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THE RE-ESTABLISHMENT OF INTERNATIONAL LAW

Lecture

The Urgent Need for a New Paradigm in International Relations:
A World Order of Peace Based on the Development of Nations

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(I)

Diagnosis: Antagonism between law and realpolitik

Before the international community can embark on re-establishing international law, there needs to be clarity about the *nature of the law*. In the many debates about a reform of the system of international relations, misunderstandings of what constitutes a legal norm have led to false expectations, and disillusionment about world order in general.

Law is a system of norms of behavior in society, which are – consistently and permanently – *enforced* by the state by virtue of its monopoly on violence.[1] The term "rule of law" denotes a coercive system with an efficient separation of powers ("checks and balances"), to avoid arbitrariness. Generally: a norm without sanctions is not a legal, but a *moral* norm. While legal norms should be based on the moral principle of the *bonum commune* (common good), they are not themselves of the nature of moral directives. The *differentia specifica* between law and morality lies in *enforcement*. Violation of a moral norm has consequences in the ideal (metaphysical) realm; the transgression of legal norms has immediate effects *hic et nunc*, namely a sanction – punishment – in the real world.[2] Only the latter ensures peace and stability in a given social system. Consistent enforcement of norms is the very essence of the rule of law and the criterion that distinguishes a legitimate from a "failed" state. As far as the domestic system is concerned, there seems to be consensus on this link between norm and reality.

The decisive question is, however, whether this criterion is fulfilled in the domain of *international* law. Are there – consistent and efficient – mechanisms available for the enforcement of norms of inter-state behavior, in particular as regards the norm of non-use of force, the very cornerstone of the UN system of international legitimacy? The answer, plain and simple, is: no. Does there exist a separation of powers concerning collective decisions on the statutory (though, as yet, not effective) enforcement of norms? Again, the answer is: no.

One first must *deconstruct the illusions* about the international rule of law in the current system, as represented by the United Nations, before one can come up with a remedy. We, thus, must *identify the reasons* why the international system, and in particular the United

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[1] The term ("Gewaltmonopol") was coined by Max Weber: *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* [1921/22]. (Ed. Johannes Winckelmann.) 5th rev. ed., Tübingen: Mohr, 2009, § 17 ("Politischer Verband, Hierokratischer Verband").

[2] Hans Kelsen, *Reine Rechtslehre*. (Studienausgabe der 2. Auflage 1960.) Ed. M. Jestaedt. Tübingen/Vienna: Mohr Siebeck / Verlag Österreich, 2017, Chapter I/6/c: *Das Recht als normative Zwangsordnung*, pp. 94ff.

Nations Organization, does not meet the basic criteria of the rule of law – and especially so in the fundamental domain of international peace and security or, more generally, global justice.

The symptoms are obvious to everyone. The causes for the dysfunctionality of international law are also easy to identify, but almost always overlooked – because people are not reading the fine print of the UN Charter. The contemporary system of international law as embodied by the only universal intergovernmental organization so far, the United Nations, is flawed from the outset. This is obvious from the following competencies and decision-making procedures – and their interrelation – set out in the Charter:

1. "Law enforcement" is exclusively entrusted to the Security Council as supreme executive – and more and more also legislative[3] – organ of the world organization. According to Chapter VII of the Charter, outlining the mechanisms of *collective security*, the Council has supreme authority, overriding national sovereignty, in all matters related to enforcement of the basic norm of international law, the *prohibition of the use of force* (Article 2[4] of the UN Charter). The Council's decisions under Chapter VII are *legally binding* upon all member states. The coercive powers of the Council, in that regard, are virtually unlimited. They range from the imposition of diplomatic and economic sanctions and the interruption of all forms of transport and communication to the use of armed force, all at the sole discretion of the Council – and without any possibility to appeal the decisions. (The International Court of Justice has no authority to adjudicate in such matters.)[4] The actual enforcement of Chapter VII resolutions is ensured through the permanent membership, in the Council, of the countries that were the most powerful when the organization was established in 1945. This particularly relates to their military potential. For several decades, those five countries (the United States, the Soviet Union [now Russia], China [initially: the Republic of China/Taiwan, now: the People's Republic], the United Kingdom, and France) were also the only nuclear powers. According to the Charter, a "Military Staff Committee," consisting of the Chiefs of Staff of the permanent members, is established that is responsible "for the strategic direction of any armed forces

[3] For details see Hans Köchler, *The Security Council as Administrator of Justice? Reflections on the Antagonistic Relationship between Power and Law*. Studies in International Relations, Vol. XXXII. Vienna: International Progress Organization, 2011, pp. 64ff.

[4] See the Judgment of the International Court of Justice of 27 February 1998: *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America). Preliminary Objections*, Par. 43 (by implication).

placed at the disposal of the Security Council" (Article 47[3]). Although that particular provision has remained dead letter, it is indicative of the *rationale* of the UN policy of collective security: namely, that, in all matters related to the maintenance or restoration of international peace and security, the most powerful countries are entrusted with the enforcement of the rules.

2. At the same time, the very enforcers of the rules are themselves – not only *de facto*, but also *de jure* (!) – exempt from any enforcement action in case of their own transgressions. The rules do effectively not apply to their own conduct of international affairs. This follows from the decision-making provisions of Article 27(3) of the Charter. There is no ambiguity or room for interpretation:

   (a) All decisions on other than procedural matters require the consent of the five permanent members. This means that the Council can undertake no enforcement action at all if a permanent member casts a veto.[5]

   (b) The general norm that a party to a dispute shall abstain from voting – a common-sense principle of justice, so to speak – does not apply to decisions of the Council under Chapter VII. This means that a permanent member can commit an act of aggression against another state with full impunity. That state simply can veto any Security Council enforcement action against its own aggression. The consequence that cannot be explained away by any legal construct: *the prohibition of the international use of force effectively does not apply to the permanent members*.

   (c) In this statutory framework, there is no separation of powers at all. There is no constitutional court of the United Nations that could censure the Security Council. (As already explained, the International Court of Justice does not possess this authority.) There exists no legislative authority either that would be independent of the Security Council. The General Assembly is not a parliament with legislative powers, but a deliberative body that can only make recommendations and, in matters of peace and security, cannot even

[5] According to Article 27(3), decisions require the "concurring votes of the permanent members." Although there is no ambiguity in the wording of this provision, the ensuing Council practice to consider abstentions by permanent members as "concurring votes" has resulted in substantial ambiguity. To accept this, by now well established, practice requires a *sacrificium intellectus*: one has to redefine the notion of "abstention" as also meaning "consent."

> exercise this modest competence while the Security Council is dealing with a particular issue (Art. 12 of the Charter).

These provisions mean, plain and simple, that in the United Nations Charter *power trumps law*. Nothing can be expected of the UN when a permanent member is involved in a dispute or is the aggressor itself. When it comes to international peace and security, the world organization, self-proclaimed guarantor of the international rule of law, operates on the basis of the "power principle" (*Machtprinzip*). This has been the basic flaw of international law since the foundation of the United Nations. *There is no law if there is no consistent mechanism of enforcement of the law*. A policy of double standards, written into the Charter, in favor of the most powerful member states is an insult to the international community and makes a mockery of the principle of "sovereign equality" of states (Article 2[1]).

To sum it up: The United Nations has become *inefficient* and *dysfunctional* for two simple reasons:

a. Because of the Charter, the most powerful country/countries (the Council's permanent members) have nothing to fear procedurally (i.e. in <u>legal</u> terms).

b. Because of their very power, the strongest actors, protected by the veto, need not pay attention to the rights and interests of others (in terms of <u>realpolitik</u>).

The statutory predicament resulting from the voting procedure (point [a] above) cannot be overcome because of a mechanism of self-immunization the founders of the UN (those same permanent members) built into the Charter: According to Article 108, nothing, not even a comma, can be changed unless the five permanent members (P5) agree.

In such a constellation, appeals to the great powers to exercise self-restraint will not be effective. What alone works is a *balance of power* among those who hold the supreme privilege (the veto), namely the P5. To some extent, at least, such a balance existed in the early period of the United Nations. It soon turned into a bipolar balance between the United States and the Soviet Union. The two superpowers of the Cold War era held each other in check, which meant that it was next to impossible for each of the major players to use the Security Council for its own agenda.

The truth is plain and simple: When there is no legal (constitutional) <u>separation</u> of powers, the only recipe to limit arbitrariness is one of realpolitik: namely a <u>balance</u> of power,

whether multipolar or bipolar. With the end of the Cold War, this inherent "corrective of power politics" suddenly lost its effect. The United States as the *only superpower* was able to act with full impunity – without fear of any adverse consequences from violations of the UN Charter, namely repeated acts of aggression as in the cases of the Kosovo war of 1999 or the Iraq war of 2003.

Against this background, the only hope for change lies in the gradual emergence of a new global balance of power. As is obvious from developments such as the formation of BRICS (Brazil, Russia, India, China, South Africa) and the creation of new regional organizations, this balance will most likely be multipolar. The "global re-alignment," to borrow a term from the late Zbigniew Brzezinski,[6] may be a long-term process, however.

(II)

Re-establishment of international law

In the decades since the end of the Second World War it has become obvious that international law can only exist under conditions of a *real*, not merely *statutory*, balance of power. The United Nations Organization, in its present form, lacks even basic procedural provisions for the enforcement of international law in a *consistent* manner. There is no law without clear and precise measures of enforcement, however. In the absence of such mechanisms, what rules is the "law of the jungle." This has all along been the predicament of the so-called "New World Order" proclaimed by the leader of the only remaining superpower after the collapse of the power balance of the Cold War.[7] Under the conditions of today's realpolitik, the "international rule of law," a solemnly proclaimed goal of the United Nations, has become more and more elusive.

The re-establishment of international law will only be possible under the following conditions, or if the following developments occur, respectively:

a. **Power balance**: The facts of realpolitik cannot be ignored. The development of a *new multipolar order* will be decisive for the revitalization of the international legal system. Only when the arrogance of power is effectively checked by the power of others (i. e. when a balance

[6] Zbigniew Brzezinski, "Toward a Global Realignment," in: *The American Interest*, Vol. 11, No. 6 (July/August 2016), pp. 1-3.
[7] For details see Hans Köchler, *Democracy and the New World Order*. Studies in International Relations, Vol. XIX. Vienna: International Progress Organization, 1993.

exists among the major players), will there be a realistic chance that states "play by the rules." This may also provide some breathing space to smaller and weaker states amidst the global concert of powers.

b. **National sovereignty**: The United Nations Charter's basic principle of sovereign equality (Art. 2[1])[8] must no longer be allowed to be compromised by procedural norms such as the veto privilege for five specifically named countries (Art. 27[3]). Equality before the law, an intrinsic principle of law, has no meaning if some are "more equal" than others.

c. **UN reform**: Accordingly, the UN Charter would have to be adapted so as to make its basic norms enforceable. This alone will give meaning to the notion "international rule of law." The essential guideline for this process must be the elimination, first and foremost, of all *normative contradictions* from the UN Charter.[9] Only this can bring an end to the infamous policy of double standards for which the world organization has become notorious.

Specifically, such measures must include a reform of the Security Council – in terms of structure as well as voting regulations. (Such a reform is the necessary consequence of developments/measures mentioned under points [a] and [b] above.) The veto provision of Article 27(3) must be *modified* in the sense of a consensus requirement among the major global regions. Instead of linking permanent membership, connected with the veto privilege, to the power constellation of a bygone era (with three Western countries plus Russia, as successor of the Soviet Union, and China as the only "beneficiaries"), the Charter should redefine the notion of permanent membership on the basis of the *global regions*. Accordingly, not specifically named states, but collective entities – regional organizations such as the African Union, the European Union, the Association of South-East Asian Nations (ASEAN), etc. – should have permanent membership in the Council. Any binding decisions under Chapter VII of the Charter would, thus, require consensus among all regions.[10] This could not

[8] In the UN Charter, "sovereign equality" is a *normative*, not a *descriptive* term. It must not be misunderstood as suggesting that all states are equal in terms of power and influence. Equality relates to the rights and obligations of every state in the normative order of the United Nations.

[9] For details see the author's analysis: "Normative Inconsistencies in the State System with Special Emphasis on International Law," in: *The Global Community - Yearbook of International Law and Jurisprudence 2016*. Ed. Giuliana Ziccardi Capaldo. Oxford: Oxford University Press, 2017, pp. 175-190.

[10] For details see the author's earlier proposal: *The United Nations and International Democracy: The Quest for UN Reform*. Studies in International Relations, Vol. XXII. Vienna: International Progress Organization, 1997, esp. pp. 17ff.

only be more democratic, but would provide additional protection to smaller and weaker states against abuses of power by the organization's major players.

First and foremost, however, the wording of the Charter that somehow obliquely allows parties to a dispute – aggressor states – to use the veto to protect themselves must be abolished.[11] This will have an enormous "civilizing effect" on those actors, and it will help to restore the confidence of the international community in the world organization. A (legal) ban on the use of force is simply not credible if an aggressor can be judge in his own cause.

The idea underlying this long overdue adaptation of the Charter to the global realities of today – and to the requirements of democracy and the rule of law – is not in any way to create structures of a *world state*, which would mean a totalitarian colossus, totally absorbing the sovereignty of nations, threatening diversity, and marginalizing the role of all international actors. The main aim of measures of reform must be to establish a *consistent* (contradiction-free) system of decision-making and coordination of policies among a multitude of sovereign states on the basis of *mutuality*. This is the very essence of the Charter's principle of "sovereign equality."

There should be no illusion: under present conditions, statutory as well as political, this is still a dream – because the holders of power and privilege will not easily agree to give up their dominant position (which they can conveniently defend by resorting to the veto according to Article 108 of the Charter). However, the emerging *multipolar power constellation* may gradually convince those who have benefited the most from the status quo in the UN that continuing to insist on their privilege may ultimately be detrimental to the pursuit of their national interests (including their vital economic interests).

As the nature of the human being – and, thus, *collective action* – will not change in the secular realm of inter-state relations, the only hope for the revitalization of international law lies in a *prudent conduct of realpolitik*. A redrafting of the United Nations Charter along the lines we have proposed here will be an indispensable step in that direction. Should this prove impossible, the community of nations may have to consider a *new beginning* in a *different* normative framework, phasing out an organization that represents the thinking and power balance of 1945 and replacing it by an *organization of sovereign* states whose charter will be based on the realities of the 21st century.

[11] This will mean redrafting the last sentence of Par. 3 of Art. 27 – by removing the phrase, "in decisions under Chapter VI, and under paragraph 3 of Article 52."

Accordingly, the re-establishment of international law will mean the reinvention of international organization on the basis of sovereign equality among all nations – not merely among those who happen to be the most powerful at a given point in time.[12] As always in history, the challenge is not in the drafting of a proposal, but how to bring about a corresponding *paradigm change* in the normative framework – or bridge the gap between idea and reality. If the solemn proclamations of the Preamble and the Purposes and Principles of the UN Charter are meant to be more than mere exhortations, the supremacy of the law must not be compromised by the dictates of power politics.

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[12] On the UN dilemma between power and law cf. more generally the author's analysis: "The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order," in: *Chinese Journal of International Law*, Vol. 5, No. 2 (2006), pp. 323-340.