law, however, this normative inconsistency between a normative order of peaceful co-existence and the relics of pre-World War I international law has been largely ignored. In the discourse reflecting the moral awareness of international public opinion, the principle of the non-use of force was perceived as a basic norm of *jus cogens* of general international law. This situation prevailed up to the end of the Cold War period, which was characterized by an order of *bipolarity* in which one superpower held the other in check and where their rivalry necessitated respect for the principles of non-interference and the non-use of force. The real paradigm change in regard to this global awareness of universal norms binding upon all members of the international community, and on top of them the obligation to refrain from the use of force except in acts of self-defense, may have occurred with the collapse of the system of bipolarity and with the emergence of the present *unipolar order*. In many respects, the present global system resembles the earlier Eurocentric order of imperial states that was determined by an exclusively state-centered system of international law built around the concept of absolutely posited *national sovereignty*.

In the post-war consensus on the basic codex of international law (as it prevailed until the emergence of a "New World Order" after 1989),³¹ intervention in internal affairs,

³⁰ See the author's paper *The Voting Procedure in the United Nations Security Council*, esp. Chapter III: *The veto privilege as the major impediment to the achievement of collective security*, pp. 13ff.

³¹ See the author's analysis: *Democracy and the New World Order*. Studies in International Relations, XIX. Vienna: International Progress Organization, 1993.

including armed intervention against a UN member state, was conceivable only as an exceptional measure of *reaction* against a breach of or threat to the peace within the strictly *collective* framework of the UN Charter. The respective provisions were meant to exclude any arbitrariness or bias resulting from special interest in the respective enforcement action. Although the Charter, as demonstrated above, did not properly and consistently implement (or reflect) this consensus in all its procedural regulations, the doctrine of international law – as based on the United Nations system – did not recognize a general right to intervene. During the period of the Cold War with its superpower rivalry, the respect of the principle of non-intervention – emanating from that of the "sovereign equality" of states (Art. 2 [1] of the Charter) – was seen by most as the only safeguard against international anarchy and as the only guarantee of a stable international order of peace.

Within this context of the post-war order we earlier (1981) tried to find a way out of the apparent contradiction between these general norms of international law and the principles of human rights.³² Without putting into question the validity of the principle of non-intervention as a general norm of international law, we tried to address the problem of the corpus of *human rights norms* existing separately and without normative connection to the other areas and principles of international law (such as that of national sovereignty). By proposing a new *system of norms* in which human rights principles are identified as norms of the highest order – to which the norms of each national legal system as well as the traditional corpus of norms of international law were to be subordinated –, we tried to overcome the apparent contradictions in the normative framework of the United Nations Charter, which, in most cases, have made human rights norms unenforceable: "The unity of a normative system as required by legal theory can only be attained in the following way: Human rights – which refer in every instance to the individual rather than to a collective legal person – must be regarded as a general normative system from which the normative systems of both national and international law are derived (and not vice-versa)."³³ In our effort at reorganizing the system of norms of general international law we suggested a redefinition of the concept of sovereignty on the basis of the inalienable *autonomy* of the citizen who is at the origin of any entity of public order such as the state or an intergovernmental organization. According to this conception, *state* sovereignty is of secondary nature in relation to the *individual* sovereignty

³² "Die Prinzipien des Völkerrechts und die Menschenrechte. Zur Frage der Vereinbarkeit zweier Normensysteme," in: *Zeitschrift für öffentliches Recht und Völkerrecht*, vol. 32 (1981), pp. 5-28; later published in English: "The Principles of International Law and Human Rights," in: Hans Köchler, *Democracy and the International Rule of Law. Propositions for an Alternative World Order. Selected Papers Published on the Occasion of the Fiftieth Anniversary of the United Nations*. Vienna-New York: Springer, 1995, pp. 63-84.

³³ "The Principles of International Law and Human Rights," loc. cit., p. 76.

of the citizen.³⁴ In such a reorganization of the normative order, basic human rights constitute a system of primary norms from which other norms (like those of national sovereignty or non-intervention) will have to be deducted. Those secondary norms obtain their validity only insofar as they guarantee the full realization of the rights of the primary normative order, i.e. the principles of human rights. In this normative context proposed by us earlier, an intervention in defense of the human rights of the population of a sovereign state is admissible, *in principle*, but only insofar as it does not lead to the negation of rights of a higher order (as, for instance, the right to life). In this sense, a violation of sovereignty in the form of armed intervention is still inadmissible – not because of the supposed priority of the norm of non-intervention but because of the superseding norms of human rights. Although national sovereignty is seen as a secondary norm, derived from the basic rights of each citizen, the admissibility of a specific intervention in favour of the human rights of the population of a sovereign state has to be determined, on a case-by-case basis, by taking into account those very human rights according to the principle of *proportionality*. The maxim *fiat justitia, pereat mundus* cannot be considered as a viable alternative for realizing the international rule of law. Although the principle of non-intervention, in the normative system proposed by us in 1981, is not one of the primary order, its validity is *not* derived from the supposed inviolability of state sovereignty. In most cases, actual intervention will be inadmissible because of the consequences of the use of force for the civilian population affected by the intervention. Furthermore, in the total absence of an *international division of powers*, there exists no authority to define criteria of intervention and to adjudicate cases of its eventual application, the intervention in Yugoslavia in 1999 being a clear case in point. Regretfully, the International Court of Justice cannot play this role in the present statutory framework of the United Nations.

The way out of the state-centered system of international law that we tried to identify in our outline of a normative order – one that is consistent in itself and compatible with human rights as *jus cogens* of general international law – proved to be a dead end because the *effective* inadmissibility of the use of force – even if it is applied in favour of the restoration of human rights – has to be acknowledged in the *real* (not ideal) context of international power politics. We initially outlined the philosophical framework for the justification of what is actually termed "humanitarian intervention," by redefining the concept of national sovereignty and the related principle of non-intervention in the sense of being subordinated to the

³⁴ For the details of the argumentation see "The Logical Reorganization of the Normative Systems of International Law and Human Rights: Outline of a System," in: "The Principles of International Law and Human Rights," loc. cit., pp. 74ff.

principles of human rights as norms of *jus cogens* of general international law. In spite of this effort on the level of normative theory, we have to admit that the step from *idealistic vision* to the *realization* of an international policy of intervention can not be responsibly made – in the existing framework of *states* as the primary actors of international relations – without defeating the very purpose which "humanitarian intervention" is supposed to serve, namely safeguarding the basic human rights of the population concerned. It became clear to us that, in the present context of international law, the *actual practice of humanitarian intervention* will only create additional and more acute *inconsistencies* of the normative order. Even if a United Nations Security Council without veto privileges of permanent members would exist, and if this only executive organ of the international community would be entrusted with the implementation of a consistent policy of "humanitarian intervention," the basic obstacle to the implementation of such a policy still remains: the international system lacks universally defined criteria for the definition of basic human rights.³⁵ Only a consensus on the criteria in terms of content and application (which would have to be reached outside the framework of power politics) will make a general policy of human rights enforcement meaningful and justifiable. Whether one regrets it or not: as long as there exists no instance in the framework of international law to objectively determine the conditions of application of the principle of humanitarian intervention, this doctrine cannot be used as an instrument of international law enforcement.

Even if generally defined criteria for the application of human rights existed, the special voting procedures of the Security Council as outlined in Art. 27 of the Charter would still make that body unfit to act as guarantor of universal human rights. The actual normative context of the United Nations Charter is dictated by power politics and does not allow for consistent application of a universal humanitarian agenda. As post-war history has amply demonstrated, the permanent members – because of their special veto privilege – will always be tempted "to act as judges in their own case." Human rights enforcement on a global level would thus become an instrument for the implementation of a "policy of double standards" on the part of the most powerful members of the United Nations. Against this background of the antagonistic relationship between an ideal system of norms and the reality of power politics, it has become obvious that the practice of "humanitarian intervention," though desirable in terms of an ideal system of global justice, cannot be a *real option* if one is seriously committed to the preservation of international peace and, thereby, to the protection of the basic human rights of the citizens of the world. In our interpretation, this observation is in line

³⁵ See esp. the debates in the course of the *World Conference on Human Rights* in Vienna (1993).

with the general orientation of the United Nations Charter and its provisions for the collective use of force. In the Charter, enforcement measures, including the use of armed force, are envisioned only in regard to acts of aggression and threats to or breaches of the peace, but not in regard to violations of human rights (Art. 39).

An overall commitment to the international rule of law – based on the preservation of peace as basic maxim – characterized the global order up to the end of the Cold War. This conception – with national sovereignty as a core element of the international order – has only recently been challenged. In the course of the collapse of the bipolar system of power since 1989, a paradigm change – away from national sovereignty and towards a system of intervention – accompanied the advent of a so-called "New World Order," symbolizing the ascension of a single country to the status of *global hegemon*.

(III) The revival of interventionism in the new imperial order of the 21st century

A profound change has occurred in the geopolitical constellation as a result of the sudden disintegration of the Soviet power bloc. A bipolar system, characterized by a balance of forces based on mutual deterrence, turned into a unipolar order in which the United States acts as the only superpower. At the beginning of the 21st century, a global order has taken shape in which one country enjoys the unrivaled role of *global hegemon*. This situation has brought about the revival of great power rule with all that it entails. The exercise of "imperial" power – which many thought had become history with the geopolitical changes triggered by two world wars – has again become a reality to which the "international community" is forced to adapt itself under the euphemistic slogans of what was originally (i.e. shortly after the collapse of the bipolar system of power) called the "New World Order."³⁶ The revival of the old dominationist system is accompanied by the renaissance of ideological concepts characteristic of imperial rule. It is here that the 19th-century concept of "humanitarian intervention" comes into play – because it fits perfectly into the framework of a policy which is essentially not obliged to seek compromise or to convince others when it comes to the exercise of power. In a system of imperial rule – which is characterized by the total lack of a

³⁶ For a more detailed description of this new power constellation see the author's *Democracy and the New World Order*, esp. Chapter II: "Ideological Claims versus Real Political Action: The Quest for a New Paradigm in International Relations," pp. 11ff.

division of powers – the hegemon may pursue its interests without being challenged by potential competitors. In such a framework of political, military and economic domination the hegemonial power creates its own *ideology* which allows it to justify the exercise of power vis-à-vis the rest of the world.

The concept of humanitarian intervention serves exactly that purpose when it comes to the resort to the use of force by the hegemonial power. A justification of the exercise of power within the framework of the norms of international law is being replaced by an ideological – or, for that matter, *moral* – discourse which is determined by the hegemonial power alone. Undoubtedly, such an *imperial* exercise of power with the strategic aim of securing global hegemony does not fit into the 20th-century context of the *international rule of law* as represented, to a certain extent, by intergovernmental organizations such as the United Nations. Modern international law – which is oriented towards peaceful co-existence among a multitude of states on the basis of sovereign equality – is in open contradiction to the precepts and requirements of imperial rule. The latter is not oriented towards the avoidance of war as the supreme goal agreed upon among the community of nations; because of its very nature, imperial rule in the 21st century cannot but ignore the lessons of the 20th century's two world wars and their legacy in terms of a reform of the system of international law centered around the basic norm of the non-use of force in relations between states. In a unipolar system of power, where the aggressive pursuit of national interests is not challenged by rival powers, the corpus of norms forming the "modern international law of peace" is gradually being eroded. It is being replaced by a system of *moral principles* which are defined by the hegemonial power. *Political* hegemony is complemented by *ideological* domination. This is one of the basic features of power politics in any historical context. In the present international constellation, this means the revival of the concept of the *bellum justum*, or just war, the normative criteria of which are defined by the party that conducts the war. In a framework of unchallenged global rule, the hegemonial power acts as judge in her own case. The sudden revival of the doctrine of humanitarian intervention (which we have witnessed since the Gulf War in 1991 and more recently since the Kosovo war in 1999) has to be seen in this context.³⁷

It is obvious, in general terms of power politics, that this doctrine can be implemented only in a framework which is determined exclusively by the interests of the respective

³⁷ On the complex legal issues of the Kosovo intervention and the contradictions of the concept of humanitarian intervention in this case see the comprehensive analysis by Reinhard Merkel, "Das Elend der Beschützten. Rechtsethische Grundlagen und Grenzen der sog. humanitären Intervention und die Verwerflichkeit der NATO-Aktion im Kosovo-Krieg," in: Reinhard Merkel (ed.), *Der Kosovo-Krieg und das Völkerrecht*. Frankfurt am Main: Suhrkamp, 2000, pp. 66-98.

intervening power(s). An implementation of the doctrine outside the realm of power politics, be it on the level of "pure morality" as is often claimed by those practicing humanitarian intervention, is impossible. Any act of humanitarian intervention, whether exercised on a unilateral, regional or multilateral level, will be determined by the interests of the power(s) initiating it. Moral norms serve merely as tools to legitimize what has earlier been decided on the basis of national interests.³⁸ Even in the global multilateral framework of the United Nations, any action will be determined by the balance of interests of the Security Council's permanent members – this is due to the structure and the procedural rules of the Council described above. And the absence of checks and balances which is characteristic of decision-making in the Security Council is even more acute in regional organizations such as the North Atlantic Treaty Organization (NATO).

Because of the *multilateral* nature of the United Nations Organization, the present hegemonial power has increasingly acted in the *regional* framework of NATO, where it enjoys unrivalled supremacy. In the decade since the collapse of the Soviet bloc, the United Nations Organization, incorporating the post-war balance of power, has proved to be an increasingly unreliable instrument of hegemonial rule. Because of the veto privilege of the permanent members, it could not easily be orchestrated for *just war campaigns* such as the one against Iraq in 1990/1991 – in the context of which the concept of humanitarian intervention was extensively used. The unanimity among the permanent members, i.e. the identity of their interests (not their commitment to a common standard of moral principles), did not last for long. Because of conflicting interests among the permanent members, the constellation of 1990/1991 could not be repeated in the 1999 war against Yugoslavia. It is exactly because of the United Nations' structural inability to act according to the interests of the hegemonial power, i.e. its uselessness in the strategic hegemonial framework of the United States, that an organization with a strictly regional mandate such as NATO was brought in to act as *surrogate* of the global organization. The North Atlantic Treaty Organization was commissioned to execute, for the first time, the just war doctrine of the United States. Because of the paralysis of the Security Council in the matter of Yugoslavia-Kosovo, the United States made NATO the executor of its seemingly new doctrine of "humanitarian war."³⁹ This concept reflects in many aspects the spirit of the 19th-century

³⁸ See the revealing statement made by former NATO Commander General Wesley Clark in an interview on the Kosovo war. He simply determined that, for Western democracies, morality and human rights are part of the national interest: "Es gab kein Zurück mehr." *Spiegel-Gespräch*, in: *Der Spiegel*, n. 43/2000, p. 174.

³⁹ On the political considerations underlying this concept see Lord Hurd of Westwell, *Humanitarian War – Theory and Practice*. One People Oration given at Westminster Abbey, Tuesday, 6 July 1999. At http://www.westminster-abbey.org/other/humanitarian_war_.htm.

doctrine of humanitarian intervention or even of the earlier Christian doctrine of the Holy War (or just war). In the war against Yugoslavia in 1999, NATO acted as the "Holy Alliance" of our times, trying to justify with *moral principles* a campaign of war that was in clear contradiction to the UN Charter and to international law in general.⁴⁰ In a quasi-religious manner, legal norms were substituted by moral principles for the purpose of a war of aggression; the actual conduct of warfare was hidden behind a smokescreen of imperial propaganda making use of common moral principles to legitimize actions which otherwise would have to be qualified as war crimes. Those who in reality carried out a war of aggression tried to place themselves on the "moral high ground" not only by reviving the traditional concept of humanitarian intervention, but by coining new terms such as that of "humanitarian war" (or even "humanitarian bombing") in order to prevent serious scrutiny of their acts in regard to their conformity with international humanitarian law.⁴¹ As rightly observed by Diana Johnstone, this strategy implies an intrinsically racist attitude vis-à-vis the adversary; it divides humanity into "good" and "bad" nations: "To merit all those bombs, the 'bad' people must be tarnished with collective guilt."⁴²

In view of this actual practice, i.e. of this arrogation of a right to wage war (*jus ad bellum*) by a regional organization which acts as surrogate of the only – though insufficient – representative of international legality, the United Nations, the basic question of all those who are seriously determined to uphold the international rule of law will be whether there exists any alternative at all to the traditional rule of non-intervention: Can the doctrine of humanitarian intervention be practiced in such a way that it does not defeat its basic purpose, namely respect for those fundamental rights which are supposed to be the basis of any legal order, whether national or transnational? When it comes to the rationale behind "humanitarian" interventions such as those against Iraq or Yugoslavia, the empirical data demonstrate, however, that the global *humanitarian régime* at the beginning of the 21st century very much resembles the earlier authoritative rule of the 19th century's Holy Alliance and the interventions of the then European powers on the territory of the rival Ottoman Empire.

⁴⁰ See Daniel Singer, *Against the Holy Alliance*, published by *Against the Current* at <http://www.igc.apc.org/solidarity/atc/81NatoSinger.html>.

⁴¹ For a legal analysis of NATO's war against Yugoslavia see the statement of the International Progress Organization: *Yugoslavia – NATO – United Nations. Call for Invoking the Uniting for Peace Resolution of the UN General Assembly*. Vienna, 7 August 1999.

⁴² *Humanitarian War: Making the Crime Fit the Punishment*. At <http://www.emperors-clothes.com/articles/Johnstone/crime2.htm>.

What this new "humanitarian régime" actually implies becomes clear in the defense doctrine proclaimed by the North Atlantic Treaty Organization in the wake of its unilateral military action against Yugoslavia. For this large-scale intervention, a United Nations (Security Council) mandate was obtained only *post festum*. The sidelining of the United Nations Organization – the only international body competent to authorize the collective use of force on the basis of Chapter VII of its Charter – required a new imperial doctrine. Such a doctrine was promulgated by the Heads of State and Government of NATO's member countries at the summit conference held on the occasion of the 50th anniversary of the founding of the organization. This new doctrine marked NATO's departure from its self-definition as a strictly regional defense organization that was integrated into the post-war system of international law as represented by the United Nations. This reorientation resulted in the *de facto* rejection of the legal supremacy of the United Nations Organization, in particular of the Security Council. Through the reformulation of its doctrine, NATO has challenged the very basis of international legality and of the system of peaceful co-existence as it has existed since the creation of the world organization in 1945. While NATO, according to the provisions of the North Atlantic Treaty of 4 April 1949, was created in full recognition of the supremacy of the United Nations Organization, the *Washington Declaration*, adopted on 23 April 1999 by the Heads of State and Government of NATO member countries, points in a totally different direction, as we shall demonstrate below.

Article 5 of the North Atlantic Treaty outlines the strictly *defensive* mission of NATO, on the basis of Art. 51 of the UN Charter defining the right of individual or collective self-defense. In this Article, the NATO states formulate their collective defense doctrine in case of "an armed attack against one or more of them in Europe or North America." They limit any such action not only *geographically* in regard to the territory covered by NATO membership, but also *legally* in the sense of merely provisional measures which are seen within the context of a global system of collective security: "Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security." Article 1 of the Treaty places NATO within the framework of international legality as defined by the United Nations Charter. The Article particularly confirms the principle of peaceful settlement of international disputes and commits NATO member states, in a language resembling the wording of Art. 2 (4) of the UN Charter, "to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations." In the North Atlantic Treaty, no mention is made of democracy or human rights.

In sharp distinction from the strictly formal and legal language of the Treaty, the declarations and documents adopted by NATO's Heads of State and Government at the Washington Summit in April 1999 contain repeated references to the "common values of democracy, human rights and the rule of law."⁴³ This resort to an *idealistic* language – similar in structure to the formulations of Articles 6 and 7 of the *Treaty of Amsterdam Amending the Treaty on European Union*⁴⁴ – is coupled with an outright commitment to operations *outside* the framework of the North Atlantic Treaty. Paragraph 25 of the Alliance's Strategic Concept emphasizes "a broad approach to security" and explicitly mentions factors of security "in addition to the indispensable defence dimension." The departure from the traditional defense doctrine based on Art. 51 of the UN Charter (as referred to in Art. 5 of the Treaty) is further confirmed in the formulation of Par. 31 of the Strategic Concept, which mentions "the possibility of conducting *non-Article 5 crisis response operations*."⁴⁵ In the wake of NATO's war in Yugoslavia, "crisis response operation" has become a key term in a new legitimization discourse which was created to provide "justification" for actions *outside* the Treaty and *without* United Nations (Security Council) authorization. In view of the actual conduct of such operations by NATO, references to crisis management "consistent with international law"⁴⁶ or to Art. 7 of the Washington Treaty (which stipulates the supremacy of the United Nations)⁴⁷ are not really convincing. Those references, including the one in Par. 15 of the Strategic Concept, are definitely not consistent with the new doctrine of NATO's "self-authorization" of non-Article 5 crisis response operations. NATO's new "broad approach" to security includes not only cases of armed attack – as referred to in Art. 5 of the Treaty – but also "other risks" such as terrorism or the "disruption of the flow of vital resources," i.e. oil.⁴⁸ In Chapter IV of NATO's Strategic Concept, those "crisis response operations" outside the scope of Art. 5 play a major role in the definition of the "Principles of Alliance Strategy." In Par. 48 of the Concept such operations are even envisaged as *preventive measures* "[i]n the

⁴³ Formulation in Par. 6 of *The Alliance's Strategic Concept approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C. on 23rd and 24th April 1999*. See a similar reference in Par. 1 of the *Washington Declaration* of 23 April 1999 and in Par. 2 (with regard to democracy) and Par. 7 (with regard to human rights) of the *Washington Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C. on 24th April 1999*.

⁴⁴ Art. 6 of the Treaty refers to the principles of "freedom," "democracy," "respect of human rights," "fundamental freedoms," and the "rule of law" and states that these values are shared by all member states. In the case of the violation of these principles, Art. 7 details procedural rules of "enforcement measures" in the form of suspension of certain membership rights. See the appendix below on measures unilaterally adopted by 14 member states of the European Union against Austria in connection with these vaguely formulated "European values" of human rights and democracy.

⁴⁵ Emphasis by the author.

⁴⁶ Par. 31 of the Strategic Concept.

⁴⁷ Par. 10 of the Strategic Concept, "*Crisis Management*."

⁴⁸ Par. 24 of the Strategic Concept.

event of crises which ... *could* affect the security of Alliance members."⁴⁹ The "management of crises through military operations" (Par. 49) is placed on an equal footing with "collective defence missions." Together with the provisions of Par. 52, according to which such operations may be carried out "beyond the Allies' territory," this reference to a preventive management of crises through military operations marks NATO's effective departure from the traditional defense doctrine, which was based on the concept of self-defense and on the system of collective security and international law as represented by the United Nations.

The euphemism consisting in labeling military operations as measures of *crisis management* is typical for the *newspeak* authoritatively established by the leading member of the most powerful military alliance. In the context of the new Defense Doctrine and of NATO's actual conduct of warfare in Yugoslavia, the solemn affirmation in Par. 7 of the *Washington Declaration* ("We remain determined to stand firm against those who violate human rights, wage war and conquer territory.") can be interpreted only as the pronouncement of a *global claim to hegemony*, outside the restrictions on the arbitrary (unilateral) use of force imposed by the UN Charter and, for that matter, also by NATO's founding document, the North Atlantic Treaty. The resolutions and declarations of the 1999 Washington Summit have made the basic provisions of Articles 1, 5 and 7 of the North Atlantic Treaty obsolete. Irrespective of the lip service paid to United Nations supremacy,⁵⁰ NATO has put itself, under the leadership of the United States, *above* the United Nations Security Council – when it comes to cases where NATO members consider their vital security interests threatened. By launching the concepts of "preventive" and "humanitarian" warfare, NATO has placed itself outside the framework of international law (whatever the ideological or "moral" legitimation for specific interventions may be). By going beyond clearly defined cases of self-defense against armed aggression, NATO's new doctrine seriously undermines the UN Charter's principle of the non-use of force and severely erodes the system of international law as represented by the United Nations as universal organization. De-linking the issue of the legitimacy of the use of force from the principle of self-defense (as enshrined in Art. 51 of the UN Charter) is tantamount to abrogating the system of general international law as established since the Second World War. This paradigm change is all the more obvious if one considers the provisions of NATO's founding document, as referred to by Bruno Simma: "If the Washington Treaty [North Atlantic Treaty] has a hard legal core which even the most

⁴⁹ Emphasis by the author.

⁵⁰ See Par. 15 of *The Alliance's Strategic Concept*: "The United Nations Security Council has the primary responsibility for the maintenance of international peace and security and, as such, plays a crucial role in contributing to security and stability in the Euro-Atlantic area."

dynamic and innovative (re-)interpretation cannot erode, it is NATO's subordination to the principles of the UN Charter."⁵¹ Whatever the interpretations of "non-Article 5 crisis response operations" may be, they cannot do away with the fact that they contradict the letter and spirit of the North Atlantic Treaty. Those interpretations introduce a modern equivalent to the traditional (by now officially abrogated) *jus ad bellum* along the lines of the old-fashioned doctrine of just war (*bellum justum*). This doctrine nowadays operates with the *secular* concepts of human rights, democracy, "Western values," etc.

(IV) The doctrine of humanitarian intervention and the reintroduction of the *jus ad bellum*: the end of international law?

Whatever may be the idealistic rhetoric by which military actions are justified, the system of norms ensuring the peaceful co-existence among nations – what has been known essentially as the "international rule of law" – will not only be gradually undermined but will finally collapse if an equivalent to the old *jus ad bellum* is introduced into international relations. This fact cannot be denied, whether the principle is introduced under the pretext of "crisis response operations" (described in the rather idealistic framework of a supposed preservation of "human rights" and "democracy") or of outright "humanitarian intervention." As far as those NATO members who are at the same time permanent members of the Security Council are concerned, this situation further complicates the issue of legality of the international use of force. As we tried to demonstrate above, Art. 27 of the UN Charter establishes a "*jus ad bellum* in disguise" by granting the permanent members of the Security Council a special veto right without obliging them to abstain from voting if they are themselves involved in an international dispute. This *de facto* immunity from any enforcement measures (including the use of armed force) against their own (or their allies') acts of aggression has now been elevated to the level of *special rights* enjoyed by NATO as a *regional* military organization so as to support its global claim to power. As was demonstrated through the unilateral use of force orchestrated by NATO against the Federal Republic of Yugoslavia, no effective measures can be taken by the international community against a self-proclaimed humanitarian intervention by NATO – as long as its permanent members in the Security Council are determined to use their veto power. Not only has NATO created a self-serving defense doctrine (*The Alliance's Strategic Concept* as outlined above), putting itself

⁵¹ "NATO, the UN and the Use of Force: Legal Aspects," Abstract, in: *European Journal of International Law*, vol. 10 (1999), p. 1.

beyond the limits of its own statute and *above* the rules of general international law; by controlling the procedures of the Security Council through its permanent members in that Council, it may act with impunity and may determine its own use of force as "humanitarian intervention" whenever it deems it appropriate and without any fear of being censored by the world organization's only body with executive power.

In this new constellation of imperial power politics in a basically unipolar international order, a *jus ad bellum* is not just being "quietly" practiced under the cover of Chapter VII enforcement measures;⁵² such a right is openly claimed in the name of a doctrine of international law which is centered, on the one hand, around a broad definition of "legitimate security interests," and, on the other hand, around a Eurocentric doctrine of human rights and, resulting from it, of humanitarian intervention. As openly and unambiguously stated by one of the apologists of this new strategy of power politics, "we are witnesses of a kind of millennium shift, from diplomacy to justice as the dominant principle of global relations, achieved through the evolving force of international human rights law carrying *jus cogens* compulsion ..."⁵³ In his analysis of the conditions of an international system of criminal justice, Geoffrey Robertson demands that "international law should permit intervention out of humanitarian necessity without UN approval."⁵⁴ He puts the blame for this development towards unilateral humanitarian action on "delay and partisanship in Security Council politics"⁵⁵ – while in reality those permanent members of the Security Council most responsible for the partisanship of the Council's decision-making are themselves the most active sponsors of NATO's doctrine of "preventive" crisis management and of a "humanitarian" use of force. Because of the new just war doctrine, two classes (categories) of states are being created: that of the *imperial* (or superior) states and that of the "*inferior*" states. The former arrogate to themselves a status of moral superiority – and ideological supremacy – including the right to define supposedly moral criteria for the use of force. Until a recent shift in terminology of US diplomacy, the latter were often referred to as "rogue states." In their majority they belong to the Third World. The imperial states replace the principle of the non-use of force by a *right* (in some instances even equated with a *duty*) to *intervene*, thus exchanging the earlier religious legitimation with a "secular" human rights discourse. In reality though, this right to intervene is based merely on the superior power of the imperial states. It has no legal grounds.

⁵² As was the case with the intervention against Iraq in 1991.

⁵³ Geoffrey Robertson, *Crimes against Humanity. The Struggle for Global Justice*. London: Allen Lane – The Penguin Press, 1999, pp. 374f.

⁵⁴ *Op. cit.*, p. 381.

The resulting lack of legal credibility characterizes modern (i.e. 21st-century) power politics and the universal claim to hegemony related to it. That very dilemma was exposed by Antoine Rougier in a comprehensive critique of 19th-century interventionism. He pointed to the "puissance de fait que certains États possèdent d'influer à leur gré sur la vie juridique d'un autre État, puissance de domination qui échappe à l'analyse scientifique et que les juristes américains appellent le *controll*."⁵⁶ The essence of imperial politics has not changed over the centuries. For those who undertake a comprehensive analysis and try to put 21st-century interventionism into the historical context, the humanitarian newspeak introduced today triggers a sense of *déjà-vu*.

While placing those who challenge their rule into the category of "states of concern," the imperial states of today, first and foremost the United States, similar to the powers of 19th-century Europe, create for themselves the aura of moral superiority from which they derive their claim to ideological, political and military supremacy. From this position of the "moral high ground" Madeleine Albright, in a debate on the use of force against Iraq, referred to the United States as the "indispensable nation."⁵⁷ Because of the lack of constraint on the part of the imperial power in a unipolar international order, the logic of the *just war* is very much alive: frankly speaking, there is no credible force to challenge an imperial (dominationist) ideology created to legitimize the actual conduct of power politics including the use of force. As M. Walzer explains in his comprehensive analysis of the just war concept, in the present dominationist context of international relations, such a doctrine may well be used to justify – vis-à-vis international public opinion – war as an intervention for the protection of human rights.⁵⁸

As demonstrated by global developments since the Gulf War in 1991, this paradigm change in international law, brought about by the shift of the power balance from a bipolar "sharing" of power to a system of unipolar rule, results in the threat of *new wars* which may be waged by the hegemonial power because of the lack of deterrence. Because of the ideological supremacy that is a corollary of global political and military hegemony, those wars may be labeled as *just*, a classification of warfare that could not easily obtain support

⁵⁵ *Ibid.*

⁵⁶ "MAROC. – La question de l'abolition des supplices et l'intervention européenne. [Communication de M. Antoine Rougier]," in: *Revue générale de Droit International*, vol. 17 (1910), p. 98.

⁵⁷ "And what we are doing is serving the role of the indispensable nation to see what we can do to make the world safer for our children and grandchildren, and for those people around the world who follow the rules." (*Secretary of State Madeleine K. Albright, Secretary of Defense William S. Cohen, and National Security Advisor Samuel R. Berger – Remarks at Town Hall Meeting, Ohio State University, Columbus, Ohio, February 18, 1998. As released by the Office of the Spokesman, February 20, 1998. U.S. Department of State.*)

during the Cold War period. The revival of the just war concept in the new imperial environment *rehabilitates* war as a means of foreign policy. The taboo placed on the non-use of force has quickly vanished under the pressures of "humanitarian realpolitik" (i.e. realpolitik in humanitarian clothes). In turn, the moral justification of the use of force termed "humanitarian" places on it a taboo which makes it virtually impossible to scrutinize its actual conduct or to question its very legitimacy. As Carl Schmitt much earlier explained in his analysis of war in the context of politics, morally "justified" wars transcend the neutral category of power (or interest) politics and make of the adversary a morally inferior being, a "monster" who is not simply to be conquered but to be *destroyed as such*.⁵⁹ This kind of moral (or "moralistic") justification makes of the act of warfare something *absolute* which goes beyond the mere defense of interests or the repulsion of aggression. Whenever a war is portrayed, in this sense, as *bellum justum*, a taboo is placed on *war itself*. This may open the gates to ideological fanaticism of an emotional intensity which well may resemble the rhetoric of the medieval crusades. Such a rationale of humanitarian intervention, when made use of by great powers or – in regard to the present situation – by the leading imperial power, undermines and gradually abolishes whatever has remained of the fragile system of "international legitimacy" in the post-war framework of the United Nations Charter.

The "international rule of law," praised as the major achievement of the post-World War II order of peaceful co-existence among nations, is being replaced by the *rule of the powerful* (the law of force) who – at the same time – determine the legitimation discourse and define the ideological criteria for the exercise of power. Because of the total lack of checks and balances in the prevailing unipolar international structure, this situation gradually leads to a state of global *anarchy* among the self-declared champions of *just causes*, whichever the criteria of their definition may be. It profoundly demoralizes all those who believe in a system of peaceful co-existence as it was guaranteed, though insufficiently and in somewhat contradictory legal terms, by the United Nations Organization. This system was based on the norms of the non-use of force and of collective security. Those norms were supposed to preclude any arbitrary action on the part of the more powerful international actors. One has to admit, however, that the United Nations system of collective security – as a result of compromise with the requirements of power politics – was basically flawed. This compromise had been imposed upon the other members and was inserted into the Charter by the

⁵⁸ *Just and Unjust Wars. A Moral Argument with Historical Illustrations*. New York: Basic Books, 2nd ed. 1992, pp. 101ff.

⁵⁹ *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien*. Berlin: Duncker & Humblot, 1987, p. 37.

organization's founders, the self-appointed permanent members of the Security Council.⁶⁰ Nonetheless, over several decades this rudimentary system of collective security provided a framework which helped to contain, though imperfectly and only to a certain extent, the arbitrary use of force by the UN's most powerful member countries.

Theorists of international law have become aware of the consequences of this anarchic situation for the applicability of the concept of humanitarian intervention. In his comprehensive analysis of the legitimacy of the use of force, Peter Malanczuk points to the likelihood that humanitarian intervention "will be applied in one direction only, by powerful states against weak ones."⁶¹ He cautions against the unilateral use of this instrument of "international law enforcement" in a framework dictated by power politics and concludes "that unilateral humanitarian intervention is illegal due to the prohibition of the use of force as the prevalent principle in the present international legal system in the interest of international peace and security."⁶² Malanczuk sees the danger "of opening a Pandora's box by declaring unilateral intervention to be lawful"⁶³ and emphasizes that, in current international law, only collective humanitarian measures on the basis of a decision by the Security Council – as the only body competent to authorize the use of force – are admissible. The fact that, in most cases, the Security Council may be prevented from acting because of the lack of unanimity among the permanent members is not sufficient justification for the unilateral use of force – whether by one country acting alone, by a group of countries, or by a regional alliance such as NATO. Malanczuk considers invalid the argument of self-help in cases of paralysis of the Security Council and rejects the "non-legal proposition that 'necessity knows no law'."⁶⁴ Whatever may be the legitimization efforts to establish the international legality of a unilateral, i.e. unauthorized intervention such as that of NATO in Yugoslavia, there is clear jurisdiction of the International Court of Justice banning any recourse to armed force by one state (or a group of states, by implication) to influence the political situation in another state.⁶⁵ In

⁶⁰ For details see the author's analysis *The Voting Procedure in the United Nations Security Council*, esp. Chapter V: "The specific abuse of the veto for reasons of power politics," pp. 27ff.

⁶¹ *Humanitarian Intervention and the Legitimacy of the Use of Force*. Amsterdam: Het Spinhuis, 1993, p. 27.

⁶² *Op. cit.*, p. 30.

⁶³ *Op. cit.*, p. 31.

⁶⁴ *Op. cit.*, p. 28.

⁶⁵ See the decision of the International Court of Justice in the Nicaragua case: "The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle *that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State*, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State ..." (International Court of Justice, "Case Concerning Military and Paramilitary Activities In and Against Nicaragua [Nicaragua v. United States of America] [Provisional Measures]," *Order of 10 May 1984*.) (Emphasis by the author.)

Malanczuk's interpretation, the International Court of Justice, as a result of its ruling in the Nicaragua case, "rejects the doctrine of unilateral humanitarian intervention."⁶⁶

As convincingly argued by Gerhard Zimmer in his analysis of law enforcement for the protection of human rights, norms which are part of *jus cogens* of general international law and the resulting obligations of states *erga omnes* may be enforced only by the competent organ of collective enforcement, i.e. in the framework of the United Nations with its universal legal structure. This is due to the collective nature of those norms, binding upon the international community as a whole.⁶⁷ By implication, it would be an inconsistent strategy in international law to define certain norms as part of *jus cogens* – putting them under the collective obligation of the international community (*erga omnes*) –, while at the same time "sub-contracting" their enforcement to individual states⁶⁸ or regional organizations. Whatever the moral argumentation on the part of interested states or an alliance of states may be, unilateral humanitarian intervention, i.e. intervention without proper authorization by the Security Council, does not fit into the framework of "collective law enforcement" and collective security as embodied by the United Nations Organization. However, one cannot derive from the inadmissibility of unilateral humanitarian intervention, by reverse argument, the validity of the concept of humanitarian intervention on the collective level of the United Nations. The question remains whether the United Nations Security Council has any competence to take collective action against the sovereignty of a United Nations member state on any issue which is not directly linked to international peace and security.

As explained by Bruno Simma, the protection of human rights is a universal obligation of all states and respect of this obligation is the *concern of all states*, i.e. those rights are owed *erga omnes*.⁶⁹ In spite of this legal obligation, countermeasures against any violations must not include the use of armed force because Art. 2 (4) of the UN Charter is a norm of *jus cogens*⁷⁰ as defined in Articles 53 and 64 of the Vienna Convention on the Law of Treaties.⁷¹

In his assessment of the legal and political implications of the new "interventionism" propagated in the course of NATO's war on Yugoslavia, UN Secretary-General Kofi Annan

⁶⁶ *Op. cit.*, p. 27.

⁶⁷ Gerhard Zimmer, *Rechtsdurchsetzung (Law Enforcement) zum Schutz humanitärer Gemeinschaftsgüter. Zur Theorie und Praxis der "Intervention" im zeitgenössischen Völkerrecht*. Series *Völkerrecht und internationale Sicherheit*, vol. 1. Aachen: Shaker, 1998, pp. 99f.

⁶⁸ *Op. cit.*, p. 100.

⁶⁹ "NATO, the UN and the Use of Force: Legal Aspects," *loc. cit.*, p. 2.

⁷⁰ *Op. cit.*, p. 3.

⁷¹ Such a norm of *jus cogens* is defined as "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" and which can be modified only by a subsequent

rightly points to the problems caused by the arbitrariness of unilateral action in the absence of common legal standards. In cautious diplomatic language he raises the question of international anarchy: "Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the second world war, and of setting dangerous precedents for future intervention without a clear distinction to decide who might invoke these precedents and in what circumstances?"⁷² The UN Secretary-General is definitely aware of the realities of power politics and of the dangers of a policy of double standards when he postulates that "intervention must be based on legitimate and universal principles."⁷³ He seems, however, to undermine the United Nations' role as the only transnational structure that may authorize the collective use of force, because he leaves open the question of the legitimacy of unilateral humanitarian intervention. Kofi Annan points to the dilemma of humanitarian intervention in the present international context: does a regional organization have a right to intervene without a Security Council mandate? Can the international community simply stand by and "let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?"⁷⁴

In a way similar to our earlier effort to redefine the concept of sovereignty so as to make the system of general international law compatible with the principles (or requirements) of human rights,⁷⁵ Annan suggests the introduction of a concept of "individual sovereignty," by which he means "the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties."⁷⁶ He acknowledges that state sovereignty is currently being redefined on the basis of this new perception of individual sovereignty and that states are increasingly understood "to be instruments at the service of their peoples, and not vice versa."⁷⁷ Annan suggests that this change in perception of basic notions of international law has increased awareness of humanitarian issues and shed a new light on acts which are directed against state sovereignty in its traditional definition. At the same time, he is aware that there is no legally consistent doctrine of humanitarian intervention that would be compatible with the norms of the United Nations system. He concedes that the "developing

norm of general international law having the same peremptory character (*Vienna Convention on the Law of Treaties of 23 May 1969*, Art. 53. United Nations Doc. A/CONF.39/27).

⁷² "Two concepts of sovereignty," in: *The Economist*, 18 September 1999, quoted from the online version at <http://www.un.org/Overview/SG/kaecon.htm>.

⁷³ *Loc. cit.*

⁷⁴ *Loc. cit.*

⁷⁵ Hans Köchler, "The Principles of International Law and Human Rights," *loc. cit.*, Chapter 4: *The Logical Reorganization of the Normative Systems of International Law and Human Rights: Outline of a System*, pp. 74ff.

⁷⁶ *Loc. cit.*

⁷⁷ *Ibid.*

international norm in favour of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community."⁷⁸

In sharp distinction from the rather idealistic discourse and the high-flying expectations of the UN Secretary-General, a new school of thought in the United States has brought an element of realpolitik into the evaluation of the policy of humanitarian intervention. In his article "Give War a Chance," Edward N. Luttwak argues that interference in a conflict situation by outside powers, as well-intentioned as it may be, only intensifies and prolongs struggles in the long run.⁷⁹ In Luttwak's analysis, such intervention in the name of humanity may effectively prevent a settlement of the conflict "from inside," among the partners to the dispute themselves. The pacification achieved through intervention may be highly artificial and may, in the long run, do even more damage to a peaceful settlement and, by implication, to the restoration of human rights because "the transformative effects of both decisive victory and exhaustion are blocked by outside intervention."⁸⁰

As regards assessment of the possibility of a consistent practice of humanitarian intervention, the British Foreign Office seemingly was more aware quite some time ago of the detrimental impact of power politics on international humanitarian action than the Secretary-General of the United Nations is today. In a foreign policy analysis (1986) it was argued "that the scope for abusing such a right argues strongly against its creation."⁸¹ It remains to be seen whether this argument – stated well before the end of the East-West rivalry – will be upheld in the present context of the "New World Order," in which the United Kingdom has repeatedly joined the United States in unilateral "humanitarian action."

Similarly, in his comprehensive evaluation of the doctrine of humanitarian intervention H. Scott Fairley states in a kind of disillusioning conclusion: "The case for humanitarian intervention is essentially misdirected. A history of black intentions clothed in white has tainted most possible applications of the doctrine."⁸² This cautious, albeit skeptical attitude as regards this new form of "military humanism" is shared by Jean-Claude Rufin, who observed in connection with the Gulf War of 1991: "Quand des armées entrent en action –

⁷⁸ *Ibid.*

⁷⁹ "Give War a Chance," in: *Foreign Affairs*, vol. 78, n. 4 (July/August 1999), pp. 36-44.

⁸⁰ *Op. cit.*, p. 44.

⁸¹ "Is intervention ever justified?" *Foreign Policy Document No. 148*, Par. II.22, partial reprint in: *British Yearbook of International Law*, vol. 57 (1986), p. 619.

⁸² "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box," in: *Georgia Journal of International and Comparative Law*, vol. 10 (1980), p. 63.

quelle que soit cette action –, je crains que des motifs bien autres qu'humanitaires soient en cause."⁸³

While the debate has been focused recently on the admissibility of *unilateral* humanitarian intervention (i.e. intervention not authorized by the UN), it must again be emphasized that also the collective use of force on the basis of Chapter VII of the UN Charter *cannot* be undertaken if the *specific purpose* is human rights enforcement. According to Art. 39 of the Charter, the collective use of force is strictly limited to threats to the peace, breaches of the peace, and acts of aggression. Humanitarian considerations may only *indirectly* come into play insofar as the safeguarding of international peace and security *also* guarantees the basic human rights of the concerned population(s) or as the violation of a population's basic human rights on a systematic and permanent basis may constitute a threat to international peace and security as referred to in the Charter. Because of the strict limitations on the right to intervene – even in the context of the Security Council's authority to use force – and in view of the *jus cogens* character of the prohibition of the use of force in Art. 2 (4) of the Charter, it is obvious that a "duty to intervene" cannot be derived from the existing norms of international law and cannot be claimed, neither by the United Nations Organization as the universal institution of collective action on behalf of the international community, nor on the part of regional organizations or individual states. Such a "duty" is definitely not a general principle of law "recognized by civilized nations," as defined in Art. 38, Par. 1 (c) of the Statute of the International Court of Justice.⁸⁴

In a realistic assessment of the implications of the use of force for humanitarian purposes, R. J. Vincent gives three reasons why the principle of non-intervention should be upheld. In his analysis – which resembles Rougier's assessment of the 19th-century practice of *intervention d'humanité* – Vincent states that (a) there is no guarantee of impartiality; (b) the action, however well-intended it may be, might be resisted simply because it comes from outside; (c) there is no common morality which transcends borders and from which one could derive principles for intervention, i.e. criteria for the application of a doctrine of intervention.⁸⁵ Similar to our earlier approach, Vincent relates the level of the *ideals* (norms, principles) to the level of the *facts*, i.e. to the political and social reality in which the community of states exists. One cannot credibly claim to uphold certain legal norms – particularly in the sense of higher norms of morality – if one ignores the factual conditions of

⁸³ "La maladie infantile du droit d'ingérence," in: *Le débat. Revue mensuelle*, n. 67 (1991), p. 29.

⁸⁴ See Sean D. Murphy, *Humanitarian Intervention. The United Nations in an Evolving World Order*. Philadelphia: University of Pennsylvania Press, 1996, p. 295.

⁸⁵ R. J. Vincent, *Nonintervention and International Order*. Princeton: Princeton University Press, 1974, p. 345.

their implementation. The realization of these norms is often characterized by a policy of double standards; such a policy may even lead to all-out war, threatening the life of the population to be protected, etc.⁸⁶ If the practice of intervention defeats the very principles the doctrine is based upon, the whole concept becomes ambiguous and loses its morally convincing and legally binding nature. This predicament is even acknowledged by one of the propagators of "humanitarian war." Lord Hurd of Westwell speaks of the "paradox of humanitarian war, namely that you are bound to inflict on the innocent some of the suffering which you are trying to remedy."⁸⁷ In our analysis, the maxim of *fiat justitia, pereat mundus* is not a credible – or even practicable – guideline for the application of a normative concept such as that of humanitarian intervention. If respect of a legal norm cannot be assured without violation of basic principles of the rule of law, such a norm has to be dismissed as a viable rule of international conduct. Such a norm must be considered "dead law," because its consistent application is impossible in the given framework of the norms of *jus cogens* and under the realities, regrettable as they may be, of power politics. The maxim according to which "the end justifies the means" is not a viable guideline for the practice of modern international law.

(V) Conclusion: The renaissance of power politics in humanitarian clothes – the end of international law?

As explained above, since the shift of the power balance from bipolarity to unipolarity we have witnessed a major paradigm change in international relations. Nowadays, a right – even a moral duty – to intervene is claimed by those states who dominate the global power balance. Human rights have become an instrument of power politics in an environment in which no checks and balances exist to restrain the arbitrary use of power. In such an environment, the most powerful nations arrogate to themselves the right to act in the name of "humanity" or of the "international community." While enjoying a monopoly on definition of

⁸⁶ The interventions of the Western powers in Iraq and Yugoslavia clearly demonstrate this dilemma. Operations which are officially termed as "humanitarian" and which, as in the case of the comprehensive sanctions imposed on Iraq, are carried out with formal Security Council approval, have in many instances led to the violation of the basic human rights of the population supposedly being protected. Those "humanitarian interventions," whether or not based on UN resolutions, may include the commission of *war crimes* against the civilian population (as in the case of the Yugoslav war of 1999) or may be tantamount to a *crime against humanity*, as in the case of the continued comprehensive economic sanctions imposed on the population of Iraq. On the legal aspects of the latter case see the author's analysis: *The United Nations Sanctions Policy and International Law*. Penang: Just World Trust, 1995.

these terms, the global actors have resorted to *arbitrary action* against the sovereignty and independence of other states whenever they deem such action appropriate to serve their interests. "Humanitarian intervention" has become one of the key terms to legitimize what otherwise would have to be called "act of aggression" or "interference in internal affairs."

As we have seen since the events of 1990/1991, there is a clear order of priority in regard to such "enforcement actions." Whenever possible, the action required in view of the interests of the major player(s) will be orchestrated as a "collective enforcement measure" in the framework of the UN Security Council (as in the case of the Gulf War of 1991).⁸⁸ In the case that not all of the permanent members of the Security Council can be induced either to support the respective measures or to abstain from voting,⁸⁹ the interested power(s) will resort to regional organizations such as NATO (as in the case of the Kosovo war in 1999).⁹⁰ For this purpose they have created their own doctrine of intervention apart from the UN Charter's provisions, thereby completely sidelining the world organization. If even this strategy proves unsuccessful, the interested power may decide "to go it alone" – as the United States has repeatedly demonstrated through its interventions in Latin America and the Caribbean. By emphasizing its "vital interests" and by giving them priority over considerations of international legality, the United States has *de facto* created a doctrine of *limited sovereignty*, resembling the *Brezhnev doctrine* of the Soviet era.⁹¹ This policy has led to a profound destabilization of the international order and to a *demoralization* of the global community of states in regard to the acceptance of universal legal principles binding upon all. The very system of norms that is supposed to guarantee a peaceful international order so as to ensure for the citizens of the globe the enjoyment of fundamental human rights, above all the right to

⁸⁷ *Humanitarian War – Theory and Practice. One People Oration given at Westminster Abbey, Tuesday, 6 July 1999.* At http://www.westminster-abbey.org/other/humanitarian_war_.htm.

⁸⁸ On the problematic legal nature of the collective enforcement action in regard to the Gulf crisis of 1990/1991 see the International Progress Organization's *Memorandum on the Invasion and Annexation of Kuwait by Iraq and Measures to Resolve the Crisis Peacefully* (P/K/12313, 28 September 1990) and the organization's message to the President of the Security Council (P/K/12507, 19 December 1990).

⁸⁹ It is to be noted, however, that a strict interpretation of the UN Charter leaves no room to consider abstention as being in conformity with the requirement of unanimity among the permanent members. Art. 27, Par. 3 unambiguously mentions the "concurring votes of the permanent members" as requirement for the adoption of a resolution. In Security Council practice, however, abstention has been considered as equivalent to the requirement of unanimity. This is just one example of the impact of international *realpolitik* on the legal interpretation of the Charter.

⁹⁰ On the political motives behind this war and the role of NATO see Howie Hawkins, "A 'Humanitarian War' for an Imperialist Peace," in: *Synthesis/Regeneration*, vol. 20 (Fall, 1999). At <http://www.greens.org/s-r/20/20-10.html>.

⁹¹ See F. A. Freiherr von der Heydte, "The Thornburg Doctrine: the end of international law," in: *Executive Intelligence Review*, 25 May 1990, pp. 62-66. On the US doctrine concerning the use of force in general see "Defence by Harry Almond," in: Hans Köchler (ed.), *The Reagan Administration's Foreign Policy. Facts and Judgement of the International Tribunal*. Studies in International Relations, XI. Vienna-London: International Progress Organization [1985], pp. 439-442.

life, is being challenged in the name of humanity or of "humanitarian principles." The principles of peaceful co-existence are placed in jeopardy. This means the effective *end of international law* in the sense of a system of norms which are binding upon all states the validity of which derives from the *legal (or normative) equality* of nations. As a result of this paradigm change in regard to the relationship between the norms of sovereignty, sovereign equality, and non-intervention on the one side, and humanitarian principles (human rights norms) on the other side, a special category of "morally superior nations" has been invented, with special rights and responsibilities vis-à-vis mankind as a whole.⁹² The rudimentary forms of a universal system of law – represented by the United Nations Organization and commonly known under the slogan of the "international rule of law" – are effectively eradicated and replaced by a new set of norms which are *flexibly* defined according to a given constellation of interests. This constellation results from the new imperial order that has evolved around the United States as pole of gravitation. The re-colonization of the countries of the Third World is just one of the more visible consequences of this major paradigm change resulting from the shift in the global power balance.⁹³ One of the most drastic examples of this re-colonization in the context of a unipolar international order is the unbalanced "peace process" imposed upon the Arab world and upon the Palestinian people in particular. A strategy of *pax Americana* is being executed for the entire region of the Middle East – in a situation in which virtually no margin of independent action is left to the Arab-Palestinian side of this long-standing dispute over land and resources.⁹⁴

In this context of power politics in the "New World Order," the doctrine of humanitarian intervention has become the most effective and highly visible *ideological tool* to assure acceptance – by the peoples of the world – of a quasi-imperial order in the framework of *globalization*.⁹⁵ In this framework, the related normative discourse is exclusively shaped by the specific constellation of interests of the single hegemonial power.⁹⁶ This development not only brings about the end of international law – in the shape into which it gradually evolved since the Hague Conventions, culminating in the abrogation of the *jus ad bellum* in the

⁹² On the European dimension of this new ideology of "humanitarian power politics" see the Appendix below: *Austria – European Union: The problematic nature of "humanitarian politics."*

⁹³ See Yussuf Naim Kly, "Globalization: A Multidisciplinary Perspective," in: Hans Köchler (ed.), *Globality versus Democracy? The Changing Nature of International Relations in the Era of Globalization*. Studies in International Relations, XXV. Vienna: International Progress Organization, 2000, pp. 19-32.

⁹⁴ For more details see the author's paper: "The Palestinian People's Right of Self-determination: Basis of Peace in the Middle East," in: *IKIM Journal*, vol. 7, n. 2 (July/December 1999), pp. 45-58.

⁹⁵ Cf. the affirmative reference to globalization by Kofi Annan in his effort to promote the idea of humanitarian intervention in: "Two concepts of sovereignty," *loc. cit.* On the concept of globalization in general see Hans Köchler (ed.), *Globality versus Democracy?*

⁹⁶ On the detrimental implications for international law see Robert Charvin, "Le processus de mondialisation - Impact juridique et politique," in: Hans Köchler (ed.), *Globality versus Democracy?*, pp. 45-63.

Kellogg-Briand Pact (as a result of World War I) and in the establishment of a universal system of norms of *jus cogens* (after World War II); the renaissance of power politics in humanitarian clothes also means the collapse of the system of peaceful co-existence as represented by the United Nations⁹⁷ during the post-war period⁹⁸ and the *de facto* abrogation of the principle of the non-use of force as a rule of *jus cogens* of general international law. In the name of "humanity," the role of the United Nations as the only global organization providing a framework – inefficient and inconsistent as it may be⁹⁹ – for the universal rule of law is seriously undermined, even rejected, by some of the major players of world politics. This development has mainly been in favour of the *global claim to power* by the new *hegemon*.

It is no mere accident if the 19th-century doctrine of *intervention d'humanité* is being reinvented at the beginning of the 21st century. The renaissance of interventionism – with all its ideological accompaniments¹⁰⁰ – marks a new era of imperial power wherein the dominating force is no longer compelled to seek the consent of the international community within a framework of elaborate rules of law binding upon all. It is a general characteristic of an imperial order – corresponding to a unipolar system of power – that its main actor cannot resist the temptation to formulate the "rules of engagement" himself, so as to legitimize what would otherwise not be acceptable (if perceived as the exercise of power politics alone). With the concept of humanitarian intervention (and related terms such as that of "humanitarian war"), the dominating power is able to define those rules in a manner that provides a semblance of international *legality*; this aim is achieved by linking the use of force against another state with issues of *moral legitimacy* (referring to pre-positive norms of human rights and thereby evoking a sense of fairness and justice). It is a basic element of hegemonial power and a vital ingredient of its sustainability that the hegemon is able to reserve to itself the right to define the criteria of legitimacy of its own actions. In addition to this monopoly over definitions, the hegemonial power enjoys the privileged position of being able to violate with

⁹⁷ On the related international law theory see Milan Šahović (ed.), *Principles of International Law Concerning Friendly Relations and Cooperation*.

⁹⁸ The post-war system of norms of peaceful-co-existence was most comprehensively expressed in the UN General Assembly's *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (Resolution 2625 [XXV] of 24 October 1970).

⁹⁹ On the need of making the United Nations Organization more compatible with the requirements of international law and democracy see the author's analysis: *The United Nations and International Democracy. The Quest for UN Reform*. Studies in International Relations, XII. Vienna: International Progress Organization, 1997.

¹⁰⁰ Cf. also Hans Köchler, *The Use of Force in the New International Order. On the Problematic Nature of the Concept of Humanitarian Intervention*. Occasional Papers Series No. 4. Vienna: International Progress Organization, 2000.

impunity legal rules such as that of the prohibition of use of force in international relations. However, hegemonial power is not content with this *de facto* "immunity from prosecution" (which has been hitherto guaranteed to the permanent members of the UN Security Council by virtue of Art. 27 of the Charter);¹⁰¹ it creates its own doctrine by which even an *openly illegal* exercise of power will be interpreted as a legitimate action in defense of higher norms of *jus cogens*. Thus, a crude policy of interests (*Interessenpolitik*) may be portrayed in the sense of a higher humanitarian mission. It is in exactly this ideological context that the concept of humanitarian intervention finds its adequate place – whether in the framework of a "Holy Alliance," representing the 19th-century concert of European powers, or of the so-called "New World Order" at the beginning of the 21st century.¹⁰²

These *systemic realities of power politics* render obsolete whatever has been achieved in terms of the international rule of law since the beginning of the 20th century. In view of this development, it might be worthwhile to reevaluate Immanuel Kant's *Fifth Preliminary Article* for the safeguarding of lasting peace ("*Kein Staat soll sich in die Verfassung und Regierung eines anderen Staats gewalttätig einmischen*")¹⁰³ and to recapitulate his warning in regard to international anarchy and the threat to the independence of all states resulting from a policy of forceful intervention.¹⁰⁴ A *de facto* reintroduction of the *jus ad bellum*, i.e. a return to a system in which war, defined as *bellum justum*, is seen as the prerogative of the sovereign state, cannot be the answer to the requirements of "law enforcement" and of the universal safeguarding of human rights in an increasingly interconnected global order. There is simply no alternative to the acceptance of the *rule of non-intervention* as norm of *jus cogens* of general international law. This is even more so in a unipolar international order where respect for the *sovereign equality of states*¹⁰⁵ is the only safeguard against the global anarchy that would result from the arbitrary use of power. In a unipolar system, use of force unrestrained by common rules basically serves the hegemonial power's interests, to the detriment of the vast majority of nations. In such a system, the problems posed by "humanitarian politics" are magnified. If one seriously takes into consideration these realities of the present global order –

¹⁰¹ See above, Chapter II, and our analysis "Circumventing the abstention clause," in: *The Voting Procedure in the United Nations Security Council*, pp. 29ff.

¹⁰² On the general ideological background of the "New World Order" see the author's analysis: *Democracy and the New World Order*.

¹⁰³ *Zum ewigen Frieden. Ein philosophischer Entwurf*. [Königsberg: Friedrich Nicolovius, 1795.] Hamburg: Felix Meiner, 1992. p. 55. "No state shall intervene by force into the constitution and government of another state." (Trans. by the author.)

¹⁰⁴ *Ibid.* ("... würde diese Einmischung äußerer Mächte ... selbst also ein gegebenes Skandal sein und die Autonomie aller Staaten unsicher machen.") (Emphasis by the author.)

¹⁰⁵ See Art. 2 (1) of the UN Charter: "The Organization is based on the principle of the sovereign equality of all its Members."

and of any order in which states have to co-exist with one another, whether unipolar, bipolar or multipolar –, there are no sufficient grounds, "in fact or law,"¹⁰⁶ for abolishing the principle of non-intervention and replacing it with a doctrine of humanitarian action that cannot be consistently integrated into the body of modern international law.

¹⁰⁶ H. Scott Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box," p. 63.

Appendix: Austria – European Union: The problematic nature of "humanitarian politics"

Interventionism on the basis of humanitarian principles seems to have become a common feature in today's international relations. Human rights are emphasized not only on a global level whenever a unilateral use of force is to be justified, they have also become a factor in power politics on the regional level. The special measures ("sanctions") unilaterally imposed in February 2000 on the government of Austria by 14 member states of the European Union are a clear case in point. When imposing their punitive measures, those EU member states referred to European "values" or "principles" which are rather vaguely mentioned in Art. 6 of the Treaty of Amsterdam, namely democracy, human rights and fundamental freedoms.¹⁰⁷ Those governments reproached the Austrian government for "threatening" these European values. European values and principles were invoked in an openly political move against the formation of a new governmental coalition in Austria.¹⁰⁸ The measures of diplomatic isolation imposed upon Austria between February and September 2000 clearly demonstrate that "human rights" have become a tool of power politics in the relations among EU member states. The use of vague and largely undefined concepts, principles, "European values," etc. for mainly political purposes devalues – or even discredits – the human rights concept at the European level, particularly in regard to the judicial competence of the European Court for Human Rights. This is all the more regrettable as remarkable achievements have been made in the field of compulsory transnational human rights jurisdiction through the European Court, the only one of its kind with jurisdiction binding upon member states.

Not only were the measures adopted by the 14 member states against their fellow member Austria in violation of the decision-making procedures of the European Union as such, they constituted a blatant interference in the internal affairs of Austria on the basis of an arbitrary interpretation of the principles of Art. 6 of the Treaty of Amsterdam. They furthermore acted *ultra vires* by ignoring the strict procedural rules of Art. 7, requiring multilateral action.¹⁰⁹ The Portuguese and French Presidencies of the European Union,

¹⁰⁷ "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." (Art. 6 of the *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*.)

¹⁰⁸ On the legal aspects of the "sanctions" imposed on Austria see the statement by the International Progress Organization: *Austria – European Union*. Vienna, 1 February 2000, at <http://i-p-o.org/austria-eu.htm>.

¹⁰⁹ "The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European

subsequently, also acted *ultra vires* by dealing with an issue that legally was of *bilateral* nature between each of the 14 member states and Austria. However, this first "political intervention" with humanitarian rationale in the history of the European Union revealed an uneven power balance within the Union. As was demonstrated by the 14 member states under the *de facto* leadership of France and Germany, power politics quickly resorts to self-defined legal – or even moral – standards whenever states feel obliged to provide an aura of legitimacy for political strategies that are foremost dictated by interests, not values.

To induce political changes in a member country – or to prevent the formation of a certain governmental coalition after elections – is part of a political, not a legal agenda which is determined, in the present case, by European party politics, not European values. By arrogating to themselves the right of definition of those values as enunciated in Art. 6 of the Treaty of Amsterdam, i.e. by monopolizing what is euphemistically called "political correctness," the dominant states try to create for themselves a convenient margin of flexibility and a space of independent action vis-à-vis the weaker state. The newspeak of so-called "European values" has proven to be a convenient cover for an agenda of power politics in the modern concert of European powers. As demonstrated by the debate about eventual measures against Italy, disciplinary measures on the political and diplomatic levels – "humanitarian intervention" European style – are executed only against a weak member state, never against the powerful "core members" of the European Union. This fact of power politics has profoundly demoralized the European citizenry and has eroded the very legitimacy of the evolving transnational order in the framework of the European Treaties.¹¹⁰ Whenever humanitarian measures, initiatives or declarations serve as a corollary of power politics – whether on the national, regional or global level –, they inevitably become part of a policy of double standards. This defeats the very principles on which those measures are supposedly based. The case of Austria, i.e. that country's treatment by its fellow members in the European Union, is a vivid illustration of this new reality of power politics in humanitarian clothes.

Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6 Paragraph 1, after inviting the government of the Member State in question to submit its observations." (Art. 7 [1])

¹¹⁰ On the issue of transnational democracy in the European Union and the related question of legitimacy see the author's analysis: "Decision-making Procedures of the European Institutions and Democratic Legitimacy. How Can Democratic Citizenship Be Exercised at Transnational Level?," in: *Concepts of democratic citizenship*. Strasbourg: Council of Europe Publishing, 2000, pp. 147-165.

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