IV. The Narrative of the Antinomy of Peace / Security and Justice in the Collective Security System

One of the main objections concerns the narrative of the antinomy of peace / security and justice in the collective security system. According to Josef L. Kunz:

> "Two world wars and the fear of more catastrophic wars have made the avoidance of war more important than the achievement of justice. The first aim in the preamble of the United Nations Charter is 'to save succeeding generations from the scourge of war.' The first purpose in Article 1 is not to achieve and maintain justice, but to 'maintain international peace and security'. Again, we are faced with the antinomy between the two juridical values of security and justice. Security is the lower, but most basic value. […] First to establish security is the philosophy of recent developments, in the conviction that security is the indispensable pre-condition of later achieving justice. This philosophy may be wholly justified, but it is not the philosophy underlying the bellum justum doctrine."[225]

To put this briefly: It is claimed that "under the Charter, peace takes precedence over justice."[226] Or in Josef L. Kunz's words: "[…] the problem of peace overshadowed and overshadows today the problem of justice."[227] Furthermore, one reads that in spite of the commonly used description as "sanctions," enforcement measures taken under Chapter VII of the UN Charter do not possess the character of "real sanctions" against a law-breaker – according to Kunz, they are "not necessarily sanctions in a juridical sense."[228] They rather serve to enforce peace and may also be directed at states that have neither violated international law nor are threatening to do so.[229] In this regard, any "Kelsian" interpretation of war as a general

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[225] Kunz, *supra* note 2, at 533–34.

[226] Nico Krisch, *Introduction to Chapter VII: The General Framework*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 41 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).

[227] Kunz, *supra* note 104, at 326.

[228] *Id.*, *supra* note 2, at 533.

[229] *See* Krisch, *supra* note 226, at para. 17; *see* also Kunz, *supra* note 104, at 331, 337.

sanction, i.e. as a lawful response against a delict constituting a violation of international law, seems inconsistent, if not contradictory – at least with regard to the system of collective security.

However, this critique does not hold weight with respect to a just war concept viewed as law enforcement in general international law. In that regard, Dinstein's objection "of the obvious inadequacy immanent in the role of war as a general sanction"[230] relativizes, but does not disprove Kelsen's theory. This is for the simple reason that the United Nations Charter has not essentially changed the nature of international law. It is still characterized by the basic *self-assessment* of existing rights and obligations and by the *self-enforcement* of the respective legal claims under international law.[231] Even Kunz admitted that

> "general international law *has* sanctions: reprisals and war. [...] There are no collective but only individual sanctions, carried out by way of self-help; there is no monopoly of force at the disposal of a central law-enforcing organ; [...] Where collective security is absent, the states, for their individual security, follow the policy of armaments, alliances and the balance of power."[232]

In addition, following Derek Bowett, one can point to the fact that armed reprisals are still present in the reality of international relations:

> "[...] while reprisals remain illegal *de jure*, they become accepted *de facto*. Indeed, it may be that the more relevant distinction today is not between self-defense and reprisals but between reprisals which are likely to be condemned and those which, because they satisfy some concept of 'reasonableness', are not."[233]

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[230] Dinstein, *supra* note 6, at 72.

[231] *See* Verdross & Simma, *supra* note 123, at § 41; *Fastenrath*, *supra* note 29, at 334; *id.*, *supra* note 23, at 263–64, 276, 284, 287.

[232] Kunz, *supra* note 104, at 325; *see* also Nigel D. White & Ademola Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW, 522 et seqq. (Malcolm D. Evans ed., 5th ed. 2018); Leo Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in LAW AND POLITICS IN THE WORLD COMMUNITY, 59 et seqq. (George A. Lipsky ed. 1953).

[233] Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 American Journal of International Law, 11 (1972); *see* also Hakimi & Cogan, *supra* note 83, at 275; Reisman, *supra* note 206, at 391; Andrea Bianchi, *Enforcing International Law Norms against Terrorism*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, 506 (id. ed. 2004): "[...] armed reprisals risk sneakingly making their

Furthermore, the objections raised in reference to the narrative of the antinomy of peace / security and justice have no bearing on the fact that the Security Council incorporates or relies on considerations of justice within the scope of its political decisions. The judgments of the UN Security Council are naturally based on an evaluative assessment of the conflicting parties,[234] as this is an inherent part of the *bellum iustum* concept. The determination of a threat or a breach of the peace is a political decision, not to mention the result of an evaluation of an act of aggression. It is a political, not a judicial finding.[235] Given that the Security Council has the power to bring about an end to hostilities without having to consider whether one side could legally have recourse to armed force,[236] in order to take effective collective measures for the prevention and removal of threats to the peace (Art. 1 (1) UNC), accordingly illustrates that the Charter relies on a political, not on a legal approach to peace maintenance.[237]

Although, this does not necessitate a sequential approach according to which the Organization can find the latitude to apply the principles of justice and international law only when it has used the power given to it and the force at its disposal to stop war.[238] An *idealist* view of international politics does not automatically relegate considerations of justice to secondary means. The *la securite d'abord* narrative does not preclude the Security Council from incorporating considerations of justice when deciding on enforcement measures.

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way back into the reality of international relations if not in its illusive representation."

[234] *See* e.g. MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW, 84 (2011); Bothe, *supra* note 102, at para. 44: "The Security Council has hesitated for a long time to identify a threat to peace in Syria" [transl. by the author]; Albrecht Randelzhofer, *Neue Weltordnung durch Intervention?*, in WEGE UND VERFAHREN DES VERFASSUNGSLEBENS: FESTSCHRIFT FÜR PETER LERCHE ZUM 65. GEBURTSTAG, 60 (Peter Badura & Rupert Scholz eds. 1993).

[235] *See* Nico Krisch, *Article 39*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 44 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).

[236] *See* Krisch, *supra* note 226, at para. 41; Higgins, *supra* note 84, at 4.

[237] *See* also Rüdiger Wolfrum, *Article 1*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 22 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).

[238] UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, VOL. VI, 453; *see* also Butchard, *supra* note 181, at 253; Wolfrum, *supra* note 237, at para 22 Fn 39; Kunz, *supra* note 2, at 533–34; Higgins, *supra* note 84, at 9.

Aside from that, it can be argued that contemporary international law formalized the concept of a just war, which basically is another way of describing the equation of *bellum iustum* and *bellum legale*. According to this line of interpretation, legality implies a decision by the Security Council that follows a particular procedure, not a substantive assessment.[239] Justice is understood in an extrinsic-formal way. It is a purely formal concept, which is completely independent of the substantial claims put forward by the respective states.[240] The "Who fires the first shot" principle is viewed in light of an adapted just war concept. "Just war" means individual or collective self-defense against an aggressor who has violated positive rules concerning the prohibition of the use of force, whereby the party first resorting to arms is to be regarded as the aggressor.[241] To illustrate this point, one could make reference to the famous dictum coined by Arnold D. McNair:

> "On the one hand, war in breach of the Charter is made illegal [= *unjust* – A/N]; on the other, force which is collectivized and placed at the service of the international community is made legal [=*just* – A/N]."[242]

In view of this new form of procedural justice, sociological and legal objections ("völkerrechtssoziologische Einwände"[243]) against a "modern" just war concept, referring to an *auctoritas* that no longer exists,[244] especially with regard to a pluralistic international society ("heterogenous value systems"[245]), are met with opposition, since the legality, i.e. the justness of war, is based on a (relative) procedural criterion, namely a multilateral decision

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[239] *See* Corten, *supra* note 28, at 266; *see* also *id.*, *supra* note 27, at 816.

[240] *See* Krakau, *supra* note 178, at 338–42.

[241] *See* e.g. Grewe, *supra* note 3, at 677.

[242] McNair, *supra* note 146, at 155; *see* on McNair also Grewe, *supra* note 3, at 603–04.

[243] THOMAS M. MENK, GEWALT FÜR DEN FRIEDEN: DIE IDEE DER KOLLEKTIVEN SICHERHEIT UND DIE PATHOGNOMIE DES KRIEGES IM 20. JAHRHUNDERT, 358 (1992).

[244] *Id.*; *see* also PETER SCHMIDT, BELLUM IUSTUM: GERECHTER KRIEG UND VÖLKERRECHT IN GESCHICHTE UND GEGENWART, 429 (2010); KATHARINA ZIOLKOWSKI, GERECHTIGKEITSPOSTULATE ALS RECHTFERTIGUNG VON KRIEGEN, 65 (2008).

[245] Delbrück & Dicke, *supra* note 1, at 205: "[…] but this is only in *seeming* conformity with the Doctrine of Just War because international society is pluralistic, adhering to heterogenous value systems and, therefore, is not in a position to prescribe objective ethical criteria for the embarking on a defensive war."

of the Security Council, in contrast to an (absolute) unilateral decision by a state or a group of states.[246]

Again, it will not do to reduce this line of reasoning to the existence of different legal cultures, i.e. "the equation of justice with peace in the American doctrine."[247] Drawing on conceptual history it can be argued that the concept of peace has always been received as a qualified value, implying a certain form of peace, a certain notion of an international and domestic order.[248] In this perspective, "justice" and "order" are the concepts from which the value of peace is ultimately derived. In other words, there is no concept of peace without a concept of justice.

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[246] *See* Corten, *supra* note 28, at 267; *id.*, *supra* note 27, at 816.

[247] Miller, *supra* note 3, at 265; *see* also Krakau, *supra* note 178, at 340.

[248] *See* Miloš Vec & Thomas Hippler, *Peace as a Polemic Concept: Writing the History of Peace in Nineteenth Century Europe*, in PARADOXES OF PEACE IN NINETEENTH CENTURY EUROPE, 8 (*id.* eds. 2015).