INTERNATIONAL LAW ANTINOMIES AND CONTRADICTIONS OF AN ERA OF HISTORICAL TRANSITION: RETROSPECTIVE ON THE NATO ARMED INTERVENTION IN KOSOVO

Edward McWhinney[*]

We live today in an era of historical transition. The 20th century really ended with the fall of the Berlin Wall in 1989. This heralded the end of the Bipolar system of World public order that had dominated the post-World War II era in its various phases. From the early, Stalinist, Cold War years of nuclear confrontation, through the pragmatic accommodations of Peaceful Coexistence, and on, finally, to an active East-West cooperation under the rubric of Détente.

The post-Cold War (more accurately, post-post-War) system of World public order is harder to identify in terms of its political Grundnorm or basic premises, to which all the legal ground rules ("rules of the game") must be logically related. Bipolarity has disappeared now into history. Is it now a Unipolar model of World public order, dominated by the single remaining superpower, the United States; or is it, rather, a plural, multipolar system, whether centered in the United Nations or operated, de facto, by a new oligarchy of which the United States, the European Union (or Germany, at least), Japan, China, Russia, and probably India too, must, by virtue of a combination of military and economic and geopolitical factors, become the principal players?

The patterns are not clear, and are frequently quite contradictory, and this is to be expected in a period of fundamental and rapid change in international society. The accidents of personality in political leadership, created by the changing of the guard and generational replacement in the political élites, have their impact today.

For the first time, the dominant political and also military élite in all of the main post-industrial societies is without direct, personal experience of World War II or active military service under combat conditions. A good deal of the "One World" idealism that, in reaction to World War II, inspired the creation of the United Nations and its sophisticated institutions and processes for resolution of international conflict, has gone. A form of atrophy was already there during the Cold War period, as emerging Coexistence and then Détente

* Edward McWhinney, Q.C., LL.M, S.J.D., LL.D., M.P.; Barrister and Solicitor; Professor (Em.) of International Law. Président de l'Institut de Droit International (1999-2001); Member of Parliament (Canada) and sometime Parliamentary Secretary (Foreign Affairs).

produced special, bilateral, inter-bloc, international law-making. This was achieved through Summit Meetings of the two bloc leaders, Soviet and Western, and manifested in a whole series of Soviet-Western pragmatic, empirical, step-by-step, problem-solving exercises, in nuclear and general disarmament, security of territorial frontiers, control of international terrorism, and related subjects.

The first post-Cold War election of a new United Nations Secretary-General in 1991 and the choice in that election of the brilliant International lawyer and reform-minded activist, Boutros Boutros-Ghali, seemed to presage a post-Cold War return to the United Nations in its original, 1945, spirit of the main arena for international law-making. But that promise was lost in the emerging conflicts between the United Nations Secretary-General and the United States State Department in which, in part at least, the political joinder of issues involved major intellectual differences over the new, United Nations-based, multipolar paradigm of World public order which Boutros-Ghali was considered to be projecting. United States President George Bush, though stressing United States primacy in any decisions on maintenance of international peace and security, had felt able, nevertheless, to operate easily enough under the United Nations aegis, and he was able to obtain the necessary prior United Nations legal authority, in the form of the United Nations Security Council umbrella Resolutions, to support and legitimate the allied military operations in the Gulf War crisis in 1990-1. His successor, President Clinton, in contrast, in stated fear of a possible Veto in the Security Council by either Russia or the People's Republic of China (though the matter was never tested concretely), and putting aside the alternative law-making route through the United Nations General Assembly on the Uniting-for-Peace precedent successfully sponsored by then United States President Harry Truman and United States Secretary of State Dean Acheson in the Korean War crisis in 1950, chose to by-pass the United Nations in the Kosovo situation.

President Clinton's decision on Kosovo was to operate, instead, through the vestigial Cold War military alliance, North American Treaty Organization (NATO). This left the combined North American-Western European military action against the former Yugoslavia (Serbia-Montenegro) over Kosovo without a positive law, International Law base. It is elementary that the NATO organization could not hoist itself by its own bootstraps into legal powers that it does not have under the United Nations Charter, or, a priori, outside the Charter.

A legal dispensation from the United Nations Charter's absolute prohibition on the use of force or from the Charter definition and limitation of the collective self-defense exception under § 51 of the Charter, would have to come from the United Nations Security Council or, failing, that, from the United Nations General Assembly. A political and legal tidying-up of the

Kosovo operation, such as it was, thus had to occur ex post facto: at the political level, by bringing in the Russians and placating the Chinese (P.R.C.), and leading on to the final, consensus settlement, at the legal level, by a United Nations Security Council Resolution adopted on June 10, 1999, with the support of Russia and with a Chinese abstention.

Would it not have been politically and legally wiser to have tried such a multilateral approach, based on a multipolar consensus and within and through the United Nations, from the very beginning? In the East Timor situation that followed immediately afterwards, that was the approach that was adopted from the outset: the Security Council was asked to approve armed intervention under Chapters VI and VII of the Charter, and by Resolution adopted by unanimous vote of the Security Council, including all the Permanent Members, gave that legal authorization on September 15, 1999.

The contradictions of an era of historical transition continue, in both substantive-legal and also processual-legal terms. The project to establish an International Criminal Court of universal jurisdiction was finally signed in Rome in July 1998, but it was indicated that four at least of the five Permanent Members of the United Nations Security Council would be unlikely to ratify it, for fear of submitting their own nationals (civil and military) to any new international criminal jurisdiction. Can the new International Criminal Court have any real role without the effective working participation and cooperation of the major powers? Meanwhile, the ad hoc United Nations War crimes tribunal for former Yugoslavia and Rwanda continues, but with its mandate apparently being interpreted so as not to extend to intervening states from outside the region concerned. Will there be no legal opportunity, therefore, for testing the relevance and applicability of the 1977 Protocols Additional to the Geneva Convention of 1949, to the contemporary law of aerial bombardment with particular relevance to civilians and civilian property?

As a municipal, national tribunal, the judicial committee of the British House of Lords, has voted to remove the legal claims to Sovereign Immunity against possible extradition to Spain to face charges of Crimes against Humanity that had been advanced before it by Chilean ex-Head-of-State General Pinochet. The legal initiative before the British tribunal falls wholly within municipal national law and is based on the incorporation into British law of International Law norms (here international treaty norms). It is paralleled by populist participatory democracy action – in default of larger, diplomatic progress on the Non-Proliferation Treaty (including action by the five existing members of the "Nuclear Club" to reduce their own nuclear weapons stockpiles) and in the face of the somewhat restrictive, no-clear-majority holding by the International Court of Justice in the recent Advisory Opinion on the legality of Nuclear Weapons, to spark the recent middle-power initiative for—a Land Mines Treaty, banning the production and sale of these particular, vicious

weapons of modern armed conflicts. Within ten months of its signing by a record 121 countries, the Land Mines Treaty has been ratified by the minimum number of forty states necessary for it to enter into legal force. But this has been done without the United States and other Permanent Members of the United Nations Security Council who feared a diminishing of their operational military power under the treaty, and who thus lobbied, in some cases strenuously, against the measure.

The new confidence of non-Permanent Members of the Security Council and particularly of those who, in the new international economics terms, may realistically aspire to a recognition of their claims to superpower status and those same new powers' disaffection with the failure of the World Community to up-date and reform United Nations basic structures and processes so as to take more account of contemporary realities in the World Community, may be expected to produce increasing fractionalism within the United States led, Western political-military alliance, and in turn, to encourage more local or regional, direct democracy initiatives in new international law-making, of the sort seen in the case of the General Pinochet extradition caper and the Land Mines Treaty initiative.[1]

1. The present study draws on the author's monograph, "*The United Nations and a New World Order for a New Millennium, Self-Determination, State Succession and Humanitarian Intervention*" (Kluwer Law International, The Hague, 2000).