The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?

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I. Introduction

The last years have been characterized by an intense debate on the role of the United Nations for the shaping of the international peace order. Probably never before in the history of this institution has world opinion been so divided between those who believe in the pivotal role of the United Nations for this task and those who have lost all hope of this or have even tried actively to sideline the organization.

While the Cold War had for decades reduced the activities of this institution to a minimum, providing at the same time a facile excuse for many its deficiencies, the thawing in East-West relations revealed new fault lines and introduced challenges which the United Nations were

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 10, 2006, p. 35-69.

manifestly unable to deal with. First the Kosovo conflict and afterwards the invasion of the Iraq begged the question whether power politics[1] was to supersede UN law. At the same time calls for intervention in cases of massive human rights violations grew ever louder.

It is against this background that the activities of the UN Secretary-General Kofi Annan directed at regaining a central role for the United Nations in international conflict prevention and settlement may be explained.[2] In September 2003 he announced before the General Assembly that the time for radical change had come.[3] Since fundamental decisions with far-reaching consequences were needed these could not be taken on the basis of political demands alone. Groundbreaking analysis by renowned authorities and bodies or by eminent persons were needed. While in the past the Secretary-General had himself exercised this role[4] this time it was different as he was no longer a neutral referee but a party himself[5] – at least, he could not take the first step.

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1 See on this issue Th.M. Franck, "Preemption, Prevention and Anticipatory Self-Defense: New Law Regulating Recourse to Force?", *Hastings Int'l & Comp. L. Rev.* 28 (2004), 425 et seq.

2 Of course, there was also the attempt by the Secretary-General to overcome criticism regarding allegations of personal mismanagement but this criticism may also not be unrelated to his position on the controversy between multilateralism and unilateralism in international relations.

3 This was the famous "fork in the road"-speech where he asked the governments to decide whether it was possible to continue on the basis agreed in 1945, or whether radical changes were needed. See under <http://www.un.org/News/Press/docs/sgsm891.doc.htm>. See also H. Corell, "Reforming the United Nations", *International Organizations Law Review* 2 (2005), 373 et seq. (374). Also in the time before the Secretary-General had made clear that this was a very important subject to him. See, for example, his Millennium Report address of 3 April 2000, to the General Assembly:
"We must protect vulnerable people by finding better ways to enforce humanitarian and human rights law, and to ensure that gross violations do not go unpunished. National sovereignty offers vital protection to small and weak States, but it should not be a shield for crimes against humanity." See under <http://www.un.org/millennium/sg/report/state.htm>.

4 See the ground-breaking report entitled *An Agenda for Peace*, Doc. A/47/277-S/24111 of 17 June 1992 presented by Boutros Boutros-Ghali, see under <www.un.org/documents/secretariat.htm>. See also the follow-up document, *An Agenda for Peace, Supplement,* Doc. A/50/60-S/1995/1 of 3 January 1995, see under <www.un.org/documents/secretariat.htm>.

5 See note 2.

In November 2003 the Secretary-General appointed a High-level Panel of eminent persons to assess current threats to international peace and security.[6] One year later, in December 2004, this High-level Panel on Threats, Challenges and Change as it was officially termed (HLP) presented its Report entitled *A more secure world: Our shared responsibility* (later on HLP Report).[7] On 21 March 2005 the Secretary-General presented his own Report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All* (later on Annan Report).[8] This Report drew heavily on the HLP Report. In a certain sense the HLP Report prepared the ground for a profound change of perspective. On this basis the Secretary-General could further develop some ideas and, at the same time, exercise moderation in the most contentious fields, as would be expected from the holder of such a prominent and important office.

The natural completion of this procedure should have been the adoption of a comprehensive reform resolution by the UN General Assembly in September 2005. Alas, the proponents of the reform had not reckoned with the states, still the true masters of international law development.[9] While the general public and in particular the media seemed to welcome the Annan Report favourably, the document had to undergo the grinding examination procedure of the state chancelleries and of the General Assembly's preparatory institutions themselves. A leading role in this process was exercised by its 59th President Jean Ping from Gabon who prepared various documents in the attempt to find a common consensus in the state community.[10]

The document resulting at the end of this process, the draft outcome document of the high-level plenary meeting of the Assembly in Sep-

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6 See on the following process also P. Hilpold, "Reforming the United Nations: New Proposals in a Long-lasting Endeavour", *NILR* 52 (2005), 389 et seq.

7 See *A more secure world: Our shared responsibility*, Report of the High-level Panel on Threats, Challenges and Change, Doc. A/59/565 of 2 December 2004.

8 Doc. A/59/2005 of 21 March 2005.

9 To be fair, it must, however, also be mentioned that the whole reform discussion was poorly planned and followed a chaotic path. See D.M. Malone, "Threats, Challenges, and Change: The Secretary-General's High-Level Panel", *ASIL* 99 (2005), 58 et seq. (60).

10 See N. Schrijver, "Editorial: UN Reform: A once-in-a-generation opportunity?", *International Organizations Law Review* 2 (2005), 271 et seq. (273).

tember (hereinafter: Ping Document)[11] was sort of a compromise on the smallest common denominator. When the Ping Document was finally transposed into the 2005 World Summit Outcome (hereinafter: Outcome Document)[12] it lost further substance.

This document is surely not devoid of suggestions and concrete proposals for reform[13] but it is doubtful whether it has still sufficient substance to serve as a sign for the right way to follow when the United Nations have come to the fork at the road. It has been said that the reform documents have been "emasculated."[14] This seems true, at first sight, in two senses. First of all, the reform agenda has lost both in scope and in depth. It is far less vigorous and daring than the HLP Report and the Annan Report have been. It is very probable that any future attempt to revitalize the reform discussion will not be based on the Outcome Document alone but will also refer back to the Reports issued by the HLP and by the Secretary-General.

But there is a second sense to the metaphor used above: the main theme of the original reform initiative, the attempt to re-write the provisions on the use of force, is no longer perceptible. The reform agenda has shifted towards safer grounds and the content appears to be, on a whole, almost trivial. As will be seen later on, this does not, however, mean a definite negative judgment on the reform, as triviality is perhaps to be preferred to a counter-productive approach where the solution found, well-intended as it may be, could even worsen an already critical situation. As will be shown, this is exactly the danger with central provisions on the use of force both in the HLP Report and in the Annan Report.[15] It is, therefore, short-sighted to blame the current unsatisfactory development of the reform discussion on the resistance by reform-opposing states defending their sovereign rights. It is rather the case

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11 Revised draft outcome document of the High-level Plenary Mtg of the General Assembly of September 2005 submitted by the President of the General Assembly, 8 June 2005, Doc. A/59/HLPM/CRP.1/Rev.1.

12 2005 World Summit Outcome, A/RES/60/1 of 16 September 2005.

13 Most prominent are the introduction of a Peacebuilding Commission (foreseen in para. 97 et seq. of the Outcome Document/ cf. also para. 261 et seq. of the HLP Report) and the transformation of the Commission on Human Rights into a Human Rights Council (see para. 157 et seq. of the Outcome Document/ cf. also para. 282 et seq. of the HLP Report).

14 Schrijver, see note 10, 273.

15 See extensively on this issue also P. Hilpold, "Die Vereinten Nationen und das Gewaltverbot", *Vereinte Nationen* 53 (2005), 81 et seq.

that the documents mentioned do not adequately reflect the achievements both in international law peace preservation and in the international academic discussion. Nonetheless, this reform discussion deserves, as a whole, to be applauded as it touches dangerous wounds in the international law system. The sheer identification of these problematic areas can be considered an important step forward. At the same time the solutions proposed need to be discussed openly: where they appear to be wrong they need to be confuted in order to open the way for new ideas. Where they encapsulate ideas that seem to be useful these concepts have to be explained and further developed in order to meet the standards of present international law discussion. Once this level of development is achieved, the resulting proposals are more likely to be suitable for transposition in hard law provisions.

II. The Recourse to Force and the Development of the Theory of Humanitarian Intervention

As a consequence of the Kosovo conflict, the common consent on the content of the law on the use of force has been shattered. The seventy-eight day bombing campaign by NATO against the Federal Republic of Yugoslavia (FRY) starting on 24 March 1999, destroyed not only the fire power of the Serb forces but it also disrupted some core traditional beliefs with regard to the interpretation of United Nations law.[16]

While previously the prohibition of the use of force according to Article 2 para. 4 of the UN Charter had been considered one of the few core international law rules to which every nation across all ideological and political barriers unconditionally subscribed (even though not al-

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[16] See L. Henkin, "Kosovo and the Law of 'Humanitarian Intervention'", *AJIL* 93 (1999), 824 et seq.; St. Wheatley, "The Foreign Affairs Select Committee Report on Kosovo: NATO Action and Humanitarian Intervention", *Journal of Conflict and Security Law* 5 (2000), 261 et seq.; Ch. Greenwood, "International Law and the NATO Intervention in Kosovo", *ICLQ* 49 (2000), 926 et seq.; I.F. Dekker, "Illegality and Legitimacy of Humanitarian Intervention: Synopsis of and Comments on a Dutch Report", *Journal of Conflict and Security Law* 6 (2001), 115 et seq.; N.J. Wheeler, "Legitimating Humanitarian Intervention: Principles and Procedures", *Melbourne Journal of International Law* 2 (2001), 550 et seq.; R. Zacklin, "Beyond Kosovo: The United Nations and Humanitarian Intervention", in: D. Freestone et al. (eds), *Contemporary Issues in International Law*, 2002, 219 et seq.

ways adhered), now it seemed possible to qualify this norm. An old concept, the so-called right to humanitarian intervention, resurfaced and its advocates tried hard to demonstrate that there was a direct line of development of this concept from the beginning to the present day.[17] There were two fundamental problems with this proposition: the right to humanitarian intervention had never been truly recognized in the pre-Charter era and afterwards it conflicted manifestly with the letter of Article 2 para. 4 of this document.

Prior to World War I, when there were no legal restrictions to go to war, moral or "humanitarian" justifications bore a certain relevance on political grounds.[18] In the concert of the European or the "civilized" nations such justifications were needed both to defend self-respect, the membership of the "club" which was ostensibly founded on religious and moral rules and to appease public opinion. One should not overlook the strong influence intellectuals and the bourgeoisie had on the forging of foreign policy in the leading European countries in the 19th

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17 For a comprehensive definition of such a position see, for example, F.R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2005.

18 See P. Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?", *EJIL* 12 (2001), 437 et seq. It must, however, also be mentioned that several contemporaneous writers considered these events as expression of a proper right to humanitarian intervention. See, for example, T.S. Woolsey, *Introduction to the Study of International Law*, 1875; A. Rougier, "La théorie de l'intervention d'humanité", *RGDIP* 17 (1910), 468 et seq. (489); A. Arntz, in: G. Rolin-Jaequemyns, "Note sur la théorie du droit d'intervention, à propos d'une lettre de M. le professeur Arntz", *Revue de droit international et de législation comparée* (1876), 675 and J.K. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, 1868, at para. 478. Others, like A. Zorn, *Grundzüge des Völkerrechts*, 1903, strictly excluded such a justification: "Unzulässig ist unter allen Umständen die Intervention nur aus Gründen der Humanität oder aus Kulturinteressen," ibid., 51. See also P. Pradier-Fodéré, *Traité de droit international public européen et américain*, 1885, para. 430: "[...] les actes d'inhumanité, quelque condamnables qu'ils soient, tant qu'ils ne portent aucune menace aux droits des autres Etats, ne donnent à ces derniers aucun droit d'intervention, car nul Etat peut s'ériger en juge de la conduite des autres, tant qu'ils ne lèsent pas les droits des autres Puissances et de leur ressortissants, ils sont l'affaire des seuls nationaux du pays ou ils sont commis."

century.[19] Nonetheless, these interventions were questioned even on these limited, merely political, ambitions. The prevailing opinion in literature seems to be that these interventions were heavily inspired by egoistic motives.[20] There is some irony in the fact that the right to humanitarian intervention could become a right proper only at the moment when the right to go to war was outlawed. As this happened, however, in a very extensive way, there seemed to be no place left for a competing principle. With the prohibition of the use of force being attributed the nature of *jus cogens*[21] – whatever its practical meaning – the possibility that such a derogation could emerge appeared the more improbable.

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19 This was particularly true with regard to the lot of Christians in the Ottoman Empire. It can be argued that the theory of humanitarian intervention developed in the 19th century more or less around this issue. See, in this sense, already L. Le Fur, "L'intervention pour cause d'humanité", in: Vitoria et Suarez, *Contribution des théologiens au droit international moderne*, 1939, 237. The joint intervention of the United Kingdom, France and Russia in favour of Greek insurgents in 1827 took place after atrocities had been committed by the rulers against the Greek population and notice of these events had spread to Western Europe. French intervention in favour of Christian minorities in Lebanon took place in 1860 after these groups were harassed and attacked by Druses and Muslims. The U.S. intervention in Cuba in 1898 was preceded by massive human rights abuses by the Spanish authorities trying to quell local opposition. These events had caused outrage in the United States. See extensively on these and further cases of humanitarian intervention A. Pauer, *Die humanitäre Intervention*, 1985, 44 et seq.

20 See, for example, Pauer, see above, 75 and H. Köchler, *Humanitarian Intervention in the Context of Modern Power Politics*, International Progress Organization: Studies in International Relations, Vol. XXVI, 2001, 5 et seq. According to this writer's view, however, such a negative view does not do full justice to the facts. As already stated, the governments' decisions to intervene were regularly (also) prompted by domestic public opinion enraged about human rights abuses in third countries. See also A. Mandelstam, "La protection des minorités", *RdC* 1923 (I), 367 et seq. (379): "Il serait injuste d'attribuer ces interventions collectives à des motifs d'égoïsme national." That in these cases egoistic political motives were – to a greater or lesser extent – also at play cannot, of course, be denied. This becomes evident, for example, if one looks again at the U.S. intervention in Cuba as the relative decision was also influenced by U.S. hegemonial aspirations.

21 See A. Randelzhofer, "Commentary to Art. 2(4)", in: B. Simma (ed.), *The Charter of the United Nations – A Commentary*, 2002, 112 et seq. (129, para. 52).

The only source from which such a development could depart was human rights. The spreading and the strengthening of a common understanding of core human rights seemed for some to lay the basis for such a fundamental change. In fact, the development of the human rights corpus has happened since 1945 at a breath-taking speed and there is broad agreement that to a core area of human rights the character of *jus cogens* cannot be denied.[22] From this fact it does not follow automatically, however, that a right to humanitarian intervention would have come into existence. To this avail, first of all, formidable technical problems have to be solved. Thus it would not only be necessary to demonstrate in each case that the rights the single intervention is directed to protect pertain to *jus cogens* but also the fact that these rights now override the prohibition of the use of force which, as seen above, is also part of *jus cogens.*[23] It does not seem, however, that the advocates of humanitarian intervention after World War II spent much time on such technicalities. The preponderant role of human rights over concerns for the preservation of state sovereignty was often taken as an implicit given which needed no further explanation.[24]

In the post World War II state practice there were several actions that can be qualified as humanitarian interventions, even though it has to be said that such a qualification has primarily been made in literature while the intervening states haven been far more cautious in this regard.

The most prominent cases of this period were the Belgian interventions in Congo in 1964; the U.S. intervention in the Dominican Republic in 1965; the Indian intervention in East Pakistan/Bangladesh in 1971; the Vietnamese intervention in Cambodia in 1978; the Israeli interven-

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22 This is true notwithstanding the fact that there is disagreement about the exact contours of this area. For rights as the prohibition of slavery or torture there can be no doubt as to the pertinence to this field. With regard to torture see the "Pinochet-case", R.V. Bow Street Stipendiary Magistrate and others, ex p. Pinochet Ugarte (Amnesty International and others intervening), (1998) 4 All E.R. 897.

23 See Ch. Gray, "The legality of NATO's military action in Kosovo: is there a right of humanitarian intervention?", in: S. Yee/ W. Tieya (eds), *International Law in the Post-Cold War World – Essays in memory of Li Haopei*, 2001, 240 et seq. (251).

24 See, for example, A.D. D'Amato, "The invasion of Panama was a lawful response to tyranny", *AJIL* 84 (1990), 516 et seq. D'Amato submits that the core understanding of Article 2 (4) of the UN Charter is directed at outlawing the use of military force for the purpose of territorial aggrandizement or colonialism, ibid., 520. See also Tesón, see note 17, 151.

tion in Uganda in 1976; the Belgian and French intervention in Zaire in 1978; the Tanzanian interventions in Uganda in 1978 and 1979; the United States intervention in Grenada in 1983; the United States intervention in Panama in 1989/90, and, most recently, the NATO intervention in Kosovo in 1999.[25]

If one tried to identify on the basis of these events a new customary law rule, state practice concomitant and consequent to these interventions has to be observed. This practice can hardly be considered to form a sufficient basis for a new customary law rule. First of all, the intervening states were – as already mentioned – themselves rather reluctant to qualify their interventions as measures taken on humanitarian grounds. In those cases where humanitarian considerations were advanced most forcefully they seemed to be, in hindsight, the least founded.[26] The contentiousness of humanitarian intervention has most clearly been demonstrated on the occasion of the Vietnamese intervention in Kampuchea in 1978 and 1979. This intervention ended the savage, genocidal regime of the Khmer Rouge and saved probably millions of lives. Interestingly, however, the Vietnamese did not try to justify this intervention by a recourse to the concept of humanitarian intervention but referred rather to its right to self-defence because of continuous border violations by Khmer Rouge forces. Even at a time when the appalling acts of the

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25 See, for example, F.K. Abiew, *The evolution of the doctrine and practice of humanitarian intervention*, 1999, 61 et seq. and M.T. Karoubi, "Unilateral use of armed force and the challenge of humanitarian intervention in International Law", *Asian Yearbook of International Law* 10 (2001-2002), 95 et seq. (118). The intervention by the U.S. in Iraq together with the "coalition of the willing" could also be considered as a humanitarian intervention but the relevant intent was only one element among many and it could hardly be considered the most important one, neither officially nor in fact. If one tries to shed some light on the thicket of mutually contradictory justifications for this intervention it seems that it was the alleged possession of weapons of mass destruction by the Iraqi government that gave the decisive impetus for this military operation even though the suspicion proved to be unwarranted at the end.

26 This was, in particular, the case with the U.S. intervention in the Dominican Republic. See Pauer, see note 19, 156 and S.D. Murphy, *Humanitarian Intervention – The United States in an Evolving Order*, 1996, 94. It should also be remembered that even Indonesia justified her intervention in East Timor in 1975 referring *inter alia* to humanitarian considerations while it was more than evident that this intervention happened as a flagrant violation of basic principles of international law. See P. Hilpold, *Der Osttimor-Fall*, 1996.

Khmer Rouge had become fully known and documented, the Vietnamese intervention was the subject of widespread criticism and outright condemnation.[27]

For many, the Kosovo crisis appeared to be a watershed. Probably never before in the post-war period had the concept of humanitarian intervention met with such wide-spread acceptance as a possible instrument for the solution of internal conflicts which had gone out of control.[28] The most outspoken advocate of a right to humanitarian intervention was Belgium. A forum to present this position publicly was opened to this state by an action brought by Yugoslavia against 10 of the 19 NATO Member States before the ICJ.[29] When Yugoslavia requested provisional measures Belgium, as the only one of the 10 involved NATO states responded with a broad reference to the right to humanitarian intervention in the sense of a duty to protect.[30] None of

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27 That such condemnation came from the People's Republic of China can be explained in view of the rivalry between these countries in South East Asia. It appears more difficult to qualify the criticism by Western democracies as appropriate. True, these declarations were also primarily inspired by ideological considerations. On the other hand the situation in Cambodia under the Khmer Rouge regime was so outrageous that democracies which strongly identify with the fight against Nazi Germany can hardly condemn the termination of a genocidal regime without becoming contradictory. See, for example, the statement by the French representative in the Security Council, SCOR, 34th Year, 2109th Mtg, para. 36:
"The notion that because a regime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous. That could ultimately jeopardize the very maintenance of international law and order and make the continued existence of various regimes dependent on the judgment of their neighbours." For a very critical statement with regard to the position taken by the state community in this case see R. Falk, "The Complexities of Humanitarian Intervention: A New World Order Challenge", *Mich. J. Int'l L.* 17 (1996), 491 et seq. (504 et seq.). On the other hand, the elimination of the blood-thirsty regime of Idi Amin in Uganda by Tanzanian forces was greeted by the world community.

28 See, for a very prominent author advocating the existence of such a right Ch. Greenwood, "Humanitarian Intervention: The Case of Kosovo", *Finnish Yearbook of International Law* 10 (1999), 141 et seq., with further references.

29 Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium), Order of 2 June 1999, ICJ Reports 1999, 124 et seq.

30 "L'OTAN, le Royaume de Belgique en particulier, était tenu d'une véritable obligation d'intervenir pour prévenir une catastrophe humanitaire qui était en cours et qui avait été constatée par les résolutions du Conseil de sé-

the other respondents expressly referred to a right to humanitarian intervention. Outside this area the reaction of the state community to these events was also mixed. Protests came not only – as expected – from countries like China, Russia and India but also from large parts of the Third World.[31] This being the state practice one could have come to the conclusion that some governments may have become more daring in their political announcements but on the normative level little has changed.

This was the point where legal literature came in. There was a host of writers who saw – notwithstanding the described practice – a new era set in. This is not necessarily a discrepancy as legal writers are not circumscribed in their activity to the definition of the actual *status quo* but can dedicate themselves to the identification of new legal trends.[32] On the other hand, academics in the field of international law were often accused of being too emphatic in recognizing developments which were not always corroborated by state practice. In more recent times and in a somewhat more cautious way some lawyers began to speak about "emerging" international norms thereby having both the advantage of being the first to recognize that a certain political development is crystallizing into law and not having to fully demonstrate that this has already happened or will be happening within a pre-determined period.[33]

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curité pour sauvegarder quoi, mais pour sauvegarder des valeurs essentielles qui sont elles aussi érigées au rang de *jus cogens*. Est-ce que le droit à la vie, l'intégrité physique de la personne, l'interdiction des tortures, est-ce que ce ne sont pas des normes érigées au rang de jus cogens? [...] Donc pour sauvegarder des valeurs fondamentales érigées en *jus cogens*, une catastrophe en cours constatée par l'organisation du Conseil de sécurité, l'OTAN intervient. [...] jamais l'OTAN n'a mis en question l'indépendance politique, l'intégrités de la République fédérale de Yougoslavie [...]," ibid., 10.

31 See M.J. Glennon, "The Rise and Fall of the U.N. Charter's Use of Force Rules", *Hastings Int'l & Comp. L. Rev.* 27 (2004), 497 et seq. (503).

32 See generally on the role of the lawyers in the international law creation process R. Jennings, "International Lawyers and the Progressive Development of International Law", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21th Century*, 1996, 413 et seq. (414): "[...] it remains broadly true that the professional international lawyers, including academics, have much more say in the shaping of international law, whether in treaty or in customary law form, than do their counterparts in domestic law making and changing. This is a very important competence and responsibility."

33 The most prominent norm having been identified as an "emerging" one is without doubt the "right to democratic governance" by Thomas Franck.

With regard to humanitarian intervention, it was Antonio Cassese who identified the emergence of a new customary rule legitimizing the use of force by a group of states in cases of large-scale atrocities committed by a state on its own territory, provided that a set of conditions were met.[34] These conditions appear to be very demanding[35] and request a guaran-

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See Th. Franck, "The Emerging Right to Democratic Governance", *AJIL* 86 (1992), 46 et seq.

34 The title of the relevant article in which this theory was first fully developed is revealing: "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *EJIL* 10 (1999), 23 et seq., the question mark indicating in this case a cautious answer in the affirmative.

35 The central importance of these conditions requires their detailed citation:
"(i) gross and egregious breaches of human rights involving loss of life of hundreds of thousands of people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central government authorities or with their connivance and support, or because the total collapse of such authorities cannot impede those atrocities;
(ii) if the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes; while at the same time refusing to call upon or to allow other states or international organisations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that those authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations or decisions of such organizations;
(iii) the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power. Consequently, the Security Council either refrains from any action or only confines itself to deploring or condemning the massacres, plus possibly terming the situation a threat to the peace;
(iv) all peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted, notwithstanding which, no solution can be agreed upon by the parties to the conflict;
(v) a group of states (not a single hegemonic Power, however strong its military, political and economic authority, nor such a Power with the support of a client state or an ally) decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of Member States of the UN;
(vi) armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going

tee that the motives of the intervening states are sincere, that no decision to intervene is taken carelessly, that the force applied is commensurate to the effective need and that no further aims are pursued. Only groups of states may exercise these actions – an implicit criticism against the behaviour of the United States in this field.

Although the intellectual appeal of an approach seemingly bringing order and justice in an international reality characterized by chaos and inhumanity cannot be denied, this author has already pointed out in the past[36] that the elaboration of catalogues of criteria which should allow, if respected, for a derogation from the prohibition of the use of force, poses considerable dangers. In fact, each of these criteria has again to be interpreted, they have to be mutually weighted against and they leave considerable leeway for abuse. There is no central institution which could assess in a specific situation whether these criteria have been respected. Similar catalogues of criteria have already been developed in the past, in particular with regard to the question whether endangered groups should be allowed a right to secession in cases of extreme persecution.[37]

It is a small wonder that all these attempts have remained in vain. Ready-to-use recipes, schemes and models for the legal evaluation of factual situations reveal all their weaknesses in the internal legal order. They are more or less worthless in a legal system such as the international one which is characterized both by its vagueness and its complexity, its extreme fragmentation[38] and its dependence, from an interna-

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beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained. Moreover, it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies on the ground. The more urgent the situation of killings and atrocities, the more intensive and immediate may be the military response thereto. Conversely, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed confrontation.", ibid., 27.

36 See "Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte?", *Zeitschrift für Öffentliches Recht* 54 (1999), 529 et seq. (584 et seq.); Hilpold, see note 18, 455 et seq.

37 See, for example, L.C. Buchheit, *The Legitimacy of Self-Determination*, 1978; D. Murswiek, "The Issues of a Right of Secession – Reconsidered", in: Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, 21 et seq.; A. Tancredi, *La secessione nel diritto internazionale*, 2001.

38 See on this issue, for example, G. Hafner, *Risks Ensuing from Fragmentation of International Law*, Doc. ILC (LII)/WG/LT/L.1/Add.1 (2000).

tional consensus, upon continuously remoulding international rules anew.[39]

Only a limited set of norms have been exempted from this continuous rewriting process in view of their paramount importance for the present international society and the defence of the cultural and ethical standards dear to it. The prohibition of the use of force is one of the most important ones. There seems to have been, in the past, a broad agreement that notwithstanding the many deficiencies surrounding the implementation of this rule and with regard to the consequences it has on the possibility to address effectively internal problems, it should not be easily given up. The Kosovo crisis did not really change this situation, even though there seems to be a broader preparedness to discuss this issue than previously. Within the framework of the discussion on the reform of the United Nations of the last years, however, an attempt to make a difference was made.

In the following it shall be examined whether further elements have arisen in recent years that would corroborate the assumption that there is an emerging new law on the prohibition of the use of force. Particular attention will be given, in this context, to the recent proposals for a reform of the United Nations. As already hinted, in the ambit of these proposals much care has been dedicated to precisely this topic – it could even be argued that this issue stood at the very centre of the reform endeavour.

III. The Call for a New Approach

Already in 1999 UN Secretary-General Kofi Annan formulated the fundamental dilemma that would keep him busy over the following years:

> "It is indeed tragic that diplomacy has failed, but there are times when use of force may be legitimate in the pursuit of peace. In helping to maintain international peace and security, Chapter VIII of the United Nations Charter assigns an important role to regional organizations. But as Secretary-General I have many times pointed

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39 See B. Simma, "Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung", in: R. Bernhardt et al., *Fünftes deutsch-polnisches Juristen-Kolloquium*, 1981, 45 et seq. (58 et seq.), referring to M.S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea", *AJIL* 49 (1955), 356 et seq.

> out, not just in relation to Kosovo, that under the Charter the Security Council has primary responsibility for maintaining international peace and security – and this is explicitly acknowledged in the North Atlantic Treaty. Therefore the Council should be involved in any decision to resort to the use of force."[40]

At first sight, the Secretary-General emphasizes the role the Security Council has to play in any decision to intervene. But what if the Council remains inactive or if a decision is blocked by one of the permanent members? Conditions have to be created in which such a situation becomes more unlikely to happen.

The time seemed to be propitious for bold steps towards a new future. There were important signals for a greater preparedness by the state community to undertake the "radical changes" the Secretary-General had hinted at in his "fork-in-the-road" speech, the most important of these signals being the United Nations Millennium Declaration adopted by all UN Member States in 2000.[41] A new sense of membership to an international state community and of mutual solidarity – at least in the development context – had gained hold.[42] In his addresses to the General Assembly in September 1999 and 2000 the Secretary-General pressed, however indirectly and vaguely, the idea of intervention:

> "[...] if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?"
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> Later on, Kofi Annan became even more explicit:
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> "The sovereignty of States must no longer be used as a shield for gross violations of human rights".[43]

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40 See UN Press Release SG/SM/6938 of 24 March 1999.

41 A/RES/55/2 of 8 September 2000.

42 See also in this regard the discussion about a new international solidarity. See K. Wellens, "Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitation", in: R.St.J. Macdonald/ M. Johnston (eds), *Towards World Constitutionalism*, 2005, 775 et seq.; P. Hilpold, "Solidarität als Rechtsprinzip – völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen", to be published in: Jahrbuch des öffentlichen Rechts (2007).

43 This statement was made by the Secretary-General on the occasion of his Nobel Peace Prize Lecture in Oslo in December 2003. See G. Evans, "The

On the highest level, therefore, more and more daring ideas were advanced. An important contribution to this development – at least on the academic level – has been given by two independent expert commissions, the International Commission on Intervention and State Sovereignty appointed by the Canadian Government and the already mentioned High-level Panel appointed by the Secretary-General. They implicitly understood themselves both as catalysts of these new developments and as forerunners for change. The new international climate may explain why both commissions were so sanguine about the prospects of change and about the very preparedness by the state community to embark on such a journey.

IV. The Report of the International Commission on Intervention and State Sovereignty (ICISS)

The establishment of the ICISS by the Canadian Government in September 2000 can be seen as an immediate consequence of the Kosovo intervention. The title of the Report presented in December 2001 and dealing in substance squarely with the right to humanitarian intervention is in itself revolutionary: "The Responsibility to Protect".

If generally accepted, this new approach would turn upside-down some basic tenets of international law: it would not only imply a possibility to intervene – in itself a contested issue putting into question the fundamental concept of state sovereignty – but it would introduce an actual *responsibility* in this sense, i.e. an obligation. Formally, state sovereignty is safeguarded, as the primary responsibility for the protection of its people which continues to lie with the state itself. The exception to this rule appears to be, however, extremely far-reaching:

> "Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."[44]

In substance, the concept of sovereignty is redefined and the range of matters which fall 'essentially' into a state's domestic jurisdiction ac-

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Responsibility to Protect: Rethinking Humanitarian Intervention", see under <http://www.crisisgroup.org/home/index.cfm?id§2561&l=1>.

44 See ICISS Report, page XI.

cording to Article 2 para. 7 of the UN Charter is further reduced.[45] The authors of this Report again adopted a conditional approach where several criteria had to be fulfilled:

- Just cause (large scale loss of life or large scale "ethnic cleansing");

- Right intention (the primary purpose of the intervention must be to halt or avert human suffering);

- Last resort (every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded);

- Proportional means (scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective);

- Reasonable prospects (there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction);

- Right authority (the Security Council should bear primary responsibility for the intervention but on a subsidiary level also alternative avenues can be pursued).

Again, from a political viewpoint these criteria may appear to deserve full approbation, at least at first sight. On closer examination, however, all the contradictions we have come across before with regard to the conditional approach in general reappear. In particular, it is by no means clear that an abusive recourse to this exemption from the prohibition of the use of force can be avoided.

Of course, the attribution of a clear prerogative to intervene to the Security Council provides a far-reaching guarantee. The ICISS Report also contains interesting passages about the need for the introduction of early-warning instruments and for root cause prevention efforts.[46] As was expected, however, these parts of the Report are held rather generally and intense further studies and discussion would be needed to give more substance to these ideas. The proposal to revitalize the "Uniting for Peace" resolution[47] which instituted a mechanism of dubious legality within the UN system is not convincing, even though its historic

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45 See N. Schrijver et al., "Reforming the United Nations: A Closer Look at the Annan Report", *NILR* 52 (2005), 319 et seq. (321 et seq.). This report is also available under <http://www.AIV-Advice.nl>.

46 See para. 3.10 et seq. of the report.

47 A/RES/377 (V) of 3 November 1950.

importance in the Korean conflict of 1950 and subsequently for allowing operations in Egypt in 1956 and the Congo in 1960 cannot be denied.[48]

The ICISS went clearly beyond existing international law when it proposed – as a further alternative in case of inaction by the Security Council:

"action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council."[49]

The authors of this Report seem to be aware of the fact that what they are proposing constitutes a violation of the UN Charter, at least according to a traditional reading of this document. At the same time it does not seem, however, that they cared much for formal issues or they were very optimistic about finding a way out of this dilemma:

"In strict terms [...] the letter of the Charter requires action by regional organizations always to be subject to prior authorization from the Security Council. But [...] there are recent cases when approval has been sought *ex post facto*, or after the event (Liberia and Sierra Leone), and there may be certain leeway for future action in this regard."[50]

The suggestion that "there may be certain leeway for future action in this regard" is purely speculative. The existence of such a leeway would imply a large derogation from the prohibition of the use of force, a derogation which is nowhere in sight. If at all, the pressure for such a change could come from documents like the ICISS Report which could be interpreted in this sense more as a political document than as a legal one and, if successful, a self-fulfilling prophecy. This Report sees interventions by collective organizations as some sort of a compromise between a collective intervention authorized by the Security Council, an authorization which often cannot be obtained, and an intervention by

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48 In fact, the inactivity of the Security Council does not necessarily provide a legal justification for the General Assembly to intervene. Furthermore, in view of the composition and the way of functioning of this organ it seems rather improbable that it will operate more effectively than the Security Council.

49 ICISS Report, see note 44, page XIII. See also page 53 et seq., para. 6.31 et seq.

50 Ibid., para. 6.35. On the problem of authorization for the use of force in general see P. Picone, "Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e Diritto Internazionale generale", *Riv. Dir. Int*. 88 (2005), 5 et seq.

ad hoc coalitions and individual states. The second scenario is seen as dangerous not only because of the danger of abuse in the individual case but also because this could disrupt basic tenets of UN law, if the intervention proves to be successful.

The assumptions on which this approach is based can be criticized for two reasons: first, an intervention by a collective organization constitutes an unilateral act – prohibited by UN law – if it takes place without authorization by the Security Council.[51] Second, the fears that successful interventions could engender a string of further interventions that could endanger the whole UN system appear unrealistic, especially in view of the last years' experiences. Interventions will always remain dangerous and the Iraq conflict demonstrates that even the leading superpower is not necessarily capable of appeasing groups engaged in a civil war, even if the war takes place in a third world country. Furthermore, it has to be asked, why, for example, an unilateral intervention by NATO should be judged differently from an – equally unilateral – intervention by a group of NATO countries.[52]

As a consequence, the verdict on this document is rather critical: it advocates a softening of the prohibition of the use of force in cases of grave breaches of human rights and it contains a conditional approach which in its substance is not new. As has been stated in literature, the most significant contribution by this Report is to be found in the conceptual field.[53] The authors of this Report indirectly acknowledge that a very important element of the "duty to protect" is constituted by the old concept of humanitarian intervention, even though the focus has shifted. The authors deliberately avoid this term justifying this choice with the negative connotations associated with it. They refer to the "very strong opposition expressed by humanitarian agencies, humanitarian organizations and humanitarian workers towards any militariza-

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51 See B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", *EJIL* 10 (1999), 1 et seq. (11); Hilpold, see note 18, 448.

52 This is not to deny the very important role regional organizations can play for the maintenance of international peace and security. See R. Burchill, "Regional organizations and the promotion of democracy as a contribution to international peace and security", in: R. Burchill et al. (eds), *International Conflict and Security Law – Essays in Memory of Hilaire McCoubrey*, 2005, 209 et seq.

53 See A. Acharya, "Redefining the Dilemma of Humanitarian Intervention", *Australian Journal of International Affairs* 56 (2002), 373 et seq. (373).

tion of the word 'humanitarian'"[54] as it imperils their own activity. Furthermore, the word "humanitarian tends to prejudge the very question in issue – that is whether the intervention is in fact defensible."[55]

In sum, it appears that the ICISS saw humanitarian intervention as a valuable instrument if applied under certain very restrictive conditions. At the same time the Commission was aware of the strong opposition this concept encounters in the state community and of the difficulties of making it compatible with a traditional reading of the UN Charter. It decided to change the appearance of this concept and to preserve its substance. In the final analysis, however, the new concept bore all the ambiguities which were characteristic of the former one.[56] This meant that the UN reform discussion which drew heavily, at least initially, on the ICISS Report was also ill-fated with regard to this subject.

V. The High-Level-Panel Report

1. Interventions as an Execution of the Duty to Protect

Already at a first reading of the HLP Report it becomes evident how strongly this document has been influenced by the ICISS Report as it cites numerous findings of this Report[57] and it seems somewhat odd that the origin of these ideas which are pivotal for the whole reform agenda was not clearly revealed.[58]

The relevant provisions are set forth in paras 199 et seq. The HLP starts out with demands which appear to conform to international law developments:

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54 See ICISS Report, see note 44, 9, para. 1.40.

55 Ibid.

56 For a comment on this report see J.I. Levitt, "The Responsibility to Protect: A Beaver without a Dam?", *Mich. J. Int'l L.* 24 (2003), 153 et seq. for whom, however, the approach of the ICISS was not far-reaching enough. In particular he deplored that this report failed to suggest ways to encourage state authorities to act on the responsibility to protect, ibid., 175.

57 See T. Ruys, "Reshaping Unilateral and Multilateral Use of Force: The Work of the UN High Level Panel on Threats, Challenges and Change", *International Law Forum* 7 (2005), 92 et seq. (96).

58 See M. Odello, "Commentary on the United Nations High-Level Panel on Threats, Challenges and Change", *Journal of Conflict & Security Law* 10 (2005), 231 et seq. (235).

> "We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."[59]

In assessing the need to take recourse to the use of military force the Security Council may take into account five basic criteria of legitimacy (seriousness of threat, proper purpose, last resort, proportional means, balance of consequences) which correspond more or less to those elaborated by the ICISS. Probably these criteria will not be very useful but they do no harm. As the scope of action by the Security Council is very broad (not to say factually unlimited) to introduce criteria of legality of such a vague nature is equivalent to a very soft self-regulation.[60] On the other hand, the Security Council had been rather reluctant in the past to permit the use of force in cases of inner conflicts[61] and an automatic change in this attitude is not foreseeable. Therefore, the HLP has undertaken intense efforts to render the operation of the Security Council more effective: "The task is not to find alternatives to the Security

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59 HLP Report, para. 203.

60 For this reason this author does not feel the criteria introduced would hamper the activity by the Security Council as was feared by some authors. See, for example, A.M. Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform", *AJIL* 99 (2005), 619 et seq. (626 et seq.): "This approach, as some commentators have already decried, sounds like a recipe for further inaction by the Council, giving members five new criteria to argue about while Rome, or Rwanda, or Darfur, burn." Professor Slaughter believes, however, that the substantial expansion of Security Council jurisdiction, also proposed by the HLP Report, could counterbalance this effect. Professor Benedetto Conforti is generally critical towards the approach taken by the HLP in this field: "[...] ci si aspetterebbe, che, almeno nei casi estremi, interventi *unilaterali* [...] fossero considerati tollerabili, in conformità a quanto una parte della dottrina sostiene." And: "Dunque, una norma emergente, che... riprodurrebbe quanto già si ricava chiaramente dalla Carta," see B. Conforti, "Il rapporto del 'high-level panel' sul come rendere più efficace l'azione dell'ONU, ovvero la montagna ha partorito un topo!", *Riv. Dir. Int.* 88 (2005), 149 et seq. (150).

61 See P. Hilpold, "The Continuing Modernity of Article 2(4) of the UN Charter", in: W. Ingenhaeff et al. (eds), *Festschrift Rudolf Palme*, 2002, 281 et seq. (290).

Council as a source of authority but to make it work better than it has."[62]

This part of the reform proposal by the HLP Report was intensely discussed in public. As is known, it was proposed to reform both the composition of the Security Council whereby this body should be enlarged according to different models, as well as the way of its decision taking, providing for more transparency and accountability.[63] None of these proposals was accepted afterwards by the state community. As no compromise on the composition of the Security Council is in sight, it seems that the present solution is the one UN members can best live with as it is the result of a historic injustice beyond the reach of present governments.

On a whole, it can therefore be said that the duty to protect in the HLP Report remains a purely political slogan and there are no instruments in sight which would offer a realistic perspective to render this concept operative. While the ICISS Report also takes into consideration unilateral actions by regional organizations, the HLP Report remains silent in this regard. The authors of the latter Report seem to be absolutely confident about the feasibility of the institutional reform of the United Nations and, as a consequence, no greater obstacle should hinder the obeyance of the duty to protect. In this, the Report appears to be rather ingenuous.

2. The Right to Self-Defence

As already mentioned, a duty to protect exists also (and foremost) for governments with regard to their own people. The need for such a protection can also be given as a consequence of an actual or an impending international conflict in the form of acts of self-defence. In this field the HLP proposed rather daring solutions which can hardly be reconciled with existing international law. As is known, Article 51 of the UN Charter sets rather restrictive conditions for the recourse to the right to self-defence, requiring that "an armed attack occurs." The HLP adopts, however, a totally different approach:

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62 See HLP Report, 3.

63 See Y.Z. Blum, "Proposals for UN Security Council Reform", *AJIL* 99 (2005), 632 et seq. and Hilpold, see note 15, 86.

> "However, a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability."[64]

In reality, it is not so clear that a military reaction against an imminent threat is permissible "according to long established international law."

In two judgments the ICJ has clearly given a restrictive interpretation to the right to self-defence: in the Nicaragua-case[65] as well as in the Oil platforms-case[66] the ICJ has unmistakably pointed out that recourse to self-defence presupposes an armed attack.[67] Does this comprise also an imminent attack? On the basis of a traditional, "conservative" interpretation self-defence is permissible only after an armed attack has been launched.[68] Accordingly, Article 51 has to be interpreted narrowly.[69] At the same time, however, it must be mentioned that there is another school of thought that is more permissive with regard to possible reactions against an imminent threat. Taking recourse to the ambiguous, but nonetheless often cited *Caroline* formula, self-defence is allowed if the necessity is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[70]

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64 See HLP Report, para. 188.

65 Case concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Report 1986, 14 et seq.

66 Oil Platforms, Islamic Republic of Iran v. United States of America, ICJ Report 2003, 161 et seq.

67 According to the ICJ it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms", since "[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack", ICJ Reports 1986, 101, para. 191 and 103, para. 195; ICJ Reports 2003, 27, para. 51.

68 See A. Randelzhofer, "Commentary to Art. 51", in: Simma, see note 21, 803, para. 39 with further references.

69 Ibid. See also I. Brownlie, *International Law and the Use of Force by States*, 1963, 275 et seq.; L. Henkin, *How Nations Behave: Law and Foreign Policy*, 1979, 141.

70 See the letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington, "Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. Mc

This formula seems not to rule out self-defence against imminent attacks. What constitutes an "imminent attack" is, however, not clear – especially if this concept is further qualified, as often, by a reference to new arms technologies. As has been correctly pointed out, in this case what is "imminent" is no longer only a question of temporality but also the magnitude of the threat which has to be considered.[71] In substance, such a position is not new as it has already been sustained by U.S. lawyers in the first case where nuclear weapons were supposed to be the source of an immediate threat to the security of their country.[72]

It is more than doubtful whether in the meantime this position can be considered to be the prevailing one. While some countries repeatedly claimed the existence of such a right in the last decades,[73] there was no

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Lead, for the Destruction of the Steamboat Caroline, March/April 1841", *British and Foreign State Papers* 39 (1857), 1126 et seq. (1138), cited according to J. Yoo, "International Law and the War in Iraq", *AJIL* 97 (2003), 563 et seq. (572). As has been written, the magnitude of a threat should therefore be judged on the basis of "radicalism and technology", "that is, political and religious extremism joined by the availability of weapons of mass destruction." See J.G. Castel, "The Legality and Legitimacy of Unilateral Armed Intervention in an Age of Terror, Neo-Imperialism, and Massive Violations of Human Rights: Is International Law Evolving in the Right Direction?", *CYIL* 42 (2004), 3 et seq. (13).

71 See Yoo, see note 70, 572 et seq. The Webster formula has therefore to be developed further and to include factors like "the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat", ibid., 574.

72 This case regarded deployment of Soviet nuclear weapons on Cuba in 1962. See M.S. McDougal, "The Soviet-Cuban Quarantine and Self-Defense", *AJIL* 57 (1963), 597 et seq.: "Expectations of crisis in the world arena as a whole were high, and estimates of prompt and effective action from the organized community of states for ameliorating particular crises were realistically low," ibid., 602. A traditional textual reading of Article 51 was rightly dismissed by McDougal: "[...] the words and behavior in the past are relevant only as they affect contemporary expectations about the requirements of future decisions," ibid., 599.

73 Among these countries, first of all Israel and the United States have to be mentioned. The most notorious act carried out by Israel was the destruction of an Iraqi nuclear reactor in 1981 while the United States acted in the last years pre-emptively against Afghanistan, Iraq and the Sudan. The bombing of Libya ordered by Ronald Reagan in 1986 probably had more a retaliatory character than the nature of a pre-emptive strike.

general state practice in this sense accompanied by claims of a respective *opinio juris.*[74] The intervention in Iraq by the "Coalition of the Willing" led by the United States met with such intense international criticism that as a consequence the prohibition of the use of force can be said to have been not only confirmed but to have even been strengthened. The damage to the reputation of the United States as a herald for international peace is enormous. The fact that the Security Council was not able to condemn these actions can obviously not be taken as evidence for an emerging new norm allowing pre-emptive measures as there would always have been a permanent member of this body to veto such a resolution.

The HLP Report places reactions against imminent dangers on a continuum leading finally to preventive wars towards which this Panel is clearly critical. Even leaving aside the fact that it might often not be possible in practice to distinguish between an imminent threat and a non-imminent or proximate threat as proposed by the HLP,[75] the solution recommended in this Report for these latter sort of threats seems rather curious:

> "[...] if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option."[76]

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74 See in this sense also the ICJ in the Nicaragua case, ICJ Report 1986, 98 et seq. This is true even though the recent conflict on the Iran nuclear programme may be seen as providing further arguments in favour of the advocates of a re-definition of what constitutes "imminence" of an attack.

75 As has been correctly remarked, in this sense the position by the HLP is in its final consequence very similar to that taken by the authors of the U.S. American National Security Strategy. See I. Johnstone, "Threats, Challenges, and Change: The Secretary-General's High-Level Panel", *ASIL* 99 (2005), 57 et seq. (62). See also A. Cassese, "Article 51", in: J.P. Cot et al., *La Charte des Nations Unies – Commentaire article par article*, 2005, 1329 et seq. (1342), who is also critical about the approach taken by the HLP in view of possible abuses. He proposes rather a modification of Article 51 of the Charter together with a conditional approach which should again rule out abuses. As explained above, however, the view taken here is that, in the end, such an approach is difficult to implement and cannot rule out abuse.

76 See HLP Report, para. 190.

It seems the authors of this Report assume that the Security Council operates purely on technical grounds, uninfluenced by political considerations and will authorize recourse to force – if such a step is necessary – with mathematical certainty. If the Security Council does not give such an authorization "by definition" there is time to pursue other strategies. As is known, reality is, alas, different. Even if the HLP already had in mind the reformed Security Council when describing the operating of this body the assumptions mentioned are utopian.[77]

On a whole it can be said that the HLP Report is not suited to bring about a change of law in the field of self-defence. The HLP recognized that it would be unwise to turn away from the prohibition of the use of force in favour of a fully-fledged right to preventive self-defence. This was openly declared in the Report and its authors merit praise for adopting such a realistic perspective. Nonetheless, a tendency can be noticed to soften the prohibition of the use of force and to extend the right to self-defence, selling this new approach, however, as expression of a long-lasting development which has found broad recognition in the meantime. This may be a politically astute move; it is, however, not convincing on the legal level. Already in the past, various authors had tried to bring evidence for such a development taking recourse to customary law having come into existence before and going beyond the UN Charter law.[78] It has, however, also been demonstrated in literature that this position is untenable as this would conflict with the wording and the system of Article 51 and could furthermore not be based on a meaningful state practice.[79]

The HLP Report has, however, created a certain amount of uncertainty precisely by misinterpreting the existing law and by reading into

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77 The words "to visit again the military option" may also cause some perplexity. It is assumed that the military option has to be examined by the Security Council and it is not up to the individual state to decide.

78 See, in this sense, in particular M.S. McDougal/ F.P. Feliciano, *Law and Minimum World Public Order*, 1961, 232 et seq.

79 See Y. Dinstein, *War, Aggression and Self-Defence*, 2005, 184 et seq. who clearly pointed out that between 1928, when the Briand-Kellogg Pact was stipulated and 1945, when the UN Charter came into force, there were no preventive wars that could have constituted state practice for such a customary law development. While the ICJ stated in the Nicaragua case that there existed a customary right to self-defence alongside the one in Article 51 of the Charter it cannot be sustained that the material content of customary law in this field would go beyond Charter law, ibid., 183. For a recent different opinion see Castel, see note 70, 24.

it a subjective political programme. As will be seen in the following, the confusion created found an immediate follow-up in the Report issued by the UN Secretary-General, Kofi Annan.

VI. The Annan Report

The Report presented by UN General-Secretary Kofi Annan in March 2005 (the Annan Report) was intended to further develop the ideas conceived by the HLP Report and in many instances also to render them more adherent to reality, to make them implementable. As far as the duty to protect is concerned, these goals have only partly been achieved.

The Secretary-General "strongly agree(s)" with the assumption contained in the HLP Report that there is an emerging norm establishing a collective responsibility to protect.[80] Again, the Annan Report also does not reveal the real origin of this concept but it is more prudent than the ICISS Report when it comes to the modes of implementation:

> "This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required."[81]

Therefore, no unilateral actions characterized according to the traditional terminology as of humanitarian intervention should be allowed.

A little bit earlier in the Report Annan makes a distinction that appears to be more problematic:

> "Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened."[82]

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80 See para. 135 of the Annan Report, see note 8.

81 Ibid.

82 Ibid., para. 124.

Here, the Secretary-General adopts the findings of the HLP on the ways a state can react to an external military threat choosing even a somewhat more daring language. As already explained above it is simply not correct to interpret the outcome of the international legal discussion in this field this way. Here, an interpretation of Article 51 of the Charter is sought that does not correspond to a textual reading of this provision and which is not corroborated by any significant state practice accompanied by a corresponding *opinio juris*.

The statements in the following paragraph are also important:

> "Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?"[83]

With regard to the events mentioned in the last sentence it can really be said that there is an emerging trend to establish a respective Security Council competence, although this tendency is a cautious one, intentionally blurred by states eager to emphasize possible international repercussions of internal conflicts as a consequence of a Security Council intervention.[84]

Generally it can be said, however, that it would be difficult to contest a Security Council's faculty to act in these cases alleging the existence of an *ultra vires* situation.[85] The Annan Report evidences that the Secretary-General is aware of the underlying dilemma and he chooses a pragmatic way out of it, presenting his opinion as a question to the international community. At the same time he leaves no doubt, however, that he firmly believes in such an authority of the Security Council.

In sum, with regard to the duty to protect, two main elements can be discerned in the reform proposals by the HLP and the Secretary-General:

The possibility to react against external threats has been extended considerably. While the authors of these Reports tried to sell the rele-

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83 Ibid., para. 125.

84 Hilpold, see note 61.

85 See, for example, R. Higgins, "The New United Nations: Appearance and Reality", in: D. Freestone et al. (eds) *Contemporary Issues in International Law*, 2002, 143 et seq. (151) and Hilpold, see note 61.

vant passages of their documents merely as something like a "restatement of the existing law" in reality they went far beyond. This approach has to be criticized for content and form. With regard to the material content to recognize an imminent threat as a justification for the recourse to self-defence would considerably weaken the prohibition of the use of force and it is in no way clear where self-defence ends and where a preventive war begins. With regard to the form in which this approach has been presented it is somewhat worrying to see that a totally partial view has been declared as a mainstream position by personalities who are assumed to know better or who are at least in a position to be able to procure this knowledge easily. With regard to possible reactions against internal threats both the HLP and the Secretary-General again try to develop the law progressively but in this case the *status quo* of the relevant international norm is correctly described and to ask for a more consequent intervention by the Security Council in the event of genocide and large-scale killings appears to be fully legitimate and in line with recent international law practice where elements operating in this direction can be noticed.

No convincing proposal has, however, been brought forward that should make sure the Security Council will act more effectively in the future. The formulation of guidelines and conditions that should direct the Security Council to this avail is a well intended gesture but even in the rather improbable case that such a catalogue should find international recognition, it would neither constitute an effective barrier against abusive interventions nor a real guarantee that the Security Council would authorize an intervention if a factual need for such an intervention is given. There is no point in trying to clarify a provision with some interpretative leeway by an array of conditions again suitable for diverging interpretations when, at the same time, the decision to authorize an intervention or not is essentially of a political nature.[86] For the same reason proposals to hold members of the Security Council responsible for their voting in this body in case no majority is found for an intervention when grave human rights abuses occur are moot and fly

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[86] Johnstone, see note 75, 64, pointedly – and probably a little bit too pessimistically – remarks that "material power and hard bargaining over interests are all that matters in the Security Council, and [...] deliberation and persuasion on the basis of norms count for nothing." Therefore, "legal quibbles" are futile.

in the face of international reality and the very nature of the UN system.[87]

Thus, notwithstanding the far-reaching pretensions underlying these documents they do not seem to be suited to make a real difference in the attempt to establish an effective "duty to protect".

VII. Further Developments

As soon as the Annan Report was presented an intense international discussion began with the intention to draft a globally agreed document which should have been adopted by the General Assembly in September 2005. This discussion soon revealed that the position taken by the state community with regard to this issue differed widely from that of the drafters of the two documents mentioned.

When the President of the 59th session of the General Assembly, the above mentioned Jean Ping, tried to draft a document summarizing the various positions taken by the states little was left of the ideas advanced by the HLP and by the Secretary-General:

> "We reaffirm that the relevant provisions of the Charter regarding the use of force are sufficient to address the full range of security threats and agree that the use of force should be considered an instrument of last resort. We further reaffirm the authority of the Security Council to take action to maintain and restore international peace and security, in accordance with the pertinent provisions of the Charter. We recognize the need to continue discussing principles for the use of force, identified by the Secretary-General."[88]

While the first paragraph cited reflects merely a traditional international law position which could have been formulated, say, in the 1950s, in the following paragraph a link to the present reform discussion can be found. The efforts by the Secretary-General (and, indirectly, those of

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87 See M. Toufayan, "A Return to Communitarism? – Reacting to 'Serious Breaches of Obligations Arising under Peremptory Norms of General International Law' under the Law of State Responsibility and United Nations Law", *CYIL* 42 (2004), 197 et seq. (200 et seq.) who ponders whether the concept of complicity could be referred to in order to hold the respective states responsible. On the wide discretion the Security Council enjoys when it discharges its duties resulting from the Charter see also Dinstein, see note 79, 283.

88 Ping Document, see note 11, para. 75 et seq.

the HLP and also those of the ICISS) receive appreciation but the Ping Document does not contain any definite judgment on the relative proposals, requiring instead that the discussion continues. In the definite Outcome document of 24 October 2005[89] even this tenuous link is severed. The decisive paragraph reads as follows:

> "We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter."[90]

At first sight, nothing is left in this area of the bold designs developed by the ICISS, by the HLP and by Secretary-General Kofi Annan.

VIII. Conclusions

Thus, the question has to be posed whether all the endeavours of the last years to reform one of the most important – and most contested – areas of UN law have proven to be futile. While a first examination of this development might suggest such a conclusion, at a closer, contextual look, a somewhat different impression emerges. In fact, the provisions on the use of force are embedded in a broad reform framework expressing a new understanding of the international community. It must be emphasized that one of the most characterizing elements of the documents presented is the attempt to furnish a holistic vision of the main problems and challenges that international society is faced with.[91] Poverty, infectious diseases, environmental degradation, internal conflicts, terrorism and transnational organized crime – to mention only a few of the most urgent present day problems the international community faces – are described as mutually interlinked. This approach is not free of exaggeration but the main idea on which it rests appears to be convincing. In sum, these concepts are inspired mainly by the idea that international cooperation has to be enhanced, international institutions have to be strengthened and unilateralism has to yield to multilateralism. They constitute, therefore, a valuable antidote against the strong

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89 World Summit Outcome, see the A/RES/60/1 of 16 September 2005.

90 Ibid., para. 79.

91 See extensively in this regard Hilpold, see note 6.

trend towards unilateralism characterizing current developments and find their foremost expression in the National Security Strategy promulgated by the United States government on 17 September 2002.[92]

The HLP Report has been criticized for attributing too much importance to the role of the Security Council in the future world order foreseen in this Report.[93] This criticism appears to be justified. The community of states is not prepared to accept a world directorial nor would such an institution be very well suited to solve the complex problems mentioned above. Both the efficiency problem – a decentralised order is much more efficient in procuring the data necessary to affront the problems mentioned – and the necessity to provide for democratic governance rules respecting at the same time the equality of states stand in the way of such an approach. A stronger international constitutional order allowing (and requiring) states to cooperate more intensively would, however, be useful. Although this aspect has also been weakened along the way from the HLP Report to the Outcome Document this basic idea is still clearly perceptible in the resolution approved by the General Assembly on 24 October 2005. Also the follow-up process characterized by the establishment both of the Peacebuilding Commission[94] and the Human Rights Council[95] evidences the vigour still residing in this reform movement. The fact that both institutions will give an important contribution to the implementation of the duty to protect demonstrates further the pivotal importance of this duty in the whole reform process.

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92 See under <http://www.whitehouse.gov/nsc/print/nssall.html>. See on this issue E. Bohne, "Die Europäische Sicherheitsstrategie und die Nationale Sicherheitsstrategie der USA im Vergleich", in: S. Brink/ H.A. Wolff (eds), *Gemeinwohl und Verantwortung – Festschrift für Hans Herbert von Arnim zum 65. Geburtstag*, 2004, 43 et seq. and P. Hilpold, "Gewaltverbot und Selbstverteidigung – zwei Eckpfeiler des Völkerrechts auf dem Prüfstand", *Juristische Arbeitsblätter* 38 (2006), 234 et seq.; Ch. Gray, "The US National Security Strategy and the New 'Bush Doctrine' on Pre-emptive Self-Defence", *Chinese Journal of International Law* 1 (2002), 437 et seq.

93 See L. Boisson de Chazournes, "La réforme des Nations Unies: à propos des réponses aux menaces à la paix et à la sécurité internationales", *International Law Forum* 7 (2005), 84 et seq. who wrote that there is a "risque de 'securiser' l'action des Nations Unies dans ses multiples domaines de compétence", (85).

94 A/RES/60/180 of 20 December 2005.

95 A/RES/60/251 of 15 March 2006.

On a whole, it is not easy to give a definite answer to the question whether this reform endeavour has been a success – and not only because the reform process is still ongoing. The evaluation of the results will depend mainly on the perspective adopted. For those who expected immediate results, a fundamental change in world governance and a strengthening of central institutions responsible for a direct implementation of the duty to protect (and, subsidiarily the competence for individual states to enact this duty) the results can only be disappointing and the ongoing reform discussion unpromising. For those, however, who advocated a more gradual development the results achieved hold more promise. The global vision, the interconnection between the various problems and the clear demonstration that state sovereignty knows its limits when essential human rights issues are concerned[96] is laying the foundations for a new international order – which, however, must always respect the fact that international law is mainly formed by states. A concept denying this fact is condemned to failure from the beginning. True, there have been times in the past when international law changed more or less abruptly and profoundly; the creation of the Holy Alliance, the coming into being of the USSR, the formation of the United Nations and the process of decolonization being examples of this. This time, however, the changes appear to be not so profound, notwithstanding the many laments about an excessive recourse to unilateralism by the only remaining superpower and about an ever-growing discrepancy between rising international human rights standards and the lack of willingness to implement them. Viewed realistically, the collective security mechanism operates quite well in consideration of the degree of development of the international society. There is much room for improvement but it is far more likely that this can be brought about by an

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96 All too often it is forgotten what the Permanent Court of International Justice stated in 1923, in its fourth Advisory Opinion on the Nationality Decrees in Tunisia and Morocco (PCIJ, Series B, No. 4, 1923, page 24): "The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations." Therefore, there is no rigid distinction between "internal" and "external" questions. There is rather a "moving scale" which takes into account the evolution of international law. See G. Abi-Saab, "Some Thoughts on the Principle of Non-Intervention", in: K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy*, 1998, 225 et seq. (230). See also C.N. Gregory, "An Important Decision by the Permanent Court of International Justice", *AJIL* 17 (1923), 298 et seq. (301).

evolutionary process than by a total remodelling of United Nations law. In fact, the UN Charter is a "living instrument" and its interpretation can and has to be adapted continuously to new needs.[97] This is often missed by those interpreters who adopt a kind of a religious attitude towards the Charter: the reading of this document is closely tied to the factual realities of the 1950s and any deviation intended to make this document better correspond to present needs is condemned as dogmatic impurity.[98]

In reality, any dogmatic "extremist" reading of the Charter does little service to the purposes for which the United Nations was founded. As it is not correct to rule out any evolution of United Nations law,[99] so it is dangerous to simply do away with the strict prohibition of the use of force. Therefore, while it is no longer possible to simply ignore the plight of people in cases of massive human rights abuses, neither the HLP Report nor the Annan Report were suited to serve as the immediate basis for a new constitutional order of the United Nations. They have given, however, a worthy impetus for the further development of this law. The great challenge for the future will be to achieve what was recently called the "humanization of international law"[100], a painstaking, slow and often disillusioning process which receives far less public attention than the drafting of lofty concepts but which is far better capable of generating lasting effects.

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97 See O. Schachter, *International Law in Theory and Practice*, 1991, 118 et seq.: "[The Charter] is, like every constitutional instrument, continuously interpreted, moulded and adapted to meet the interests of the parties."

98 See, in this sense, the brilliant comparison made by Rein Müllerson: "For some, the UN Charter seems to have acquired certain characteristics of the Holy Books – either the Bible or the Koran. One cannot change it, one has to believe in it and even swear allegiance to it, but at the same time, one can hardly live by it. However, fundamentalism in the Charter may be almost as dangerous as Biblical or Koranic fundamentalisms. Literal and non-contextual interpretation of any text – be they religious or secular texts – is bound to lead to social impasse. If in the case of holy texts such interpretation sometimes guides towards, and justifies, violence, in the case of the UN Charter, it may, on the contrary, be one of the causes of the inability to adequately respond to violence," see R. Müllerson, "The Law of Use of Force at the Turn of the Millennium", *Baltic Yearbook of International Law* 3 (2003), 191 et seq. (199).

99 See in this sense also N.D. White, "Self-defence, Security Council authority and Iraq", in: Burchill, see note 52, 235 et seq. who strongly criticizes the approach taken by the National Security Strategy.

100 See Th. Meron, *The Humanization of International Law*, 2006.

Recently it has been deplored that paralysis has set in the development of international law and that those institutions which should deal institutionally with it are stuck in technical discussions.[101] This criticism does not, however, do sufficient justice to the complexities of a highly developed international order which is working fairly well. Of course, aspirations range still higher and many deficiencies of the international order have to be confronted. On the other hand, idealistic ideas are rarely suited for direct application. Technical groundwork and the development of great strategies are both necessary and not mutually exclusive. Therefore, the HLP Report and the Annan Report were both worthwhile contributions to the development of international law; not as blueprints for a new international constitutional order but as authoritative reminders that more care has to be dedicated to new great challenges such as the duty to protect. The hard work to implement these ideas has to be done on the ground, by committed politicians, by NGOs[102], by single human rights activists and not least by the disillusioned technician, not to say by the "pedantic man in his closet" as the international lawyer was once characterized.[103]

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101 See B.G. Ramcharan, "The United Nations and New Threats, Challenges and Change: The Report of the High-Level Panel", in: R.St. Macdonald/ D.M. Johnston (eds), *Towards World Constitutionalism*, 2005, 911 et seq.

102 See D. Thürer, "The Democratization of Contemporary International Law-Making, Processes and the Differentiation of Their Application", in: R. Wolfrum (ed.), *Developments of International Law in Treaty Making*, 2005, 53 et seq. (57).

103 See J. Marriot for the English High Court of Admiralty in: "The Renard" (1788); 1 Hay & M. 222 (224), I Rose. P.C. (1778), cited according to A. Verdross/ H.F. Köck, "Natural Law: The Tradition of Universal Reason and Authority", in: R.St.J. Macdonald/ D.M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, 1986, 39 et seq.