The Use of Force in the Kosovo Affair and International Law

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Summary

The use of force in Kosovo in 1999 was, for certain North Atlantic Treaty Organization (NATO) member countries, justified by its legitimacy much more than its legality – a just war if not a licit war. In this respect it would seem to meet numerous objections, with regard to general international law, to the United Nations Charter and even the Atlantic Pact.

Nevertheless, it is legally possible to construct a doctrine of intervention of humanity in conformity with present laws. This is not based merely on ethics but can be found at the intersection of legal thinking and strategic reflections. It presumes not only that hypotheses for the licit use of force be defined but also that the means employed correspond to humanitarian objectives.

The occasion could have been used profitably for affirming this doctrine and for developing its legal conditions and military implications. This opportunity was not grasped. Far from being exemplary, the action taken by NATO member countries in Kosovo will probably remain only an exception.

The Use of Force in the Kosovo Affair and International Law

The military action demanded by NATO in the Kosovo affair, and for which it assumed public responsibility, raises important legal questions, especially in the realm of international law. Is it possible in such a context to use force against a sovereign state, in a matter concerning the fate of a part of its territory and its inhabitants, without a mandate or even authorisation from the Security Council? Can NATO exercise the responsibilities it claimed? And on what bases? Can the type of action undertaken – extensive aerial bombing of multiple targets throughout all of the Yugoslav Federation – be justified under international law? In what way should theses set forth by the States involved militarily be evaluated? What are the implications for the right to use of force and, more generally, for the system of international security? These are the central questions among all those raised by this operation.

It is clear that purely legal considerations, although not secondary, were never in the forefront during the military action. And why be surprised? The use of force would normally seem to suspend ordinary and peaceful rule of law, if not eliminate it altogether, even if perhaps in order to restore it better afterwards. Nevertheless, in this incident the law remained in a certain sense omnipresent – but not the law of *jurists*, scholarly law, that of experts or judges. On the contrary, there was law shaped by the media, aimed at ethical justification of the action undertaken, resting on repetition of a few principles meant for public opinion. The law referred to in this case was to a certain extent an instrument of combat. It reaffirmed armed intervention in the eyes of its instigators rather than being based on unquestionable texts or even on a rational and objective line of argument designed to convince specialists. This provoked the evident unease of jurists who said little about the matter, torn between the desire to preserve their freedom of analysis and their reservations, and the desire not to condemn an action

whose finality was hardly questionable and which, moreover, had mobilised their countrymen.

This *instrumentalisation* of the law raises several problems. It leads to questions about the legal framework governing the use of force in international relations, the role of the UN, in particular the Security Council, the role of military alliances and the role left to States. More generally it requires resituating this legal framework within the logic of the security system that inspires the United Nations Charter, the essential reference in the matter. Is it possible to say that it realises the ideal of peace by law? In the Kosovo affair, the justification for armed intervention was set on two foundations: legality and legitimacy. In a certain manner, the two lines of argument are mutually supportive, with legitimacy affirming the rightness of the cause and legality protecting it from protests. On the other hand, this double register weakened each of them. Why invoke legitimacy, returning to the just war theory so to speak, if an irrefutable legal basis was available? It is necessary to clarify these ambiguous relations. It must be recognised that the intervening countries did not present a well-argued and coherent doctrine in light of the United Nations Charter, nor even in light of the Atlantic Pact. Could such a doctrine have been formulated? And if so, on what bases and with what arguments? Can the notion of intervention of humanity find a place in contemporary international law in that it implies a unilateral right for States to use force against other States? If this is so, did the action undertaken meet the requirements flowing from this, to the extent that intervention of humanity cannot be likened to an ordinary conflict but necessarily implies specific constraints? How can these requirements be respected? These are the questions this present study plans to examine.

■ The Use of Force and International Law

We know that the use of force in international relations involves two aspects: the right to the use of armed force in determined circumstances, known as the Latin expression of *jus ad bellum*; and the right to licit means that belligerents may employ in conflict, or *jus in bello.*

The attempt to limit force is quite old in international law. It was first attached to *jus in bello* and more recently to *jus ad bellum*. Both aspects must be considered, and both interest us here for different reasons. The question of *jus ad bellum* is certainly most important, but the growing concern to protect humanitarian law, including by international penal punishment of individuals who violate it, naturally has important consequences for current conceptions of international security. The relationship between use of force and international law has become extremely complex, causing repercussions on the security system itself, whose principles and objectives are becoming more confused.

As for *jus ad bellum*, an innovation of the United Nations Charter, which accomplished successfully what previous attempts had failed to do, consists in subjecting use of force in international relations to international law. This is the subject of article 2, paragraph 4 of the Charter, which states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." This principle does not limit the possibility for States who are victims of an armed aggression to ensure their legitimate defence and to obtain the aid of other States in pursuing this end (article 51). Indeed the Atlantic Pact was conceived on this basis, and its article 5 (paragraph 1) stipulates: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

The UN Charter creates above all a Security Council, an immensely powerful organ which, according to article 24, paragraph 1 is entrusted with "primary responsibility for the maintenance of international peace and security." Within this framework it disposes of coercive

powers with regard to Member States (Chapter VII of the Charter). It exercises control over the use of the right of legitimate defence (article 51 being the last article of Chapter VII), and must be informed of measures taken individually or collectively by Member States. Article 5, paragraph 2 of the Atlantic Pact, moreover, specifies that measures taken by parties will be brought to the attention of the Security Council and will cease as soon as it takes the necessary steps. In a more general manner, the Atlantic Pact recognises its subordination to the United Nations Charter (article 7), as well as the "primary" responsibility of the Security Council. The superiority of the Charter derives especially from article 103 of this document, earlier than the Atlantic Pact and to which all NATO members are parties. This represents a highly developed legal organisation for international security, based both on normative principles and institutional mechanisms, composed of an articulation and even a hierarchy between universal norms and special conventions. This is the realisation of "peace through law." It is a matter of ensuring that any use of armed force in international relations is either in conformity to the law or else repressed by mechanisms that are themselves organised in a legal manner.

Nevertheless, this objective of peace through law has certain limits, or at least certain specific features. Let us note the main ones. First of all, the role of the Security Council is not to force respect for all of international law but only to maintain or to re-establish international peace and security. It follows that the Security Council is not authorised to intervene if peace and security are not threatened, which is the case for many violations of international law deriving from a peaceful disagreement between States. It also follows that the Security Council is authorised to act when faced with an attack against international security as it perceives it, whatever its origin, whether or not it is a result of a violation of international law. Furthermore, the Council, by virtue of its composition as well as its responsibilities, is a political organ and not a jurisdictional one. Its role is to use its discretion in evaluating the situations that confront it, to decide whether or not to act, and to choose freely the type and intensity of the measures it decides. It is in no way comparable to a judge, who would apply objective criteria and must act as soon as he is appealed to, dealing with identical situations in an

identical manner. And the Security Council is also a sovereign organ whose decisions cannot be subjected to jurisdictional control before an international tribunal such as the International Court of Justice (ICJ). Finally, the hierarchy established between the UN and organisations such as NATO is completely theoretical, inasmuch as certain members of these organisations are capable of blocking any control that the Security Council might attempt to exercise. This is precisely the case with NATO, since it includes three permanent members of the Council (United States, France, United Kingdom), who have the right to exercise a veto on the Council.

The system of international security established by the Charter therefore rests in reality much more upon a political construction than on legal rules. It is a matter of collective security, an intermediate system between the right of States to ensure their security by their own means, and a mechanism of international police based on a monopoly of coercion for the benefit of an international organ. It matters little what type system is involved. The problem raised here is that of the effectiveness of the security system, or the consequences or its eventual ineffectiveness, and it is in these terms that the question of the use of force in the Kosovo affair may be asked. In this regard any security system primarily fulfils a dissuasive role; the more effectively it functions the more invisible it is. It is, so to speak, the unmoved mover of the peace it produces. Difficulties appear only when it is challenged by failures to which it must react. However, the system is confronted with two types of failures. First, those that flow from foreseen hypotheses: the armed aggression of one State against another for collective security; and then those going beyond hypotheses initially foreseen: struggles of decolonisation, subversion, international terrorism, and more recently the internal collapse of certain States – a collapse creating regional situations threatening international peace and security.

These hypotheses, in fact external to the system of international peace and security, place it in a difficult situation. They constitute catastrophes, in the sense of unforeseen events, to which the system must attempt to adapt itself, and without which the peace and security system is at best placed out of action, at worst destroyed. Thus the system of collective security was for a long time left on the margins in the

context of the East-West conflict, and it was only able to survive by adapting downwards, in particular in its peacekeeping operations. Without even going into the enlargement of their missions here, these operations were subsequently confronted with new situations, which did not correspond to the logic of their initial construction: the development of civil confrontations, with the antagonism of elusive factions, with cease-fires not respected, with the political-military inability to obtain a return to civil peace, but also with the multiplication of serious attacks on humanitarian law in light of which neutrality, passivity, the absence of coercive means left the operation defenceless. The failures of UNPROFOR (United Nations Protection Forces), the operations in Somalia or in Rwanda seem to have signalled the end of peacekeeping operations, at least in the UN sense of the term. It is in this context that the operation of NATO member countries must be situated, which, it must not be forgotten, represented an extension and amplification of NATO's action in Bosnia with IFOR (Multinational Peace Implementation Force) and then SFOR (Multinational Stabilisation Force), based on the Dayton Agreement, which had already left the United Nations out of the picture, other than to approve a settlement achieved in another context.

Another aspect of the adaptation of the system in fact concerns new forms of violence, or more precisely a new sensitivity to such forms, for such practices are unfortunately ancient. These are particularly odious forms of civil violence, the nature and extent of which create an international problem. The existence of organised massacres of civilian populations on an ethnic basis, tolerated or even conducted by public authorities, led to the creation by the Security Council of special International Criminal Tribunals (ICTs), one of which concerns, in fact, former Yugoslavia and therefore Kosovo. Here we are in the framework of *jus in bello* or, according to the International Court of Justice, humanitarian law. Its obligations are not new; they flow from conventional norms (the 1949 Geneva conventions and the 1977 Protocols, the 1948 Convention on repression of the Crime of Genocide) as well as customary norms (the *inviolable* obligations cited by the ICJ in its 8 July 1996 opinion on the lawfulness of the threat or the use of nuclear arms). What is new is the international repression exercised

directly against individuals by international tribunals, skipping over the level of national competence. But the competent ICTs were created by the Security Council and their authority is based on its decisions. However, this no longer falls within the framework of classic collective security, with implied indifference to individual suffering, attachment to stability rather than to justice, predominance of the interests of States over individual rights. Nor is this within the framework of legitimate defence, which only protects States and overlooks individuals and can even sacrifice the principles of humanitarian law (opinion cited above, should the survival of the State be at stake).

This is, therefore, evidence of a profound evolution in concepts governing international security. No longer is it simply a matter of defending peace, but also and perhaps especially of promoting somewhat sacred values, which by themselves can justify the use of force to repress attacks against them. It is not a matter, then, of regulating or restricting the international use of force to ensure the peace of States. Instead it means organising in service of values greater than States and mobilising states to defend these values, including perhaps at the cost of peace. This evolution seems, on the one hand, to have affected the Security Council itself, when it instituted International Criminal Tribunals with the responsibility for repressing crimes against these superior values. However, this apparent extension of the framework of classic collective security must be made relative. It is indeed limited, since these tribunals aim for the return to peace, which supposes that such crimes do not rest unpunished, an impunity which would encourage indefinite and recurring troubles. On the other hand, NATO, officially an instrument of legitimate collective defence at the service of its member States, assumed this concept of expanded collective security, in the name of universal values. The material expansion of collective security is then reinforced by an institutional substitution, without a formal modification of the law governing either of them. Such an unstable arrangement can only create general confusion, which it is hoped will only be temporary.

At the same time, this confusion determines the legal approach to be retained. It is not, or at least not merely, a matter of analysing the texts and comparing them to the behaviour of States, as a court might do in

order to pronounce a judgement of conformity or non-conformity. This type of analysis is not necessarily irrelevant. The International Court of Justice can indeed be called upon to rule on these questions, and it is already asked to do so for litigation. The Yugoslav Federation appealed to the International Court of Justice to condemn the intervention of NATO member countries, and the court ruled on this matter on 2 June 1999. In the consultative realm, the precedent of the opinion requested of the ICJ by the General Assembly concerning the legality of the use of nuclear arms (consultative opinion of 8 July 1996) shows that these subjects are no longer considered limited to an exclusively political approach. Certain States (including Russia and China) have already raised the possibility of such a request for an opinion, and it is not excluded that this will occur some day. But for the present, and in the present context, the object is not to comment on judicial procedures. It is above all to research, define and evaluate the options of legal policy, which, based on presently applicable rules, make it possible to provide a legal explanation, justification, and consistency for developing practices; in other words this means going beyond the present dichotomy between legality and legitimacy.

■ Legality and Legitimacy of the Use of Force

To deal with the question of legality requires an analysis of the legal justifications for military action undertaken and an evaluation of these justifications in light of applicable norms of international law. The actors themselves normally produce these justifications. They can likewise be derived from external argumentation if the possibilities opened by these norms are developed beyond what even the actors themselves have claimed. The question of legitimacy, on the other hand, is of a totally different order, and indeed is much more difficult to grasp and widely open to subjectivity. For example, it is possible to invoke the spirit of international law, the fundamental values from which it proceeds and that should guide its interpretation. Going even further, it is also possible to set aside positive norms in the name of supposedly higher values. In any case, it is clear that a confrontation between legality and legitimacy betrays an inadequacy of legality, or at least a per-

ception of such inadequacy by those who lay claim to legitimacy. For jurists, the reference to legitimacy is the sign of a crisis of law and, at a minimum, of a doubt in this regard. However, in the Kosovo affair, official discourse, which authorities directed to public opinion, was above all based on legitimacy. The law was invoked more as a value in itself that had to be defended as a principle than as a precise and articulated foundation based on particular and indisputable norms. Whence the feeling that the legal discussion had been dodged and that declarations of the legitimacy of the operation were unable to compensate for this weakness.

• With regard to *legality*, one is immediately struck by the contradictions between arguments presented by the various States that participated in the military action. Without going into a detailed examination of these arguments here, it suffices to say that three different theses were defended. According to the first, the action undertaken was justified by earlier decisions of the Security Council, and in particular by resolution 1199 (23 September 1998). The violation of its prescriptions by the Yugoslav Federation constituted a sufficient basis for coercive action intended to bring it into compliance. But a mere reading of this document, and in particular of its paragraphs 16 and 17, convincingly indicates the opposite. The Security Council declared that in case of non-respect, it would examine further action and additional measures. Moreover, it decided to maintain jurisdiction over the question. In other words, it in no way authorises the use of force by its Member States. The second thesis rests on an autonomous right, which NATO claimed, to use force in similar situations without being required to obtain prior authorisation from the Council; and this thesis is indeed an affirmation of the practice that was actually followed. Although it is not necessary for the moment to examine the validity of this position, it stands in evident contradiction to the preceding thesis. There where certain persons wish, even against the evidence, to identify the military action with the Security Council, others want to promote a freedom of initial action for NATO. And still others mentioned the humanitarian requirements that made the intervention necessary, but without furnishing a very precise legal basis, so that the argumentation veered toward one based on legitimacy rather than legality.

Beyond this contradiction, the question of an autonomous basis capable of justifying NATO's action merits more careful examination. We know that this organisation has always refused to consider itself a regional organisation in the sense of Chapter VIII of the United Nations Charter, which would have the effect of subordinating it to the Security Council in the framework of regional actions. Those who support the capability for autonomous action thus establish a distinction between the Charter and Security Council. NATO, according to its founding treaty, must respect the Charter. On the other hand, it is not required to wait for decisions by the Security Council, especially if the Council were incapable of acting because certain permanent members had exercised their veto rights. This argument is fundamentally quite close to the one which led during the Korean war to the adoption by the General Assembly of the Acheson resolution ("Union for peace," 377/V of 3 November 1950), already under the influence of the United States. At that time it was a question of considering that, in case of failure by the Security Council to act due to exercise of a veto, the General Assembly could recommend military actions that it judged necessary on the basis of the Charter and to ensure respect for it. NATO would then play a role comparable to that of the Assembly in the framework of the Acheson resolution: it would ensure maintenance of international peace and security, which the Security Council had noted was threatened by the Kosovo crisis (resolution 1199), and take measures necessary for this end due to the incapacity of the Council. Finally, it should be noted that article 1 of the Atlantic Pact, while recognising the limitation of the right to use force, fails to mention, as in article 2, paragraph 4 of the Charter, the ban on infringing on political independence or territorial integrity of any State, and mentions only refraining from the use of force "in any manner inconsistent with the purposes of the United Nations."

Nevertheless, it is not excessive to conclude that this thesis self-destructs upon examination. The General Assembly is an organ of the United Nations; it is directly invested with responsibilities by the Charter; it acts in the name of the United Nations. Moreover, the legality of the Acheson resolution with regard to the Charter was highly contested. And although it is still in theory part of the means available

to the General Assembly, in practice it is not used to authorise the use of force. As for NATO, it has no organic link to the UN, even though it can be maintained that, in the context of NATO's origin, the United States already intended it as a replacement for the United Nations, considered defective by the US. But the Atlantic Treaty contains no stipulation to authorise an autonomous action apart from legitimate defence. Article 5 is the only one that foresees the possibility of employing coercive means; this possibility is limited to the hypothesis of an armed attack against one or more of its parties, in accordance with article 51 of the Charter that recognises the legitimate individual and collective defence of Member States under control of the Security Council. NATO is an instance of collective defence and not of collective security. And finally, in its article 7, the Atlantic Treaty reaffirms the obligations of its partners flowing from the United Nations Charter, a general reserve which seems to restrict the loosening that article 1 might contain concerning the use of force.

Certainly, it is possible to maintain that later developments of the Atlantic Pact, and in particular the new "strategic concept" adopted on 24 April 1999 by Alliance heads of State and Government, led to an expansion of these bases for intervention. In the latter document, there is mention of "crisis management" and "operations in response to crises" that the Alliance can undertake (paragraph 11), beyond its article 5 (paragraph 31). It is noted that the military forces of the Alliance must be ready for this type action (paragraph 41). But several elements manage to limit its application. First, this text came after the Kosovo action; second, it recalls the role of the Security Council, in particular by mentioning "peace-keeping operations and other operations conducted under the authority of the Security Council" (paragraph 31). And above all, it is not legally binding; similar to joint declarations or final acts of certain conferences, it belongs to the category of non-conventional concerted instruments that in any case cannot override obligations of the parties resulting from the Charter. Even supposing that one would want to see it as obligatory for NATO members, it would remain subordinate to the Charter by virtue of article 103 of the Charter, which stipulates that it prevails over any obligations that might be contrary to it. Thus, to recognise a power of autonomous

action for an organisation independent of the United Nations would in reality render the Charter inconsistent, inasmuch as any particular group of States could justify and exercise a right to military intervention, over which they alone could judge, on the basis of their discretionary interpretation of the Charter.

Still, with regard to NATO, there is a final element that seems to negate its claims to a capacity for autonomous action. The declarations made by its Secretary General, in particular on 23 March 1999, could give the impression that NATO, by itself, decided on military action. But, without even raising here the problem of NATO's international legal status, it must be admitted that this impression does not hold up to analysis. On the political level it was the Atlantic Council which authorised the Secretary General to act, as early as 30 January 1999, in other words a group of States. Moreover, the choice of targets was regularly subordinated to the approval of the governments concerned. As for aerial bombing operations, these were indeed conducted under a unified command, but the aircraft retained their own symbols and their national identities, so that the engagement of the different countries was exercised on a national basis much more than an international one. Not all NATO Member States took part (and it is interesting in this respect that the Atlantic Pact does not speak of "Members" but of "Parties"), and one of the participants, France, is not subject to NATO's integrated command. In reality, this was an ad-hoc coalition of States, a little like during the Gulf War, and this affair was no more a NATO conflict than the Gulf War was a UN war. In this respect, we can speak of NATO's legal transparency, even though the parties preferred to hide behind their spokesmen, an attitude that resembles much more an effort to seek legitimacy than legal justification, as we will see in a moment.

Finally, it can be noted that no *a posteriori* legal justification can be produced to consolidate an argumentation so evidently difficult. Thus some interpreted the decision by the prosecutor of the ICT for former Yugoslavia to charge President Milosevic with various violations of humanitarian law, a decision taken during the aerial bombing, as support for and confirmation of the legality of these actions. This was evidently not so since the ICT did not ask for military assistance of States,

which should in any case have been decided by the Security Council; nor is it known how these actions were directed toward the capture of the accused President, nor even toward a search for proofs of violations, which would have required a land intervention. In the same manner, it is not possible to interpret resolution 1244 of the Security Council (10 June 1999), which took note of the political solution reached and in part organised its consequences, as an after-the-fact validation by the United Nations of an action undertaken outside the organisation. This resolution contains three levels, so to speak. A security level, composed of the creation in Kosovo of an "international security presence… with a substantial participation of NATO" (annex 2, point 4) authorised to act on the basis of Chapter VII, and including a Russian contingent. A civilian presence level, with a special representative named by the Secretary General in charge of administration, the return of refugees and the provisional organisation of the region. And a UN level, which consists especially in co-ordinating and validating on a universal level what was in fact to be undertaken by a group of other organisations and Member States. This resolution is thus concerned only with the future and overlooks all of the controversial past.

And finally a word on the reference to human rights, cited repeatedly and almost ritually as justification for the military action. In the legal realm this claim derives from confusion between human rights and humanitarian law, which are nevertheless philosophically and especially technically different. Philosophically, humanitarian law, concretely universal, protects the human person in his physical and moral integrity from torture, inhuman and degrading treatment, deportation, rape, summary execution, and massacre. Human rights, a product of western political concepts, organise an individual's ordinary insertion in society, protect private life and determine the conditions for participation in public life. They do not have the same objective, and it is clear that what might be called ordinary violations of human rights – violating the secrecy of correspondence, sexual discrimination, lack of right to defence, insufficient freedom of the press, absence of participation in public life, for example – could not justify military action against a State guilty of violating them, for otherwise the door would be opened to war by anyone against anyone, or almost so. Technically,

humanitarian law is for exceptional circumstances, a law applicable in case of armed conflict, internal or international, and it establishes obligations for combatants, sanctioned by penal proceedings, even without the victims necessarily being accorded an individual right to action. On the other hand, human rights are meant to enable ordinary, simple, peaceful living. They create individual rights in favour of individuals, which these individuals can plead directly before tribunals. The two types of rights are thus different in nature and are not set in motion by the same techniques. Finally the universality of humanitarian law contrasts with the different interpretations of human rights.

Thus, if we quickly review the various legal justifications advanced in defence of the military intervention in Kosovo, even beyond their desultory nature we are struck by their fragility. The Security Council neither authorised nor subsequently validated such an action. Nor did the Atlantic Pact furnish any apparent legal basis for the aerial bombing of a sovereign country apart from legitimate defence of the parties. Human rights violations are not a sufficient justification either. We can only agree with the opinion of the International Court of Justice, appealed by the Yugoslav Federation against the intervening States, when the Court declared, in an order of 2 June 1999, that "the Court is greatly concerned by the use of force in Yugoslavia; under present circumstances, this use raises very grave problems of international law" (paragraph 16). However, it is no doubt necessary to go beyond this legal analysis in order to recognise the true justification for the action undertaken. Behind this type of legal argumentation floats the shadow of legitimacy, which can be appealing even if not convincing, persuading that the action is just even if it does not correspond to a punctilious evaluation of its legality. The Security Council, unable to act by itself, became an instance of legitimisation of what exceeded it, and of which it sometimes pretended to be the organiser. NATO furnished a multi-lateral cover for actions taken by a group of States. Human rights arguments elicit spontaneous and immediate sympathy in public opinion, especially among the inevitable partners that non-governmental organizations (NGOs) have increasingly become. It is this legitimacy, therefore, that must now be examined. Is it in fact sufficiently convincing to justify not having a possibly better argued legal justification?

• Let us first note a characteristic of this justification by *legitimacy*. It rests upon a claim of exceptional circumstances, a sort of state of necessity, which would exclude ordinary legal regulation. Thus it can be established that the absence of a mandate or authorisation from the Security Council for the NATO intervention cannot constitute a precedent; that the mission lies outside of article 5 of the Atlantic Pact. This strategy of negative affirmations pursues several objectives. It makes a legally questionable action more acceptable; it preserves the legal position of those who claim that any military intervention apart from legitimate defence must have approval of the Security Council; it does not excessively enlarge the conditions for NATO intervention, actually controlled by the United States; it does not raise immoderate hopes among minorities who could be tempted to use their agitation to provoke a repression sufficient to call for a similar kind of military intervention. This strategy likewise has two consequences. It underscores, on the one hand, the hesitation of the intervening countries concerning the international legality of their own position. On the other hand, it excludes the possibility that an international custom could arise from this to justify similar operations in the future. Not only did the regularity of this action encounter criticism of certain important States, such as China, India and Russia, but it left a number of its very partisans perplex as well. However, it is no less true, and this is an important fact, that the Security Council agreed to organise the consequences of a military action from which it had been held distant. It had even agreed to be supplanted, for the political settlement, by the G8, a *de facto* group of States that represents in part an unofficial enlargement of its composition and to whose declaration it referred in its resolution 1244 (annex 1, declaration of Petersberg, 6 May 1999).

Let us likewise point out that an important dimension of this claimed legitimacy was the support of public opinion in the intervening countries. This support was unflagging, and it even went beyond the aerial bombing since, according to polls, a strong majority of the various factions of public opinion concerned would have favoured a ground intervention, including American public opinion. This quest for legitimacy by approval of the polls is in fact quite revealing of a limited conception of democracy and of law, both at a domestic level and on an inter-

national level, and especially for a country such as France. Parliament was not consulted there, nor even informed of the action before its launch, and was not invited to express itself by a vote, unlike what happened at the time of the Gulf War. It can also be asked if we were not legally in the presence of a war that, according to article 35 of the [French] Constitution, must be authorised by the Parliament. In other words, stress was laid on a public relations type communication, and the polls, far from expressing an elaborated reflection of public opinion, served as echo or mirror for the authorities. One has the feeling that these were in fact experiments in propaganda techniques, which may be called information or pedagogy if one wishes, techniques already proven during the Gulf War. Beyond the malleability of public opinion, it will be retained that, contrary to expectations of idealism and of pacifism, this opinion is ready for violence as soon as a detestable enemy is presented to it. We will refrain from drawing the conclusion that this resulted in a collective progress of democratic and legal practices or consciousness, beyond official slogans and the self-satisfaction of the authorities. Let us merely note, before returning to this point later, the affirmation of a two-fold limitation. On the one hand, this type of operation should only apply to Europe; and ground actions are in principle excluded.

Beyond the slogans in fact, no doubt it is necessary to distinguish between the justifications and the reasons for the intervention. The justifications tended to be somewhat angelic: the strong at the service of the weak, democracies coming to the rescue of the oppressed, the paragons of human rights against dictators, just violence against torturers, images that have basically accompanied every war of the 20th century. The reasons are clearly more complex, and no doubt Machiavellianism was not absent from the scene. From the angelic, it is possible to slip into the diabolic, or at least toward a suspicion of it. Was this crisis not amplified and accelerated by an American desire, which happily accepted the creation of a permanent abscess on Europe's Southern flank, thereby justifying a continued American military presence, of which NATO would provide the necessary military framework? Does this not also prove that the Europeans are fully incapable of ensuring the security of Europe by themselves and that, in terms of security,

there are only small powers in Europe, incapable of developing their own organisations such as the WEU (Western European Union), totally absent from this affair? Was there not a desire to wage the war in Kosovo that no one had thought possible, or perhaps not desirable, to wage in Bosnia? As for the Europeans, they followed along with varying degrees of enthusiasm. Some tried to claim that they were the organisers of the American intervention, according to a traditional dream of certain authorities, who are difficult indeed to follow. Others continue to engage in the on-going competition for the title of best ally of the United States. Still others considered that it was simply better to be within than without.

A few observations in conclusion. First, the true legitimacy of the operation, at least in the short term, no doubt resulted from its political success; many doubts about the pertinence of the action and about its methods, whether expressed or not, were erased by its success. This is the strength and the weakness of legitimacy. Then, the expansion of NATO coincided with the return of war in Europe, whether it be a cause or an effect. Russia, excluded and pushed away during the entire military phase of the operation, managed nevertheless to achieve readmission into the following phase. It is no less true that this action contributed to a renewal of a climate of mistrust in international relations, well beyond Europe. Some States may esteem that only possession of nuclear arms can protect them from similar interventions, which would represent a threat for the legal regime of non-proliferation. Moreover, a long-term settlement remains uncertain, and former Yugoslavia is far from being stabilised.

The principal responsibility for this stabilisation now falls to the Europeans themselves. They must assume it, politically, financially and technically. Even if this affair underscores their lack of preparation and their intellectual, military and political inadequacies, every European is now convinced that the solutions required call for a reinforcement of European responses. The administration, the political transition and the reconstruction of Kosovo offer an experimental area they must use profitably in order to regain in peace what they lost in the war, to realise a model of democratic coexistence and development. Finally, and

at once, it is necessary to know how to apprehend the lessons of the military operation, without which the Kosovo affair will remain an anomaly with no lasting effects. One of these consequences consists in affirming the absence of a coherent legal doctrine, especially on the part of Europeans. Would not this doctrine be that of an intervention of humanity?

■ Towards a Legal Doctrine of Intervention of Humanity

It is striking that, after the end of military operations, Western political authorities frequently referred to the ethical nature of the Kosovo intervention. Here can be seen the desire to exploit the political benefit of a success and to affirm it before those who had contested or doubted it. Something more profound can be discerned as well, which is the desire to prolong this type of intervention in time. True, the term ethical is not well chosen. Ethics deals with behaviours and not principles; it implies a degree of subjectivity and is distinguished from the simple certitudes of morality by arbitration between the contradictory obligations it imposes. It is in a way a quest for an existential balance in the context of a conflict of norms. However, to seek prolongation, and even permanence, implies dealing in the realm of law. In this respect the attitude of the countries involved remains hesitant. In a sense, they practised intervention of humanity without formulating a doctrine for it, or before formulating one, or in no more than a random fashion. However, this unformulated doctrine is latent. A doctrine is an articulated legal position which results from a coherent interpretation of current rules. It can be constructed on the basis of existing law, without recourse to the idea of some new international custom that might be crystallised from recent practice, a thesis whose weakness has already been pointed out. Formulating a doctrine for intervention of humanity, moreover, has the merit of specifying the conditions for its validity, its motives, its objectives, its instruments, and thereby its limits as the means of avoiding the risks and wayward tendencies it contains. If this principle is accepted, it offers a hypothesis for licit use of force in international relations, a hypothesis which must be carefully framed and limited.

Let us note first that intervention of humanity must not be confused with what is called humanitarian intervention. There is not merely a difference of degree between these two concepts but also one of nature, even if promotion of the latter preceded, in the course of recent years, with the reappearance of the former. As we will see, reappearance for a somewhat underground or implicit practice has always existed in this respect. "Humanitarian intervention", using an expression more attuned to the media than to law, involves the protection of civilian populations affected by conflicts or natural catastrophes, the supply of medical assistance, food, etc. It rests on peaceful means, it supposes the consent of the States involved, it is assured by humanitarian organisations, particularly NGOs, generally supported by States. It has become an almost obligatory dimension of the most recent peacekeeping operations, both of which have grown increasingly complex due to the interference of public and private sectors, of civilian and military activities, of the recommendational or the decisional nature of Security Council resolutions. It is not always perceived in a favourable manner by the countries who could be considered its beneficiaries, for they sometimes suspect it to be a disguised meddling in their affairs through the intermediary of falsely private NGOs. Intervention of humanity, in the sense understood here, is something altogether different. It responds to criminal breaches of humanitarian law, committed by a State apparatus or by private groups within a State, against individuals or groups on the territory of this State. It does not request the consent of the State involved. It implies the use of armed force against those who might attempt to oppose it. It has its origins from states, which means that it is not necessary for the Security Council to have given prior authorisation. It is destined to bring a halt to the criminal attacks that have justified it.

An apparently simple solution could be to obtain a revision or an amendment to the United Nations Charter in order to incorporate formally this type of intervention into international law, and in particular into the area of competency of the Security Council. This would remove all legal controversy. Such a solution nevertheless seems highly improbable in practice, and moreover unnecessary to the extent that it is perfectly possible to base intervention of humanity on present

international law. Highly improbable, for any revision or amendment to the Charter encounters considerable political difficulties, reinforced by the legal conditions for realising it. According to articles 108 and 109, amendments or revisions require the consent of the five permanent members of the Security Council, as well as ratification by two thirds of Member States. It is more than doubtful that this unanimity and this majority could be achieved on such a subject. It could also be expected that reform of the composition of the Security Council, discussed for the past ten years, would lead to a positive result in this respect, strengthening the Council through participation of States sensitive to the ethical dimension of international relations. But in fact, reform of the Security Council is at a standstill, illustrating the structural difficulty of attacking the balances – or imbalances-established by the Charter. But this practical inviolability of the Charter has but few consequences in this respect. On the one hand, nothing can guarantee that a formal modification will lead the Security Council to modify its practices in particular cases; on the other, general international law as well as the Charter are sufficient in their present state for justifying interventions of humanity, whether practised by the Council or, the most sensitive, by States.

• *How can such a right to intervention be established legally for the benefit of States?* Three apparently formidable obstacles must be overcome. The first is that of article 2, paragraph 4 of the Charter. It seems to forbid in principle the use of armed force by States. A more careful reading, however, shows that it regulates the use of force rather than forbidding it. It only forbids the use of force against the territorial integrity or the political independence of any State – two specific hypotheses – or in any other manner inconsistent with the purposes of the United Nations – a general hypothesis. But intervention of humanity does not fall under any of these hypotheses. In addition, the Preamble to the Charter states that "armed force shall not be used, save in the common interest", which is clearly the case for intervention of humanity. The second obstacle is that of the Security Council, to which members of the UN have entrusted "the primary responsibility" for maintenance of peace and security (article 24, paragraph 1). But a primary responsibility is not an exclusive responsibility. Moreover, the

obligations that the Charter establishes for its members are to be interpreted restrictively, and the general right to use of force available to sovereign States can only be set aside by distinct obligations. As a result, if the Security Council does not exercise the primary responsibility invested in it, or if a situation falls outside this responsibility, the States retain their initial areas of competence, those which have not been excluded by article 2, paragraph 4. The third obstacle is that of the sovereignty of the State that is the object of the intervention. But this State cannot maintain that violations of humanitarian law committed on its territory are its internal affair. These questions are international by nature. Moreover, the Geneva conventions contain stipulations that can positively lay the foundation for this kind of right to intervention. Article 1, common to the four conventions, stipulates that "the High Contracting Parties commit themselves to respect and ensure respect for the present convention in all circumstances." This is precisely the object of intervention of humanity.

However, another possible objection should be examined briefly. This objection is not based on a positive legal text but on a somewhat ambiguous passage of the order issued by the ICJ on 2 June 1999 in the case concerning lawfulness of the use of force, brought by the Yugoslav Federation against the intervening States. In paragraph 31 of this order the Court declared that "any dispute relative to the lawfulness [of acts contrary to international law, including humanitarian law] must be settled by peaceful means," and in paragraph 32 that "in this framework the Parties should take care not to aggravate nor enlarge the dispute." Paragraph 33 adds that "when such a dispute raises a threat against peace, a break in peace or an act of aggression, the Security Council is invested with special responsibilities by virtue of Chapter VII of the Charter." We could interpret these dicta as an implicit but clear condemnation of the intervention of NATO Member Countries who, in the context of a dispute with regard to respect of humanitarian law by the Yugoslav Federation, did not seek a peaceful settlement but took recourse to force, and did so without the approval of the Security Council. Such a conclusion would no doubt be overdrawn. First because the Court was addressing itself to all parties of the dispute and not only the defendants. It might also be possible to see in this a

condemnation of the Yugoslav Federation, whose excesses, amplified by the aerial bombing, contributed to an enlargement and aggravation of the dispute. And then, because such declarations are limited to recalling in an abstract manner a few general stipulations without drawing particular conclusions. Finally, and especially because, at this point in the procedure, the Court had not established its competence, and the order in fact refused to take the measures of conservation demanded by the Yugoslav Federation. This means that the Court can take no position concerning the basic issue. The tone of its remarks nevertheless underscores the necessity for intervening countries to present a solidly argued doctrine.

This is all the more so since the doctrine of intervention of humanity can be based on a rigorous interpretation of legal texts concerning both rules for the use of force as well as international humanitarian law. Here it can be seen that the object is not to react with force against human rights violations in general, but indeed against serious transgressions against obligations qualified as "inviolable" by the ICJ (opinion of 8 July 1996 on the lawfulness of the use of nuclear arms). These obligations are specifically mentioned in article 3, common to the four Geneva conventions, relative to non-international armed conflicts, that is relations between a State and its own inhabitants, an article which specifically prohibits attacks on the lives of non-combatants, torture and cruel treatment, hostage-taking, attacks on human dignity. In a wider view, it is possible to include incriminations resulting from the ICT statute regarding former Yugoslavia. Moreover, some of these prohibitions have been incorporated into common international law. On a technical level it is always possible to debate the qualification of this or that action. The repetition or the notorious nature of such acts, the objective verification of their existence, the clear inability of the territorial State to put an end to and to repress them, or even its complicity or its primary responsibility in their execution are sufficient reasons for justifying that an external intervention put an end to them. Yet it is necessary to define as objectively as possible when conditions for such an intervention have been realised. We will return to this point.

We could also reason by analogy with the statute of legitimate defence in international law. According to article 51 of the Charter, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." This means the right to legitimate defence does not result from the Charter, that it is external and prior to it, and that the Charter merely regulates this right without touching on its substance. This also means that even if the Charter were silent on this subject, this right would still exist and it is not limited by the prohibitions of article 2, paragraph 4. In the same manner, it is possible to maintain that there is no need for the Charter to deal with intervention of humanity expressly for it to be recognised by international law. Indeed, on the one hand, intervention of humanity is not in contradiction to the Charter, and on the other, it belongs substantially to the realm of sovereign competence of States, and they have not intended to renounce this by becoming members of the United Nations. Like legitimate defence, it responds to exceptional circumstances. In the same way, it is employed in an autonomous manner to the extent that the Security Council does not act within the framework of its primary responsibility. Thus we leave the framework of institutionalised collective security to enter, not the realm of collective defence, but the framework of decentralised collective security: collective since the intervening State or States are not defending their own interests but a wider interest, in accordance with the purposes and principles of the Charter.

To this argument based on current legal rules may be added certain elements of practice, including recent practice, independently of the Kosovo affair itself. True, the term intervention of humanity has not been used, but the substance of the interventions in question corresponds overall to what this term covers. Thus we can mention as well the Kolwezi affair, in which French intervention put an end to abuses committed in former Zaire against citizens of various nationalities; an intervention by Tanzania to put an end to the regime of Marshall Idi Amin Dada in Uganda; an intervention by Vietnam in Cambodia to eliminate the Khmer Rouge regime. We could also add the action in Iraq at the end of the Gulf War by France, the United States and the United Kingdom to protect the Kurd population, going beyond what the Secu-

rity Council had authorised. These are varied examples. They did not always correspond to an intervention of major powers external to the region, and it was rarely a case of the intervening parties protecting their own nationals. The actions in question barely raised protests, and it did not appear that they were considered violations of international law. With regard to the Kosovo affair, although certain States protested, and even if the Yugoslav Federation appealed to the ICJ charging illicit use of force, it is evident that until now no international authority has condemned this intervention in any way. We even know that a proposed resolution along these lines presented to the Security Council was rejected by 12 votes to 3. This does not mean that the intervention did not give rise to legal uneasiness. But in our opinion this comes more from an absence of justifying arguments, which may cause certain States to fear a claim by NATO of an indefinite right of intervention, undetermined in its motives and unlimited in its means. It also comes from the military means employed.

It would certainly be more satisfying for the mind as well as for the integrity of the system of collective security in the Charter if the Security Council itself would determine when these conditions are realised, and then authorise or order this kind of intervention. It is fully capable of doing so on the basis of Chapter VII. If it were to do so, however, intervention of humanity would lose its specificity and be absorbed into the exercise of its general area of competence, reduced to one of the responses to unspecified hypotheses of infringement of international peace or security. To establish this specificity it is possible to imagine that the Security Council could adopt in an abstract and general manner a declaration in which it would recognise the validity and the necessity of interventions of humanity, similar to the declaration issued by its President on 31 January 1992, considering the proliferation of weapons of mass destruction to be a threat to peace. However, beyond the political difficulty of its adoption, the idea of such a declaration raises several legal objections. First, the Security Council does not possess a general normative power, but can simply react to particular situations. Consequently, a special resolution would then be necessary in each concrete circumstance, so that the problem would not be resolved but merely deferred and scaled back. Finally, in

case the Security Council refused to act, the position of States wishing to intervene would necessarily be weakened. But its inaction does not in principle create an obstacle to the autonomous right enjoyed by States by virtue of their own areas of competence. Paradoxically, an intervention by the Security Council would reinforce the legitimacy more than the legality of these interventions. Finally, let us note that such intervention does not imply a prior judgement concerning the penal responsibilities that may be at issue, nor the arrest of suspects or of those charged. These responsibilities belong to judicial procedures, internal or international. Intervention of humanity is a police intervention destined to restore public order and to bring to a halt attacks against it.

• This leads to *specifying the characteristics of such interventions*, characteristics they have assumed in practice, but that they should also respect in order to earn this qualification. *First*, they should be based on specific violations of international humanitarian law, which destroy or threaten the life of communities, without opposition from the territorial State. Not every violation of international law can justify the use of force. It is precisely against this practice that restrictive regulations have been developed over the last century. For it is necessary for there to be an attack on qualified obligations. We are not in the realm of collective security, which obviously has as objective only to ensure respect for the law. This means moving away from the organising principles, at least the initial ones, of the United Nations. *Second*, and in this spirit, this does not have to be decided or recommended by the Security Council. It can be, but, as we have seen, it then falls under the Council's general mission of maintaining peace and security, and at the same time it loses its specificity. It can also be unilateral, or conducted by a group of States under their responsibility. This latter formula has the advantage of eliminating suspicions of a search for an individual advantage by those who have recourse to it. *Third*, it is discretionary, which means no State is bound to undertake it or participate in it, and that those it aims to protect have no specific right to make claims against those who might fail to practice it. It could even be added that in reality those intervening in a situation always involving risks and costs, must have a special interest in the operation, an inter-

est that can be regional or correspond to the attachment of the intervening States to the values being threatened. *Fourth*, the military means employed must correspond to the objectives pursued, not so much with respect to a principle of proportionality, as in the case of legitimate defence, as a principle of adequation. It would be indeed be incomprehensible if an intervention of humanity would itself offend humanitarian law.

How should the Kosovo affair be evaluated on these different points? To do this it is necessary to examine successively the motives for the intervention, the means employed and finally the results obtained. With regard to the motives, in light of official declarations made by the North Atlantic Council on 30 January 1999, repeated by the NATO Secretary General on 23 March, date of the beginning of aerial bombing, they seem highly ambiguous. The humanitarian concern is indeed present in the 30 January declaration, and the 23 March communiqué insists on this point in particular. But this is accompanied by an appeal for a provisional political settlement. It is true that if it had accepted negotiation, Yugoslavia would have consented at the same time to an internationalisation of the problem. However, from what we know of the contents of the "Rambouillet agreement", refused by the Yugoslav Federation, it can be thought that negotiations did not founder on humanitarian aspects but on the question of allowing the presence in Kosovo of NATO forces disposing of particular rights without a mandate from the Security Council. The press spoke of secret clauses in the "agreement" on this matter, which would have included the right for NATO troops to come and go with immunity over the entire territory of the Yugoslav Federation, which the Federation rejected, and this fact does not seem to have been clarified. Very quickly in fact, the use of force led to a certain restriction on available information, to put it mildly. Since it also seems that the abuses against the so-called Albanian population of Kosovo and their massive exodus followed the aerial bombing, and were even accelerated by the attacks, it is possible to question the capacity of the intervening countries to anticipate the consequences, even without putting in doubt the pureness of their intentions. Moreover, we know that not all members of the contact group who participated in the negotiations with the Yugoslav Federa-

tion were in agreement about breaking them off, and that certain members thought the halt was premature.

This leads to a second area of evaluation, that of the means employed: the exclusive use of high altitude aerial bombing. Did this not lead to destruction an human losses difficult to justify, especially in the context of a humanitarian operation? The choice of targets as much as the "collateral damage" can only contribute to the unease the operation stirred up among those not forewarned. In this respect we can return to the 2 June 1999 ICJ order in this affair. The Court points out, even as the bombing continued, that "all the Parties who present themselves before it must act in accordance with their obligations by virtue of the United Nations Charter and other rules of international law, including humanitarian law" (paragraph 18), and that "States, whether or not they accept the jurisdiction of the Court, remain in any event responsible for acts against international law, including humanitarian law, which might be imputable to them" (paragraph 31). This latter dictum is aimed in particular at the intervening States since they, as defendants, are contesting the Court's competence. Many experts in strategic matters demanded a ground intervention, more for military reasons than in the name of protecting civilian operations. The argument here is different. One cannot treat an intervention of humanity like an ordinary military action. Not only, as in all military operations, must all parties respect the requirements of humanitarian law, but in addition the particular nature of the intervention should lead to an even more pronounced concern for not causing harm to civilian populations.[1]

As for the last area of evaluation, it is too early to judge the final results of the operation. Provisional results are hardly encouraging: the accentuation of the problem of Kosovar refugees, the risks of destabilising the fragile neighbouring countries who received them, the improvised nature of answers provided to unanticipated problems, the delicate coexistence of the two communities in Kosovo after the return of the Albanian population to their homes or to new refugee centres, the risks of a reverse ethnic cleansing with regard to the Serb minority, the unde-

1. Yves Sandoz, "Beware the Geneva Conventions Are Under Fire," *International Herald Tribune*, 14 July 1999.

fined nature of the "international security presence" in the field, the incertitude about the future status of Kosovo over which the Yugoslav Federation retains but "residual" sovereignty for the time being, the extremely high costs of necessary reconstruction, the consequence of the destruction caused over two and a half months. On the other hand it must be recognised that the Yugoslav Federation accepted, for the most part, the demands imposed on it, and that ultimately the use of force achieved what negotiation had been unable to obtain by peaceful means. This could be seen as validation of the choices made, both the principle of military action and the strategy employed of exclusive aerial bombing. Nevertheless, it must be asked if this result could not have been obtained at a lesser cost – human, moral, material – if NATO Members had accepted from the beginning that the presence of an external military force in Kosovo be ratified by a Security Council resolution and thus placed under the auspices of the United Nations, which the resolution 1244 of 10 June 1999 ultimately realised. Here a number of questions remain unresolved, due to a lack of all the necessary explanations.

• At least it is possible to continue pursuing an unbiased reflection on the *conditions of validity and effectiveness of this type of operations*. The governments of the countries involved sometimes give the impression that they consider these operations to be a communication problem rather than a problem of conception, and see their justification as a media concept rather than a legal concept. If intervention of humanity is accepted, how should it be organised and regulated? It is clear that there is a risk of going astray since it depends solely on the evaluation of States. Thus it could be feared, especially if this ratifies a right proper to NATO, which we have shown not to exist, that this collective defence alliance could be transformed implicitly into an international police authority, which would immediately expose it to multiple challenges and provocations. Why intervene here and now, and not tomorrow? It can also be feared that behind NATO might develop in reality an American doctrine, coherent and resolute, which would endeavour to recognise a right to unilateral and unconditional use of force to defend and promote the national interests of the United States. A series of precedents in this sense exists, in particular involving aerial

bombing, in fact, of countries such as Afghanistan, Iraq, Libya, Sudan. Ultimately there is an impression of doctrinal opportunism on the part of the United States, which leads the US to use the United Nations when this is possible, or otherwise NATO; and if no multilateral cover seems practicable, to act alone. Intervention of humanity would then not only serve to promote the respect of universal values but to destroy the entire security architecture of the United Nations in the name of renewal of the just war theory.

Even if one might be convinced that neither NATO nor the United States can do wrong, for they are driven by a just desire to promote democracy, and the state of law and human rights everywhere, there remains the question of the precedent created in favour of States whose motives might be less pure. It might be feared that this example could encourage similar behaviour, for example in Russia with regard to the "near abroad." This might lead unexpectedly to a return to "limited sovereignty" which, in its time, justified the intervention of Warsaw Pact countries in Czechoslovakia to preserve socialist achievements. This vocabulary is no longer in vogue, but it would be possible to reintroduce surreptitiously the practice of zones of influence, with a kind of right of regional police recognised for certain powers – China in Asia, India in South Asia, tomorrow perhaps, South Africa in East Africa. There is an inherent risk in any action undertaken outside the framework of the United Nations or a regional organisation in the sense of the Charter, meaning one not clearly placed under the control of the Security Council. It is clear that the existence of a collective decision offers guarantees in this respect, provided it does not simply offer a diplomatic cover for unilateral action in disguise. The difficulty, no doubt, is that it must be evident both that the action in question is subject to international interests that all can understand and share, and that the States who act do not repudiate their responsibilities by hiding behind an international organisation that is but the sum of their individual desires. But if the Security Council does not exercise its responsibility, which everyone agrees is "primary," "primordial" or "special," there can only be make-shift measures.

The regularisation of intervention of humanity by an overriding doctrine thus supposes several conditions. *First*, it is essential – and this is

not simply a platitude – that this doctrine be affirmed and proclaimed publicly and in advance, and not in the midst of the event or by a sort of stopgap action here and there. *Second*, it is necessary that the conditions for launching an intervention be specified in order to allow the least room possible for contesting the sincerity of those intervening. The difficulty in this respect is that intervention can only take place in an urgent situation, but, as much as possible, it must anticipate rather than repress; and at the same time it can only be a last resort. Whence the importance of having available independent and pluralist networks of observation and warning, and for ensuring the balance and transparency of their information. *Third*, and in this spirit, it would be preferable that these interventions have a collective character, escaping from the individual decision of a State, while the States participating collectively assume legal and political responsibility for it. *Fourth*, on a strategic level, adequate means must be defined for these operations, so that they do not cause greater damage than the remedies they provide. Here, there is matter for reflection concerning military actions, and the articulation between legal thinking and strategic thinking. Is the doctrine of "zero casualties" compatible with this type of intervention? Is it possible to limit the operation to aerial bombing? Should an extended stationing of foreign troops in States who are the object of the intervention not always be ratified by the Security Council? *Fifth*, how can these interventions be co-ordinated and harmonised with the penal repression of authors of internationally qualified crimes, especially when international penal tribunals are competent? What type of support should be given to these tribunals?

On a more specifically European level, does not such a doctrine offer a framework for defining a formula for common actions, giving body to the external policy and common security of the Union and making it possible to reinforce the role of the WEU? At the same time, it would require possession and command by European countries of their own means of observation, communication, intervention, transportation. *Finally*, it seems clear that the capacity for humanitarian intervention cannot be universal, and that each country or each group of countries, with the exception perhaps of the United States, has, at least on the military level, only limited possibilities available. Whether we like it

or not, intervening countries need a special interest in order to commit themselves and to expose their troops, their resources and their combatants to risks that go beyond a classic vision of national interest. How far can the interest of European countries extend? Does this mean all OSCE (Organization for Security and Co-operation in Europe) Member Countries? What role then for OSCE, in fact excluded from Kosovo when the operation was started? And beyond? In the Kosovo affair, there was stress on the unbearable nature of such abusive depredations on European territory. This does not mean they would be bearable elsewhere, but that the European countries do not possess the same capacities for action nor, therefore, the same responsibilities. What about Africa, for example? Should European countries encourage and contribute to the creation of regional intervention forces, as they try to do for peacekeeping troops? Does intervention of humanity not contribute to the regionalisation of security problems? An overall reflection is needed to envisage all possibilities opened by development of such a concept and the new dimensions it includes for international security.

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