



INTERNATIONAL PROGRESS ORGANIZATION
DEPARTMENT OF PHILOSOPHY, UNIVERSITY OF INNSBRUCK



**The Use of Force in International Relations
Challenges to Collective Security**

International Roundtable Discussion

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*The Precarious Nature of International Law
in the Absence of a Balance of Power*

Introductory remarks

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On behalf of the International Progress Organization and the Department of Philosophy of the University of Innsbruck I am pleased to welcome all of you – and in particular our guest speakers from Canada, China, India, the Philippines, Turkey, and the United Kingdom – to the roundtable meeting on “The Use of Force in International Relations – Challenges to Collective Security.” This is the third meeting organized by the I.P.O. in co-operation with the University of Innsbruck. The earlier conferences were devoted to “Democracy after the End of the East-West Conflict” (1994)¹ and the question of a clash or dialogue of civilizations (1998).²

It is no coincidence that this year’s meeting takes place in the week when the United Nations Organization celebrates the 60th anniversary of its foundation. The I.P.O. has dealt with fundamental issues of international affairs, in particular the conditions of global peace and a just world order, since its very foundation here in Innsbruck in 1972. Almost two decades ago we sponsored an international colloquium in New York City on “Democracy in International Relations” to mark the 40th anniversary of the United Nations Organization;³ in 1991 we organized – with a coalition of NGOs from all continents – the “Second International Conference on a More Democratic United Nations” (CAMDUN-2) at the United Nations Centre in Vienna;⁴ more recently, in 2004, we held a roundtable meeting on “The United Nations and International Power Politics: The Future of World Order” in co-operation with East-West University in Chicago.

After this quick look back at the history of our modest efforts, let me look back at the less recent history of international law.

The use of force between states (more precisely: the rules regulating it) has become the major issue of international relations at the beginning of the 21st century. This concerns the meaning of *unilateral* as well as the *multilateral* (or “collective”) action.

The history of international relations in the 20th century has been determined by repeated, though not really persistent, efforts to ban the unilateral use of force while subjecting *multilateral* armed action to specific regulations – with the overall aim of taming what has become known as international power politics and softening the effects of global

¹ Hans Köchler (ed.), *Democracy after the End of the East-West Conflict*. Studies in International Relations, XXI. Vienna: International Progress Organization, 1995.

² Hans Köchler and Gudrun Grabher (eds.), *Civilizations: Conflict or Dialogue?* Studies in International Relations, XXIV. Vienna: International Progress Organization, 1999.

³ Hans Köchler (ed.), *Democracy in International Relations*. Studies in International Relations, XII. Vienna: International Progress Organization, 1986.

⁴ Hans Köchler (ed.), *The United Nations and the New World Order. Keynote addresses from the Second International Conference On A More Democratic United Nations*. Studies in International Relations, XVIII. Vienna: International Progress Organization, 1992.

anarchy resulting from it. Many had identified the nation-states' exercise of power politics, based on a doctrine of the supremacy of the "national interest," as origin of Europe's two fratricidal wars within a period of less than three decades.

The efforts towards restraining the arbitrary use of force meant, at the same time, a fundamental revision of the concept of *national sovereignty* – which was to be redefined in such a way as to make it compatible with the norms of a world order of peaceful co-existence. The idea of replacing – not merely restricting – unilateral armed action by means of a system of collective security, however, was not entirely new. As early as 1693, William Penn had presented a far-reaching proposal for a system of peace through collective enforcement of rules mutually agreed upon. In Section IV of his "Essay towards the Present and Future Peace of Europe by the Establishment of an European Dyet, Parliament, or Estates," he had suggested that disputes among states that cannot be settled bilaterally shall be brought before this assembly and that "if any of the Sovereignties ... shall refuse to submit their Claim or Pretensions to them, or to abide and perform the Judgment thereof, and seek their Remedy by Arms, ... all the other Sovereignties, United as One Strength, shall compel the Submission and Performance of the Sentence, with Damages to the Suffering Party, and Charges to the Sovereignties that obliged their Submission ..."⁵

More than two centuries after his far-reaching proposal and after Europe had undergone the conflagration of the First World War, the *Briand-Kellogg Pact* of 1928⁶ – in line with William Penn's motto "*Beati Pacifici. Cedant Arma Togae*" –, brought about the first major departure from a system of international law incorporating the *jus ad bellum* towards a co-operative international order based on what today is described as the "international rule of law." The paradigm shift towards a "less absolute" notion of sovereignty (if that semantically problematic formulation is permitted) was documented by the High Contracting Parties' declaration "that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another" (Art. 1).

However, that era's intergovernmental organization *per se*, the League of Nations, had proven incapable of enforcing a general ban on the use of force. (The one stipulated by the Briand-Kellogg Pact was anyway adopted outside its statutory framework almost a

⁵ William Penn, "An ESSAY towards the *Present and Future Peace of Europe*, by the Establishment of an *European DYET, PARLIAMENT, or ESTATES* (1693)," in: *The Political Writings of William Penn. Introduction & Annotations* by Andrew R. Murphy. Indianapolis: Liberty Fund, 2002, p. 406.

⁶ *Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy*. Signed at Paris, 27 August 1928 (entered into force: 24 July 1929).

decade after the Covenant of the League had come into force.) Within the League's Covenant, a system of collective security existed only in rudimentary form. Strictly speaking, the Covenant provided only for a *partial* prohibition of war as an instrument of national policy: while Art. 12 made the right to conduct war conditional upon a preceding effort at pacific settlement, Art. 15 provided that no war can be conducted against a unanimous decision of the League's Council. This has been described, in general terms, as departure from a doctrine of *bellum justum* towards one of *bellum legale*; in view of the goal of abolishing the *jus ad bellum* altogether, it may be considered only a partial achievement.

A serious attempt in the direction of a system of collective security⁷ was made by the Fifth Assembly of the League of Nations as early as 1924; the members had adopted a "Protocol for the Pacific Settlement of International Disputes" (the so-called "Geneva Protocol") establishing a general scheme of arbitration between states on the basis of recognizing the "solidarity of the members of the international community" and declaring that "a war of aggression constitutes a violation of this solidarity and is an international crime." However, like so many instruments adopted in this era (such as the Convention for the Prevention and Punishment of Terrorism of 1937), this Protocol never entered into force.

At the World Disarmament Conference held under the auspices of the League of Nations in 1932–1934, France had suggested a kind of rapid deployment force to be put at the disposal of the League of Nations. Again, this proposal has never been adopted.

As regards the League's peace-keeping capability it must be said, in due fairness, that the League was never truly representative of the international community at the time, the United States of America not having joined exactly because of considerations of national sovereignty.

A major – and decisive – step towards abolishing the "right to war" (*jus ad bellum*) was only taken by the international community after the catastrophe of another world war. It was the United Nations Charter of 1945 that has eventually implemented the basic provision of the Briand-Kellogg Pact by *integrating* the ban on the use of force into a system of collective security. Art. 2 (4) of the Charter provides for a ban on the *unilateral* use of force

⁷ On the history of the doctrine of collective security see, *inter alia*, Klaus Schlichtmann, "Linking Constitutional Laws of Peace and Collective Security," in: *Indian Journal of Asian Affairs*, Vol. 17, No. 2 (December 2004), pp. 1-22.

in any manner which is not consistent with the purposes of the Charter.⁸ Apart from cases of individual or collective self-defense under Art. 51, the right to use force is reserved to the international community represented by the Security Council. According to Art. 42, that body alone may resort to armed action “as may be necessary to maintain or restore international peace and security.” Furthermore, according to Art. 39, it is the Council’s exclusive privilege to determine the existence of a threat to or breach of the peace.

However, there is a major flaw in the United Nations system of collective security which must not be overlooked lest one is taken away by false expectations as to the nature and reliability of what has been called the “international rule of law.” The Security Council’s system of enforcement is collective only by name; the dictates of *power politics* have been incorporated into the very provisions regulating the Council’s exercise of its basic mandate. According to the rules of Art. 27 of the Charter, the five permanent members – the victorious powers of World War II – are effectively *immune* from any compulsory measures under Chapter VII of the Charter in cases of acts of aggression committed by them. Due to the wording of Par. 3 of Art. 27, they may use their special voting privilege also in cases where they are party to a dispute. The predicament of the world organization since its very establishment has existed in the normative inconsistency – namely: deviation from the principle of sovereign equality – brought about by the insertion of the *veto right* into the Charter (which, by the way, is only indirectly – and euphemistically – referred to as requirement of unanimity among the permanent members).⁹ It is no wonder that the United Nations, because of this “compromise” with power politics, has never been able to establish its credibility as guarantor of the international rule of law.

The – already dubious – role of the UN in the field of collective security has effectively collapsed with the end of the Cold War and the replacement of that era’s bipolar order by an essentially unipolar structure (at least in political and military, if not in social and civilizational terms). In the absence of a balance of power, the United Nations, after a prematurely declared “renaissance” at the beginning of the 1990s, appears having made an unwarranted transition – and a very rapid one, for that matter – from *paralysis* to *marginalization*.

Chapter VII’s philosophy was conceived of and its mechanisms of collective security were designed with a *multilateral* framework (in terms of power relations) in mind – albeit

⁸ “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.”

⁹ Art. 27, Par. 3 of the Charter speaks of the “concurring votes of the permanent members.”

one that only included five privileged member states. Those provisions have proven inoperable in an essentially *unilateral* order – something which by now has become obvious even to the most idealistic observer of international affairs.

The developments of 2002/2003 in connection with the conflict over Iraq are proof of this predicament of the world organization. The sequence of events since the first Gulf crisis in 1990/1991 and the legal facts have been documented by the International Progress Organization.¹⁰ The Security Council has not endorsed the use of force against Iraq; after having threatened the UN with a declaration of irrelevance, the United States attacked, invaded and occupied Iraq on a unilateral basis; a “coalition of the willing” around the global hegemon has replaced the earlier “Gulf war coalition” dating back to 1991; that group of states had acted – at least in name – as a United Nations coalition with the professed goal of restoring the rule of law by liberating Kuwait and pacifying the Gulf region on a permanent basis. Eventually, in May 2003, the Security Council had “recognized” the responsibilities of the occupying powers as *de facto* rulers of Iraq, addressing them as “the Authority,”¹¹ and thus had authorized, *ex post facto*, a state of affairs that had been brought about by means of a violation of the United Nations Charter.

Against the background of the events of September 11, 2001 – of which there still exists no clear and undisputed account –, the Gulf war of 2003 has indeed become the defining event of a new-old world order¹² in which the use of force is determined by the national interests of the most powerful international actor(s), and not by commonly accepted legal principles. This development has brought about the effective abdication by the United Nations Organization of its basic mandate of maintaining and, if need be, enforcing the peace on a consistent, i.e. non-discriminatory, basis. Another major step in that direction, undermining the global rule of law through establishing a practice of double standards, was the rejection – on the basis of the principle of national sovereignty (implying the notion of “sovereign immunity”) – of the International Criminal Court by the United States.¹³

The renewed paradigm shift in international relations – this time in the form of a reversal from a position outlawing the unilateral use of force to one of *de facto* reintroducing the *jus ad bellum* – has been solemnly proclaimed in two U. S. documents in the course of

¹⁰ Hans Köchler (ed.), *The Iraq Crisis and the United Nations. Power Politics vs. the International Rule of Law*. Studies in International Relations, XXVIII. Vienna: International Progress Organization, 2004.

¹¹ Resolution 1483 (2003) adopted on 22 May 2003.

¹² On the notion of the “new world order” see Hans Köchler, *Democracy and the New World Order*. Studies in International Relations, XIX. Vienna: International Progress Organization, 1993.

¹³ For details see the author’s *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*. Vienna/New York: Springer, 2004, pp. 240ff.

2002: the *National Security Strategy of the United States of America* and the *National Strategy to Combat Weapons of Mass Destruction*.

Regrettably, from the viewpoint of legal doctrine, the United Nations Organization has done – and could do – nothing to contain the negative effects of the proclamation of this doctrine on its system of collective security – with the exception of reaffirming in an almost ritualized fashion the organization’s basic multilateral philosophy and warning of the potentially disastrous consequences for global peace and stability resulting from the application of such a doctrine. In his address to the UN General Assembly in September 2003, Secretary-General Kofi Annan addressed this new unilateralism as a “fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested” since the establishment of the United Nations Organization and warned of the demoralizing consequences for global stability and the international rule of law.¹⁴

Thus, the fundamental question we are confronted with at the beginning of the 21st century as to the future of world order poses itself in the following terms: are those unilateral measures – which we have referred to only very briefly – the first steps of a regression towards the 19th century system of international relations – which was based on a (more or less) legally unrestrained exercise of nation-state sovereignty?; do they eventually indicate a *permanent* redefinition of “world order” in the sense of a power-centered set of rules where law is merely a corollary of a policy of the national interest?

What will become of the rule of law¹⁵ if all constraints on the use of force – in particular the UN Charter’s albeit imperfect checks and balances under Chapter VII – have been rendered ineffective insofar as the actions of the most powerful member state are concerned? We can definitely not satisfy ourselves with Goldsmith’s and Posner’s “realist” reduction of international law to situations in which states comply with it simply because they “act out of self-interest”¹⁶ – a position which implies that law as a coercive order (as succinctly defined by Kelsen) is non-existent and resides in the domain of “legal rhetoric” only. As these scholars rightly observe in their recent treatise on “The Limits of International Law,” more often than not “international legal rhetoric is used to mask or

¹⁴ *United Nations Press Release*, SG/SM/8891, GA/10157, 23 September 2003.

¹⁵ On the notion of the rule of law in present-day international discourse see esp. Sienho Yee, “The Perfect Rule of Law,” in: *Towards an International Law of Co-progressiveness*. Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 41-58.

¹⁶ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*. Oxford/New York etc.: Oxford University Press, 2005, p. 225.

rationalize behavior driven by self-interested factors that have nothing to do with international law.”¹⁷

The basic question is indeed – even if one does not share the American scholars’ “defeatist” assumptions – whether the notion of “collective security” can have any meaning at all in an essentially unilateral framework. What, then, is the *raison d’être* of an organization that aspires to be *universal* – in terms of membership as well as mission – in the absence of a balance of power? Will that organization be replaced – or will the power vacuum resulting from the organization’s marginalization be filled – by a plethora of regional security organizations with eventually conflicting mandates – something which would imply a definitive departure from a philosophy of global solidarity? How can the United Nations Organization, euphemistically referred to nowadays as “the international community” but more and more resembling the old League of Nations, stem the tide of global anarchy when the will to and capability of collective action appear having been lost?

These are some of the questions that will be asked by all those who are concerned about the future of world order. I sincerely hope that our meeting will contribute to asking those questions more precisely. I am aware that this means searching for a solution that resembles very much the *quadrature of the circle*: namely how to reconcile *unilateral* with *multilateral* principles, i.e. how to make a constellation characterized by the absence of a balance of power compatible with the requirements of the rule of law, not to speak of transnational democracy. In view of the historically proven unpredictability of the consequences of the interaction among states in the essentially extra-legal framework of power politics, I am fully aware that no definitive answer(s) can be given at this point in time.

¹⁷ Loc. cit., p. 226.