New Trends in the Enforcement of erga omnes Obligations

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I. The Emergence of erga omnes Obligations

1. Human Rights Under the UN Charter

a. The Programme

Articles 55 and 56 of the Charter proclaimed the promotion of universal respect for, and observance of, human rights and fundamental freedoms as a programme of the United Nations. By referring in Article 56 to the items of that programme as "purposes", the Charter links them to Article 1 which lists the purposes of the organization, and among them, in para. 3 the promotion and encouragement of respect for human rights and for fundamental freedoms for all.

Until then international law had been focussed on the sovereignty of states and dealt with the relations between them. The Charter now established the human person as a second focal point, proposing to make it the subject of international rights and to impose on states corresponding obligations under international law for the benefit of persons under their jurisdiction. In the absence of special research it is unclear[1] whether the founders of the United Nations realized that they were profoundly changing the parameters of traditional international law with that programme. Hence it does not come as a surprise that they failed to prescribe the manner in which these new type of obligations should be fitted into the traditional framework of international law. Moreover, by listing the maintenance of international peace and security, sovereignty, justice, and respect for human rights as purposes and putting them on the same footing, without indicating which of them should prevail in case of conflict, the Charter laid the foundation of a philosophical debate which is, until today, without issue.

b. The Implementation

With the exception of the Universal Declaration of Human Rights of 10 December 1948[2], the United Nations have chosen multilateral conventions as vehicles for implementing the programme of the Charter. These are, to mention the most important ones: *The Convention on the Prevention and Punishment of the Crime of Genocide* (1948); the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965); the *International Covenant on Economic, Social and Cultural Rights* and that on *Civil and Political Rights* (both 1966); the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); and the *Convention on the Rights of the Child* (1989).

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1 This is suggested by the absence of any consideration regarding this in such basic papers as Sh. Oda, "The Individual in International Law", in: M. Sørensen (ed.), *Manual of Public International Law*, 1968, 470 et seq., (498); I. Szabo, "Historical Foundations of Human Rights and Subsequent Developments", in: K. Vasak (ed.), *The International Dimension of Human Rights*, 1982, 11 et seq., (21–22); and F. Capotorti, "Human Rights: The Hard Road Towards Universality", in: R.St.J. Macdonald/D.M. Johnston (eds), *The Structure and Process of International Law*, 1983, 977 et seq., (981–982).

2 A/RES/217A (III) of 10 December 1948.

By choosing multilateral conventions as instruments for implementing their programme, the United Nations took a double risk: that of non-ratification and that of across-the-board reservations.

The risk of non-ratification proved to be lower than in respect of other multilateral treaties adopted under the auspices of the United Nations, notably codification conventions[3], because becoming a party to human rights treaties was and is considered one of the indispensable marks of a civilized state and is thus coveted all the more by illiberal regimes.

These make use of another device to minimize the impact of the conventions on their manner of governing: They attach across-the-board reservations to their ratifications or accessions. Already correct reservations cause a lot of problems in the application of conventions, but across-the-board reservations endanger the very purpose of them. They come in two forms: either reserving the supremacy of domestic law or the supremacy of Sharia, the Islamic religious law. Both have been combined in the reservation of Iran to the *Convention on the Elimination of All Forms of Discrimination Against Women* which reads as follows:

> "The Government of the Islamic Republic of Iran reserves the right not to apply any provision or articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect."

Such reservations impair the purpose of human rights conventions to establish a common and uniform standard of rights of individuals for implementation in the respective domestic legal order, because they create a disturbing legal uncertainty. First, only the author of the reservation can determine its scope. Secondly, other parties sometimes raise objections, asserting the incompatibility of the reservation with the object and purpose of the convention and declaring it thus implicitly null and void. Hence it becomes doubtful which obligations the reserving state has accepted *erga omnes*, and in respect of which contracting parties relations under the convention exist.[4]

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3 Cf. K. Zemanek, "Does Codification Lead to Wider Acceptance?", in: *International Law as a Language for International Relations, Proceedings of the United Nations Congress on International Law* New York 1995, 1996, 224–229.

4 Cf. generally B. Clark, "The Vienna Convention Reservation Regime and the Convention on Discrimination Against Women", *AJIL* 85 (1991), 281 et seq.; and L. Lijnzaad, *Reservations to UN-Human Rights Treaties. Ratify and Ruin?*, 1995, 298 et seq. The way in which the matter is treated by

In spite of the risks involved, regional organizations have also chosen multilateral treaties as instruments for their human rights regimes. Examples are the *European Convention on Human Rights and Fundamental Freedoms* (1950), *the American Convention on Human Rights* (1969), and the *African Charter on Human and Peoples Rights (Charter of Banjul)* (1981). Only reservations against the European Convention are more strictly controlled than on the universal level, because the European Court of Human Rights has assumed jurisdiction in this respect[5].

2. The Establishment of erga omnes Obligations in Other Fields

a. Conventional Creation

Multilateral treaties have also been used in other fields for creating general standards of conduct in the achievement of a common purpose.

Thus common article 1 of the Four Geneva Conventions of 1949 states: "The High Contracting Parties undertake to respect and to *ensure respect*[6] for the present Convention in all circumstances." This language is repeated in article 1 para. 1 of the First Additional Protocol of 1977.

Even if the words "to ensure respect" should initially have been meant as reference to the obligation of the parties to ensure that their armed forces and public authorities were made aware of their duties under the Conventions, i.e. as obligation to instruct[7], they are today understood not only as a right but as a duty to claim performance by the other contracting states of the *erga omnes* obligations established by the Conventions and the Additional Protocol[8].

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the Special Rapporteur of the ILC is critized by K. Zemanek, "Allain Pellet's Definition of a Reservation", *Austrian Review of International and European Law* 3 (1998), 295 et seq.

5 See R.St.J. Macdonald, "Reservations Under the European Convention on Human Rights", *RBDI* 21 (1988), 429 et seq.

6 Italics added.

7 Cf. e.g. article 144 of the Fourth Convention or article 83 of Protocol I.

8 See G. Barile, "Obligationes erga omnes e individui nel diritto internazionale umanitario", *Riv. Dir. Int.* 68 (1985), 1 et seq.; J.A. Frowein, "Reaction by Not Directly Affected States to Breaches of Public International Law",

Standard-setting is also the characteristic of conventions with the aim of protecting the global environment, such as the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987; with amendments); or the *Framework Convention on Climate Change* (Rio Convention, 1992; and Kyoto Protocol 1997). They, too, establish obligations which have to be implemented in domestic law or by administrative measures and are not created for the benefit of individual contracting parties but in the interest of all of them, as a community[9]. An infringement of the conventions' obligations by one party does not hurt a specific other contracting party (although this may incidentally be the case), but the common purpose and thus all other contracting states.

Arms control and disarmament treaties are in some way similar, because they do not establish *reciprocal* rights and obligations between the parties. However, they do not require formal transformation into domestic law for their implementation because the latter is a matter of governmental security policy. Instruments such as the *Non-Proliferation Treaty* (NPT, 1968), the *Biological Weapons Convention* (1972), the *Chemical Weapons Convention* (CWC, 1993), or the *Comprehensive Nuclear Test-Ban Treaty* (CTBT, 1996) are salient examples of this particular type of *erga omnes* obligations.

b. Jus cogens

The most advanced type of this kind of obligation derives from peremptory norms of international law (*jus cogens*). They differ from ordinary *erga omnes* obligations insofar as they do not protect common values or interests of a random group of states but the basic values on which the international community as a whole is built. Thus, all peremptory norms create obligations *erga omnes*, but not all *erga omnes* obligations derive from peremptory norms.

RdC 248 (1994), 353 et seq., (395–397); and D. Schindler, "Die erga omnes-Wirkung des humanitären Völkerrechts", in: U. Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung*, Festschrift für R. Bernhardt, 1995, 199 et seq.

Cf. M.E. O'Connell, "Enforcing the New International Law of the Environment", *GYIL* 35 (1992), 293 et seq., Ph. Sands, "Enforcing Environmental Security: The Challenges of Compliance with International Obligations", *Int'l. Aff.* 46 (1993), 367 et seq.; and R. Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law", *RdC* 272 (1998), 25 et seq., (56–57).

In a pioneering paper[10] Bruno Simma seems, at first view, to limit the *erga omnes* character of obligations to those deriving from peremptory norms, when he writes: "... *jus cogens* and obligations *erga omnes* are but two sides of one and the same coin."[11] But he later qualifies that view, when he states in respect of human rights treaties: "If I am permitted to vary the meaning of a well-known concept for a moment, the obligations arising from such treaties can be considered obligations *erga omnes* — the *omnes*, however, limited in our present context to the circle of the other contracting parties."[12] This coincides with the opinion expressed above.

The idea that some norms of international law may have a peremptory character was first suggested by Alfred Verdross in an article in the *American Journal of International Law* in 1937[13]. The concept is reflected in positive law by arts 53 and 64 of the *Vienna Convention on the Law of Treaties* of 1969. Their adoption was preceded and followed by a vivid academic debate[14]. Notwithstanding the persistent objection of France to the idea as such, the existence of *jus cogens* in international law is nowadays undisputed, although no consensus exists on its substance, beyond a tiny core of principles and rules, such as the prohibition of the use of force[15].

This is due to the fact that no procedure to identify peremptory norms of international law is indicated in the tautological definition in

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10 B. Simma, "From Bilateralism to Community Interest in International Law", *RdC* 250 (1994), 229 et seq.

11 Ibid., 300.

12 Ibid., 370.

13 A. Verdross, "Forbidden Treaties in International Law", *AJIL* 31 (1937), 571 et seq.

14 Cf. e.g. G. Schwarzenberger, "International Jus Cogens?", *Tex. L. Rev.* 43 (1965), 455 et seq.; A. Verdross, "Jus Dispositivum and Jus Cogens in International Law", *AJIL* 60 (1966), 55 et seq.; E. Suy, "The Concept of Jus Cogens in Public International Law", in: Carnegie Endowment for International Peace (ed.), *The Concept of Jus Cogens in International Law*, 1967, 17 et seq.

15 During the Vienna Conference on the Law of Treaties initiatives were taken to establish a list of peremptory norms of international law which should have been annexed to the Convention and subjected to periodic review. The initiatives failed because, as the discussion revealed, views were too divided; see J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, 1974, 119–123.

the Vienna Convention[16]. The peremptory character of a rule of international law rather results from the substantive importance of the interests protected by the rule and of the universal recognition that the underlying value or values are not at the disposal of individual states[17]. Since, however, values in the international community emanate from a plurality of sources, they are sometimes incompatible or even mutually exclusive. Hence it is not surprising that the scope of globally shared values is rather modest and nothing indicates a substantive increase in the near future; rather the contrary must be feared[18]. This explains the narrow scope of undisputed *jus cogens*.

3. Ensuring Compliance with erga omnes Obligations

a. The Growing Awareness of their Different Character

Traditional international law has a bilateral performance structure[19]. Rights and obligations under it arise between two specific states. This is even so when they derive from a multilateral treaty. Thus under the Vienna Convention on Diplomatic Relations a specific receiving state is obliged to grant diplomatic immunity to the representatives of a specific sending state and the latter has a claim to performance against that specific receiving state.

Standard-setting conventions have a different performance structure. They prescribe a conduct which is unrelated to any *specific* right of the other contracting parties under the convention. That has been recog-

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16 The relevant part of article 53 of the Vienna Convention on the Law of Treaties reads: "For the purpose of the present Convention, a peremptory norm of general international law is a norm 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 norm of general international law having the same character."

17 Simma, see note 10, 288, 292. Cf. also Ch. Tomuschat, "Obligations Arising For States Without or Against Their Will", *RdC* 241 (1993), 209 et seq., (306–307).

18 See K. Zemanek, "The Legal Foundations of the International System. General Course in Public International Law", *RdC* 266 (1997), 23 et seq., (32–36).

19 For a profound general discussion cf. B. Simma, *Das Reziprozitätselement in der Entstehung von Völkergewohnheitsrecht*, 1970; and id., *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge*, 1972.

nized by the ICJ in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, when it stated:

> "In such a convention the contracting States do not have an interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between the rights and duties."[20]

Thus, a standard-setting convention creates only the right of a contracting party to request fulfilment of its *commitments* by all other contracting parties. A party does not have substantive rights under the convention in relation to other individual parties, such as it has under the Vienna Convention on Diplomatic Relations or under the Vienna Convention on the Law of Treaties. The obligation of a party to conduct itself in accordance with the prescribed standard exists towards all other contracting parties[21], and is, therefore, an obligation *erga omnes*[22].

This characteristic performance structure is bound to cause clashes with the principle of non-intervention, which derives from the sovereignty of states and thus from the very foundation of *traditional* international law. When a party to a standard-setting convention complains about (non) performance to another contracting party, the former will more often than not be accused of intervention[23]. In traditional international law this argument does make sense; the manner in which states design their domestic laws to allow them the implementation of inter-

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20 ICJ Reports 1951, 15 et seq., (23).

21 Whether they are interested in actually requesting the performance of the obligation is another matter; see B. Simma, "Consent: Strains in the Treaty System", in: Macdonald/Johnston, see note 1, 483 et seq., (500).

22 See J.A. Frowein, "Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung", in: R. Bernhardt *et al.* (eds), *Völkerrecht als Rechtsordnung — Internationale Gerichtsbarkeit — Menschenrechte*, Festschrift für H. Mosler, 1983, 241 et seq., C. Annacker, "The Legal Regime of erga omnes Obligations in International Law", *Austrian J. Publ. Int. Law* 46 (1994), 131 et seq.

23 Cf. O. Corten, *Droit d'ingérence ou obligation de réaction? Les possibilités d'action visant à assurer le respect des droits de la personne face au principe de non-intervention*, 1992; and H.-J. Blanke, "Menschenrechte als völkerrechtlicher Interventionstitel", *AVR* 36 (1998), 257 et seq.

state obligations is indeed a matter "within their domestic jurisdiction". But the argument fails in respect of standard-setting conventions; if valid, it would reduce such instruments to purely hortatory proclamations.

Or, as Bruno Simma has put it: "When human rights are violated there simply exists no *directly* injured State because international human rights law does not protect States but rather human beings or groups directly. Consequently, the substantive obligations flowing from international human rights law are to be performed above all within the State bound by it, and not *vis-à-vis* other States. In such instances to adhere to the traditional bilateral paradigm and not to give other States or the organized international community the capacity to react to violations would lead to the result that these obligations remain unenforceable under general international law."[24]

The crucial aspect of *erga omnes* obligations is, therefore, the manner in which they may eventually be enforced. The examination of this problem and, in particular, of recent trends to deal with it, are the purpose of this article.

b. The Tortuous Implementation of the Idea in Practice

In spite of its early recognition of the specific character of standard-setting conventions in the *Genocide Convention Opinion*[25], the ICJ has not really admitted the consequences of *erga omnes* obligations in cases where they were at issue.

In an often quoted statement in the *Barcelona Traction Case* the Court recognized the existence of *erga omnes* obligations:

> "... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes."[26]

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24 Simma, see note 10, 296–297.

25 See the quotation at note 20.

26 ICJ Reports 1970, 3 et seq., (32, para. 33).

This position has been reaffirmed in a number of cases[27], most recently in the *East Timor Case*[28] and in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[29].

However, in all relevant cases the Court found a way to avoid giving force to the claims based on the *erga omnes* character of an obligation, in spite of having recognized them in principle. In the *South West Africa Case* it did so straightforwardly by declaring an *actio popularis* incompatible with existing international law[30]. In the *Barcelona Traction Case* it misconstrued the nature of *erga omnes* obligations by making claims depend on nationality[31]. In the *Nicaragua Case* it evaded the consequences of a violation of *erga omnes* obligations by treating human rights conventions erroneously as self-contained regimes[32]. In the *East Timor Case*, finally, it denied jurisdiction on the ground that Indonesia was an "indispensable third party" to the proceedings but had not accepted jurisdiction[33].

While one observes thus a certain evolution in the thinking of the Court in respect of *erga omnes* obligations, this evolution has not yet reached a point where the Court could be relied on to accept claims to performance by parties which have a specific legal interest but are not directly affected. Speculatively, one may imagine that this reluctance is

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27 See C. Annacker, *Die Durchsetzung von erga omnes Verpflichtungen vor dem Internationalen Gerichtshof*, 1994, 1 et seq.

28 Portugal v. Australia. ICJ Reports 1995, 90 et seq., (102, para. 29): "Portugal's assertion that the right of peoples to self-determination ... has an erga omnes character, is irreproachable."

29 Bosnia Herzegovina v. Yugoslavia, Preliminary Objections. ICJ Reports 1996, 595 et seq., (616).

30 Ethiopia v. South Africa; Liberia v. South Africa, Second Phase, ICJ Reports 1966, 6 et seq., (32 and 47).

31 Source note 26, 48, para. 91: "... the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality."

32 Nicaragua v. United States of America, Merits, ICJ Reports 1986, 14 et seq., (134, para. 267): "However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves."

33 Source in note 28, 105.

due rather to the procedural problems[34] which the admission of consequences might entail[35] than to misgivings about the existence of *erga omnes* obligations, which owe their recognitions in no small degree to the Court.

However, judging by the attitude of the Court, neither it nor arbitral tribunals which would presumably follow its lead, can — for the time being — be considered reliable instances for the enforcement of *erga omnes* obligations.

II. Can the Existing Community Mechanisms Ensure Enforcement?

1. The Conceptual Question

Erga omnes obligations are, by their very nature, owed to a community of states, be it the international community as a whole (*jus cogens*) or a specific community created by a multilateral convention. Enforcement of the deriving obligations, should it eventually become necessary, should thus ideally be undertaken by the respective community. One must therefore enquire whether the conventions provide for that possibility. In its *Nicaragua Judgement* the ICJ made such provision the condition for enforcing human rights conventions by restricting measures to the "arrangements ... provided for in the conventions themselves"[36], treating such conventions thus as self-contained regimes[37].

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34 This refers to arts 62 and 63 of the Court's Statute. Cf. also J.M. Ruda, "Intervention Before the International Court of Justice", in: V. Lowe/M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice*, Essays in Honour of Sir Robert Jennings, 1996, 487 et seq.; and S. Torres Bernardez, "The New Theory of 'Indispensible Parties' Under the Statute of the International Court of Justice", in: K. Wellens (ed.), *International Law: Theory and Practice*, Essays in Honour of E. Suy, 1998, 737 et seq.

35 These are thoroughly discussed by Annacker, see note 27, 89 et seq.

36 Source in note 32.

37 This concept was "discovered" by the ICJ in the *Case Concerning U.S. Diplomatic and Consular Staff in Teheran*, ICJ Reports 1980, 3 et seq., (40, para. 86). B.Simma, "Self-contained Regimes", *NYIL* 16 (1985), 111 et seq., argues that human rights treaties belong to this group, (129–135); this view is not generally shared.

This focuses the enquiry on the means with which international organizations are empowered to enforce *erga omnes* obligations.

2. The Relevant Functions of International Organs

a. Reporting Systems

They are now fairly common in all international regimes which establish *erga omnes* obligations. An example with a long history is the reporting system of the ILO[38], but now reporting systems also exist in human rights regimes, e.g. the UN Human Rights Covenant on Economic, Social and Cultural Rights, or in environmental protection regimes, like the Rio Convention[39].

If reporting systems are to induce noncompliant states to mend their ways, their effect depends to a large extent on the existence of democratic control in the state concerned. In the absence of that condition the report may be manipulated with impunity. And even if world public opinion reacts to the report, the government concerned may deflect the impact by withholding the information from its population or by presenting it as hostile propaganda. Hence the method does not seem particularly helpful in respect of those states where an occasional disregard of international obligations is most likely to happen.

b. Inspection, Verification and Investigation Systems

They are a speciality of weapons conventions and extremely rare in other contexts[40]. They appear, in various forms, e.g. in the Non-Proliferation Treaty, the Chemical Weapons Convention, and the Com-

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38 Cf. N. Valticos, "Once More About the ILO System of Supervision: In What Respect is it Still a Model", in: N. Blokker/S. Muller (eds), *Towards More Effective Supervision by International Organizations*, Essays in Honour of H.G. Schermers, Vol. I, 1994, 99 et seq.

39 Cf. I. Freudenschuss-Reichl, "Die Umsetzung der 'Rio Commitments' fünf Jahre nach der Konferenz für Umwelt und Entwicklung von Rio de Janeiro", in: H.F. Köck (ed.), *Rechtsfragen an der Jahrtausendwende*, Akten des 22. Österreichischen Völkerrechtstages, 1998, 83 et seq., (86).

40 Cf. S. Oeter, "Inspection in International Law. Monitoring Compliance and the Problem of Implementation in International Law", *NYIL* 28 (1997), 101 et seq.

prehensive Nuclear Test-Ban Treaty. The reason for this singularity was recently explained in the following terms: "These regimes demonstrate that States, in order to enter into regimes that provide for preventive measures, will insist on extensive procedures for verification. For such limited but important purposes many nations seem willing to accept an evolving definition of their sovereignty provided that the procedures are implemented either by an international organization with a track-record of impartiality (such as IAEA[41]), or by a specialist institution created expressly to verify compliance (such as OPC[42])."[43]

It seems, however, that such willingness does not, or only exceptionally, extends to areas other than disarmament or arms control. Two instances in the field of human rights need, nevertheless, be mentioned. One is the European Convention Against Torture which, by setting up the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[44], established the only effective organ for monitoring compliance outside the arms control and disarmament area. The other is the procedure under ECOSOC Resolution 1235 (XLII)of 6 June 1967 and that under ECOSOC Resolution 1503 (XLVIII)of 27 May 1970. Neither, however, is a true inspection system. The former authorizes the Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights (former Sub-Commission on Prevention of Discrimination and Protection of Minorities) "to examine information relevant to gross violations of human rights and fundamental freedoms". The latter resolution provides for a *confidential procedure* to examine communications "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms". Neither "examination" relies, however, on inspection in the field. And although para. 6 of Resolution 1503 authorizes the establishment of an

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41 This refers to the NPT, where verification of compliance is administered under safeguard agreements with the respective contracting party by the IAEA.

42 This is a reference to the "Organization for the Prohibition of Chemical Weapons" (OPC), established by the CWC.

43 L. Sucharipa-Behrmann/T. Franck, "Preventive Measures", *N.Y.U. J. Int'l L. & Pol.* 30 (1998), 485 et seq., (524).

44 Cf. A. Cassese, "The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Comes of Age", in: Blokker/Muller, see note 38, 115 et seq.

ad hoc committee to investigate allegations, on the condition that the state concerned agrees, none has ever been appointed[45].

In the field of environmental law only the Montreal Protocol allows its Implementation Committee (10 states) to carry out on-site inspections in a state suspected of non-compliance — provided the latter consents[46].

c. Complaints Procedures

The term "complaints procedure" can be understood in two senses: Either as the right to initiate an institutional process of verification or investigation, as mentioned above e.g. in the case of the Montreal Protocol. Or as the right to initiate a process in which the alleged violation is adjudicated and the accused state bound to abide by the decision. Only procedures of the second type are mentioned in this section.

Instances of a right to complain do not exist outside the field of human rights protection. However, only the jurisdictions of the Inter-American Court of Human Rights and of the European Court of Human Rights fulfil the conditions just mentioned[47].

The right of states to complain under the Optional Protocol to the International Covenant on Civil and Political Rights is optional and requires reciprocity. An eventual report of the Human Rights Committee, which meets in private, may not make an authoritative statement on the violation, nor is it published. Individual complaints are only admissible if the state concerned has ratified the Optional Protocol. Resulting "views" of the Human Rights Committee may establish violations but are not formally binding, although they must be accepted *bona fide* by

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45 See M. Novak, "Country-Oriented Human Rights Protection by the UN Commission on Human Rights and its Sub-Commission", *NYIL* 22 (1991), 39 et seq., (53).

46 Cf. M. Koskenniemi, "Breach of a Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", *Yearbook of International Environmental Law* 3 (1992), 123 et seq.; and W. Lang, "L'Enquête et l'inspection", in: C. Imperiali (ed.), *L'effectivité du droit international de l'environnement; contrôle de la mise en œuvre des conventions internationales*, 1998, 137–145, (143).

47 Cf. A.G. Mower Jr., *Regional Human Rights: A Comparative Study of the West-European and Inter-American Systems*, 1991.

the respective state and implemented in their essence — which is habitually done[48].

d. (Limited) Non-Violent Sanctions

In the relatively few instances which provide for sanctions in case of persistent non-compliance with treaty obligations or non-cooperation in a verification procedure, publication of an otherwise confidential report of the findings is nearly always the only available means. This sanction supposes thus that the state concerned will wish to avoid publication and possible embarrassment. Or, if publication should take place, that it will stir up world public opinion enough to induce the state to mend its ways. As has been argued above, this sanction works only under certain circumstances.

Only the Montreal Protocol goes a step further. That is made possible by the Protocol's provision for certain rights and privileges related to trade, transfer of technology and financial assistance in favour of contracting parties, and thus for incentives that may be withheld. The Implementation Committee, which monitors compliance on the basis of periodic reports by the parties, submits severe shortcomings to the Meeting of the Parties which may then issue warnings and suspend rights and privileges under the Protocol.

3. Conclusions

The foregoing short survey shows conclusively that, with one exception, the institutional mechanisms in the examined fields, whether of human rights law, environmental law or arms control and disarmament law, although they may indirectly encourage compliance, are not effective means for enforcing the *erga omnes* obligations deriving from these regimes.

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48 That is to no small degree due to the "Follow-Up Procedures" adopted by the Human Rights Committee in 1990; see K. Herndl, "Zur Frage des rechtlichen Status der Entscheidungen eines Staatengemeinschaftsorgans: die "views" des Menschenrechtsausschusses", in: K. Ginther et al. (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität*, Festschrift für K. Zemanek, 1994, 203 et seq., (217–218). Cf. in general Y.K. Tyagi, *The Law and Practice of the UN Human Rights Committee*, 1993.

This is not really surprising. In view of the limited powers which states are willing to grant to international institutions and of the feeble resources which they are eventually prepared to put at their disposal for enforcement measures, institutional law is necessarily concerned with prevention[49], not enforcement.

This confirms that the opinion of the ICJ, as expressed in the *Nicaragua Judgement*[50], "that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves", if taken literally and applied to all areas in which obligations *erga omnes* exist, would render them unenforceable. If the ICJ's conclusion was justified, then the whole idea of *erga omnes* obligations, to which the Court referred in a number of cases, would be but a *chimera*.

III. Individual Criminal Responsibility

1. The Evolution of the Concept

a. The Way to Nuremberg, Tokyo, and Other Prosecutions After World War II

There is — at least in one respect — reason for optimism. Starting from very special circumstances, namely the prevention of war crimes, the institutional enforcement of violations of *erga omnes* obligations in the humanitarian field has recently been significantly developed and includes today gross human rights violations when they are perpetrated in international or civil wars.

Already in the second half of the 19th century military manuals of several states prescribed that prisoners of war were answerable indi-

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49 See Sucharipa-Behrmann/Franck, see note 43; U. Kriebaum, "Prevention of Human Rights Violations", *Austrian Review of International and European Law* 2 (1997), 155 et seq.; and J. Vessey, "The Principle of Prevention in International Law", *Austrian Review of International and European Law* 3 (1998), 181 et seq.

50 Source in note 32.

vidually for war crimes against the captor's army or population for which they had not been punished by their own authorities[51].

The Peace Treaties after World War I provided for the surrender of persons charged with war crimes to the Allied and Associated Powers upon request. Germany and the other defeated states were made to *recognize* in the treaties the right of the Powers to prosecute them, which implies that the right was not newly created but, at least in the opinion of the Allies, already existing[52].

It seems therefore reasonable to assume that on the eve of World War II individual criminal responsibility for serious violations of the laws of war was firmly established in international law. Jurisdiction rested, however, with the culprit's own state and, in the case of a prisoner of war, with the detaining power. It was exercised by domestic tribunals[53].

Nuremberg and Tokyo were an exception to this pattern. Not only were they *international* Tribunals, but their Statutes added two more crimes to the list: crimes against peace and crimes against humanity[54], the latter being evidence of a beginning trend to include fundamental human rights in the protection. Furthermore, they extended individual criminal responsibility to the political and military leadership of a country should they have ordered the crimes to be committed. In addition to these international prosecutions, German and Japanese prisoners of war were tried for war crimes by military tribunals of individual Allied Powers. The events after World War II demonstrate anew the weakness of a system of individual criminal responsibility which has to rely for its implementation primarily on domestic tribunals: Most states are reluctant to prosecute their nationals[55]. Thus, neither the bombing of Dresden nor the bombing of Hiroshima and Nagasaki have been the subject of judicial examination.

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51 See A. Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten*, 1920, 16–19.

52 Ibid., 84–87.

53 Cf. G.A. Finch, "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes", *AJIL* 14 (1920), 218–223.

54 Cf. J. Graven, "Les crimes contre l'humanité", *RdC* 76 (1950), 427 et seq.

55 Cf. A. Marschik, "The Politics of Prosecution: European National Approaches to War Crimes", in: T.L.H. McCormack/G.J. Simpson (eds), *The Law of War Crimes*, 1997, 65 et seq., (100).

b. The Geneva Conventions of 1949 and their Additional Protocols

The next step in the development of the law were the Four Geneva Conventions of 1949 and, later, the two Additional Protocols of 1977. Before these instruments came into force, the prosecution of war crimes had been a *right* of every state. Now, each of the Four Conventions and Protocol I enumerates "grave breaches"[56] of their rules, such as wilful killing, torture, unlawful transfer or deportation, taking of hostages, which the parties to the Conventions undertake to make punishable under their domestic laws. They are further *obliged* to prosecute such crimes regardless of the nationality of the perpetrator[57], which means prisoners of war as well as their own soldiers. But jurisdiction remains with domestic tribunals, therefore prosecution of a state's own military personnel is rare; My Lai[58] was an exception, due to the pressure of American public opinion.

2. The Influence of the International Criminal Tribunals Established by the Security Council

a. Jurisdictional Innovation

Responding to specific situations, the Security Council has established two international tribunals: with Resolution 827 (1993) of 25 May 1993 the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991"[59] (henceforth Yugoslavia Tribunal) and, upon request by the Government of Rwanda,

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56 Convention I, article 50; Convention II, article 51; Convention III, article 130; Convention IV, article 147; Protocol I, article 85, para. 3.

57 Convention I, article 49; Convention II, article 50; Convention III, article 129; Convention IV, article 146; Protocol I, article 85, para. 1. Cf. also C. Pilloud, "La protection pénale des conventions humanitaires internationales", *Rev. ICR* 35 (1953), 842 et seq.

58 See St. Paulson/J. Banta, "The Killings at My Lai: 'Grave Breaches' under the Geneva Conventions and the Question of Military Jurisdiction", *Harv. Int'l L. J.* 12 (1971), 345 et seq.

59 In S/RES/808 (1993)of 22 February 1993 the Security Council decided to establish the Tribunal and requested the Secretary-General to submit a draft statute, which he did in his Report Doc. S/25704 (reprinted in: *ILM* 32 (1993), 1191 et seq.) together with a commentary.

with Resolution 955 (1994) of 8 November 1994[60] the "International Tribunal for Rwanda". The controversial question whether the Security Council had the necessary powers under the Charter to establish such tribunals[61] is not dealt with in this context where it is irrelevant.

This was the first time since Nuremberg and Tokyo that international tribunals were given jurisdiction to prosecute war crimes and related crimes. However, the countries in whose territory the events had taken place were not subjugated as Germany and Japan had been. Hence, the Tribunals, particularly the Yugoslavia Tribunal, have no direct access to suspects. For this reason article 29 of the Statute of the Yugoslavia Tribunal establishes the duty of states to cooperate in investigations and to surrender suspects to the Tribunal upon request. The commentary[62] argues that "an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be an application of an enforcement measure under Chapter VII of the Charter". That formulation neatly bypasses the troublesome question whether the Security Council may delegate its powers, by stating it as a fact. Although "surrender and transfer" are not the same as "extradition", states which adhere to the rule of law had nevertheless some difficulty to incorporate the obligation into their domestic laws[63], especially as regards the eventual surrender of their own nationals.

b. The Subject-Matter Jurisdiction of the Tribunals

The Statute of the Yugoslavia Tribunal is rather conservative when indicating genocide (article 4), violations of the laws or customs of war (ar-

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60 Rwanda, a non-permanent member of the Security Council at the time, voted *against* the Resolution, because it did i.a. not agree with the limitation in time put on the Tribunal's jurisdiction, to prosecute only violations having occurred between 1 January and 31 December 1994.

61 For an overview of the problem and of the relevant literature see K. Zemanek, "Is the Security Council the Sole Judge of its Own Legality?", in: E Yakpo/T. Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui*, 1999, 629 et seq., particularly 637–640.

62 Source in note 59, paras 125 and 126.

63 See for Austria, R. Regner/A. Reinisch, "Zur Umsetzung der österreichischen Verpflichtungen gegenüber dem Jugoslawien Tribunal der Vereinten Nationen", *Österreichische Juristenzeitung* 50 (1995), 543 et seq.; and for the United Kingdom H. Fox, "The Obligations to Transfer of Criminal Jurisdiction to the UN Tribunal", *ICLQ* 46 (1997), 434–442.

ticle 3), and grave breaches of the Geneva Conventions of 1949 (article 2) as punishable crimes. It is, however, more enterprising in respect of the crimes against humanity (article 5), and that in two ways. First, it penalizes these crimes when directed against the civilian population irrespective of whether the acts are committed in an international or an internal armed conflict. Secondly, by listing as punishable crimes murder, extermination, enslavement, deportation, imprisonment, torture, rape, and persecution on political, racial and religious grounds, and other inhumane acts. It makes explicit that "crimes against humanity" is, in fact, another term for gross violations of human rights.

The Statute of the Rwanda Tribunal follows this pattern when it identifies genocide (article 2) and crimes against humanity (article 3) as punishable crimes. Since the Tribunal was established to adjudicate crimes in a *civil* war, war crimes are missing from the list. However, the provision in article 4, which subjects serious violations of article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II of 1977[64] to individual criminal responsibility, had an immense influence on the development of the law since it gives an unequivocal answer to pre-existing doubts about the applicability of the "grave breaches" provisions of the Geneva Conventions to situations covered by common article 3.

The factual situation with which the Yugoslavia Tribunal had to deal was more complex. As the Appeals Chamber found in a landmark decision in *The Prosecutor v. Dusko Tadic a/k/a "Dule"*[65]: "... when the Statute was drafted, the conflict in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof."[66] There was, therefore, a strong component of a non-international armed conflict involved, but the Statute contained no provision comparable to article 4 of the Statute of the Rwanda Tribunal.

Looking for a solution, the Appeals Chamber had recourse to international custom. It held that "a number of rules and principles govern-

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64 Rwanda is a party to all of them.

65 Case No. IT-94-1-AR 72 of 2 October 1995. For an evaluation see M. Sassòli, "La première décision de la Chambre d'appel du Tribunal Pénal International pour l'ex-Yougoslavie: Tadic (compétence)", *RGDIP* 100 (1996), 101 et seq.

66 Judgement, para. 7.

ing international armed conflicts have gradually been extended to internal conflicts", but observed cautiously that "this extension has not taken place in the form of a full and mechanical transplant of these rules to internal conflicts; rather, the general essence of these rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[67] In respect of common article 3 it held that "customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."[68]

If one reads these two passages together, one realizes that the Tribunal had made a courageous decision. Without invoking any serious evidence, it had discovered customary law, first to supplement the law applicable to non-international armed conflicts[69], and then for subjecting violations of it and of common article 3 to individual criminal responsibility. It does not seem farfetched to imagine that the adoption of the Statute of the Rwanda Tribunal on 8 November 1994 had an influence on the decision of the Appeals Chamber on 20 October 1995. The latter provoked a lively academic debate[70] in which defenders and critics were taking part. Finally, however, as will be shown below, the law as stated by the Appeals Chamber was incorporated into the Statute of the International Criminal Court.

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67 Ibid., paras 125 and 126.

68 Ibid., para. 134.

69 It followed therein F. Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts", in: A Cassese (ed.), *Current Problems of International Law*, 1975, 267 et seq.

70 Cf. e.g. Ch. Meindersma, "Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws and Customs of War Under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia", *NILR* 42 (1995), 375 et seq.; Th. Meron, "International Criminalization of Internal Atrocities", *AJIL* 89 (1995), 554 et seq.; id., "The Continuing Role of Custom in the Formation of International Humanitarian Law", *AJIL* 90 (1996), 238–249; and Sassòli, see note 65, 117–118.

3. The International Criminal Court (ICC)

a. Jurisdiction and its Implementation

The Statute of the International Criminal Court[71], which was adopted in Rome on 17 July 1998 by 120 against 7 votes (including China, India, Israel and the United States) and 21 abstentions, is a multilateral treaty. Consequently, it applies only to those states which ratify it or adhere to it, or to states which accept the jurisdiction *ad hoc* (article 12 para. 3). A special role is reserved for the Security Council: Acting under Chapter VII, it may refer "a situation in which one or more of such crimes appear to have been committed ...", to the prosecutor, irrespective of whether the state or states involved are parties to the Statute or have accepted the jurisdiction of the Court *ad hoc* (article 13 lit.(b)). By invoking Chapter VII it may also request the Court to defer an investigation or prosecution for a period of 12 months, a request that is renewable (article 16). This power to interfere with the functions of the Court dissatisfied some states which expressed that in their vote (e.g. India).

Since the Statute is a multilateral treaty its success and the effective functioning of the Court depend on the number of states which will ratify it or adhere to it; more particularly, on the ratification by states whose policies suggest a potential for crimes within the jurisdiction of the ICC. An equally important factor will be the way in which the Security Council will make use of its considerable powers.

A further consequence of the Statute's character as a treaty is the necessity of provisions concerning the cooperation of states with the Court (arts 86 and 87), specifically the surrender and transfer of persons sought by the Court (article 89). While these are generally duties of the States Parties only, the Court may invite any state to provide assistance on the basis of an *ad hoc* arrangement (article 87 para. 5). If a State Party fails to comply with a request, the Court may make a finding to that effect and refer the matter to the Assembly of the States Parties or to the Security Council if it had referred the situation to the Court (article 87 para. 7). Except in the latter case, no community procedure to enforce the obligations under the Statute is provided. Thus, it would be the law of state responsibility which would come into play in case of default.

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[71] Doc. A/CONF.183/9; source: http://www.un.org/index.htm
Cf. also A. Zimmermann, "The Creation of a Permanent International Criminal Court", *Max Planck UNYB* 2 (1998), 169 et seq.

b. Subject-Matter Jurisdiction

The subject-matter jurisdiction of the ICC is regulated in a rather complicated manner. Crimes within the jurisdiction of the Court are enumerated in article 5 of the Statute. They are: genocide; crimes against humanity; war crimes; crime of aggression. The crime of aggression is not defined in the Statute. A provision to that effect has yet to be adopted by the States Parties, either by making use of the amendment procedure (article 121) or during a review of the Statute (article 123). The eventual provision must be consistent with the relevant provisions of the Charter (article 5 para. 2). The apparent reasons for this *lacuna* are the same difficulties which troubled the definition of aggression by the General Assembly 25 years ago[72]: How to square it with the discretionary power of the Security Council under Article 39 of the Charter to determine the existence of an act of aggression. In the General Assembly's definition the problem was solved by a saving clause[73]. To repeat that in the present context would hardly satisfy the maxim *nullum crimen sine lege*.

The other three crimes are defined in considerable detail. Genocide in article 6, crimes against humanity in article 7, and, in even greater detail, war crimes in article 8. Nevertheless, "elements of crimes", which shall assist the Court in the application of the provisions defining crimes, will supplement the statutory provisions; they have to be adopted by a two thirds majority of the members of the Assembly of States Parties (article 9 para. 1). The Preparatory Commission is presently working on the "elements" of war crimes; it has already finished work on the "elements" of genocide.

In a noteworthy step the development of the law initiated by the two Tribunals established by the Security Council has been incorporated in the definition of war crimes in the Statute: article 8 para. 2 lit.(c) includes among "war crimes" serious violations of common article 3 of the Geneva Conventions of 1949, and in para. 2 lit.(e) "other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." Twelve separate crimes are specifically enumerated under this heading. The Statute confirms thus the appeals judgement in the

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72 Annex to A/RES/3314 (XXIX) of 14 December 1974.

73 Ibid., article 4: "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."

Tadic Case[74] which held that the "essence" of the rules applicable in international armed conflicts applied also in internal conflicts. Consequently infringements qualify as war crimes for which the perpetrators are individually responsible. The wide support for the Statute of the ICC, expressed in the affirmative votes for its adoption, suggests that the definition of crimes reflects a general *opinio juris*, albeit with a few dissenters.

4. Evaluation

The institutionalization of international criminal responsibility is a valuable addition to those institutional mechanisms which ensure compliance with *erga omnes* obligations but, because of its specificness, it improves the possibility of their enforcement only marginally. On the one hand, its jurisdiction is limited to international humanitarian law and includes other human rights violations only indirectly, *via* the crimes against humanity. On the other hand, and leaving aside the *ad hoc* jurisdiction of the Tribunals established by the Security Council, it makes the enforcement of *erga omnes* obligations subject to the ratification of a separate international instrument, the Statute of the ICC. The scope of its application will thus have important gaps, at least in the near future. It is, even potentially, no substitute of other, more comprehensive institutionalized procedures for the enforcement of *erga omnes* obligations. That steers the examination towards the question as to whether other means, outside the institutional framework, may be used for such enforcement.

IV. State Responsibility

1. The Present State of the ILC Draft

The ILC has worked since 1953[75], with several interruptions and new Special Rapporteurs, on the codification of the law of State responsibil-

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74 See text at notes 67 and 68.

75 A/RES/799 (VIII) of 7 December 1953.

ity. A draft was finally completed on first reading in 1996[76]. After that, a newly elected Commission and a new Special Rapporteur (James Crawford) began in 1998 with the second, and hopefully final, reading.

It should be recalled that the Commission distinguishes between "primary" rules of international law, i.e. rules which impose specific substantive obligations on states, and "secondary" rules which determine the legal consequences of a failure to fulfil the obligations established by primary rules[77]. The draft deals only with these secondary rules.

It is divided into three parts. Part One (35 articles) concerns "the origin of international responsibility", while Part Two (18 articles), on "the content, forms and degrees of international responsibility", regulates the consequences of responsibility (reparation, etc.) and countermeasures. Part Three on "implementation of international responsibility, and the settlement of disputes" treats in fact only the latter. The second reading of Part One is, more or less[78], finished; no fundamental changes have so far been made. Part Two is still in the course of second reading; some important changes have been made.

Two topics in the draft, as it now stands, are of importance to the subject under consideration: one is the question whether all states which are injured by the violation of "primary" obligations of an *erga omnes* character are entitled to demand fulfilment of the "secondary" obligations and, in case of non-compliance, to apply countermeasures. The second is the question whether one of the circumstances precluding wrongfulness, the state of necessity, legitimizes forceful humanitarian intervention. Both topics are examined more closely below.

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76 The articles as adopted on first reading are reproduced in the *Report of the International Law Commission on the Work of its 48th Sess.*(1996), UN GAOR 51st Sess., Doc. A/51/10, 125–151. The commentaries to the articles appear in successive Reports of the ILC, from 1973 onwards, according to the session in which they were adopted. For a short history see C. Annacker, "Part Two of the International Law Commission's Draft Articles on State Responsibility", *GYIL* 37 (1994), 206 et seq., (207–209).

77 See J. Combacau/D. Alland, "Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations", *NYIL* 16 (1985), 81 et seq.

78 The question whether "international crimes" should be maintained in the draft is to be decided in the context of Part Two.

2. Determining the Injured State

a. The Context of the Draft

In order to present the problem, a short survey of the context in which it arises in the draft is useful.

If a breach of a "primary" international obligation occurs, the following secondary obligations arise for the author state in respect of the injured state[79]:

Cessation is the obligation to end the violation of the primary norm. While it may be theoretically questionable whether this is a true secondary obligation, since the duty to perform the obligation under the primary norm is inherent in the latter, one must nevertheless concur with the Commission that, on systematic grounds, the provision has its place in the draft.

Reparation is the obligation to wipe out the effects of the violation of the "primary" obligation. It may take four different forms, which may be claimed singly or in combination, depending on the nature of the violation:

Restitution in kind requires the re-establishment of the situation as it existed before the wrongful act was committed.

Compensation may be claimed if and to the extent that *material* damage is not made good by restitution in kind.

Satisfaction is the appropriate form of reparation for immaterial damage, in particular moral damage, and takes mainly the form of an apology[80].

Where appropriate, the injured state may also request *assurances or guarantees of non-repetition* of the wrongful act.

If a demand for cessation and, eventually, for reparation in one or the other forms is rejected, because the alleged wrongdoer either denies the facts or the existence of the legal obligation which it is supposed to have violated, or disputes the allegation that its conduct constituted a violation of the asserted obligation, then an international dispute ex-

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79 Arts 41 to 46 of the draft; source see note 76.

80 On the insistence of the then Special Rapporteur the Commission included also punitive damages in the prescription (article 45, para. 2 lit.(b) and (c). For a critique see S. Wittich, "Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility", *Austrian Review of International and European Law* 3 (1998), 101 et seq.

ists[81] which, when unresolved, entitles the injured state to take countermeasures[82].

There are certain limits to countermeasures. Some norms may not be infringed, such as norms of *jus cogens*, in particular those prohibiting the threat or use of force, or norms protecting basic human rights or diplomatic and consular inviolability[83]. Moreover, countermeasures must be proportionate[84]. While this is a time-honoured principle[85], it is not easy to measure proportionality in practice[86]. That may be even more difficult when more than one state take countermeasures against the author of the same breach of an *erga omnes* obligation.

b. Injured States and States with a Legal Interest

If state responsibility is to be the *modus operandi* for the individual enforcement of *erga omnes* obligations, the definition of the injured state in the ILC draft becomes the essential point. If all partners of the universal system (*jus cogens*) or of a particular sub-system established by treaty (conventional regime) are designated as injured states, they dispose, collectively as well as individually, of the whole range of "secondary" rights which arise from the breach of any "primary" obligation which the system partners owe *erga omnes* under the system.

This would have been the consequence of the determination in article 40 as it was adopted on first reading[87]. The relevant part reads:

> "(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other

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81 As the ICJ stated in the *South West Africa Case* (Preliminary Objections), a dispute arises when "the claim of one party is positively opposed by the other": ICJ Reports 1962, 319 et seq., (328).

82 Arts 47 and 48 of the draft; source see note 76.

83 Article 50, ibid.

84 Article 49, ibid.

85 It was invoked and explained in the *Naulilaa Arbitration*, 1928; *Report of International Arbitral Awards*, Vol. 1, 1013 et seq., (1028, para. c/2).

86 See *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France*, 1978; *Report of International Arbitral Awards*, Vol. 18, 417 et seq., (443, para. 83): "... judging the 'proportionality' of countermeasures is not an easy task and can at best be accomplished by approximation."

87 Source see note 76.

> State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:
>
> .....
>
> (iii) the right has been created or is established for the protection of human rights and fundamental freedoms;
>
> (f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto."

The commentary to that article made it clear, that the quoted provisions refer to *erga omnes* obligations.

Fair as this solution appears to be, it is not really satisfactory. If one imagines a case in which a human rights violation has resulted in material damage, who is to claim reparation? Except in the case where the victim has the nationality of the claimant, no other state is *directly* affected. Should that entitle *all* other contracting parties of the respective human rights treaty to claim reparation of the material damage from the state which had violated its obligation? If restitution in kind is not possible and compensation is to take its place, would satisfying one claimant state extinguish the parallel claims of other contracting parties? What would be the relationship between the state whose claim has been satisfied and the person or persons who are the victims of the human rights violation, if they do not have the nationality of the claimant state?

These and many other doubts which could be added to the list tend to indicate that the proposed solution does not take the nature of *erga omnes* obligations sufficiently into account. As has been explained above, a convention establishing *erga omnes* obligations creates, as between the contracting states, the right of each of them to request fulfilment of their commitments by the others. Hence a violation of that commitment causes only immaterial, moral damage to the other contracting parties, for which the consequentially arising "secondary" rights are limited to requesting cessation, assurances or guarantees of non-repetition, and, where appropriate, satisfaction.

In order to make this difference explicit, it is suggested that instead of the uniform use of "injured State", a different term for designating the state or states affected by the violation of an *erga omnes* obligation should be introduced. The expression used by the ICJ in the *Barcelona Traction Case*, of "States can be held to have a legal interest in their [i.e.

substantive rights] protection"[88] might offer itself for that purpose. The second reading of the draft has not yet reached the relevant article, but it seems that the Special Rapporteur is leaning towards a similar solution.

However, there exists a second problem which the differentiation between "injured State" and "State with a legal interest" does not solve. That is the question of the proportionality of countermeasures. In his Second Report[89] the Special Rapporteur justly points out: "The Draft articles, however, contain no provision dealing with the possible consequences of many States taking countermeasures in response to a wrongful act ... It appears that proportionality under article 48 is judged on a bilateral basis, as between the injured State and the target State, so that there is no mechanism for assessing the overall proportionality of conduct taken by way of 'collective countermeasures'. This is, however, a broader consequence of the width of the definition of "injured State", and of the fact that all injured states are treated by article 40 in the same way, whether the internationally wrongful act specifically concerns them or whether they are reacting, as it were in the public interest, to a grave breach of international law or of human rights."[90]

The Special Rapporteur proposes to resolve the difficulty[91] but that is not easy. Since a truly collective organization of countermeasures will only happen sporadically, if at all, the only option would be a separate regime for countermeasures taken in response to the infringement of *erga omnes* obligations, probably by limiting the means that may be employed. But would that be appropriate in a case of systematic and massive violations of human rights? Be that as it may, the foregoing analysis leads to the submission that the law of state responsibility needs further development before it can be relied upon for the enforcement of *erga omnes* obligations.

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88 See quotation at note 26.

89 Doc. A/CN.4/498/Add.4 ,1999.

90 Ibid., para. 15.

91 Ibid., para. 33: "But these can be resolved in the framework of the consideration of Part 2, and in the case of "collective" responses to breaches of obligations *erga omnes*, which have to be addressed in any event, in the context of article 40 and the incidence of obligations *erga omnes*."

3. The State of Necessity

a. The Context of the Draft

Criminal as well as civil laws recognize that circumstances which make it either objectively impossible to fulfil an obligation or subjectively unavoidable to violate an obligation preclude either responsibility or wrongfulness. Since the ILC draft has eliminated fault from the constituent elements of an internationally wrongful act, it does not distinguish between responsibility and wrongfulness[92] and lists as "circumstances precluding wrongfulness": consent, compliance with peremptory norms, self-defence, countermeasures, *force majeure*, distress, and state of necessity[93].

It is the state of necessity which is of interest in the present context, because it has been invoked by some writers as justification of humanitarian intervention[94].

b. Necessity

The text of article 33 of the draft as adopted on first reading has been redrafted in order to take better account of *erga omnes* obligations. The former text had required that the act for which necessity was invoked was "the only means of safeguarding an essential interest of the State against a grave and imminent peril". Although the Special Rapporteur had not proposed a change in that formulation, the words "of the State" were nevertheless deleted during redrafting[95]. The new text suggests that necessity may be invoked by a state which is not *directly* affected, if it reacts against a violation of an *erga omnes* obligation which objec-

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92 However, the Special Rapporteur apparently intended to propose such a distinction (Second Report, Doc. A/CN.4/498/Add.2, paras 341–347; repeated in the oral presentation, in: Report of the International Law Commission on the Work of its 51st Sess., 1999, UN GAOR 54th Sess., Doc. A/54/10, paras. 302–403. The Commission, however, did not follow his suggestion (ibid., paras 406–409).

93 See the text of the articles adopted on second reading in Doc. A/CN.4/L.574 and Corr. 1, 2, 3.

94 See under, V. 2. a.

95 Cf. the Second Report of the Special Rapporteur (source in note 92), para. 290; and the Report of the ILC (source ibid.), paras 374, 379 and 383. The source for the new text quoted above and below is indicated in note 93.

tively causes a grave and imminent peril. Provided, however, that no force is used, as is indicated by the following part of article 33:

> "(2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) The international obligation in question arises from a peremptory norm of general international law;"

It was the commentary to that article as adopted on first reading which apparently gave rise to some misunderstandings concerning the extent to which the defence of necessity was precluded in respect of the prohibition of the use of force. Para. 23 of the commentary stated i.a.:

> "... the question might arise whether a state of necessity could be invoked to justify an act of the State not in conformity with an obligation of that kind *[jus cogens].* The Commission is referring in particular to certain actions by States in the territory of another State which, although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression ... The common feature of these cases is, first, the existence of a great and imminent danger ... to people — a danger which the territory of the foreign State is either the theater or the place of origin, and which the foreign State has a duty to avert by its own action, but which its unwillingness or inability to act allows to continue. Another common feature is the limited character of the actions in question, as regards both duration and the means employed, in keeping with the purpose, which is restricted to eliminate the perceived danger ... The problem is reduced to knowing whether the Charter, by Article 2 para. 4, is or is not intended to impose an obligation which cannot be avoided by invoking a state of necessity."[96]

It is evident that what the Commission had in mind at the time when it adopted the commentary were limited incursions like the events in Entebbe. However, it did not give an answer to the question it had raised; it simply remarked:

> "The Commission considered that it was not called upon to take a position on this question. The task of interpreting the provisions of the Charter devolves on other organs of the United Nations."[97]

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96 Report of the International Law Commission on the Work of its 32nd Sess., 1980, UN GAOR 35th Sess., Doc. A/35/10; commentary to article 33, para. 23.

97 Ibid., para. 24.

Whether it was intended or not, the commentary raised doubts about the absolute prohibition of the use of force and facilitated the academic arguments in favour of humanitarian intervention. As the present Special Rapporteur observed:

> "Thus it could be argued that article 33, while purporting not to take a position on the exception of humanitarian intervention, in fact does so, since such an exception cannot stand with the exclusion of obligations under peremptory norms. The commentary appears to suggest that this difficulty can be avoided by differentiating between the peremptory status of some aspects of the rules relating to the use of force (e.g., the prohibition of aggression) and the non-peremptory status of other aspects (e.g., the injunction against the use of force even when carried out for limited humanitarian purposes). By implication, therefore, necessity can excuse the wrongfulness of genuine humanitarian action, even if it involves the use of force, since such action does not, at any rate, violate a peremptory norm."[98]

Since the Kosovo intervention took place during the session of the ILC, the real-world events influenced the discussions. The Special Rapporteur had suggested in his Report:

> "This construction raises complex questions about the 'differentiated' character of peremptory norms which go well beyond the scope of the draft articles. For present purposes it seems enough to say that either modern State practice and *opinio juris* licenses humanitarian action abroad in certain limited circumstances, or they do not. If they do, then such action would appear to be lawful in those circumstances, and cannot be considered as violating the peremptory norm reflected in Article 2 (4) of the Charter. If they do not, there is no reason to treat them differently than any other aspect of the rules relating to the use of force. In either case, it seems than (*sic*) the question of humanitarian intervention abroad is not one which is regulated, primarily or at all, by article 33. For these reasons, it is suggested that the exception in article 33 for obligations of a peremptory character should be maintained."[99]

The Commission, alarmed by the danger of abusive reliance on the concept of humanitarian intervention, agreed with the suggestion of the

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98 Second Report on State Responsibility, 1999, Doc. A/CN.4/498/Add.2, para. 286.

99 Ibid., para. 287.

Special Rapporteur and requested that the point be made in the commentary, to ensure that the state of necessity was not improperly invoked. It is thus absolutely clear that in the opinion of the ILC the lawfulness or unlawfulness of humanitarian intervention has to be established by interpreting the primary norm in Article 2 para. 4 of the Charter and not by invoking the state of necessity.

V. Humanitarian Intervention

1. The Concept

a. An Academic Rediscovery

As has been shown, institutionalized community procedures are either insufficiently developed or inefficient in preventing or stopping infringements of *erga omnes* obligations, especially massive violations of human rights. This leads sometimes to particularly unpleasant situations, when media reporting of systematic and massive human rights violations puts governments under public pressure to take decisive action towards ending them, while the community mechanisms which they could use are either powerless or unwilling to act. This dilemma prompted some academics to rediscover the concept of humanitarian intervention, which was in great political favour throughout the 19th century and until World War I, sometimes as a cover for imperialistic designs.

It is therefore necessary to clarify the term before its present use can be studied. The term is fluid and used in political language for a broad range of phenomena. Non-violent forms include intercession, diplomatic representation, protests, economic pressure, embargoes. Military forms range from quasi-surgical incursions of short duration and limited purposes (e.g. Entebbe) to temporary invasions with large-scale, sustained military combat operations (e.g. Yugoslavia/Kosovo)[100]. The term was also borrowed to describe peace-keeping and peace-making operations (e.g. Congo 1960) of the United Nations[101]. Considering

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[100] Cf. Th. Schilling, "Zur Rechtfertigung der einseitigen gewaltsamen humanitären Intervention als Repressalie oder als Nothilfe", *AVR* 35 (1997), 430 et seq., (430–431).

[101] The most recent decisions of the Security Council involving violations of human rights concerned the security areas in Iraq (1991), Liberia (1992),

them all together under a single heading is misleading because different rules of international law apply to them. Leaving aside UN action, which will be considered later[102], it seems reasonable to distinguish between "humanitarian intercession" which would be anything below the level of force, and "humanitarian intervention". Only the latter is examined here.

Humanitarian intervention is thus understood as a forceful military incursion into foreign territory for the purpose of preventing or ending grave and systematic violations of human rights, perpetrated either against the entire population or against a minority.

b. Conditions

The concept of humanitarian intervention was mainly rediscovered during the last decades in the Western world, particularly by some legal schools in the United States. It is also part of the vocabulary of big powers. For many states, on the other hand, particularly for those in Africa and Latin America, humanitarian intervention, because of its previous misuse, is a spectre. And for many European legal scholars belief in the UN system it is an article of faith, after the experience of two World Wars on the continent. Views on the legality and even legitimacy of humanitarian intervention are, therefore, divided among states as well as among scholars[103]. To dispel any misgivings, the academic pro-

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Somalia (1992) and the Former Yugoslavia (1992). On the issue cf. Y. Kerbrat, *La référence au Chapitre VII de la Charte des Nations Unies dans les résolutions à caractère humanitaire du Conseil de Sécurité*, 1995; H. Gading, *Der Schutz grundlegender Menschenrechte durch militärische Maßnahmen des Sicherheitsrates — Das Ende staatlicher Souveränität?*, 1996; M. Lailach, *Die Wahrung des Weltfriedens und der internationalen Sicherheit als Aufgabe des Sicherheitsrates der Vereinten Nationen*, 1998, 183 et seq. Critical M. Koskenniemi, "The Police in the Temple: Order, Justice and the UN: A Dialectical View", *EJIL* 6 (1995), 325 et seq.

102 Below, Part VI. 2. a.

103 The contradiction inherent in the use of force for humanitarian purposes is exposed by A. Roberts, "Humanitarian War: Military Intervention and Human Rights", *Int'l Aff.* 69 (1993), 429 et seq.; and by Ch. Schreuer, "Comment", in: J. Delbrück (ed.), *The Future of International Law Enforcement. New Scenarios — New Law?*, 1993, 147–153, (150): "... military humanitarism is a contradiction in itself."

ponents of humanitarian intervention[104] propose to put certain limitations on the freedom of action of future intervenors. The following conditions seem to be common ground among them:

- There should be no (overriding) selfish interest involved on the side of the intervenor, so that the abuse of humanitarian intervention as an excuse for selfish political or economic motives would be excluded[105]. That request discloses the naivety of the authors as far as motives of states are concerned: No state acts solely out of moral indignation.
- The magnitude of the military involvement should be proportionate to the gravity of the human rights violations and should not cause more human loss and tragedy that it purports to prevent or eliminate. Moreover, the intervention should not, by itself, constitute a threat to international peace and security[106]. It is not disclosed how the strategic and tactical requirements of a large-scale military operation may be squared with these conditions, nor how a military invasion may avoid being regarded as a threat to international peace and security, especially when the target state defends itself.
- Recently the request has been added that the intervenor must painstakingly observe international humanitarian law[107].

Not all authors agree on the point in time when humanitarian intervention becomes legitimate in their view. The majority argues that since

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104 Even before NATO's intervention in Yugoslavia the legal literature on humanitarian intervention was so extensive that it is not possible to deal with each view in the present context. However, W.D. Verwey, "Humanitarian Intervention and International Law", *NILR* 32 (1985), 357 et seq., is a carefully researched summary of the different schools of thought in well balanced form; for this reason references below are to that paper, unless a very special attitude requires reference to the original work.
For a good overview of the trends in the United States and of their critics cf. particularly the contributions of Baxter, Brownlie, Falk, Fonteyne, Franck and Goldie in: R.B. Lillich (ed.), *Humanitarian Intervention and the Charter of the United Nations*, 1973; and D.J. Scheffer/R.N. Gardner/G.B. Helman, *Post-Gulf War Challenges of the UN Collective Security System: Three Views on the Issue of Humanitarian Intervention*, 1992.

105 Verwey, see above, 371.

106 Ibid., 418.

107 J.A. Frowein, "Der Schutz des Menschen ist zentral", *Neue Zürcher Zeitung*, Nr. 163 of 17/18 July 1999, 62.

humanitarian intervention is a protective and not a punitive measure, it may be undertaken to prevent grave violations, such as genocide, if they are imminent[108]. The judgement of the ICJ in the *Case concerning the Gabčíkovo–Nagymaros Project*[109], which addresses the same basic problem, although in the context of environmental protection, lends support to that proposition — provided the intervention is otherwise legal.

2. Its Justification

a. Article 2 para. 4 of the Charter

The legality of a forceful humanitarian intervention by individual states without a mandate of the Security Council depends, as the discussion in the ILC, referred to above[110], indicates, on the interpretation of Article 2 para. 4 of the Charter[111]. The state of necessity, on which some writers[112] rely as a justification, is irrelevant in the context since it may not be invoked against a rule of *jus cogens*[113] which the prohibition of the use of force undoubtedly is.

The advocates of the legality of humanitarian intervention interpret Article 2 para. 4 restrictively. Their main argument is that such intervention was not directed against the territorial integrity or political independence of the target state. They argue further that humanitarian intervention was not inconsistent with the purposes of the United Nations since the protection of human rights is also one of the main purposes, on the same footing with the maintenance of international peace

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108 Verwey, see note 104, 370.

109 Hungary/Slovakia, ICJ Reports 1997, 7 et seq., (42, para. 54): "That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable."

110 See above, Part IV. 3. b.

111 For the following summary cf. Verwey, see note 104, 378–398.

112 E.g. Verwey, see note 104, 417–418; or, implicitly, Th. Franck, "Fairness in the International Legal and Institutional System", General Course in Public International Law, *RdC* 240 (1993), 23 et seq., (256–257). Critically Schilling, see note 100, 438–444.

113 See above, Part IV. 3. b.

and security. In a concrete situation the latter must be weighted against other main purposes, like "justice" (Article 1 para. 1) or "respect for human rights" (Article 1 para. 3). It is interesting to note that during the decolonization period states and authors from the non-aligned group also argued that the purpose of "peace" was not superior to the purpose of "justice".

Some defenders of humanitarian intervention refer also to the inefficiency of the United Nations: Since the Security Council made no or only insufficient use of its powers under the Charter to protect human rights, the rights of states under traditional customary international law, including the right to intervene for humanitarian purposes, were restored.

The critics rely on an extensive interpretation of Article 2 para. 4 and reject these arguments. They maintain that the expression "territorial integrity" in Article 2 para. 4 included the *inviolability* of the territory: The drafting history of the provision proved that no limitation of the comprehensive prohibition of the use of force was intended by the drafters. The reference to the "other purposes of the United Nations" would, moreover, close any existing gap. The maintenance of international peace and security was *the main* purpose of the United Nations and for the sake of that purpose "justice" must sometimes give way. In sum, the letter and spirit of the Charter prohibited the individual use of force independently of the motive, except in self-defence.

Nor could the claimed inefficiency of the United Nations be a justification for humanitarian intervention. The ICJ had already held in the *Corfu Channel Case* in 1949, that a right to forceful intervention had no place in international law, "whatever be the present defects in international organization"[114].

On balance, and considering the object and purpose of the system of the United Nations, the arguments in favour of an extensive interpretation of Article 2 para. 4 of the Charter are more persuasive than those proposing a restrictive construction — at least as long as it cannot be convincingly demonstrated that emerging customary international law had modified the respective provision.

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[114] ICJ Reports 1949, 4 et seq., (35).

b. Moral Philosophy

It should by now be obvious that the legal debate on the interpretation of Article 2 para. 4 of the Charter conceals a underlying difference of values and interests.

As far as interests are concerned, it is not surprising that mainly big powers, like the United States or, formerly, the Soviet Union, defend the right to intervene in foreign states under certain circumstances, and that authors from these states are prominent in the defence of its legality. After all, great powers do have the necessary means and, according to Talleyrand's definition, universal interests.

The disparity of values is a more complex problem. The Charter provides no procedure for and does not indicate how conflicts between different purposes enunciated in Arts 1 and 2 of the Charter are to be resolved. Whether peace and justice, or sovereignty and human rights are equal values, or whether one should prevail over the other, cannot be answered on the basis of existing positive law.

This is why some defenders of humanitarian intervention have recourse to pre-positive moral systems in support of their proposition[115]. This way of arguing has two weaknesses: First, having recourse to morality makes it difficult to explain why comparable situations are treated differently, humanitarian intervention taking place in some, but not in others (e.g. in Turkey protecting the Kurds, or in Tibet and Chechnya). Secondly, moral imperatives do not invalidate rules of law, however much an actor may feel justified by the former to disregard the latter, unless they develop into a general *opinio juris* and are confirmed by state practice, a proposition that will be examined below.

c. Was the Law of the Charter Changed?

In its judgement in the *Nicaragua Case* the ICJ held that the prohibition of the use of force had been transformed from a Charter obligation into an obligation under customary international law[116]. If that is the case, the customary formation of an exception of humanitarian intervention or, at least, of the exclusion of wrongfulness, is possible, if the modification fulfils the conditions of *jus cogens*, i.e. it is "a subsequent

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[115] See e.g. F.R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 1988; probably the most stringently argued thesis of this kind.

[116] Source in note 32, paras 181 and 190.

norm of general international law having the same character"[117]. The maxim *ex injuria jus non oritur* would not apply in this case since the first act in the process of modifying customary international law will always appear as a violation of the *existing* norm. If, however, other states accept the new conduct, either by emulation or connivance, the originally illegal act becomes the origin of new custom.

Since 1945 individual states or groups of states have intervened militarily in other states on a number of occasions and under various pretexts, sometimes by claiming humanitarian purposes. Without attempting completeness, the following targets may be mentioned: Hungary (Warsaw Pact, 1956), Congo (Belgium, 1960), Dominican Republic (USA, 1965), CSSR (Warsaw Pact, 1968), East Pakistan (India, 1971), East Timor (Indonesia, 1975), Angola (South Africa, 1975), Cambodia/ Kampuchea (Vietnam, 1979), Uganda (Tanzania, 1979), Central African Republic (France, 1979), Grenada (USA and members of the Organization of East-Caribbean States, 1983), Panama (USA, 1989), Liberia (ECOWAS, 1990-1992).

Have these interventions and the responses thereto — none provoked Security Council measures under Chapter VII of the Charter against the intervenor — changed the law? The evidence is not yet convincing[118]. A recent survey by F.K. Abiew[119] comes to contradictory conclusions. On the one hand, the author claims that "[t]he advent of the UN Charter suggests that the customary institution of humanitarian intervention still exists, and is not inconsistent with the purposes of the UN. Thus, in the event of failure of collective action under the Charter, there is a revival of forcible self-help measures to protect human rights. This is buttressed by the doctrinal writing."[120]. It is not clear whether this is intended as a statement of fact or one of law, because the author admits, on the other hand: "It is apparent that although support for humanitarian intervention is gaining currency, there are still various actors opposed to its use. In order to get closer to an

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117 Article 53 of the *Vienna Convention on the Law of Treaties.*

118 See Roberts, see note 103, 448. The *UK Foreign and Commonwealth Office Foreign Policy Document* No. 148, reprinted in: *BYIL* 57 (1986), 614 et seq., came to the conclusion that "the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention ...".

119 F. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 1999.

120 Ibid., 132; see also 222 and 246.

international consensus, a clearer articulation of principle is necessary to further enhance the legitimacy of humanitarian intervention."[121] This latter statement argues against a modification of the norm of *jus cogens* concerning the use of force having taken place, since that requires acceptance by the international community *as a whole*.

This makes it necessary to enquire whether NATO's intervention in Yugoslavia has finally dipped the balance and changed the law. Before that question can be answered, one has to settle the preliminary question whether the operation was in fact a humanitarian intervention[122].

The operation was not officially labelled a humanitarian intervention, but its presentation in the media implied it tacitly. And it had, indeed, some features of a humanitarian intervention, yet it failed to fulfil conditions which the academic proponents had considered essential[123].

If it is the aim of humanitarian intervention to prevent or stop atrocities, then the manner in which the operation was undertaken did not achieve this. The persecution of ethnic Albanians increased during the intervention and lasted for six weeks[124]. It seems an inevitable conclusion that with the means which states are *in fact* prepared to use in such cases and the manner in which they want them used ("no loss of soldiers"), the conceptive aim of humanitarian intervention cannot be achieved under similar circumstances.

Although the interests involved may not have been "overridingly selfish", interests there were, even if they were not in the narrow sense "selfish". The danger of the conflict spilling over to neighbouring states and the need to prevent "Greater Serbian" ambitions to destabilize the whole Balkans were presumably as relevant as the suffering of the ethnic Albanians.

Proportionality of means is difficult to assess. Much of the military action seems to have been less designed to aid the victims directly than

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121 Ibid., 256.

122 It provoked a lively discussion among scholars which is too extensive to be documented in full. Cf. e.g. B. Simma, "NATO, the UN and the Use of Force — Legal Aspects"; A Cassese, "Ex injuria jus oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?"; and K. Ambros, "Comment", all in: *EJIL* 10 (1999), No.1.

123 See above, Part V.1.b.

124 Cf. Ch. Schreuer, "Is there a Legal Basis for the NATO Intervention in Kosovo?", *International Law Forum du droit international* 1 (1999), 151–154, (153).

to put pressure on the leadership and population of Serbia[125]. Without confusing cause and effect, it is nevertheless true that the suffering of the ethnic Albanians increased during the operation and new suffering was inflicted on the population of Yugoslavia (Serbia) through the bombardments.

As far as the "painstaking observance of international humanitarian law" is concerned, it may be doubted that the choice of some targets and the use of some weapons conformed to that requirement[126]. Attacking installations which supply the civilian population with water or electricity, destroying bridges over the Danube far away from Kosovo, are actions which are causing doubts.

In conclusion it is submitted that the intervention of NATO in Yugoslavia did not conform to the model which the academic supporters of humanitarian intervention have put forward as legitimate. It has thus not contributed to forming a customary exception to the prohibition of the use of force in favour of humanitarian intervention. On the contrary, it raises the question whether the idea of humanitarian intervention should be maintained in the light of the experience, even as an academic proposition.

VI. Perspective of the Future

1. A Conflict of Laws Regulation

a. The Lack of Consensus on the Hierarchy of Basic Values

Norms with an *erga omnes* character do not have the purpose of safeguarding rights and interests of one state *vis-à-vis* another. They are the expression of the international community's concern with basic values that underlie the international system, or of the intention of a community established by a treaty to realize a programme based on the members' common values or interests. When two or more norms of this character apply in a given situation and the conduct required by one contradicts the other, a conceptual conflict arises. This is particularly true when a value underlying traditional international law, like sover-

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125 Ibid.

126 See text at notes 6 and 107.

eignty, conflicts with a value underlying a more recent addition to that body of law[127].

Non-intervention and the protection of human rights are a well-known instance of such a conflict[128]. For decades the United Nations have been the forum of acrimonious debate on which of the two was to have precedence over the other. Among the Member States of the OSCE (formerly CSCE) the issue was resolved when the Moscow Meeting of the Conference on the Human Dimension recognized in 1991 that compliance with the obligations which they had accepted in this field "was not an exclusive matter of the State concerned"[129]. But on the global level the "Vienna Declaration" of the World Conference on Human Rights (1993) admits only by implication that compliance with human rights obligations is a matter of international concern. Objectively one may say that while it is no longer a generally shared view that compliance with human rights obligations is a matter exclusively within the domestic jurisdiction of every state, there exists, on the other hand, probably no consensus within the international community *as a whole* in this sense, or on the relation between human rights and sovereignty or peace in general[130].

There are other examples of such conflicts, for instance between the *uti possidetis juris* principle[131] and the right to self-determination and,

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127 For an interesting discussion of the dilemma in respect of humanitarian intervention see H. McCoubrey/N.D. White, *International Organizations and Civil Wars*, 1955, 14–15, who see a possible justification of humanitarian intervention by force, which objectively violates the *jus cogens* norm banning the use of force, in the breach of the other peremptory norm of international law prohibiting genocide. But they also argue strongly that "humanitarian intervention cannot be justified within the terms of the UN Charter, except as collective right authorized by the Security Council",15.

128 Cf. U. Beyerlin, "Menschenrechte und Intervention", in: B. Simma/E. Blenk-Knocke (eds), *Zwischen Intervention und Zusammenarbeit*, 1979, 157 et seq.; and the Resolution of the Institut de droit International on "The Protection of Human Rights and the Principle of Non-intervention", *Annuaire de l'Institut de droit international* 63-II (1990), 338–345.

129 See S. Pöllinger, *Der KSZE/OSZE Prozess*, Laxenburger Internationale Studien 12,1998, 110.

130 Cf. V. Dimitrijevic, "Human Rights and Peace", in: J. Symonides (ed.), *Human Rights: New Dimensions and Challenges*, 1998, 47 et seq.

131 Cf. S. Torres Bernardez, "The 'Uti Possidetis Juris Principle' in Historical Perspective", in: Ginther, see note 48, 417 et seq.; and E.K.M. Yakpo, "The

what is perhaps even more disturbing, these conflicts invade positive law when its rules are the expression of such values. Thus, diplomatic immunity from the jurisdiction of the receiving state, as formulated in article 31 para. 1 of the *Vienna Convention on Diplomatic Relations*, conflicts with the human right of equality before courts and tribunals and with the human right to have a legal claim judged, both of which are guaranteed by the Universal Declaration (arts 7, 8 and 10 as well as by the UN Covenant on Civil and Political Rights (arts 14 para. 1 and 17 para. 2)[132].

b. The Need for a Conflict of Norms Regime

Up to now, new rules which are created in the course of developing international law are simply added to its body even if there exist doubts about their conformity with already existing rules, in the pious hope that concordance will pragmatically evolve in the course of time. Occasionally this pragmatism is rewarded when judges or other decision-makers express a preference in the guise of interpretation. The ICJ, for instance, stated in its Advisory Opinion on *Certain Expenses of the United Nations*: "The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition"[133]. This statement stands as a judicial pronouncement[134], but is misleading in its generality. It gives the impression of having been reached by rational reasoning. In fact, however, it is the result of a value judgement made in a specific situation. The Court's choice, to give preference to peace over other purposes of the United Nations, is not necessarily generally shared or applicable in all circumstances.

This shows clearly what would be needed: A rational, legal procedure in the form of a conflict of values/rules regime by which priority

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African Concept of *uti possidetis* — Need for Change?", in: Yakpo/Boumedra, see note 61, 271 et seq.

132 For another, but similar example see I. Seidl-Hohenveldern, "Functional Immunity of International Organizations and Human Rights", in: W. Benedek et al. (eds), *Development and Developing International and European Law*, Essays in Honour of K. Ginther, 1999, 137–149.

133 ICJ Reports 1962, 151 et seq., (168).

134 Approving M. Bedjaoui, "On the Efficacy of International Organizations: Some Variations on an Inexhaustible Theme ...", in: Blokker/Muller, see note 38, 7 et seq.

could be determined without recourse to intuitive interpretation. It should permit an objective determination of the priority in a given group of values or between the norms derived from them; in other words: which of them should prevail in a given situation. That need is even greater in regard to the conflict of rules of positive international law. We witness an ever growing application of such rules by domestic courts and tribunals[135] and their judges are not always familiar with the particularity of international law; they need firmer guidance than they receive today if a relatively uniform application of international law is wanted. Otherwise, this trend will fracture international law even further than is already the case, into 190 or so "international laws as applied by ..."

2. Improving Community Action

a. Reforming the Security Council

It is a complete misreading of the actual situation to suppose that an increase in the membership of the Security Council and the nomination of additional permanent members would make the Council more operational or bring about a change in its attitude towards enforcing the protection of human rights or of other *erga omnes* obligations, for instance in the field of environmental protection. It is the nature of the powers vested in the Security Council and the manner in which the Charter regulates their use which causes the problem; the Council's composition is of secondary concern.

The Security Council is a *political* organ, a fact which is often ignored. It *may* enforce but is not obliged to do so. Experience shows that it acts only when it is in the collective interest of its members. If such a collective interest does not exist spontaneously, only one permanent member, the United States, may in the current situation rally support for its own interest or what it perceives as community interest, and build up a corresponding consensus among the other members — although it sometimes fails. As the Secretary-General of the United Na-

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135 Cf. J.A. Frowein, "The Implementation and Promotion of International Law Through National Courts", in: *International Law as a Language For International Relations*, see note 3, 85 et seq. and Th. Franck/G.H. Fox (eds), *International Law Decisions in National Courts*, 1996.

tions, Kofi Annan, stated in his Annual Report on the Work of the Organization in 1999:

> "The past decade has been a period of tension and difficulty for the United Nations as it has sought to fulfil its collective security mandate. Earlier this year, the Security Council was precluded from intervening in the Kosovo crisis by profound disagreement between Council members over whether such an intervention was legitimate. Differences within the Council reflected the lack of consensus in the wider international community. Defenders of traditional interpretations of international law stressed the inviolability of State sovereignty; others stressed the moral imperative to act forcefully in the face of gross violations of human rights. The moral rights and wrongs of this complex and contentious issue will be the subject of debate for years to come, but what is clear is that enforcement actions without Security Council authorization threaten the very core of the international security system founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis for the use of force."[136]

Although the members of the Security Council are bound, like all other members of the United Nations, by Article 56 of the Charter "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55", which include "universal respect for, and observance of, human rights and fundamental freedoms"(Article 55 lit.(c)), no remedy exists if they do not observe that obligation in their decision-making in the Council.

In a few recent instances the Council adopted measures against violations of human rights[137]. The security zones in Iraq (1991), Liberia (1992), Somalia (1992) and Bosnia (1992) are examples thereof. But the pattern of decisions is inconsistent, and massive human rights violations are only occasionally considered as constituting *per se* a threat to international peace, without necessarily requiring a danger to the security of other states[138]. No consensus has yet emerged on the questions why

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136 *Preventing War and Disaster. A Growing Global Challenge*, 1999, para. 66.

137 See the literature cited in note 101.

138 Cf. H. Freudenschuss, "Article 39 of the Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council", *Austrian J. Publ. Int. Law* 46 (1993), 1 et seq.

and when the United Nations should intervene in a civil war, either among states or in the academic community[139].

It does not seem that reforming the membership of the Council would affect these basic conditions. It would be delusive to expect an improvement of the record in the near future. Even if a reform were to happen, the Security Council's lack of means of enforcement — other than those which states will provide voluntarily, which they usually do only when their interests are affected — would leave it basically impotent. It is again the Secretary-General of the United Nations who put this succinctly:

> "Disagreements about sovereignty are not the only impediments to Security Council action in the face of complex humanitarian emergencies. Confronted by gross violations of human rights in Rwanda and elsewhere, the failure to intervene was driven more by the reluctance of Member States to pay the human and other costs of intervention, and by doubts that the use of force would be successful, than by concerns about sovereignty."[140]

b. Increasing the Supervisory Functions of Other Organs

As the survey of these functions[141] has shown, they are primarily directed towards prevention. Their development may, hopefully, reduce the probability of enforcement measures becoming necessary. It would thus be desirable that all conventions which establish *erga omnes* obligations would also establish supervisory organs and give them *adequate* powers to exercise supervision. Reporting systems alone, valuable as they may be under certain circumstances, will not suffice. Some element of verification should be added to reduce the temptation to fudge the reports. Yet, in view of the general unwillingness of states to accept verification in fields in which their own direct interests do not require it, as they do in the context of disarmament and arms reduction, chances for such an evolution in the near future must be considered slim.

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139 Cf. L. Fissler Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, 1993; and E. Mortimer, "Under What Circumstances Should the UN Intervene Militarily in a 'Domestic Crisis'?", in: International Peace Academy, *Peacemaking and Peacekeeping for the Next Century*, Report of the 25th Vienna Seminar, 1995, 33–34.

140 Kofi Annan, see note 136, para. 67.

141 Part II. 2.

Nor is there a realistic prospect of improved enforcement powers of international organs. This is not only due to the reluctance of states to submit to an independent evaluation of their compliance with international obligations, although they have voluntarily accepted them. More relevant is the fact that means of enforcement are only exceptionally available to international organs. The withdrawal of incentives provided for in the Montreal Protocol[142] is made possible by the existence of such incentives under the Protocol in the first place, a feature which is difficult to duplicate in other areas, such as human rights or humanitarian law. Yet the idea of including incentives, which can be withheld as sanction, should be considered for inclusion in future environmental protection treaties and for the eventual revision of existing ones.

3. Greater Use of Individual Enforcement?

a. Should States Be Encouraged to Make Use of Universal Criminal Jurisdiction?

The *Pinochet Case*[143] suggests still another mode in which *erga omnes* obligations, at least in the field of human rights law or humanitarian law, may be enforced. For the present purpose it is not necessary to enter into the discussion on whether the right to prosecute derives directly from international law, as in the case of war crimes under customary law[144], or requires implementing domestic law, enacted in consequence of an enabling rule of customary or conventional international law, as do most other *delicta juris gentium*[145]. Whether, e.g. piracy is an international crime, or is rather a matter of international concern as to which international law accepts the jurisdiction of all states, does not make an important difference, except in one respect: In the first case it may be argued that it is a *duty* to prosecute, whereas in the second case prosecution is a right or freedom, not an obligation.

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142 See above Part II. 2. d.

143 The final decision of the House of Lords can be found in the internet: http://www.lemonde.fr/actu/international/chili/pinochet/jugem2403/jugem1.htm

144 Cf. Marschik, see note 55.

145 See R. Wolfrum, "The Decentralized Prosecution of International Offences Through National Courts", in: Y. Dinstein/M. Tabory (eds), *War Crimes in International Law*, 1996, 233 et seq.

Surprisingly, however, few conventions establish such a duty; examples are: The Geneva Conventions of 1949 and Additional Protocol I[146], the Genocide Convention (arts IV and V), and the Convention Against Torture (arts 4 and 5).

If one follows the opinion of the *US Restatement* that "a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern"[147], which entails the jurisdiction to enforce such criminal laws through its courts[148], "recognition" of the concern by a multilateral treaty offers a clear-cut case but is not indispensable. "Universal concern" could also be expressed in other ways, for instance in a relevant *opinio juris*. It would thus become necessary to develop such an *opinio juris* in respect of grave violations of human rights or of environmental protection laws, perhaps with the help of relevant NGOs.

The *Pinochet Case* has yet another aspect, which is the immunity of Heads of State under international law in foreign countries[149]. The Lords, especially Lord Goff, distinguished nicely between immunity *ratione personae* of a serving Head of State and immunity *ratione materiae* which continues after he leaves office. The majority of the Lords, and this is best expressed by Lord Saville, found that — at least since the entry into force of the Torture Convention (26 June 1987) — an exception or qualification of the general rule of immunity *ratione materiae* exists in consequence of the Convention's language.

This tends to show that a general *opinio juris* permitting the exercise of universal jurisdiction in respect of grave violations of human rights, which derive from a convention that does not contain an explicit provision about the criminalization of its violations, would not permit prosecution abroad when the incriminated acts were committed or ordered by Heads of State or other officials with a claim to immunity *ratione materiae*. This argues in favour of not relying on the eventual development of custom. The right and duty to prosecute should be spelled out

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146 See above, Part III. 1. b.

147 *Restatement of the Law Third, The Foreign Relations Law of the United States*, 1987, §404.

148 Ibid., §423.

149 For the following see G. Handl, "The Pinochet Case, Foreign State Immunity and the Changing Constitution of the International Community", in: Benedek, see note 132, 59 et seq. Cf. also P.J.I.M. de Waart, "Pinochet: To Be or not to Be Immune", ibid., 185–199.

in future human rights conventions and should be an item in the eventual revision of existing ones.

b. Has Humanitarian Intervention a Future?

The foregoing study of humanitarian intervention confirmed the view that the law of the Charter has not changed, in spite of numerous transgressions. In other words: the use of force for humanitarian purposes, without authorization by the Security Council, remains highly controversial. Arguments against a restrictive interpretation of the prohibition of the use of force appear, on balance, to be more persuasive than those in favour of it.

Does that mean that military interventions by individual states, groups of states, or regional organizations, for humanitarian or other purposes, will not occur in the future? That does not appear likely; there are, rather, indications to the contrary.

The new Strategic Concept of NATO, approved by the Heads of State and Government in Washington on 24 April 1999[150] states i.a.:

> "31 ... NATO will seek, in cooperation with other organizations, to prevent conflict, or, should a crisis arise, to contribute to its effective management, consistent with international law, including through the possibility of conducting non-Article 5 crisis response operations".

In a similar vein the European Council concluded in December 1999 in Helsinki[151]:

> "26. In accordance with the principles of the Charter of the United Nations, the Union will make its contribution to international peace and security. The Union recognizes the primary responsibility of the Security Council of the United Nations for the maintenance of international security.
>
> 27. The European Council affirms its determination to put the Union in a position to take autonomous decisions ... for initiating and implementing EU-led military operations in reaction to international crises."

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150 Source http://www.nato.int/docu/pr/1999/p99-065e.htm

151 *Schlußfolgerungen des Vorsitzes*, Helsinki, 10 und 11 Dezember 1999; II. Gemeinsame Europäische Sicherheits- und Verteidigungspolitik. Translation by the author.

It is significant that the document refers to the "principles" of the UN Charter rather than to its provisions, and recognizes the "primary" responsibility of the Security Council, in a language reminiscent of the "Uniting for Peace" Resolution of the General Assembly of the United Nations.

A variety of arguments have been developed for buttressing this position. Sometimes it is argued that NATO, or the EU, could claim the status of a "regional arrangement" under Chapter VIII of the Charter. These arguments seem to overlook that according to Article 53 para. 1 of the Charter, enforcement actions by regional arrangements need the authorization of the Security Council, although it is not entirely clear whether that authorization may not eventually be expressed subsequently or even by implication[152]. Moreover, such enforcement actions may not be undertaken against a non-member, unless requested by the Security Council[153]. Yet, that will perhaps spark off the argument that "crisis response operations" in the form of "humanitarian intervention" are not "enforcement actions".

In a recent article in *NATO Review*[154] Ove Bring argues in favour of NATO's formulating a doctrine on humanitarian intervention. He stipulates a number of conditions for such intervention, which are nearly identical with the conditions that emerged from the academic discussion[155], except for two additions. Namely that "the Security Council must be unable or unwilling to stop the crimes against humanity" and that "the government of the state where the atrocities take place must be unable or unwilling to rectify the situation". He further recommends "using the 'Uniting for Peace' precedent to seek approval by the General Assembly as soon as possible; or the decision could be taken directly by a two-thirds majority in the General Assembly in accordance with the 'Uniting for Peace' procedure".

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152 See Ch. Walter, *Vereinte Nationen und Regionalorganisationen*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.124, 1995, 289 et seq.

153 Id., 310–317; cf. also J.A. Frowein, "Legal Consequences for International Law Enforcement in Case of Security Council Inaction", in: Delbrück, see note 103, 111 et seq., (122).

154 O. Bring, "Should NATO Take the Lead in Formulating a Doctrine on Humanitarian Intervention?", *NATO Review*, On-line Library, http://www.nato.int/docu/review/1999/9903-07.htm

155 See above, Part V.1.b. Bring agrees i.a. that the intervention must be "in accordance with international humanitarian law of armed conflict".

These are expressions of a growing unilateralism in international relations, typical signs of a hegemonial tendency. Presently, the international community, which was organized as a balance of power system in the Security Council, tends — after the decline of Russia — towards a hegemony by the United States which is, at least temporarily, supported by European NATO Members as junior partners. The new Russian doctrine of a multi-polar world (in fact a three-polar world, with Russia and China), is, for the time being, illusory. Unilateralism has a long-standing tradition in the United States[156] and the tendency has now, apparently, infected Europe. Thus, circumstances permitting, we must reckon with further interventions in the future — if and when they are in the interest of the intervenors. But, as the latest example demonstrates, they will be a far cry from the academic model of humanitarian intervention.

156 Expressed e.g. in the wide claim of extraterritorial jurisdiction.