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The Impact of the East-West Divide on International Law: Patterns of Discourse and the Waves of 1989

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I. INTRODUCTION

IN ONE OF his letters from the Birmingham Jail, Martin Luther King writes: ‘Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly’.¹ The inspiration for these sentences may not stem from the domain of international law, but it is a striking caption of the reality (or of the predicament) of international law. Mutuality is, indeed, an inescapable element of the very existence of international law—particularly since the relevant arena has become global.

The focus of this paper is on a specific segment of history in which mutuality (or the absence of it) played an important role. The East-West divide was for several decades the single most important confrontation; steps taken and choices made were classified (and were labelled) according to their position in the light of this divide. It is not quite unequivocal what was ‘East’ and what was ‘West’. According to the most common (and most relevant) understanding, the Soviet Union and other European socialist countries represented the ‘East’, while Western Europe and the United States were the ‘West’. It is in the context of this understanding that 1989—marked by the fall of the Berlin Wall—is the historic turning-point marking the end of the divide.

This divide certainly had an important impact on international law. Both the rift itself, as well as endeavours to prevail over it, yielded much inspiration and motivation. International law has less inherent power than national law, and therefore it is more dependent on motivation. It is important to note that not only cooperation, but confrontation and competition might also craft motivation and synergies. The question arises how international law coped with this confrontation—and how the end of the confrontation influenced international law. One may also ask whether some patterns of

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¹ Martin Luther King Jr, Letter from Birmingham Jail, 16 April 1963.





thoughts and arguments which lost ground with the collapse of communism managed to find refuge in different environments and contexts. Of course, these issues deserve serious and detailed study—and some important studies have, indeed, been devoted to these questions. What I would like to submit are some observations, some of them made from angles that are not mainstream.

II. THE EAST-WEST DIVIDE AS A DETERRENT AND AS AN INSPIRATION

A. Competition and Confrontation

The title of this forum (An Era of International Law? The Years 1989–2010 in Perspective) suggests—although with a question mark—that 1989 was a year marking a consequential turning point (in the ‘East’, in particular), and that it might have introduced an era of international law. It is, indeed, quite clear that 1989 contributed to the importance of legal norms, and also brought about better observance of international law in the ‘East’. In a newly acquired perspective, the question also arises how the divide was conceptualised in the sphere of international law. A further question is whether the pre-1989 divide left a mark on perceptions of international law in the ‘West’.

Since I would like to make some observations about competition (which may be perceived as one dimension of confrontation), let me mention that competition is certainly not a new phenomenon in the domain of law. Going back in history, a quite striking parallel can be found as early as in the *Iliad*. Homer described competition for reward given for the best judgment in a dispute. As is written in Book XVIII:

Meanwhile the people were gathered in assembly, for there was a quarrel, and two men were wrangling about the blood-money for a man who had been killed, the one saying before the people that he had paid damages in full, and the other that he had not been paid. Each was trying to make his own case good, and the people took sides, each man backing the side that he had taken; but the heralds kept them back, and the elders sat on their seats of stone in a solemn circle, holding the staves which the heralds had put into their hands. Then they rose and each in his turn gave judgment, and there were two talents laid down, to be given to him whose judgment should be deemed the fairest.²

How did the ‘East’ and the ‘West’ compete for the epithet of the fairest? Juxtaposing ‘East’ and ‘West’, one generally comes to the conclusion that there was a continuous pressure from the ‘West’ endeavouring to persuade the ‘East’ to follow international law. This conclusion reflects the truth, but not the whole truth. Influence was exerted in both directions, and some attitudes on both sides were shaped by competition. In his book *Soviet Legal Innovation and the Law of the Western World*,³ John Quigley submits that the Bolshevik revolution brought a quite considerable number of new ideas that represented a challenge to the West. These ideas included the equality of sexes, abolishing the distinction between legitimate and illegitimate children and social welfare rights. All these ideas became legal norms in the USSR—and some of them became reality. The communist State also took important initiatives within the field of international law,

² Homer, *Iliad*, Book XVIII.

³ John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge, Cambridge University Press, 2007).



including, for example, a radical condemnation of colonialism. According to Quigley, in order to blunt a competitive edge in the making, Western societies went through a process of accommodation, adopting—or partially adopting—a certain number of ideas, which were first phrased as legal rules in communist Russia. According to Quigley's book, the Soviet model (or rather fear of the Soviet model) was an important factor in what the author calls 'accommodation in the West'. Speaking of the establishment of the International Labour Organization (ILO), for example, Quigley quotes Henkin, who states that 'improvement in the conditions of labour' and the ILO were 'capitalism's defense against the spectre of spreading socialism which has just established itself in the largest country of Europe [Russia]'.⁴ The fact that fear was one of the inspirations that brought about the creation of the ILO has also left a mark in its Preamble, which states: 'Conditions of labour exist, involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled'.⁵

At this point, one could make the observation that ideological principles—including some truly progressive ones, but also some disastrous ones—had a shortcut towards legal norms in the USSR, a State in which the legislators had to heed the party line rather than the opinion of their voters. But this does not disprove, but only explains, the point Quigley is making. The Soviet legislator accepted some rules before Western societies were ready to accept them—and probably before Soviet citizens would have accepted them as a result of a democratic process.

At any rate, the most consequential rivalry during the second half of the twentieth century yielded some noteworthy adaptations—just as it yielded fierce competition.

B. Rhetoric Expressions of Competition and Confrontation—and a Side Note on Titles

It is important to take note of the fact that throughout a considerable part of its history, the USSR was an agitated society, and this left an imprint on the style of its legal norms and legal thinking. Titles of legislative acts were particularly combative and ideologically loaded. Of course, in the USSR—like everywhere—titles are important, because they catch the eye of even those legislators who may not take time to read the text and consider the content; titles are also more likely to reach the public, and possibly the headlines. Let me give an example: following a then fresh revolutionary fervour, on 11 November 1917, the new Soviet Russia adopted an act entitled: 'On the Fight with the Bourgeoisie and its Agents who are Disrupting the Supply of the Army with Food, and Who are Obstructing the Achievement of Peace'.⁶ What is remarkable in such titles (and often in the content following such titles) is not just zeal in legal norms. What we have here is actually an abuse of the space of norms. The authority and dignity of the space of legal norms is ruthlessly abused when political messages, incantations and slogans are pushed into it, like junk mail pushed into the space

⁴ Louis Henkin, *International Law: Politics, Values and Functions*, Recueil des Cours (Hague Academy of International Law, 1989 part 4) 216, quoted in Quigley, *Soviet Legal Innovation* 77.

⁵ Constitution of the International Labour Organization, Preamble, cited in Quigley, *Soviet Legal Innovation* 78.

⁶ "О БОРЬБЕ СЪ БУРЖУАЗИЕЙ И ЕЯ АГЕНТАМИ, САБОТИРУЮЩИМИ ДЕЛО ПРОДОВОЛЬСТВИЯ АРМИИ И ПРЕПЯТСТВУЮЩИМИ ЗАКЛЮЧЕНИЮ МИРА".

of our mailboxes. Cardozo warned about the danger of infecting the space of legal scholarship. In his words: '[M]agic words and incantations are as fatal to our science as they are to any other'.⁷ The detriment is even more serious if not only legal science, but the space of the legal norms themselves is infected.

Agitated societies tend to plant magic, slogans, and incantations, into the space of legal norms—and into titles of legislative acts in particular. This is unfortunately not restricted to communist agitation, and to threats from the 'agents of bourgeoisie' who are obstructing the achievement of peace, and at the same time disrupting the supply of food. Other agitations in different societies—and outside the East-West divide—might bring about the same mindset. Prompted by 9/11, the US legislature crafted an act with the following title: 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001'. As is well known, this title contains an added rhetoric construct (not without some trace of strain and sweat of those who construed it). The first letters add up to supplementary magic and incantation: 'USA Patriot Act'.

C. Rivalry Targeting the Aura of International Law

One of the disciplines of East-West competition was a fight for the aura of international law. This was facilitated by the vast manoeuvring room left to rhetoric. International law became a strong symbol with inherent power and positive connotations, with which all players wished to associate themselves. Heeding this fact, the 'East' found it important to posit itself on the side of international law. We have witnessed a constantly positive and affirmative language relating to international law in the USSR, and in East-European countries in which Soviet political influence was present (along with the Soviet Army). In sum, one may note that the East-West divide did not yield fundamental differences regarding expressions of respect towards international law. It is a different matter, of course, to what extent norms of international law were truly observed.

At any rate, the authority of international law, which acquired solid ground in the Western World, was never challenged in the East—on the contrary, it received enthusiastic rhetorical support. The Soviet Union was heralded as a hero of the struggle for peace, for international legality, and for international law; and in this context, peace, international legality, and international law were understandably treated as uppermost values. In the words of Wolfgang Friedmann, '[S]oviet theorists maintained and developed a need to recognize the existing structure of international law, and to use it to the advantage of the Soviet Union'.⁸ International law was posited as a discipline in which the 'socialist bloc' had a comparative advantage. Grigorij Tunkin, a leading Soviet scholar (who cites in his treatises about the same Western authors who are also cited in Western treatises published in the same period) states that the October Revolution shaped critically important ideas in the field of international law. Tunkin identifies three such ideas: socialist internationalism; the principles of equality and self-determination of nations (which imply rejection of colonialism and of oppression); and the principle of peaceful cooperation of States with different social systems.⁹

⁷ Benjamin Cardozo, *The Growth of the Law* (Yale University Press, March, 1924) 66.

⁸ Wolfgang Friedmann, *The Changing Structure of International Law* (London, Stevens & Sons, 1964) 328.

⁹ Grigorij Tunkin, *Teorija mezhdunarodnogo prava*, 2nd edn (Moscow 1970) 4.

The same approach and rhetoric was adopted in other European socialist countries (with the exception of Yugoslavia, which espoused similar values, but demonstrated more self-reliance in shaping principles and arguments). In order to give a further illustration of this approach, I shall cite a few sentences from the standard Hungarian treatise on international law, first published in 1954, at the peak of the communist regime that prompted the 1956 Hungarian Revolution. According to Búza and Hajdú:

We definitely have to reject the short-sighted and defeatist view according to which international law is just a collection of wishes devoid of substance, because a considerable part of States does not obey its rules, while others are not in the possession of instruments with which they could bring about the rule of law. Those who take such positions leave out of consideration that nowadays, already one third of mankind lives in socialist systems and—in the words of the Second Moscow Declaration—‘the most distinctive feature of our epoch is that the socialist world order is becoming the decisive factor in the development of human society’. This socialist world order is fighting for the realization of international legality, since it secures peace.¹⁰

In the same spirit, various constitutions of the USSR gave ample emphasis to peace (tying it to Lenin) and to international cooperation. According to the last (1977) Constitution of the USSR: ‘The USSR steadfastly pursues a Leninist policy of peace and stands for strengthening of the security of nations and broad international co-operation’.¹¹

The difficult question arises whether such rhetoric may contribute towards a positive image and better observance of international law. It is certainly true that international law needs motivation—more so than various fields of internal law. The still imperfect system of sanctions needs substitutes. According to the classic sentences of Grotius, ‘[la]w, even though without a sanction, is not entirely void of effect. For justice brings peace of conscience, while injustice causes torments and anguish ... Justice is approved, and injustice condemned, by the common agreement of good men’.¹² Strong rhetorical support favouring international law may, in principle, yield positive motivation, and may foster observance. This chemistry may only work, however, if slogans are not completely out of touch, if they remain within some human range of realities. In some periods and with regard to some issues (like affirmation of social rights or rejection of colonialism), Soviet rhetoric and Soviet actions were within the same range. In this setting, strong wording and repeated emphasis may have contributed to motivation—and Soviet attitudes contributed to mutuality.

But this was not always the case. Some pledges of allegiance towards international law and incantations were capable only of engendering cynicism rather than motivation. To give an example, on October 31, 1956, a week after outbreak of the 1956 Hungarian Revolution—and four days before the brutal Soviet intervention—the Soviet Government issued a ‘Declaration regarding the Bases of the Development and Further Strengthening of the Friendship and Cooperation between the Soviet Union and other States’.¹³ The same principles (including the ‘further strengthening of friendship’) were asserted during the 1968 intervention in Czechoslovakia as well.

¹⁰ Búza László—Hajdú Gyula, *Nemzetközi Jog*, 3rd edn (Budapest 1961) 454 (translated from the Hungarian original by the Author).

¹¹ Art 28(1) of the Constitution of the Union of Soviet Socialist Republics, Adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation, on 7 October 1977.

¹² Grotius, *On the Law of War and Peace (De Iure Belli ac Pacis)*, Prolegomena—in ‘Grotius Reader’, (T.M.C. Asser Instituut, The Hague 1983) 234.

¹³ See Friedmann, *Changing Structure*, 332.

Rivalry targeting the aura of international law had different facets. One way of competing was shifting emphasis to areas where the rival was more vulnerable; or, looking from another angle, where the 'East' (or the 'West') was able to assert loyalty without jeopardizing its interests. Instead of competing, for example, in the area of freedom of speech, politicians and scholars in the USSR opted to put emphasis on other (also commendable) values, such as decolonisation. Before the Soviet Revolution, Lenin extended his criticism of colonialism to (tsarist) Russia as well, and stated that 'if Morocco would declare war to France, India to England, Persia or China to Russia, these would be just wars'.¹⁴ After the Soviet Revolution, these ideas were repeatedly stressed by Soviet scholars and diplomats. The Soviet Union had an important role in the adoption of the 1960 UN resolution entitled 'Granting Independence to Colonial Countries and Peoples'.¹⁵ What we have here may be qualified as a ploy with the aim of moving to a playing field that provides advantages, but the fact remains that most of the arguments and steps taken by the USSR with regard to colonialism were progressive.

Of course, anti-colonialism had ardent advocates in the West as well. One can go back to Grotius who stated:

Victoria then is right in saying that the Spaniards have no more legal right over the East Indians because of their religion, than the East Indians would have had over the Spaniards if they had happened to be the first foreigners to come to Spain. Nor are the East Indians stupid and unthinking; on the contrary they are intelligent and shrewd, so that a pretext for subduing them on the ground of their character could not be sustained. Such a pretext on its very face is an injustice. Plutarch said long ago that it was greed that furnished the pretext for conquering barbarous countries, and it is not unsuspected that greedy longing for the property of another often hid itself behind a pretext of civilizing barbarians.¹⁶

This is the logic and moral height which Lenin tried to claim, and where the USSR tried to posit itself. The principles espoused by Grotius remained, however, a challenge—both before and after 1989—when applied to the present environment. The critical question is whether one would recognise the 'greed under the pretext of civilization' pattern in new contexts—such as the context of armed intervention for the purpose of 'safeguarding socialist democracy' or for the purpose of 'establishing democracy'.

Still in connection with competition for a place under the aura of international law, I would like to take note, very briefly, of another technique. Just as there has been manoeuvring for the purpose of making comfortable things relevant, there has also been manoeuvring with the aim of making uncomfortable things irrelevant. In recent times, we have seen two techniques of displacing bothersome things, of pushing them beyond the realm of relevance. One is territorial displacement (one can take the example of Guantánamo). The other approach is logical displacement—placing vexing incidents outside the scheme of mutuality and consistency ('Kosovo is not a precedent').

¹⁴ The citation is from the text 'Socialism and War', written in July/August 1915, cited from a Hungarian collection of Lenin's writings, *Lenin a kommunista erkölcséről* (Lenin on Communist Morality) (Budapest 1970) 82.

¹⁵ See Quigley, *Soviet Legal Innovation*, 143.

¹⁶ Grotius Reader, 65.



III. THE YIELDS OF 1989

A. A Consequential Change of Style

There are several ways to characterise the yields of the fall of the Berlin Wall. One critically important change is the shift from rhetoric to reality. I am not going to suggest that there are no longer slogans or rhetorical manipulations in the 'East' (or in the 'West'), but there is a remarkable difference. Let us consider, for example, constitutional provisions. Prior to 1989, the constitutions of the 'East' had a combative tone. The Project (draft) of the first Soviet Constitution was introduced by Stalin at the Congress of Soviets, on 26 November, 1936. In his speech Stalin stressed that unlike bourgeois constitutions, the Project of the Soviet Constitution was 'deeply international' and started from the assumption that 'no difference in colour of skin, language, level of culture, level of development of the State, or any other difference between races and nations can justify inequality'.¹⁷ Stalin stressed that the new Soviet Constitution would be a 'document evidencing that what millions of honest men were dreaming about and are still dreaming about in capitalist countries—is already implemented in the USSR'; and added that the 'new USSR Constitution will be an indictment against fascism'.¹⁸ Many provisions of the first Soviet Constitution were imbued with this rhetoric. In later versions and modifications this combative tone subsided, but it did not disappear. The last (1977) Soviet Constitution had the following provisions dealing with international law:

Chapter 4 'Foreign Policy':

Article 28

The USSR steadfastly pursues a Leninist policy of peace and stands for strengthening of the security of nations and broad international co-operation.

The foreign policy of the USSR is aimed at ensuring international conditions favourable for building communism in the USSR, safeguarding the state interests of the Soviet Union, consolidating the positions of world socialism, supporting the struggle of peoples for national liberation and social progress, preventing wars of aggression, achieving universal and complete disarmament, and consistently implementing the principle of the peaceful coexistence of states with different social systems.

In the USSR war propaganda is banned.

Article 29

The USSR's relations with other states are based on observance of the following principles: sovereign equality; mutual renunciation of the use or threat of force; inviolability of frontiers; territorial integrity of states; peaceful settlement of disputes; non-intervention in internal affairs; respect for human rights and fundamental freedoms; the equal rights of peoples and their right to decide their own destiny; co-operation among states; and fulfilment in good faith of obligations arising from the generally recognised principles and rules of international law, and from the international treaties signed by the USSR.

Article 30

The USSR, as part of the world system of socialism and of the socialist community, promotes and strengthens friendship, co-operation, and comradely mutual assistance with other socialist

¹⁷ J V Stalin, *Pitanja lenjinizma* (Questions of Leninism) (Belgrade, 1946) 518.

¹⁸ Stalin, *Pitanja lenjinizma*, 534.



countries on the basis of the principle of socialist internationalism, and takes an active part in socialist economic integration and the socialist international division of labour.

It is pertinent that the provisions relevant for international law have found place in the chapter entitled 'Foreign Policy'. The context is a consistently activist one. Definitions and delimitations have been replaced with drive and announcement of trends. The phrases posited into operative position are: 'steadfastly pursues', 'aimed at ensuring', 'based on observance', or 'promotes and strengthens'. The text comes closer to a straight normative commitment in Article 29, which refers in connection with international treaties to 'fulfilment in good faith of obligations arising from the generally recognised principles and rules of international law, and from the international treaties signed by the USSR'. But even here, the Constitution does not simply say that treaties will be observed. The context is that 'relations with other states are based on' the principle of fulfilment of international obligations. Critically important legal questions like that pertaining to the relationship between treaties and domestic law were not raised, let alone answered.

The year 1989 brought a radical change with regard to style and approach. Enthusiasm for international law ceded place to international law itself. Very shortly after 1989, some scholarly articles were published in the USSR suggesting a different discourse. In the well-known Soviet law journal *Sovetskoe Gosudarstvo I Pravo*, three Soviet authors proposed in 1990 a constitutional reform that would specify the place and authority of international law, including a provision giving priority to treaties over Soviet legislation.¹⁹ The change came within a few years.

Let us take a look at the wording of some constitutions that replaced the Soviet era constitutions. According to the present (1993) Russian Constitution:²⁰

Article 15, Part 4:

4. The universally-recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

In a similar vein, the 1996 Ukrainian Constitution²¹ states:

Article 9

International treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine.

Conclusion of international treaties, contravening the Constitution of Ukraine, shall be possible only after introducing relevant amendments to the Constitution of Ukraine.

To give a further example, according to the 1997 Polish Constitution:²²

Article 9

The Republic of Poland shall respect international law binding upon it.

¹⁹ A S Vereshchetin, G M Danilenko, R A Mullerson, *Конституционная реформа в СССР и международное право* (Constitutional Reform in the USSR and International Law) *Sovetskoe Gosudarstvo i Pravo*, 1990, 13.

²⁰ Constitution of the Russian Federation, adopted at National Voting in December 1993, in force since December 25, 1993.

²¹ Constitution of the Republic of Ukraine, adopted at the Fifth Session of the Verkhovna Rada of Ukraine, on 28 June 1996.

²² Constitution of the Republic of Poland, adopted on 2 April 1997.

Article 87 Part 1

1. The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.

Article 91

1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

All these (and other) post-1989 constitutional provisions have defined the position of international law within the (domestic) legal system. The Russian and the Polish constitutions have also recognised the supremacy of international law, stating that ratified international agreements shall have precedence over domestic statutes. The Ukrainian Constitution does not take an unequivocal position in this respect; it just states that ratified international treaties shall be part of the national legislation of the Ukraine. The constitutions of the Republic of Georgia,²³ Estonia,²⁴ and the Slovak Republic²⁵ have also granted priority to ratified treaties over domestic legislation. The Hungarian Constitution guarantees conformity between domestic law and accepted international obligations.²⁶

A rule-based (rather than slogan-based) approach has positioned international law within an environment of legal norms. Of course, real norms need not be ideal norms. In the new setting we have witnessed debates and controversies regarding the exact meaning and range of norms of international law, as well as regarding the specific import of norms dealing with international law. In this setting some traditional dilemmas have re-emerged, and some new ramifications of legal questions have come to the fore. Newly established constitutional courts in former socialist countries have played a significant role in bringing about more clarity, and in confirming the authority of international law.

One could easily cite a significant number of consequential decisions of various constitutional courts. In order to demonstrate the emergence of new problem patterns (and of a new thinking) I shall refer to just one example—an early decision of the Constitutional Court of the Republic of Lithuania. Soon after 1989, Lithuania enacted a special statute on international treaties.²⁷ This Statute preceded the 1992 Lithuanian Constitution. Art 12 of the Statute provided that international treaties of the Republic of Lithuania ‘shall have the force of law’. This Statute envisaged several ways of confirming treaties (which shall have the force of law): by ratification, confirmation by the Government, or confirmation by the Ministry of Foreign Affairs. Accession was

²³ Adopted on 24 August 1995, with amendments as of 27 December 2006—see Art 6.

²⁴ Adopted on 28 June 1992—see Art 123.

²⁵ In force since 1 October 1992, with amendments as of 2002—see Arts 7 and 154c.

²⁶ The 1949 Constitution of the Republic of Hungary, as amended through 25 May 2010—see Paragraph 7.

²⁷ Law on International Treaties of the Republic of Lithuania, Official Gazette (*Valstybes Žinios*) No 16-415, 1991.

identified as an additional method. On 19 June 1995, the Government of the Republic of Lithuania requested the Constitutional Court to take a position with regard to the constitutionality of this provision. The key issue was whether the provision of Article 12 of the 1991 Statute may endow with force of law all international treaties adopted by Lithuania, or only those that have been ratified by the Seimas (the Lithuanian Parliament). According to Article 138 of the Lithuanian Constitution 'International treaties ratified by the Seimas of the Republic of Lithuania shall be constituent parts of the legal system of the Republic of Lithuania'. The Government also pointed out that according to Article 7 of the Constitution 'Any law or other statute which contradicts the Constitution shall be invalid'. In the opinion of the Government, the status of treaties accepted by Lithuania but not ratified by the Seimas, had become 'indeterminate'. After a careful analysis (devoting considerable attention to the norms of the 1969 Vienna Convention on the Law of Treaties), the Constitutional Court came to the following conclusions:

Pursuant to the Constitution only the legislator by the way of ratification may decide which statute of international law shall be the constituent part of the legal system of the Republic of Lithuania having the force of law. The Seimas shall have the right of legislation and the legislation shall not be delegated to any other institution of the State power. Upon recognizing that non-ratified international treaties have the force of law, the prerogative of the Seimas to pass laws would be negated. It is also important that the treaties which must be ratified have the essential significance to the further creation of the legal system. Therefore, the provision of Article 12 of the Law in dispute that 'international treaties of the Republic of Lithuania', i.e. also the international treaties which are not ratified by the Seimas have the force of law, unfoundedly extends their juridical force in the system of sources of law of the Republic of Lithuania. From this standpoint the provision of Article 12 of the disputable Law that international treaties of the Republic of Lithuania 'shall have the force of law' contradicts Part 3 of Article 138 of the Constitution.

Facing the issue of the supposedly 'indeterminate' nature of treaties not ratified by the Seimas, the Constitutional Court found the following solution:

The Constitutional Court also points out that after the Constitution coming into force, the legal force of the concluded and enforced but non-ratified international treaties of the Republic of Lithuania does not remain indeterminate, as it is stated in the petition of the Government. They have force which is obligatory for entities of legal relations and which is characteristic of every legal act. However, their juridical force differs from ratified treaties in such fact, that they must be in compliance not only with the Constitution but also with the laws.²⁸

B. Coping with Doubt

The shift towards a matter-of-fact approach in the 'East' has turned mutuality into a much more realistic goal. Results, steps towards compliance (or steps towards non-compliance) have become measurable by the same instruments and criteria. International institutions have become—more than before—a common arena, and their authority is nowadays more broadly respected. The 'East' joined the Council of Europe and the ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms) and its

²⁸ Decision of the Constitutional Court of the Republic of Lithuania of 17 October 1995. Full text of the decision is available in English at: www.lrkt.lt/dokumentai/1995/n5a1017a.htm.

additional protocols. Consequential disputes involving States and other actors from both the 'East' and the 'West' have been submitted to the European Court of Human Rights, decisions have been rendered—and heeded. The CSCE (Conference on Security and Cooperation in Europe—later OSCE, Organization for Security and Cooperation in Europe) has become an important actor.²⁹ The ICTY (International Criminal Tribunal for the Former Yugoslavia) and the ICTR (International Criminal Tribunal for Rwanda) have brought about major advances in the fight against impunity on the international arena. One hopes that the same will apply to the ICC (International Criminal Court).

Of course, 1989 did not eliminate all imperfections, and did not do away with doubt whether international law can be really efficient when important personalities or state interests are at stake. As a matter of fact, when in May 1999 the ICTY indicted Slobodan Milošević, charging him with crimes against humanity and violations of the laws and customs of war during the Kosovo conflict, this indictment did not have much more effect than the 21 September 2000 Judgment of the Belgrade District Court condemning—as was stated in the Judgment—William Clinton aka Bill Clinton, Madeline Albright, Anthony Blair, Jacques Chirac, Gerhard Schröder, Javier Solana, Wesley Clark and others, to 20 year of prison each, for their role in the same Kosovo conflict. Things changed after 5 October 2000 when Milošević was ousted. But—staying with the example of Serbia—doubts in the effectiveness of international law, along with doubts in the veracity of mutuality persisted, and reasons for doubt were further generated even after the end of the Milošević rule. It was not easy to supersede ethnic perceptions of 'just causes' in any of the successor countries of the former Yugoslavia.³⁰ There were also situations that raised doubts in the minds of those as well who had consistently opposed ethnic leaders and ethnic narrow-mindedness. The transfer of Milošević to The Hague posed great challenges, and yielded true controversies. The international obligation of the FRY existed, but the Constitution of the FRY (enacted in 1992) stated in Article 17 that a citizen of Yugoslavia cannot be extradited to another country. The Yugoslav Code of Criminal Procedure made this prohibition even more explicit. In this situation, Professor Grubač, then Minister of Justice of the Federal Republic of Yugoslavia (Serbia and Montenegro), proposed a federal legislative act that would supersede (or bypass) the Code of Criminal Procedure, and draw a distinction between extradition to a foreign country and transfer to an international tribunal. The draft was prepared as a matter of priority, but it became soon clear that the Montenegrin representatives in the Parliament would probably block it. The frustration mounted—and so did the temptation to disregard the Constitution (and the Code of Civil Procedure) for the sake of international reward. In this situation, the draft legislative act prepared by Minister Grubač was practically copied and submitted to the Federal Government in the form of a government decree. There was no force in the Federal Government that could have blocked the adoption of the decree. (It was, of course, very much questionable whether a government decree could replace a legislative act aiming to supersede the Code of Criminal Procedure.) The decree was adopted by the Government, but it was successfully challenged before the Constitutional

²⁹ This has come to the expression in the 6 December 1994 Budapest Summit Declaration and Decisions (Reprinted in 34 ILM 764—1995).

³⁰ See interesting reflections on this issues in Dan Saxon (from the ICTY Prosecution) 'Exporting Justice: Perception of the ICTY Among the Serbian, Croatian and Muslim Communities in the Former Yugoslavia', (2005) *Journal of Human Rights* 559; on perceptions in Serbia see also M Grubač, Hag očima Beograda (*The Hague in the Eyes of Belgrade*) Glasnik Advokatske komore Vojvodine, 9-10/2001, 439.

Court of Yugoslavia. Before rendering a final decision, the Constitutional Court issued an interim measure prohibiting the transfer of Milošević under the Government Decree. In the meantime international pressure mounted, and it became clear that sorely needed international financial aid would depend on extradition. The Serbian Government opted to transfer Milošević to The Hague, just a few days before an international donor-conference.³¹ The situation was a difficult one, and it is not easy to tell whether waiting would have been the better approach. It was certainly in line with justice—and also in line with the international obligations of Serbia—that Milošević was delivered to The Hague. It is distressing that under the circumstances this was not a clear triumph of the rule of law.

Faith in international law and mutuality were exposed to new trials when diplomats visiting countries of the former Yugoslavia requested the arrest of war criminals who were still at large, and at the same time asked these countries to sign a statement that they would not extradite US indictees to the ICC.

Doubts are often tied to a perceived lack of mutuality. This perception is particularly typical in less powerful countries. In various countries, (certainly including those qualified as ‘superpowers’) time and again, the question has also emerged as to whether international law can (and should) supersede some ‘more important’ values and principles. Doubts have often been spurred by agitation—and this is not a phenomenon restricted to communism. Agitated societies (or leaders) often lose a sense for balance; they are blinded by one priority, and forget the well-established need for heeding more values at the same time. The words of John Bolton, US Ambassador to the UN, under the Bush Administration, represent a stunning example of such thinking:

It is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so—because, over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States.³²

Bolton’s position was shared by a number of influential authors and decision-makers.³³ At the same time, consequential arguments were advanced against this position. An analysis of arguments and counter-arguments would take me way beyond the limits of these observations. I would just like to refer—among other possible sources—to an important study of M Scharf, devoted to the influence of international law in the formation of American foreign policy, relying on empirical data supplied by former State Department Legal Advisers.³⁴ In the closing sentences of his article, Scharf reaches the conclusion that ‘[i]n the final analysis, the qualitative empirical data has shown that international law is real because it plays a real role in shaping the conduct of States (even a superpower in times of crisis)’.³⁵

³¹ See a more detailed description of this sequence of events in Grubač, *ibid.*

³² See M Scharf, ‘International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate’ (2009) 31 *Cardozo Law Review* 47, 56—quoting Samantha Power, Boltonism, *New Yorker*, March 21, 2005.

³³ See, among others, J Goldsmith and E Posner, *The Limits of International Law* (Oxford, Oxford University Press, 2005); M Paulsen, ‘The Constitutional Power to Interpret International Law’ (2009) 118 *Yale Law Journal* 1762. Paulsen’s article found prompt criticism in R Ahdieh’s ‘The Fog of Certainty’ (2009) *The Yale Law Journal Online* 41.

³⁴ M Scharf, *International Law in Crisis*.

³⁵ *Ibid.*, 97.



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The debate will certainly continue. 1989 is not the end of history, and it did not bring us to an end of trials awaiting international law. It is next to impossible to keep count of the predictions that heralded an end of history, the end of some intrinsic problem, or the arrival of the 'era of peace'. (One may incidentally take note of the fact that 'Peace of God' was proclaimed exactly one thousand years ago, by Robert II of France in 1010.) Doubts linked to international law will certainly continue, just as international law will continue to exist. Looking back at the situation prior to 1989, we can nevertheless say that a step forward was indeed taken. Instead of discarding doubt (which was the Soviet style solution), we have now gained an opportunity to face its causes. And as a matter of fact, it is easier to cope with doubt than with slogans of exuberant loyalty.



