



**THE UNITED NATIONS, THE INTERNATIONAL  
RULE OF LAW AND TERRORISM**

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## **(I) Preliminary remarks: The United Nations Organization in the global power constellation**

It is a historical fact that the United Nations Organization was established at the end of a world war, and it cannot be overlooked that the world organization reflects, in its structure, the power balance that resulted from this war.

The incorporation of the *veto rule* into the Charter, in particular, can be explained by the fact that it was the victorious powers of this war who drafted the Charter and shaped the post-war order of 1945.

In view of the power constellation prevailing at that particular juncture in history, the United Nations Charter is the result of a compromise between commitment to the universal rule of law on the one side and the requirements of post-war *realpolitik* on the other. The interests of the “great powers” of 1945 – who, as sponsoring governments, defined their membership status as “permanent members” of the Security Council and wrote their privileges into Art. 27 of the Charter – have determined the fate of the organization until the present day. It should not be overlooked that the process of shaping the destiny of the community of nations after the conflagration of World War II took place in the absence of the majority of the world’s peoples – who had not yet achieved the status of sovereign nations and/or membership in the world organization.

It has been the *predicament* of the United Nations Organization ever since its foundation that the enforcement of the general principles of international law as set out in the Charter has only been possible when and to the extent to which the interests of the Security Council’s permanent members allowed such measures to be undertaken.

Obviously, this was the main reason for the *de facto* paralysis of the Security Council during the Cold War, which was characterized by a bipolar power structure resulting from the rivalry between the United States and the Soviet Union.

After the end of the Cold War – and more specifically since the events of the year 1989 – only one country has been able to retain the status of global superpower. Because of this constellation, there exists, at present, virtually no challenge to that power’s supremacy in the Security Council. This unipolar power structure made

possible the adoption of the Security Council's Gulf War resolutions of 1990/1991<sup>1</sup> on the basis of Chapter VII, and it facilitated the resolution authorizing the use of force (by NATO and its allies) in the Kosovo war in 1999. It must be noted, however, that the latter was adopted post factum and enforced retroactively, which caused a serious problem in regard to the legality of the use of force against the Federal Republic of Yugoslavia.

The unipolar power structure, as evidenced in the Security Council's "revival" as an actor on the global scene since 1989, has both advantages and disadvantages as far as the international rule of law is concerned:

The basic advantage consists in a new and much wider margin of action of the United Nations Organization in the field of international peace and security. Because of the *de facto* lack of opposition to the leading power in the Security Council, the main executive organ of the United Nations has been able to deal with threats to international security in several regions of the world more effectively.

This "revitalization" of the Security Council, however, is accompanied by a basic disadvantage: Because of the veto privilege granted to the permanent members, the Security Council will only function and be able to exercise its vast powers according to Chapter VII if and to the extent to which the strategic interests of the only superpower allow it to act.

This constellation, in terms of power politics, is the basic reason for the Security Council's continuing inability to act in cases such as that of Palestine. This state of affairs is also the determining factor for the continuation of the comprehensive economic sanctions against Iraq originally imposed in 1990: Because of the veto rule of the Security Council, the sanctions will go on indefinitely if the interests of the United States (and/or her allies) so dictate – in spite of the overwhelming number of Security Council member states (not to mention that of the member states of the General Assembly) which think otherwise.

Another illustration of this "imbalanced" situation – in terms of the consistency of the Council's actions and the predictability of the application of the general legal principles of the Charter – is the establishment, on the part of the Security Council, of *Ad Hoc Criminal Tribunals* on a selective basis. As evidenced in the choice of

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<sup>1</sup> On the legal problems of the Security Council's action in the Gulf crisis see the author's *Memorandum on the Invasion and Annexation of Kuwait by Iraq and Measures to Resolve the Crisis Peacefully* (Vienna, 28 September 1990).

countries, the criteria for the establishment of such tribunals are determined by the strategic interests of the hegemonial power in the Security Council.

## **(II) Obstacles to the enforcement of the international rule of law in a unipolar power structure**

In the context described above, serious problems arise for the universal enforcement of the international rule of law:

- (1) The basic principles of the United Nations Charter (e.g. the principles of the non-use of force in international relations, the sovereign equality of all states, the respect of their territorial integrity, etc.) are often enforced in a *selective*, i.e. *discriminatory* manner. This selectivity in the application of international norms is, in fact, the essence of the frequently denounced “policy of double standards” attributed to a “revived” Security Council.
- (2) The Security Council has established a practice of arrogating to itself powers it does not possess under the terms of the Charter, and often oversteps its competence by ignoring norms of jus cogens: For instance, the Council exercises *de facto* judicial powers by creating war crimes tribunals under Chapter VII; it ignores the basic norms of human rights by imposing comprehensive sanctions regimes on entire peoples, etc.
- (3) Many decisions of the Security Council are adopted simply because of the overwhelming power of one country and the other countries’ fear of disadvantages resulting from their eventual opposition – permanent members, to protect their own interests, dare not make use of the veto, and it is no wonder that only a few non-permanent members ever cast dissenting votes in such a situation.

The facts illustrating the problematic nature of consenting votes achieved under duress are well documented, particularly in regard to the decision-making in the Security Council during the Gulf crisis of 1990/1991. In his documentation and analysis of this regrettable

state of affairs, the late Erskine Childers spoke of “the outright subversion of the very sovereignty and equality of member-states in international law at the United Nations.”<sup>2</sup> Resolutions adopted under pressure, treaties concluded – or abrogated – as a result of force are legally not only problematic, but, strictly speaking, not binding (if one is truly committed to the rules of jus cogens of general international law).

- (4) Frequently, decisions of the Security Council are adopted with one or more permanent members *abstaining*. In the most serious cases of the use of force since 1991 – i.e. when enforcement measures under Chapter VII were adopted by the Security Council – China has resorted to abstention. Abstention, in this context, is the equivalent of a refusal to take a position because of *tactical* considerations in a global power game dominated by only one decisive player.

In strictly legal terms, such decisions must be seen as invalid because the Charter prescribes – for the adoption of resolutions by the Security Council which are not of procedural nature – the “consenting votes“ of the permanent members (Art. 27 [3]). Obviously, even with a lot of semantic sophistication, abstention cannot be interpreted as an expression of consent. However, it became the practice of the Security Council long before the end of the Cold War to interpret abstention as in conformity with the requirement of consent. This has meant a modification, or *de facto* amendment, of the Charter. However, such an amendment, in regard to the letter of the Charter, can only be achieved by a decision of two thirds of United Nations member states in the General Assembly and with the *consenting* votes of the permanent members (Art. 108). Because of this reason, a shadow lies over many of the binding resolutions of the Security Council authorizing the use of

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<sup>2</sup> “The Demand for Equity and Equality: The North-South Divide in the United Nations,” in: Hans Koechler (ed.), *The United Nations and International Democracy*. Vienna: Jamahir Society for Culture and Philosophy, 1995, p. 33.

force under Chapter VII of the Charter, particularly when they lead the world organization into a war scenario.

- (5) There are no checks and balances in regard to the actual implementation of Security Council resolutions authorizing the use of force, the most serious field of responsibility of the Council, with the widest repercussions not only on world peace, but on the basic human rights of millions of people in regions of crisis and turmoil supposedly to be pacified by the Council. The actual conduct of the military campaigns against Iraq in 1991 (by a coalition of forces assembled around the United States) and against Yugoslavia in 1999 (by the NATO alliance acting on the basis of a retroactive “authorization” by the Security Council) clearly documents this lack of transparency of military action and the related lack of accountability vis-à-vis the community of states.

Transgressions of the laws of war, of the generally recognized norms of international humanitarian law, by members of a coalition of states acting with Security Council authorization, will effectively not be scrutinized (or “investigated”) in regard to their compatibility with the obligations of states under international law – because the leading power, or a coalition of powers formed around the global hegemon, by virtue of the veto right, will not allow the setting up of ad hoc tribunals judging its (their) own transgressions. In the case that such tribunals are established, however, those powers will exercise their political influence on a particular tribunal – as in the case of the Yugoslav War Crimes Tribunal in The Hague – so that it will not bring charges against officers of their own armed forces or against political leaders of the coalition states. Criminal charges in regard to the conduct of the Kosovo war by NATO, though well documented, were never dealt with by that tribunal’s prosecutor. This state of affairs underlines the biased and legally problematic

nature of ad hoc tribunals directly established by the Security Council.<sup>3</sup>

This state of affairs may completely demoralize those who – upon the end of the Cold War – idealistically expected that common legal principles might come to be universally enforced under the unique circumstances of a “New World Order,” as was proclaimed by the American president in 1991.<sup>4</sup>

Because of the exclusive control exercised by the most powerful permanent member(s) of the Security Council over that central executive organ of the United Nations, a policy of double standards has taken shape not only in decisions regarding states, but also in the field of international criminal justice; in short: Only officials of those states that are not allies of the most powerful permanent member(s) of the Security Council will be brought to justice, while those who act under the umbrella of the global hegemon will enjoy virtual immunity for their actions.

- (6) In such a context of power politics and of the predominance of strategic interests, international criminal law is practiced under the effective, though often indirect, direction of the Security Council on a strictly selective basis. This means that considerations of power politics will in most cases be decisive in regard to who will actually be brought to justice and who not. The cases in point are numerous: the Scottish Court in the Netherlands (the so-called Lockerbie Trial), where two Libyans were brought to justice on the basis of a Security Council resolution, though under the provisions of Scottish law setting up a special court;<sup>5</sup> the Yugoslav War Crimes Tribunal

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<sup>3</sup> See Hans Koechler, *Memorandum on the Indictment of the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia and Other Officials of Yugoslavia by the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991."* Caracas: International Progress Organization, 27 May 1999.

<sup>4</sup> See the author's assessment in *Democracy and the New World Order*. Vienna: International Progress Organization, 1993.

<sup>5</sup> See *Report on and evaluation of the Lockerbie Trial conducted by the special Scottish Court in the Netherlands at Kamp van Zeist* by Dr. Hans Koechler, University Professor, international observer of the International



in The Hague with “special emphasis” on the defeated former head of state of the Federal Republic of Yugoslavia; the “non-trial” of the current Israeli Prime Minister in connection with the 1982 Sabra and Shatila massacre in Lebanon (in spite of a criminal case being filed in Belgium); the “non-trial” of those who ordered the attack on the Al-Amiriya civilian air raid shelter in Baghdad in 1999, etc. Judicial action in the application of international criminal law will only be undertaken as long as the vital interests of the powerful members of the Security Council do not dictate otherwise.

Furthermore, the Judgement by the International Court of Justice dated 14 February 2002 concerning criminal prosecution of an official of the Democratic Republic of Congo before a Belgian court excludes any legal action by national courts in cases of international criminal justice when these concern officials of foreign governments. The ICJ authoritatively stated the obligation “to respect the immunity from criminal jurisdiction and the inviolability” which officials of governments enjoy under international law.<sup>6</sup> This puts an end to the recently advanced theory of “universal jurisdiction” in regard to grave breaches of human rights<sup>7</sup> and effectively closes the door on all efforts aimed at establishing international criminal justice outside the framework of the Security Council’s ad hoc tribunals.<sup>8</sup> In certain exceptional cases, however, one may refer to the provisions of the *Convention on Prevention and Punishment of the Crime of Genocide*.<sup>9</sup>

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*Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998)*. Santiago de Chile, 3 February 2001.

<sup>6</sup> See International Court of Justice, Press Release 2002/04, 14 February 2002: *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*.

<sup>7</sup> See Henry Kissinger, “The Pitfalls of Universal Jurisdiction,” in: *Foreign Affairs*, vol. 80, n. 4, July/August 2001, pp. 86-96.

<sup>8</sup> On the general aspects see Laurence R. Helfer and Anne-Marie Slaughter, “Toward a Theory of Effective Supranational Adjudication,” in: *The Yale Law Journal*, vol. 107 (1997), pp. 273-391.

<sup>9</sup> Adopted by UN General Assembly resolution 260 (III) of 9 December 1948.

**The United Nations' scope of action against the background of a unipolar world order (in which the implementation of the rule of law is a function of the hegemonial power's strategic interests)**

In the present global order, the “international rule of law” is frequently affirmed and given utmost attention in the declarations issued by the major global players, but in a somewhat *misleading* sense – in a form that suits the strategic interests of the leading superpower.

The rule of law is authoritatively defined in a normative framework drawn up by the most influential member(s) of the Security Council. Legal principles, among them the basic principles of the United Nations Charter and the general norms of human rights, are enforced on the basis of what can be called “imperial interventionism.” In the context of unrivalled global rule, the doctrine of *humanitarian intervention* (even “humanitarian war,” as referred to during the Kosovo campaign) is experiencing a spectacular revival. It now flourishes in a way not witnessed since the imperial era, dominated by the concert of the European powers of the 19<sup>th</sup> century.<sup>10</sup>

The new wars are fought in the name of “humanity;” armed confrontations are put in the framework of “good versus evil;” self-righteousness replaces legal scrutiny. The underlying normative concepts – referred to in any justification of humanitarian intervention – are defined by the hegemonial power that sets the rules of the game and challenges the supremacy of the United Nations in the field of enforcement measures. This has been demonstrated rather drastically in the recent campaign in Afghanistan. The authority of multilateral organizations such as the United Nations is no longer accepted when it comes to the definition of humanitarian concepts and to decisions, *sine ira et studio*, on their realm and method of application. Humanitarian principles mainly serve as *basis of legitimation* of the most powerful member state's actions; if strategic interests so dictate, these actions are carried out even outside the framework of the United Nations.

This may finally result in a kind of a *pax Americana* – similar, in structure, to the *pax Romana* two millennia ago –: a system of self-declared “benevolent” global rule on behalf of the “international community” (and, if so required, outside the multilateral framework of the United Nations). In this context, the leading global

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<sup>10</sup> See the author's treatise *The Concept of Humanitarian Intervention in the Context of Modern Power Politics. Is the Revival of the Doctrine of “Just War” Compatible with the International Rule of Law?* Vienna: International Progress Organization, 2001.

power (a) defines the rules to be applied; (b) decides on the scope of their application; and (c) determines the specific means and methods of their implementation.

It is obvious from the foregoing that intergovernmental organizations – whether regional ones such as NATO or universal ones such as the UN – can only exercise their mandate in the framework of the leading power’s geostrategic considerations. Particularly in regard to Eurasia, Zbigniew Brzezinski has laid out this geostrategic design in a rather blunt, but honest, manner in his book *The Grand Chessboard*, which has acquired special relevance in light of recent events in Central Asia.<sup>11</sup>

Although the multilateral entities have an existence of their own as far as their legal structure is concerned, they are only able to act in a way *complementary* to the leading power’s strategy or strategic interests. This fact of global power politics was drastically demonstrated in the war campaign in Yugoslavia (1999) and is still being demonstrated in the ongoing campaign in Afghanistan. In both cases, the United Nations Security Council produced resolutions that helped the interested powers to legitimize their use of force, while the Council itself – contrary to the aspirations of the UN Charter towards collective enforcement measures – was not able to exercise any form of control over the actual conduct of those campaigns. As far as NATO is concerned, it served as the executive military arm in the war of 1999 (although this was clearly an “out of area operation” not covered by the North Atlantic Treaty),<sup>12</sup> while in the ongoing war in Afghanistan its role is limited to offering assistance on the basis of Article 5 of the Treaty – without being involved in decisions on the actual conduct of the campaign.

What we witness in this neo-imperial context – which is often related to the process of “globalization” – is the gradual appearance, since 1989, of a new unilateralism in multilateral clothes: The strategic actions, including armed enforcement measures, of the leading superpower are always referred to in the sense of the global goal of preserving justice and peace, i.e. of establishing a just international order. The rather euphemistic terminology used in this context is not legal, but moral and often quasi-religious, as the pronouncements of a war of “good versus evil,” or of a war for the sake of humanity, for democracy, etc. clearly indicate.

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<sup>11</sup> *The Grand Chessboard: American Primacy and Its Geostrategic Imperatives*. New York: Basic Books, 1998.

<sup>12</sup> On the legally problematic nature of “out of area operations” and the newly-defined “non-Article 5 crisis response operations” of NATO as a regional alliance see the author’s analysis in: *The Concept of Humanitarian Intervention in the Context of Modern Power Politics*, loc. Cit., pp. 33ff.

### **(III) Implications of a unipolar world order for the United Nations' capacity to act as global guarantor of the rule of law, and in particular for the fight against terrorism**

In the current unipolar context of international relations, the “fight against terrorism” has become one of the basic slogans when it comes to justifying the use of force against certain states and against groups operating internationally. Lists of states “sponsoring terrorism” and of terrorist organizations have been set up and are constantly being updated according to criteria that are not always known to the public, but which are clearly determined by strategic interests.

The basic problem underlying all these military actions – or threats of the use of force, such as the most recent one by the United States against Iraq<sup>13</sup> – consists in the *absence of an agreed definition of terrorism*.

Remarkable confusion persists in regard to the legal categorization of acts of violence either by states, by armed groups such as liberation movements, or by individuals.

The dilemma can be summarized in the saying “*One country's terrorist is another country's freedom fighter*.” The apparent contradiction or lack of consistency in the use of the term “terrorism” may further be demonstrated by the historical fact that leaders of national liberation movements such as Nelson Mandela in South Africa, Habib Bourguiba in Tunisia, or Ahmed Ben Bella in Algeria, to mention only a few, were originally labeled as terrorists by those who controlled the territory at the time, but later became internationally respected statesmen.

What, then, is the defining criterion for terrorist acts – the *differentia specifica* distinguishing those acts from eventually legitimate acts of national resistance or self-defense?

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<sup>13</sup> See the International Progress Organization's *Memorandum addressed to the President of the General Assembly and to the Secretary-General of the United Nations on the humanitarian emergency and threat to peace resulting from the Security Council's sanctions policy vis-à-vis Iraq, on the efforts to establish a régime of so-called “smart sanctions,” on the continued violation of Iraqi sovereignty by permanent members of the Security Council, on the unilateral threat of the use of force against Iraq, and on the special responsibility of the international community to uphold the principles of the United Nations Charter and to avert armed aggression against Iraq* of 18 February 2002.

Since the times of the Cold War the United Nations Organization has been trying in vain to reach a consensus on the basic issue of definition. The organization has intensified its efforts recently, but has been unable to bridge the gap between those who associate “terrorism” with any violent act by non-state groups against civilians, state functionaries or infrastructure or military installations, and those who believe in the concept of the legitimate use of force when resistance against foreign occupation or against systematic oppression of ethnic and/or religious groups within a state is concerned.

The dilemma facing the international community can best be illustrated by reference to the contradicting categorizations of organizations and movements such as the Palestine Liberation Organization (PLO) – which is a terrorist group for Israel and a liberation movement for Arabs and Muslims –, the Kashmiri resistance groups – who are terrorists in the perception of India, liberation fighters in that of Pakistan –, the earlier Contras in Nicaragua – freedom fighters for the United States, terrorists for the Socialist camp –, or, most drastically, the Afghani Mujahedeen (later to become the Taliban movement): During the Cold War period they were a group of freedom fighters for the West, nurtured by the United States, and a terrorist gang for the Soviet Union. One could go on and on in enumerating examples of conflicting categorizations that cannot be reconciled in any way.

How, then, can these intractably contradicting definitions and conflicting perceptions and evaluations of one and the same group and its actions be explained? In our analysis, the basic reason for these striking inconsistencies lies in the *divergent interests of states*. Depending on whether a state is in the position of an occupying power or in that of a rival, or adversary, of an occupying power in a given territory, the definition of terrorism will “fluctuate” accordingly. A state may eventually see itself as protector of the rights of a certain ethnic group outside its territory and will therefore speak of a “liberation struggle,” not of “terrorism,” when acts of violence by this group are concerned, and vice-versa.

The United Nations Organization has been unable to reach a decision on the definition of terrorism exactly because of these conflicting interests of sovereign states that determine in each and every instance how a particular armed movement (i.e. a non-state actor) is labeled in regard to the terrorist-freedom fighter dichotomy. A “policy of double standards” on this vital issue of international affairs has been the unavoidable consequence.

This “definitional predicament” of an organization consisting of sovereign states – and not of peoples, in spite of the emphasis in the Preamble to the United Nations Charter! – has become even more serious in the present global power constellation: One superpower exercises the decisive role in the Security Council; former great powers of the Cold War era as well as medium powers are increasingly being marginalized; and the problem has become even more acute since the terrorist attacks of 11 September 2001 in the United States.

#### **(IV) The history of United Nations codification efforts and measures against terrorism**

A first effort towards a definition of the concept of terrorism was undertaken before World War II by the League of Nations. However, the draft *International Convention for the Prevention and Punishment of Terrorism* of 1937 was never adopted. The proposed definition described as terrorist “all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”

At the initiative of then Secretary-General Kurt Waldheim, the General Assembly of the United Nations put terrorism on its agenda after the terrorist act at the Olympic Games in Munich in 1972. The respective item was entitled: “*Measures to prevent terrorism and other forms of violence which endanger or take innocent lives or jeopardize fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.*”

The rather long formulation clearly demonstrates the cautious attitude of the international community at the time, which was oriented towards dealing not only with the *symptoms* but also with the *causes* of terrorism. However, this comprehensive approach of the era of the East-West conflict (taking into consideration the concerns of the then newly independent countries of the Third World) may not be achievable under the present conditions of a unipolar world order.

Since 1963, the United Nations has adopted 12 multilateral treaties on terrorism. The original emphasis of the organization was on the safety of civil aviation (e.g. the Tokyo Convention of 1963, the Hague Convention of 1970, the Montreal Convention of 1971) and on violence against state leaders, officials and diplomatic

personnel (e.g. *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* of 14 December 1973).

The scope of the United Nations conventions eventually widened towards measures penalizing the taking of hostages (1979), terrorist bombings in general (1997), and the financing of terrorism (1999).

In addition to these legally binding conventions, a number of resolutions were passed by the General Assembly and the Security Council concerning strategies against and measures to eradicate international terrorism.

Among the most recent measures are the adoption of a resolution by the General Assembly in 1999 creating a “Terrorism Prevention Branch” (TPB) attached to the UN Office for Drug Control and Crime Prevention (ODCCP) in Vienna; the resolution adopted by the General Assembly on the report of the Sixth Committee concerning “measures to eliminate international terrorism” (res. 54/110 of 2 February 2000); and the resolution adopted by the Security Council, acting under Chapter VII, on 28 September 2001 (res. 1373 [2001]), which provides for the establishment of a so-called Counter-Terrorism Committee (CTC).

### **The dilemma of counter-terrorism: the lack of an explicit definition of terrorism – operational definition as surrogate**

The crux of all these conventions and resolutions – as regards the urgency of their implementation for the sake of a consistent anti-terrorism policy of the international community – consists in the fact that a precise definition of terrorism is nowhere to be found in these United Nations instruments. Because of the lack of consensus among member states on the basic criteria defining terrorist acts and on the characteristics distinguishing them from acts of national liberation (eventually providing special exemptions for certain movements under anti-terrorist conventions), there exist only implicit – or “operative” – definitions.

The hitherto unresolved dilemma can best be summarized in the formula “*terrorism versus national liberation*.”<sup>14</sup>

The examples of “operative” definitions are numerous, however. In Art. 5 of the *International Convention for the Suppression of Terrorist Bombings* (1997)

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<sup>14</sup> See Hans Koechler (ed.), *Terrorism and National Liberation. Proceedings of the International Conference on the Question of Terrorism*. Frankfurt a. M., Bern, New York: Verlag Peter Lang, 1988.

terrorist acts are referred to as “criminal acts ..., in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons ...;” it is furthermore stated, in the same article, that such acts “are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”

In another effort towards an operative definition of the term, General Assembly resolution 54/110 of 2 February 2000, in its operative Paragraph 2, describes terrorism in the sense of “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political reasons.” In certain basic aspects, this description resembles the language of the League of Nations draft convention of 1937.

Furthermore, in her preliminary report for the UN Commission on Human Rights on “Terrorism and human rights,” Kalliopi K. Koufa rightly states that the *Rome Statute of the International Criminal Court* (1998) contains basic provisions concerning war crimes, crimes against humanity etc. “that prohibit the commission of certain acts that in essence form part of a terrorist campaign.”<sup>15</sup>

In spite of the numerous “operative” definitions – or definitions by implication – it has been impossible to bridge the gap between the system of norms governing legitimate acts of resistance against foreign occupation or acts of “national liberation” on the one hand, and those norms allowing one to define acts of violence, whether against the state, state officials or civilians, as criminal acts of terrorism.

With resolution 51/210 adopted on 17 December 1996, operative Para. 9, the General Assembly of the United Nations established an *Ad Hoc Committee* whose task it would be “to elaborate an international convention for the suppression of terrorist bombings.”

Since its establishment this committee has been working on a *comprehensive international treaty on terrorism*. However, in a recent statement to the media the Chairman of the committee, Rohan Perera (Sri Lanka), had to admit that Art. 2 of the draft convention, under consideration by the committee, on a *definition* of terrorism and Art. 18 concerning acts of “armed forces” or “parties” to a conflict and an eventual reference to “foreign occupation,” could not be agreed upon.<sup>16</sup> Furthermore,

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<sup>15</sup> United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-first session, item 12 (b) of the provisional agenda, Doc. E/CN.4/Sub.2/1999/27, 7 June 1999, “Terrorism and human rights,” Par. 42.

<sup>16</sup> See United Nations press release, Ad Hoc Committee on Assembly Resolution 51/210, Sixth Session, 26<sup>th</sup> Meeting (AM), Doc. L/2993, 1 February 2002.



in the words of the Chairman of the committee, no consensus could be reached on an eventual article covering who would be entitled to exclusion from the treaty's scope. The delicate question of an eventual exemption for national liberation movements still haunts the committee. The concerns of the member states of the Organization of the Islamic Conference (OIC), particularly in regard to the status of movements such as the Palestine Liberation Organization, apparently could not be reconciled with the views of the group of Western states. Any effort towards a unified approach is caught in a kind of argumentative circle: The specific definition of the concept determines the exemptions; the actual exemptions claimed by certain countries for "their" liberation fighters may in turn determine the scope of the definition and its basic criteria, and so on.

In spite of the tragic events of September 11, 2001, a comprehensive convention – one that would unify and complete the normative approach of the existing 12 anti-terrorism conventions of the United Nations – seems to be beyond the reach of the Ad Hoc Committee and of the General Assembly's Sixth Committee (Legal Affairs). The divergent political interests and contradicting normative perceptions cannot be reconciled by mere reference to the universal principles of human rights as part of *jus cogens* of general international law.<sup>17</sup>

The problem for international law enforcement caused by the non-existent consensus on the very concept of terrorism cannot be conjured away by "operative" steps within the United Nations system such as the establishment of a *Terrorism Prevention Branch* (TPB) by the General Assembly in 1999 and the creation, in 2001, of the aforementioned Counter-Terrorism Committee by virtue of a binding Security Council resolution.

That very dilemma was also highlighted in the Secretary-General's addresses to the General Assembly on 1 October 2001 and to the Security Council on 12 November 2001. Mr. Kofi Annan acknowledged the definition of terrorism as one of the most difficult issues before the world organization and said that he understands and accepts "the need for legal precision."<sup>18</sup> However, the Secretary-General referred

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<sup>17</sup> On the complex question of the status of human rights norms in present-day international law see the author's analysis: "The Principles of International Law and Human Rights," in: *Democracy and the International Rule of Law. Propositions for an Alternative World Order*. Vienna, New York: Springer-Verlag, 1995, pp. 63-84.

<sup>18</sup> United Nations, Doc. SG/SM/7977, GA/9920, 1 October 2001. See also Doc. SG/SM/8021, SC/7209, 12 November 2001.

to the existing body of norms of international humanitarian law according to which “even in situations of armed conflict, the targeting of innocent civilians is illegal.”<sup>19</sup>

This allusion of the Secretary-General of the United Nations to the binding norms of international humanitarian law may give a useful hint as to how to bridge the gap between the opposing schools of thought concerning the *definition of terrorism as a crime*.

### **(V) The way out of the dilemma: comprehensive definition of terrorism by means of integration into existing instruments of international humanitarian law**

As with all terms that are related to binding measures including the use of force, the international rule of law requires a precise legal definition of the term “terrorism.” Such a definition must include – or take note of – a clear distinction between criminal acts of terrorism and acts of resistance against foreign occupation and/or of national liberation.

In general terms, the principle – or postulate – of the “unity of normative knowledge,” as enunciated in Hans Kelsen’s theory of international law,<sup>20</sup> must be adhered to, particularly in regard to the necessity of placing the regulations concerning terrorist acts in a generally acceptable normative framework. The system of norms of international humanitarian law (first and foremost those laid down in the Geneva Conventions) and the system of norms defining and regulating international action against terrorist offences have to be harmonized – so as to avoid a “policy of double standards” in the field of international law enforcement.

In a universal and at the same time unified system of norms – ideally to be created as an extension of existing legal instruments –, there should be corresponding sets of rules (a) penalizing deliberate attacks on civilians or civilian infrastructure in wartime (as covered by the Geneva Conventions), and (b) penalizing deliberate attacks on civilians in peacetime (covered by the various anti-terrorism conventions referred to above).

Such a harmonization of the basic legal rules related to politically motivated violent acts against civilians would make it legally consistent also to include the term “state terrorism” in the general definition of terrorism.

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<sup>19</sup> United Nations, Doc. SG/SM/7977, GA/9920, 1 October 2001.

<sup>20</sup> See Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*. Tübingen: J. C. B. Mohr (Paul Siebeck), 2<sup>nd</sup> ed., 1928, p. 108.

This harmonization would further imply that the provisions of common Article 3 of the four Geneva Conventions and specifically of the *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of August 12, 1949 may equally be applied to acts of politically motivated violence in a non-war situation (whether of an international or national dimension).

In the context of such a comprehensive approach, the principles of *Additional Protocol II* to the Geneva Conventions relating to the protection of victims of non-international armed conflicts (1977) should also be applied, particularly Art. 13 (2) which stipulates: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

This approach was advocated as early as 1987 in the International Progress Organization’s *Geneva Declaration on Terrorism*, which undertook an effort towards a comprehensive definition including acts by states, groups and individuals on the international as well as the national level.<sup>21</sup>

In our analysis, this comprehensive approach is compatible with – even complementary to – the concerns repeatedly expressed by the United Nations General Assembly concerning the principle of self-determination as enshrined in the Charter of the UN and the “inalienable right to self-determination and independence of all peoples ... under foreign occupation” resulting therefrom, with the consequence of “upholding the legitimacy of ... the struggle of national liberation movements” (resolution 46/51 of 9 December 1991).

In the unified approach suggested by us – which is in conformity with the spirit of the related General Assembly resolutions –, acts of national resistance would not be criminalized *per se* (as is often attempted by states when they are in the position of occupying power), but would be judged according to the same rules as acts of regular warfare by a national army. Both, state and non-state actors, would be held to the same standards of international humanitarian law.

In this context, it should be possible to bridge the gap between the normative perceptions, for instance, of the group of Islamic states on the one side and Western states on the other, the opposing views of which recently prevented again the reaching of a compromise on the issue of the definition of terrorism (proposed by Australia in the Ad Hoc Committee of the General Assembly in November 2001).

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<sup>21</sup> See Hans Koechler, *Terrorism and National Liberation. Proceedings of the International Conference on the Question of Terrorism*. Frankfurt a. M., Bern, New York: Verlag Peter Lang, 1988, pp. 307-313.

The philosophy behind such a unified approach has been aptly described by A. P. Schmid in his 1992 report to the UN Crime Prevention Office, in which he suggested considering an act of terrorism as the “peacetime equivalent of a war crime.”

Ideally, the definition of terrorism and the regulation of penalties should be part of the normative system of the Geneva Conventions – as suggested in the I.P.O. declaration of 21 March 1987. Practically, this could be achieved in the form of an Additional Protocol to be agreed upon through a negotiation process similar to the one that led to the additional protocols of 1977.

Through such a comprehensive codification effort it could be made clear that resistance or national liberation movements must in no way resort to terrorist tactics and that an (eventually politically legitimate) aim does not necessarily justify all available means (or any means, for that matter). In the general framework of a unified system of international humanitarian law, terrorist methods would be punishable irrespective of the specific political purposes behind them and irrespective of whether those acts were committed by liberation movements or regular armies.

Or, a universal convention could be adopted on this basis, referring, in its introductory chapter, to the principles of the Fourth Geneva Convention and of Additional Protocol II.

The seemingly intractable problem of exemptions from the application of a comprehensive terrorism convention – which has been one of the *dilemmata* faced by the General Assembly’s Ad Hoc Committee since its inception – could be solved on the basis of the comprehensive approach suggested above: On this premise, it would no longer be a matter of *exempting* certain groups fighting foreign occupation from the application of the proposed anti-terrorism convention, but of *subjecting* those groups to the very rules defined for the behavior of states in the Geneva Conventions of 1949. Thus, military and non-military groups, state and non-state actors (operating in a situation without a formally declared war) would be held to the same standards.

Since the tragic events of September 11, 2001 the Ad Hoc Committee established by General Assembly resolution 51/210 of 1996 has made renewed efforts towards the adoption of a comprehensive treaty. Similarly, the Security Council has affirmed its responsibility in the battle against terrorism by establishing a so-called Counter-Terrorism Committee (CTC) through its resolution 1373 (2001) adopted on 28 September 2001.

However, the predicament of the CTC – which was established on the basis of the strict enforcement mechanisms of Chapter VII of the Charter and which enjoys wide-ranging authority vis-à-vis member states – consists in the fact that it has to act on the issue of terrorism in a decisive manner, but *in the absence of a definition of that very term*.

Even in the wake of last year's tragedy in the United States, the international community is still paralyzed by rivalries and power struggles among United Nations member states over the issue of definition of the term and eventual exemptions from its application. In the present unipolar system, it has become even more difficult to resolve the underlying conflicts of interest between member states. The central – and yet unresolved – question is still: *Who has the "power of definition"?* As long as there is no answer to this question and as long as the proposals advanced by legal theory cannot be reconciled with the conflicting interests of member states, the United Nations Organization will be incapable of adopting an efficient multilateral approach in the struggle against terrorism.

## **(VI) The conditions for a consistent anti-terrorist policy of the United Nations**

The United Nations can only establish a cohesive anti-terrorist strategy, based on the rule of law and on the provisions of the Charter, if and insofar as:

- existing legal standards and conventions are integrated into a universal system of norms that serves as “common denominator” for the respective sub-systems, or – vice-versa – if a comprehensive convention on terrorism eventually to be adopted by the General Assembly is integrated into the existing set of norms of international humanitarian law;
- particular interests of member states, including the most powerful ones, are effectively held in check in the negotiating process leading to the adoption of an international convention;
- an institution of an “international arbiter” is created in regard to sanctions and penalties to be imposed on the basis of such a convention, and insofar as this body is able to act in an independent, objective and unbiased manner (similar to the International Court of Justice's mode of operation);
- the veto privilege of the permanent members of the Security Council is abolished so as to allow an international arbiter to act in complete

independence and without interference from the “executive branch” of the United Nations.

Up to the present moment, the veto privilege has granted *de facto*, though not *de jure* immunity to many violators of international humanitarian law, even to perpetrators of state terrorism – because of the effective procedural rule that no enforcement action can ever be undertaken if the perpetrator of a violation is a permanent member of the Security Council or its ally.

It is no wonder that such a state of affairs profoundly demoralizes the international community in regard to the requirements of universal law enforcement – whether vis-à-vis states or individuals.

Ideally, the *International Criminal Court* (ICC), when it will have become operative,<sup>22</sup> should be entrusted with the jurisdiction in cases of terrorism (whether by states or non-state actors) so as to avoid the application of double standards and to get things out of the sphere of influence of the Security Council. (The problematic nature of Security Council involvement in judicial matters has repeatedly been demonstrated in the practice of the Yugoslav War Crimes Tribunal in The Hague.)

The crime of terrorism – when it will have been defined in a comprehensive international convention – could be included in the enumeration of Art. 5 (1) of the *Rome Statute of the International Criminal Court* – in addition to the four kinds of crimes already listed: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

The detrimental role of power politics in the present efforts towards a comprehensive codification of the norms on terrorism is highlighted by the United States’ persistent opposition to the creation and coming into force of the Rome Statute of the International Criminal Court (whereby the US administration is even threatening sanctions against states intending to ratify the Rome Statute).

However, if we truly believe in the United Nations Organization as the universal guarantor of the rule of law also in the global circumstances of the 21<sup>st</sup> century, there exists no alternative to the comprehensive, unified and universal codification effort described above, and to the acceptance of an independent

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<sup>22</sup> Ratification status (April 2002): Signatories: 139, Parties: 66. According to Art. 126, the Rome Statute of the International Criminal Court will enter into force on the first day of the month after the 60<sup>th</sup> day following the date of the deposit of the 60<sup>th</sup> instrument of ratification, acceptance, approval or accession. Accordingly, the Statute will enter into force on 1 July 2002.

international judicial institution that would be able to act as arbiter in cases of international terrorism and to prosecute perpetrators of this crime *sine ira et studio*, irrespective of their position or nationality, on a strictly non-discriminatory basis.

### **Democratization of the United Nations as basic requirement**

The ambitious and far-reaching development of the corpus of international law and of international criminal law as an integral part of it – as advocated by the propagators of a new international order –, will remain an illusion and will never transgress the boundaries of utopia, if the creation of unified legal instruments of law enforcement – with a comprehensive anti-terrorism convention at its core – is not accompanied by a genuine reform of the United Nations Organization along the guidelines of *transnational democracy*.

Such a reform would have to include a redefinition of the role of the Security Council and in particular of the concept of “permanent members” with a view to abolishing the veto privilege of Art. 27 of the Charter<sup>23</sup> – or at least to applying the abstention clause not only to decisions under Chapter VI, but also to those under Chapter VII, so that the permanent members cannot act with impunity in matters regarding international peace and security.

The reform should be oriented towards the principle of the separation of powers, which is indispensable for the rule of law – whether on the national or the transnational level. It would have to include measures that allow a more precise definition of the powers of the Security Council. Because of the recent practice of the Security Council of transgressing the boundaries between executive and judicial powers, the competence of the Council should be drafted in such a way that it cannot act, for instance, as surrogate judiciary by instituting ad hoc war crimes tribunals or, *in eventu* – should the present anti-terrorist initiatives of the Council, particularly of resolution 1373 (2001), evolve in that direction –, by creating ad hoc tribunals on international terrorism.

Because of the power structure currently determining the decision-making processes of the Security Council, the institution of tribunals by the supreme executive organ of the United Nations means *international law enforcement on the basis of*

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<sup>23</sup> See the author’s reform proposal: *The Voting Procedure in the United Nations Security Council. Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations*. Vienna: International Progress Organization, 1991.

*convenience and political expediency.* As the recent practice of the Council has demonstrated, crimes eventually committed by officials of the powerful permanent members of the Security Council – whether officers or politicians – will not be prosecuted; only those crimes committed by officials of nations effectively “defeated” or “incapacitated” (either militarily or in terms of a disadvantageous power balance) will be dealt with.

Furthermore, a truly democratic reform of the United Nations should preclude the possibility of interpretation and implementation of Security Council resolutions in a self-serving manner – according to the unilateral strategies of the most powerful actors. Seeking multilateral cover for the advancement of purely national strategies should not be possible in a United Nations system in which the principle of the separation of powers is strictly enforced and the International Court of Justice and other legal organs eventually to be created enjoy supremacy in all judicial matters, including matters of legal interpretation, over the Security Council – well beyond the scope of giving mere “advisory opinions.” The arbitrariness of power politics is never compatible with the requirements of due process.

There will be no remedy to the scourge of terrorism being practiced on an ever larger, technologically more sophisticated, global scale if the United Nations Organization fails in the above-described efforts to:

- codify the norms on terrorism in a universal manner (including the norms regulating the actions of national liberation movements);
- unify those norms in the general framework of international humanitarian law;
- reform the UN Charter in such a way that a genuine division of powers takes shape between the “legislative” branch (represented by the General Assembly), the “executive” branch (represented by the Security Council), and the “judicial” branch responsible for international law and international law enforcement (represented by the International Court of Justice, the future International Criminal Court, etc.).



## (VII) Concluding remarks

At the dawn of the 21<sup>st</sup> century, the issue of terrorism constitutes the most serious challenge to the world organization's supremacy in matters of enforcing common legal principles vis-à-vis all nations, small or big, weak or powerful. The fashion in which the United Nations deals with this challenge and its manner of undertaking collective action against terrorism will decide its future in the global system. Indeed, the world organization will have to walk a tightrope in trying to find a balance between the power politics of sovereign nation-states and the requirements of collective action as set out in the Charter.

It will be the *punctum saliens* of the new global order under the conditions of unipolarity how the United Nations will be able to enforce the rule of law in a universal and cohesive manner so that the principle of the sovereign equality of states, including the principle of non-interference, will be upheld while all actors in the international arena will be subjected to the same standards of the legitimacy of their political actions vis-à-vis one another.

Only if the organization succeeds in this mission will it be possible to preserve world peace and “to save succeeding generations from the scourge of war” – as solemnly proclaimed in the Charter's Preamble.

This challenge, however, cannot be met using instruments created on the basis of the power balance of 1945, i.e. by means of a Charter reflecting the necessities of an earlier era. The United Nations Organization can only accomplish its mission if it adapts itself to the newly emerging global situation through a genuine *democratic reform* – along the lines neither of bipolarity nor of unipolarity, but of multipolarity – and by establishing a comprehensive and consistent system of international humanitarian law of which norms regulating the definition and punishment of the crime of terrorism will form an integral part.

Neither the unipolar power structure of the present world order nor the terrorist threat to peace and stability – whether on the national or international level – must be accepted as *fait accompli*. As in 1945, the United Nations Organization, at the beginning of the Third Millennium, should again unite the peoples of the globe in the search for a system of norms encompassing the practice of states and integrating it with the requirements of a peaceful international order in which no state, no group, no

individual will be exempt from the basic rules of law.<sup>24</sup> In such a system, there can be no *domaine réservé* – neither for a state nor for a movement acting against a state; *no state's terrorist can be the other state's freedom fighter, and vice-versa*. Even if it may sound highly idealistic or utopian in the present state of international affairs: In the eyes of the citizens of the world, the very legitimacy of the world organization will depend on such a *consistent* and *persistent* commitment to the rule of law.

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<sup>24</sup> On the principles of a peaceful global order see also the International Progress Organization's *Baku Declaration on Global Dialogue and Peaceful Co-existence among Nations and the Threats Posed by International Terrorism*. Baku / Azerbaijan, 9 November 2001, at [http://i-p-o.org/Baku\\_Declaration.pdf](http://i-p-o.org/Baku_Declaration.pdf).