

COMMENTARY

International Law and National Security

By ARTHUR J. GOLDBERG*

In writing on the subject of international law and national security, I commence with the observation that, for all too long, international law and international tribunals have been regarded as the exclusive province of the Department of State, its legal advisors, and nongovernmental international lawyers and academicians.

No longer so. As this Commentary shall point out, increasingly, international law tribunals are a political issue and an important aspect of our national security and strategic planning.

The fact is that international law and its tribunals have become intertwined often to the discomfort, in varying and often differing degrees, of the Secretary of State, the Secretary of Defense, the Joint Chiefs of Staff, the National Security Advisor, academics, and of course the President, who as the organ of our Nation in foreign affairs and Commander in Chief of our armed forces, must choose between the conflicting views of his principal advisors.

The object of our foreign and strategic policy is to serve our national interest in a thermonuclear age where survival is still an open question. Our goal is not to wage war, unless this is forced upon us, but to keep the peace. We are warned in the Bible that those who take the sword will perish by the sword.¹ Adlai Stevenson aptly said that the human race is a family, that all men are brothers, and that all killing is fratricidal.²

* Permanent Representative of the United States to the United Nations; former Associate Justice of the United States Supreme Court; Distinguished Professor of Law Emeritus, University of California, Hastings College of the Law.

1. *St. Matthew* 26:52: "Then said Jesus unto him, Put up again thy sword into his place: for all they that take the sword shall perish with the sword."

2. Nearly twenty-five years ago, Adlai Stevenson voiced a sentiment which we often think of as a current trend:

For, on this shrunken globe, men can no longer live as strangers. Men can war against each other as hostile neighbors, as we are determined not to do; or they can co-exist in frigid isolation, as we are doing. But our prayer is that men everywhere will learn, finally, to live as brothers, to respect each other's differences, to heal each

Our hope for world peace largely depends on our ability to accept the rule of law in the international sphere rather than resort to force to settle disputes.

If protection of human rights is essential to peace, as President Reagan has said,³ then compliance with treaties and agreements, such as the United Nations Charter and the Helsinki Accords,⁴ the very essence of international law, is imperative.

We live in an unruly world which, all too often, cynically subscribes to the dictum of Clausewitz: "War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means."⁵

This real political view is an expression that what nations really respect is not law but political power. Besides, we are told, this is an age of revolution, of deep differences of values between East and West and between North and South. And since law, domestic and international, derives from values, this revolutionary era is said to be going through what one distinguished critic calls "a withdrawal from the legal order," in which sheer power is determinative of world affairs, and international law and its agencies, in particular, have become little more than a mockery.

My own conception leads me to a very different conclusion.

First, we must beware of framing the argument in such a way that law, domestic or international, and power, become antithetical. Law and power operate together. Power not ruled by law is a menace; but law not served by power is a delusion. Law is thus the higher of the two principles; but it cannot operate by itself.

Second, law ultimately cannot be derived from power alone. On the contrary, law springs from one of the deepest impulses of human nature. No doubt the contrary impulses to fight and dominate often prevail; but sooner or later law has its turn. In one of the decisive moments in the

other's wounds, to promote each other's progress, and to benefit from each other's knowledge. . . .

. . . .

Perhaps younger people are especially sensitive to this growing conviction that nowadays all wars are civil wars and all killing is fratricide.

Stevenson, *The Hard Kind of Patriotism*, HARPER'S MAG., July, 1963, at 31, 34.

3. Reagan, *A Foundation for Enduring Peace*, DEP'T OF STATE BULL., Dec., 1985, at 1, 6 (Address before the 40th session of the United Nations General Assembly, New York, Oct. 24, 1985).

4. Conference on Security and Co-Operation in Europe: Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975). See generally J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 356-58 (9th ed. 1984).

5. C. VON CLAUSEWITZ, ON WAR 119 (A. Rapoport ed. 1982).

history of Anglo-American law, King John thought he could impose his arbitrary will by force; but the barons insisted upon a rule of law—the Magna Carta—to restrain the sovereign's arbitrary will.⁶

Thus, the King became subject to the law, and new proof was given of the strong human impulse toward law and the peace that law brings. In the history of this country, this impulse has been especially strong from the beginning, and found its highest expression in our written Constitution.

My third point flows from the second. Because law responds to a human impulse, it rests on much more than coercion. Law must have the police power, but it is by no means synonymous or coterminous with police or military power. It is much larger in its conception and in its reach. It builds new institutions and produces new remedies. It channels the forces of change and keeps them peaceful. People and countries obey law not only out of fear of punishment, but also because of what law does for them: the durability and reliability it gives to institutions; the reciprocity that comes from keeping one's word; and the expectation, grounded in experience, that the just process of law will right justifiable wrongs and grievances. All the police power in creation, nationally or internationally, cannot, in the long term, uphold a system of law and does not meet these affirmative expectations.

Of course, law must recognize that to "provide for the common defense,"⁷ as our Constitution provides, is a primary goal of any organized society. The rule of law cannot be a national suicide pact.

These concepts—accepted, by and large, at home—are far from realization in international and security affairs. This is not to say that international law is merely an abstraction. Interestingly, it may have its greatest import in security matters. The ancient law of the seas is still the bedrock of the concept of freedom of the seas, dear to our Navy and to all maritime powers. For those who persist in the belief that the norms of international law are not concerned with strategic considerations, let me cite a few other examples to the contrary. Military aircraft, as we were reminded in our air strike against Libya, may not, without permission, fly over another nation's air space.⁸ Another reminder occurred during the Yom Kippur war—prisoners of war are entitled to the protection of the

6. See generally W. McKECHNIE, *MAGNA CARTA* 3-47 (2d ed. 1914).

7. U.S. CONST. preamble.

8. See *U.N. Vote Adopts Resolution Rebuking U.S. Libya Raid*, N.Y. Times, Nov. 21, 1986, at A13, col. 6; *A New War—And New Risks*, U.S. NEWS & WORLD REP., Apr. 28, 1986, at 20.

Geneva Convention.⁹ Instruments of mass destruction, namely nuclear weapons, may not be deployed in space—the Outer Space Treaty.¹⁰ The Test Ban¹¹ and Non-Proliferation Treaties¹² are important additions to this illustrative list. And, of course, we are currently negotiating arms control treaties with the Soviets at the Summit and in Geneva.

I could cite many other treaties but those mentioned are illustrative and their implications for national security self-evident. Treaties are not only the supreme law of the land under our Constitution,¹³ they also constitute an essential element of international law.

There are other norms of international law—some traditional and others established by custom, agreements, or treaties. Many have strategic implications. Without international law, war criminals would be immune from prosecution;¹⁴ short wave radio broadcasts would drown each other out;¹⁵ ships and aircraft would collide in the night; nuclear plants would escape inspections;¹⁶ terrorists would be immune from apprehension and extradition;¹⁷ international business contracts could be violated with impunity;¹⁸ travellers would lack the protection of their governments;¹⁹ infectious diseases, pests, and pollution would erode frontiers all the time;²⁰ and diplomats and soldiers—who are supposedly full-time

9. Geneva Convention on Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 135. *See also* J. STARKE, *supra* note 4, at 505-507 (discussing the 1977 supplements to the Convention, and the application of the Convention's protections to persons involved in "non-war" hostilities").

10. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

11. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *opened for signature* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43. *See also* G. VON GLAHN, *LAW AMONG NATIONS* 177-78 (4th ed. 1981).

12. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161. *See also* J. STARKE, *supra* note 4, at 302-03.

13. U.S. CONST. art. VI, cl. 2.

14. *See generally* J. STARKE, *supra* note 4, at 59-62 (discussing the Nuremberg Tribunal, and the Genocide Convention, 78 U.N.T.S. 277 (adopted by the U.N. General Assembly, Dec. 9, 1948)).

15. *See, e.g.,* International Telecommunications Satellite Consortium (INTELSAT), the principal details of which are discussed in DEP'T OF STATE BULL., May 3, 1971, at 569-72.

16. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 12, at art. III; *see also* J. STARKE, *supra* note 4, at 303 & n.13.

17. *See generally* J. STARKE, *supra* note 4, at 97-98.

18. *See generally id.* at 359-61.

19. *See generally id.* at 330: "The right to diplomatic protection abroad is an essential attribute of nationality. . . . [A]s early as *Calvin's Case* [7 Co. Rep. 1a (1608)], it was ruled that allegiance and protection are the correlative aspects of nationality."

20. *See* Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, T.I.A.S. No. 1808, 14 U.N.T.S. 185.

practitioners of power politics—would be unable to carry on their business.²¹

But, what are we to conclude when law directly confronts political conflict and violence among nations—the most strategic implication of all?

The basic international law here is in article two, paragraph four, of the United Nations Charter: “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”²² As the Charter embodies this law, so the United Nations as an organization should be, ideally, the court of last resort in seeing that it is adhered to.

The framers of the Charter did not assume that the Security Council would always be able to meet its responsibilities. By providing for a great power veto,²³ they recognized the divisions of power and the paralysis that these divisions might cause. And most importantly, they reaffirmed the inherent right of self-defense against aggression and endorsed regional arrangements for security and common defense.²⁴

The United Nations system of peace and security, then, depends upon the individual actions of states as well as the collective actions of the Organization. It is a most fragile and imperfect system, to be sure, as the record shows.

The inadequacies and irresponsibility of the United Nations and the politicization, on occasion, of the International Court of Justice point up the frustrating difference between the domestic and the international realm. On the Supreme Court, I soon learned that the most satisfying words are four in number, and they appear at the end of a Court decision: “It is so ordered.”

The U.N. system is bereft of these judicial and enforceable words. It is imperfect, but the only one we have. The founding fathers of the United Nations conceived of an international utopia in which a few super-powers would use their power peacefully to settle the affairs of the world, much as the major powers of Europe did in the century after the

21. See, e.g., Vienna Convention on Consular Relations and Optional Protocol on Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

22. U.N. CHARTER art. 2, para. 4.

23. *Id.* at art. 27, paras. 2 & 3; see also L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 215-31 (3d ed. 1969).

24. U.N. CHARTER art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs”); *id.* at art. 52, para. 1 (“Nothing . . . precludes the existence of regional arrangements . . . for dealing with . . . maintenance of international peace and security . . .”).

Congress of Vienna.²⁵ And they mistakenly assumed the Soviet Union shared this dream, only to find otherwise.

We should remember, however, that when the rule of the Concert of Europe finally fell apart,²⁶ two world wars ensued. This happened in great part because, in large areas of the world, the international order of the nineteenth century did not redress grievances, but merely submerged them until in our own century they erupted in revolution and war.

The international law and world security we should seek is different. It should extend impartially to white and black, north and south, old and new, and super-powers and countries lacking in nuclear weaponry and large conventional forces. It would still be imperfect; it would still depend for its effectiveness on the willingness of the stronger nations to put their power at its service. But it should embrace in a spirit of equality all the nations, races, and cultures of the world, and it should address itself to the real troubles of mankind: the menace of nuclear destruction, the danger to civilized societies of wanton terrorism, poverty, and the deprivation of human rights. If it does, and it will take some doing, it will surpass even the hundred years of peace of the Congress of Vienna, which was based on the subjection or impotence of half the world's peoples.

It must be acknowledged, as I have said, that the United Nations is not yet the agency to achieve such a world order based on the law of the Charter and the norms of international law. Thus far the members lack the common will to make it so. And the World Court, as now constituted, needs revision to meet the standards of a truly impartial and nonpolitical judicial tribunal. But if we are to achieve this goal, abolishing the World Court or the United Nations is not the answer; we must persist in our efforts to convert the World Court from a political tribunal to a truly independent judicial one, and to make the United Nations a genuine and effective body to ensure peace and security.

Our country rather should take a strong and principled stand for revision of its imperfections, in defense of the rule of law applied fairly and without political considerations.

25. After the experience of the Napoleonic wars, and at the instigation of Prince Metternich, the Congress of Vienna convened in September, 1814 and lasted through June, 1815. See generally H. NICOLSON, *THE CONGRESS OF VIENNA* (1946); H. KISSINGER, *A WORLD RESTORED* (1957).

26. For a concise overview of the successes and failures of the Concert, see R. ALBRECHT-CARRIE, *CONCERT OF EUROPE* (1968). Although some historians consider the Crimean War (1854-55) as putting an end to the Concert, Albrecht considers the resolution of the Balkan Wars (1912-13) to be a "good example of the Concert at work," and places its finale at the outbreak of World War I. *Id.* at 359.

We need always to bear in mind that our Nation derives its great influence in the world not only from great economic and military power, but also from the fact that our basic law and our national outlook are premised on the equality, dignity, and human rights of all persons.²⁷

The way to peace in this turbulent age is to keep to this national vision; to work with all our might for the establishment of a structure of international law and institutions that will be reliable, impartial, and just to all nations and peoples. For though law alone cannot assure world peace and security, there can be no peace without it. Our national power and all our strategic policies should operate in the light of this self-evident truth.

27. U.S. CONST. preamble. *See also* Declaration of Independence para. 2 (U.S. 1776).