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Dean Rusk International Law Center

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### No. 2 - The Dean Rusk Lectures at the Dean Rusk Center

Eric Stein

*University of Michigan School of Law*

Louis Henkin

*Columbia University School of Law*

Abiodun Williams

*United Nations Office of the Secretary-General*

Manuel Medina Ortega

*European Parliament*

Gabriel M. Wilner

*University of Georgia School of Law*

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*Occasional Papers*

# Dean Rusk Center

University of Georgia School of Law

*Number 2*

## The Dean Rusk Lectures

at the Dean Rusk Center

Democracy Beyond Nation-State: On World  
Trade Organization and European Union  
*Professor Eric Stein*

Human Rights, Constitutional Rights  
*Professor Louis Henkin*

The United Nations and Peace Operations  
*Mr. Abiodun Williams*

The United States and Europe: Political  
Cleavages and the Use of Law  
*Dr. Manuel Medina Ortega*



## **PREFACE TO THE OCCASIONAL PAPERS**

The Dean Rusk Lectures series at the Dean Rusk Center was organized in the fall of 2002 to celebrate the twenty-fifth anniversary of the founding of the Center and, in particular, to pay tribute to Professor Dean Rusk, fifty-fourth Secretary of State of the United States and Samuel H. Sibley Professor of International Law at the University of Georgia. It was Professor Rusk who provided the inspiration for the Center's creation and its continuing role at the School of Law and the University.

The papers delivered by the four distinguished scholars form the content of this second Dean Rusk Center Occasional Paper. Issues of legitimacy-democracy in the activities of integrated international and supranational organizations are dealt with in the first paper by Professor Eric Stein. Professor Louis Henkin offers incisive comparisons and contrasts on the nature and sources of human rights in international law and rights under the Constitution of the United States. The central role of the United Nations in peace operations is explained in the paper by Mr. Abiodun Williams, the director of strategic planning for the office of the Secretary-General of the United Nations. Professor Manuel Medina Ortega, MEP, presents a broad historical and contemporary view of the situation of Europe in its relationship with the United States.

— *Gabriel M. Wilner, Executive Director*

## ***THE DEAN RUSK CENTER***

The *Dean Rusk Center—International, Comparative and Graduate Legal Studies* functions as the international dimension of the teaching and other scholarly activities of the University of Georgia School of Law. The Center was established in 1977 to expand the scope of research, teaching, and service at the University of Georgia School of Law into the evolving international dimensions of law. The Rusk Center and International and Graduate Legal Studies, which merged in 1999, play an active role in international law and policy, organizing and hosting conferences, colloquia, and visiting scholars, and undertaking international research and outreach projects. The Center serves as a nucleus for enhancing collaboration between School of Law faculty and students, the Law School community, and diverse international partners on foreign and transnational legal and policy matters.

Through collaboration, partnership, and exchange, the Rusk Center integrates international scholarship at institutional, state, national, and international levels. Within the School of Law, the Rusk Center serves as a forum for exchange of ideas and development of concrete international projects among students, faculty, staff, practitioners, and alumni. At the University of Georgia, the Center cooperates with units involved in other disciplines. As the institution of the University System of Georgia with a focus on comparative and international dimensions of law and a service mandate bolstered by broad scholarly reach, the Center has a unique vocation for serving its constituencies in law, government, and business through scholarship and outreach. Nationally, the Center collaborates with academic and professional legal institutions to promote integration of parallel efforts in international and comparative law. Finally, the Center plays an active role in international exchange and outreach. Collaboration with foreign universities, judiciaries, and governments has furthered institutional reform, capacity-building, and legal scholarship in Africa, Europe, Latin America, and the Middle East.

Documentation of scholarly work is essential to the dissemination of work associated with the Law School's international programs. The Occasional Papers series has now been initiated. The Rusk Center Monographs publish the results of work done at the Rusk Center, conference proceedings, and other work on diverse themes. The LL.M. Research Theses Series, housed at the Rusk Center library, records the extensive comparative and international research work prepared by the graduate students. The *Georgia Journal of International and Comparative Law*, which has published the results of a number of International Legal Studies Conferences, publishes articles on the international and transnational dimensions of law by faculty members who take part with colleagues at other universities in comparative law projects, by other legal experts, and by students.

Further information regarding the Dean Rusk Center—International, Comparative and Graduate Legal Studies may be obtained on the Center's web page: [www.uga.edu/ruskcenter](http://www.uga.edu/ruskcenter) or by writing to the Center.

## THE DEAN RUSK LECTURES

### ERIC STEIN

Hessel E. Yntema Professor Emeritus of Law at the University of Michigan Law School, Eric Stein holds Doctor of Law degrees from the University of Michigan and Charles University, Prague, and Honorary Doctor of Law degrees from both Free Universities of Brussels and from the West-Bohemian University in Pilsen, Czech Republic. He served in the U.S. Department of State and was adviser to the U.S. Delegation to the U.N. General Assembly and to the U.S. representatives at the U.N. Security Council and the International Court of Justice. He has taught and lectured widely at American, European, and Asian universities and at the Hague Academy of International Law. Professor Stein is former Honorary Vice President and current Counselor of the American Society of International Law.

#### ***Democracy Beyond Nation State: On World Trade***

***Organization and European Union*** . . . . . 1

Wednesday, September 25, 2002 - 3:00 p.m., Hatton Lovejoy Courtroom

### LOUIS HENKIN

At Columbia University, Professor Louis Henkin is University Professor Emeritus, chair of the Center for the Study of Human Rights, and director of the Law School's new Human Rights Institute. Professor Henkin previously held chairs in Constitutional Law and in International Law and Diplomacy. He was the Chief Reporter of the Restatement of Foreign Relations Law of the United States (1979-87), Co-Editor-in-Chief of the American Journal of International Law (1978-84), and president of the American Society of International Law (1992-94).

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Wednesday, October 2, 2002 - 3:30 p.m., Hatton Lovejoy Courtroom

**ABIODUN WILLIAMS**

Director of Strategic Planning in the Executive Office of the Secretary-General of the United Nations, Abiodun Williams served in three peace-keeping operations as Special Assistant to the Deputy Special Representative of the Secretary General in Bosnia and Herzegovina (1999-2000), Special Assistant to the Representative of the Secretary-General in Haiti (1998-2000), and Political and Humanitarian Affairs Adviser to the U.N. Preventive Deployment Force in Macedonia (1994-1998). He was Georgetown University Edmund A. Walsh School of Foreign Service Assistant Professor of International Relations and 1988-1994 graduate program academic adviser, teaching courses in International Organization, Theory and Practice of International Relations, and Honours Seminar on Power and Justice in the International System.

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Thursday, October 17, 2002 - 3:30 p.m., Walker Room, Dean Rusk Hall

**MANUEL MEDINA ORTEGA**

Dr. Manuel Medina Ortega has been one of Spain's members of the European Parliament for the Group of the Party of European Socialists for many years. He is a 1999-2004 term member of the Committee on Legal Affairs and the Internal Market and was its coordinator during the 1994-99 term. He currently is on the Committee on Citizens' Freedoms and Rights, Justice, and Home Affairs. He serves as a member of the delegation for relations with South American countries and MERCOSUR. Dr. Medina received his law degrees at La Laguna, Columbia (LL.M.), and Madrid (Ph.D.). He holds a chair and teaches at the University of La Laguna and at Complutense University, Madrid.

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Monday, October 28, 2002 - 3:30 p.m., Hatton Lovejoy Courtroom

**Democracy Beyond Nation-State:  
On World Trade Organization and European Union**

**Eric Stein**

Hessel E. Yntema Professor of Law Emeritus  
University of Michigan Law School

**Democracy Beyond Nation-State:  
On World Trade Organization and European Union**

**Eric Stein**

I was delighted to receive Professor Wilner's kind invitation to return to Athens and participate in the celebration of the 25th anniversary of the distinguished Dean Rusk Center. I have a particular, personal reason to be here. Dean was my superior in the Department of State and I claim him as an admired friend.

During his remarkable career in the State Department, Dean Rusk was first in charge of United Nations affairs. I shall return to this period of U.N. glory later in my talk. He was promoted to Deputy Undersecretary for Operations and then to Assistant Secretary of State for Far Eastern Affairs, probably the most critical troubleshooting job in the American foreign affairs establishment at the time of the war in Korea, the firing of General MacArthur, and the defense of Taiwan. This was all in the Truman administration. After leaving State in 1952, he served for eight years as President of the Rockefeller Foundation. With sharp foresight, he concentrated Foundation activities on aid to developing nations, a core problem facing the new century. Rusk returned to State in 1961 as Secretary of State to serve under Presidents Kennedy and Johnson for eight long years. This was the time of the Cuban missile crisis and finally of the Vietnam War. Professor Tom Schoenbaum, member of the law faculty of the University of Georgia (and I might say with some pride, a former student of mine at the Michigan Law School), wrote in his Rusk biography that, "Rusk made himself the rock against which crashed the successive waves of dissent" with American Vietnam policy.

Dean Rusk was a model of a devoted public servant, intelligent, well educated (he was a Rhodes Scholar at Oxford), "a man of a million ideas" (according to the *New York Times*), thoroughly decent, courteous in the Southern way, self-confident but not pushy, prudent to a point of being slow on decisions, and above all loyal, loyal to his Presidents, his staff, and his friends. As President Johnson put it, "He has courage, a Georgia cracker—when you are going in with the Marines, he is the kind you want to be at your side." In fact, he remained at Johnson's side until the bitter end at the price of great heartache.



If we had a chance to ask Rusk which of his assignments in the Department of State he cherished most, he would, I believe, after the characteristic pause for reflection but with little hesitation, name the Bureau of U.N. Affairs. This was a brand new bureau staffed by "outsiders" rather than the career foreign service that had dominated the department and looked down on us with suspicion. I was a junior member, an outsider joining directly from the Army. This was also my happiest time in the department, as a member of an extraordinary group with the highest moral and least bureaucratic restraint, with ideas moving up and down the hierarchy. Rusk, an Army Colonel coming from the Pentagon (Legion of Merit for service in the Burma theater of operations), was to provide legitimacy for us, and he did his best. He invented the concept of "parliamentary diplomacy" in an effort to bridge the chasm between traditional diplomacy and the new multilateral method in the U.N. It was the time of anticolonial campaigns centered on the U.N. General Assembly in New York. I was tempted, ladies and gentlemen, to devote my talk here to the heroic contests both in Washington and New York in Rusk's time, but I decided, rather than dwelling on the past, to focus on the present and the future on a set of problems in Rusk's favorite area, international organization. I am confident that he would approve.

A few thoughts about the context:

We live today still in the afterglow of the exuberant international institution building that followed the catastrophic Second World War. At the time, after 1945, "a new world order" was to replace the uncertain balance of power, autarchy, and protectionism of the 1930s. The new order (this really was a new order) was to consist of so-called "United Nations specialized agencies," that is, intergovernmental organizations with universal membership that would cover all major fields of human concern, including trade, shipping, health, labor, food supply, telecommunications, economic development and finance, and culture. The U.N. would be the prime political, security, and coordinating body at the center, with major powers to play a crucial role.

That system is substantially still in place, although its impact has fallen far short of the original expectations. Nevertheless, the number of intergovernmental organizations, IGOs, has continued to increase (from 123 in 1951 to 251 in 1999). This is because the solution of vital problems, such as security, protection of basic human rights, international trade and development, the surge of migration, environmental protection, and cross-border criminality has moved beyond the reach of individual states and has called for cooperation and institutional commitments on global and regional levels.

There has been another significant development parallel to the growth of IGOs: The idea and practice of democratic government has received a widening acceptance, particularly in the 1990s. Some scholars argue that, owing to the extensive treaty network on basic human rights and state practice, democracy, at least in its minimalist form (free elections and majority rule), has matured into customary international law; and that is certainly so on a regional basis in Europe, as I shall show later.

These two trends, the internalization of decision making in IGOs and the widening of democracy, have led to a tension that underlies the discourse on the alleged legitimacy-democracy deficit in international organizations.

Let me illustrate the issue: First, a Vermont lady farmer is cited in the *New York Times*, and I quote: "Why do we put up with a central organization that can tell us how we can farm and what we can eat?" The lady means, of course, the World Trade Organization in Geneva or World Food and Agriculture Organization in Rome. Second, a London based tobacco manufacturing company is furious that a group in Brussels presumes to dictate maximum nicotine content and ways of advertising its cigarettes, and it goes to court to block the law. Their target is, of course, the European Union (EU).

In a more general vein, the critics of the IGOs argue that superimposing a new level of normative activity, such as the World Trade Organization (WTO) or European Union (EU), on national systems of the member states makes citizen participation more remote and parliamentary control over the executive, which is generally loose in foreign affairs matters, even less effective. Of course, in a democracy like the United States, Congress approves U.S. adherence to the treaty setting up an IGO; and the President, who instructs the American delegates to an IGO, is accountable for their action to Congress and to the people. But in reality, this rationale for legitimacy dissipates quickly. Once established, the IGOs operate with little transparency or parliamentary and public scrutiny: The word used is "deparliamentarization," a rather inelegant but apt term invented in Germany. The IGOs are seen as being run by an elite group of national officials who are instructed by their respective executives, in cahoots with international secretariats, whose staff at times acts independently even of the IGO governing bodies.

In the last two decades or so, a "third force" has emerged in the shape of rapidly proliferating *non*-governmental organizations, the NGOs, reflecting the "civil society." They are helped greatly by the new information technology and

justly are credited with raising national and international awareness of vital issues and with efforts to open the IGOs to the scrutiny of public opinion. But skeptics see NGOs as self-elected advocates of special causes, unrepresentative of the general public, non-transparent as to their internal structure and finances, and often engaged in "an unholy alliance" with IGO bureaucrats and so-called "sympathetic states," "a romance," according to Kenneth Anderson, of questionable legitimacy.

Just a word about the many-splendored and changing concept of democracy: The range, to quote Robert Howse, includes representative, deliberate, corporate or consociational, republican, or communitarian democracy, or democracy as decentralization. For the purpose of this talk, I have in mind primarily representative democracy which, I believe, is still the preferred model. Democracy has developed within the confines of the state, and today it is still dependent for its protection first and foremost upon the state. But there is no way—here I am anticipating my conclusion—there is no way of transferring any variant of democracy, lock, stock, and barrel, to an international organization; and to my knowledge, there is no general theory on democracy beyond the nation state. We essentially are still at a stage of empirical studies.

There is another equally elusive concept I use here, the concept of "legitimacy." In a normative sense, it denotes, according to Thomas Franck, a system based on rules administered by an independent expert body. We can define it also in a social sense (J. Weiler) as a system accepted by the citizens. Democracy supports legitimacy in a system of governance—that is the connection between the two concepts.

So much for the context.

I propose to talk briefly about one global organization, the WTO with 144 members, and one regional organization, the European Union, presently with fifteen members and some ten more to go by 2004. I chose these two bodies because of their higher level of integration and because they have substantial direct or indirect effect on citizens, as illustrated by the lady farmer from Vermont and the tobacco company from London. Understandably, in an essentially technical IGO that is not faced with mediating between conflicting values and that relies on experts, the debate on the "democratic deficit" is less likely to arise (e.g., in the World Health Organization).

In the new post World War II order I mentioned earlier, the International Trade Organization (ITO) was to play a vital role in liberalizing international trade; but it foundered in the U.S. Congress. The U.S., a trade "hegemon" at the time, was not prepared to accept an institutional discipline in trade matters. The ITO was replaced by the General Agreement on Tariffs and Trade (GATT) which, in the following years, periodically was broadened by successive "rounds" of multilateral negotiations. Finally, the Uruguay Round vested the governance of the GATT in the World Trade Organization and at the same time extended the GATT's competence and discipline. It covers now not only trade in goods but also in services, aspects of competition, agriculture, government procurement, sanitary and phyto-sanitary measures, antidumping, subsidies and countervailing measures, and intellectual property, all this—according to John Jackson—in some 26,000 pages of text and annexes, although most of the text is negotiated tariff schedules.

Following the GATT pattern, rule making in the WTO requires, in principle, a consensus of all member states—essentially institutionalized diplomacy, which makes adoption of new rules extremely difficult. But the dispute settlement procedure, which in the GATT was viewed as an extension of diplomatic negotiations, has been refashioned into a compulsory, quasi judicial process that assures finality of the outcome, and in case of non-compliance provides for controlled sanctions by the winning against the losing member state. This is the famous "judicialization" of the GATT—another rather ungainly contribution to the new English vocabulary. Since 1996, 262 complaints have been notified by member states and more than sixty-one conclusions rendered by the panels and the Appellate Body of the WTO. The panels are organized on an ad hoc basis, but the Appellate Body is a permanent bench of jurists, independent of national governments. The system has worked well, with a high compliance rate, albeit often after delays. It lifts the organization on the ascending integration line and provides an element of legitimacy that is attached to the rule-of-law concept. But note the striking imbalance between the consensus-bound political institutions and the strong adjudication process.

I want to talk briefly about the legitimacy-democracy discourse in and about the WTO, first in the normative sense. The WTO adjudicating system, so goes the argument, is incompatible with national constitutions. This objection has been raised in a number of democratic member states including Canada, the European Union countries, as well as in the United States. In the U.S., the challenge of unconstitutionality has been based primarily on Article III of the Constitution. That Article, you will recall, vests the judicial power in the federal

judiciary and does not mention adjudication by an international tribunal. Other objections have been that Congress violated the Constitution by approving the WTO in the form of a congressional-executive agreement rather than a treaty, that the WTO violates the due process clause, and, generally, what John Jackson calls "the sovereignty argument." None of the challenges has prevailed.

Other claims of illegitimacy are based both on WTO procedure (in the normative sense) and on its policies and impact (in the social sense). The opposition, combining both these claims, culminated in massive demonstrations in Seattle in 1999 which were organized by a coalition of environmentalists, labor unionists, and "advocates of the poor," with a crowd of anarchists at the fringe. The environmentalists in particular were upset that a WTO dispute settlement panel held the U.S. in violation of the GATT Agreement by excluding the importation of Mexican tuna caught by fishing methods which were outlawed by Congress because of the damage to the dolphin population. Other charges were that the organization is dominated by business interests and major trading states to the exclusion and prejudice of other states and groups and in disregard of other values than trade; that it operates behind closed doors in a "club model" and lacks transparency. The secret, exclusive negotiations may have been tolerable under the GATT with its limited agenda, but could not be accepted in the WTO, with its broad competence (Daniel Esty). The meeting of Ministers that was to prepare a new round of negotiations for expanding WTO activity was aborted.

The need for reform designed to meet some of the criticism has been recognized widely, including by then-President Clinton, and a host of suggestions for improvement has been advanced. I can mention a few:

At the national level, the flow of information from the WTO to national parliaments should be increased. A special parliamentary committee in each member state should be charged with this task, and contacts between national parliaments and the WTO should be increased to include common sessions. A new, standing consultative body composed of members of national parliaments should be established at WTO headquarters to make accountability easier. This idea was suggested by deputies of the European Parliament about which I shall have more to say later. An advisory committee composed of NGOs might also be attached to the WTO to balance the present one-sided influence of producer interests with a representation of consumer and other public interests (Petersmann).

At the WTO operating level, it is proposed that actual decision making should not be confined to major powers—broad membership should have opportunity for genuine participation. Again, a major, if not principal, focus should be on transparency; minutes of some meetings should be published and private group representatives should be given regular opportunity to state their views during the negotiations. Contrary to judicial tradition, the panels and the Appellate Body sit behind closed doors, but some dispute settlement documents appear now on the Internet.

Finally, in the dispute settlement process, the list of panelists proposed by member governments should be diversified beyond the elite group of trade lawyers and diplomats to include, in particular, persons with fact finding experience, such as judges.

Lawyers in the audience may be interested that, according to the Appellate Body, both the panels and the Appellate Body have the authority to accept and consider unsolicited *amicus curiae* briefs from private groups, individuals, and non-party governments. This opens a new avenue of public participation. However, a "vast majority" of members is opposed to opening the proceedings to "outside" influences (Ehlermann).

Perhaps the most difficult problem currently facing the dispute settlement panels is the so-called "linkage" issue illustrated by the tuna-dolphin case referred to earlier. When the panel reviews a national, democratically enacted, non-discriminatory legislation, such as the act of the American Congress blocking imports in the tuna-dolphin case, should the panel be confined to the sole question whether the legislation restricts trade, as it obviously did in the tuna-dolphin case, or may the panel uphold the legislation by taking into account a legitimate national purpose, such as protection of environment, workers rights, or basic human rights? There is a basis for a broader approach in the preamble to the WTO agreement which lists values other than free trade as WTO objectives, such as protection of environment and sustainable development, and also in the text of exceptions from GATT obligations (e.g., public morals, human and animal life, conservation of resources). Actually, in a 1998 WTO case, a U.S. legislation designed to protect sea turtles against a prohibited way of fishing for shrimp was upheld by the Appellate Body. This holding, reached in complex proceedings, in effect "overruled" the narrow interpretation in the tuna/dolphin case.

The linkage issue raises also the problem of the relationship with, and competence of, other international organizations such as the International Labour Organization in regard to workers rights (the less developed countries would prefer ILO as a forum). Clearly the dilemma, which on the face of it is a question of treaty interpretation, bears upon the legitimacy in the social sense for those who believe that trade liberalization must not be the sole, overriding value in the WTO and that upholding a non-discriminatory national law, adopted through democratic process for a legitimate purpose, would advance WTO legitimacy. The current rules, of course, can be amended, but the consensus requirement makes this avenue difficult.

I shall return to some more radical reform proposals, bearing on the legitimacy-democracy issue, in the conclusion.

Turning now to the European Union: interestingly, the Union and WTO had common political origins in the aftermath of World War II. The WTO's ancestor was seen as a star in the constellation of the United Nations new order as I described it earlier; the European Community was to guarantee against another European civil war and provide a foundation for French-German conciliation. But consider the differences: WTO membership includes every conceivable political, social, and economic system; the European Union, on the other hand, consists of fifteen democratic states at a unique, high level of integration. Democracy, basic human rights protection, and the rule of law are prerequisites to membership in the EU and are enforceable by sanctions, and the Union champions democracy in its relations with third states, particularly in its aid programs. Isn't it a paradox, in a sense, that the democracy-legitimacy deficit debate has become most vocal in and about a democratic Europe?

The core of the Union competence has been free movement for goods, workers, capital, services, and entrepreneurs and common policies in agriculture, competition, and foreign commerce. Its powers have grown, both by interpretation and successive amendments of the constituent treaties, to include an Economic and Monetary Union with a common currency and a Central Bank. It also deals with common control of Union frontiers, judicial cooperation, and aspects of environment and consumer protection, social, educational, and cultural policies and it provides a foundation for common foreign and defense policies. In limited areas, the Union wields exclusive competence, while in others it shares competence with member states. We should keep in mind that the power and activities of the Union have had incomparably more direct and substantial effect on its citizens than in the WTO (think of the vanished German mark and French

franc, all replaced by the common Euro) and that means, of course, more Union citizen questions regarding its legitimacy.

The so-called Community method of governance consists of an interaction between its principal organs. The executive Commission, which is appointed by the member governments with the approval by the European Parliament, proposes legislation and policy to the Council of Ministers, composed of Ministers in the national government. The Council decides on the Commission's proposals, in most instances in "co-decision" with the European Parliament. That body now is elected by the people in the individual member states. A vast majority of decisions are made in a subculture of joint committees of national and Community officials and rubber-stamped by the Council. Finally, there is the judiciary—the Court of First Instance and the European Court of Justice—to which I shall return. There is also a European Council composed of heads of member states or government who provide general policy direction.

Formally, the Ministers in the Council are controlled by, and accountable to, their respective national parliaments. This, the approval by national parliaments of any new transfer of national powers to the Community, and the role of the European Parliament might appear to satisfy the representation and accountability requirements on which normative legitimacy is based. And, indeed, some believe that this is the case and that little more is required.

But the reality has been different. In the first place, as I suggested in the introduction, the role of national parliaments has been limited in foreign affairs and a timely flow of information to and from national parliaments has proved a serious problem. Most member parliaments have set up a special committee designed to improve control over Union institutions, but the effectiveness of these committees varies greatly (it has proved effective, for instance, in the U.K. and Germany).

Again, final decisions are made in a give-and-take negotiation in the Council behind closed doors. (Georg Röss calls the Council the Kremlin of the West.) And, since the Council today decides in most instances by a qualified majority, a Minister may be outvoted, whatever may have been his or her national mandate. This raises the question of old-time sovereignty and it differs dramatically from the consensus rule making in the WTO.

I should mention that some substantive progress has been made in reducing the secrecy in the process. The Council now is required to publish the minutes



of its legislative sessions (still held behind closed doors), the Commission's proposals appear on the Internet, and any party whose request for a document or information is denied has recourse to the Court; the Court, almost without exception, has upheld the request.

As for the European Parliament, so goes the argument of the critics, there are no real European-wide political parties, and the elections for it do not give rise to a genuine debate on European issues. The Parliament does have the power to dismiss the Commission, but, apart from its still limited role in legislative co-decision, it has no authority over the Council of Ministers, the kingpin in the system. At any rate, the level of integration in rule making, incomplete as it is, is much higher than the state-based consensus process in the WTO.

There is also a striking difference between the "dispute settlement" of the WTO and the Union judiciary. The European Court of Justice is an independent, permanent tribunal sitting in public. In its case law, the Court has drawn on the innovative provisions of the constituent Community treaties and on elements of national legal orders, as well as its own vision of what the Community should be; it has developed an original design based on direct effect of Community law on its citizens, supremacy of Community law over member-state law, and a scheme of judicial review in a unique, symbiotic relationship with courts of the member states. It "constitutionalized" what is a treaty-based organization by applying to it principles derived from constitutional law rather than international law. The Court (and the more recently created Court of First Instance) are open, not only to member states and other institutions, but also, in a more limited way, to individuals and firms. It has evolved its own scheme for the protection of basic human rights, which has been incorporated into the constituent treaty network, and there is now a Charter of Fundamental Rights still in a legally ambiguous state. It is widely agreed that a rule-of-law, as defined in the West at any rate, has been in place in the Union, with some gaps generally not wider than in the legal orders of the member states. Rule-of-law is, of course, a crucial component of normative legitimacy in any modern democratic form of governance.

At the national level, courts in some member states, particularly in Germany, have experienced some difficulties in reconciling the supremacy of Community law with what they conceived as mandates of their national constitutions. For obvious reasons the questions of constitutionality are much more plausible here than in the WTO; and they have raised a legitimacy question, particularly as regards standards of constitutional protection of basic rights. However, direct confrontation between national courts and the European Court has been avoided,

and sensible restraint is the obvious approach. As one would expect, the Court has been criticized like any working court, both for being too activist and for not being activist enough, but the basic scaffolding of the Community judiciary is not in question.

In contrast with the WTO, it is the lawmaking side of the Union that is the focus of the legitimacy-democracy deficit. The question then is: what could or should be done to fill the gap, if indeed there is one?

A veritable flood of reform proposals has been advanced in the current European discourse, offered by government officials, academics, and non-governmental civil society groups. The central forum for this debate at this time is the Convention on the Future of Europe, meeting in Brussels. It has 105 members, representing Union institutions, member state governments and parliaments, as well as civil society groups, and it is chaired by the former French President Giscard d'Estaing. It is expected to prepare recommendations for the periodic intergovernmental conference called for in 2004, which is to carry forward the integration process by drafting a final text. This text will be subject to approval by national parliaments, and in many countries probably put to referendums. So this is not a Philadelphia-type convention, although the central constitutional questions would be familiar to Madison or Hamilton (*The Economist*), and the crucial decisions will be made in closed sessions as was the case in Philadelphia. At any rate, the Convention pattern, which earlier was used successfully in drafting the Union Charter on Fundamental Rights, is an interesting innovation. Surprisingly, it has been completely ignored in the American media, and, even more surprisingly, has been given only sparse attention in Europe as well.

I can mention here only a handful of reform ideas, many of which go beyond alleviating the legitimacy-democracy deficiency. It might help to think of three categories of proposals:

The first category seeks incremental, essentially efficiency-motivated, adjustments. For instance, the first and unavoidable priority of Union business is the adjustment of its institutions to cope with the impending accession of as many as a dozen new member states. You can't have an effective executive Commission with twenty-seven or thirty members. The principle of rotation in the Commission membership has been accepted, but not the method; and the devil is in this "detail." In the same vein, there is much room for improvement in procedures (for instance, distinguishing between administrative and legislative acts) and providing for still more transparency. The constituent treaties, with all the amendments

and special protocols, are very difficult to work with and call for simplification and systemization.

The proposals in the second category contemplate major mutations still within the reach of reality, such as extending the powers of the European Parliament and qualified majority voting in the Council, introducing full Community discipline to some areas that have been handled thus far by intergovernmental cooperation, and defining the legal status of the Charter on Fundamental Rights. One idea is for the President of the Commission to be elected by the European Parliament which would mean more accountability and further politicization of the Commission. The division of competences between the member states and the Union might be defined somewhat more clearly, taking account of the principle of subsidiarity, an old canon law principle for limiting action by the center to instances where periphery cannot do better. Also, the Union defense and foreign affairs mechanism is to be strengthened to enable the Union to speak with a single voice in the world arena. A Union rapid deployment force of 60,000 is to become operational shortly.

But there are significant voices that view these and similar proposals as mere "palliatives." The prophets in the third category argue that only a new, full-fledged federal-type constitution can fill the legitimacy-democracy gap. So, for instance, the present Commission should be turned into a Union government and the Council into an upper chamber, a Senate, a bicameral European Parliament. But others abhor the idea of the Union as a traditional superstate (J. Weiler) with all the vices of a major nation state, with its own exclusory nationalism and excessive aggregation of central power. They argue that there is no European public opinion, no real European political parties, no common European identity that would sustain a federal type form of governance. And they offer a more plausible alternative: to preserve and strengthen the current unique supranational system in the image of a confederal rather than federal model. The voices of state governments would remain at the center of the system. The President of the Convention envisages a Union of European States closely coordinating their policies and managing certain common powers in a federal way. This would take account of the still pervasive linguistic, historical, political, ethnic, economic, and cultural differences among member state peoples; and these differences are bound to increase with the accession of new members. In this context, it also is proposed to make it easier for core members of the Union to transfer new powers to the Union institutions, with the understanding that others will join in due course. Actually, this "flexibility" already exists, for instance in the common

currency scheme. Only twelve of the current fifteen members have accepted the Euro.

From the perspective of practical politics, the radical ideas do not take into account the influential Euro-skeptics, particularly in the U.K. and the Northern member states. These Eurodoubters would want to move in the opposite direction, to re-nationalize certain extant Union competences, for instance in agriculture. And they point out that the French approved by a razor-thin majority the latest treaty amendment which slightly extended Union power, and it took the Danes and the Irish two referenda to stay in line.

I should mention, going back for a moment to the WTO, a comparable radical vision worthy of the prophets, a vision of restructuring the WTO: the idea of replacing state governments, which are now exclusive actors in the WTO, with private stakeholders, individuals, and firms. Those who believe that the WTO, a state-based intergovernmental system with global membership, could be "constitutionalized" like the European Union might take note of the statement by one of the WTO panels. That panel observed that, unlike the European Union, the GATT-WTO did not create a legal order that would comprise both the member states and their nationals and that it has only "indirect effect" on private operators even though, and I quote, "the multilateral trading system is, per force, composed . . . indeed, mostly, of individual economic operators." Howse and Nicolaidis rightly warn against "the naive notion of transplantation." On the other hand, the Ministers of the WTO member governments, meeting in Doha, Qatar, last year, outlined a series of areas to which the competences may be extended by a new consensus of member states in a new round of negotiations.

To conclude, I should like to revert to some of the ideas I raised in the introduction which bear upon the context within which both the WTO and the EU operate. There have been changes in the international state-based system, including the emergence of new actors, intergovernmental (the many IGOs), subgovernmental (regional, etc.), and nongovernmental (the many NGOs and even individuals). Their number and their influence on the behavior of states have grown, and in the words of the late Harold Jacobson, they hold a potential for spillover of democratic practices. The character of internal and external sovereignty of states is changing, but the states are not about to fade away. There is little evidence that the democracy-legitimacy gap can be filled by "Great and Desperate Cures" (John Bunyan in the year 1668). There is, however, a distinct need for creative, idiosyncratic arrangements commensurate with the respective levels of integration in international institutions.

This, ladies and gentlemen, is an anniversary celebration. Let's raise our virtual champagne glasses to wish the Rusk Center many happy returns in fond memory of its founders and first directors. The Center has flourished under the inspiration of Dean Rusk and under the leadership of Professors Rick Huszagh and Tom Schoenbaum, and currently of Professor Gabriel Wilner. We all want to wish it continued success.

# **Human Rights, Constitutional Rights**

**Louis Henkin**

Professor Emeritus

Chair, Center for the Study of Human Rights

Director, Human Rights Institute

Columbia University

# Human Rights, Constitutional Rights

Louis Henkin

I am pleased to be here at the invitation of Professor Gabriel Wilner, a former student, and I am pleased to speak at the Dean Rusk Center. Dean Rusk was my first "boss" in the United Nations Bureau of the Department of State, now more than fifty years ago. I respected him; I liked him. I am pleased that you remember him and that you remind the generations.

My subject is large; indeed it includes two (or three) large subjects. It may require that I speak some parentheses and some footnotes. But none of them is about September 11, 2001, or about terrorism, directly, though I may not avoid glancing over my shoulder at that date and at that subject, if only in a brief postscript on Human Rights in United States Foreign Policy.

## Rights, Generally

First, about *rights* generally: Rights is a philosophical, ethical, legal term. A right is a moral/legal claim *as of right*, not by grace, or love, or charity. For our purposes, a right is a claim upon society, which has a legal, moral obligation to honor the claim, to respect it, to ensure it, to help realize it.

## Constitutional Rights

Any meaningful discussion of rights in society needs an adjective. In the United States, famously, we speak of constitutional rights.<sup>1</sup> In the United States,

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<sup>1</sup>The idea of individual rights in society came out of the Enlightenment, and is credited in particular to John Locke and Immanuel Kant. The idea of rights is linked to the idea of popular sovereignty and to the myth of the social contract.

The spread of the idea of individual rights in society, I believe, owes much to the rise of Protestantism. The idea was converted to a political ideology in the eighteenth century, thanks to the writings of Thomas Paine, to the declarations in the original state constitutions, to Thomas Jefferson (in the American Declaration of Independence), and to the French Declaration of the Rights of Man and of the Citizen. It was constitutionalized in the state constitutions and in the U.S. Constitution and its Bill of Rights. Before the Age of Rights, justice and the Good Society were seen as the result of commitment to "duties,"

the most prominent use of rights is in the Bill of Rights, the popular appellation for the first ten amendments to the U.S. Constitution. Later, the Bill of Rights was supplemented, modified, by other constitutional amendments: the thirteenth, fourteenth, fifteenth, nineteenth, twenty-fourth, twenty-sixth.<sup>2</sup>

In the United States, rights are our hallmark, even though many of us are not quite sure what those rights are<sup>3</sup> or what they mean. The text of the U.S. Constitution is readily available, but not frequently read or accurately recalled; too many of us have not read it recently or do not recall it accurately. Rights are, deservedly, our pride, and we properly recall that we have had constitutional government, with a decent record of respect for rights, for more than two hundred years (without long interruptions since the Civil War).<sup>4</sup>

A discussion of rights in the United States requires a few additional parentheses to link to our second subject, human rights. Rights in the United States are "natural," as articulated, memorably, by Thomas Jefferson in the American Declaration of Independence: the rights to life, liberty, and the pursuit

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generally duties to God. For example, "Thou shalt love thy neighbor as thyself" did not confer a right to be loved. The neighbor, we might say, was the third-party beneficiary of our duty to God.

<sup>2</sup>I would include as a rights amendment, the sixteenth, the amendment that authorized a graduated income tax, without which we could not have the resources for what came to be known as economic and social rights.

<sup>3</sup>Some excuse for our ignorance is that not all of our Bill of Rights is actively "in play": today, for example, the Third Amendment prohibition on the quartering of troops in private homes. Some provisions of the Bill of Rights are in dispute as to what they mean, for example, the Second Amendment on the right to bear arms and its relevance today to owning rifles and handguns. And what each amendment means and includes requires interpretation, ultimately by the courts, since we have come to accept that the Constitution means what the courts say it means.

<sup>4</sup>Our important rights include those which cured the "genetic" defects in the original Constitution and the Bill of Rights: the abolition of slavery; the addition of a commitment to the equal protection of the laws; the "incorporation" of the Bill of Rights and its extension to protect also against violations by the states and state officials.



of happiness with which we are endowed by birth and which are "unalienable." Some are of the view that the natural rights character of the Bill of Rights is implied in the Ninth Amendment; but we cannot invoke those natural rights in the courts unless they can be found in the Constitution, as written, or as authoritatively interpreted. A different kind of footnote: Most of the rights we think of as constitutional are not. Many rights are given us by Congress under one or another of its enumerated, large, constitutional powers, notably the power to regulate commerce among the states; for example, the Civil Rights acts. Legislation also has added to and helped secure our right to vote.<sup>5</sup>

### **Human Rights**

Now to human rights.<sup>6</sup> Effectively, while constitutional rights are two hundred years old, human rights are a recent growth.<sup>7</sup> Human rights is a modern term. There were some stray, colloquial references, including one by John Marshall, but without initial capital letters on the words *human* and *rights*, and without any definition. Human rights came into the language—many languages—slowly, during and after the Second World War, conceived, I would suggest, by President Franklin Roosevelt in a famous address known as the Four Freedoms speech, in which he projected a *world order* in which four major freedoms—including freedom from want— would be enjoyed by all human beings everywhere. In 1945, human rights were enshrined in the Charter of the United Nations, which the United States helped to found. The Charter was ratified by the United States in 1945 as a treaty, and, therefore, is part of United States law under the Constitution. But human rights was not in common parlance, and they were not defined until 1948 in the Universal Declaration of Human Rights, an international instrument generally acclaimed as one of the most important international instruments of the last century.

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<sup>5</sup>A different footnote: Rights in the United States also are protected by state constitutions (for example, Georgia) and by state legislation.

<sup>6</sup>Human rights are universal rights, as implied in the word human, and commonly are described as "international." But, whereas national human rights are rights against the nation, international human rights are not rights against the international system. They are rights which the international system and international law recognize, promote, and protect, but they are rights against an individual's nation.

<sup>7</sup>There were rights in the common law of the American colonies and some wish to find rights, or the seeds of rights, in the Magna Charta.

What are human rights? And how do they differ from U.S. constitutional rights? Human rights<sup>8</sup> are the rights recognized, promoted, and protected by the international political system—essentially those proclaimed and enumerated in the Universal Declaration of Human Rights, rights which should be enjoyed by all human beings. Human rights were not characterized as natural, but have been treated as such: All human beings are born with them and are entitled to enjoy them in their own societies. Human rights are rights deemed essential to human dignity and are declared, defined, and justified by their source in that conception and by their purpose, to promote justice and maintain international peace.

Which are the human rights recognized and defined in the Universal Declaration? Many of them are familiar to us in the United States: a right to live under the rule of law; the right to life and liberty; rights to particular freedoms—freedom of speech, press, religion, association, privacy; a right to equality under the law, to freedom from discrimination on irrelevant grounds, such as gender and race; freedom to travel, within and outside one's country, and to return to one's own country, rights read into the U.S. Constitution but explicit in international instruments.

But universal human rights, as declared and defined in the Universal Declaration, have an additional, strong, extensive dimension. Every human being has economic and social rights: a right to food, shelter, health care; a right to education; a right to work and to rest. Like civil and political rights, economic and social rights, too, have to be realized, if only progressively, if only subject to available resources. Like constitutional rights, international human rights are not absolute. All rights are subject to the police power, the responsibility of government to safeguard health, safety, morals, and the general welfare, including the perceived needs of national security against external enemies.

### **Comparing Constitutional Rights and Human Rights**

A large difference between international human rights and U.S. constitutional rights, a difference which the world emphasizes and throws at the United States, is that economic-social rights are not constitutional. And the United States has not remedied that constitutional deficiency by comprehensive laws or by assuming international obligations to provide defined social-economic rights to

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<sup>8</sup>The human rights idea, a universal idea of rights born during the Second World War, became a universal ideology in the middle of the twentieth century. An ideology of rights essentially succeeded the ancient ideology which saw justice and the good society in duties rather than in rights.

all of its inhabitants and made such international obligations part of the law of the United States. There also are particular differences between U.S. constitutional rights and international human rights. For example, hate speech largely is protected by the U.S. Constitution but largely is prohibited by international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR). International human rights also include limitations on capital punishment and have moved toward total abolition; not so the United States.

I have suggested differences between U.S. constitutional rights and human rights—differences in the rights protected; differences in their history and theory, which also determine or shape the rights protected. U.S. rights are *positive* rights. Their protection is dependent on articulation in the Constitution, or in legislation (or, at least, in the common law). International human rights also can be seen as *positive* or *positivistic*, since they are established by treaty or by customary law. But there is also some *jus cogens*, some law of supreme character (such as crimes against humanity), and some soft law established by declarations and resolutions of authoritative bodies such as the U.N. General Assembly, that may serve as sources of international human rights. There are important differences in the political-legal universes in which these two systems of rights exist and operate. There are differences between the two systems in the institutions for creation, interpretation, and implementation of rights. The U.S. constitutional system includes a legislature (or legislatures) with power to define, add, and protect rights. Above all, perhaps, the U.S. constitutional system has an independent and supreme judiciary, the Supreme Court, which can effectively enforce and authoritatively interpret constitutional rights, and sometimes even amend them. (I cite as a particular example the Supreme Court's development of *liberty* and of *substantive due process*. The right not to be deprived of life, liberty, or property without due process of law has had radical interpretation, and far-reaching consequences for U.S. constitutional rights.)

In contrast, the international system has no authoritative interpreter, though it has grown some bodies with lesser authority, for example, the U.N. General Assembly, and an array of treaty bodies—committees established by treaty, such as the Human Rights Committee, CERD, CEDAW, CAT. On the other hand, the international system has developed only a loose network of institutions in the United Nations system and in regional organizations, as well as a universe of non-governmental organizations (NGOs), all contributing to making law, to interpreting it, and to inducing compliance with it, notably by "mobilizing

shame." (It continues to come as a surprise that governments can be shamed into compliance.)

Human rights and constitutional rights coexist. The influence of national rights on international rights is deep and old. But it is not sufficiently reciprocated. In some parts of the world, notably in Europe, in Latin America, and in South Africa, there are reciprocal influences between constitutional rights and international human rights. But to date there has been little international influence on U.S. rights and jurisprudence, and some authoritative voices in the United States have strongly resisted such influences.

### **Coda**

I sum up, and offer a coda, a postscript: I have suggested differences between U.S. constitutional rights and human rights—differences in the rights protected, some differences in their history and in their theory, which also shape the rights protected and their scope and content. There are defining differences in institutions for the creation, interpretation, and implementation of rights: a national constitution or legislation; above all, an independent judiciary with recognized supremacy, the U.S. Supreme Court whose authority is not questioned, as compared to the General Assembly of the United Nations, whose authority is often questioned; and regional courts and committees of inchoate political authority and influence. On the other hand, the international system has developed only a loose network of institutions in the United Nations and in regional organizations, as well as a small universe of non-governmental organizations, all contributing in some measure to making law, to interpreting it, and to inducing compliance, notably by "mobilizing shame." (It *continues to* come as a surprise that governments can be shamed into compliance.)

There are defining differences in the political-legal system in which each operates a constitution for a national system, as distinguished from international norms for more-or-less independent units in the international-state system, where only some of them have a domestic culture of right, of commitment to the rule of law. Inevitably, international human rights and U.S. constitutional rights became entangled in U.S. political culture and U.S. foreign policy. Should the United States join the International Human Rights Movement, promote and participate in human rights treaties and declarations and in their international implementation, for example, in sanctions against apartheid or trade sanctions against the Soviet Union? During the Cold War, respect for human rights became an important factor in U.S. monitoring of human rights around the world, although the U.S., it was charged, did not always scrutinize the human rights

record of its anticommunist allies. After the Cold War ended, the United States joined in efforts to promote democracy and respect for human rights in the former Soviet empire. But the U.S. has courted, and continues to court, criticism for its own exceptionalism, for failure to accept economic and social rights as human rights at home, for inadequate support for economic and political development and other assistance to help other countries achieve greater respect for the economic and social rights of their inhabitants, and for its resistance to the establishment of and participation in international human rights institutions, such as the International Criminal Court.

Slowly, a universal, transnational, international human rights ideology has emerged; a human rights community has grown. It is not as effective as the U.S. constitutional ideology, but it works remarkably. Why do governments expend tremendous amounts of money and effort to promote and enforce human rights? Why can they be shamed into significant measures of compliance with universal standards?

Finally, the matter I have suppressed, avoided: September 11, 2001. As a result, the United States has faced accusations of violation of international human rights as well as of rights under the U.S. Constitution. There is an unfortunate postscript to write on the tension between the age of rights and the age of terrorism. It is too early to tell the outcome. Is the age of terrorism forever? For how long? Will the age of rights survive it? I hope so; I believe so; I think so.

# **The United Nations and Peace Operations**

**Abiodun Williams**

Director Strategic Planning Unit

Executive Office of the United Nations Secretary-General

# **The United Nations and Peace Operations**

**Abiodun Williams**

Members of the faculty and students of the University of Georgia, ladies and gentlemen: It is a privilege to be invited to give a Dean Rusk Lecture at the Center that also bears the name of one of America's most distinguished Secretaries of State.

I can vividly recall meeting Dean Rusk in 1984 at The Fletcher School of Law and Diplomacy where I was a graduate student. He came to The Fletcher School to participate in a round table on United States foreign policy with other former Secretaries of State, in commemoration of the school's fiftieth anniversary. He gave a brilliant and riveting presentation. He had a remarkable lack of the pomposity which some might inevitably associate with those who have wielded great power.

As a servant of the United Nations, I often think of Dean Rusk's observation in a speech to the General Assembly in October 1968:

This Organization was not created to preside over an earthly paradise; it was created to enable frail human beings to find a way to resolve their disputes by peaceful means and to join hands in conquering their difficulties, animosities, passions and fears—all in fidelity to the Charter.

Dean Rusk reminds us that the United Nations exists in an imperfect world; that it is an instrument for making and maintaining global peace, as well as promoting international cooperation; and that the Charter has unique moral and legal authority. Dean Rusk's wisdom is of continuing relevance, especially in the context of our times.

I have chosen as the subject of my lecture, The United Nations and Peace Operations. You will notice that it is slightly different from the one that was publicized, The United Nations and Peacebuilding. This is because the broader term, peace operations, covers both peacekeeping and peace building, which are complementary and sometimes overlapping activities.

As a former peacekeeper, I come to this subject with, I hope, some level of experience in the trenches. I will offer, for what they are worth, my personal views, which are not necessarily those of the United Nations. My basic views can be stated simply. First, states are still the primary holders of political power

in the international system and it is an illusion to view the United Nations as an emerging world government. Nothing demonstrates this more vividly than the flags of 191 countries that snap in the breeze on Turtle Bay. Second, peacekeeping will remain the United Nations' main operational tool in matters of international peace and security for some time to come. Member States have shown no appetite for giving life to the U.N. Charter framework for a universal system of collective security. Third, the United Nations *can* keep the peace when it is given the right mandate, resources, organizational structure, and political support. Finally, no other organization can substitute for the legal and moral authority of the United Nations.

For good or ill, the United Nations still is obliged to operate within norms first laid down at Westphalia three and a half centuries ago. The organization is no stronger than the collective will of the states that are its members and political masters. What really matters is the willingness of states to act, to mobilize resources and take risks. These are the firm realities of an intergovernmental organization.

It is hardly necessary to point out to this audience that the term peacekeeping does not occur in the U.N. Charter. Though not envisaged by the founders of the United Nations, peacekeeping is consistent with the aims and principles of the organization. The fathers of peacekeeping, Ralph Bunche, Dag Hammarskjold, and Lester Pearson, would be surprised at the evolution of the model they developed to manage and resolve international disputes in a world haunted by the Cold War. They well understood the principles and parameters of classical peacekeeping.

The cardinal principles, which guided peacekeeping for four decades, were host government request and consent, use of force only in self-defense, and non-use of troops from the five Permanent Members of the Security Council. United Nations peacekeepers were charged with monitoring cease-fires and armistice agreements, and overseeing the withdrawal of forces from the battlefield.

The United Nations operation in the Congo from 1960 to 1964 deserves special mention because of its historic significance and contemporary relevance. Perhaps it is symptomatic that in the map room in the executive office of the Secretary-General on the thirty-eighth floor of the U.N. secretariat hangs the framed final telex of 30 June 1964 from Leopoldville to Ralph Bunche. The Congo operation foreshadowed the challenges facing post-Cold-War peacekeeping in general. It was deployed in a civil conflict and chaotic political



conditions. In a notable departure from established doctrine, the mission's initial stringent peacekeeping mandate was expanded to allow it to use military force to end the secession of Katanga. It was the first peacekeeping operation to include a large number of civilian personnel, some two thousand at its peak. The Congo conflict claimed the lives of 250 peacekeepers, the life of Dag Hammarskjöld, and sparked a constitutional and financial crisis at the United Nations.

A decade ago, freed at last from Cold-War constraints, the United Nations had eighteen missions and over seventy thousand personnel in the field. There were exaggerated expectations of a "new world order" and the "end of history," but there also was unprecedented international cooperation in addressing some long-standing conflicts including Mozambique, Namibia, Cambodia, and El Salvador. The scale and complexity of the tasks given to peacekeepers were extended to monitoring elections, demobilizing armed factions, delivering humanitarian aid in combat zones, protecting safe areas, removing antipersonnel mines, investigating human rights abuses, assisting the return of refugees and displaced persons to their pre-war homes, and training local police forces to uphold the rule of law. In the case of Cambodia, and more recently in Kosovo and East Timor, peacekeepers have assumed transitional authority for those territories until the conclusion of a representative constitutional process and formation of legitimate institutions. In Afghanistan, the United Nations assistance mission is supporting the political, governance, and peace-building processes while simultaneously responding to urgent humanitarian and recovery needs. In the aftermath of the Cold War, peacekeeping was seen as a panacea for communal conflict and failed states.

The *critical* distinction between peacekeeping and peace enforcement was blurred in the new post-Cold War missions, with tragic consequences in Bosnia. Peacekeepers were deployed in the *no-man's-land* between peacekeeping and peace enforcement. The United Nations was pitch-forked into an extremely difficult situation without a proper mandate or adequate resources. Eighty-two Security Council resolutions and 140 presidential statements do not constitute a viable mandate. The provision of humanitarian aid became a substitute for the political will required to end the fighting.

Bosnia taught another tough lesson. In peacekeeping, one should not confuse impartiality with neutrality towards aggression. That confusion led to the massacre at Srebrenica, the worst atrocity of the Bosnian war, a terrible symbol of the impotence and irresponsibility of the community of nations in the face of

evil. Srebrenica tragically demonstrated that it is *immoral* to make promises and not to uphold them.

In former Yugoslavia, the U.N.'s peacekeeping record was not one of total failure. The United Nations deployed an unprecedented preventive deployment mission in Macedonia, the perennial tinderbox in the Balkans. The operation was a success until its premature termination. The United Nations Preventive Deployment Force (UNPREDEP) demonstrates that with the right mandate, resources, organizational structure, and political support the United Nations has the capacity and experience to manage complex conflicts. Security Council members demonstrated political will and took decisive action to ensure that war did not spill over into that troubled republic. The Council gave us a clear mandate with realistic military and political objectives. The mission's objectives were defined in three sentences—a record by legislative standards. Peacekeepers were deployed rapidly and the first Blue Helmets were in place within three weeks. Ford observed in Shakespeare's *The Merry Wives of Windsor*, "Better three hours too soon than a minute too late." When the Security Council decides to establish a peace operation, it is vital that the various components—military, civilian police, civilian staff—arrive swiftly, even if the early arrivals are only temporary. Speed is as important as firepower and size in peacekeeping. UNPREDEP was supported with adequate resources and one thousand Nordic and U.S. troops, combining the long peacekeeping experience of Nordic battalions with the robust credibility of American ground troops. Our multinational United Nations military observers and civilian police conducted regular border and community patrols, especially in villages with sensitive inter-ethnic relations.

On the authority of our "good offices" mandate, we persuaded ethnic Albanian political parties not to boycott the 1994 presidential and parliamentary elections and encouraged the government to include ethnic Albanians in the cabinet. We defused the crisis surrounding the Albanian-language University of Tetovo and prevented the dispute from igniting a violent ethnic confrontation. We promoted dialogue among the various political forces in the country and, as Winston Churchill remarked at a White House luncheon in 1954, "To jaw-jaw is always better than to war-war."

We recognized that unless sustained efforts were made to address the structural causes of violent conflict, preventive measures will not have long-lasting effects. UNPREDEP initiated a number of projects to create jobs, reduce

poverty, and foster social integration. The mission also organized training programmes for social welfare workers and for police officers in crime prevention, drug trafficking, and narcotics control. UNPREDEP's peace-building efforts reinforced its military, political, and diplomatic action and enhanced local support for the mission. UNPREDEP was a bargain for the international community. It cost fifty million dollars annually. Some six billion dollars have been spent in reconstruction assistance in Bosnia and Herzegovina since the Dayton Accords ended the war six years ago. There is no doubt that preventive action is cheaper than post-conflict enforcement and reconstruction.

The sobering experiences of the United Nations in Bosnia, Rwanda, and Somalia led to a dramatic decline in peacekeeping. After the fall of Srebrenica in 1995, United Nations credibility was at a low point; it was not even invited to Dayton. The death of peacekeeping was widely predicted on the grounds that the U.N. was incapable of conducting peacekeeping in an era of homicidal ethnic and religious hatreds and separatism. When the former Under-Secretary-General for Peacekeeping, Bernard Miyet, was appointed in 1997, many people called him the "commissioner of liquidation" of U.N. peacekeeping.

The international community turned to regional organizations to assume peacekeeping tasks. NATO (the North Atlantic Treaty Organization) took on a peacekeeping role in Bosnia and Herzegovina, OSCE (the Organization for Security and Cooperation in Europe) in Croatia, ECOWAS (the Economic Community of West African States) in Liberia and Sierra Leone, and CIS (the Commonwealth of Independent States) in the Caucuses. However, the general record of regional peacekeeping has proved to be mixed. We have learned that few regional or sub-regional organizations have the necessary capacity for effective peacekeeping.

The framers of the U.N. Charter envisaged that regional organizations had an essential part in the maintenance of international peace and security. However, the founders of the United Nations recognized the regional role within a wider construct of global order based on universal legal norms and values. Any regional contribution to universal conflict management should not be an exclusive enterprise. It should remain anchored within an inclusive global organization.

This brings me to my point about the unique qualities of United Nations peacekeeping. When it comes to international peacekeeping, no other organization can match the United Nations' legal and moral authority. This

authority rests on its Charter, its universal legitimacy, and its secular pope—the Secretary-General.

The U.N.'s legal authority has operational advantages, particularly when dealing with new states seeking to affirm their international personality through United Nations recognition and membership. When the Security Council deployed peacekeepers in Macedonia, the country was not yet a member of the United Nations or any of the European institutions. Very few states had recognized Macedonia. The small landlocked country had troubled relations with its neighbors who challenged its right to independence. The presence of Blue Helmets in Macedonia legitimized its sovereignty and independence.

Similarly, in Bosnia and Herzegovina a major challenge is to build a state identity. The U.N. Mission in Bosnia and Herzegovina has created two multiethnic Bosnia and Herzegovina United Nations civilian police contingents, which served in East Timor, and two groups of U.N. military observers, deployed to the U.N. mission in Ethiopia and Eritrea. A multiethnic composite logistics unit of over 120 personnel has been trained for deployment to other peace operations. These projects underline the sovereignty of Bosnia and Herzegovina and demonstrate that it is an actor in the community of nations. After a few years of unpopularity and retrenchment, United Nations peacekeeping is again in fashion. Transitional administrations have been established in Kosovo and East Timor, and there are new operations in Sierra Leone, the Democratic Republic of the Congo, Ethiopia and Eritrea, and Afghanistan.

Secretary-General Kofi Annan recognized that, with the start of another era of broad engagement in peacekeeping, it was vitally important to learn the lessons of the recent past and apply them to the future. He commissioned a major review of peace operations by a panel of experts chaired by Lakhdar Brahimi, the former Foreign Minister of Algeria and now the Secretary-General's Special Representative for Afghanistan. The Brahimi Report concluded that Member States often had used peace operations as a means to be seen as "doing something," in the face of public outcry, especially when the will to do the right thing had been lacking or consensus about the right thing to do had been elusive. The Brahimi Report stressed that doing the right thing sometimes means not deploying an operation at all, because the conditions for success simply do not exist. In other cases, it means deploying operations with better resources and greater support. In short, the Brahimi Report called for an end to half measures. The report offered recommendations which will make a real difference to how

peacekeeping operations are carried out and, as important today, how the world *perceives* that they are being carried out.

The United Nations has learned a number of valuable lessons about peace - building in various missions around the world. The most important is that peace building is a home-grown process in which the role of the United Nations is to support and complement national efforts to build sustainable peace. Peace building must include measures for promoting good governance, the rule of law, democratization, and human rights as essential elements of a sustainable peace. Peace building has a fundamentally political character. The different components of a peace-building strategy need to contribute to the main goal of preventing the outbreak or recurrence of conflict.

Ladies and gentlemen, the United Nations is an indispensable instrument that can be used by the international community for the common good. It embodies the hope that we can meet with understanding and respect those with different cultures and traditions.

In this uncertain world one cannot be sure of much. However, I am convinced of two principles:

*Any attempt to impose through political power or force, one set of views on others, leads inevitably to resistance and conflict; and*

*The concept of peace contained in the U.N. Charter entails both the preservation of order and the pursuit of justice.*

Thank-you very much.

**The United States and Europe:  
Political Cleavages and the Use of Law**

**Manuel Medina Ortega**  
Member, European Parliament  
Professor, University of La Laguna,  
Complutense University

# **The United States and Europe: Political Cleavages and the Use of Law**

**Manuel Medina Ortega**

It is an honor for me to deliver a lecture at this distinguished university at a crucial moment in the relationship between the U.S. and Europe. I am grateful to Professor Wilner for giving me the opportunity to address a select group of students and faculty on the burning issue of European-U.S. relations and the use of law.

When I received the invitation for this lecture, I thought that I knew pretty well what I had to say. At the time, I was wondering whether law would remain of use in the world after the dramatic events of the last year. I believed then that I was dealing with the right questions and also that I had the right answers. Later, I realized that the issues I wanted to deal with were more complex than I had envisaged at first, and that the answers were not so simple and forthcoming as I originally had thought.

In this lecture I intend to cover four topics which are closely interrelated: The first topic is the idea of Europe. What do we mean by Europe? The second topic will be the state of the relationship between the United States and the European Union today. The third topic will be the appearance of serious political cleavages between the U.S. and Europe in an evolving world scenario. Finally, I will refer to use of the law in the new circumstances. Is there any use left for law in present world politics?

## **The Idea of Europe**

Let us begin with the idea of Europe. What is Europe? To begin with, geographically, Europe is not a continent. America is a continent. Australia is a continent. Antarctica also is a continent, even if it is covered fully by snow and uninhabited. We might go as far as saying that both Africa and Asia are separate continents, because they are linked to each other through the narrow Sinai peninsula. Europe definitely is not a continent, as it is welded to the great Asian continental mass and only separated from Africa by the narrow and easily accessible Mediterranean Sea. Following the ideas developed by a great British theoretician of geopolitics, Sir Halford Mackinder, and accepted by another great theoretician, the American Admiral Alfred Thayer Mahan, Europe is only a

peninsula of the large continental mass formed by Africa and Asia, the *great island of the world*, somewhat like the Arabian peninsula, the Hindustan, or Southeast Asia, although somewhat bigger. There are no clear boundaries between Asia and Europe. Caucasia basically is a border region, not a divide. The Urals never have been a barrier to movement between Asia and Europe, and the Mediterranean is an inland sea that allows easy access between Africa, Asia, and Europe.

We speak of Europe as a separate part of the world, thanks to the Greeks and the first real historian, Herodotus of Milet. Each of us considers our immediate environment as the center of the world. The Greeks thought, naturally, that they were in the center of the world. East of them was Asia. South of them was Africa. Europe was the part of the world that lay north and west of Greece. The Greeks had the privilege of occupying the central region between the three parts of the world, the Hellenic peninsula, the coasts of Anatolia, and the islands between them, including Crete and Cyprus, both very close to Africa. Herodotus, born in the Greek city of Milet, in Anatolia, traveled through the known world. He realized that the Greeks occupied a privileged position between the oldest civilizations: Egypt and Mesopotamia. When Herodotus was born, 500 years before Christ, those civilizations had thousands of years behind them, and they were still alive and doing well. By the way, it appears that the first historical civilization, Egypt, was the product of a black people, while the second civilization, Mesopotamia, although white, was basically Semitic. Thus, there is not too much substance to claim of priority for the Aryan civilization, represented by the Greeks and Persians at the time of Herodotus. The Greeks and the Persians took advantage of the heritage transmitted to them by the previous two non-Aryan civilizations of Egypt and Mesopotamia, which already had three thousand years behind them when the Aryans entered history.

By placing Greece at the center of the world, the Greeks felt capable of playing a pivotal role in the historical process. Alexander the Great, in the fourth century before Christ, conquered most of the known world, from the Nile to the Indus and beyond, into central Asia. Thus, he set a precedent. The *Europeans* once had conquered the world, and they would try it again in the future. Although the universal empire of Alexander was short-lived, the Romans, the direct inheritors of the Greek civilization, managed to subdue the whole Mediterranean basin, from Spain to Palestine and Syria, and from Egypt and Lybia to the Alps and beyond, the Danube, the Rhine, and the British Isles. The Mediterranean became the *Mare Nostru, id est*, our Sea, to the Romans. The Romans managed to hold their sway over the Mediterranean basin for seven



centuries. By doing so, they fostered a European claim to world dominance that was to appear again later on.

The Hellenic-Latin civilization that emerged from the expansionist efforts of the Greeks and the Romans in the millennium that covers the period preceding and succeeding the birth of Christ still survived for another millennium after the end of the Roman Empire, in pain and anguish, before it could assert itself in the world at large. In the fifth century after Christ, the German peoples living north of the Danube and east of the Rhine, conquered the western part of the Roman Empire. In the seventh century, Muhammad preached a new faith to the Arabs, Islam, which soon spread through the African and the Asian parts of the Roman Empire. In 1453, the eastern part of the Roman Empire, collapsed when the Turkish Muslims finally conquered its capital city, Byzantium. It was during this millennium of trial for western civilization when the *Europeans* developed a sense of their identity.

In the year 732, the Arabs, who had conquered the whole of the Iberian Peninsula a few years before, were marching victoriously toward Paris. A Frankish warlord, Charles Martel, confronted the invaders near the French city of Poitiers. A Spanish chronicler, *El Pacense*, described the situation in these terms: When the Europeans woke up at dawn, they found that the Muslims had set their camp just in front of their own. This was the first time, the word European was used, meaning Christian as opposed to Muslim. Thereafter, the consolidation of Christian dominance over the territory that we now call Europe gave this notion a geographical connotation. The Europeans are the people who live in the part of the world limited by the Caucasus and Ural mountain ranges and the Mediterranean Sea. The Americans, who also are Christians, are not Europeans. But it is possible to be a European without living in the part of the world that we now call Europe. Russians living in Asia are Europeans, as are the French, Portuguese, and Spanish people who have settled in the French *Departments d'Outremer* or the Atlantic Islands of Portugal and Spain.

Americans may be Christian, but they are not Europeans because they don't live on the European continent. Russians are Europeans even if they live in Asia. But is Russia a part of Europe? Can we say that Europe reaches the Bering Straits, the Kamchatka peninsula, and the island of Sakhalin? This adds a new problem to the definition of Europe. While the Russians culturally are European, as are Americans, and Christian, and pertain to the same civilization, it is doubtful that we can say that Russia is a part of Europe.

A different criterion is needed to identify Russia as opposed to Europe. Geography and culture are not enough. We have to look instead for a political criterion. Although from geographical and cultural points of view it is impossible to separate Europe and Russia, politically they are two different entities. Thus, we are using a different, political criterion to differentiate Europe and the Europeans from the rest of the world. Russia is a nation state, a federation, like the United States. Europe is neither a federation nor a nation state. Europe is a conglomerate of small, independent, political units that have been struggling among themselves for political supremacy for 1500 years. War, national and international, has been the rule in the part of the world that we call Europe; the Europeans have been killing each other for centuries in civil and international wars. They managed to conquer the world between 1492 and 1900. By doing so, they upset basic mechanisms of survival of very ancient civilizations in India, China, Japan, and Africa.

The main feature of Europe as a political entity is the lack of unity. If the U.S. can be identified with the device "united we stand," the Europeans have always been disunited. This has been the main trait of the Europeans since the collapse of the western Roman Empire in the fifth century after Christ. Europe is not a continent. The people of Europe have a common cultural heritage, but they have failed to forge a political community. Each European identifies himself as a member of a small social group, separated from the others by language, religion, life-style, and a history full of resentments and hatred.

Europe is a conglomerate of small states that have fought each other for centuries. Seldom have the Europeans fought for a common cause. In fact, that happened only once, during the Crusades, around the twelfth century. Even then, their alliance was short lived. The Christian kingdom of Jerusalem collapsed for lack of unity and the Emperor of Germany kidnapped for a ransom the crusading English king, Richard the Lionheart. In the sixteenth century, when the Turks were threatening Austria and Italy, the call by the Pope to rally behind Emperor Charles the Fifth to fight Muslims was disobeyed by the King of France, who made deals with the Turks against the Holy League of Christian monarchies.

Europe always has been divided. It still is divided into more than forty independent states speaking some 150 different languages. Since the collapse of the western Roman Empire, 1500 years ago, the Europeans have tried all possible forms of government and political arrangements: the Holy Roman empire, confederations and leagues of states, feudal systems, independent city-states, ecclesiastical towns and territories, and so on. Eventually, one of these political

organizations, the territorial kingdom, emerged toward the end of the Middle Ages as the most viable polity. Italian Renaissance thinkers like Macchiavelli and French lawyers like Jean Bodin developed a political theory of the *state*, and applied it to the territorial kingdoms which became the *modern states*. The modern state had defined boundaries, a permanent army, and a stable administration. It became the model for the political organizations of the Modern Ages. The world now is organized in about 200 states that share the common features of a well-defined territory, a permanent army, and a stable administration. One of these nation states is the United States of America.

### **The U.S. and the European Union**

The U.S. and the European Union are two different political animals. Like Europe, the U.S. is made up of sovereign states, but the American States, at least since the Civil War of 1861-1865, do not have the right to secede from the Union. Although the 1787 Constitution had provided for a federal Union, the United States basically were a confederation until 1861. Only after the defeat in 1865 of the southern confederation did the U.S. become a modern state in the European sense of the word, although at a very high cost in lives and wealth, especially for the South.

Shortly after the Americans acquired their independence from England at the end of the eighteenth century, the Europeans transformed the territorial monarchical states into modern nation states. After the French Revolution of 1789, the role of kings as holders of the political powers and organizers of the state was replaced by an abstract concept: the idea of the *nation*. Nobody has defined clearly what is a nation, but for this abstract idea, millions of persons have been killed in the last two centuries of European history. This has led to a patchwork of European nation states with identities based on language, religion, history, or geography.

By contrast with Europe, the federated states of North America, the United States of America, have become a unified nation state, with a common flag, a common constitution, an army, and a powerful federal administration. Whatever their ethnic origin, the 280 million Americans who now live in the U.S. identify themselves proudly with the most successful nation state in the world.

Europe is not a nation state. It is formed by a plurality of nations that have shaped a plurality of states. The European Union is striving to follow the model of the nation state, but we are far from having achieved it. The European Union

has its own anthem, the Ode to Joy, from the choral movement of the Beethoven's Ninth Symphony. But this anthem is rather highbrow and distant from the more simple tastes of the average European citizen, who would rather sing his own national anthem, the Marseillaise, the Deutschland über Alles, God Save the Queen, or, for that matter, the socialist International. The European Union has a flag made of twelve golden stars on a blue field, which is shared with another European international organization, the Council of Europe. The European flag is seldom seen flying alone. It always is accompanied by national, regional, or local flags forming an array of beautiful colors. Nobody has died for the flag of the European Union, while the French, the German, the Spanish, and most other European national flags have been abundantly soaked with the generous blood of citizens willing to die and kill for the fatherland.

The European Union does not have an army. We only have the concept of a European army: the European corps, ready to be activated but existing only on paper. There is no European police, just a network of national police officers, Europol. The security in the buildings of the Union is guaranteed by hired private security services, and important officials of the Union are protected by the national police services of each member state.

The Union hires fewer than 30,000 civil servants. This is much less than the number of civil servants working for a large city like Berlin, London, or Paris. The European Union budget amounts to some 100 billion euros, which represents percent of the gross national product of the Union, while the U.S. federal budget is now in the area of 1.6 trillion dollars, amounting to some twenty-five percent of the U.S. GNP.

These data may give some idea of the weakness of the European Union. There is no army and no common foreign policy. When we speak of a Common and Foreign Security Policy we are referring to intergovernmental committees that discuss international affairs, and to the single role of Mr. Javier Solana, the European Union's High Representative for common and foreign security matters. Seldom will Mr. Solana travel alone. He usually is accompanied by the troika formed by the pro tempore chairman of the Council and his two following successors at the head of the Council, or by the commissioner responsible for foreign affairs, Mr. Christopher Patten.

Mr. Henry Kissinger used to say that there was no person he could call on the phone to discuss the European Union. The Union has three presidents: the president of the Commission (today, Romano Prodi of Italy), the president of the

Parliament (Pat Cox from Ireland), and the president pro tempore of the Council (which rotates every half-year). The president of the Commission is elected for five years, and the president of the Parliament is elected for two and a half years. None of the three can properly be called a president of the Union.

The Union may be represented abroad by the troika formed by members of the Council, by the high representative for Common and Foreign Security Policy, by the president of the Commission, or by the commissioners responsible for foreign affairs, foreign trade (Paschal Lamy, France), or foreign aid (Poul Nielson, Denmark). This makes up a very cumbersome representation. None of the presidents or foreign representatives trusts the other. Thus, they have to travel together in groups of four, five, six, or more persons. Even the euro common currency has its own cumbersome system of foreign representation: the governor of the European Central Bank (currently Willem F. Duisenberg, the Netherlands), the president pro tempore of the Euro Group, and the president of the Commission.

Although the U.S. and Europe are two different political animals, we should remember that the European Union owes its existence to the U.S. The Union originated in the years following the end of World War II. After the defeat of Nazi Germany and the agreements at Yalta and Potsdam in 1945 between Britain, the U.S., and the Soviet Union, Europe was divided in two. The Soviets occupied most of central Europe, up to the Baltic Sea and the Elba River in Germany, and the city of Vienna in Austria. Joseph Stalin controlled most of central and eastern Europe directly, with the powerful Soviet army, or indirectly, through the local Communist parties. Most of Yugoslavia had been liberated from Germany by guerrillas led by the Communist Croatian leader Tito. In Czechoslovakia, the local Communist party, after winning the parliamentary elections, staged a bloodless coup d'etat to take over power.

By contrast to the solid communist bloc, western Europe formed a ring of weak and divided states: Britain, France, Italy, the Benelux, and the Scandinavian countries. Spain and Portugal were subject to dictatorial right-wing governments, and Greece was involved in a civil war. Austria and Germany were divided among the occupying forces of the western Allies and the Soviet Union. Finland was almost a Soviet protectorate, at least in the areas of foreign policy and trade. Within the western democratic states of Europe, the communist parties, allied with the Soviet Union, were then strong, especially in France and Italy.

Americans found themselves entangled in a worldwide confrontation with the Soviet Union after 1945. In China, the Communists led by Mao Tsetung were winning the war against the Kuomintang regime of Chiang Kaishek. In Greece, the U.S. supported British intervention in favor of the monarchists against the Republican guerrillas led by Marco and supported by the Communists. In 1947, President Truman asked Congress for an allocation of 400 million dollars to support the governments of Greece and Turkey against the national or international communist threat. In 1948, the Secretary of State, General George C. Marshall, announced in his commencement speech at Harvard University his plan to help western Europe. The American ambassador in Moscow, George Kennan, sent alarming reports about Soviet plans to conquer the world via *the long telegram* and an article signed by Mr. X in the *Foreign Affairs* magazine of the U.S. Council on Foreign Relations.

The Marshall Plan conditioned American assistance to Europe upon uniting the European states. This led to the creation of the first international organization in the area of economic integration, the Organisation for European Economic Cooperation (OEEC). The OEEC provided the framework for effective American assistance to Europe. A mechanism for the settlement of payments (the European Payments Union) was established, and trade was liberalized among western European countries and between them and the United States. Once the original aims were achieved, in 1960 the OEEC was replaced by a new agency, the Organisation for Economic Cooperation and Development (OECD), open to non-European countries, such as Canada, the U.S., and Japan. The OECD is now known as the "club of the wealthy," although countries with a lesser degree of economic development, such as Mexico, are also members of the organization.

The main problem left pending in 1950 was Germany. Although the three occupants of west Germany had set up, in 1949, a Federal Republic of Germany, limitations imposed by the occupation authorities hampered the growth of the potentially strong west German economy. Dean Acheson, the new Secretary of State under Truman, sent an ultimatum to the western European allies that in May 1950, a conference should be held in London in order to put an end to the constraints imposed by the occupation authorities on the German economy, and that above all, the controls over coal and steel should be lifted.

The European allies were concerned that lifting the restrictions imposed upon Germany might lead to a resurgence of German militarism. France had been invaded three times by Germany between 1870 and 1940, and the treatment given by Germany to the population of the territories it held in the two world wars was

far from kind. The main British cities had been smattered to pieces by the German bombers. The blooming Jewish communities of Belgium and the Netherlands were exterminated. Even its former ally, Italy, was cruelly mistreated by Germany after 1943, when the King of Italy switched sides in the middle of the war. Thus, the Americans had to exert strong pressures over the European allies to attain the lifting of the regime of military occupation. The newly created west German state had to become viable from an economic point of view, and this required a free German economy.

France was the main target of the American diplomatic effort. The French were opposed to lifting the occupation regime. French Foreign Minister Robert Schuman, with the help of the chairman of the French Commissariat du Plan, Jean Monnet, came up with a very intelligent proposal. On May 9, 1950 at the symbolic Salon de l'horloge of the Quai d'Orsay, Foreign Minister Schuman announced his plan to set up a European Coal and Steel Community. Instead of simply lifting the restrictions imposed by the allies on Germany, a supranational authority would bring together the main resources of western Europe. The Americans accepted the French initiative. In 1952, the European Coal and Steel Community was set up with the blessings of the United States while the war in Korea was still going on.

After the death of Stalin, with the economic progress and the development of the supranational institutions in western Europe, the Americans felt that they could concentrate on other areas of international concern. In 1954, a new organization for military cooperation, the Western European Union, was set up. Under American pressure, Germany became a founding member of the new organization as well as a member of the North Atlantic Treaty Organization (NATO).

### **Europe's Self-assertion and the Emergence of Cleavages in the Western Alliance**

After the death of Stalin, the thaw in East-West relations initiated by the new secretary general of the Communist Party of the U.S.S.R., Nikita Khrushchev, allowed the Europeans to take a more independent stance. The U.S. had become a world power and was faced with conflicts in other parts of the world, such as the Middle East, Latin America, and the Far East. The Europeans felt that they could pursue an independent course in some areas, notwithstanding the ever present American tutoring. The first independent European initiative was to set

up two new supranational organizations: the European Economic Community and the European Coal and Steel Community. Paul-Henri Spaak, an experienced Belgian politician, launched the proposals for setting up two new institutions in 1955. In 1957, the treaties for the new institutions were signed in Rome at the Campidoglio, the symbolic site of the former Capitoline of the old Romans.

Before the new institutions were set up, the first serious political crisis between the Americans and their European allies took place. A new Arab revolutionary leader, Gamal Abdel Nasser, had taken control of Egypt after the demise of King Faruk. Nasser, intent upon asserting the Egyptian national identity and the Arab cause, nationalized the Suez Canal. The canal was then owned by a joint British-French company operated by the British. The British government of Conservative Anthony Eden and the French government of Socialist Guy Mollet took advantage of the Hungarian crisis that kept the Soviets busy, and, with the support of Israel, occupied the canal in a swift military operation that brought the Sinai under Israeli military occupation for the first time. The three allies had not foreseen the strong reaction by the U.S. to this unilateral act of force. President Eisenhower, with the advice of Secretary of State John Foster Dulles, reacted promptly and forced the Europeans and their Israeli ally to evacuate the canal and to return it to the Egyptians together with the Sinai peninsula. The British and the French were humiliated, but they had to accept the American conditions. Israel also withdrew from the zone, thus guaranteeing another decade of peace in the Middle East.

This crisis notwithstanding, the interpenetration of the American and European economies continued in the 1950s and 1960s. The new European international organizations were not set up against Americans. On the contrary, through the strengthening of their economies, the Europeans could reinforce their links with the strong American economy in a more competitive environment. The Americans and the Europeans were working together within the framework of the main world economic institutions: the World Bank, the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT), and the OECD. Trade negotiations within GATT and swapping agreements within the IMF facilitated exchanges across the Atlantic and beyond, up to Japan and the Far East. Economic interpenetration took place between European and American companies through trade and investment.

The Suez crisis of 1956 taught a lesson to the Europeans. They realized that the Americans controlled the diplomatic and the military scene worldwide. The Europeans henceforth would not dare to undertake international political



initiatives without consent from the Americans. On the other hand, as the European economies became stronger, Europe could consider being more assertive in economic affairs. Setting up the European Economic Community, or Common Market, allowed the Europeans to speak with one voice in commercial matters, and this led to the first serious economic dispute between the United States and Europe: the *Chicken War* of the 1960s. The *Chicken War* was handled swiftly within the GATT, and it provided the framework for future settlement of disputes of this kind. Although the Europeans gave up any claims to supremacy in political matters, a united Europe could negotiate on an equal basis with the U.S. in the areas of trade, investment, and foreign aid. Besides the traditional fora of the World Bank, the IMF, the GATT, and the OECD, a new forum was set up, the Group of Seven, where the U.S., Canada, Japan, and the four wealthier European countries (Britain, France, Germany, and Italy) could discuss economic issues in an informal atmosphere.

The shaping up of the European Union has become a very lengthy process. Some have compared the European unification process to the construction of European cathedrals in the Middle Ages that took centuries to be built, but were solidly built and still are intact today. The European Union has not been built only by Europeans. I have mentioned before the contribution made by the United States to the launching of the European Communities. Further progress has been achieved through a permanent dialogue with the U.S., usually in very friendly terms. Occasionally, conflict has appeared in the open. As the European Union becomes stronger, the new European assertiveness may cause misunderstandings and disputes with the U.S., and the settlement of economic disputes between the two sides has thus become a permanent feature of the transatlantic relationship.

### **The Opening Gap in Transatlantic Relations**

In the close to sixty years that have elapsed since the end of world war, the relationship between the U.S. and Europe has had its ups and downs, but it has been consistently good. From the European point of view, Truman, Eisenhower, Kennedy, and Clinton are considered to have been receptive to the concerns of Europe. The Johnson administration was too concerned with the war in Vietnam to pay a great deal of attention to Europe. Nixon, Carter, Reagan, and Bush appeared to pay more attention to the role of the U.S. in the world at large than in old Europe. The eight years of the Clinton administration were marked by a very positive approach to Europe by the U.S., and transatlantic dialogue was developed at this time.

Some people in Europe say that the most important elections for the Europeans are the elections to the presidency of the U.S., and that it is unfair that the European voters are not taken into account in the American elections. In any case, the Europeans are very sensitive to political gestures from the White House. In this respect, presidents from the eastern and mid-western U.S. appear to be more sensitive to European concerns, while southern and western presidents appear to be less concerned by Europe and more worried about other areas of the world, such as Asia and Latin America.

After the high point of very friendly relations between the U.S. and Europe during the Clinton administration, the George W. Bush administration appeared to the European as something of a letdown. Problems of communication that had not existed before appeared. After the tragic events of September 11, 2001, European public opinion showed deep sympathy for the suffering of the American people, and the European governments closed ranks to support the U.S. in its struggle against international terrorism. Europeans supported American action in Afghanistan and other parts of the world. At the NATO Council, the European governments declared that an attack against the U.S. would be considered as an attack against their own territory, under the common defense clause of Article 5 of the North Atlantic Treaty.

Since the inauguration of the administration in January 2001, President Bush took steps that ran counter to the concerns of Europeans, such as withdrawing the U.S. signature from the treaty on the International Criminal Court, denouncing the Kyoto Protocol on the protection of the atmosphere against harmful gasses, setting up new tariffs on the importation of steel, and increasing aid to American farmers. The strong pro-Sharon stand of the new Republican administration was seen with apprehension in Europe, where a pro-Palestinian and pro-Arafat mood prevails due to the geographic proximity to the Arab world and the large numbers of Arab and Muslim citizens present in Europe. The Europeans were receiving negative signals from Washington on almost any issue of international concern for Europe.

The terrorist attacks against America on September 11, 2001, changed all that. The people of Europe concurred with ordinary Americans in the need to fight a worldwide struggle against terrorism. For the first time in many years, Americans needed the support of the Europeans, and the Europeans were glad to have a chance to give their support to the Americans. On the basis of the NATO Council resolutions, the Europeans joined the Americans in their fight against the Taliban in Afghanistan, contributing troops and logistical support, and sent

Airborne Warning and Control System (AWAC) reconnaissance planes to protect the continental United States against eventual attacks by foreign terrorists.

Once the Afghan war was over, things worsened again. When I agreed to deliver this lecture, a few months ago in the summer, I was concerned that a big rift could be developing in the transatlantic relationship.

On the fourth of September this year [2002], the German Marshall Fund and the Chicago Council on Foreign Relations released the results of an extensive public opinion poll, conducted both in Europe and in the U.S., on attitudes towards foreign policy. The opinion poll showed a larger than expected degree of consensus on foreign policy issues between Europeans and Americans, notwithstanding the cleavages being developed between the political elites across the Atlantic. I cannot give here the total results of the study, but some of its findings are worth being mentioned. Although fifty-five percent of the Europeans believe that, due to the role of the U.S. as a world power, American foreign policy had somewhat contributed to the terrorist attacks of September 11, fifty-nine percent felt that the American reaction afterwards was justified by the need to protect themselves against further terrorist attacks. The Europeans felt that American retaliation was not aimed to strengthen their position as a world power, but only to achieve the legitimate end of protecting American citizens against renewed attacks by terrorists.

Europeans are more critical than Americans about the way President Bush handles foreign policy. Only thirty-eight percent of Europeans rate President Bush's foreign policy as excellent or good, while fifty-six percent rate it as fair or poor. The Bush administration gets higher marks for the way it is handling terrorism. Forty-seven percent of Europeans rate U.S. actions against international terrorism as excellent or good. The war in Afghanistan had the support of thirty-five percent of Europeans. On the other hand, Europeans are much more critical of the way the U.S. is handling the Arab-Israeli conflict (only twenty-five percent support it) and relations with Iraq (supported by twenty-one percent of Europeans).

Europeans and Americans have common perceptions about their external threats, with only minor differences of opinion. Both Americans and Europeans place international terrorism at the top of the list of external threats, but this is the opinion of ninety-one percent of Americans, and only of sixty-five percent of Europeans. Eighty-six percent of Americans are concerned by Iraq's development of weapons of mass destruction, while only fifty-eight percent of

Europeans are worried by it. Islamic fundamentalism is a main threat for sixty-one percent of Americans and for only forty-nine percent of Europeans. Thus, there are some differences of perception, but there is no big rift between American and European public opinion.

The deepest gulf appears in relation to the Arab-Israeli conflict. It is a big problem for sixty-seven percent of Americans and only for forty-three percent of Europeans. Americans (sixty percent) are more concerned by the phenomenon of immigration than are Europeans (thirty-eight percent), notwithstanding the great political debate generated in Europe by the rise of right-wing, xenophobic, anti-immigration parties in recent years.

Americans and Europeans differ widely on two issues: China and Russia. Fifty-six percent of Americans are worried by the eventual development of China as a world power, while this is a concern for only nineteen percent of Europeans. Eighteen percent of Europeans show concern over a possible outbreak of political violence in Russia, while this is a worry for only thirteen percent of Americans. The difference of attitude can be explained by the geographical proximity of China to the west coast of America and the ominous presence of Russia in the eastern frontiers of Europe.

The most critical issue at this moment is an eventual attack by the U.S. and its European allies on Iraq. Although sixty percent of Europeans would support an armed attack by the U.S. on Iraq on the basis of a U.N. resolution, only ten percent would support it without such a resolution. American support for an attack based on a resolution of the U.N. is slightly higher (sixty-five percent) while twenty percent would support an attack without a U.N. resolution.

Thus, the gulf between American and European public opinion is not as wide as it appeared at first sight. I will not tire you with further details of this survey, but its results show that the men in the street on both sides of the Atlantic perceive common threats for their security in world politics. The differences of opinion are minor. The political leadership in both Europe and America should draw conclusions from these findings and try to work together to solve the issues of common concern. The differences between Americans and Europeans, as perceived by the political leadership, are important, but we should not try to exaggerate them when we take into account the attitude of the average citizen. For Europeans leaders, the Americans are now pursuing a unilateral foreign policy. The U.S. recently has taken some very important decisions in foreign policy matters without consulting their European allies — on the Kyoto Protocol,

the International Criminal Court, steel tariffs, and agricultural policy. American unilateralism now is the main concern for the European leadership and the average European citizens.

It could be said that the Europeans are behaving as unrequited lovers. Europeans are complaining that their attachment to America is not being reciprocated by the U.S., and this is why they have become more aloof in their relations with Americans. If we reduce the present tensions between Europe and the U.S. to a matter of unrequited love, the present gaps could be closed through diplomatic gestures by both sides. Although Americans and Europeans are coming closer together in the way they see world problems, European leadership is feeling left out of the decision-making process in international affairs by the U.S. administration.

There are good reasons for the Americans not to lend too much attention to their European allies. Europe is a very weak political entity. As I have said before, there is no common European army and no common foreign policy. The Europeans disagree among themselves on many important issues in world affairs. This division makes Europe a weak and unreliable ally. Unless Europe strengthens its political and military union, it cannot be a good ally for the U.S. that can be treated on equal footing. The U.S. cannot take Europe seriously if Europe is not united. This is the main lesson the Europeans should learn from their recent disagreements with the U.S.

### **The Use of Law at the Time of the Widening Transatlantic Rift**

*Ubi societas, ibi ius*: That is an old Latin adage which we translate as "there is law wherever there is an organized society." In order to have an organized society, there have to be laws, legal rules, courts of justice, and an administration capable of enforcing the legal order. There was already a penal code in Mesopotamia five thousand years ago, given by King Hammurabi, which contained binding rules and penalties. The Romans developed a very subtle system of civil law that became the basis of their Empire. The Jewish have managed to survive through thousands of years of nomadism and pogroms thanks to their allegiance to the legal provisions of the Torah. The religious book of the Muslims, the *Koran*, is also a legal book. Any political entity needs a system of laws to survive, and a basic principle of political organization is to have coherent and unified enforcement of law. When there is no power that can enforce law in a unified and coherent way, social conflict is generated, sometimes erupting into civil war. The United States had the example of a lengthy civil war caused by

opposite interpretations of basic legal principles. When law breaks down, people fight each other in accordance with the old Hobbesian principle *Homo homini lupus*: Man is a wolf to man.

In Europe, political unity has been lacking since the breakdown of the western Roman Empire in the fifth century after Christ. Western Europe maintained for some time a facade of unity through the dual powers of the pope and the emperor. A uniform Roman law was supposed to be in force. Real power, however, was in the hands of independent units, such as the kingdoms, the feudal lords, or the cities, which developed their own statutes and administrative institutions.

Toward the end of the fifteenth century, the process of rationalization imposed by the Renaissance led to systematization of political institutions. This is how the modern state was born. The Middle Age kingdoms of England, France, Portugal, and Spain became unified states endowed with a permanent army, a standing bureaucracy, a centralized law-making process, and a uniform judicial system. The new system of centralized states became the standard model of political organization, and it spread all over the world. Now, we have close to two hundred political units that call themselves states. These political units fulfill or attempt to fulfill the requirements of a centralized administration and a unified legal system.

The modern state of the Renaissance guaranteed security for its citizens. The permanent army protected the state territory against outside threats. Judges and civil servants appointed by the king guaranteed the internal security of the state. The king himself, alone or jointly with parliament, assumed statutory legal powers in order to adapt to the new, changing times. What the state could not guarantee was international peace. The kings and other political powers kept fighting each other across the boundaries of their respective realms. The level of armed conflict between the fifteenth and the twentieth centuries remained high. Efforts to rationalize the system of international relations centered on the development of a theory of the *law of nations*, or, as we call it today, of international law. The origins of international law can be traced to the University of Salamanca in Spain (Vitoria, Suárez) and to Dutch lawyer Hugo Grotius. This intellectual development was continued by state practice of treaties and international arbitration.

The treaties signed in Westphalia in 1648 are considered to be the cornerstone of modern international law. Westphalia had put an end to the Thirty

Years' War caused by the strife between Catholics and Protestants all across Europe. The Treaty of Westphalia attempted to restrain the use of force across the frontiers of the states. The basic principle was *cuius regio eius religio*, that is: the king decided freely on the establishment of religion within his own kingdom. The sovereigns could not meddle in the internal affairs of other kingdoms. The new international law attempted to regulate relations between states, not only where they were at peace and trading with each other (*ius pacis*), but also when they were fighting each other (*ius belli*).

It is not easy to understand how international law could apply to relations between states that did not refrain from using force against each other. Notwithstanding the lack of political unity, international law was supposed to be applicable to relationships between independent states. In fact, the independent states resorted to war as a means of maintaining the international system. Systemic war is not an easy concept to understand, but this is what the European states did for five centuries, until the end of World War II in 1945. The balance of power required recognition of the right of the states to resort to war in their own interest. The states had the *ius vitae et necis* (the right over life and death) over their citizens and those of other countries to declare war if the supreme interests of the state so required. International treaties were complied with only if circumstances didn't change: *clausula rebus sic stantibus*. No state could attempt to impose itself over the others. Whenever a European state (Spain, France, England, Austria, Prussia) threatened to acquire a position of leadership or preeminence over the others, the principle of the balance of power forced the others to gang up against it, and this led to an almost uninterrupted series of wars in Europe for five hundred years. The security of Europe and the internal peace in each of the European states required continuous wars, leaving the fields of Europe covered with corpses and the cities devastated.

The American revolution was perceived in Europe as a breeze of fresh air. The new American republic became the model for the European democrats since the French Revolution of 1789. The events leading to the American revolutionary war were intertwined with traditional European politics and the balance of power. From the end of the Spanish War of Succession in 1714 until the end of the Napoleonic Wars in 1814, Britain and France were engaged in a duel for supremacy in Europe. The French and Indian wars of 1746-1753 ended with the defeat of France and the loss of its possessions in North America. The kings of France and Spain supported the American revolutionaries in order to seek revenge on England in an effort to redress the balance of power in Europe. But the defeat of Britain in North America announced a new dawn for mankind,

far apart from what the kings of France and Spain attempted to achieve through their intervention in the war between England and the colonist of North America.

Americans saw their success in the revolutionary war as the opening of a new period in the history of mankind. In fact, it was a new beginning as the joint events of the American independence and the French Revolution effectively changed the course of history.

The Americans were lucky to have George Washington, both as their military leader during the Revolutionary War and as their first constitutional president. He combined prudence with courage. Like the model prince of Macchiavelli he was "sly as a fox and strong as a lion." Above all, he was a man of consensus. He managed to keep together a loose confederation of thirteen states during the Revolutionary War, and later transformed the confederation into a federal state under its first written Constitution. But he also could look beyond the American continent. Although the U.S. owed France a debt of gratitude, Washington declared the neutrality of the U.S. in the new war unleashed against revolutionary France by the dynastic powers of Europe (Austria, Britain, Prussia, Sardinia, Spain). His declaration of neutrality marked the beginning of a new way to participate in international affairs. There was temptation to participate in the war on the side of France in order to grab Canada from the hated Englishmen. But he chose neutrality and, by doing so, he steered a new course and example in the conduct of foreign relations by the new country.

Washington's Farewell Address of September 17, 1796, stated the basic principles of the new nation's approach to foreign policy: a new vision of international law and international relations. The text is well know to any American student of international relations, but some of its most relevant pronouncements are worth being recalled:

Observe good faith and justice towards all Nations. Cultivate peace and harmony with all. Religion and morality enjoin this conduct; and can it be that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and at no distant period, a great Nation, to give to mankind the magnanimous and too novel example of a People always guided by an exalted justice and benevolence. Who can doubt that in the course of time and things the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be that Providence has not connected the permanent felicity of a Nation with its virtue? The experiment, at least, is recommended by



every sentiment which enobles human nature. Alas! is it rendered impossible by its vices?

In the execution of such a plan nothing is more essential than that permanent, inveterate antipathies against particular Nations and passionate attachments for others, should be excluded; and that in place of them just and amicable feelings towards all should be cultivated. The nation which indulges towards another an habitual hatred or an habitual fondness is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest. Antipathy in one Nation against another disposes each more readily to offer insult and injury, to lay hold of slight causes of umbrage, and to be haughty and intractable, when accidental or trifling occasions of dispute occur. . . .

It is a most remarkable text representing a new approach to international law. This new approach also can be found in another important American foreign policy document: the message delivered to Congress by President Monroe on December 2, 1823, that has become known as the Monroe Doctrine:

. . . Of events in that quarter of the globe [Europe], with which we have so much intercourse and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments; and to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. . . .

Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is, not to interfere in the internal concerns of any of its powers; to consider the government de facto as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy, meeting in all instances the just claims of every power, submitting to injuries from none. . . .

The same line of thought may be found in the address to Congress by President Wilson in 1917 asking for the authorization to declare war to the Central Powers. The basis for the declaration of war by the U.S. was the decision of Germany to conduct unrestricted submarine warfare against merchant ships in the Atlantic. In 1915, the sinking of the *Lusitania*, a British liner carrying American passengers, already had caused a big crisis between the U.S. and Germany. War was averted only by the commitment of Germany to restrict submarine warfare to military targets. Now, the reopening of unrestricted submarine warfare against civilian ships became a *casus belli* for U.S. President Wilson, who referred to the origins of international law in an attempt to establish a world order that could maintain peace in the seas. Now, the Germans were threatening that world order by a ruthlessly conducting war at sea, and this justified U.S. intervention into the European war. In a sense it turned upside down the Washington doctrine, but we find a constant strain of moral principles in the conduct of foreign relations by the U.S., from Washington to Wilson and beyond. Both Wilson and Franklin Delano Roosevelt sponsored a worldwide international organization to maintain peace and security. Wilson was the father of the League of Nations, and Roosevelt actually created the United Nations. Kellogg, the U.S. Secretary of Defense, signed in 1928 a Treaty with France's Foreign Minister, Aristide Briand, to ban war, that received a very positive response around the world, with most countries signing it.

The Americans were always intent upon the development of an international law based on justice. For the Europeans, international law has been mostly a procedure to settle conflicts between nations. In this sense, war was compatible with international law, and even necessary in order to maintain a balance of power in the international scene.

For the Europeans, international law had little to do with justice. Probably, the best expression of the procedural nature of international law can be found in a book published before the first world war by a distinguished German professor,

Erich Kaufmann, about the *clausula rebus sic stantibus* and the essence of international law. For Professor Kaufmann, the essence of international law lay in the right of states to defend themselves. In case their vital interests were threatened, they could resort to all means, including war. The *clausula rebus sic stantibus* allowed non-compliance with treaties when the vital interests of a state were concerned.

The Americans moved into the international arena with a very different approach. For them, international law had to be the embodiment of justice in the relations between nations. The general principles deserved compliance in the area of international relations. If these principles were not complied with, the Americans were ready to intervene to preserve justice. Violation by the German admiralty of the laws of war at sea forced the U.S. to enter into World War I. Although President Franklin Roosevelt sensed the need to enter into World War II to put an end to the expansionistic aims of the Axis powers, the U.S. was not able to declare war until the Japanese attacked the Americans at Pearl Harbor on December 7, 1941, with no previous declaration of war. The Day of Infamy proclaimed by President Roosevelt deserved retribution for Japan, and it was up to his successor, Harry Truman, to punish the Japanese. The U.S. launched the two first atom bombs over the densely populated cities of Hiroshima and Nagasaki in 1945. In a sense, however, by having to wait for an undeclared act of war before declaring war, the Americans were complying with traditional international law and not departing from the principles of the 1928 Kellogg-Briand Pact banning war "as an instrument of foreign policy."

One of the most traditional American textbooks on international law is the treatise by Professor Charles Cheney Hyde of Columbia University, *International Law, Chiefly as Applied and Interpreted by the United States*. Some people in Europe would say that Americans always understood international law as applied and interpreted by themselves. This shows the gap existing between these two conceptions of international law: the American one and the European one.

For the Americans, the purpose of international law is to achieve freedom and justice. The moral reasons to achieve these ends may legitimize unilateral decisions, such as the invasion of the island of Grenada to overthrow an illegal government, or the invasion of Panama in order to arrest its president, General Noriega, who was being accused by American authorities of being involved in drug trafficking. Actually, to justify such actions we can use another phrase of Professor Kaufmann: *Nur der der kann darf auch*. That is to say, only those who have power are bound to act. The U.S., as a sheer consequence of its military

power, is bound to guarantee compliance with law and justice, irrespective of procedural considerations applicable to other lesser powers. The Europeans, by contrast, find limits to their action in the international arena in their own weakness. Unilateral action is out of the question for the Europeans. The Americans feel that they have the duty to resort to force when law and justice are threatened.

This is how I come to my final thoughts about the way Europeans and Americans differ over the use of law in international affairs. The European Union and the U.S. are settling their financial and commercial problems within the framework of a set of international organizations created in the wake of American initiatives to liberalize the world economy at the end of World War II: the World Bank, the International Monetary Fund, the World Trade Organization, and other economic specialized agencies of the United Nations.

In addition to the economic area, Europeans are accustomed to working with Americans within the U.N. system and NATO. Thus, when the Europeans and the Americans disagree on the need to attack Iraq, the Europeans feel that the proper arena to discuss this issue is the United Nations. France and Germany, together with China and Russia, feel that this matter should not be settled within the closer relationship of the U.S. and Europe, the transatlantic partnership, but, rather, by the world organization itself. The Americans claim that there already are enough U.N. resolutions asking Iraq to disarm, and that it is time for the U.S. and its allies to use their power to enforce those resolutions. Differences about a new U.N. resolution on this issue reflect the American concern that Iraq may not disarm, and European the concern that a new attack against a Muslim country may cause a very negative, strong response from the Arab and Muslim peoples.

The Europeans need the Americans to preserve world peace, and they want to keep alive the transatlantic partnership. The Atlantic partnership is essential to maintaining world peace, but the Europeans fear that the rest of the world may not understand what this partnership attempts to achieve if decisions are taken on a unilateral basis and not within the U.N. framework. Europeans fear the Americans have lost touch with the sensitivities of the Arab and Muslim world. If the Americans and allied countries keep attacking the Arabs and Muslims in Afghanistan, Palestine, and now Iraq, a rise in the hostility towards the West already existing in that part of the world is to be feared.

The present crisis with Iraq differs essentially from the 1990-1991 Gulf crisis. In 1990, the Europeans joined the Americans to repel the unilateral

annexation of Kuwait by Saddam Hussein. Several Arab states (Egypt, Saudi Arabia, Syria, the Emirates, and so on) joined this coalition to defend an Arab country that had been invaded by another Arab country. The Arab support for an action against Iraq is now uncertain. The Europeans fear that, after the ruthless intervention in Afghanistan and the increase of the reprisals by Ariel Sharon against the Palestinians, an attack against Iraq may be perceived as a new crusade by the Christians against Islam. Europeans have been involved in wars with Muslims for almost fifteen centuries, and they do not want to repeat the mistakes of the painful colonial wars of the twentieth century.

This is the main bone of contention between the Europeans and the Americans today. The new law on use of force in international relations was developed through American initiatives (Wilson's Covenant of the League of Nations, Kellogg-Briand Pact against War, and Franklin Delano Roosevelt's Charter of the U.N.). The Europeans claim now that any military action against Iraq has to be conducted with the full support of U.N. institutions. After the collapse of the Soviet bloc, the world is not yet unified. China, India, and Russia are still big powers holding weapons of mass destruction. Although the U.S. has enough military power to neutralize any other country in the world, Europeans have doubts about the possibility of solving all major international problems through the use of naked force.

The Europeans, due to their internal weakness and their disastrous historical experience with the use of force, do not trust their own ability, or the ability of others, to settle international conflicts through war. The 1914-1918 first world war was called by President Wilson and his European allies "the war to end all wars." Since then, millions of men and women have fallen as victims of armed conflict all over the world. In the past, since the breakdown of the western Roman Empire in the fifth century, all powers that attempted to impose themselves by force have failed. In fact, even before then, we have enough references in the Old Testament of the Bible to the fragility of military power: Assyria, Babylon, Egypt, Persia. Senator Fulbright reminded Americans half a century ago of the dangers of "the arrogance of power." My own country, Spain, was once a big empire. Spain, in the sixteenth and seventeenth centuries, ruled most of America, large sections of Europe, and even archipelagoes in the Pacific (the Philippines and the Marianas, Palaos, and Caroline islands). Spain was a powerful country for three centuries, but in the nineteenth century our power disintegrated. During the nineteenth and twentieth centuries we lost all our colonies in America, Africa, and the Pacific. We were involved in disastrous colonial wars, which were followed by internal strife and repressive regimes on

the mainland. Only in the latter part of the twentieth century have we benefited from a prolonged period of internal and external peace, within the framework of a stable, peaceful, and democratic Europe.

All empires end at a given moment. Those who live by the sword die by the sword. The political philosophy sponsored by the founding fathers of the U.S. was extended to the foreign relations of this country by several American presidents: George Washington, James Monroe, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John Kennedy, and William Clinton. That political philosophy was not aimed to build a new world empire. The idealist American approach to foreign policy assumed that military power should be used with restraint. The job of the international organizations that the U.S. helped to build was to create a world ruled by law and not by naked power.

The restraining position on the use of force maintained now by most Europeans is, of course, also the expression of a weak and divided Europe. We may ask ourselves what course would take a strong united Europe into world affairs. Power generates the need to use it. A weak and divided European Union is bound to be dovish in international relations. A strong united Europe might take quite a different position.

Perhaps the role of a divided and weak Europe now is, precisely, to introduce a counterweight element in foreign affairs to the overwhelming power of the United States. Europeans are, of course, bound to support the American ally in case of military need. As good friends, however, the Europeans do have the duty to act as a moderating factor when the Americans act in international affairs. I see the role of Europe today as a force of moderation. That role is consistent with the maintenance of the transatlantic alliance.

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Gabriel M. Wilner, Editor

Nelda D. Parker, Editorial Manager

Dean Rusk Center—International, Comparative, and Graduate Legal Studies

University of Georgia School of Law

Dean Rusk Hall

Athens, GA 30602 U.S.A.

706-542-5137, phone

706-542-7822, fax

[www.uga.edu/ruskcenter](http://www.uga.edu/ruskcenter)