
Editorial

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Slouching towards the Cool War

It was a feature of the Cold War that the Security Council was essentially immobilized in its principal functions under Chapter VII and at times Chapter VI. Since most conflicts were refracted through the dichotomous politics of the Super Powers and at times protagonists were little more than clients of the antagonists of the Cold War, both holding the veto, the Security Council was at best a place to hear canned ideological speeches before washing such down in one of NYC's more salubrious eateries surrounding the Shoebox.

The year 1989 ushered in a different politics and a different paradigm. Suddenly, though far from perfect, the Security Council was no longer that dead letter of the past, with important initiatives carried out under its auspices and with its authority. The difference between Iraq I and Iraq II was telling: Iraq II was not a regress to the Cold War, a sign of failure and irrelevance. Iraq II was a functioning Security Council exercising its authority to say – at best or worst – a muted No.

The wars and bloodshed that trouble us most now are no longer the surrogate conflicts of the Cold War, internal or international. One is most concerned with dreadful and savage internal conflict, which can no longer with any credibility come under the gruesome legitimacy of 'self-determination', with its 'hands off' legal implication. Darfur in the past, and Syria – 25,000 senseless dead, 250,000 homeless and displaced and even larger numbers of external refugees – right now bracket a whole range of humanitarian catastrophes, mostly man made.

Responsibility to Protect (R2P) has featured in these pages with some fanfare, but somehow has not translated into an operational duty of action on the body at the centre of such potentialities, the Security Council. There was a moment when one thought that the locus of R2P would shift to the regional – after all, the humanitarian action surrounding Kosovo was NATO driven – circumventing, with questionable legality, the Security Council, but at least lending it the legitimacy that comes from collective and deliberative process rather than from unilateral cowboyism. But recent events in the South China Sea, and the inability of ASEAN to produce even a common communiqué, are just one of the signs that we may be entering a Cool War. No, we do not find

this or that super power facing each other with arsenals at the ready, and the talk is very different. And yet, from one point of tension and global threat to another, whether Africa, the Mid East (Syria, Iran), South East Asia, the Koreas, Japan and China, the Security Council or regional bodies seem to be regularly thwarted by veto, by talk of veto, or by some other lack of consensus. The rhetoric is typically non-Cold War, but the actions begin to evoke memories. The voice is Jacob's, but the hands are Esau's. And suddenly we are back to the usual suspects. The Cool War upon us. Not very cool.

Catalonian Independence and the European Union

'Vive le Québec libre!' Who can forget de Gaulle's mischievous and irresponsible speech in July 1967 during his visit to that hapless province, a catchphrase which has become since then the eternal rallying cry for Western tribalism. And now, joining the ever lengthening queue is Catalonia – the subtext of whose recently called elections is, once again, 'independence'. The Basques are lurking in the background and the Scots are not even lurking but quietly forging ahead. And there is 'Padania' led by the awful Lega Nord in Italy, and the list does not end there.

Feeding this frenzy for secession and independence in Europe is the premise that all these new states will somehow find a safe haven as Member States of the European Union. Absent that assumption, appetite for independence would be significantly muted, the rough seas of 'going it alone' far more threatening. The Canadian Supreme Court, in its careful and meticulous decision on Quebec (<http://scc.lexum.org/en/1998/1998scr2-217/1998scr2-217.html>), the reasoning of which remains valid today, clearly showed that none of these cases enjoy a right of secession under public international law, since all of them enjoy extensive individual and collective liberties enabling the full vindication of their national and/or cultural identity within their respective states.

But the issue is not one of rights, of law. It is simply ethically demoralizing to see the likes of Catalonia reverting to an early 20th-century post-World War I mentality, when the notion that a single state could encompass more than one nationality seemed impossible – hence the special treaties on minorities which abounded in the break-up of the Ottoman and the Austro-Hungarian Empires. These arrangements were well-intentioned but lacking in political imagination and eventually, let us not hide the ugly facts, feeding and leading to that poisonous logic of national purity and ethnic cleansing. Make no mistake, I am not suggesting for one minute that anyone in Catalonia is an ethnic cleanser. But I am suggesting that the 'go it alone' mentality is associated with that kind of mindset.

Yes, Catalans and Basques suffered serious historical wrongs in the pre-democracy era in Spain. And I have huge, truly huge, empathy and sympathy for Catalans who want to live and vindicate their cultural and distinct political identity. For thousands, maybe the majority, this is really all it is about. But to play the 'Franco card' as a justification for secession is but a fig leaf for seriously misdirected social and economic egoism, cultural and national hubris and the naked ambition of local politicians. It also runs diametrically contrary to the historical ethos of European integration. The

commanding moral authority of the Founding Fathers of European integration – Schumann, Adenauer, de Gaspari and Jean Monnet himself – was a result of their rootedness in the Christian ethic of forgiveness coupled with an enlightened political wisdom which understood that it is better to look forward to a future of reconciliation and integration rather than wallow in a past, which, notably, was infinitely worse than the worst excesses of the execrable Franco.

It is sometimes said that the principles of democracy and self-determination require decision by referendum. But this of course begs the question of who is the ‘political self’ that has the right to determine whether or not the historical nation – even if composed of several peoples – will be broken up and secession allowed. Do we allow every distinct national, cultural and linguistic ‘minority’ in Europe to hold a referendum about secession and independence? The Corsicans? the Bretons? The Welsh? The German speakers of the Alto Adige? The list is endless, given the wonderful cultural richness of Europe. Why should it not be the French as a whole, or the British as a whole, or the Italians as a whole who get to decide the future of their state? Why should it be the Catalans rather than, perhaps, all citizens of Spain who get to decide about the breakup of the Kingdom? There is no self-evident answer to this question. I would argue that it is only under conditions of political and cultural veritable repression that a case for regional referenda can convincingly be made. With its extensive (even if deeply flawed) Statute of Autonomy it is simply laughable and impossible to take seriously Catalan arguments for independence, arguments which cheapen and insult meritorious – if inconclusive – cases such as that of the Chechens.

The European Union is struggling today with a decisional structure which is already overloaded with 27 Member States, but more importantly with a socio-political reality which makes it difficult to persuade a Dutch or a Finn or a German that they have a human and economic stake in the welfare of a Greek or a Portuguese, or, yes, a Spaniard. Why would there be an interest in taking into the Union a polity such as an independent Catalonia predicated on such a regressive and outmoded nationalist ethos which apparently cannot stomach the discipline of loyalty and solidarity that one would expect it owed to its fellow citizens in Spain? The very demand for independence from Spain, an independence from the need to work out political, social, cultural and economic differences within the Spanish polity, independence from the need to work through and transcend history, disqualifies morally and politically Catalonia and the likes as future Member States of the European Union.

Europe should not seem like a Nirvana for that form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union. The assumption of automatic membership in the Union should be decisively squelched by the countries from whom secession is threatened and if their leaders, for internal political reasons, lack the courage so to say, by other Member States of the Union, France in the lead.

It would be hugely ironic if the prospect of membership in the Union ended up providing an incentive for an ethos of political disintegration. There really is a fundamental difference in the welcoming into the Union of a Spain or a Portugal or a Greece emerging from ugly and repressive dictatorships and a Catalonia, part of a functioning democracy which at this very moment is in need of the deepest expression of internal

and external solidarity. In seeking separation, Catalonia would be betraying the very ideals of solidarity and human integration for which Europe stands.

I hope it never comes to it, but the only merit in a Catalonian referendum would be to allow the Catalans to have the good sense decisively to reject the proposal. If there is a referendum all Europeans should hope that that is what they will do. And if they do not – well, let us wish them a Bon Voyage in their separatist destiny.

Roll of Honour

In a recent Editorial, both in *EJIL* and *I.CON*, I inveighed against the difficulty of finding scholars who will agree to peer review and who, once agreed, will do it in a timely fashion and with a level of detail which enables us to take meaningful decisions.

We wish to thank the following for their efforts in 2011 and 2012. We hope we have not forgotten anyone.

Dapo Akande, José Alvarez, Stelios Andreadakis, Antony Anghie, Helmut Aust, Petra Bard, Eyal Benvenisti, Nehal Bhuta, Leora Bilsky, Michael Bothe, Kieran Bradley, Jutta Brunée, Karine Caunes, Cai Congyan, Luigi Crema, Jean d'Aspremont, Kevin Davis, Gráinne de Búrca, Katherine Del Mar, Bruno de Witte, Isabel Feichtner, Francesco Francioni, Giorgio Gaia, Kirsty Gover, Vera Gowlland-Debbas, Andrew Guzman, Laurence Helfer, Robert Howse, Jan Klabbers, Nico Krisch, Andrew Lang, Brian Leopard, George Letsas, Doreen Lustig, Marina Mancini, Petros Mavroidis, Marko Milanovic, Christoph Möllers, Sonia Morano-Foadi, Liam Murphy, Burt Neuborne, Tzvika Nissel, Georg Nolte, Alexander Orakhelashvili, Joost Pauwelyn, Jacqueline Peel, Anne Peters, Diarmuid Phelan, Arie Reich, Adam Roberts, Anthea Roberts, Iain Scobbie, Joanne Scott, Gregory Shaffer, Malcolm Shaw, Alexander Sicilianos, Bruno Simma, Guy Sinclair, Thomas Skouteris, Maya Steinitz, Alan Khee Jin Tan, Antonello Tancredi, Ruti Teitel, Ingo Venzke, Frans Viljoen, Armin von Bogdandy, Tania Voon, Matthew Waxman, Wouter Werner.

In this Issue

If there remain any lingering doubts regarding *EJIL*'s commitment to cutting-edge scholarship – or its inveterate eclecticism – the first two articles in this issue should put them to rest. In his article, Jens David Ohlin takes a fresh and exciting look at the significance of game theory for international law. And for something completely different, Mark Neocleous makes an important contribution to critical scholarship on international law by introducing the concept of 'primitive accumulation', central to Marx's account of capitalism and colonialism, into international legal theory.

Our two occasional series, *Critical Review of International Governance* and *Critical Review of International Jurisprudence*, return in this issue. In the first, Laurence Boisson de Chazournes and Edouard Fromageau analyse the judicial features and development of the World Bank's sanction process, while Arman Sarvarian examines the ethical standards applicable to agents and counsel appearing before the European Court

of Justice and the European Court of Human Rights. In the second rubric, Juliane Kokott and Christoph Sobotta reconsider that well-worked topic, the *Kadi* case, and find something new and interesting to say about it; their piece will help scholars and practitioners alike to frame and consider the issues to be addressed in the forthcoming second *Kadi* ruling.

Roaming Charges brings us back from Moments of Dignity to Places, this time Places of Kitsch, with a photograph of tell-tale signs from Orlando, California.

This issue presents a collection of essays offering diverse reflections on Nino Cassese's last work, *Realizing Utopia: The Future of International Law*. All written by past and present members of *EJIL*'s Editorial Board and Scientific Advisory Board, the collection provides a fitting homage to our late, dearly missed colleague.

We continue with a wonderful addition to our series of *Impressions*, a book review rubric that invites distinguished scholars to reflect on a book that strongly influenced their intellectual development. Having rediscovered Gandhi's *Hind Swaraj Or Indian Home Rule* later in his career, as he writes, B.S. Chimni reveals how insights from that text into the significance of the ethical and spiritual self might complement and correct failings in a Marxist analysis of the material structures of global capitalism.

We round out the issue with a special treat on *The Last Page: Le Droit des Nations, Ode*, by Eusebe Salverte. The poet was a young French republican who lived through the tumultuous times of the French Revolution and its aftermath. Having previously served briefly in the Ministry of Foreign Affairs – he was forced to resign because of his sympathy for the Revolution – he earned a living as a teacher and achieved some prominence as a writer of both fiction and non-fiction on a wide variety of topics. Later in life he enjoyed a highly successful career in politics, and was repeatedly elected to the legislature in Paris. The *Ode* itself was initially published as a pamphlet circa 1799, apparently in reaction to a brutal attack upon three French plenipotentiaries as they were leaving the unsuccessful Congress of Rastatt in April of that year. All but ignored for nearly 200 years, it was reprinted in its original form (including the poet's own annotations), together with a learned introductory essay by Edward Gordon, in the 1995 *Finnish Yearbook of International Law*¹. We thank Mr. Gordon for contributing the *Ode* to *EJIL*, and hope its appearance here will reawaken interest in the poem and its author.

Personal Statement

Many readers and contributors to *EJIL* have been congratulating me on my appointment as the next President of the European University Institute (EUI). I thank them all. I have also been asked endlessly if this will signify a masthead change at *EJIL*. Not for now. I will continue to serve as Editor-in-Chief of *EJIL*. The EUI has been the *alma mater* of both *EJIL* and myself. It is a homecoming for both.

JHHW

¹ Edward Gordon, 'Salverte's *Ode*', 6 *Finnish YB Int'l L* (1995) 479.