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Anarchy-Law, East-West, North-South

by Jonathan Bingham*

This issue of the *Case-Western Reserve Journal of International Law* grapples with a complex, inchoate and difficult form of law. It is one that should be extended, developed and strengthened. In spite of the set-backs suffered by the United Nations and other multilateral institutions, there are groups throughout the world which continue the struggle to develop a structure of law to replace the international anarchy of the past. Parliamentarians have been a part of this movement, internationally through Parliamentarians for World Order and on Capitol Hill through a bipartisan, bicameral organization known as Members of Congress for Peace Through Law.

Treaties and Conventions of course offer the most satisfactory means for building the structure of international law. The Law of the Sea Treaty, so painfully negotiated through several Administrations, provided a major opportunity for broadening the legal structure to include two-thirds of the earth's surface; the Reagan Administration destroyed that opportunity, but the damage may some day be mitigated if a future American Administration, sympathetic to the goal, can persuade the participating nations to amend the present statute, at least to some degree.¹

A body of law of somewhat lesser status, composed of resolutions adopted by the U.N. General Assembly and other world bodies, decisions of the International Court of Justice, and precedents created by custom, is constantly in the process of growth and refinement. Most of the articles which follow focus on various actions by the Carter and Reagan Administrations in the light of such "norms" of international conduct.

After the Soviet invasion of Afghanistan at the end of 1979, the Administration felt, and most Members of Congress agreed, that the United States had to respond with punitive measures, not in the hope of causing

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¹ I assume that the Treaty would not be ratified by the U.S. Senate if submitted in its present form. However, it might well have been amended before adoption so as to make it acceptable to the Senate, had not the Reagan Administration handled the matter in such an arrogant and abrasive manner.

the Soviets to change course, but to encourage them to think twice in the future before undertaking a similar adventure. Various steps were indeed taken, including a decision that the United States would not participate in the Moscow Olympics and would attempt to persuade other nations to do likewise. This seemed to most people on the Hill a practical answer to a practical problem. The Olympics are supposed to be non-political, but it is clear they are not. The Soviets were obviously trying to make political capital out of the fact that the Olympics were to be held in Moscow. Their national pride was involved, and that was the very reason why this particular form of response to the invasion of Afghanistan was well calculated: it would hurt. In his article on the subject, James Nafziger suggests that such a boycott of the Olympics may have been a violation of customary international law. However, Nafziger also states that a similar boycott against South Africa would have been justified. Nafziger's position implies that apartheid is a more grievous violation of international law than armed aggression against a neighboring country. The question of whether the Olympic boycott was contrary to principles of international law was not raised as a major issue on the Hill.²

The imposition of martial law in Poland and the suppression of slowly emerging freedoms there, as exemplified by the Solidarity movement, presented the United States with an even more difficult problem. Although aggression in a military sense had not been committed, there was little doubt that the Soviets were responsible for Warsaw's actions. Once again the feeling was widespread in Washington that something had to be done. But the options were limited. One course would have been to reimpose the grain embargo which had been lifted in April 1981. This course of action would have offended the American farmers, a risk the Reagan Administration was unwilling to take.

What the Administration in fact did was to tighten export controls over equipment and technology for the production of oil and gas, a step which hard-liners in the Administration had long favored as a way of hurting the Soviet economy. In June of 1982, the ban on exports was extended to equipment for transport for the Ouregio gas pipe-line and to foreign subsidiaries and licensees of American companies. Not content with seeking to impose such drastic controls on exports from the United States, the Administration put heavy pressure on our European allies to take parallel action. As several of the *Journal's* contributors effectively point out, these actions went well beyond permissible limits under accepted principles of international law. They were also unwise because of the harm they did to the United States' relationship with its European allies. The attempt by the United States to *compel* its allies to repudiate

² The Carter Administration did, however, research the legal issues and concluded that the boycott was justified, according to Lloyd N. Cutler, Presidential Counsel at the time.

their agreement to cooperate in the construction of the pipeline probably did more to undermine the foundations of its alliance with the European allies than any other action since World War II.

Eventually, the Administration itself had to back down. Yet high officials in the Administration continue to place undue emphasis on the importance of barring exports of significant technologies to the Soviet Union for strategic reasons having nothing to do with events in Poland. This spring, for example, Assistant Secretary of Commerce Lawrence Brady was quoted by European officials as having suggested that, if our European allies proved uncooperative on export controls to the Soviet bloc the United States would have to "reconsider military commitments to Western Europe."³ He denied having made the statement, but Mr. Brady has long been of the view that the West has been inexcusably lax in allowing the Soviets to import key technology of military significance.⁴ The Europeans naturally resent this attitude. Late in April the European Economic Community expressed deep concern over U.S. proposals to toughen controls, especially a proposed amendment to the Export Administration Act that would authorize the President to restrict imports from countries that sell to the Soviet bloc in violation of American trade restraints. The E.E.C. angrily described the Administration's moves as "contrary to international law and comity."⁵

The hard-line view expressed by Brady and others overlooks several key points: (1) the Soviets are by no means incapable of making scientific and technological breakthroughs on their own: consider Sputnik; (2) there is no way that export controls can *prevent* the Soviets from acquiring the most modern technology—as most controls can only *delay* the process for a year or two; and (3) the incremental advantage to the West of delaying Soviet acquisition of certain technologies is surely less important to our security than the preservation of the Western Alliance.

Lynne Finney's article on development aid looks at North-South, rather than East-West, issues. In a broad sense development assistance is a "tool of foreign policy," as Ms. Finney says. Beginning in the immediate post-World War II period, the United States embarked on a series of unprecedented foreign aid programs which were recognized by Congress as well as the Executive Branch as being in the interest of our country, even though the popular conception was widespread that they were "give-aways." One of the most significant was President Truman's "bold new program" for sharing our scientific and technical know-how with the developing countries, enunciated in the fourth point of Truman's 1949 Inaugural Address and known for years as the "Point Four" program. This

³ N.Y. Times, Apr. 24, 1983, § 1, at 8, col. 1.

⁴ *Id.*, at col. 3.

⁵ *Id.*, Apr. 29, 1983, at 1, col. 5.

dramatic proposal sparked a whole range of multilateral and bilateral technical cooperation programs by the United Nations and many industrialized countries. Trying to close the gap between rich and the poor nations—or at least trying to prevent the gap from getting wider—is still a legitimate and important aspect of U.S. foreign policy.

All too often, however, U.S. officials tend to see aid programs as a way of exercising short-term leverage on the policies of the recipient countries. This is usually a mistake; bought friends do not stay bought. The process gives rise to the classic questions asked by the constituent of the hard-working politician: "What have you done for me lately?"

Cooperation in social and economic activity with a minimum of political overtones, as described by Ms. Finney based on her own experience in Israel, is the ideal form of development aid. It does indeed tend to foster the kind of lasting friendships that knit nations together in a way that strengthens international law and order.