THE MOSCOW SUMMIT MEETING AND THE POST-DETENTE INTERNATIONAL LAW

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I. LEGITIMATION AND SANCTIFICATION OF THE CONCEPT OF "PEACEFUL COEXISTENCE"[1]

The concept of "Peaceful Coexistence," the *bête noire* of some Western political leaders and their jurists in the early 1960's, figures prominently in the texts of the two recent great political accommodations that are now being widely heralded as marking the final ending of the Cold War, namely the Chinese-U.S. Joint Communiqué of February 27, 1972, and the Joint U.S.-Soviet Declaration of May 29, 1972. "Peaceful Coexistence" was advanced by Soviet policy-makers and their jurists at the beginning of the 1960's as the *leitmotiv* of Soviet foreign policy in the then new, Khrushchev era of political power in the Soviet Union that had emerged after the immediate, post-Stalin succession struggles. This particular Soviet campaign was, however, viewed by Western policy-makers, at first, with reserve and suspicion, perhaps in part because of the zealousness with which Soviet policy-makers, in their own politically understandable desire to demonstrate their own revolutionary continuity and faithful adherence to Marxist orthodoxy, dropped retrospective historical footnotes and established that "Peaceful Coexistence" had been originally devised by Lenin himself and that it had always been the guiding principle of Soviet conduct towards the outside World. The initial Western political reaction, therefore, was to conclude that the Khrushchev policy of "Peaceful Coexistence" was a purely verbal device for enabling the

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1. In the ensuing discussion, the author has drawn, in various places, on the discussion in his previously published books. *See* E. MCWHINNEY, "PEACEFUL COEXISTENCE" AND SOVIET-WESTERN INTERNATIONAL LAW (1964); INTERNATIONAL LAW AND WORLD REVOLUTION (1967); CONFLIT IDEOLOGIQUE ET ORDRE PUBLIC MONDIAL (1970). Some of the arguments in the final section stem from an earlier article. *See Pax Metternichea? International Law and Power in the Era of the Détente*, in FESTSKRIFT TIL PROFESSOR ALF ROSS 335, 349 (M. Blegvad, M. Sørensen, *et al.* eds. 1969).

carrying out of traditional Cold War objectives under somewhat more sophisticated, or at least externally more reassuring, slogans than heretofore. On this view, which was generally held by Western leaders at the opening of the Khrushchev campaign in behalf of "Peaceful Coexistence," that concept itself was a Trojan Horse device for lulling the West into a false sense of security while the Soviet Union prepared, *sub rosa,* (to borrow one of Premier Khrushchev's colorful phrases) to "bury the West." With all the advantages of historical hindsight, these particular Western attitudes seem, now, to have been too absolute or at least overstated, having resulted in part from bad Western fact-finding in relation to basic political changes within the Soviet Union. Such Western attitudes represented a continuance, therefore, into the early 1960's and into the then new, post-Stalin era of political flux and transition, of old Western attitudes and policies born of the earlier Cold War rigidities. Western policy-makers failed clearly to grasp the emerging new imperatives of Soviet policy-making, in the post-Stalin era: the Soviet Union's need for at least partial relief from the crushing burden of competitive (Soviet *versus* United States) armament costs, so as to allow for some diversion of Soviet production and planning energies to the satisfaction of internal economic needs and also the demands of the Soviet Union's own rising new *bourgeois* class; and the Soviet Union's need for at least partial political accommodation or *détente* with the West, especially in Western Europe, so as to allow for some diversion of Soviet military strength and planning to meet potential Chinese "revisionist" claims along the Soviet Union's Asian frontiers, following on the, then still secret, Russian break with China in 1959 over the Chinese demand for nuclear armaments, and on the rapidly ensuing Soviet-Chinese ideological conflict.

Like most new Soviet policies, "Peaceful Coexistence" had, at the outset and in the period of its first political testing, a *Janus*-like quality — looking forward and looking back at the same time: forward, if, on balance, the results yielded by it should seem to validate it in action; backward, in case of political rebuff, to enable a speedy retreat by its Soviet sponsors to the convenient safety of conventional Marxist political orthodoxy. This ambivalence in basic Soviet governmental attitudes as to "Peaceful Coexistence" was paralleled by the political fate of various Soviet foreign policy initiatives in the early Coexistence era. As an example, the initial Soviet nuclear missile investment in Cuba, an operation that was clandestine and hostile (in Soviet-U.S. bipolar terms) in the best of the old, Cold War traditions, was followed up immediately by

the Kennedy-Khrushchev *détente* of October 1962, when a Soviet-U.S. highly pragmatic accommodation was achieved on a basis of mutual give-and-take and reciprocal self-interest. Again, Premier Khrushchev's New Year's Eve message (of December 31, 1963) on the security of territorial frontiers was misconstrued by Western leaders, at the time, as being designed primarily to legitmate the Soviet Union and its allies' de facto territorial acquisitions, after World War II, in Central Europe; whereas in fact, as we now know (and as the particular orientation and direction of the then current Soviet literary-scientific campaigns should have informed us) it was designed, rather, as a preventive legal measure to buttress existing Soviet territorial interests in Central Asia and the Far East against mounting Chinese "irridentist" pretensions.

Whatever the various political origins of "Peaceful Coexistence" may have been in the Kremlin political leaders' own thinking, there is no doubt that, as a theoretical juridical concept, it was attractively and persuasively developed by its original legal spokesmen, particularly Dr. Gregory Tunkin, who was, at the time, the Principal Legal Adviser to the Soviet Foreign Ministry. On this particular Soviet scientific legal thesis, Coexistence, far from being an abnormal, and hence purely artificial, legal construct, no more than reflected the basic societal facts of the national and international political communities. Here we have, of course, a legal truism that has been developed in depth by the members of the North American Pragmatist-Realist legal school. All law, on this view, is a process of reconciliation and accommodation of conflicting social forces, through the balancing and ultimate maximization of the competing interests presented by those particular forces. Further, it is not necessary, for the existence of an organized political community — the starting point of any legal system — that a total societal consensus should exist as to the basic values and even as to the basic procedures of that community, or that any one group or combination of groups should possess a complete monopoly of power. The mediaeval political community, from which analogies are sometimes drawn for the present-day World Community, was characterized, after all, by widespread dissent and dissonance within its territorial frontiers, with the King's writ and the Common Law often running no further than the reach of the King's armies. Yet the mediaeval political community was for all practical purposes, a viable political community in a difficult and dangerous age. The conclusion, for purposes of present-day International Law, was clear. Identity of outlook as to a priori principles — that is, as to ultimate ideological

premises or goal values, and identity even as to methods and instruments for achieving those principles — was neither a prerequisite, nor even necessarily a *desideratum*, for the achievement and maintenance of a viable system of World public order in a post-World War II era characterized by Soviet and Western political-military bipolarity and ideological debate in general.

II. Development and Concretization of an Operational Methodology for Soviet-Western Practical Accommodation

The main doctrinal legal thrust of the Soviet campaign in behalf of "Peaceful Coexistence" was the demand for the codification of the "Legal Principles of Peaceful Coexistence." This demand was raised not merely in official international arenas like the United Nations General Assembly and its specialist Sixth (Legal) Committee, but also, and certainly earlier and more vigorously, in purely unofficial, private and scientific arenas, like the International Law Association. In the actual scientific legal confrontations in these international arenas, the initial Western reaction, especially at the top political decision-making level, was to see this demand as a not overly subtle Soviet campaign to undermine and discredit traditional International Law, and especially its *corpus* of old existing *customary* International Law, through attempting to set up an alternative, rival body of so-called "new" International Law, with a revolutionary content and consequent widespread appeal in a revolutionary age.

On the other hand, secondary (and inevitably calmer, and more rigorously analytical) Western reactions, based on greater knowledge of Soviet legal thought-ways and basic legal method, saw this Soviet campaign to codify "Peaceful Coexistence," instead, as being the product, in part at least, of a Soviet preference, in the full Continental European Civil Law, Cartesian tradition, for the postulation, a priori, of abstract general principles to guide and control the regulation of concrete problems, before any entering into discussion of those problem-situations themselves. The Western tactical legal response — as it was perfected, first, in the unofficial, private or scientific arenas for legal confrontation, like the International Law Association, rather than in the official or public arenas like the United Nations and its specialized committees or commissions — was to join issue at the level of legal methodology. For purposes of any meaningful legal dialogue, Western jurists suggested, it was necessary to eschew all temptations to begin with a debate on abstract legal principles which too often would run the risk of developing into mere professions of faith or

sterile name-calling. Again, according to the arguments advanced by Western jurists, the Legal Principles of Peaceful Coexistence, even if they should be arrived at by a process of consensus *in abstracto,* would inevitably be formulated at too high a level of generality and abstraction to be operationally utilizable or even helpful in the attempted solution of concrete problems. To succeed here one would need to go on to establish rather more low-level, intermediate or secondary principles, a process hardly severable from the consideration of detailed fact-situations and the range of alternative policy options available for their solution. For these reasons, Western jurists argued, it would be wiser to begin with the concrete problem-situations. One could then go on to isolate the key facts of those problem-situations, to identify the main policy options as seen from the viewpoint of the contending political-ideological systems and their decision-makers, and to identify also the main institutional machinery and instruments available for application of the alternative policy options. In each of the contending political-ideological systems, the process of ultimate policy choice would undoubtedly involve some sort of quantification of the political and social cost of each of the alternative solutions available in any problem-situation. But it was not impossible — indeed, the more technical the problem, perhaps the likelier it would be — that the ultimate policy choice would be the same in each of the contending political-ideological systems. In any case, once a solution had been reached in a concrete problem-situation, it could be viewed in relation to the solutions adopted in other related problem-areas; and general principles would thereby be arrived at, inductively, from those decided cases and their solutions.

This, self-evidently, is the difference between a pragmatic, empirical, problem-oriented, step-by-step approach, as favored from the outset by the West, and an essentially holistic approach, focussing upon purely abstract principles, to be postulated a priori, as sponsored originally by the Soviet Union.

The Soviet and Soviet bloc response to this Western tactic was two-fold, or, more accurately, was a response at two levels. On the one hand, Soviet jurists pressed for continuance of the debate at the "higher," or abstract philosophical level. In the private scientific arenas, like the International Law Association, the issue bogged down eventually in proceduralisms though the exchange on issues of basic legal methodology and particularly on the alternative techniques of international legal problem-solving was, in terms of legal doctrine, of a high intellectual quality and range.

In the official, inter-governmental arenas, like the United

Nations General Assembly, the bitterness of the opening exchanges and the fear of an escalating, abstract, ideological conflict that would effectively stalemate the work of the Sixth Committee, and ultimately perhaps of the General Assembly itself, led to the formation of a Special Committee of the General Assembly which, it was hoped, would siphon off most of the conflict. This Special Committee (euphemistically, and purportedly neutrally, styled as the Special Committee on Friendly Relations and Cooperation among States), though initially serving as yet another and more specialized arena for direct, Big Power confrontation, was increasingly overcome by attrition, the Big Powers seeming to lose interest over the years as they increasingly resolved their differences by direct accommodations in other arenas of their interaction. The first-rank international jurists — of the calibre of Dr. Gregory Tunkin, Professor (now Judge) Manfred Lachs, and Sir Kenneth Bailey — dropped out of the debate as its practical importance waned. In the end, the initiative of the Special Committee seemed to be maintained only by supporting or satellite countries, like Czechoslovakia, which were perhaps seeking (like Yugoslavia before them under the legal initiatives of Dr. Milan Bartos) to work out special conceptions of Coexistence that would limit and restrain the Big Powers in their dealings and relations with their own allies and associated states, or by third parties like India and Sweden that were more or less non-engaged in terms of the Cold War line-up and the bipolar bloc system. This is not, of course, to denigrate the contribution of those jurists who remained. Some, like the late Dr. Krishna Rao of India, contributed high intellectual skills, enthusiasm and moral leadership to a lagging verbal debate in the Special Committee, but by and large the assignment by now was relegated by the major Powers to their second or third-string teams of jurists.

The Special Committee, in fact, lingered on until 1970, when an essentially vague and diffuse Declaration of Principles emerged.[2] One of the American team working on that project has (presumably tongue in cheek) hailed the Declaration as "representing one of the major achievements of the Twenty-Fifth Anniversary Session of the United Nations;"[3] and the same observer goes on to suggest that the Legal Advisers to the Foreign Offices have had their "perceptions of the issues involved . . . clarified and sharpen-

2. U.N.G.A. Res. 2625 (xxv) (Oct. 24, 1970).

3. Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 714 (1971).

ed."[4] This is damning with faint praise! Nevertheless, by the time the Declaration had been finally achieved and published, the Soviet Union and the United States had long since achieved a whole series of concrete, low-level, essentially pragmatic and empirical accommodations, based on mutual give-and-take and reciprocal self-interest. These de facto Big Power direct accommodations extended over a wide range of matters including the successful resolution of the Cuban Missile Crisis in October, 1962, the Moscow Test Ban Treaty of August, 1963, the "Hot Line" Agreement, the Agreement on Non-Orbiting of Nuclear Weapons in Space, the Moon Treaty, and the Nuclear Non-Proliferation Treaty. The explanation for this successful record lies in the fact that, while maintaining the official position that any *détente* in East-West relations must be preceded by an agreement on "Fundamental Principles," the Soviet decision-makers quietly consigned the pursuit of any such Code to the inessential legal superstructure of international relations and concentrated their main energies instead on the achievement of substantive accommodations with the West in specific areas of conflict and confrontation, in effect accepting, practically, the main thrust of the Western methodological argument as to the most effective road to Coexistence.

III. Political Balance Sheet of a Decade of Soviet-Western Detente (1962-1972)

Establishing a political balance sheet for "Peaceful Coexistence" and so arriving at some sort of conclusion as to whether or not, in its end results, it has really contributed to the maintenance of world peace in general and to the progressive development of international law in particular, must obviously turn in very considerable measure on just who are the participant-observers making the assessment, and just what their personal philosophy of history may happen to be. From the viewpoint of the two Big Powers, the Soviet Union and the United States, once the initial legal methodological problem had been resolved and East-West contact removed from the domain of debate of purely abstract, a priori principles to consideration of actual problems common to both Big Powers, the way was paved to concrete accommodations and compromises on a basis of mutuality and reciprocity of interest. In practical terms, Peaceful Coexistence meant, here, the end of an essentially abstract and sterile, ideological confrontation between East and West and its replacement by a new pragmatic problem-

4. *Id.* at 735.

solving approach. The old ideological slogans continued to be invoked in public, of course, but they were increasingly relegated to the domain of superstructure — the legal folk-lore in Harold Lasswell's phrase — and could not conceal the underlying reality of the steady and continuing augmenting and extension of Big Power accords, both de facto ones in such areas as disarmament and the recognition and respect of mutual spheres of influence and the de jure ones in the area of Big Power-conceived and Big Power-sponsored accords and treaties. The "victors' consensus" at the military conclusion of World War II, which had been replaced so soon by the Cold War confrontation, thus gave way, in its turn, to a new style, Big Power "World Concert," resembling in measure the Metternichean, post-Congress of Vienna, Concert of Europe. That earlier Concert of Europe, as we know, established a durable and generally acceptable 100-years' peace in Europe, albeit at the expense, quite often, of denial or repression of the incipient forces of nationalism, independence, and liberalism in Europe.

If "Peaceful Coexistence" and the Big Power *détente* that it inaugurated thus operated for a decade as a highly effective World peace-keeping agency by both avoiding an all-out nuclear war between the two Big Powers and minimizing the risks of accidental or unnecessary confrontations, short of all-out nuclear war, on major tension-issues, it also had, like Metternich's Concert of Europe in the earlier era, a somewhat conservative, even reactionary, aspect in its tendency to emphasize and reinforce, and ultimately to legitimate, the status quo of the de facto political-military settlement of 1945. For, in the ultimate, as a *working* international law principle (or international law-in-action, in terms of Sociological Jurisprudence), "Peaceful Coexistence" tended to mean an opting for stability as opposed to change in the World Community, for peace-keeping as an end in itself, as opposed at times to elementary considerations of justice or equity. This was most notable, of course, in the emphasis upon monolithic solidarity within the dependent political-military blocs associated with each of the two Big Powers at the expense of natural law-based claims of political self-determination on the part of bloc members and of equality of member states within the bloc, and in the emphasis upon mutual respect for, and non-intervention in, the somewhat greyer "zones of influence" (outside the dependent political-military bloc) of each of the two Big Powers. In its pathological sense, the notion that "Peaceful Coexistence" as between the two rival political-military blocs had no necessary correlative of coexistence and non-intervention within each bloc — that is, as between the Big Power

bloc leader and its satellites — was demonstrated in the Czechoslovakian episode of 1968, the fact of which (and also its ensuing legal rationalization in the so-called Brezhnev Doctrine), was tacitly accepted by the United States and the main Western countries after what seemed, in historical retrospect and even at the time itself, to be purely polite or perfunctory official public expressions of regret.

The "zones of influence," in their practical demarcation and also their progressive mutual recognition, also necessarily involved a somewhat Machiavellian, at times seemingly cynical, approach to the interests of smaller states — witness Premier Khrushchev's rather cavalier trading off (without prior consultation with Premier Castro) of the more intransigent Cuban security demands vis-à-vis the United States, in the Kennedy-Khrushchev accord ending the Cuban Missile Crisis in October, 1962, and witness perhaps the curiously muted long-range Soviet attitudes towards United States' involvement in Vietnam and the failure of the Soviet Union, in particular, energetically to protest the special U.S., blockade-style, "quarantine" action against North Vietnamese ports in May of 1972, and the resumption at the same time of U.S. air strikes against North Vietnamese targets.

A system of World Public Order that focusses too exclusively on dominant Big Power needs and that does not sufficiently consider the interests of other, lesser participants in the World power process offends accepted, post-Versailles and post-San Francisco preferred notions in favor of an ever wider, more inclusive World Community with ever wider participation in that Community's decision-making. It may also, and rather more dangerously, in focussing too much on the facts of contemporary power in the World Community — Bipolarity — miss the winds of change now sweeping through the World Community and eroding the basic Bipolar power structure. In short, it may fail as international law-in-action, in so far as it seeks too literally to describe or reflect the exigent here-and-now of international relations, and in so far as, accordingly, it fails to appreciate and to record the new international law-in-the-making and in process of coming into being.

"Peaceful Coexistence" and the Big Power *détente* also meant — in a period when energies and resources (physical, material, and financial) are not inexhaustible and rationed in their use according to definite scales of community priority even on the part of the Big Powers — that while the Big Powers rightly gave their full enthusiasm and mobilized their resources towards

solution of, or at least accommodation on, tension-issues in which their own major interests were directly involved, they tended to lose interest in, or at least not to concern themselves too much, with, other issues that they viewed as secondary in so far as not involving a major or direct East-West conflict. In these latter situations — such as Biafra and the Nigerian Civil War, perhaps also (if, immediately, less obviously) the East Pakistan-Bangla Desh crisis, and the continuing Middle Eastern crisis — each of the Big Powers normally contented itself with the minimum modalities of an eventual settlement, that is, with ensuring that, in any final settlement of these particular problems, its own Big Power interests, remote as they might be, would not be adversely prejudiced and that, by the same token, the rival Big Power's interests would not be materially improved.

The emphasis, here, was on maintaining the pre-crisis Big Power balance of power or equilibrium of forces in the crisis area concerned. On any view, however, it must be admitted that "Peaceful Coexistence" and the Big Power *détente* did not provide a fully comprehensive, over-arching system of World Public Order, even though establishing orderly procedures and techniques and effectively maintaining peace, on all the major, Big Power tension-issues of international relations. The "gaps," however, remained, both occasionally troubling the conscience and (perhaps, for the Big Powers, more importantly), continually carrying the risk that, through error, miscalculation or misjudgment on the part of the Big Powers, an initially purely local or regional, non-Big Power conflict could escalate uncontrollably, *Sarajevo* style, into a full-scale nuclear conflict.

IV. International Institutional Consequences of the Soviet-Western Detente

In addition to its substantive consequences in terms of the nature and organization of political power in the post-Cold War World Community, "Peaceful Coexistence" and the Big Power *détente* had important implications for the institutional structure of World Public Order and also for the techniques and instruments of international law-making.

First, and perhaps most immediately important, it established the Summit Meeting, and especially the Summit Meeting *à deux*, as the principal arena for discussion, negotiation, and solution of the major tension-issues of the World Community. The United Nations organization, founded as it was on the political premise of a continuance of the "victors consensus" of 1945, and enshrining

that political premise in permanent, positive law form in the institution of the Big Power veto in the Security Council, was bound to decline in significance and even relevance for major international problem-solving as its *grundnorm* ceased to be a meaningful description of the political facts-of-life of the Cold War era World Community. And once the Big Power *détente* was in fact achieved — for example, the Kennedy-Khrushchev accord over Cuba of October, 1962 — by direct, bilateral negotiations and discussions between the two rival bloc leaders, the two Big Powers tended readily to conclude that there would be franker discussion and fuller understanding between them without any bothersome necessity for having intermediaries or third parties present, and certainly without the protracted oratorical exercises and the perverse playing to the gallery that had too often characterized the United Nations, and the U.N. General Assembly in particular, since the vast expansion in its membership following on the famous nineteen-nation "package deal" of 1956. The United Nations, in its turn, found itself increasingly relegated to being an arena for discussion of the lesser or "unimportant" (since not directly involving the Big Powers) problems, with the ever-present risk that, even as to these lesser categories of problems, the United Nations would find its mandate for solution preempted or effectively stalemated if any one or both of the Big Powers should happen to feel their special interests threatened — for example, with the Congo crisis in 1960-61, and, more recently, with the Middle Eastern crisis.

Linked to the acceptance of the Big Power Summit Meeting as the preferred arena for major international problem-solving, came acceptance of the bilateral treaty or accord between the two Big Powers as the preferred instrument of international law-making. Where, as often occurred, the two Big Powers saw merits in extending their own special, bilateral consensus on a particular problem and their own preferred solutions to it, on a more general, claimed "universal" scale, by incorporating that consensus and that solution in a multilateral convention open for more general signature and adherence, they established a procedure working out the actual text of the accord on a joint, reciprocal basis, and then formally accepting and signing it, *before* opening it up to signatures by other countries, normally without the possibility of amendment or change by those other countries. This was in fact the procedure followed by the Soviet Union and the United States (with the United Kingdom added for this special purpose) in the case of the Moscow Test Ban Treaty of August, 1963: the text was worked out, in final form, at the Summit Meeting, and formally signed by

the Summit participants; then, and only then, was it opened to signature by other countries, with the United Nations Secretary-General, U Thant, being invited — as a polite and essentially honorific afterthought — to attend the Summit participants' formal signature in Moscow, although the United Nations organization, as such, had not participated in any way in the elaboration of the substantive agreement or in the formulation of the final text.

Even in those cases where, for reasons of political tact or simple courtesy, the Big Powers opened the formal discussions and negotiations for a treaty on a particular problem to the representatives of other countries, they tended to develop an unusual coordination and "twinning" of their own particular national approaches to solution, continually exchanging drafts and revisions, so that in the end an approved version would emerge that might genuinely be called the product of a bilateral, Big Power consensus. This happened, for example, with the Moon Treaty of January, 1967, and with the Nuclear Non-Proliferation Treaty.

In the case of certain problems, whose solution through treaty has been lagging because of the lack of urgency of a Bipolar confrontation or involvement, entry of the two Big Powers into the problem-setting has remarkably accelerated agreement on a solution in treaty form. This was demonstrated, for example, when the recent wave of aerial hijackings in the Soviet Union brought the Soviet Union for the first time into the attempts at international institutionalization of the aerial piracy problem: what followed was the direct Soviet involvement, for the first time, in the actual law-making process, and this produced, very quickly after months of prior delay and deadlock, an international convention that really did have some teeth in it, in contrast to the earlier, rather bland, Tokyo Convention of 1963 — namely The Hague Convention of December, 1970, on Illegal Diversion of Aircraft.

In working so closely with the Soviet Union in the elaboration of these Big Power, bilateral accord-based, multilateral conventions, the United States for practical purposes accepted the Soviet Union's clear doctrinal preference for the Treaty as the primary instrument for international law-making in the contemporary era, and necessarily also as the prime "source" of international law, in comparison to other sources like traditional custom, judicial decisions, and international legislation. Though the Soviet legal doctrine has recognizably always tended to downgrade custom as a source of law today and to frown on judicial legislation in view of a claimed, historically anti-Soviet bias in the World Court's decisions; a new element in Soviet doctrinal legal thinking is to be

rather more cautious than heretofore about the normative, law-making possibilities inherent in United Nations General Assembly resolutions. This particular Soviet attitude is more striking since the disappearance of the erstwhile pro-Western voting lineups of the late 1940's and early 1950's might have seemed to offer ever more interesting possibilities for Soviet political initiatives or adventurism in the General Assembly, in terms of the imaginative use of General Assembly resolutions for international legal norm-making purposes.

In line with the Soviet emphasis on the bilateral treaty and the bilateral accord-derived multilateral treaty as the prime instrument of international law-making today, came a concomitant Soviet insistence upon the strict interpretation of such contemporary treaties, and upon the closing of the apparent escape hatches to any such strict interpretation policy presented by the *clausula rebus sic stantibus* doctrine and the newer, "flexible" or instrumental theories of treaty and general legal interpretation. One may speculate, in this regard, that the juridical conservatism manifested in the recent Vienna Convention on Treaties on both these points is a response, in measure, to Soviet persuasion and pressures in general in the prolonged negotiations and discussions leading up to the adoption of the Vienna Convention.

V. The Moscow Summit Meeting in International Legal Perspective

The two different Summit Meetings of February, 1972, and May, 1972, and especially the later, Moscow Summit Meeting, have been widely acclaimed in the popular press in the West, and also by some Western political leaders, as marking the end of the Cold War era. Actually, as we have already seen, the Cold War era effectively ended with the Kennedy-Khrushchev *détente* of October, 1962, and with the general pragmatic, empirical, problem-oriented, step-by-step approach to resolution of Soviet-Western conflicts that was thereby inaugurated. It is no derogation from the statesmanship and leadership displayed by President Nixon and Secretary Brezhnev in Moscow in May, 1972, to say that the Moscow initiatives represented, in no real sense, a novel or revolutionary breakthrough, in terms either of the substance or the basic method of Soviet-Western relations. What was done at Moscow simply built upon the substantive record of achievement, and also fully utilized the operational procedures, worked out over the past decade of concrete negotiations between, successively, Presidents Kennedy, Johnson, and Nixon on the one hand, and Premier Khrushchev, and Messrs. Kosygin and Brezhnev on the other.

It is worth remembering, in this regard, that the Soviet-U.S. two-pronged agreement on limiting nuclear weapons, consisting of the formal treaty effectively limiting each country to two anti-ballistic-missile systems and of the five-year executive agreement effectively limiting the number of offensive weapons to those in existence and under construction, had been preceded, in terms of its adoption at the Moscow Summit Meeting in May, 1972, by two and a half years of painstaking negotiations (involving no less than 130 separate meetings, alternating between Helsinki and Vienna, by specialist Soviet and U.S. teams) in the so-called Strategic Arms Limitations Talks (SALT). And the SALT discussions themselves were simply a logical follow-up to a chain of steps beginning with the original Moscow Partial Test Ban Treaty of August, 1963, and continuing through the series of measures of conventional disarmament under the so-called "politic of mutual example," the Treaty on Non-Proliferation of Nuclear Weapons, and the various accords accepting the principle of de-nuclearization of outer space and the ocean floor. The operational methodology for Soviet and U.S. decision-makers at the Moscow Summit Meeting remained throughout, pragmatic, empirical, and problem-oriented, along lines already long since perfected by the two Big Powers in their dealings *inter se*.

The only real difference, and it was a difference of degree, was that in joining these arms limitation measures together in some more comprehensive, "package deal" involving also acceptance of common health research, cooperation in environmental protection, collaboration in science and technology, cooperation in space, mutual agreement on "rules of the road" for ships and planes so as to avoid incidents at sea, and the principle of creation of a new joint Soviet-U.S. commercial commission to look into possibilities of Soviet-U.S. trade, President Nixon and Secretary Brezhnev transcended the scenario successfully applied over the past decade, in the step-by-step approach, by their taking a number of big steps instead of a single one as has been the practice heretofore. Otherwise, the procedure remained as before: wholly bilateral, Soviet and U.S. initiatives, achieved at a Summit Meeting *à deux* that pointedly excluded other countries and the United Nations and its Secretary-General and initiatives concretized in terms of reasonably specific and immediate, joint Soviet-U.S. accords and understandings. The contrast in this sense is rather striking with that other international conference that took place at almost the same time — the United Nations Conference on the Human Environment held in Stockholm in early June of 1972,

with 112 countries taking part and with the U.N. Secretary-General in attendance but without the Soviet Union and most of its Eastern European associates. The Soviet-U.S. Summit Meeting has been demonstrably concrete and operational in terms of its conclusions and far-reaching in its practical consequences, while the Stockholm conference, by comparison, in ranging very widely, without much attempt at intellectual self-discipline, into issues like the Vietnam War that, on the normal reading, would seem to transcend the conference's official theme, may have sacrificed opportunities for actual problem-solving to the pleasures of engaging in oratorical exercises or the taking of cheap debating points.

In other respects, the Moscow Summit Meeting of May, 1972, has built upon the political foundations firmly established in the preceding decade of Soviet-Western *détente* and reflected in what the present author has elsewhere called the Soviet-U.S., inter-bloc "ground rules" or "rules of the game." A necessary part of the political background of the Moscow Summit Meeting, and something on which it was understood that the Soviet Union would have the tacit support and the extra weight of United States' persuasion in relation to the West German government, was the European security question. West Germany, after long and bitter internal political debate, finally ratified the two Eastern European frontier treaties — the treaties with the Soviet Union and with Poland — thus completing, from the Soviet viewpoint and to its satisfaction, the process of confirmation and legitimation of the de facto political-military boundaries established in Eastern Europe in May, 1945, with the German military collapse and surrender and the ensuing Soviet military occupation. The further Soviet-U.S. agreements, at the Moscow Summit Meeting, on the principle of a European Security Conference, long sponsored by the Soviet Union and on the conjoined idea of reciprocal reductions of military forces and armaments in Central Europe, should finally satisfy those long maintained, essentially conservative, Soviet aspirations for giving, in Jellinek's terms, "normative quality to the factual"—here the existential condition of the present-day effective political-military balance and status quo in Central Europe. These latter developments will obviously require the presence, at a certain stage, of participants in addition to the two Big Powers — meaning here either NATO and the Warsaw Pact organizations acting together, or at least the Central European countries immediately and directly affected. But presumably this will occur only within the framework of the additional general ground rules already agreed upon by the Soviet Union and the United States at the Moscow Summit Meeting.

From the foregoing, some general conclusions seem to follow as to the main trends and directions of international law and organization in the new, post-*détente* era:

(1) The Soviet Union and the United States have formally and in terms accepted the situation that their special role as superpowers casts on them some special or augmented degree of responsibility for peace-keeping and the maintenance of World public order in the nuclear age. Though the *Eleventh* point of the Joint U.S.-Soviet Declaration of May 29, 1972, is at pains to declare that —

> The U.S.A. and the U.S.S.R. make no claim for themselves and would not recognize the claims for any one else to any special rights or advantages in world affairs. They recognize the sovereign equality of all states;

the *Third* point of the same Declaration acknowledges the "special responsibility" of the U.S.A. and the U.S.S.R., stated to flow from their individual status as permanent members of the U.N. Security Council.

(2) In spite of the manifest long-range trends towards Polypolarity in the contemporary World Community and the accentuating weakening of the old Bipolar power structure, among the members of that somewhat enlarged World Concert that is now in process of emergence, some powers are still obviously more "equal" than others. The Soviet Union and the United States, because of the hard reality of their continuing nuclear preeminence and their conventional military and technological superiority, will clearly, for some considerable time, continue to be main actors in World Community decision-making; and, where they happen to be in concert, they will clearly tend to determine the content of that decision-making, to the exclusion of others if need be.

(3) The emerging trend towards Polypolarity is likely to be manifested in "regional" or loose geographical groupings, proceeding upon a common economic base or common system of social and economic organization and upon the congruence of values and cultural outlook that that tends to imply. Relations between such "regional" groupings — which might include, in addition to the Soviet Union and the United States, certainly the newly enlarged European Community, China, and Japan — are likely to be conducted not merely mutilaterally but also on a bilateral basis, yielding an essentially multi-textured, pluralistic public order system based on the overlapping patterns of bilateral accords and special arrangements negotiated by the different regional groups *inter se*. Dispute settlement on problems *within* or directly affecting

only one of the regions — whether conducted through conventional diplomatic negotiations, or even (more rarely) through other means such as judicial settlement — is likely to be conducted on a strictly *intra-regional* basis. Disputes arising *between* the different regions, as such, seem, on the same logic of events, rather more likely to be settled on an *inter-regional*, than on a global or universal, basis.

(4) The United Nations and the specialized agencies and institutions (including the World Court) stemming from it appear, on this basis, to be fated to continue, as at present, as arenas for the discussion or arbitrament of essentially lesser or secondary problems, or else narrowly technical matters not going to issues of fundamental Big Power interests. The vastly amplified character of the Soviet-U.S. consensus, after the Moscow Summit Meeting, might, of course — in the light of the very explicit reference to the Soviet and U.S. positions as permanent members of the Security Council contained in the Joint U.S.-Soviet Declaration of May 29, 1972 — have offered the very real possibility for a revived role for the U.N. Security Council as an arena for the resolution of Big Power conflicts, in historical accord with the original intentions of the drafters of the U.N. Charter. However, for the present time at least, any Soviet and U.S. initiatives to take their Big Power *inter se* differences to the United Nations, for discussion and settlement there, seem rather unlikely, in the absence, in any case, of some more concrete evidence of a trend to greater intellectual discipline and self-restraint on the part of the U.N. General Assembly members. A manifest tendency of the U.N. General Assembly, and of some of the specialized conferences arising under its *aegis*, to operate, in this regard, rather like the legislature of the ill-fated Third French Republic, seems hardly likely to inspire any greater confidence for the future on the part of Soviet and U.S. decision-makers as to the operational utility of the U.N. as an arena for the really important problem-solving of our times.

(5) The conscious shift, on the part of Soviet and U.S. decision-makers, from the erstwhile emphasis on "nuclear superiority" to more simple "nuclear sufficiency" should, apart from the undoubtedly welcome diversion that it allows of Soviet and U.S. funds and resources to rather more peaceable activities, assist in extending the possibilities for rational decision-making in international crisis situations. The major contribution made thereby to the contemporary system of World public order should not be forgotten, for this tempers the criticisms that may otherwise be formulated too easily, that the new *Pax Sovietica-Americana*, with

its links to the new, if more limited, Chinese-American *détente*, may end up as a sort of Metternichean "Holy Alliance" intent primarily on preserving the status quo with all its more obvious sins and inequities. It is on this basis, quite clearly, that Secretary Brezhnev decided that the prospects of consolidating and extending the Soviet-U.S. *détente* and calling a halt to the nuclear arms race were worth far more, on balance, than the success of General Giap's curiously ill-timed military offensive into South Vietnam in the Spring of 1972, on the eve of the Moscow Summit Meeting. The failure of the Soviet Union, and for that matter of China, effectively to protest the U.S. mining of Haiphong Harbor and to protest the renewed and extended American aerial bombings against North Vietnam was quite as deafening, in its message as to the real nature and character of the contemporary World public order system, as Premier Khrushchev's failure effectively to consult Fidel Castro, ten years ago, *before* the Soviet Union agreed to remove the offensive, ground-to-ground, Soviet nuclear missiles from Cuba as part of the October, 1962, *détente* with the United States.