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Abstract

This Essay discusses the progress that has been made in the post-Cold War world to bring international law's contribution to political areas into line with its longstanding contribution to functional ones. It uses three issues—human rights and the commission of war crimes; international trade; and the use of force by States—to show how international law has been used to achieve concrete results and to highlight the challenges that remain.

INTERNATIONAL LAW'S CONTRIBUTION TO SECURITY IN THE POST-COLD WAR ERA: FROM FUNCTIONAL TO POLITICAL AND BEYOND

*Matthew H. Adler**

INTRODUCTION

I took my first international law class as an undergraduate in 1979, at the last full blooming of the Cold War, just before the Soviet invasion of Afghanistan. My notions of precisely what international law was were not dissimilar from those of the students I now interview; I had some idealistic idea that international law would both prescribe a moral set of rules for the World to abide by, and, not incidentally, let me travel often. I was half right (on the travel side). I remember my youthful hopes being quashed by my professor's accurate but cold-blooded delineation of two poles of international law, which he called "functional" and "political." The functional bodies were those like the international postal service, and weights and measures; there, he said, international law worked well, as it did not conflict with notions of sovereignty, ideology, and power. The further one got from the functional side of the continuum, however, the less effective was international law; thus, rules on subjects such as human rights and self-defense were harder to both promulgate and enforce.

Later, I was to witness this first hand. In my first job, I was the junior member of a team of Washington lawyers who were seeking over US$1 billion from the Islamic Republic of Iran.[1] My particular issue was lost profits: whether, having been kicked out of Iran in 1979, the big oil companies could claim not only the value of the hard assets that they lost but also the value of their concessions on a going-forward basis. To my clients, this

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1. Amoco v. Islamic Republic of Iran, *reprinted in* 27 I.L.M. 1320 (1988).

was nothing less than their contractual right to recoup the full value of their investment, since without the promise of those future profits they would not have made the investment in the first place. To Iran, this was a matter of national sovereignty: the idea that a country could at any time assert title to its own resources was at the heart of the self-determination and anti-colonialism strain that had influenced international law since World War II. Reams have been written on this issue and I will not even attempt to do it justice here; I remember, though, as I toiled on the brief and seethed at what I thought then was the overly political nature of Iran's briefs, hearing my undergraduate professor's voice as he spoke about the functional-political continuum. Iran was more than able to cite Third World commentary on what by then was a significant North/South issue, and it readily became apparent that whoever prevailed under "international law," there was a dramatic absence of consensus.

In my next job, as a lawyer with the U.S. Department of State, I had the opportunity to negotiate a property claims treaty with East Germany ("GDR"), back when there was such a country as East Germany. Now, it should hardly come as a surprise to anyone that political considerations impinged on this process, but what I was unprepared for was the *extent* to which the Cold War reared its head. After all, I remember thinking, the biggest policy decision — whether the GDR would pay U.S. citizens whose property had been expropriated — had been made already, in the affirmative, when the East Germans gave the green light to the negotiations. That decision taken, I thought that it was my task to craft workable rules for reimbursement. To my surprise, I found the drafting next to impossible, because we could never refer to property "taken" by an entity which the United States barely recognized. As to how we dealt with property taken in Berlin, a city stratified by the Cold War into quadrants — well, let us just say that the Berlin Wall collapsed in time.

In the seventeen years since my college survey course, the decade since I fought with Iran, and the seven years since my time in Foggy Bottom, great progress has been made to bring international law's contribution to political areas into line with its longstanding contribution to functional ones. Thus, to answer the question posed by this Essay, not only can international

law "truly effect global political and economic stability," but it is doing so more every day.

I. *INTERNATIONAL LAW IN THE COLD WAR ERA*

The achilles heel of international law has long been its lack of an executive body. Absent the ability to enforce international edicts, international law depends upon virtually unanimous consensus or, in the case of the Gulf War, overwhelming firepower to be effective. For the considerable post-World War II period, consensus on most meaningful matters was precluded by the ideological and economic divisions that clove the World. This led to every international legal principle of any consequence being filtered through the prism of the Cold War.

Take, for example, nuclear non-proliferation. On paper, it is a testament to what international law can achieve. The Nuclear Non-Proliferation Treaty[2] ("NPT") is signed by over one hundred countries, including some but not all of the countries most suspected of harboring ambitions to be nuclear weapons states. It represents a consensus on a difficult political issue: at bottom, non-nuclear weapons states trade off their ambitions to obtain nuclear weapons for promises of nuclear power assistance from the nuclear weapons states. In practice, however, matters have not worked as smoothly. Specifically, to again recall the Soviet invasion of Afghanistan in what would prove to be the last gasp not only of Soviet President Leonid I. Brezhnev[3] but of the empire he represented, the United States decided that it could not have both a strong non-proliferation policy and a bulwark against the Soviet Union in South Asia. The United States thus chose to look the other way at both India's "peaceful nuclear explosion"[4] and Pakistan's increasingly bold and transparent moves to acquire the bomb.[5] The administrations in power during this period, both Democrat and Republican, annually obtained the requisite waivers under the Nuclear Non-Proliferation

2. Treaty for the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

3. Alessandra Stanley, *Russia's New Leaders Govern, And Live, in Neo-Soviet Style*, N.Y. TIMES, May 23, 1995, at A1 (describing Brezhnev as Soviet leader).

4. John F. Burns, *India Denies Atom-Test Plan But Then Turns Ambiguous*, N.Y. TIMES, Dec. 16, 1995, at A4 (describing India's secret nuclear weapons program).

5. *Id.* (discussing Pakistan's secret nuclear weapons program).

Act[6] ("NNPA") so that they could continue to supply foreign assistance to states that were then judged vital to U.S. interests, bomb or no bomb. International law thus took a decided back seat to national security.

II. *DE-POLITICIZATION OF INTERNATIONAL LAW IN THE POST-COLD WAR ERA*

With the end of the Cold War, the opportunity for this kind of interference with international legal principles has diminished. Will political considerations continue to impede legal ones, so that not all international legal edicts get carried out? Of course they will; there will always be issues that are simply too difficult for resolution by consensus. The Cold War, however, was a particularly nasty and prolonged political fight, and with it over, there is the opportunity for international law to take giant steps and make the same contribution to establishing norms in traditionally political areas as it has in traditionally functional ones.

Three examples of recent "political" issues come to mind: human rights and the commission of war crimes; international trade; and the use of force by States. In all three, the ability of international law over the past six years to achieve concrete results has been as astonishing as it has been heartwarming; in all three, that progress has been much greater than it would have been during the Cold War; and in all three, lest we break our arms patting ourselves on the collective international back, much remains to be done.

A. *The Development of Human Rights Law: War Crimes*

In the immediate post-World War II era, before the Cold War gathered steam, the law of war crimes represented a major development in international law. Telord Taylor's recent book on the Nuremberg trials[7] demonstrates how legal was the search for a basis upon which to charge the Nazis; while everyone had an instinctual feeling that these men were guilty of terrible wrongs, the exact nature of those wrongs and the jurisdictional basis for prosecuting those wrongs were questions with which the

6. 22 U.S.C. § 3201 *et seq* (1994).

7. T. TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992).

Allied lawyers struggled mightily. The resulting indictments, and the subsequent convictions based on those indictments, represented a giant leap forward for international law. From that point forward, there was a basis, set forth in clear rules and supported by dramatic precedent, for outlawing war crimes.

That development almost died stillborn, however. When I think of war crimes trials, I think not of the Nuremberg trials but of their immediate aftermath. The Nazis in the dock at Nuremberg, however heinous they were, did not personally kill a single Jew. Their underlings, indicted and tried later, had that blood directly on their hands. But with few exceptions, most of those underlings served little or no time in prison. By the time those secondary trials began the Cold War had begun in earnest and the United States and the Soviet Union were vying for the hearts and minds of the vanquished Germany. More war crimes trials, and stiff sentences, had no place in that equation. Thus, early in the war crimes era, international law was outshone by the Cold War, and the development of international law on this subject ceased.

The men shortly to be tried in The Hague for war crimes in the former Yugoslavia will have no such ideological cover.[8] Russia may be sympathetic to the Serbs, but not to the point of demanding that the trials not take place. For the first time in fifty years, there will be a war crimes trial that will take the ideas first advanced in Nuremberg — that some forms of behavior have no place in civilized society no matter the circumstances — and develop them for the next century. Whether one's goal is punishment, deterrence, or simply codification of international law on this subject — and a compelling case can be made for any or all of the above — this is a substantial advancement of international law. It is also one that, obviously, could not have occurred were Yugoslavia or Serbia still in what we used to call the "Eastern Bloc."

B. *The Development of International Trade Law*

International trade is at once the issue on which the most and least progress has been made since the end of the Cold War. This progress has been due in part to a development almost as

8. Philip Shenon, *G.I.'s to Provide Security for War Crimes Investigators in Bosnia*, N.Y. TIMES, April 1, 1996, at A6 (detailing War Crimes Tribunal's activities).

striking as the end of the Cold War: the toning down of North/South rhetoric. This has not occurred, to be sure, because income differentials have narrowed; to the contrary, the gap between the haves and have-nots continues to widen. Rather, this progress, described briefly below, has occurred because the socialistic ideology professed by many Third World nations in the 1970's and 1980's has been adjudged out of style. Whether this is because it did not work, because the Soviet Union is no longer sponsoring these states, or because the United States is the only remaining superpower is beside the point; the impact of this toning down is that North and South now seem to apply a shared set of economic values to international agreements.

Consequently, international trade agreements now reflect an essentially capitalist trade and development model. Protectionism and state-sponsored industry are disfavored while borders are thrown open to investment, with the clear view that an entity will not invest dollars unless it can obtain an ownership stake and earn profits. One sees this in the North American Free Trade Agreement[9] ("NAFTA"), in which one party, Mexico, recently had a strong state-owned sector; in the various other regional free trade pacts that have followed in NAFTA's wake; and, of course, in the finalization in 1995 of the Uruguay Round of GATT,[10] and the corresponding establishment of the World Trade Organization[11] ("WTO") to enforce that agreement. It is unlikely that the majority of the World's nations would have agreed to a trade police force such as the WTO if they had not first acieved some fundamental consensus in recent years on trade philosophy and rules.

Make no mistake, the WTO can impose penalties which will hurt. It will be a novel experience for many countries hit with these penalties, and we may see the "brave new world" of international trade sorely tested in its early years. But the fact remains that the rules, and the enforcement mechanism, are now

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9. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat 2057 (codified at 19 U.S.C. §§ 3301-3473 (1994) [hereinafter NAFTA Implementation Act].

10. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994, 33 I.L.M. 1125.

11. Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter WTO Agreement].

far more visible and powerful than in years past. This is a substantial — and, to use my old professor's typology, political — step forward for international law. Anybody who thinks that international trade is functional and not political, that it consists mainly of dusty old customs regulations and tariff schedules, has never tried to tell France or Japan that they must open up their agricultural systems to imports, or Mexico that it must reform its labor laws, or the United States that it cannot continue to protect antiquated heavy industry or the textile industry. Trade laws cut at the heart of a country's economic vision for itself, and for nations to now cede authority over much of this heart is the clearest recognition of all that we are in a new era.

C. *A Program For Continued Development*

More dramatic, but not more important,[12] are the emerging rules on use of force. We have seen, since the Cold War ended, U.S. troops committed to the Persian Gulf, to Somalia, and now to Bosnia. I would be surprised if most of my peers do not use the Gulf War as a model for future collective security.

Admittedly, none of the three deployments would or could have taken place in the Cold War. A Western assault on the flashpoints of the Middle East or Central Europe would have been viewed as a preliminary to World War III, not as a precursor of a "new world order." And, to the extent that they save life and advance fundamental principles, such as you cannot nakedly grab your neighbor's land or send him to "ethnic cleansing" camps, they are to be applauded as courageous steps.

That said, however, the rules on use of force have a long way to go before we can argue that they proceed from as strong an international legal consensus as the GATT or even war crimes. If force is appropriate in Bosnia in 1996, why was it not appropriate in 1994? If ethnic slaughter brought troops to Europe, why not to Rwanda? If Kuwait's leading export had been fruit and not oil, would we have shown the same misty-eyed reverence for the integrity of its borders?

The point is not to sneer at any of the international military interventions to which the United States has contributed troops,

12. I say not more important, by the way, because while almost every U.S. citizen can identify the Gulf War and probably no more than one percent can identify the WTO, it is the latter that will have a much greater impact in the years ahead.

money, and lives. They have each either advanced, or promise to advance, the rule of law. What cannot be denied, however, is the selectivity involved in these commitments. Given that one purpose of any system of law, including international law, is to establish a system of rules and expectations for a variety of situations, selectivity runs counter to an established international law on the use of force. As long as we continue to approach this subject on an ad hoc basis, deciding that this land grab is acceptable but that one is not, this massacre worthy of bombing but that one is not, we run the risk of these worthy and laudable exercises being viewed with cynicism and considered of suspect international legal merit. We also run the risk that future tyrants will not take sufficient warning, because the lines of world intervention are not drawn with sufficient clarity.

CONCLUSION

Six years, however, is a very short time for so much progress, and it has barely been that long since crowds danced on the Berlin Wall. For this much to have been accomplished in reconstructing a genuine international legal regime, on so many political subjects, is the most hopeful of beginnings. The challenge is to build on this process by both successfully administering the initiatives taken to date and by continuing to construct rational rules of legal engagement on economic, military, and human rights fronts.