

EDITORIAL COMMENTS

INTERNATIONAL LAW AFTER THE COLD WAR

The Cold War was one of the major events of modern time. It did not, happily, reenact the mass slaughter of the other conflicts of this century, but in terms of lives affected, wealth consumed, geographical reach and long-term environmental consequences, it is certainly one of the great conflicts of human history. It was marked by continuing high expectations of violence and the ongoing mobilization and detailed planning for war by two military antagonists, whose alliances and hegemonic relations incorporated a large part of the globe, each part of which was deemed to have some strategic value. The Cold War surely involved more human beings than any other conflict.

The geo-strategic confrontation of the Cold War was sustained by two mutually incompatible ideologies, or “contending systems of world public order,” deriving, curiously, from the same cultural and historical sources. Each viewed the other in Manichaeian terms and disseminated or inculcated its message intensively in its own sphere. One was intent on “containing,” if not “rolling back,” its adversary; the other, bent on “burying” its adversary. At the height of the Cold War, there were two worlds on the planet, between which trade and other human contact were drastically reduced. In many ways, there were two systems of international law and two systems of world public order. The Cold War had virtually become part of the natural environment. Few thought it would ever end.

Within each of the adversaries, the anxiety generated by the anticipated conflict reached into and influenced many sectors of life. Both superpowers took on, in varying degree, garrison-state features. In the West, the effects were felt in ordinary democratic processes, in civil and human rights, in school curriculums, in literature and art, in environmental protection, in individual health, in the skewing of economies for defense, in the allocation of public funds for weapons development and the maintenance of a large standing military—indeed, in every sector of life. In the East, the ideology was totalitarian; millions of people were subjected to high degrees of control and deprived of accurate information about what was occurring elsewhere. A larger and larger proportion of the national wealth was diverted to military and security matters. Though the elites of neither superpower could have taken any pleasure in developments that would poison the environment for generations and increase the incidence of certain diseases among their own children, the threshold of “acceptable costs” for the maintenance of security through weapons development and testing and of the consequential environmental degradation was pushed higher and higher.

The Cold War was not a hot war because the introduction and constant symmetrical refinement of nuclear weapons established a “balance of terror.” While that balance prevented hot war between the superpowers, it

aggravated the general sense of anxiety. The few incidents in which the protagonists faced one another "eyeball to eyeball" were traumatic experiences for practically everyone on the planet. The balance of terror, however, did not deter proxy wars and what came to be known as "low-intensity, protracted conflict." If the big war never eventuated, violence, in one form or another, never abated.

I.

The Cold War deformed the traditional international law that had developed over centuries to facilitate and regulate political, economic and other human relationships across national boundaries. It could hardly have been otherwise. For almost half a century, the world lived in a state of neither war nor peace. The independence and rights of choice of smaller states were restricted by larger neighbors in their own interest and, it was often avowed, in the interest of systemic security. The slow effort to centralize authoritative coercive force and to restrict the freedom of unilateral action, the hallmark of civilized political arrangements and the major acknowledged defect of international law, was impeded by an international security system that accorded a veto power to each of the major protagonists. That ensured its ineffectiveness. Even the freedom of the oceans, one of the most venerable struts of the international system, which had reserved five-sevenths of the planet as a public highway for exchange, was attenuated to facilitate weapons development. As soon as outer space became accessible, it, too, became part of the military arena.

Formal prohibitions on unilateral uses of force were skirted by exceptions like "wars of national liberation," which, in turn, generated and sustained counterexceptions such as "freedom fighters." Symmetrical doctrines of selective intervention—Brezhnev or Reagan—were developed and vigorously applied by each of the protagonists. The *jus in bellum*, which, historically, had sought to reduce the savagery of war and to maintain a distinction between combatants and noncombatants, suffered serious injuries from the application of modern industry to warfare in the two world wars. It was dealt an additional blow by the nuclear weapons of the Cold War. By their nature, these weapons cannot be made to discriminate between targets and noncombatants or meet any test of proportionality. The notion of necessity as one of the traditional cumulative criteria of lawfulness was also rendered meaningless by elective strategic doctrines, such as "Mutual Assured Destruction." The doctrine worked, in the sense that it deterred nuclear conflict, but the moral implications of such a "defensive" strategy could not but have corrosive effects on other aspects of domestic public order.

Espionage and covert actions were conducted almost with impunity. A new quasi-legal category of "rules of the game" developed, but the word "rules" was an oxymoron, for they were, in fact, euphemisms for reciprocally tolerated violations of verbally accepted international law. The level of international treaty morality sank to an all-time low in arms control agreements; terms such as "national means of verification" were an explicit ac-

knowledge and acceptance, as part of the treaty regime, of the parties' reciprocal belief in the misrepresentation and perfidy of their treaty partners.

II.

Historians will quibble about the exact moment of its demise, no less than about the exact date of the start of the Cold War. Much depends on whether one views the war as a continuing effort by the Western capitalist world to contain and blunt the revolutionary force of socialism or as a struggle between a Western world that had already coopted and incorporated key planks of the socialist program and Stalin and his successors, who, capitalizing on Soviet gains in the Second World War, had mobilized the symbols of socialism in the service of an imperial totalitarianism.

Quibbles aside, it is beyond doubt that the Cold War has ended. The expectation of violence between the two major strategic powers has been drastically reduced. At the ideological level, one of the contending systems of world order has been discredited and lost its legitimacy in the countries over which it held sway and one of the military blocs has all but disintegrated. Overall, the military character of the international arena, at the strategic level, has been perceptibly reduced.

III.

Some of the traditional norms and practices of international law that were suppressed during the Cold War can now be revived. As between the two blocs, the distinction between war and peace, each with its own legal regime, will be reinstated. As a consequence, there should be reduced tolerance for, hence conduct of, covert activities. There should be less international tolerance, but not necessarily less national public support, for interventions in so-called critical defense zones under rubrics such as the Brezhnev and Reagan Doctrines. The American military action in Panama was widely supported in the United States, though the reasons for the swelling of support are not clear. Both France and the United States indicated that neither would oppose a Soviet intervention in Romania at the time of the overthrow of the Ceausescus. Nevertheless, in terms of a pre-Cold War baseline, one should expect some revival of the norm of national political autonomy.

But national political autonomy will not mean a revival of the older notion of sovereignty in its entirety. Radical changes in conceptions of the legitimacy of national authority, deriving from the international human rights program, have supplanted the older absolute notions. There is much more room for the operation of human rights norms, for the global communications system means that all of the inhabitants of the globe live in a state of electronic simultaneity, if not physical proximity. Instantaneous communication has extended the basis for symbolic, and perhaps physical, interventions into domestic processes in which gross violations of international norms are occurring. But because such humanitarian interventions, as exercises of power, are perforce reflections of the world power process, the arena of

their operation will continue to be the internal affairs of smaller and weaker states.

Not all the dead shall be raised. Many institutions of international law that had been in a state of suspended animation may now prove beyond rehabilitation. Some are victims of the Cold War. Others are rendered obsolete by its conclusion. Still others, by radical changes in circumstances.

Consider the Charter conception of the security role of the United Nations. While many now look toward the United Nations with the hope that it will play a major role in the maintenance of world order, the changes that have taken place make key parts of the UN system caducous. One should recall that the term "United Nations" was the collective name for the Allies in World War II. The permanent members of the Security Council were the victors in that conflict and the Charter itself provided for the resumption of joint action should any of the Axis powers revive.

But the *rappport de force* of 1945 has changed dramatically. The end of the Cold War is also the end of the Second World War. As such, it is marked by the reascendance of a now effectively united Germany and a vigorous Japan, each of which is stronger than at least three of the Security Council's permanent members. At the same time, a number of new states may claim a power base sufficient to warrant the special prerogatives that the Charter assigned to the most powerful nations of the world. With the possible reduction of the military value of nuclear weapons, whose possession heretofore was almost a membership card in the global elite club, even that group of aspirants may swell in number. For the short term, at least, the Security Council may simply not be strong enough to perform the role assigned to it. In the meanwhile, the question will be whether the United States, the erstwhile bulwark of international security, will lose its vision, its sense of mission and its credibility. Should that happen, there may be *no* international security system.

Adaptation of the security structure of the United Nations to contemporary realities is a necessity. To be credible, a security system must be effective. Hence, it must reflect the actual distribution of power. Until the United Nations adapts itself to the new realities, one may expect to see a shift of decision making out of the UN system and a concentration, rather than a sharing, of decision competence. A large proportion of international decisions may be made by an economic oligarchy of states, the G-7. Japan, a leading member of this club, has already indicated that it would like it to play a more overt political role and the Soviet Union has indicated that it would like a seat at the table. The G-7 may emerge as an increasingly autonomous and dominant decision process, in many cases the real Security Council but without the Charter and answerable to none other than its own members. Dynamics within the G-7 may create an "inner group" of effective power composed of no more than three states.

Within the United Nations, the regional system and the gentlemen's agreements make less and less sense, though they appear to have continued to operate through 1990. The hidden agreements on the assignment of key Secretariat posts to national officials who have been seconded by their governments, who often continue to receive supplementary salaries from them,

and who can be considered "international civil servants" only in a very limited sense (as widely practiced by some Western European as by the former socialist states) should no longer be tolerated. One hopes that this practice will be succeeded by the institution of a genuine international civil service, which the Charter called for and the world urgently needs. But this change will require fundamental rethinking of attitudes at high levels of the Secretariat. It is sad to note that in the recent Chinese cases before the UN Administrative Tribunal, the Secretariat supported what was in effect a permanent member's claim to purge the Secretariat of nationals that it no longer wanted there. It was the Tribunal that supported the concept of an independent international civil service, thereby rebuking a permanent member and the Secretariat!

Developments set into operation by the end of the Cold War may accelerate the decline of the international refugee system. It was largely a product of the war in Europe and may have since been stretched beyond its tensility. Clearly, many states are less willing to accept refugees, a development that is especially alarming as it coincides with instability in Eastern and Central Europe and North Africa, the likely outflow from those regions of large numbers of people seeking refuge, and the recrudescence of parochialism and, in particular, racism in Western Europe.

With the ending of the Cold War, the strategic value of many parts of the Third World will diminish, if not evaporate. International development aid, which was directed, in limited amounts and often for strategic reasons, to the Third World and which was an important part of its development program, could be drastically reduced as the finite amount of such aid is redirected to Eastern and Central Europe. Then the frequently mentioned "North-South" division will come into much sharper focus. In terms of human rights, some countries may benefit, as dictators, dependent on outside forces, fall and are replaced by popular governments. But the reduction of funds to key, but thoroughly dependent, countries such as Egypt and Israel could generate internal instability with uncertain consequences for the region.

IV.

The end of the Cold War means the reduction of one particular pattern of violence; but it does not mean the beginning of peace, nor does it signal a new international stability. Far from it. Both physically and politically, the world is in a more parlous situation than it was in past decades. The physical environment is undergoing change and possible deterioration, with some predictable changes in epidemiology and in climate. Emergent climatic changes will benefit some states and regions, but will prove calamitous for others, from which instability may be expected promptly to be exported. Plagues such as AIDS that have proven resistant to cure move about the planet with ease, for in an economically interactive and interdependent system, possibilities of quarantine are limited. Mutations in the virus could make it even more dangerous.

The relatively stable political environment that has prevailed for half of a century is also breaking up. Since 1945, the international system has resisted the fragmentation of its component parts. In Africa, postcolonial governments committed themselves to maintaining the borders inherited at the time of national independence. But now the Soviet Union, heir to the empire of the tsars, is belatedly undergoing decolonization. Many of its component republics will probably sever connections or radically change the nature of their relationship with Moscow. The result is likely to be greater instability in those zones as the external force that contained indigenous political activities is withdrawn. Political vacuums are likely to suck in outside political forces, which will reignite the controversy about lawful support for insurgencies.

The USSR may be the last of the great European empires, but it is not the last of empires. India, Pakistan, China, Iran, Nigeria, Ethiopia—indeed, as recent events in Canada forcefully demonstrate, any system incorporating groups of distinct identity who do not believe that there are real advantages to remaining within the collective entity—will be subjected to increased pressure for secession or reorganization. With each additional breakup, the international resistance to fragmentation will weaken further and other subgroups will find it easier to withdraw. In Western Europe, the political significance of such reorganizations will be smaller, thanks to the existence of an overarching community structure. In Africa, the development could signal major disruptive changes.

In the new context, the travail and duration of “secession” may prove to be quite different from in the past. In the old world, secession could be taken quite literally to mean as complete a severance as the parties wished. In an interdependent world, there can, in fact, be no such thing as total secession and independence—only reorganization and rearrangement. This will mean that withdrawals will become more protracted and, though there may be violent phases, ultimately each rearrangement will require overlapping bilateral and plurilateral negotiations.

The breaking of traditional links and the forging of new arrangements will have quite varied effects. Some states, such as Russia, with ample population, rich natural resources and a warming Siberia, freed of the burdens of colonialism and a crippling economic doctrine, could be major winners. Others will suffer, not simply economically but because they may discover that, alone, they are not defensible. Hence, there could be a scramble for new alliances and a gradual expansion of the arena of potential conflict.

V.

The bankruptcy of communism has led to smugness, even hubris, among some members of the Western or free market world. But the West is hardly impervious to stress and can only, at its peril, ignore processes and changes that could disrupt it. The national debt of the United States, aggravated by the additional charge of more than \$500 billion arising from the savings and loan debacle, continues to grow. Its international implications cannot be overstated. Possible slowdowns or arrests in economic growth could paralyze the West, jolt into self-consciousness inchoate classes and strata of have-nots,

the latent "inner proletariat" of every system, and set off massive internal social dislocations that could quickly be felt elsewhere, given the interdependence of the international system. Regardless of whether the configuration that stabilizes is better or worse than its predecessor, the costs of the transition could be very high.

VI.

The end of the Cold War does not mean, additionally, the end of war and all that it entails. Even shorn of its empire, Russia will remain a superpower. The national ideology that will succeed socialism and will hold the system together is not yet apparent; nor are its international implications. But it is not improbable that as the conventional threat of the East diminishes, the West will abandon its "first strike" nuclear doctrine and begin to characterize it as unlawful and immoral; while the East, feeling weak on the ground, will take up "first strike" as its own. The dancers will simply trade places. The minuet could well continue.

While the Cold War infected and, in turn, incorporated almost all other conflicts on the globe, those conflicts were not epiphenomena of the Cold War. They existed in their own right and will continue to rage at varying levels of intensity until each finds its own solution. Without an international security system or the order imposed by superpowers, local bullies may be tempted to turn to thuggery, as has Saddam Hussein of Iraq. Some local wars that have been dragging on may increase in viciousness. Many of the newer weapons that have been developed are more prone to proliferation. More than forty states now have ballistic missiles. New chemical and biological weapons are within the reach of many poor and otherwise underdeveloped states. Iraq's use of them in the gulf war and then domestically has shown that, in certain types of conflicts, it can be done with impunity. And even new states may be born with nuclear birthrights. As the Soviet Union fragments, many of its components may come into existence as nuclear states, thanks to the stockpiles of nuclear weapons that Moscow distributed about the federation. The end of the Cold War does not signal the end of the nuclear age.

The revolutionary appeal of socialism may have diminished in many parts, but there is no dearth of causes for which people are willing to fight and die. Islamic fundamentalism is extending to Egypt and North Africa in the west and as far east as China. In Eastern Europe, the revival of nationalism appears to be accompanied in many cases by politicized religious and mystical notions and the recrudescence of anti-Semitism. In parts of Western Europe, racism and anti-Semitism have become significant political factors. And, while Germany is so strong that no one wants to be seen to oppose its reunification now that it appears inevitable, behind the official faces of happiness and congratulation, security specialists are whistling past the graveyard; the effect of German reunification on Germany's political consciousness and historic geo-strategic conception is as yet unfathomable.

In this context, economic stagnation and human desperation can be especially volatile. In a world in which everyone will know what others are accomplishing, economic failure in one sector is likely to generate pressure for

migration, which will be resisted as states reach their absorptive capacity. Closed borders could aggravate the desperation and lead, as in the past, to the development of bizarre ideologies and aggressive tendencies. There will be no possibility of quarantine.

VII.

In some eschatologies, debate rages over whether there will be a need for law of any sort after the arrival of the Messiah. The international political system is at the threshold of a time of hope. The ending of the Cold War is a major achievement, but we are not about to enter the millennium. "This *annus*," as Auden said, "is not *mirabilis*." The need for international law after the Cold War will be more urgent than it was during the conflict. In many ways, what is expected of international law will be greater.

In a period of rapid change, no system of law can content itself with a pious, mechanical replication of the past, for the future may be quite different from the past. Replication may then be a formula, not for reachieving what was gained in the past, but for disaster. The challenge to international lawyers and scholars must be to clarify continuously the common interests of this ever-changing community, drawing on historic policies but bearing in mind that the constitutive and institutional arrangements that were devised to achieve them may no longer be pertinent or effective.

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SOVEREIGNTY AND HUMAN RIGHTS IN CONTEMPORARY INTERNATIONAL LAW

anachronism . . . 1: an error in chronology; esp: a chronological misplacing of persons, events, objects or customs in regard to each other . . . 2: a person or a thing that is chronologically out of place; esp: one that belongs to a former age and is incongruous if found in the present

Webster's Third International Dictionary

I.

Since Aristotle, the term "sovereignty" has had a long and varied history during which it has been given different meanings, hues and tones, depending on the context and the objectives of those using the word.¹ Bodin and Hobbes shaped the term to serve their perception of an urgent need for internal order. Their conception influenced several centuries of international politics and law² and also became a convenient supplementary secular

¹ See [Installment] 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 397, 399 (R. Bernhardt ed. 1989) (discussion of historical evolution of term "sovereignty" from Aristotle to present).

² *Id.* at 401-02.