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Mary Ellen O'Connell
University of Notre Dame

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NATO at Sixty: America Between Law and War

MARY ELLEN O'CONNELL*

ABSTRACT

NATO was founded to counter the Soviet Union and the Warsaw Treaty Organization. Both have been gone for over twenty years. So why is NATO still here? Part of the explanation may lie in Americans' strong belief in the efficacy of military force. NATO remains associated in Americans' minds with the greatest time of U.S. military power. Yet, the United States also has a strong commitment to the rule of law. The country appears overdue for a return to this other commitment. We should not be surprised to soon see the United States promoting international law again—and that could mean finally shutting down NATO.

INTRODUCTION

The North Atlantic Treaty Organization (NATO) was founded in 1949 with the express purpose of defending the United States, Canada, Western Europe, and Turkey from the Soviet Union and other members of the Warsaw Pact. In 1989, the Soviet Union ceased to exist. So it might well be asked, why in 2009 is NATO still around? I gained some insights into this question when I left Indiana University in 1995 to work at the George C. Marshall European Center for Security Studies, a new institution in Germany aligned with a NATO program called The Partnership for Peace.¹ The Marshall Center was founded to help in the

* Robert and Marion Short Professor of Law and Research Professor of International Dispute Resolution, Kroc Institute for International Peace Studies, University of Notre Dame. This essay draws on MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* (2008).

1. See generally George C. Marshall European Center for Security Studies, www.marshallcenter.org/mcpublicweb (providing helpful background on the Marshall Center) (last visited Feb. 27, 2010).

transition to democracy of the twenty-four Warsaw Pact members when communism collapsed. The U.S. Department of Defense and the German Defense Ministry jointly created the Marshall Center, but the United States provides the greater share of the budget and personnel. It is a place that reveals the two sides of our national personality: commitment to law and confidence in the use of military force.

The Marshall Center provides courses for members of the defense establishments of the participating countries. Some participants wear uniforms to class. It is clearly a military institution. Many of the courses are designed around preparing military budgets for parliaments or civil-military relations. Yet, I went to the Marshall Center to teach international law. It seemed only natural since the most important statement of the U.S. global vision at the end of the Cold War was when President George H.W. Bush spoke of a new world order under the rule of law. It seemed appropriate and indicative of the new spirit that there be an international law professor at the Marshall Center. I gave a series of lectures on conflict resolution using international legal principles and peaceful procedures, and I pointed out how such issues as the division of the Caspian Sea, the sharing of the waters of the Aral Sea Basin, the protection of minorities, and similar challenges could be addressed peacefully by relying on principles and processes of international law.

The Marshall Center embodies the tensions of the two American commitments: belief in law and belief in the use of force. These tensions are also found in the parent organization of the Marshall Center, NATO. The continuing existence of NATO is evidence that at this time in our history, the American belief in military force is stronger than our commitment to the rule of law. The lesson of American history, however, is that this emphasis will shift.

At the Marshall Center we had many discussions about NATO. One of the standard lectures was about why NATO had “won” the Cold War. Our students from the “defeated” countries, especially the Russian students, raised complaints about the lecture, but the faculty persisted because we were ourselves interested in the question and several related questions. For example, what had NATO done relevant to the decline of communism? Did NATO’s actions really contribute to winning the Cold War, and, if so, was that something that could be redirected to other challenges? And the final, existential question: with the Cold War over, did NATO have any purpose?

Many proposals were made to respond to the challenges of environmental decline, human rights abuse, and weapons of mass destruction. The participants from Poland had no doubt about the continuing relevance of NATO—it was needed for the defense of Poland against Germany and Russia. Poland had two major goals upon

becoming a democracy: to join the European Union and become a member of NATO. Poland's interest does not, of course, fully explain NATO's persistence. The explanation must also lie in large part in what NATO does for the United States. My conclusion from three years at the Marshall Center is that NATO helps secure America's place in the world from the realist perspective that measures status by military power. As the head of an alliance of major militaries, the United States keeps its place as the leading military power, even if the purpose of the alliance itself is in doubt.

This answer to the "why NATO?" question is demonstrated by the example of U.S. President Barack Obama, who campaigned on promises of hope, change, and opposition to the Iraq War. Yet within short time after taking office, he was visiting NATO headquarters, meeting with NATO personnel, and entering into the debate about who should be the NATO Secretary-General. Why would President Obama, committed to change, be seemingly as committed to NATO in 2009 as the U.S. resolved to be in 1949 and 1999? Part of the answer, it seems to me, must lie in our national thinking about military force. The rest of this article concerns that line of thinking, as well as the counterbalancing thought—our national commitment to the rule of law.

I. COMPETING BELIEFS

Since its founding, the United States has shown two very strong tendencies in its character. On one hand, it is very much committed to and convinced of the efficacy of military solutions for the problems the United States faces. The United States was founded through the use of force, and its citizens continue to believe that they can accomplish the Nation's goals through force. On the other hand, the view that the United States can protect itself through the rule of law has almost equally persisted. There are eight particular moments in U.S. history where a tension between these two sides has shown itself quite dramatically. These moments indicate that neither the military side nor the legal side ever completely dominates the other. U.S. history has been one of ebb and flow, but it is currently in a period in which the "military force" side dominates. This period is persisting after a very long period and even under a lawyer-president who greatly admires that champion of non-violence, Martin Luther King.²

2. In December 2009, President Barack Obama won the Nobel Peace Prize. For the reasons behind his selection and a transcript of his Nobel Lecture, which stressed the need to use military force, see Nobelprize.org, Peace 2009, http://nobelprize.org/nobel_prizes/peace/laureates/2009/index.html (last visited Feb. 27, 2010).

The founding, of course, is where Americans always start when it comes to thinking about their country and its identity. They can never get away from it; it is amazing how many in the legal community and on law faculties spend all of their time studying the history of the drafting of the Constitution in minute detail. For the American story of national identity, the founding period remains very present and very important. It is one place where Americans clearly see the two tendencies in their national character. Take the founding document, the Declaration of Independence. It is a legal document, and it was written by learned individuals who were well versed in international law—that we know for certain.³ They were readers of Vattel and Grotius. The Declaration of Independence demonstrates that its authors and signers understood and respected international law. The Declaration speaks of inalienable rights and of sovereignty as a nation. Sovereignty is an international law concept. The principle of non-intervention, which is the core principle of sovereignty, was confirmed in the Peace of Westphalia of 1648.⁴ The Declaration of Independence demonstrates that the U.S. founding story rests on profound concepts of international law, including natural rights—particularly the inalienable right to be an independent and free nation. In 1776, law was just beginning to have its new identity as a product of pure positivism. The drafters of the Declaration of Independence still understood law to be based in natural law theory.

One side of the U.S. founding story, then, is the law. However, equally important—perhaps more powerful than the example of the Declaration of Independence or the Constitution—is the Revolutionary War. U.S. citizens still pride themselves on having been the underdog in the fight and having used innovative methods in military force to defeat the major military and naval power of the day, Great Britain. It was the leadership of the military genius George Washington and military force that established the nation. The United States is a country founded in war. Its identity, its ability to exist, and its existential story unfold in a war story.

Americans had some sense that they were lucky to win that war, and they very quickly turned to solutions of law to carry on, establish

3. For example, Benjamin Franklin once wrote to a book dealer in The Netherlands to thank him for sending three copies of Vattel's *The Law of Nations* (1758). ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 161 (rev. ed. 1958) (quoting Franklin as writing, "the circumstances of a rising state make it necessary frequently to consult the law of nations"); see also MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789-1914* (2004).

4. See LEO GROSS, *The Peace of Westphalia, 1648-1948*, in *I ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 3 (1984).

the country, and make it a sovereign state that was going to last. This led to the Jay Treaty with Great Britain of 1794, which was wildly unpopular in the United States. It was considered to be submissive to the British, our recent enemies who the United States had just defeated. George Washington, however, said that the United States needed the treaty, which would resolve ongoing disputes through arbitration, not war. The Jay Treaty was a major legal innovation. It resulted in a great deal of arbitration with the British. Before the Jay Treaty, arbitration had been primarily a diplomatic method—more like negotiation.⁵ The Jay Treaty firmly placed arbitration of disputes in the category of law. Washington responded to criticism of the Treaty by emphasizing that the United States was a small, new nation that could not afford to take on another war with Great Britain. So it was that one of the United States' greatest war heroes counseled resolution of disputes through the mechanism of law.

Supporting this view were important communities of early Americans: Quakers, Anabaptists, Mennonites, and others who brought a strong pacifist message to early U.S. civil institutions and civic discourse.⁶ They were opposed to the next U.S. war, the War of 1812, and it was not clear that Americans were actually going to respond to the British with a robust military answer. Then Jefferson decided the new country had to use military force, turning once again to the military solution, to begin this next phase with the British in the War of 1812. In the early establishment period, therefore, the legal side is exemplified by the Jay Treaty and the military side by the War of 1812. Both of these elements are present in the lead-up to the next most dramatic moment in U.S. history: the Civil War.

The peace movement after the War of 1812 pressed for the need to use pacific methods of resolving disputes, particularly with other countries. People were pressing for arbitration, for world congresses, and other methods in international law for the peaceful settlement of disputes. The peace movement began a debate about how to end slavery, and this debate split the movement. On the one side was a very firm, continuing view that these kinds of problems had to be resolved through peaceful means. The courts were available to challenge slavery. On the other were those who insisted that the atrocity of slavery had to be ended by any means necessary, including the use of force. In the American founding, war had been the solution. It could be again.

5. See generally A.M. STUYT, *SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1970*, at ix (2d. ed. 1972).

6. See Mary Ellen O'Connell, *Arbitration and Avoidance of War: The Nineteenth-Century American Vision*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 30 (Cesare P.R. Romano ed., 2009).

Yet, for some in the peace movement it would have been acceptable for the South to secede because while they did not want to live in a country that allowed slavery, they were opposed to the use of force to keep the nation intact. Others in America thought allowing secession was a betrayal of what made the United States a country—unification under the rule of law. The United States had to turn to the use of force to keep the union together to enforce the law. The subsequent Civil War again represents the split between the use of the courts and the use of war to end slavery and keep the Union together.

Reference to international law was prominent in some of the anti-slavery cases that made it to the Supreme Court. Advocates referred to the growing body of international law against the slave trade and the institution of slavery. Mark Janis notes:

There is probably no better example of the considerable role of international law in mid-nineteenth century American legal argument than the US Supreme Court's judgment in *Dred Scott v. Sandford* ... The judgment is an excellent example of how international law discourse had become a legal common place in the United States by the middle years of the nineteenth century.⁷

But the Supreme Court failed to end slavery in its *Dred Scott* decision, and, although the decision was heavily criticized, many in the United States subsequently came to believe that war was the only solution. Indeed, war did succeed in ending slavery and in keeping the union together—another lesson that war was the right solution for this country.

After the Civil War, however, the United States won an amazing arbitral award against Great Britain in the 1872 *Alabama Claims* arbitration.⁸ It was a triumph of law. The British had allowed the Confederacy to have three warships constructed and outfitted in Liverpool, which was a violation of Britain's neutral duties during the American Civil War. The United States complained persistently about the British violation until an agreement was reached to arbitrate the matter. The British lost; they had failed to fulfill their duty of neutrality, and they owed the United States 15.5 million dollars (in 1872 dollars). The British signed the check and delivered the payment. The cancelled check hangs in the British Foreign and Commonwealth

7. JANIS, *supra* note 3, at 76-77.

8. See J. GILLIS WETTER, 1 *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* 57 (1979); Eric C. Bruggink, *The Alabama Claims*, 57 *ALA. L. REV.* 339, 342 (1996).

Office. There were some in the United States who had wanted to go to war with Britain. Instead, through a peaceful process, the United States received substantial compensation and vindication of its legal rights.

The *Alabama Claims* arbitration electrified the peace movement in the United States and in Great Britain. Groups took up new initiatives to promote law generally as a peaceful way to settle disputes, and arbitration in particular as the best approach to international relations. From arbitration, some moved toward building a world court that could play the same role internationally as the United States Supreme Court played within the U.S. The platforms of both U.S. political parties in the late 1800s included an arbitration plank promising that the United States would conclude a standing arbitration treaty for the resolution of any disputes with Great Britain. Upon his election, President McKinley introduced a bill into Congress for the general arbitration treaty, but the Senate stopped it. Senators wanted to retain the power to grant or withhold their advice and consent as to each arbitral treaty for any particular dispute.

Then, in 1898, President McKinley declared war on Spain. It was a major shock to the peace movement.⁹ McKinley, however, saw the war as a way to finally get the Spanish out of the Americas. To placate U.S. objectors, he cited his determination to stop the atrocities being committed by the Spanish against the people of their colonies and, in particular, Cuba. War solved these problems when the United States freed people from Spanish colonial rule. Then the United States took over its own colonies for the first time. The people of the Philippines then turned from fighting Spain to fighting the United States in an insurgency that took years to put down.

These events took place around the time that Jane Addams, a social worker from Chicago, began leading one of the largest peace movements in the United States.¹⁰ She helped found the Women's International League for Peace and Freedom and worked on developing peace congresses. She traveled around the United States and abroad giving lectures to standing-room-only crowds on peace, the importance of the promotion of peace, and the use of peaceful means to settle disputes. Jane Addams also won the Nobel Peace Prize, which few people today seem to know. She and others in the peace movement pressed for renunciation of war and the institution of alternatives to war at the Hague Peace Conferences of 1899 and 1907.

9. See David Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 7 (2000).

10. See generally JOHN C. FARRELL, *BELOVED LADY: A HISTORY OF JANE ADDAMS' IDEAS ON REFORM AND PEACE* (1967).

Theodore Roosevelt's Secretary of State, Elihu Root, was very active at the 1907 Hague Peace Conference, putting forward the idea of a world court. Root was a great pragmatist; he was not a pacifist. He thought that courts just made common sense. He had been a New York litigator, and he found that courts were a practical, pragmatic means for resolving our disputes with other countries.¹¹

Root, however, could not convince the Germans, in particular, to agree to international arbitration or an international court. The Germans thought the United States wanted courts and international law to keep them down, that this was an American and British plot. Through war the United States had already secured control of vast resources and, in the British case, an empire. Now the U.S. proposed to take away the ability of the Germans to do the same, and ultimately Germany did not agree to any robust court or the use of law over war in 1907. But Root was determined, and in 1901 he founded, with Central American states, the first international court, known as the Central American Court of Justice. It lasted for ten years, the amount of time the United States remained interested in it. It was an accomplishment for which Root also won a Nobel Peace Prize.

Root ultimately was a person who exemplified the war-law divide in the American personality. In addition to establishing the Central American Court, he founded the American Society of International Law in 1906.¹² Yet, soon thereafter he was very much in support of the United States and British action against Germany to keep Germany from gaining military power, and he was a very strong proponent of the United States going into the First World War. He wanted the United States to enter the conflict quickly in order to repress Germany because he believed the use of military force was the only thing the Germans understood. This great founder of courts and promoter of international law felt that in some situations the only answer was significant military force. He knew exactly what would be involved in going into the First World War, and, of course, the United States did join the War. It did not, however, join the Versailles Treaty, the World Court, or the League of Nations, the failure of which resulted in part from the fact the United States never joined.¹³

11. *See generally* PHILIP C. JESSUP, I ELIHU ROOT (1938).

12. *See generally* The American Society of International Law, www.asil.org (providing helpful background information on the Society) (last visited Mar. 9, 2010).

13. *See generally* International Court of Justice, History, <http://www.icj-cij.org/court/index.php?p1=1&p2=1#Permanent> (providing a history of the first international court, the Permanent Court of International Justice, with general jurisdiction over inter-state disputes) (last visited Mar. 9, 2010).

After the Second World War, the United States led a new attempt to promote peace through law. Through a legally binding obligation, the 1945 United Nations Charter generally prohibits resort to force as an instrument of foreign policy. The Charter is not, however, a pacifist document. The Security Council has broad power to authorize force in the face of threats to the peace, breaches of the peace, or acts of aggression. Stephen Schlesinger's research shows that President Roosevelt had State Department officials working on the draft for the new organization in 1938—two and a half years before the United States was attacked by Japan at Pearl Harbor.¹⁴ The new United Nations promotes peace and security through international law, but even more so through the Chapter VII Security Council, which has a privileged place for the United States.

NATO was founded in 1949, four years after the founding of the United Nations. NATO was organized under a treaty intended to be consistent with the U.N. Charter's provisions on self-defense and regional organizations. Nevertheless, it was only organized for war purposes. It is a pure military organization with the purpose of keeping the United States, Canada, Western Europe, and Turkey independent of the Soviet Union. Yet NATO was not intended to overshadow the U.N. and the U.N.'s peaceful means. NATO was meant to be a protective and defensive organization against the Soviet Union and to be respectful of the U.N. Charter. Nevertheless, I believe NATO is more closely associated with our confidence in military force than our commitment to law. As the leader of NATO, the United States has retained a place at the head of the most powerful collection of militaries on earth. This fact may explain why NATO still exists twenty years after the fall of the Soviet Union. The United States has not let go of its need to be a dominant military power, and it thinks that dominance will continue with NATO. The United States scrambles to give NATO new tasks, which is a large part of the story of the 1999 Kosovo intervention. It also has much to do with the Afghanistan intervention.

CONCLUSION

Sixty years later, a very different world still has NATO because of an American need for military power. The Europeans have spoken since the end of the Cold War about having their own military security arm. Somehow this never quite happens and NATO continues to play a role

14. See STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED STATES: A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD* 28-36 (2003).

as the coordinating military institution for the European Union. The United States benefits greatly from this arrangement. The Europeans remain somewhat militarily weak and under U.S. control, and the United States continues to project military power. It appears that the United States may even have actually played an affirmative role in preventing the European Union from developing its own security arm. It insists that Europe continue to focus on NATO. NATO is such an important part of American identity that even President Obama, who came to office bringing a message of change, does not even hint at changing NATO.

Yet, Americans could change. They could move back again to emphasizing preference for law. The United States could, once again, be the champion of peace through law. The shift seems long overdue.