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Two Concluding Remarks, European Union countries, North Atlantic Treaty Organization, National security

Elisabeth Zoller

Indiana University Maurer School of Law, ezoller@indiana.edu

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Two Concluding Remarks

ELISABETH ZOLLER*

ABSTRACT

Professor Zoller offers several closing thoughts, focusing on the rationales for maintaining NATO in the twenty-first century and the theme of peace through law. She concludes that NATO is vital for European security, and that NATO is here to stay for both legal and factual reasons.

While addressing two different issues, Russell A. Miller's and Mary Ellen O'Connell's articles pursue a common theme in American legal thinking—peace through law.¹ Originally conveyed to Europe through American strategies designed to enforce peace after World War I, this ideological movement rests on the belief that both abiding by the rule of law and relying on courts can settle disputes in international affairs just as they do in internal affairs. Miller's article, "Germany's Basic Law and the Use of Force," serves as a reminder of the soundness of this ideology when applied at the domestic level and is evidenced by the case law of the German Constitutional Court. O'Connell's article concerns the collapse of the hope raised by President George H. W. Bush's "New World Order" after the fall of the Berlin Wall. The surprising resilience of the North Atlantic Treaty Organization (NATO) sets a more disillusioned tone regarding the feasibility of achieving peace through law at the international level. When taken in tandem, both authors' analyses are reminders of the metaphor of the bottle that is half full and half empty: The truth probably lies somewhere between the two.

As a way to conclude the lively debate on their presentations, I would like to return to the numerous points raised during the discussion

* Visiting Professor of Law, Indiana University Maurer School of Law; Professor of Public Law, University of Paris II (Panthéon-Assas).

1. Russell A. Miller, *Germany's Basic Law and the Use of Force*, 17 IND. J. GLOBAL LEGAL STUD. 197 (2010); Mary Ellen O'Connell, *NATO at Sixty: America Between Law and War*, 17 IND. J. GLOBAL LEGAL STUD. 187 (2010).

of the rationales for maintaining NATO in the twenty-first century, now that the Cold War, which originally justified the organization's existence, is over. As O'Connell iterates at the very end of her article, Americans "could move back again to emphasizing preference for law. The United States could, once again, be the champion of peace through law."² Who could disagree with her? Ideally, we all—at least those of us who participated in the conference—would prefer to agree with her approach if it were available. The problem, however, is that it is not. Both legal and factual reasons prevent such a clear solution, which I will briefly develop as concluding remarks to our debate.

From a legal standpoint, the ideal of peace through law can become a reality only if the law is certain. The certainty of international legal rules is unfortunately far from being realized. It is true that great progress has been made in the twentieth century, particularly with respect to the use of force. The war of aggression—or the "war of conquest" as it used to be termed—has been outlawed once and for all as incompatible with the only legitimate form of sovereignty in the modern age, popular sovereignty. Its unlawfulness, implicitly derived from Articles 2(4) and 51 of the Charter of the United Nations, was explicitly affirmed in Resolution 3314 (XXIX) on the Definition of Aggression. Progress has also been made on the protection of human rights front. Thanks to the Charter of the Military Tribunal of Nuremberg that introduced the notion of "crimes against humanity" in international law, states are no longer free to treat their own nationals as they please. Yet, many uncertainties as to the exact scope of the basic rules for the maintenance of international peace and security remain. For instance, no absolute fixed rules on the delimitation of frontiers in international law currently exist. A barely perceptible shadow of this uncertainty hovered over some of the European frontiers that emerged from the dislocation of the former Soviet empire, as exemplified by the refusal of some European states to recognize the territorial changes that they regard as having been imposed on them by force.

From a factual standpoint, the idea of renouncing NATO and leaving to the Europeans the task of organizing their own military security seems unrealistic. Organizing peace and security on the European continent is no longer a problem that European states can resolve by themselves, even if they had the political will to do so. European defense actually ceased to be an autonomous problem after World War II due to the emergence of superpowers in the form of federations of states with large populations that extended over a continent. The traditional European nation-states became dwarfed in

2. O'Connell, *supra* note 1, at 196.

terms of territory, population, and military power. The security and the defense of the European continent henceforth became part of a much larger issue. The fall of the Berlin Wall in 1989 did not change that reality. In the contemporary nuclear age, regional security is subsumed and determined on all continents by a strategic global balance that no continent could achieve alone. As to the survival of NATO in a post Cold War world, an honest appraisal of the situation suggests the following conclusion: It is a blessing for Europe that all American presidents, including Nobel Peace Prize winner Barack Obama, have consistently recognized the “stubborn facts” of the strategic balance since the end of the Cold War and, consequently, the necessary realism of international law.

Paradoxically, if NATO did not exist, its creation would be necessary now because it seems doubtful that without it, the European Union could have come into being. The crucial point is that the military alliance took the problem of security out of the common issues that had to be solved to unite European states. Not a single European state offered an alternative solution to NATO when the negotiations were under way to strengthen the European Union in the late 1980s and early 1990s that eventually led to the Maastricht Treaty in 1992. The unanimity of the European States concerning the renewal of NATO at that time, albeit by tacit agreement, bears witness that the alliance is vital to European security. True, it is not *per se* the realization of the ideal of peace through law, but it makes it possible to take steps toward that goal.

