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The continuing modernity of Article 2(4) of the UN Charter[1]

1 Introduction

In hindsight the Cold War era has been a remarkably stable period in human history. Though regional armed conflicts were very common – especially in the form of proxy wars – the basic constitutional order in international relations was respected and upheld. This was true even though basic ideological conflicts harbored an enormous disruptive potential. The price (or, according to the perspective, the precondition) for this stability was strict adherence to the principle of non-intervention and the ban on the use of force according to Article 2 (4) of the UN Charter. Human rights violations in other countries were deplored or even criticized but in principle the respect to sovereignty was given priority. With the end of the Cold War not only the ominous threat of a great nuclear conflict between East and West has become far less probable but it was the issue of human rights that was given a totally different weight in the overall assessment of the rights and duties of States. There was a wide perception that mankind was opening a new chapter in human history where compassion for the plight of others should not stop at the national borders but be, instead, universal and lead to universal enforcement of human rights. While, in principle, universality is the very nature of human rights as enshrined in the Universal Declaration of Human Rights of 1948[2], it took half a century – and the diffusion of satellite TV as well as continous on the spot broadcasting by companies such as CNN – to really transpose this principle into the conscience of the broad masses[3].

The universal scope of this principle is now an obvious aspect in any endevour to promote human rights and when this principle clashes with sovereignty it goes without saying that sovereignty has to retreat. The elimination of war and the concern for human rights have been described as part of a „natural and inevitable self-reconceiving of international society and its law" conducive to a situation where „sovereignty over territory will disappear as a category from the theory of international society and from its international law"[4]. The impression is taking ground that in politically correct discussions even the potential conflict between these opposing principles has to be ignored. On the other hand, in a globalized world this development generates enormous hopes also on the other side, on the side of the oppressed. While in the past oppressed people used to direct their calls for help to their kin nation[5] now it is the whole free world these calls are addressed to, thereby compounding the pressure of public opinion on governments to intervene. This situation is shaping content and form of political thought and – in part – of

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[1] This article is part of broader studies on the subject of "humanitarian intervention". See by this author also "Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte", 53 Zeitschrift für Öffentliches Recht (1999); "Auf der Suche nach Instrumenten zur Lösung des Kosovo-Konfliktes: Die trügerische Faszination von Sezession und humanitärer Intervention", in: J. Marko (Hrsg.), Gordischer Knoten Kosovo/a: Durchschlagen oder entwirren? (1999), 157; "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?", in: 12 European Journal of International Law (2001), 437.

[2] U.N. Doc. A/811.

[3] On the tortous way through which human rights have become universal see also Capotorti, „Human Rights: The Hard Road Towards Universality", in: Macdonald/Johnston, The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory, 1983, 977.

[4] See Allot, Eunomia, 2001, para. 16.79 and 16.80.

[5] The history of humanitarian intervention shows that help came usually from nations with which the oppressed people shared a common ethnic background or religious belief.

political reasoning. This is exemplified very impressively by some remarks of persons who are among the most renowned exponents of the International Society, the last three UN Secretaries-General. While in office the last three UN Secretaries-General declared the following:

"We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that defence of the oppressed in the name of morality should probably prevail over frontiers and legal documents" (Javier Pérez de Cuellar)[6].

"It is now increasingly felt that the principle of non-interference with the essential jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity" (Boutros Boutros-Ghali)[7].

"State sovereignty, in its most basic sence, is being redefined by the forces of globalisation and international cooperatoin. The state is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty – and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter – has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny" (Kofi Annan)[8].

This new way of thinking put considerable stress on the traditional viewpoints with regard to the value of Article 2 (4) of the UN Charter and the question of humanitarian intervention. Politicians, political scientists and international lawyers eager to change direction looked out for justifications which would legitimize such a re-orientation. While some authors tried to find such hints in the system of the law of the United Nations as it stands now[9] or tried to devise the conditions under which a principle of customary international law allowing acts of intervention could come into being[10] others turned their head to the past in the hope to find guidance. The intention was, first of all, to detect a principle of customary international law which could have survived notwithstanding the coming into force of the Charter of United Nations. In the second place, and this appears to be the far more important aspect, a closer look at past acts of humanitarian intervention and the surrounding discussions may reveal that many thoughts and ambitions which seem so modern today and peculiar to our enlighted age have come also to the minds of our ancestors. On this basis it shall be shown that the law on the use of force or, respectively, the law of humanitarian intervention as it stands now is the result of a continous development and that any deviation in this process for the sake of a misguided understanding of the concept of modernity would throw us far back in our quest to improve the respect for human rights. Article 2(4) of the UN Charter is the cornerstone of an international order in which the pursuit of peace and respect for human rights has become centerstage.

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[6] See Report of the Secretary-General, in: UN Yearbook 1991, para 11, quoted according to Advisory Council on International Affairs, Advisory Committee on Issues of Public International Law, Humanitarian Intervention, Report NO. 13, The Hague (April 2000), also available on: AIV-Advice.nl.

[7] See, again, the Report cited in previous note, page 9, which refers to P. Malanczuk, "Humanitarian Intervention and the Legitimacy of the Use of Force (1993), 29.

[8] See United Nations Press Release SG/SM/7136, GA/9596, again quoted according to the Report mentioned above (supra note 4).

[9] This tendency could be noted especially in German International law literature. See, especially, Doehring, Völkerrecht (1999), para 1008 et seq.; Delbrück, "Effektivität des UN-Gewaltverbots", 74 Die Friedens-Warte (1999) 139 and Köck, "Die humanitäre Intervention", in: Gustenau (ed.), Humanitäre militärische Intervention zwischen Legalität und Legitimität (2000), 25.

[10] See, in this respect, Cassese, "Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, 10 EJIL (1999), 2 and "A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis", 10 EJIL (1999), 791.

2 The law of humanitarian intervention - the traditional view

As in the abundant literature about humanitarian intervention this concept is not used in an uniform manner[11] any inquiry into this matter must first define the meaning attributed to these terms. With regard to the latitude of the concept three different distinctions can be made[12]. The traditional interpretation of this concept can be briefly summarized as follows: Humanitarian intervention involves the use of armed force by an international entity in order to protect humanitarian interests in another State. In the meantime, many writers seem to prefer an enlarged concept of humanitarian intervention which takes into consideration other coercive measures short of armed force as well[13]. Finally, there is a so-called broad concept of humanitarian intervention which encompasses any form of influencing a State´s freedom of action for humanitarian motives[14]. Although the author of this contribution has given preference in the past to the enlarged concept for a broader assessment of this institute[15] with regard to the present task, focussing mainly on the question whether the main cases of humanitarian intervention require - also in the light of a reassessment of historic events - a reinterpretation of art. 2 (4) of the Charter, the traditional concept seems more appropriate[16].

Another distinction is that between collective and unilateral measures. Since the entry into force of the UN Charter this distinction is generally understood to relate to the question whether the measures have been taken according to Chapter VII of the Charter[17] or outside this system. Even when an intervention

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[11] This uncertainty is widely denounced in legal literature. See e.g. Thomas/Thomas, Non-Intervention (1956), 65; Moore, "The Control of Foreign Intervention in Internal Conflicts", Moore (ed), Law and the Indo-China War (1972), 119.

[12] For the following see Pauer, Die humanitäre Intervention (1985), 5 ss. and Verwey, "Humanitarian Intervention under International Law", NILR (1985), 357.

[13] See for example Pauer, ibid., 7 s.

[14] Ibid. referring to Friedmann, Intervention in International Law, Jaquet (ed.), Intervention in International Politics (1971), 40.

[15] See Hilpold, „Sezession und humanitäre Intervention“ (supra note 1).

[16] As so often in law the distinction between "false" and "correct" definitions is less valuable than that between "useful" and "less useful" analytical tools. Thus the broad concept of humanitarian intervention may be extremely useful in a political or in a sociological study; in a legal inquiry, however, it is not suited to lead to meaningful results as many acts forming part of a broad concept of humanitarian intervention are legally irrelevant.

The selection of the traditional concept is connected with another advantage: Thereby the distinction between the normative and the descriptive concept of humanitarian intervention is avoided, as the traditional concept - in contrast to the enlarged one (Pauer, supra note 12, 7 s.) - is only descriptive and leaves the judgement about the legality of these measures to the subsequent analysis.

In this sense the concept adopted here is in line with the affirmation of Verwey (supra note 17, 374): "There is a tendency in the literature to confine ´humanitarian intervention´ to those kinds of protective operations which involve the use of armed force."

On the definition problem with regard to the concept of humanitarian intervention see also Beyerlin, "Humanitarian Intervention", Bernhardt (ed.), EPIL II (1995), 926.

[17] According to Article 39 of the Charter, the Security Council, when determining the existence of a threat to the peace, a breach of the peace or an act of aggression can make recommendations or decide what measures in accordance with Articles 41 (non-forcible measures) or Article 42 (forcible measures) shall be taken. As is it known, no agreements according to Article 43 of the Charter, providing men, arms and assistance have been concluded between Members of UN and the Security Council. Therefore, the Security Council, when authorizing forcible measures carried out by Members and not directly by the UN, refers generally to Chapter VII. See Frowein, Article 42, Simma (ed.), The Charter of United Nations - A Commentary, 1995, 628, at 635 (para. 23).

has been undertaken by several States, we are confronted with an unilateral initiative if the procedures regulated in the Charter are not respected[18].

With regard to the specific goal of an act of humanitarian intervention a further distinction can be drawn between an intervention directed at protecting nationals abroad and another form of intervention aimed at the protection of the nationals of the foreign State. Although of considerable theoric and practical importance the first category will not be treated here further as it involves specific questions which are usually treated as a special issue[19].

Thus this contribution shall focus on the situation where the citizens of a foreign State are endangered and other States are considering intervention. Again, two situations can hereby be distinguished. The first "ordinary" situation is characterized by the fact that there is a central power actively participating in the persecution of parts of the population or at least conniving at such acts. In the second situation, a central power is no more present or in any case unable to stop civil war-like clashes between different parts of the population. This case is also treated under the catch-word of the "failed state". While these two situations show no difference with regard to the threat the population may be exposed to, in the second case it can again be argued that the question whether humanitarian intervention is legal is less pressing as sovereignty is in abeyance in such cases.

Measures of humanitarian intervention of the type as defined for the purposes of this article can be traced back at least to the order established by the Congress of Vienna of the year 1815[20]. The main cases of intervention on humanitarian grounds prior to the entry into force of the UN Charta are the interventions of Great Britain, France and Russia in Greece (1827-30) after the Ottoman Turks had committed several massacres against Greek Christians; the intervention of France in Syria (1860-61) following the killing - unimpeded by Turkey - of thousands of Syrian Christians by the Muslim population; the intervention of Russia in Bosnia, Herzegovina and Bulgaria (1877-78), officially undertaken out of compassion for the oppressed Christians in this region, but in reality "a move [...] upon

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[18] As obvious as this may seem it nonetheless merits to be pointed out specifically because in the aftermath of the Kosovo intervention - as will be shown later on - this distinction was used in an equivocal manner in an attempt to buttress legally the intervention. Partly, it has been sustained that an intervention carried out by a group of states could be considered as legal, provided that further conditions were fulfilled.

[19] Not least because of the development of modern tecnology allowing the intervenor to airlift its nationals from the country where they are threatened (see Frank and Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, 67 AJIL 1973, 275 at 283) this type of intervention is usually of lesser impact on the sovereignty and territorial integrity of the State subject to the intervention. This may explain why some writers even consider this form as legally permissible. For a detailed analysis of this concept see Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity (1985); Ader, Gewaltsame Rettungsaktionen zum Schutz eigener Staatsbürger im Ausland (1988) and Raby, "The Right of Intervention for the Protection of Nationals. Reassessing the Doctrinal Debate", Les Cahiers de Droit (1989), 441. Beyerlin, however, considers also this type of intervention as illegal (supra, note 21, 932).

[20] For earlier measures which can be classified in a wider sense as acts of humanitarian intervention see Murphy, Humanitarian Intervention - The United Nations in an Evolving World Order, 1996, 33 ss. For an attempt to isolate the idea of humanitarian intervention from pre-Grotian writings see Meron, Common Rights of Mankind in Gentili, Grotius and Suarez, AJIL 85 (1991), 110. Jean-Pierre Fonteyne in his vast inquiry into the nature of the principle of humanitarian intervention ("The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter", in: 4 California Western International Law Journal (1974), 203) refers also to the Crusades and the 16th and 17th century religious wars (page 205 s.) but he rightly emphazises that this possible earlier instances of humanitarian intervention are too closely interwoven with religious elements so that they can hardly be classified as humanitarian according to our current way of interpreting this word. See also, as a still leading account of the history of humanitarian intervention, Stowell, Intervention in International Law (1921).

the Straits and Constantinopel"[21]; the intervention of the United States in Cuba (1898) prompted in part by the harsh repression of local resistence against Spanish rule, but, first of all, by the will to protect American interests on Cuba and aimed at reducing Spanish influence in the Western hemisphere; finally, the intervention of Greece, Bulgaria and Serbia in Macedonia, again pursuing a multitude of goals: On the one hand, outrageous acts of repression had been committed against the Christian population, on the other hand, undeniably, there were territorial claims against an ailing, receding Ottoman Empire. While interventions were also carried out subsequent to World War I, now in a setting which foresaw at least procedural limitations to the recourse to war[22], and, after the Kellog-Briand Pact of 1928, a total - though, ultimately, ineffective - repudiation of war as a means to settle international disputes, the humanitarian motives put forward on these occasions are so evidently specious that these events do not merit detailed consideration[23].

A large number of inquiries into the law of humanitarian intervention make reference to the precedents prior to World War I. Most of these inquiries are mainly interested in the question whether there had been a rule of customary law permitting an armed humanitarian intervention. This question is of considerable importance as, beginning with the existence of such a rule in the 19th century - so it is argued - it could perhaps be inferred that a customary exception to the strict prohibition of the use of force still survives in the Charter system. The whole discussion is beside the point. In fact, in a world order in which recourse to war was not legally regulated and in which the relevant decision was therefore part of the sovereign powers of each single State, a customary rule allowing interventions for humanitarian reasons was not needed nor can it develop under such conditions. True, each act of intervention was accompanied by an intensive discussion in the intervenor States and beyond. But this discussion was of a political nature and even in case sufficient evidence could be shown that on a political level a majority endorsed such a rule this would still not establish a precedence in the ambit of the legal discussion. Yet, this does not mean that the historical acts of intervention enumerated above are totally irrelevant for the present day. In fact, as the political reactions to these measures were pretty much the same as those experienced nowadays, they point to regularities which in the meantime are also of considerable importance as a precondition for the formation of customary law.

The best example in kind is that of the French intervention in Lebanon/Syria of the year 1860. Here, as in many present day cases of interventions there was a forceful movement in Western European countries pressing for coercive measures. Governments feared to lose their legitimacy should they remain inactive while actrocities were committed[24]. In a certain sense, a principle much discussed in the second

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[21] See Frank and Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, 67 AJIL 1973, 275, at 283, citing Fenwick, Intervention: Individual and Collective, 39 AJIL (1945) 645, at 650.

[22] See Articles 12, 13 and 15 of the League of Nations Covenant. At the center of this provisions stood a mechanism designed to ensure a "cooling-off period" which should at least prevent wars mainly generated by a building up of emotions.

[23] Reference is made here to the invasion of the Manchuria by Japan in 1931, of Ethiopia by Italy in 1935 and of Czechoslovakia by Germany in 1938. All these acts met with strong protests by other countries which evidenced that the justifications advanced were accepted at no time by the international community.

[24] See Endemann, Kollektive Zwangsmaßnahmen zur Durchsetzung humanitärer Normen, 1997, 20. Fiore (Nouveau Droit International Public 521-22, Antoine transl. 1885, cited according to Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Ist Current Validity under the U.N. Charter, in: 4 California Western International Law Journal, 1974, 203 at 221) has given lucid expression to this thinking:

„The violation of international law can also be a consequence of events occurring inside a State, and which results in the direct violation of international law. Let us assume, for instance, that a prince, in order to put down a revolution, violates all the generally recognized laws of war, has prisoners executed, authorises destruction, looting, arson, and encourages his supporters to commit those odious actions that it is the faction that [seized power] which engages in

half of the 20th century, the erga-omnes principle, had made an early appearance. Repressive actions in Lebanon - and in other regions of the Ottoman Empire - were felt to violate the ordre public in European countries[25]. Notwithstanding the lack of a general prohibition to use force in international relations in this and in other cases of humanitarian intervention, the pros and cons of such an initiative were largely debated and the content of this discussion did not differ much from that prompted, for example, by the Kosovo crisis.

Thus it can be said that also in those times when war was regarded - from a legal point of view - as a tecnical instrument freely available to States for promoting humanitarian ideals, in reality a multitude of (political) constraints made sure that this instrument was used with great caution; even when an increasing sense of belonging to a larger international community seemed to reduce the threshold for tolerating human rights abuses in other countries, governments were very reluctant to intervene in default of further (political or economic) reasons[26].

So it may not be enough to reject the idea that a "right" to humanitarian intervention existed; it also appears legitimate to deliberate whether a moral principle of this kind existed, given the large abuse that had been made of this concept and given the fact that the International Community has shown no intention to intervene in cases where States outrageously ill-treated their subjects[27].

As is well-known, the Charter established a monopoly for the use of force in international relations which can be exercised only according to a well-balanced procedure laid down in Chapter VII of the Charter and which takes the power realities after World War II into account. For individual states this monopoly leaves no space for unilateral action with the exception of the case of self-defence regulated in Article 51 of the Charter. This exception had to be maintained as it was neither desirable nor possible to prohibit such a reaction[28]. Outside these two specific cases "the threat or use of force" between all UN Member States and - as a result of a customary law development[29] - generally, between all States, is prohibited.

Various attempts have been made to find loopholes in the wording of Article 2 (4) of the UN Charter which would permit measures of humanitarian intervention. In this context, first of all, several writers have pointed at the fact that Article 2 (4) prohibits the threat or use of force "against the territorial integrity or political independence" of other states. As has been convincingly shown in literature both in

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similar crimes. Inaction and indifference of other States would constitute an egocentric policy contrary to the rights of all; for whoever violates international law to the disadvantage of anybody, violates it not only to the detriment of the person directly affected, but as against all civilized States".

Adapted to modern terminology a passage like this could also be found in a modern textbook on international law.

[25] It has, however, to be remarked that this compassion was felt mainly for oppressed Christians and not for each people subject to human rights abuses.

[26] In legal literature it has been shown in detail that practically every case usually touted as humanitarian intervention was characterized by the presence of specific interests going beyond that of humanitarian nature. See e.g. Murphy (supra note 25), 49; Franck and Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", 67 AJIL (1973), 275, at 283; Pauer, Die humanitäre Intervention - Militärische und wirtschaftliche Zwangsmaßnahmen zur Gewährleistung der Menschenrechte, 1985, 44; Rodley, Collective intervention to protect human rights and civilian populations: the legal framework, Rodley (ed.), To loose the bands of wickedness, 1992, 14 at 20; Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force, 1993, 11.

For an account of the interventions prior to First World War I according to which the altruistic element is to regarded as preponderant see Fonteyne, "The customary international law doctrine of humanitarian intervention: Its current validity under the U.N. Charter", California Western International Law Journal 4 (1974), 203, at 205.

[27] For example, one might cite the various progroms against the Jewish population or the killing of hunderts of thousands of Armenians by Turkey in the years 1915/16.

[28] The so-called "enemy-state-clauses" (Articles 53 and 107 of the Charter) can be ignored as they are a relic of a political situation which does not exist any more. They are considered to be no more in force.

[29] See the Nicaragua Case, Judgment of 27 June 1986, ICJ Report 1986, para. 187.

the way of a historic and a systematic interpretation of this provision, the expressions cited are not directed to restrict the scope of application of the prohibition of force[30]. On the contrary: These expressions were added at the request of several smaller states emphasizing their understanding of this provision as a special guarantee to their territorial integrity and political independence[31].

To many, it may appear redundant to rehearse a well-known, widely accepted interpretation of Article 2 (4), but the Kosovo intervention has revealed an astonishingly far-reaching preparedness of commentators to restrict this provision. A broad interpretation of Article 2 (4), however, was absolutely prevailing in the years after World War II and it is still prevailing these days. Nonetheless, it must also be emphasized that the extension of this prohibition does not go as far as to encompass so-called economic coercion as well, notwithstanding insistent demands by third world countries going in this direction. An aspect worth highlighting may also be that only states and de facto regimes[32] are protected by these norms but not other sub-state entities or actors striving for national independence. Therefore, there is no room for granting the right to self-defense to endangered sub-state entities such as minorities and, subsequently, the right to self-help as a special justification for measures of humanitarian intervention to other states[33].

As a consequence, following a "mainstream" approach[34], the situation under the Charter system can be summarized as follows: Unilateral acts of humanitarian intervention are - without doubt - prohibited; there is no way to find a justification for such measures. A “right to humanitarian intervention” could not survive under the Charter system as it had not come into being before. The political considerations surrounding many of the acts of humanitarian intervention of the 18th and the 19th century, reveal, however, an astonishing modernity. The prudence with which this issue was usually treated resembles very much the cautiousness with which the Security Council affronts this issue and – even more so – with which States or alliances take recourse to the use of force. But what are the powers of the Security Council in this field? This question will be treated in the following section.

3 The Security Council and the issue of humanitarian intervention

The practice of the Security Council with regard to the crisis in Iraq (Resolution 688/1991), in Somalia (Resolution 794/1992), Haiti (Resolution 940/1994) and Rwanda (Resolution 929/1994)[35] is often regarded as an increasing willingness by the Security Council to attribute more importance to internal conflicts if they give rise to an extraordinary humanitarian crisis. Nonetheless, the cases cited are more

[30] See Randelzhofer, Articel 2(4), Simma (ed.), The Charter of the United Nations - A Commentary, 1995, 117.
[31] Ibid., 118.
[32] See Randelzshofer (supra, note 35), 115, para. 28.
[33] See, extensively on this aspect Hilpold, “Humanitarian Intervention: Is There a Need for a Legal Reappraisal” (supra note 1),
[34] It is needless to say that this position as nearly every other position in international law was also in part contested. It may, however, be argued that the "mainstream" position has assumed a particularly authoritative role in this case. See, however, Jennings and Watts, Oppenheim´s International Law, vol. I, 1992, one of the most recognized manuals of International Law of the present, where the following statement can be found: "[W]hen a state commits cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, the matter ceases to be of sole concern to that state and even intervention in the interest of humanity might be legally permissible". Ibid., 442.
[35] See, extensively on this Resolutions Hilpold, “Humanitarian Intervention: Is There a Need for a Legal Reappraisal”, (supra note 1).

the proof of the latitude of the Security Council´s powers to autodetermine its competences than an indication of a real humanitarian intervention practice[36].

With regard to the first aspect, it must be kept in mind that the concept of the separation of powers explaining the essential features of the *Rechtsstaat* is not applicable on the United Nations[37] and the Security Council has very broad competences to interpret Article 39 of the Charter[38]. This was evidenced very clearly in the Lockerbie case where the Security Council ordered Libya to surrender two of its citizens suspected to be involved in the bombing of the Pan Am flight 103 over Lockerbie and the UTA flight 772 over Nigeria. These terrorist acts were qualified as a "threat to international peace and security", giving to this term a meaning unknown before. It was amply discussed in literature whether this meant that the Security Council was the ultimate arbiter of the legality of its own actions. A closer look reveals, however, that the legality issue is far less serious than part of the discussion would suggest. First of all, all UN Member States have by adhering to the UN Charter and according to Article 25 "confer[ed] primary responsibility for the maintenance of international peace and security, and agree[d] that in carrying out its duties under this responsibility the Security Council acts on their behalf". Secondly, as Louis Henkin has pointed out, there are "inherent, ´systematic´ limitations" - especially the majority requirements stipulated in Article 27 of the Charter - providing a strong guarantee that the Security Council will not act ultra vires[39]. The drafters of UN Charter put much trust in the single organs by

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[36] We are faced here with the danger of over-generalization. One must be very careful not to over-generalize from past UN-measures in these field. This danger has already arisen subsequent to the two SC resolutions (217, 1965 and 221, 1966) by which an internal situation (the establishment of a white, racist minority regime) was taken as immediate cause to declare the existence of a "threat to the peace". These statements by the Security Council did not mean that any illegitimate, antidemocratic and discriminatory government constitutes a "threat to the peace" but were only an early reminder of the broadness of the Security Council powers and a demonstration of the willingness to use them especially in those cases which can be qualified as "special" or "unique" and which are not suited for an easy generalization.

[37] See Herdegen, Die Befugnisse des UN-Sicherheitsrates, 1998, 25.

[38] Ibid., 5. Simma, "From bilateralism to community interest in international law", 250 RdC 1994 (1997), 219, at 269. According to Michael Reisman the powers of the Security Council are, on the basis of Article 39, practically unlimited. See 18 "Peacemaking", Yale Journal of International Law (1993), 415, at 418.

[39] See Henkin, Humanitarian Intervention, in: Henkin and Hargrove (eds.), Human Rights: An Agenda for the Next Century, 1994, 383, at 395. Theodor Schilling, however, tries to identify even material criteria in the Charter limiting the powers of the Security Council. See "Die ´neue Weltordnung´ und die Souveränität der Mitglieder der Vereinten Nationen", Archiv des Völkerrechts (1995), 66, at 78 ss.

For a recent account of the "constitutional" problems that the delimitation of the jurisdiction of the Security Council raises see the review essay by Fassbender, "Quis judicabit? The Security Council, Its Powers and Its Legal Control", EJIL, 11 (2000), 219, reviewing the following books Fraas, Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof: Die Rechtmäßigkeitsprüfung von Beschlüssen des Sicherheitsrats der Vereinten Nationen im Rahmen des VII. Kapitels der Charta durch den Internationalen Gerichtshof, 1998; Herbst, Rechtskontrolle des UN-Sicherheitsrates, 1999; Lailach, Die Wahrung des Weltfriedens und der internationalen Sicherheit als Aufgabe des Sicherheitsrates der Vereinten Nationen, 1998; Stein, Der Sicherheitsrat der Vereinten Nationen und die Rule of Law: Auslegung und Rechtsfortbildung des Begriffs der Friedensbedrohung bei humanitären Interventionen auf der Grundlage des Kapitels VII der Charta der Vereinten Nationen, 1999; Sarooshi, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers, 1999.

See also Bedjaoui, The New World Order and the Security Council: Testing the Legality of Its Acts, 1994 and Lamb, "Legal limits to United Nations Security Council Powers", Goodwin-Gill and Talmon (eds.), The Reality of International Law, Essays in Honour of Ian Brownlie, 1999, 361.

See, finally, Prosecutor v. Tadic (Jurisdiction), Trial Chamber, 10 August 1995, Case No. IT-94-I-T-m; 42: "The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, and neither the text nor the spirit of the Charter conceives of the Security Council as unbound by law".

leaving them the power to interpret their own competences and by presuming their acts not to be ultra vires. In this system lies also considerable evolutionary potential as the said presumption has a very broad scope, a fact made very clear by the ICJ in Certain Expenses of the United Nations: "[W]hen the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."[40] What does this mean for possible actions of humanitarian intervention by the Security Council? While it is probably still too early to state that the Security Council has developed a proper concept of humanitarian intervention, the practice of the last decade has shown that measures of this kind enter into the competence of the Security Council. Also for the future, however, it is to be exptected that this competence will be used very selectively. It is furthermore highly probable that the Security Council will continue to refrain from labelling these actions according to their real goal and content. Too diverse are the ideas of the permanent Members of the Security Council with regard to the domaine reservée when human rights are involved; too extensive were the interpretations some UN Members have given to preceding Security Council resolutions referring to Chapter VII of the Charter[41].

The Yugoslav crisis has furthermore shown that, notwithstanding the end of the Cold War, even in the presence of blatant violations of human rights and state-sponsored atrocities, the adoption of effective Chapter VII-measures remains more a possibility than a probability[42]. It has been stated that the Security Council in his effort to avoid the slightest hint for the creation of a precedent in the case of Zaire (Resolution 1080/1996) has even renounced to refer to "exceptional circumstances" noting instead that the situation "demands an urgent response by the international community"[43]. Why this divergency of ideas within the Security Council, why this reluctance to exercise powers this body undoubtely has, why this prudence in making perfect a peace order in which reliance alone on Article 2(4) of the Charter cannot impede war and violation of human rights? First of all, it has to be said that the carrying out of acts of humanitarian intervention is still a costly and dangerous affair where success is far from being granted. Secondly, and this is the main statement of this article, this cautious attitude has contributed to highlight the primary responsibility of the states to make sure that human rights are respected within their borders. In this task they are assisted by a panoply of international instruments whereby the national

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[40] ICJ Reports (1962), 168.

[41] Special reference is to be made here to the continuing threat and use of force against Iraq by the United States and Great Britain. After the cease-fire of 1991 British-American forces have repeatedly carried out airstrikes in the following years subsequent to the violation of the disarmament obligations imposed on Iraq and to enforce the no-fly zones established in northern and southern Iraq. Viewed from a strictly legal perspective, these actions were extremely problematic. It is true that Resolution 678 (1990) authorized "Member States, as already pointed out, "to use all necessary means to uphold and implement Security Council resolutions 660 (1990) and all subsequent relevant resolutions and to restore peace and security in the region". Correctly it has been evidenced in legal literature that the word "subsequent relevant resolutions" refer to the resolutions adopted subsequent to Resolution 660 (1990) and prior to Resolution 678 (1990) and that the authorization mentioned did not remain in force after the adoption of Resolution 687 (1991) which mandated the cease-fire. See for more details Denis, La résolution 678 (1990) - Peut-elle légitimer les actions armées menées contre l´Iraq postérieurement à l´adoption de la résolution 687?, (1991), Revue Belge de Droit International 2/1998, 485; Krisch, Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council, Max Planck Yearbook of United Nations Law 3 (1999), 59. The legality of the enforcement of the no-fly zones was even more problematic as these zones have - as already shown - no specific basis in a Security Council resolution.

[42] See Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal", (supra note 1) where I have pointed out that it is doubtful whether the war in Bosnia would have ended had single states (especially Croatia and the USA) not undertaken unilateral actions.

[43] See Advisory Council on International Affairs, Advisory committee on Issues of Public International Law, "Humanitarian Intervention", (supra note 4), page 14 s.

human rights records are closely watched and put under severe scrutiny. This approach takes account of the decentralized structure of the international system in which the enforcement of common principles by central agents must remain the absolute exception but in which States have nonetheless revealed a remarkable adherence to common rules.

4 Conclusions

While it has been shown in other places[44] more extensively that there is no space for a right to humanitarian intervention under the UN Charter and that it would not even be desirable to change the relevant rules the aim of this contribution was to highlight that a more efficient enforcement of human rights can hardly be achieved by simple solution or referring to the requisites of a new age and the supposed continuing existence of past rules governing this field. In fact, a rule allowing for acts of humanitarian intervention did not exist in the past. Only the worries and difficulties arising when confronted with emergency situation of a humanitarian kind did survive and they have changed their appearances very little. In several cases a military humanitarian intervention was an outright moral necessity and it did improve the factual situation whatever the second thoughts of the intervenor were. In some cases humanitarian issues were a mere pretext and in other cases the endeavour failed miserably. All the well-intended propositions to adopt a new approach whereby "eternal peace" could be achieved are, given the factual international reality, misguided and would lead us backward to the age of the "just war". The real modern achievement in this field is the general prohibition of the threat and the use of force according to Article 2 (4) of the Charter and this principle maintains its modernity despite its age of more than 50 years. In a global situation where power is distributed still very unevenly it implies, requires and furthers a strong belief in the existence of an International Community thereby protecting its weaker members. It is this International Community which can contribute to the building-up of a common basis of values, especially in the field of human rights, which should make one day, so it is hoped, humanitarian interventions superfluous and the states the enforcing agents of this values in a transparent global society. Article 2 (4) is therefore extremely modern in that sense that it is a constant reminder of the remaining shortcomings of the modern international order. But nobody can deny that this order has been improved tremendously since 1945 even without the proper functioning of Chapter VII of the Charter or, perhaps, exactly because it was largely inoperative. In this sense the modern quest for peace, security and the observance of human rights is very much influenced by past experiences also in the field of humanitarian intervention and modern achievements in this field appear to be the logical consequence of a long, steady development which would be endangered altogether if we embarked on an unnecessary return to the past.

[44] See the literature *supra*, note 1.