Duquesne Law Review

Volume 6 | Number 2 Article 3

1967

The Cold War and the Peaceful Settlement of Disputes: The Relevance of International Adjudication

Milton Katz

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Milton Katz, *The Cold War and the Peaceful Settlement of Disputes: The Relevance of International Adjudication*, 6 Duq. L. Rev. 95 (1967).
Available at: https://dsc.duq.edu/dlr/vol6/iss2/3

This Front Matter is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

THE COLD WAR AND THE PEACEFUL SETTLEMENT OF DISPUTES: THE RELEVANCE OF INTERNATIONAL ADJUDICATION*

MILTON KATZ†

In the two decades since the end of World War II, American conduct, whether in the United Nations or the Organization of American States or outside them, alone or in alliance with others, has revealed a consistent pattern of behavior in regard to Soviet Russian or Communist Chinese expansionism. The United States has resisted attempts by the Soviet Union or Communist China to extend their dominion or sphere of control by force or threats of force, or by the support of force or threats on the part of others. If and when peacekeeping measures or measures of pacific settlement coincided with a policy of resistance, the United States used them happily. If peacekeeping and pacific settlement did not coincide with resistance, the policy of resistance prevailed. To American eyes, the policy was fundamentally consistent with the cause of peace with justice and freedom. In the view of the United States, peace with justice and freedom could not be safeguarded against Soviet Russian or Communist Chinese expansionism by peacekeeping measures or measures of peaceful settlement, except within the frame of reference established by unrelenting resistance. The United States was ready to carry resistance to the point of the actual use of force, as in Korea and Vietnam; to the point of an explicit show of readiness to use force, as in the Cuban missile crisis; or to the point of support for the armed force of others, as in Greece.

International law played its part in fixing the frame of reference for each dispute. Treaties and customary international law defined the geographical reach of Cuba and its territorial waters, the boundaries of Guatemala crossed by the invading insurgents in 1954, and the geographical spheres of North and South Korea. If they did not define, they nevertheless pervaded the notions of blockade that affected the attitudes of other states toward the quarantine declared by the United States around Cuba in 1962, as well as the notions of supervening air and outer space from which were derived the political and psychological implications of the flights by the U2 over the fields and cities of the Soviet Union.

The adversaries could and sometimes did use international law in asserting their claims. Cuba could cite international law in support of

* Copyright © by Milton Katz, 1967. This article will appear as a chapter of a forthcoming book by Milton Katz, entitled *The Relevance of International Adjudication*, to be published by the Harvard University Press in 1968.

† Henry L. Stimson Professor of Law and Director of International Legal Studies, The Law School of Harvard University.

its right as a state to enter into relations with another state of its own choosing (the Soviet Union); in support of its right to acquire goods or services from another state; and in support of its right to place goods so acquired on its own territory. The United States could contend that, under Article 6 of the Inter-American Treaty of Reciprocal Assistance,[1] signed by Cuba, the Organ of Consultation must meet immediately in order to agree on the measures which must be taken whenever "the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America." The United States also could and in due course did point to Article 8 of the same treaty which authorized the Organ of Consultation to adopt as remedial measures any "one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force." We may take it that Cuba would deny that the integrity of the territory or the political independence of any American state was endangered or that indeed there was any "fact or situation" for which it was responsible that might threaten the peace of America. On the contrary, it would insist that the missiles it installed were there to defend it against precisely such a threat from the United States of America.

The Soviet Union fulminated against a violation of its territory by the American U2, but justified the invasion of South Korea by North Korea as well as the support of guerillas fomenting civil warfare in Greece from bases in Albania, Yugoslavia and Bulgaria. The United States invoked the United Nations Charter against the violation of South Korean territory; but it acknowledged the U2 flight as its own, and it supported the invasion of Guatemala against the Arbenz regime from Honduras and Nicaragua.

Whatever the function of international law as part of the setting of a dispute, and whatever the attempts to muster international law in support of rival claims, the parties in Cold War disputes have not resorted to adjudication under international law as a means to settle their disputes. Their aversion is not confined to adjudication in the strict sense. It extends to arbitration conceived broadly enough to encompass the efforts of impartial third parties to arrange an accommodation through flexible and orderly procedures guided by their skill and discretion.

The rejection of adjudication and arbitration in Cold War disputes

1. TIAS 1838 (Dec. 3, 1948), 21 UNTS 78 (1947).

represents the legal aspect of a pattern of behavior dominated by its political aspect. It remains to consider whether the legal aspect is anything more than a mechanical reflection of the political. It would be no more, if the pattern of behavior merely expresses the wilful unruliness of states that repudiate international law both as it is and as it might be. International law is a consensual legal system. It is consensual in a practical and operational sense, not to be confused with the abstract notion of consent assumed in the philosophical concept of the social contract. It derives from the consent of states expressed in treaties and a consensus among states implicit in a settled course of state practice. If states should want no part of it, that would end the matter. I believe, however, that the legal aspect may reveal something more. I think it will be useful to inquire how far the apparent irrelevance of international adjudication or arbitration to the settlement of Cold War disputes may result from the absence of tribunals to determine and apply the law; or, if tribunals exist, from their lack of adequate means to assert their authority; or, if the means exist, from the tribunal's lack of a will to use the means available. How far may the apparent irrelevance result from some inadequacy in the content of international law as the law then stands? How far may the irrelevance derive from limitations inherent in the nature of adjudication, as exhibited by older and more highly evolved legal systems than international law?

In a brief and preliminary way, I want to examine these questions. I shall concentrate upon the last, which I believe will lead to the heart of the matter. I shall consider it first in relation to the legal system best known to us, which exists as part of a political entity far more tightly organized and powerful, and far more profoundly accepted by its people, than any international order or international organization. I have in mind, of course, American law and the United States of America. I focus upon the behavior of the American government and the role of its legal system when the cold war over slavery between North and South became hot and bloody. It may help us to look again at the issues as they appeared to the participants.

Here is a statement of a Southern view, by a Convention held at Milledgeville in Georgia in 1850. The Convention desired "that the position of this State may be clearly apprehended by her Confederates of the South and of the North, and that she may be blameless of all future consequences—." To this end, the Convention states the views that it attributed to the people of Georgia:

> *First.* That we hold the American Union secondary in importance only to the rights and principles it was designed to perpetuate. That past associations, present fruition, and future

> prospects, will bind us to it so long as it continues to be the safe-guard of those rights and principles.
>
> . . .
>
> *Fourth.* That the State of Georgia, in the judgment of this Convention, will and ought to resist, even (as a last resort) to a disruption of every tie which binds her to the Union, any future Act of Congress abolishing Slavery in the District of Columbia, without the consent and petition of the slave-holders thereof, or any Act abolishing Slavery in places within the slave-holding States, purchased by the United States for the erection of forts, magazines, arsenals, dock-yards, navy-yards, and other like purposes; or in any Act suppressing the slave-trade between slave-holding States; . . . .[2]

Eight years later, in the "House Divided" speech, on June 16, 1858, Abraham Lincoln stated his view of the matter:

> . . . I believe this government cannot endure, permanently half slave and half free. I do not expect the Union to be dissolved; I do not expect the house to fall; but I do expect it will cease to be divided. It will become all one thing, or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the States, old as well as new, North as well as South.[3]

The Republican Party platform of May 16, 1860 carried forward the definition of these issues:

> 2. That the maintenance of the principles promulgated in the Declaration of Independence and embodied in the Federal constitution—"that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; . . ." is essential to the preservation of our republican institutions; and that the Federal constitution, the rights of the states, and the union of the states, must and shall be preserved.
>
> . . .
>
> 7. That the dogma that the constitution of its own force, carried slavery into any or all of the territories of the United States, is a dangerous political heresy, . . . is revolutionary in

2. ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES II 676-77 (1870).

3. BASLER, ABRAHAM LINCOLN: HIS WRITINGS AND SPEECHES 372-73 (1946).

its tendency, and subversive of the peace and harmony of the country.

8. That the normal condition of all the territory of the United States is that of freedom; . . . it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any territory of the United States.[4]

By a resolution adopted on November 30, 1860, the legislature of Mississippi, reaffirming the contentions of the Georgia Convention of 1850, cast them more precisely into the mold of law.

Whereas, The Constitutional Union was formed by the several States in their separate sovereign capacity for the purpose of mutual advantage and protection;

That the several States are distinct sovereignties, whose supremacy is limited so far only as the same has been delegated by voluntary compact to a Federal Government, and when it fails to accomplish the ends for which it was established, the parties to the compact have the right to resume, each State for itself, such delegated power;

. . .

That they have elected a majority of Electors for President and Vice-President on the ground that there exists an irreconcilable conflict between the two sections of the Confederacy in reference to their respective systems of labor and in pursuance of their hostility to us and our institutions, thus declaring to the civilized world that the powers of this Government are to be used for the dishonor and overthrow of the Southern Section of this great Confederacy. Therefore,

Be it resolved by the Legislature of the State of Mississippi, That in the opinion of those who now constitute the said Legislature, the secession of each aggrieved State is the proper remedy for these injuries.[5]

President Buchanan had his own view of the matter. The process of secession had already begun, but it all could be straightened out if people would live and let live:

How easy would it be for the American people to settle the slavery question forever and to restore peace and harmony to

4. EMERSON D. FITE, THE PRESIDENTIAL CAMPAIGN OF 1860 237-39 (1911).

5. MISSISSIPPI, LAWS OF THE STATE, 1860 (JACKSON, MISSISSIPPI; 1860) 43-5.

> this distracted country! They, and they alone, can do it. All that is necessary to accomplish the object, and all for which the slave States have ever contended, is to be let alone and permitted to manage their domestic institutions in their own way. As sovereign States, they, and they alone, are responsible before God and the world for the slavery existing among them. For this the people of the North are not more responsible and have no more right to interfere than with similar institutions in Russia or in Brazil.[6]

Buchanan carried his view of self-determination, 1860 style, even into his assessment of the powers of the President and the Congress:

> The question fairly stated is, Has the Constitution delegated to Congress the power to coerce a State into submission which is attempting to withdraw or has actually withdrawn from the Confederacy? If answered in the affirmative, it must be on the principle that the power has been conferred upon Congress to declare and to make war against a State. After much serious reflection I have arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government . . . .
>
> But if we possessed this power, would it be wise to exercise it under existing circumstances? The object would doubtless be to preserve the Union. War would not only present the most effectual means of destroying it, but would vanish all hope of its peaceable reconstruction. Besides, in the fraternal conflict a vast amount of blood and treasure would be expended, rendering future reconciliation between the States impossible. In the meantime, who can foretell what would be the sufferings and privations of the people during its existence?
>
> The fact is that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it can not live in the affections of the people, it must one day perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force.[7]

For the final step in the definition of the issues, I quote from Lincoln's Message to Congress in Special Session on July 4, 1861:

> At the beginning of the present Presidential term, four months ago, the functions of the Federal Government were

6. J. D. RICHARDSON, PRESIDENT JAMES BUCHANAN, FOURTH ANNUAL MESSAGE, DEC. 3, 1860, IN MESSAGES AND PAPERS OF THE PRESIDENTS V, 626-27 (1897).

7. *Id.*, 635-36.

found to be generally suspended within the several States of South Carolina, Georgia, Alabama, Mississippi, Louisiana, and Florida, excepting only those of the Post-Office Department.

. . .

. . . The purpose to sever the Federal Union was openly avowed. In accordance with this purpose, an ordinance had been adopted in each of these States declaring the States respectively to be separated from the National Union. . . .

So viewing the issue, no choice was left but to call out the war power of the Government and so to resist force employed for its destruction by force for its preservation. . . .

. . .

. . . They invented an ingenious sophism, which, if conceded, was followed by perfectly logical steps through all the incidents, to the complete destruction of the Union. The sophism itself is that any State of the Union may *consistently* with the National Constitution, and therefore *lawfully* and *peacefully*, withdraw from the Union without the consent of the Union or of any other State . . . .

. . .

What is now combated is the position that secession is *consistent* with the Constitution—is *lawful* and *peaceful*. It is not contended that there is any express law for it, and nothing should ever be implied as law which leads to unjust or absurd consequences. . . .

The seceders insist that our Constitution admits of secession. . . ." (italics in the original)[8]

The Resolution of the state of Mississippi, President Buchanan's message and President Lincoln's message explicitly defined legal issues. Mississippi affirmed the constitutional right of each state to retract the powers that it had delegated to the national government. Enumerating the alleged wrongs suffered by Mississippi, the legislature in lawyer-like terms proclaimed that the "proper remedy" for the "injuries" received by each "aggrieved State" was secession. President Buchanan "fairly stated" the central question to be whether the Constitution had "delegated to Congress the power to coerce a state into submission which is attempting to withdraw or which has actually withdrawn from the Confederacy." President Lincoln isolated the issue that in his view went to the heart of the matter as "the position that secession is consistent with the Constitution—is lawful and peaceful." In Lin-

8. RICHARDSON, *supra* note 6, VI at 20, 23, 26, 28.

coln's view, "no choice was left but to call out the war power of the government." In the message of July 4, 1861, Lincoln did not refer to an alternative possibility at least theoretically available, to submit the issue as a question of constitutional law to the Supreme Court of the United States.

Four months earlier, in his first inaugural address on March 4, 1861, Lincoln, after affirming "the proposition that in legal contemplation the Union is perpetual" and "that no State upon its own mere motion can lawfully get out of the Union," had taken account of "the position assumed by some that constitutional questions are to be decided by the Supreme Court" and that "such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government."[9] But he had earlier declared his opinion of the Dred Scott decision, and in so doing had implied a view of the position in which the decision appeared to place the Supreme Court. "Let any one who doubts, carefully contemplate that now almost complete legal combination—piece of machinery so to speak—compounded of the Nebraska doctrine, and the Dred Scott decision. Let him consider, not only what work the machinery is adapted to do, and how well adapted; but also, let him study the history of its construction, and trace, if he can, or rather fail, if he can, to trace the evidences of design, and concert of action, among its chief bosses, from the beginning. . . . We cannot absolutely know that all these exact adaptations are the result of preconcert. But when we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen . . . and we see these timbers joined together, and see they exactly make the frame of a house or a mill, all the tenons and mortises exactly fitting, . . . we find it impossible not to believe that [the several workmen] all understood one another from the beginning . . ."[10]

When Lincoln in his first inagural address returned to an examination of "the position assumed by some, that constitutional questions are to be decided by the Supreme Court," and acknowledged the binding character of the Court's decisions in any case upon the parties to the suit, he added:

> . . . At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased

9. *Id.*, VI, 5, 7, 9.

10. BASLER, *supra* note 3, at 373, 377.

> to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.[11]

Had Lincoln been disposed to invoke the judicial power to resolve the legal issue, would the necessary institutions, doctrine and procedures have been available? The Constitution existed. The Supreme Court existed. Under the famous language of Article 3, Section 2, the judicial power extended "to all Cases, in Law and Equity, arising under this Constitution . . . to Controversies to which the United States shall be a party;—to Controversies between two or more states; . . ." The Supreme Court had original jurisdiction in all cases "in which a State shall be Party." What if the United States had instituted a proceeding in the Supreme Court against, say, Georgia or Mississippi, praying that the Court adjudge the purported secession to be in violation of the Constitution and therefore void and of no effect, and asking that an appropriate decree issue enjoining the purported secession and requiring the defendant state to continue to behave as a member of the Union?

Does the suggestion bring an astonished smile to your faces? I ask you to indulge me a while to see if there may be method in this madness. On May 2, 1890, Congress enacted a statute that provided in part as follows:

> That inasmuch as there is a controversy between the United States and the State of Texas as to the ownership of what is known as Greer County . . . the Attorney General of the United States is hereby authorized and directed to commence in the name and on behalf of the United States, and prosecute to a final determination, a proper suit in equity in the Supreme Court of the United States against the State of Texas, setting forth the title and claim of the United States to the tract of land lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, . . . claimed by the State of Texas as within its boundary and part of its land, and designated on its map as Greer County . . . and said case shall be advanced on the docket of said court, and proceeded with to its conclusion as rapidly as the nature and circumstances of the case permit.[12]

The statute and the law suit were intended to bring to rest a dispute originating in a treaty between the United States and Spain made on

11. RICHARDSON, *supra* note 9, at 5, 9-10.

12. 26 STAT. 81, 92-93 (May 2, 1890), as cited in United States v. Texas, 143 U.S. 621-22 (1892).

February 22, 1819. The treaty defined the boundary line between the United States of America and Spanish territory in North America. In one provision, the treaty described the boundary line by reference to the course of the Red River and more particularly to a point where the 32d degree of latitude struck the Red River.

When Mexico became independent in 1824, negotiations for a new treaty were undertaken and, in 1828, the boundaries defined by the treaty of 1819 were confirmed by an agreement between the United States and Mexico. When the Republic of Texas broke away from Mexico, a third treaty, between the United States and the Republic of Texas, was concluded on April 25, 1838, again confirming the boundaries originally defined in 1819. To prevent future disputes, the treaty of 1838 stipulated that each of the contracting parties—the Republic of Texas and the United States—would appoint commissioners and surveyors to mark out the lines upon a map.

By an Act of Congress of September 9, 1850, disagreements that had arisen concerning the boundary were resolved in part by the renunciation of Texas to its claim to certain lands in exchange for the payment of $10,000,000 by the United States. But commissioners and surveyors in behalf of the parties were unable to resolve a dispute as to the meaning of the "Red River." The draftsmen of the treaty of 1819 had been something less than precise in their acquaintance with the geography of the Southwest, and had overlooked the bifurcation of the Red River into a North Fork and a South Fork or Main Red River. The Texan commissioners insisted that the North Fork constituted the Red River within the meaning of the treaty of 1819, while the commissioners of the United States insisted that the treaty contemplated the South Fork or Main Red River. It was after some decades of bickering that the United States finally decided to resort to an original proceeding in the Supreme Court to lay the controversy to rest.

Texas demurred to the bill, stressing three grounds. While Article 3, Section 2, referred to controversies to which the United States shall be a party and to controversies between two or more states, nowhere did it refer to controversies between the United States and a state. It was not competent, Texas insisted, under the Constitution and laws of the United States of America, "for said United States of America to sue one of its component States in her own courts." In particular, there was no authority to institute such a suit in the Supreme Court within its original jurisdiction. Furthermore, Texas insisted, the United States was seeking a judicial decree to settle a question "which . . . is political in its nature and character and not susceptible of judicial determination by this court." The third ground was narrower, and I omit discussion of it here. (In its demurrer, Texas had cited also a fourth ground, which it abandoned in its argument.)

Texas pulled no punches in presenting its case. It insisted that the dispute could only be resolved by agreement between the United States and Texas. If no such agreement could be reached, "the result, according to the defendant's theory of the Constitution, must be that the United States, . . . must bring its suit in one of the courts of Texas—that State consenting that its courts may be open for the assertion of claims against it by the United States—or that, in the end, there must be a trial of physical strength between the government of the Union and Texas."[13] The first alternative, that the United States must sue in the courts of Texas, was held by the Supreme Court to be "unwarranted both by the letter and spirit of the Constitution." The second alternative—a trial of physical strength—"has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern."[14]

The court held that Article 3, Section 2 did encompass suits by the United States against a state, and that the issues were not political but justiciable; and it decided them in favor of the United States.

The decision was handed down thirty-one years after Abraham Lincoln's message to the special session of Congress, but its logic would have been applicable in 1861. It does not follow that the Supreme Court in 1861 would have applied the same logic. That is another question. I turn for guidance to another case, growing out of the same boundary dispute, in another of its ramifications.

I remind you of the partial settlement of 1850, in which the United States agreed to pay Texas $10,000,000. The payment was made in 5% bearer bonds, of which $5,000,000 were delivered to Texas and $5,000,000 were retained in the national Treasury. By appropriate legislation, Texas provided that the bonds could be sold when duly endorsed by the governor of the state. Most were endorsed and sold according to the procedure described by law; and when the purchasers presented the bonds to the United States, they were paid. A part, however, were retained by the legislature of Texas as a school fund and remained in the state treasury until the outbreak of the Civil War.

In January, 1861, sixty-one individuals, citizens of Texas, issued a call for a convention. In response to the call, delegates were elected from various sections of the state. The state legislature, convened in an extra session on January 22, 1861, ratified the election of the delegates to the convention. Assembling on February 1, 1861, the convention adopted an ordinance to dissolve the union between the state of Texas and the other states. The ordinance, subsequently submitted to the people, was adopted by a vote of 34,794 to 11,235. The convention thereupon reassembled, announced the count of the votes, and on March 4, 1861 declared Texas

13. United States v. Texas, 143 U.S. 621, 641 (1892).

14. *Id.*

to have withdrawn from the Union of the United States. It passed a resolution requiring the officers of the state government to take an oath to support the provisional government of the Confederate States. When the governor of Texas and its secretary of state refused to take the oath, the convention declared them deposed. Under the authority of the rebel government, a number of the retained bonds in an aggregate amount of $135,000 were transferred to White and Childs, a commercial firm, in payment for a quantity of cotton cards and medicines.

After the defeat of the Confederacy, the President of the United States appointed a provisional governor for Texas, who arranged for the formation of a state government. Under his direction, the people adopted a new Constitution of 1866, under which a governor was elected. In 1867, Congress passed the first three of the five Reconstruction Acts. By the first, Texas and nine other named Southern states, as a group, were divided into five military districts. Texas and Louisiana constituted the fifth military district. The statute provided for the appointment of an army officer as a military governor for each of the five districts. His authority was plenary. When the people of any one of the states should have formed a new constitution, meeting requirements prescribed in the Reconstruction Act, notably agreement to the Fourteenth Amendment (and after the Fourteenth Amendment should have become part of the Constitution of the United States) the state could have restored to it all of its rights and privileges under the Constitution. General Sheridan, the military governor for the fifth district, subsequently appointed a third governor of Texas.

It appeared that White and Childs and certain purchasers from them were seeking to present the bonds for payment by the United States. On February 15, 1867, the state of Texas sued in the Supreme Court to enjoin White and Childs and the others from obtaining payment, and to require them to surrender the bonds. In support of the suit, counsel exhibited letters of authorization from the provisional governor (Governor Hamilton) appointed by the President of the United States, the governor elected under the Constitution of 1866 (Governor Throckmorton), and the governor appointed by General Sheridan (Governor Pease). Counsel plainly foresaw attempted defenses based on a challenge to the authority of one or another of the governors. Their foresight was vindicated. Against a contention by the defendants that the persons filing the law suit did not represent the state of Texas, the Court held that "the suit was instituted and is prosecuted by competent authority."[15] But Messrs. White and Childs also invoked another defense full of implications for our inquiry.

They challenged the right of an entity calling itself "Texas" to bring

15. Texas v. White et al., 7 Wall. 700, 732 (1868).

a law suit in the original jurisdiction of the Supreme Court. They insisted it was not a state. The Reconstruction Act of March 2, 1867 had consolidated Texas and Louisiana, as "rebel" states, into a fifth military district subject to the "military authority of the United States."[16] While the legislation had provided a means by which Texas could be regenerated as a state, the conditions had not yet been satisfied. In consequence, the entity styling itself "Texas" had no standing in the Supreme Court. The argument persuaded three of the justices, who dissented.

Mr. Justice Grier, in dissenting, skirted a question concerning the constitutionality of the Reconstruction Act. In this, he was in accord with the majority. Chief Justice Salmon Chase, writing for the majority, took pains to note that "nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these [the Reconstruction] acts."[17] Mr. Justice Grier also did "not consider myself bound to express any opinion judicially as to . . . the power of Congress to govern her [Texas] as a conquered province, . . ." For Grier, this might have created complications, since he intended to defer to a political judgment expressed in the statute. But he found his way through the confusion, explaining: "I can only submit to *the fact* as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. *Politically,* Texas is not a *State in this Union.* Whether rightfully out of it or not is a question not before the court" (emphasis in the original).[18]

The majority were not intimidated by the political implications. They faced the issue; held it to be justiciable; and decided it. Texas had been, at all times continued to be, and still remained a state. The conclusion was inescapable, for the "Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States."[19] The words were uttered by Chief Justice Chase for the Supreme Court in 1868. They could have been spoken by Abraham Lincoln in 1861.

I return to the fantasy of a suit by the United States in the Supreme Court in 1861 against Georgia or Mississippi. The doctrines proclaimed by the Supreme Court in *United States v. Texas* in 1892 and in *Texas v. White* in 1868 established that the Supreme Court had jurisdiction over a dispute between the United States and a state; the United States could institute a proceeding against a state in the original jurisdiction of the Supreme Court, and the Supreme Court could issue a decree against the

---

16. 14 STAT. 428 (March 2, 1867).
17. 7 Wall. 700, 731 (1868).
18. 7 Wall. 700, 739 (1868).
19. 7 Wall. 700, 725 (1868).

defendant state; a dispute over boundaries originally international was justiciable and not really political; and questions whether a state was indestructible and whether Texas was a state were justiciable and not merely political. By the same token, the Supreme Court would have had jurisdiction of a suit by the United States against Georgia or Mississippi in 1861. The question whether the Union was indestructible would have been no less justiciable and no more political than the question whether a state was indestructible. The principle that the Union was indestructible would have pointed unswervingly to a judgment that secession was unlawful. The Supreme Court could have issued a decree accordingly against Georgia or Mississippi. All this would have been and could have been *if* the Supreme Court in 1861 would have applied the logic of 1868 and 1892.

Why didn't Lincoln try it? For that matter, why didn't Georgia or Mississippi try it in reverse? Here again we need to invoke the advantages of legal hindsight. In 1907, the Supreme Court distinguished a proceeding by a state against the United States under Article 3, Section 2 from a proceeding by the United States against a state. Neither case is covered explicitly by Article 3, Section 2. In the view of the Supreme Court, consent by a state to a suit against it by the United States "was given . . . when admitted into the Union . . ."[20] But "It does not follow that because a state may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion."[21] The conclusion was reaffirmed in 1963.[22] It follows that *if* the Supreme Court in 1861 would have applied the logic of the Court in 1907, Georgia or Mississippi could have sued the United States only with the latter's consent. If Georgia or Mississippi had taken the initiative to resolve the mortal issue of 1861 by adjudication, would Lincoln have consented? In either case, whether on the initiative of the United States or the initiative of a state with the consent of the United States, would the Supreme Court have exercised its jurisdiction and faced up to a decision?

We do not know and never can know. There are clues to support a pretty good guess. In a passage from Lincoln's first inaugural address previously quoted, he revealed his conviction that the "people will have ceased to be their own rulers" if they were to leave "the policy of the government, upon vital questions affecting the whole people, . . . to be irrevocably fixed by decisions of the Supreme Court . . . in ordinary litigation between parties and personal actions . . . ." We can surmise that he would have adhered to his view even in relation to extraordinary

20. Kansas v. United States, 204 U.S. 331, 342 (1906).

21. *Id.*

22. Hawaii v. Gordon, 373 U.S. 57 (1963).

litigation in which the parties would have been the United States Government and one or more states. He confronted an openly avowed purpose on the part of the dissident states to sever the Federal Union that left him "no choice . . . but to call out the war power of the government. . . ." The Southern states bluntly proclaimed that the American Union was secondary in importance to "the rights and principles" upon which they insisted and in behalf of which they were prepared to resist "even . . . to a disruption of every tie which binds [them] to the Union . . . ."[23] Since neither side would brook the possibility of an adverse decision, neither would have invoked the jurisdiction of the Supreme Court unless it were certain of a judgment in its favor.

If either had instituted such a proceeding, there are other clues to warrant a guess as to how the Court would have responded. It may sharpen our conjectures if we first consider some hypothetical alternatives.

Assume a United States Constitution that explicitly affirmed the Union to be indestructible and indissoluble. It declared the adherence of the several states to be irrevocable, and any purported withdrawal by a state to be void and of no effect. It expressly authorized and directed the Supreme Court to enjoin any attempt of a state to secede, upon a proper showing in a proceeding by the United States or any other state. Under such constitutional provisions, an exercise of jurisdiction by the Supreme Court in such a case would have entailed a minimal psychological burden for the members of the court. In the minds of the judges, in the view of the society at large, in the view of the major political and social institutions of the society, and in the view of the other branches of government, the judges would have exercised no discretion but would have discharged a clear and unavoidable duty. In their minds and in the minds of the others, the judges would not have been personally accountable for the consequences.

Consider another hypothetical case. Assume a lawsuit in the Supreme Court governed by a broad and general constitutional or statutory provision. Assume also that the issues have only restricted implications. The passions of the litigants are not deeply engaged. Whatever the feelings involved, they are confined to the immediate litigants and a few others, while the society in general and its political and social institutions are untouched. In such a case, a decision by the Court would involve a measure of judicial discretion, inescapable because of the breadth of the constitutional or statutory standard. But the society in general, its major political and social institutions, the other branches of government, and in most cases even the litigants themselves would feel they had a larger stake in a dependable procedure for an orderly and expeditious disposi-

23. Milledgeville Resolution of 1850, see *ante*, pp.

tion of such controversies than in this or that outcome in the particular case. In deciding such a case, the judges would assume some burden of personal accountability for the consequences. For conscientious men, the burden is never negligible, but in the circumstances described, it would be readily bearable.

Although the two cases are imaginary, they reflect actual cases without number in the life of the English and American legal systems and the civil law systems of Europe and Latin America. I offer some generalizations derived from them concerning the optimum conditions for adjudication. I speak of optimum, not necessary, conditions. By optimum, I do not mean calculated to elicit the highest expressions of the judicial art. I refer simply to circumstances in which judges find it easiest to decide and their decisions are most readily accepted by the parties and the community.

The optimum conditions are presented when the tribunal is long established in the regard of the people, who have seen it tested in a long and varied experience. The principles and standards to be applied by the tribunal in deciding the issues are accepted by the society in the sense that they emanate from established sources and through established procedures. The principles and standards for decisions have been established prior to the acts giving rise to the controversy. The principles and standards are precise and definite and are applied to the particular issue by an established method. To these must be added another set of factors, reflecting an interaction between the conditions for adjudication and the conditions for resort to adjudication by the parties to a controversy and compliance with the resulting judgment.

The optimum conditions that foster a resort to adjudication by the parties embroiled in a dispute and compliance on their part with a judgment are presented when, in addition to the factors previously described, the issue has only restricted implications, and the consequences of a decision one way or the other are easy to foresee. The persons directly involved are few and only a very small fraction of the society identifies itself with them. To the society at large and its major social and political institutions—and even to the parties themselves—it is more important to sustain institutions for an orderly and expeditious disposition of such disputes than to arrive at this or that outcome in the particular dispute.

The conditions become progressively less favorable as the several factors move through the range of possible variations toward the other end of the spectrum. Adjudication is harder for a new and unfamiliar tribunal. It is harder even for an established tribunal, if important segments of the society do not accept the principles and standards for decision or do not understand from what source or in what way the standards and principles were derived. It is harder even for an estab-

lished tribunal applying accepted criteria, if the criteria are broad and vague.

Corresponding variations in the other factors have corresponding consequences. If the issues have far-reaching implications and the consequences of a judgment appear incalculable, the parties to a dispute will be less disposed to seek a judicial resolution. They will be still less inclined toward adjudication if a large part of the society is identified with each of the parties and major political or social institutions are involved. The disinclination will be intensified if emotions are so deeply engaged that a particular outcome may appear more important to the participants, and to large segments of the society and major political or social institutions identified with them, than the steady support of an institution for an orderly determination of disputes.

There comes a point in the spectrum where the limits of adjudication are reached, and the task becomes unmanageable. These are limits in an elemental sense, inherent in the nature of adjudication as exhibited by the historic experience of the great legal systems familiar to us. They lie beyond the limits that may be set for a particular court by a constitutional or statutory provision creating it. The elemental limits cannot be changed by a constitutional or statutory modification. They can be extended or contracted, if at all, only by alterations in political and legal concepts that would entail changes in the basic pattern of values, beliefs and habits rooted in the culture and psychology of a people. If so profound a change did occur, it would engender philosophical disputes as to whether the modified process could still be properly regarded as adjudication. The dispute would be more than semantic. It would involve a question as to how far the historic experience of known legal systems could illuminate the prospects for the new process.

Wise and experienced judges do not ordinarily push the exercise of their functions up to the limits of adjudication. Their determination of where to impose self-restraint and draw the line will vary with their estimate of how the conditions are arrayed along the spectrum. It will also vary with their judicial philosophies.

These reflections naturally shape my conjectures concerning 1861. If a proceeding had been brought by the United States against Georgia or Mississippi in 1861, I believe the Court would have found the issues political and not justiciable. Even if the Court were composed of the same judges that issued the decree in *United States v. Texas* in 1892, they would have declined to exercise their jurisdiction in 1861. If, contrary to my conjecture, the Court would have decided the issues, its judgment would not have altered the event. The United States and the Confederacy would have gone to war. The judgment might not have been wholly without effect. One combatant might have been morally supported

and the other morally hampered in "the opinion of mankind," to whatever degree and in whatever direction the judgment might have affected "the opinion of mankind."

These reflections, together with the hard evidence of what has actually happened, also shape my opinion concerning the relevance of international adjudication or quasi-adjudication to the settlement of Cold War disputes. To avoid misunderstanding, let me pause here to explain my terms, and sound a warning.

I speak of "international adjudication and quasi-adjudication" to comprehend adjudication in the precise legal sense; any decisions *ex aequo et bono* that may be attempted by the International Court of Justice pursuant to Article 38, Paragraph 2 of its Statute; arbitration within the meaning of Article 33, Paragraph 1 of the United Nations Charter that enjoins the parties to any dispute to "seek a solution by negotiation, enquiry, mediation, conciliation, *arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" (italics added); and any attempt at peaceful settlement through a resort to impartial third parties who may be authorized to use their own skill and discretion to try to work out an accommodation by fair and orderly procedures. "Cold War disputes" is a rough shorthand to encompass disputes involving American resistance to, or attempts to forestall, what the United States believes to be Soviet Russian or Communist Chinese expansionism. For the present inquiry, it is unnecessary to assess whether or how far American eyes that may see Soviet Russian or Chinese Communist aggression in any case may misread the evidence. It is also unnecessary to determine how far Soviet Russia's or Communist China's public description of the events in any case may conform to its private appraisal; or how far its private appraisal might fairly be regarded as supported by credible evidence. Our focus is upon the relevance of international adjudication or quasi-adjudication to a peaceful settlement of a Cold War dispute after it has taken form.

I come to the warning note. When we undertake to bring into focus the evidence, issues and choices involved in such a dispute we encounter a pervasive hazard. The typical situation is many-faceted, intricate and fluid, full of variations and intangibles. We seek to identify, sort out and describe the issues and choices and relate them to the evidence in a way to make them discussable, where the function of discussion is to arrive at a choice within the limits imposed by the practical possibilities of politics and law. In the very process of doing so, whatever the care exercised, we cannot avoid gliding over some of the intangibles and suppressing some of the subtleties. It is a price that must be paid to introduce a sufficient measure of clarity and definition to make the situa-

tion discussable in political and legal terms. But we must remain aware of the excluded subtleties, and be ready to reintroduce them whenever the cost of continued exclusion becomes a loss of touch with reality.

If the states or international entities involved in an international Cold War dispute should want to undertake adjudication or quasi-adjudication, what tribunals might be available? There exists one standing court, the International Court of Justice; and at least two standing political entities, the Security Council of the United Nations and the Organ of Consultation of the Organization of American States. By agreement between the parties, judicial or arbitral tribunals can be created *ad hoc* for particular cases. In theory, there is also a possibility of creating new standing tribunals along lines envisaged by a number of imaginative writers. None of those that exist has the institutional status of a tribunal long known, long tested, and long secure in the regard of the people affected by its decisions. As to new entities that might be created, we cannot even speculate how long it might take them even to approximate such a status.

Taking the existing tribunals for what they are, what principles and criteria would they have available to reach a decision? In the case of the Security Council, the principles and standards can be found in Chapters I and VI of the United Nations Charter. They include the purpose of maintaining international peace and security; the prevention and removal of threats to the peace; the suppression of acts of aggression or other breaches of the peace; the adjustment of international disputes or situations that might lead to a breach of the peace; the bringing about of adjustment by peaceful means and in conformity with the principles of justice and international law; international cooperation; and the development of friendly relations among nations based on respect for the principles of equal rights and the self-determination of peoples. In the case of the Organ of Consultation of the Organization of American States, they include the obligation of the member states to cooperate with one another in a broad spirit of good neighborliness; protection of the peace of the Americas; respect for the fundamental rights and duties of states; and an obligation to use peaceful procedures to settle international disputes. In essence, these boil down to a single general principle or standard, the concept of peaceful settlement itself. In the case of the International Court of Justice, the criteria are the familiar terms of Article 38 of the Statute: international conventions; international custom as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and, in paragraph 2, not yet used, the principle of *ex aequo et bono*.

The parties to Cold War disputes are great states, the major political and social entities of contemporary international life, unrivaled for inter-

national power and status by any other existing organization except perhaps for the great organized religions.

In Cold War disputes, the issues typically fall into the categories described in standard diplomatic parlance as "vital." If the vital character sometimes seems to lie in the eye of the beholder, that does not necessarily make it any less real in terms of human behavior. There is no need to remind ourselves how tiny and remote corners of the earth's surface, or even more remote sectors of outer space, can become identified in the minds of governments with survival, independence and honor.

The art of diplomacy has long recognized that one of the most hopeful methods for seeking a peaceful settlement is to reshape the issues to squeeze the significance out of them. But so long as the issues remain charged with deep implications, they tend to be intractable.

In sum, in international Cold War disputes, the conditions for adjudication or quasi-adjudication at best lie at the far edge of the spectrum. Typically, they lie beyond the limits.

The factors that may place a dispute beyond the limits of adjudication (or quasi-adjudication) may also impair the possibility for negotiation, in the sense of discussion seeking a mutual accommodation through an emphasis upon common interests and common purposes. In circumstances when principles and criteria for adjudication or quasi-adjudication cannot be formulated, it is likely to be difficult to find common interests and common purposes. In such a case, it may be necessary to shift the search for accommodation toward a give-and-take in which estimates of probable gain are measured against estimates of probable loss under varying assumptions. I assume that this is what Winston Churchill may have had in mind when he said that "We cannot negotiate with the Russians, but we can bargain with them."

My conclusion about the limits of adjudication or quasi-adjudication need not drive us to despair for peace, nor to a loss of regard for the role of adjudication. Adjudication remains among the great institutional achievements of mankind. Like all human creations, it has its appropriate sphere. While its particular forms and applications can be increased, and while it may have unrealized potentialities to be fulfilled, there are limits even to its potential scope. While striving in each generation to maximize its use in accordance with its nature, we must take care not to dissipate the precious resource by wishful misapplications. If my conclusion is well-founded, it should drive us into a search for other, more pertinent ways and means to curb international disputes of a Cold War type and steer them toward an outcome that is peaceful or at least not destructive.