

GUEST EDITORIAL

*Priest, Pragmatist, Apostate*¹

When the Board of this venerable publication offered me the possibility to contribute an editorial to mark my retirement from the Advisory Board after some forty-five years of membership, I was glad to accept. Although this brief essay focuses on my personal experience with and attitude toward the United Nations and the European Union, the two crucial players in the modern international system, it may reflect – I suggest – the more general feelings not only of the engaged elite but of a large sector of the public as well.

On the United Nations

When the freshly approved UN Charter appeared on my desk in the newly created Bureau of United Nations in the U.S. Department of State, the challenge was to breathe life into the virtual body. Without hesitation I claim the status of a “priest”: not only praising, as a priest would, the glory of the UN in lectures and seminars; but working on an array of issues ranging from drafting “Provisional” rules of procedure for the Security Council (still in force today as “Provisional”) to the early political issues such as protecting Greece against its Communist neighbours, decolonization of Indonesia, representation of China in the UN, voting in the Security Council, war over Kashmir, the Berlin blockade. I used to claim in jest that the speech I had written for U.S. Delegate Ambassador Henry Cabot Lodge to deliver in the General Assembly induced China to release the two American pilots who had strayed into its territory during the Korean War.

On 10 December 1948, sitting with the U.S. Delegation in the meeting of the General Assembly, I did not anticipate the impact of the Declaration of Human Rights which that body approved without dissent. In fact this action has proved to be a milestone in the development of what I believe is a truly fundamental change from the traditional 19th century system: the adoption of international human rights law, making the individual a subject of international

1. I owe this title to Helen Wallace in Phinnemore and Warleigh-Lach (Eds.), *Reflections on European Integration: 50 years of the Treaty of Rome* (Houndmills, 2009) at p. 13. My wife, Virginia, helped greatly in rummaging through our common memory and did a meticulous editing job. Professors Daniel Halberstam, Monica Hakimi, Steve Ratner and Mathias Reimann offered most useful comments as well. Jocelyn Kennedy-Lamson provided expert research assistance.

law. In this vein, it was only after recourse to President Eisenhower – and against fierce opposition by sections in the Department of State – that the U.S. Delegation was authorized to vote for the resolutions condemning discrimination against the Indian minority in the Union of South Africa. Ultimately, the U.S. Delegation, after ominous silence in Washington, co-sponsored a resolution flatly condemning the apartheid system. In line with the emerging human rights law, these activities greatly weakened the UN Charter barrier against intervention in matters “essentially within the domestic jurisdiction of any state.” Still in the human rights field, the General Assembly, in two consecutive sessions, asked the International Court of Justice to clarify the obligation of the newly Communist regimes in Bulgaria, Hungary and Romania under the post-WWII Peace Treaties. The Court ultimately deplored the failure of the three States to cooperate in an arbitration of charges of their human rights violations. This entailed two interesting trips to The Hague, but the Court’s advice was disregarded by the three governments.

In 1954, a colleague and I faced a blank sheet of paper with instructions to draft a proposal for a treaty on peaceful uses of atomic energy. We chose the title “Agency” to distinguish it from the standard specialized UN organizations. The draft changed substantially in small group negotiations before its approval as the International Atomic Energy Agency Treaty.

The post-war honeymoon was cut short by the erupting Cold War and a fusillade of Soviet vetoes in the Security Council. I participated in the project designed to improve the working of the General Assembly and to help move cases from the incapacitated Security Council to the Assembly’s standing “Interim Committee,” the “Uniting For Peace Resolution.” It was at that point that I began to turn from “priest” into “pragmatist,” still believing in a significant role for the UN in peace, economic and social problems. I have never reached the state of an “apostate,” but after nine years at the UN desk, I resigned to move into the greener pastures of academia.

My “pragmatist’s” belief in the UN was confirmed when the Security Council, confined to regional conflicts during the decades of the Cold War, resumed its role in international peacekeeping, anti-terrorism and enforcement of international criminal law. In the March 2009 issue of this Review, my colleague, Professor Daniel Halberstam, and I published a study under the self-explanatory title, “The United Nations, the European Union and the King of Sweden: Economic Sanctions and Human Rights in a Plural World Order.”

On the European Union

It was in the early 1950s that there appeared on my desk in the U.S. Department of State (the same desk I mentioned earlier), a progression of cables from the U.S. Embassy in Luxembourg. They told the fascinating – and for me,

moving – story of an agreement by France and Germany on an enforceable legal order with control over their industries central to war material production. I have never held any official function in the EU, although I spent several months at Rue Belliard with the Legal Service of the European Community as a guest of its brilliant Director General Michel Gaudet. This is where I witnessed the unforgettable debate over the famous *Costa* case² between those viewing the Community as a type of international organization and those who saw it as a new constitutional order. With a background in international law, it took me some time even to understand the issue and join the “constitutionalists” led by Gaudet. It was at this point that, here too, I became an enthusiastic “priest”: I wrote what I assume was the first English language description of the European Coal and Steel Community, I facilitated the establishment in Washington, DC of the first Community Delegation; I helped organize the first meeting of the leading officials of the Community with the American Bar and academics at the Federal Bar Association in Washington, DC. From there, the officials, including Commissioner Jean Rey (later President of the Commission), visited the Michigan Law School for a series of events. And, affirming the “priesthood,” I introduced European integration as a subject of instruction in an American law school. We developed three successive American-style casebooks: students from Europe came to Ann Arbor to study European law.

A two-volume collection of essays by European and American authors appeared under the title “American Enterprise in the European Common Market,” followed by a book on “Harmonization of European Company Laws – National Reform and Transnational Coordination,” a collection on “Courts and Free Markets: Perspectives from the United States and Europe” and a series of articles on Community themes, some of which are collected in “Thoughts from a Bridge: Retrospective of Writings on New Europe and American Federalism,” (published also in Italian).

I have preached European Community law on four continents. In Wuhan, China, I addressed a group of law students. The presiding professor left the room after I had finished my talk and answered a few technical questions. No one else moved, and I was flooded by quite “inappropriate” queries about democracy and human rights. In San Salvador I met twice with high government officials to discuss the European Community as a positive model for a Central American Economic Community. Finally, in Florence, at the first session of the Academy of European Law in 1990, I lectured on the external relations of the European Community. In contemporary vernacular, I became “part of the narrative” of European integration.

2. E. Stein, “Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the margin of the *Costa* Case”, 62 Mich. L. Rev. 491–518 (1965), also in XLVII *Rivista di Diritto Internazionale* (1965), 3–28.

After a series of advances, delays and retreats, the current Union of 27 under the Lisbon Treaty, is a radically different configuration from the original homogeneous structure. I confess to a touch of melancholy reminiscent of the disillusion with the UN dream, but I have never turned “apostate”: I see hope in the evolving patterns of cooperative constitutionalism for a prosperous Union within a pluralist international system. Yet a threat of extremism, abetted by economic distress, lurks in the future.

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