



VEREIGNTY INTERVENTION WORLD OF STATES TERRORISM HUMAN RIGHTS SOVEREIGNTY

THE ROLE OF INTERNATIONAL LAW IN A GLOBALIZED WORLD

Security Policy Challenges for the International Order
at the Outset of the 21st Century

ABRIDGED VERSION

MEMORANDUM

DR. BIRGIT LAUBACH
PROF. DR. ULRICH K. PREUSS
JOSCHA SCHMIERER
PROF. DR. PETER-TOBIAS STOLL



HEINRICH BÖLL STIFTUNG

PUBLICATION INFORMATION

THE ROLE OF INTERNATIONAL LAW IN A GLOBALIZED WORLD

Security Policy Challenges for the International Order at the Outset of
the 21st Century

Abridged Version

A Publication of the Heinrich Böll Foundation

Translated from the German by Barbara Agie Reeves

© Heinrich-Böll-Stiftung, Berlin 2004

All rights reserved

For additional copies, please contact:

Heinrich Böll Foundation

Rosenthaler Str. 40/41

10178 Berlin

Germany

Tel.: +49-30-285 34-0

info@boell.de

www.boell.de



THE ROLE OF INTERNATIONAL LAW IN A GLOBALIZED WORLD

Security Policy Challenges for the International Order at the Outset of the 21st Century

Written for the Heinrich Böll Foundation by Dr. Birgit Laubach,
Prof. Ulrich K. Preuss, Joscha Schmierer and Prof. Peter-Tobias Stoll

Abridged Version

Following the changes of the years 1989/91, i.e., the fall of the final European empire and the elimination of the remaining political obstacles for the expansion of world markets and the world economy, a truly globalized world of states now exists for the first time. International law and the United Nations provide the world of states with the means to establish a common policy which follows the same universal values and rules. Despite all successes, they have proven countless times in the past to be ambiguous and incoherent. Deficiencies in the United Nations system have often hindered an effective and above all timely response to a number of new challenges. Above all, however, the classic threats and conflicts between states, which has always been the point of departure in international law, are decreasing in relevance. Rather, the most serious and acute dangers to world peace currently emanate from the existence and/or proliferation of weapons of mass destruction, as well as terrorist Islamism combined with failing states, criminal and dictatorial regimes. Along with environmental disasters and pandemics, they currently represent the greatest political challenges to international law and the United Nations.

In this context, it is observable that the intellectual and political character of a state, meaning its "domestic affairs" pursuant to the existing understanding of international law, exercises an increasing influence on the type of dangers and risks for international security and may thus no longer be ignored; further, there are indications of a derivative transformation of the factual and legal conditions of one of the major pillars of international law: namely, the states' right of self-defense.

It is certainly not in the interests of the community of states for the role of the United Nations in preserving world peace and international security to be weakened by the states again laying claim to the power of defining the legal justification for international force by pointing to their "natural right of self-defense." On the other hand, they will be able to successfully exercise their role of preserving peace only if they are able to adapt their legal order to the changes in the causes of international insecurity.

In the face of these changed conditions, the issue arises of what role the United Nations may play for preserving international security in the future. Four models of order are conceivable in this context; but each exhibits some specific problems.

The first is the legal model of the United Nations as a legal community of equal and equally sovereign states. This model suffers from the internal contradictions of the universality of this legal community. Because of their claim to universality, the United Nations has member states whose willingness to fulfill the obligations of the organization's Charter and contribute to realizing its goals is highly questionable. As such, states that do not contribute their share to attaining the collective goods made available by the community of states, such as peace, international security and economic development, nonetheless benefit from them. At the same time, the system of the United Nations, which is based upon universal validity, also serves as an incentive for strategically-acting governments of irresponsible states to, e.g., blackmail the community of states with the threat to produce, proliferate and even deploy weapons of mass destruction (as is currently the case with North Korea).

The second model, having a single hegemonic power like the United States act as the guarantor for the law of the international community, initially suffers from the problem that the remaining four members of the United Nations Security Council would be disempowered and thus encouraged to use their formal veto power in the Security Council to hinder the single hegemonic power and strengthen their own power position rather than using it primarily for the benefit of the international community. Equally damaging to international security would be the single hegemonic power's dual position implied in this model: as a legally equal member of the international community of states, it would be subject to its constitution; but as an "international sovereign" that guarantees the security of that community, it would always simultaneously stand above the law. At the very least, it would have the right to interpret the law which it is supposed to protect.

The third possible model of development, the imperial legal order of the single hegemonic power, cannot seriously be considered as a feasible concept of order for global international law. Not only are conflicts foreseeable with forces that are unwilling to subordinate themselves to the rule of the hegemonic power. Another equally important argument against this option is the danger that the hegemonic power will shift the burdens of its task of maintaining order to its subordinates and, in cases of doubt, place criteria of opportunism and self-interest above those of global justice. In such an order, conflicts already visible today over the just distribution of resources on the global level would dominate, and would provoke the hegemonic power to continually undertake new endeavors to defend its dominant position in the world.

The fourth model, a cooperative and pluralistic cooperation among states, above all the permanent members of the Security Council on a global level, presupposes the prior development of universal forms of global solidarity in order to enable peaceful coexistence despite fundamental economic and cultural contradictions. If international law is to promote or even express this solidarity, the states must learn that they hold a common and mutual responsibility for the society of states. For small and mid-sized states, this means that they must not pass on these problems of security and order to a single hegemonic power or to a few major powers; for the major powers, especially for the United States, the dominant major power, it means they must learn to be "a state among states;" i.e., to subject themselves to the plurality and heterogeneity, and thus the will of the other states, and/or to tolerate this whenever possible.

All indications thus point to the necessity of simultaneously securing, increasingly the effectiveness and modifying the framework of order of the United Nations. The Memorandum "The Role of International Law in a Globalized World" makes the following recommendations in that regard:

■ The sovereignty of states, recognized as the foundation of a stable and peaceful international order, involves an obligation of the part of their governments to take on responsibility for the dignity and the fundamental human rights of their citizens and their right to freedom, as well as for preserving the common goods of the international community. At the same time, the community of states also has the subsidiary responsibility for the conditions and conduct of those states that they have recognized as sovereign members. One example of this is the international character of human rights guarantees – they represent a type of trusteeship on the part of the international community for a civilizational minimum standard among the states. Intervention for humanitarian reasons may be called for as an expression of the community of states' responsibility to protect the individual, and may be used as a last resort in the case of severe human rights violations which shake up the conscience of humanity (such as genocide or large-scale ethnic cleansing). But it also places this responsibility to protect in an inextricable connection with the additional responsibility of the community of states to build up a sustainable civil order following an intervention in the affected state, thus enabling that country to once again take up its role as a sovereign and responsible member of the community of states. The

closer the states come to one another as a result of development of traffic and communication technologies, economic and cultural ties, thus increasing their mutual vulnerability as well, the more urgent it becomes to continue the development of international law in that direction.

- Because of this responsibility, the world can have no interest in doing away with the veto power of the permanent members of the Security Council. Its only interest can be in strengthening that part of the veto power not founded in the potential for threat, but rather in its inherent responsibility, and to find procedures by which each of the five veto powers increasingly uses its power to attain the international common goods of peace, security, protection of the environment and human rights, as well as a minimum level of global justice. Among other things, this includes the obligation to justify a veto.
- In advance of intervention with military means, measures such as, e.g., sanctions, embargos, access barriers for economic goods and criminal prosecution must be exhausted. The basis for assessment of justification must continue to be Art. 2 no. 4 of the UN Charter. The authors of the Memorandum agree with the International Commission on Intervention and State Sovereignty (ICISS) that a code of conduct should be formulated. It would obligate the five permanent members of the Security Council to renounce the use of their veto power if the material prerequisites for an intervention are given, the majority of the non-permanent members approve the intervention, and substantial national interests are not affected.
- Another dimension of the of the important role of the Security Council lies in the type of its measures, e.g., in the possibility, practiced several times, of urging states to ratify certain agreements. Furthermore, it would be a promising step for the Security Council, to resolve general regulations within the scope of its powers, thus regulating certain areas – as an “international legislator” – with the same effect now attained only with time-consuming and costly negotiations. This would also involve an obligation by the states to incorporate such regulations into their respective national laws.
- Every action outside a proceeding and resolution in the Security Council calls this legitimacy, and thus the trust in the system of collective security, into question. In an order that must manage without trust in the employability and superiority of its own means of power, and is thus much less stable than that of individual states, dangers to international security – including the threat to individual states – cannot be excluded, and the procedures, means and capabilities of the collective security system may be inadequate to counter them. If at all, such action must be the final means to provide emergency assistance and requires compliance with criteria such as reasonableness, credibility, democratic control and chances for success.
- A large number of various regimes and regulations of control have as their subject the non-proliferation of weapons of mass destruction. But no superior, coherent and thus general system exists which follows a global security concept for the international control of weapons of mass destruction. One first step would be to obligate every state under international law to define proliferation as a criminal act. Also, the international networks of scholars, with their charters, guidelines and continual exchanges on ethical codes of conduct, fulfill an important moral and actual role in preventing danger. But it is not enough simply for the individual states to take on responsibility for international security. If necessary, this must be enforced by the community of states as well; i.e., in an emergency, the international community must intervene to ward off dangers. Military intervention for the protection against a threat from weapons of mass destruction must be subject to reliable criteria that prevent international-law abuse:
a) Military intervention must be a last resort. Sanctions not including military force must first

be imposed. b) Regimes must be targeted that maintain their domestic power by way of violence and serious human rights violations and/or criminal acts, and who lack respect for the rule of law, fair judicial proceedings and democracy. c) Information on weapons of mass destruction may not be based solely on that provided by intelligence services, but rather must require additional objective proof. d) Military intervention must be justified to the Security Council, and relevant evidence must be submitted.

- To effectively discharge their obligation to promote order, the community of states may be charged with the task of re-creating or newly justifying state order in places where it has broken down or deteriorated or become ineffective by other means. Doing justice to these tasks of guaranteeing international security, rebuilding, and nation-building requires bundling all forces, and particularly calls for commitment on the part of the group of mid-sized powers. In a system without a superior authority with its own means of power, such commitment is also necessary in order to be able to influence the continued development and shaping of the international system and to ensure the inclusion of the United States. While important organizations today already embody the idea of democracy, such as NATO and OSCE, an “alliance of democratic states” would more pointedly express the value of democracy, and could have an effect in that sense within the United Nations. It could work to defend the democratic order of the states; for example, it could take on important tasks of nation building.
- We advocate a stronger role and expanded competence for regional organizations. These organizations are more familiar with the respective parties to conflicts; due to their regional anchoring, they are often better suited to intervene and mediate. They are able to act collectively within their existing structures.
- The development of international criminal law jurisdiction is generally and aptly considered to be epochal progress in international law. It is eminently desirable that this be supported by all states, and especially by the United States. Immunity for U.S. citizens, already approved twice by the United Nations, is unacceptable, particularly as international common law precedent, and we welcome the recent rejection of a renewed extension of the immunity rule.
- The international public and civil-society initiatives have long made an important contribution to international security. If not for their efforts, the International Criminal Court would not exist. It is urgently necessary for their crucial and effective work that the suggestions, expertise and knowledge of non-governmental organizations be included in the discussions – perhaps by way of formalized hearings – in advance of imposing any measures pursuant to Chapter VII of the UN Charter. Also, their staff members in crisis regions and in armed conflict situations must be provided with better legal and physical protection.
- The current structure of the United Nations does not sufficiently encourage the states to live up to their obligations to create and maintain global common goods such as peace, international security, global justice and ecological sustainability. This is because effective incentives for collective responsible action are lacking. Thus, a reform of the United Nations should primarily focus on creating such incentives. Because the large majority of states that must be won over for global cooperation suffer from poverty and underdevelopment, a reform of the conditions of international cooperation must concentrate on this group. Already-existing institutions such as the World Bank, the International Monetary Fund and the International Development Bank, should be urged by the United Nations to take on the role of developing programs targeted to creating incentives to foster global common goods. For this purpose, the United Nations should initiate and/or support regional cooperation, such as with ASEAN, to strengthen the states’

resolve to cooperate responsibly. Based upon that foundation, development programs should be created that foster competition among the regions to make the most efficient use possible of the resources flowing to them. One reason for the current crisis in international development policy is that the political efforts and programs in many regions of the world have thus far not led to sustainable development. Perhaps the regional chambers advocated in the reform discussion of the United Nations could function as quasi-federal representatives of regional self-administration, thus opening up a promising path and making a crucial contribution to the inner stability of the world community.

As it was when the United Nations Organization was founded, the post-Cold War world is again faced with the challenge of finding an order in which freedom, security and stability mutually support one another, and in which newly-emerging conflicts may be managed without leading to another global confrontation. After being largely paralyzed by the bloc confrontation, the United Nations Organization now has the opportunity to create an effective framework of order for a common and more peaceful future.