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ESSAY

INTERNATIONAL LAW'S CONTRIBUTIONS TO PEACE

BARRY E. CARTER*

The progressive development of international law has helped move the world forward in a wide variety of ways along the paths to peace. It is a story that is often not understood or appreciated.

The Use of Military Force

In possibly the most visible area, the use of military force has been progressively limited by the development and acceptance of international legal norms. While it sounds surprising today, the right of states to go to war and obtain territory by right of conquest was widely accepted up until 1914 and World War I. While the European countries felt some constraints inside Europe because of agreements, the right of conquest was subject to few limits outside of Europe.

Evolving through bloody fits and starts, much different norms have emerged. The use of force is now viewed as against international law, with only a few exceptions. Key points along the evolutionary path start with the searing experience of World War I, followed by the League of Nations. The League, however, never condemned the use of force, but only provided for a cooling-off period. Moreover, its members were unwilling to move strongly against aggression by Italy and then Japan. The Kellogg-Briand Pact of 1928 grandly "condemn[ed] recourse to war... and renounce[d] it as an instrument of national policy."¹ However, the Pact lacked any enforcement provisions.

World War II gave new impetus to the efforts of many

* Professor of Law, Georgetown University Law Center. This essay is based on my presentation at the conference on Paths to Peace, which took place at the John Marshall Law School on September 25, 1998. The conference was part of the school's celebration of its 100th Anniversary. My thanks to Professor Walter J. Kendall III for organizing the conference and for his constructive suggestions about my presentation.

1. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. 1, 46 Stat. 2343, 94 L.N.T.S. 57.

countries to prevent wars. First, the four major Allied powers—the United States, the United Kingdom, France, and the Soviet Union—established the International Military Tribunal at Nuremberg, Germany, in August 1945.² The Charter of the Tribunal defined certain crimes, including war crimes and crimes against peace, and authorized the Tribunal to try people for them and to impose judgment and sentence.³ The Charter and the ensuing war crime trials before the Tribunal, as well as the trials of the International Military Tribunal for the Far East and a host of proceedings before other civilian and military tribunals, established important precedents both for the general norms limiting a state's use of force and for the responsibility of individuals.

At least as important was the creation of the United Nations and the U.N. Charter. Article 2(4) of the Charter provides that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . ."⁴ Note that the Article does not employ the term "war," whose definition had often become subjective, but the more-inclusive phrase of "use of force."

The only explicit exception to this prohibition is found in Article 51 of the Charter, which provides that: "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . ."⁵ "Self-defense" has become a somewhat elastic concept, and a related exception has also been widely accepted—humanitarian intervention to rescue at least a country's own citizens when the host government cannot or will not protect them. There is also discussion of other possible exceptions, such as reprisals. However, in contrast to the situation prevailing before World War I, it is important to highlight that the world community now generally accepts the principle that force cannot be used, except in certain, limited circumstances. Of course, the Charter's enforcement was uneven for many years because Security Council action could be blocked by the use of the veto by any of the five permanent members of the Council—the United States, Great Britain, France, Russia, and China. This has become less of a problem after the end of the Cold War.

The Iraqi invasion of Kuwait in 1990, as well as the U.N. and

2. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

3. *Id.*

4. Charter of the United Nations, June 26, 1945, art. 2(4), 59 Stat. 1031, T.S. No. 993.

5. *Id.* art. 51.

U.S. response to it, illustrate the progress that has been made. Iraq had no credible justification for its use of force. The world community, almost unanimously, condemned the aggression, in part because it violated the legal norm against the use of force. (Of course, there were other considerations involved, including economic and geopolitical ones, but international law helped shape the reaction.) The U.N. Security Council immediately condemned Iraq's action and later passed Resolution 678 that effectively authorized Operation Desert Storm.⁶

Limiting Weapons

There has also been substantial progress in the related area of limiting weapons. These efforts grew in part out of the efforts over the past century by the Red Cross and nation states to limit the conduct of war and the treatment of prisoners and civilians, such as in the Geneva Conventions. There also was the London Treaty for the Limitation and Reduction of Naval Armaments of 1930.⁷

There are now several important agreements limiting military forces, especially nuclear weapons and other weapons of mass destruction. These include, among others, the Biological Weapons Convention of 1972,⁸ the Chemical Weapons Convention of 1993⁹ (which came into force in 1997), the Limited Test Ban Treaty of 1963,¹⁰ the Nuclear Nonproliferation Treaty of 1968,¹¹ and the U.S.-Russia strategic arms treaties. Besides these agreements, there are several export control regimes with varying membership that are designed to limit the spread of sensitive nuclear, chemical, biological, and other items. These regimes include the Wassenaar Arrangement, the Nuclear Suppliers Group, the Australia Group, and the Missile Technology Control Regime.

Peace cannot be attained, however, simply by rules against

6. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/Res/678 (1990). Resolution 678 authorized Member States "to use all necessary means to uphold and implement" previous resolutions demanding Iraq's withdrawal from Kuwait. *Id.*

7. Treaty for the Limitation and Reduction of Naval Armaments, Apr. 22, 1930, reprinted in part in THE LAWS OF ARMED CONFLICTS (Dietrich Schindler & Jiri Toman ed., 2d ed. 1981).

8. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993).

10. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

11. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

the use of force and limits on armaments. India's and Pakistan's resort to testing nuclear weapons in 1998 highlight that more is needed.

A Comprehensive Array of International Norms

Possibly the most important contribution for international law in the recent past and next ten years is to create a comprehensive array or network of international norms that encourage economic growth, democracy, and human rights. The goal should be a more integrated world where war no longer seems an option, where it is unthinkable and impossible. The steps to this goal include increasing regional integration and strengthening international legal regimes in specialized areas.

The European Union is a model for regional integration. An important impetus for it was to integrate Germany so thoroughly into Europe that Germany would not contemplate another war. The EU grew out of a series of steps—the European Coal and Steel Community in 1952 (integrating crucial industries), and Euratom and the European Economic Community in 1958. These organizations were then merged and strengthened.

Today's European Union has 15 members with a population and gross domestic product greater than the United States. The EU now is a free trade area with common tariffs, but there is much more integration. There are EU rules regarding investment, employment practices, immigration, and the environment. Moreover, 11 of the members states are now well along in the process of switching to a common currency, the euro. The EU's Court of Justice has the power to void national laws inconsistent with the EU treaties or regulations.

Regional integration is blossoming elsewhere. Although not as advanced or as ambitious as the European Union, there is much progress underway in NAFTA, the Asian-Pacific Economic Cooperation (APEC), and Mercosur in South America.

Besides regional integration, there are major developments for specialized integration. The new model for specialized integration is the World Trade Organization (WTO), which came into existence in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT).¹² It now has about 130 members, with others seeking to join. It has extensive rules on trade in goods. It has also expanded into trade in services, intellectual property protection, and many other areas of international commerce. The WTO has a very strong and busy dispute resolution system. Incidentally, the United States has been the most frequent user of this system.

12. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 194.

Another promising area for specialized development is human rights. Again, the Europeans have shown the way with the active and influential European Court of Human Rights, to which almost all European countries belong. But the world has also seen a proliferation of multinational conventions providing norms. Also, national courts, including those in the United States, are increasingly exercising jurisdiction in cases involving international human rights abuses.

The progress toward regional and specialized integration is often supported and reinforced by new and stronger systems for international dispute resolution. While the International Court of Justice plods along, other forums and methods for international dispute resolution are arising and flourishing. There are regional courts (such as the European Union's Court of Justice and the European Court of Human Rights), specialized courts (such as the new Law of the Sea Tribunal), and the WTO's dispute resolution system.

Besides the WTO, the biggest growth stock in dispute resolution might be in commercial arbitration. Many hundreds of international commercial disputes now go to arbitration each year. A key element here is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹³ This Convention, known as the N.Y. Convention, has about 120 parties, including all the major industrialized countries, except Brazil.

If an international arbitration is conducted in the territory of one of the parties, the Convention provides that the arbitrator's decision is essentially equivalent to the final judgment of the highest court of the land in all the parties to the Convention. For example, one arbitrator in Switzerland can decide against, say, IBM for a \$1 million. If IBM refused to pay voluntarily, the winning party can go to a U.S. district court in New York and have that decision recognized and enforced against IBM assets in New York. The exceptions for enforcement and execution are very narrow, relating mainly to bias on the part of the arbitrator or lack of notice to the losing party. In practice, enforcement is almost automatic around the world.

"America Firsters" might call all the above a spider's web. I like to think of it as an emerging network that links countries and peoples together, for their mutual benefit. For example, it is unthinkable to imagine Germany attacking Belgium and France today. Rather, the countries are cooperating economically and otherwise.

I would like to end on that upbeat note. However, we have entered a period of economic slowdown and social unrest in large

13. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

parts of Asia and Russia, and possibly elsewhere. We need more than ever to expand the network of international norms and rules—of ties—and make changes in them as circumstances warrant. Maybe someday there will be such a network of ties in South Asia that a war between India and Pakistan will also be unthinkable and impossible. It is in the U.S. interest, and that of other countries, to promote the continued progressive development of international law.