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HOW CAN PUBLIC INTERNATIONAL LAW CONTRIBUTE TO THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY?

Abstract: *The article offers a comprehensive exploration of the complexities and nuances surrounding international peace and the legal mechanisms designed to achieve it. It delves into the historical evolution of public international law concerning war, peace, and international security. The article underscores the evolution of warfare as a means to achieve political objectives through sovereign rulers and states, leading to attempts at restraining warfare by humanitarian principles. It discusses the roles of the League of Nations, the Briand-Kellogg Pact, and the United Nations Charter in their attempts to curb the war. Despite peace being crucial for human rights and international behavior, wars persist. Consequently, the article scrutinizes the primary challenges associated with upholding global peace. Ultimately, it concludes that while public international law is pivotal in the pursuit of peace and justice, realizing these ideals necessitates the united determination of the collective will of all peoples to work towards that direction.*

Keywords: *international peace, international security, war prevention mechanisms, challenges in maintaining peace.*

I. PRELIMINARY REMARKS

Since ever, public international law, governing primarily the relations among States, is deeply concerned with war, peace and international security. One of the first publications, laying the systematic ground of public international law, was the book of Hugo Grotius of 1625 entitled “De Jure Belli ac Pacis – Libri Tres” (Three books on the law of war and peace). Peace has always been acknowledged as the best condition for the development of States and peoples irrespective of the

formerly generally recognized competence of States to conduct war. The right to go to war (*ius ad bellum*) was firmly founded in the sovereignty first of the rulers (monarchs) of a State, then of the States themselves, and this was the legal situation until 1919 though in the meantime some important attempts had been made to restrain warfare by humanitarian principles. Only the Covenant from the League of Nations drew first consequences of the disastrous outcome of World War I. While the articles of the League did not yet contain a clear prohibition of war but only threatened aggressor States with reactions by the other League members, the so-called Briand-Kellogg Pact of 1928 on the ban on war, still in force and having more than 100 parties, for the first time clearly outlawed war as a way to solve international disputes. Accordingly, States have renounced war as an instrument to pursue their political aims. War since then is no longer a legal means of politics.¹

We all know that neither the League nor the Briand-Kellogg Pact could prevent World War II with its abominable results. The founding States of the United Nations (UN) therefore, according to the Preamble of the UN Charter, were “determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”. For this reason the Charter clearly prohibits aggressive use of military force and obliges all States to a peaceful settlement of disputes. The UN General Assembly and the Security Council are competent to deal with threats to or breaches of these commitments and to react to them, the Council even by taking legally binding measures, including military actions “necessary to maintain or restore international peace and security.” Both UN organs have in countless resolutions and declarations underlined the importance of peace for the world.²

There is another complementary reason why maintaining peace is the primary goal of the UN. For the first time the UN Charter (UNC) has combined the values of peace and human rights. The 1948 Universal Declaration of Human Rights is still more outspoken of this idea, saying that “recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. The full enjoyment of human rights presupposes peace.³ Even if a human right to peace has not yet been

¹ The former situation is reflected by the famous dictum of Carl von Clausewitz, *Vom Kriege* (1832-34, Reprint Ullstein, Frankfurt a.M. 1980, p. 34: “Der Krieg ist eine bloße Fortsetzung der Politik mit anderen Mitteln“ (War is a mere continuation of politics by other means). – A short survey of the legal development is offered by Russell Buchanan and Nicholas Tsagourias, *Regulating the Use of Force in International Law*, Edward Elgar, Cheltenham, UK, 2021, p. 1 et seq.

² See particularly the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970, UN Doc. A/RES/2625 (XXV).

³ Cf. Samuel Baron Pufendorf, *Les Devoirs de l’Homme et du Citoyen*, Tome II, Londres 1741, Livre II, Ch. XVI, § 1: “On peut dire même, que la Paix est l’Etat propre de l’Homme, et celui qui le distingue des Bêtes.”

accepted as a legal norm, the objective need to maintain peace is a guiding principle if the behaviour of States has to be assessed. An international criminal tribunal once has said: “A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach”⁴, meaning that international law just as national law must be understood to serve mankind and their needs. And, actually, peace is their basic need. Despite all this, we had to learn that the “scourge of war” has not yet stopped. Only for 2020 one has counted 25 wars, most of them internal wars, but this does not make a difference under the auspices of international law, because any serious violation of human rights is a matter of international concern that may and even should be of interest for all States. This is certainly true for the brutal military attack of Russia against the Ukraine in this spring. The outlined unsatisfactory state of affairs should give rise to considerations how to improve it. In view of the magnitude of the problem and the limited time-frame I can only present some rather rough thoughts.

II. TAKING STOCK; MEANS AND WAYS FOR IMPROVEMENT

Starting points for such reflections could be (1) the stringency and feasibility of the existing legal rules, (2) the institutions and instruments to supervise the commitments, (3) the possibilities to prevent the rise of serious disputes that might lead to war, and, perhaps, even (4) the suitability of the present structure of the world order.

(1) Inspected superficially, the obligation of States to “settle their international disputes by peaceful means” is very clearly expressed by the UN Charter just as the instruction to “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.”⁵ There is also no doubt that these commitments are legally binding, having even the character of peremptory norms (*jus cogens*).⁶ Nevertheless, the practice of States has disclosed important deficiencies and loopholes which have *de facto*, though not legally, weakened the strictness of the rule.

The UN Charter itself admits two exceptions from the prohibition of the use of force. The first exception relates to the primary responsibility of the UN Security Council for the maintenance of international peace and security empowering the Council to use force by itself or to delegate this power to certain member States

⁴ ICTY, Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A (Appeal), 2.10.1995, para. 97.

⁵ See Art. 2 para. 3 and 4 UNC.

⁶ Dire Tladi, Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*), UN Doc. A/CN.4/727 (31 January 2019) paras 62 et seq.

(Arts 24 and 39 et seq. UNC). Thus the Council could always forcibly intervene in a military conflict.⁷ The second exception regards the right to individual or collective self-defence of a State if an armed attack occurs (Art. 51 UNC). In fact, we know this legal principle from our own national private and penal law, and it is hardly imaginable that international law would or could prohibit States to defend themselves against aggression. But looking more closely, questions arise: When does an armed attack start? Has a State the right to use preventive force when an aggression is immediately pending, a situation which might not be completely clear, or even invoke the right to preemptive self-defence when the armed attack is more or less probable? Perhaps the most difficult issue in this context is offered by the so-called humanitarian intervention performed by military force. Here States use force against another State claiming that it is seriously violating individual human rights or minority rights of its own nationals. It is true that a claim that such use of force would intervene in matters essentially within the domestic jurisdiction of the State (see Art. 2 para. 7 UNC) is not justified, if the relevant human rights obligations are based on binding international law.⁸ However, one has still to solve the dilemma that the prohibition of the use of force as a peremptory norm clashes in those situations with human rights which also may have the character of peremptory rules as, e.g., the right not to become a victim of genocide or to be tortured, the right not to be discriminated against or the right to freedom of religion.⁹ To balance the rights at stake, the territorial sovereignty of the State concerned on the one hand and the inalienable human rights on the other is not an easy task. Still, the idea of the much discussed “responsibility to protect”¹⁰ and the earlier quoted dictum of the international criminal tribunal on the change from a sovereignty-oriented to a human-being-oriented approach could indicate the direction where we should go in the future in order to preserve peace.

The suitability of the relevant legal norms might also be put into question by new challenges for the States and the world community as a whole. How to deal with aggressions by non-State actors, new forms of aggression as cyber attacks and automatic weapons?¹¹ Could States defend their borders by force against thousands or perhaps millions of people searching for new homes after having

⁷ It must be noticed that in practice the Security Council is not equipped with own military forces, but is dependent on UN members willing to make available such forces to it; cf. Arts 43 to 49 UNC.

⁸ PCIJ, Series B, No. 4 (1923), 23-24, Advisory Opinion of 7 February 1923, Nationality Decrees in Tunis and Morocco.

⁹ To this dilemma see Simantha Besson, Sovereignty, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. IX, OUP 2012, p. 366, paras 136 et seq.

¹⁰ UN Doc. A/59/2005 (21 March 2005).

¹¹ François Delerue, *Cyber Operations and International Law*, CUP 2020; Jens David Ohlin, Kevin Govern and Laire Finkelstein (eds.), *Cyber War. Law and Ethics for Virtual Conflicts*, OUP 2015; Michael N. Schmitt (ed.), *Tallinn Manuel 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., CUP 2017.

lost their homes because of the climate change, e.g., by the rise of the sea level or because of the demographic development in their home countries not having a chance to survive but by emigration?¹² I can just give some food for thinking.

(2) International courts and quasi-judicial bodies are, in principle, particularly suited to resolve a dispute between States in a peaceful, independent and impartial way. Such courts and bodies are part of the growing institutionalization on the universal and regional plane that started with the League of Nations' Permanent International Court of Justice and accelerated after 1945. The courts like the UN International Court of Justice in The Hague or the European Court of Human Rights in Strasbourg or the European Court of Justice in Luxemburg decide the cases brought before them by judgments that are binding for the parties of the dispute. The same is true with awards handed down by courts of arbitration. The views of quasi-judicial bodies as, e.g., the committees that have to monitor the compliance of States with their human rights commitments lack this binding force though their decisions obligate the States to carefully consider the views of these bodies and give well reasoned explanations if they are not prepared to follow the recommendations.¹³ Thus, if diplomatic means of a peaceful solution as negotiation or mediation are exhausted, the access to a competent court might be very attractive for the parties to a dispute.¹⁴

However, we have to take account of the sovereignty of the States. This principle works in different ways. As to access to court, one must know that there is no compulsory jurisdiction in international law. A State has to voluntarily recognize the jurisdiction of international courts. This may happen by an ad hoc submission or by ratifying a treaty containing such recognition. Further, the compliance with the outcome of the procedure by the State that has lost the case is not assured. Lately, we have seen an increasing number of incidents that States even in Europe refuse to respect the judgments of the Strasbourg Court and the Luxemburg Court, which is an alarming signal. The legal instruments to execute the judgments are rather weak, finally it will depend on the good will of the State concerned though political reactions might put some pressure. Only judgments of

¹² The former High Commissioner for Human Rights Robinson thought that climate change could well become "the greatest threat to human rights in the twenty-first century", *Mary Robinson, Social and Legal Aspects of Climate Change*, 5 *Journal of Human Rights and Environment*, p. 15 (2014); see also Eckart Klein, *Die internationale Dimension des demographischen und klimatischen Wandels*, in Christian Calliess (ed.), *Liber Amicorum für Torsten Stein, Nomos Baden-Baden*, 2015, p. 176 (188 et seq.).

¹³ Christian Tomuschat, *Human Rights. Between Idealism and Realism*, 3rd ed., OUP, 2014, pp. 233 et seq. and 266 et seq.

¹⁴ On the other hand, one has noticed that there is a growing tendency to prefer the softer diplomatic ways to the stricter jurisdiction of courts; see Sarah McLaughlin Mitchell and Andrew P. Owsiak, *Judicialization of the Sea: Bargaining in the Shadow of UNCLOS*, in 115 *American Journal of International Law (AJIL)* p. 579 et seq. (2021).

the International Court of Justice could be given effect by binding decisions of the UN Security Council, including the use of armed force. But this has never happened in practice, and would not work at all if such measures were directed against a permanent member of the Council.¹⁵ The last example of a clear disobedience regarding a binding decision of the International Court of Justice is the refusal of Russia to comply with the Court's Order of 16 March 2022 to immediately stop its military actions in the Ukraine.¹⁶ Likewise, the complete refusal of China to comply with the 2016 decision of the arbitral tribunal in the dispute with the Philippines concerning claims in the South China Sea shows the imperfection of the judicial system in international law.¹⁷ Under the auspices of sovereignty it is quite impossible to improve the situation. Moreover, we observe that even less powerful States disrespect the decisions of the Security Council, North Korea being one but by no means the only example.

(3) How can disputes threatening the international peace be prevented from the outset? Apart from the necessity to take account of the individual character of the cases which may be shaped in uncountable different ways, international law generally keeps at hand a lot of instruments to steer disputes in peaceful directions. To name just some: Joint commissions of the parties to the dispute for fact-finding and assessment, inclusion of third States by asking for their assistance through good offices, mediation and conciliation, the request to international organizations as the UN or the Organization for Security and Cooperation in Europe (OSCE) for a hearing before the competent organ and for rendering adequate advice as provided for in the relevant treaties. In the last resort the recommendation might be given to turn to international judicial bodies, but not always this suggestion will be accepted for fear to lose the case. In this context also attempts should be mentioned to deter the responsible political and military leaders from conducting aggressive wars. Today, waging an aggressive war is classified an international crime and could be prosecuted and brought before the International Criminal Court (ICC) in The Hague. However, the hurdles for such proceedings are high, and the said mechanism will anyway hardly deter powerful States ruled by authoritarian leaders firmly determined to reach their goal.¹⁸

¹⁵ See the so-called veto power of the permanent members, Art. 27 para. 3 UNC.

¹⁶ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application of Provisional Measures, para. 86, Order of 16 March 2022. Though orders on provisional measures are legally binding, they are not judgments and cannot therefore be executed according to Art. 94 para. 2 UN Charter.

¹⁷ *The South China Sea Arbitration (The Republic of The Philippines v. The People's Republic of China)*, 12 July 2016. For the PRC's illegal claims see U.S. Department of State's Office of Ocean and Polar Affairs and Office of the Legal Adviser: "Limits in the Seas study on the maritime claims of the People's Republic of China in the South China Sea", Study No. 150, January 2022.

¹⁸ See to this the Statute of the ICC and Andreas Zimmermann and Elisa Freiburg-Braun, *Aggression under the Rome Statute*, Beck, Hart, Nomos, München 2019, pp. 13 et seq.

(4) It cannot be denied that, in principle, the current international law contains a sufficient number of rules apt to resolve disputes that may endanger peace. But in all situations, how ever we like to turn them around, we get confronted with the sovereignty of States, still one of the founding pillars of today's international law. It is true that international law by treaties, customary law and general principles of law or even so-called rules of soft law have tamed the sovereignty to a great deal, considerably limiting the spectrum of permissible acts and actions of States.¹⁹ No doubt, international law has played, seen from a legal aspect, its role as “gentle civilizer of nations” quite well.²⁰ In this sense, it is no longer a primitive law, rather it has become quite sophisticated. And in some important cases, as in the situations of South Africa or, remaining in Europe, of South Tyrol and Northern Ireland at the end of the day – or better: of many years -, finally a peaceful solution could be found. At the same time international law, seen from the aspects of compliance and enforcement, suffers from serious deficiencies evidently connected with the sovereignty principle.²¹ This is particularly true if a political leader irresponsibly absolves himself of all generally recognized legal and moral rules. This must necessarily lead us to the final issue I wish to discuss. Could we conceive another public international law without such defects?

Of course, we can. What should impede us to envisage a more perfect world? Without thinking, pre-thinking, the world, human kind and the law would have never evolved. But one has to see the short-comings of any possible new concept, too. The most radical concept would be the formation of a completely new world order, meaning more or less the foundation of a World State able to guarantee as the only sovereign actor the same law and its execution everywhere and for all.²² Apart from the fact that the States would have to consent to this fundamental change (if we not assume a violent taking-over by a dominant State, a hegemon, that would form the world according to its own idea or ideology)²³, we should also think of the abundance and enormous intensity of power that would have to be bestowed on a World State and what that would mean for the freedom of the peoples and individuals. Perhaps the better way is the industrious and indefatigable work for results reached by multilateral institutionalized cooperation, the forging

¹⁹ Eckart Klein, Taking Sovereignty Seriously, in 4 *Kutafin University Law Review*, p. 292 et seq. (2017); Christian Tomuschat, Enforcement of International Law. From the Authority of Hard Law to the Impact of Flexible Methods, in 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, p. 579 et seq. (2019).

²⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, CUP 2001.

²¹ Buchanan and Tsagourias (n. 1), p. 226, mention “the current wave of anti-internationalism, anti-institutionalism and the rise of belligerent sovereignty”.

²² Otfried Höffe, *Demokratie im Zeichen der Globalisierung*, 2. ed., CH Beck, München 2002.

²³ See Elizabeth C. Economy, *The World According to China*, Polity Press, Cambridge 2022.

of compromises sustained by the will to keep peace and promote solidarity²⁴, the respect for human rights, and an unyielding resistance against an expanding breakdown of the rule of law that is permanently endangered by a growing number of authoritarian regimes and dictatorships²⁵. Though, very probably, this will become a long story.

III. CONCLUSION

For my part let me conclude with a short story. While I was serving as a member of the UN Human Rights Committee I often, during the breaks of our meetings, strolled through the gardens of the Palais des Nations in Geneva. One day I found a blue painted metal sheet on the grass. The piece of art makes me think until today. One may interpret it in quite different ways. I prefer the understanding that one day heaven, at least a little bit of it, may fall down to the earth and bring peace and justice to mankind²⁶ – even if this may take time. Public international law can be a very helpful agent in this process, but it will always need the determined will of all peoples – “We the Peoples”²⁷ – to steer for this direction.

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Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., CUP 2017;

²⁴ Cf. Rüdiger Wolfrum/Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law*, Springer, Berlin 2010.

²⁵ See for this Tom Ginsburg, *Authoritarian International Law?*, in 114 *AJIL* p. 221 et seq. (2020); Achilles Skordas, *Authoritarian Global Governance? The Russian-Chinese Joint Statement of March 2021*, in 81 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, p. 293 et seq. (2021).

²⁶ See Dante Alighieri, *Commedia*, *Paradiso*, Canto 18, 116 f.: „nostra giustizia...effetto sia del ciel“.

²⁷ With these words starts the UN Charter of 1945.

- Mary Robinson, "Social and Legal Aspects of Climate Change", 5 *Journal of Human Rights and Environment*, 2014;
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Како Међународно јавно право може допринети одржавању међународног мира и сигурности?

Сажетак: Чланак ипружа свеобухватно испраживање фактора и околности од којих зависи очување међународног мира и правних механизма осмишљених за превенцију рата. У њему је представљена еволуција међународног јавног права у вези са ратом, миром и међународном безбедношћу. Истиче се да је ратовање као средство за реализацију политичких циљева иштем суверених владара и држава временом довело до постојања ограничавања ратовања на основу хуманитарних принципа. Пажња је посвећена и улогама које су Друштво народа, Бријан-Келогов пакт и Повеља Уједињених нација имали у напорима да се сузбију ратови. Упркос томе што је мир кључан за људска права, ратови се и даље воде. Због тога се у чланку анализирају и основни изазови од којих зависи одржавање глобалног мира. Иако је међународно јавно право кључно у вези са реализацијом мира и правде, остварење ових идеала захтева уједињену одлучност колективне воље свих народа да раде ка том циљу.

Кључне речи: међународни мир, међународна сигурност, механизми за превенцију рата, изазови у одржавању мира.

Датум пријема рада: 27.09.2022.

Датум достављања коначне верзије рада: 01.09.2023.

Датум прихватања рада: 01.09.2023.