The Ties that Bind: International Law as Peacemaker

By Peter Danchin

Ever since the League of Nations, there has been hope that collective security could be attained by pure international will. Can the present U.N. and worldwide “laws” contain the threats of a post-9/11 society?

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world.
—W.B. Yeats, The Second Coming (1920)

On June 28, 1919, a year before Yeats penned his sorrowful lament to the collapse of European order in the First World War, Article 16 of the Covenant of the League of Nations came into force. Article 16 encapsulated the theory implicit in the Covenant and the Pact of Paris: War is illegitimate as an instrument of policy or of justice, or indeed for any purpose except individual or collective defense against a State which has already resorted to or is immediately threatening war. Thus was born the great institutional project of the post-Versailles order. Provoked by a sense that the old power politics of secret diplomacy, deterrence, self-help, and legitimate warfare were bankrupt, post-war jurists assumed that international legal rules had an effect on state behavior and that law and power interacted in some important way rather than marking opposite ends of the domestic-international spectrum.

Article 16 met its first decisive test on October 3, 1935, when Italy invaded Abyssinia (Ethiopia). Despite requests from Ethiopia to the League Council, and despite the Council’s own finding that Italy had resorted to war in violation of the Covenant, an effective sanctions regime was never implemented. As Britain and France vacillated in terms of their strategic, political, and economic interests with Italy, the first real test of the postwar collective security regime ended in failure. It is now a matter of history, as events turned in the widening gyre—first with the German march into the Rhineland in 1936; ultimately, with the German invasion of Poland in 1939—that things would fall apart, that the League would not hold.

But by 1945, against the backdrop of unimaginable horror and the deaths of more than sixty million people, a “new world order” was said to be instituted. Article 2(4) of the new postwar Charter declared that the “threat or use of force against the territorial integrity or political independence of other states” was outlawed. And while Article 51 confirmed that the new regime of collective security did not impair the “inherent right of individual or collective self-defense,” a newly created Security Council was given the authority under Chapter VII of the Charter to determine the existence of threats to the peace or acts of aggression, and the primary responsibility to decide what collective measures to take to maintain peace in conformity with principles of international law.

How should we today understand the problems and prospects of achieving a “system of international law and order in the world”? What are the purposes of international law, and how do they relate to any notion of collective security? These questions are vital following the events of September 11, 2001, and the American-led invasion of Iraq in March 2003.

Months after the second Gulf War, Kofi Annan told the UN General Assembly, “We face a decisive moment, a fork in the road no less decisive than 1945 itself,” and announced he was convening a “High-Level Panel of eminent persons” to assess current threats to peace and security, to evaluate existing policies and institutions, and to make recommendations for strengthening the UN “so it can provide collective security for all in the twenty-first century.”

But what kind of moment was this exactly for major changes to the international security architecture? Rather than being a crisis of sufficient gravity to open political space for normative and institutional reformation, it is now evident this most recent reform cycle has been driven primarily by concerns about the role of the world’s single superpower in the organization and, conversely, by American concerns regarding how best to protect and project its strategic interests.

This is not to say, of course, that the question of the role of law in collective security does not raise pressing conceptual difficulties of its own. As a question of identity and recognition, who is the subject of the law? Why is it exactly that only “state objectives”
count? The state-centrism of the international system has long been a target of critique. The disaggregating forces of globalization and the burgeoning role of subjects apart from states (individuals, peoples, nations, minorities, international organizations, transnational corporations) have led to new theories of “global” justice, which, it is said, international law should enforce. All sides today acknowledge a post-September 11 world of global terrorism and the threat not of state but of non-state actors seeking weapons of mass destruction.

Another area of contestation concerns sovereignty: What freedom do states have and how exactly are conflicting state freedoms to be reconciled in a world deeply divided by differences of power, wealth, and geography? International lawyers have responded in two ways. Some have accepted the diminished role that law can play in a single-superpower world and have sought instead to recreate the UN collective security apparatus and related regimes as variables dependent on a central power. Alternatively, they have developed purely instrumental accounts of the use of law in the defense of particular interests or preferences. Such lawyers are prominent in Washington.

Others, relying on some background conception of a “harmony of interests,” which international law is to realize in conflicts between states, have advanced more sophisticated interdependence or globalization theories. Jürgen Habermas, for example, has recently posited a “global domestic politics without a world government,” which combines an “empowered United Nations responsible for securing peace and promoting human rights at the supranational level with governance institutions based on cooperation among the major world powers... at the transnational level.” This kind of thinking is popular in midtown Manhattan.

These two dynamics have shaped the terms of the UN reform debate. The key question has been the relationship between the prohibition on the threat or use of force in Article 2(4) and its two exceptions in Article 51 (unilateral self-defense) and Chapter VII (collective security). Each element is premised on the basic principle of sovereign equality—the equal freedom of all States in a putative legal order. In this structure, we plainly see the dilemma inherent in the liberal structure of international law: how to reconcile the paradox of what seem like opposing demands for State autonomy (sovereignty) and social order (collective security). How is this reconciliation to occur?

The only imagined (and just) solution has been thought to be the establishment of some impartial decision-maker with the authority to interpret and enforce a set of neutral and objective “legal” rules that protect the pre-existing autonomy and liberty of States and constrain that liberty in the name of the liberty of all, the collective security of the community of States.

The High-Level Panel identified two key concerns in the norms governing the use of force. The first is the traditional Charter concern of “external threats” and interstate conflict. Following the Iraqi invasion in March 2003, the old question arose anew of “anticipatory self-defense” and the compatibility with the Charter of the new U.S. National Security Policy, which expanded beyond the notion of “preemptive war” to encompass “preventive war.” The second is “internal threats” and what today is known as the “responsibility to protect” in cases of genocide and massive humanitarian catastrophes.

In both cases, the Panel endorsed the status quo using formalist reasoning to read Article 51 (unilateral self-defense) narrowly, and anti-formalist reasoning to read Chapter VII broadly, so as to “make the Council work better” in interstate conflicts and to compel collective action in the case of great internal violence. Needless to say, commentators such as Prof. Michael Glennen have criticized the Panel both for its formalism in relation to Article 51 by setting an “unreasonable limit on state power,” and for its anti-formalism in relation to Chapter VII for relying on a “free-wheeling, outcome-oriented” species of radical adaptivism that moves well beyond the original meaning and structure of the Charter.

The tension between these two views raises a host of questions: Was the UN Charter intended to provide the “constabulary power before which barbaric and atavistic forces will stand in awe,” as Winston Churchill once suggested? Are humanitarian catastrophes in one State really a threat to the security of all States? Is it true historically that “realist” balances of power have been less effective in maintaining peace and stopping the scourge of war as compared to “idealists” collective security regimes based on the rule of law? With the war in Iraq raging on, Iran persisting with its nuclear program, and Darfurians continuing to perish in the thousands, there is perhaps only one thing of which we can be certain: as the “blood-dimmed tide is loosed,” the age-old quest to understand what tyes falcon to falconer continues.

Peter Danchin is Assistant Professor of Law and an expert in international law and human rights. This article is derived from a chapter in his forthcoming United Nations Reform and the New Collective Security, co-edited with Professor Horst Fischer of Ruhr-University Bochum and Leiden University Faculty of Law, and to be published in 2008 by Cambridge University Press.