OPERATIONAL METHODOLOGY AND PHILOSOPHY FOR ACCOMMODATION OF THE CONTENDING SYSTEMS OF INTERNATIONAL LAW

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Although Soviet-Western relations normally seem to fluctuate from summit meeting to Cold War power play, there are recent indications that this condition is not necessarily permanent. Professor McWhinney suggests that a viable compromise between the contending international law doctrines and methods is possible which would place the relations of the two power blocs on a rational and objective basis. To implement this change, he proposes a new methodology for international relations similar to that employed in achieving the Moscow Test-Ban Treaty.

From Cold War to Coexistence: Aftermath of the Cuban Offensive Nuclear Missile Crisis

IN retrospect it now seems apparent that the Soviet-Western crisis of October 1962, in its actual resolution, marked something of a turning point in world history. For if Premier Khrushchev seemed to venture rather carelessly and capriciously to the brink of a nuclear war in seeking to install offensive, ground-to-ground nuclear missiles clandestinely in Cuba, he at least had the good sense to withdraw when confronted by a resolute Western response. And once Premier Khrushchev had decided to withdraw, he did so gracefully, even elegantly.[1] Thus, there seems to be truth in Premier Khrushchev's subsequent claim that, in comparison to some of the currently more noisy and obstreperous members of the Socialist camp, the Soviet Union is taking a "responsible attitude to the problems of war and peace." [2] In the Premier's own colorful words:

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1. Walter Lippmann's characterization of Premier Khrushchev's ultimate acquiescence in the Cuban quarantine measures as being "rather elegant and nonchalant," seems just under all the circumstances. Lippmann, *Cuba and the Nuclear Risk*, The Atlantic Monthly, Feb. 1963, p. 55, at 57.

2. Address by Premier Khrushchev, The New Content of Peaceful Coexistence in

> To use a familiar expression: "blessed is he who jabbers about war without knowing what he is talking about." The Albanian leaders talk a lot about rocket and nuclear war, but nobody is worried by their talk. Everyone knows that they have nothing to their name but idle talk and that they have no real possibilities. As you see, our positions on these questions and our responsibilities are different.[3]

By the same token, President Kennedy's tactical handling of the American response to the surprise Soviet nuclear investment in Cuba was characterized throughout by a carefully calculated restraint.[4] Once the decision had been taken to face up to the Soviet challenge, President Kennedy exercised a prudent economy in the use of power: rejecting the arguments of the advocates of an all-out response, who counselled among other things an immediate air assault on the Cuban missile bases, the President employed control measures that proved sufficient, and no more than sufficient, to counter the "clear and present danger" presented. An air assault, constituting, as it necessarily would have, a disproportionate, excessive use of power, would have taken us all much closer to all-out nuclear conflict without any additional tactical military gain. It would have left the Soviet Union with no real chance of withdrawing or retreating without intolerable loss of face and would thereby almost have necessitated some form of severe Soviet retaliation.

The "lesser" response actually employed by President Kennedy not only was fully adequate for the tactical, military needs of the situation, but also allowed the Soviet leaders the opportunity for graceful withdrawal from what had become an impossible situation. The prudent relationship of ends and means—of policy objectives and the actual techniques to be used to attain them in concrete problem-situations—is, of course, at the core of the American notion of due process. The measure and manner of President Kennedy's response in the Cuban crisis were thus in the best American legal traditions. More important, however, the very moderation of the President's actions opened the way, for the first time since the inception of the cold war, for agreement between the West and the Soviet Union on a basis, not of total victory on either

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the Nuclear Age, 6th Congress of the Socialist Unity Party of Germany, Jan. 16, 1963, at 35.

3. *Ibid.*

4. See generally McWhinney, *Soviet and Western International Law and the Cold War in the Era of Bipolarity*, 1 CANADIAN YEARBOOK OF INT'L L. 40, 67 (1963). See also Cleveland, *Crisis Diplomacy*, 41 FOREIGN AFFAIRS 638, 644 (1963).

side, but of accommodation according to reciprocal self-interest and mutual give-and-take. If the Soviet Union would withdraw its offensive missiles from Cuba, then the United States would not invade Cuba. This was the reasonable compromise both sides accepted as the concrete resolution of the Cuban crisis, and it was accepted with a minimum of bluster and public name-calling.

The marked easing of surface tensions between the Soviet Union and the West since the Cuban crisis dates from, and seems fairly to be the result of, the mutual recognition in the actual *dénouement* of the crisis that rational, responsible decision-making would operate on both sides. The rational conclusion of both the Soviet Union and the West was finally that a nuclear war under present-day circumstances would be quite unthinkable. It is the fact that it was the product of a rational decision-making process, and the fact of the existence of this process on both sides, that renders agreements and accommodations between East and West viable at the present time. This process is in marked contrast, for example, to the Nazi leaders' inclination to irrational, "intuitive" approaches to decisions during World War II. For so long as the important conditions of mutuality and reciprocity are met by any such East-West accommodations, it can reasonably be expected to be in the self-interest of both sides to observe them.

The Moscow Partial Test-Ban Treaty—A Case Study in East-West Accommodations

If, in retrospect, the successful achievement in the summer of 1963 of the Moscow Test-Ban Treaty seems but a logical development and progression from the peaceful resolution of the Cuban crisis of the preceding October, it is still true that the actual methods used to achieve the treaty and its internal organization and overall design represent both significant innovations in the operational methodology of Soviet-Western relations and also something of a compromise between basic Soviet and Western doctrinal attitudes in international law. For the Test-Ban Treaty was achieved through a summit-type meeting of the personal representatives of the heads of state of the Soviet Union, the United States, and Great Britain, with the actual text of the agreement being drafted, and its terms concluded, by the representatives of those three powers. Although other countries were invited to adhere to the treaty, this was permitted only after the actual agreement had been drawn up and completed by the three powers, with these other coun-

tries of course unable, in their subsequent accessions to the treaty, to contribute to or to modify the actual terms of the agreement. The Moscow Test-Ban Treaty is thus, in form, an open-ended, but limited (actually tripartite) agreement—open-ended in the sense that other countries might adhere to it, but limited in the sense that only the original three powers participated in its drafting.

One significant innovation in the basic operational methodology of Soviet-Western relations which has prevailed up to this time[5] is that the West, for the first time in any really significant and tangible way, accepted the clear Soviet preference for summit meetings unencumbered by the distracting presence of the representatives of the lesser countries. Moreover, the West was prepared to meet the undoubted Soviet preference for negotiation through quiet, traditional diplomacy, far from the hurly-burly and din usually present in the public-style diplomacy of the United Nations' corridors and lounges or the forum of the General Assembly itself.

At the level of legal doctrine, the Moscow Test-Ban Treaty significantly reflects the Soviet preference for bargains or bilateral treaties (here, of course, strictly tripartite) as the prime source of contemporary international law. The Soviet-Western accommodation in the Cuban crisis, in contrast, was achieved, perforce, indirectly, through mutual acquiescence by each side in the other side's final course of conduct—a species almost of contemporary, custom-based international law.

Yet, insofar as the Moscow Test-Ban Treaty represents an approach to Soviet-Western relations pitched in terms of concrete problem-solving—the step-by-step consideration of specific tension-issues of international relations and the *ad hoc* attempt to solve them on a basis of mutuality and reciprocity of interest—it is a significant Soviet concession to distinctively Western legal method. In the debates in international scientific and professional legal conferences over the past few years, Western jurists have consistently argued against the more grandiose Soviet campaigns for immediate acts of codification of a priori principles

5. These matters, and the related Soviet special concept of "Peaceful Coexistence" are discussed in detail in McWhinney, *supra* note 4, at 51-63, and in my further articles, *"Peaceful Coexistence" and Soviet-Western International Law*, 56 AM. J. INT'L L. 951 (1962); *Le Concept Soviétique de "Coexistence Pacifique" et les Rapports Juridiques Entre l'U.R.S.S. et les États Occidentaux*, 67 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 545 (1963); *International Law in the Nuclear Age: Soviet-Western, Inter-Bloc, International Law*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 68 (1963) [hereinafter cited as PROCEEDINGS]. They are also examined at length in my study, in book form, on "Peaceful Coexistence," to be published in the spring of 1964.

of East-West relations, in favor of more empirically based methods which would seek to derive general principles only a posteriori from the particular solutions arrived at in the large numbers of actual problem-situations of East-West relations in the past.

The Polemics of International Law-Making and Competition of the Different Legal Systems

The Soviet legal campaign in behalf of "peaceful coexistence" coincides with the era of de-Stalinization in internal Soviet law and is associated inevitably with the regime of Premier Khrushchev. Khrushchev-era Soviet legal scientists seeking to "legitimate" or otherwise to render historically respectable the theoretical concept and the practice of peaceful coexistence as an instrument of Soviet foreign policy have sought *ex post facto* to establish ancient roots and antecedents for coexistence based on the assorted writings and public statements of Lenin. This is, of course, a perfectly permissible ploy in Soviet academic legal gamesmanship—no more offensive or amusing perhaps than the attempts from time to time of rival members of the United States Supreme Court, often with rather widely differing or even conflicting judicial philosophies, to don the mantle of Justice Oliver Wendell Holmes. The distinguished Danish legal philosopher and international lawyer, Alf Ross, has suggested[6] a more immediate tactical explanation for this minor intellectual investment in what might be called retrospective legal history. In Professor Ross' view, the development began several years ago with an eye already on the forthcoming ideological split with the Chinese Communists, probably in significant part as a defensive measure to forestall possible Chinese charges of "revisionism" in current Soviet policies or else Chinese charges of a Soviet rewriting of the fundamental principles of Marxism-Leninism.

It has been apparent from the beginning that peaceful coexistence has had, for Soviet political leaders and their jurists, a highly ambivalent character. In one respect, it has seemed to be an adjustment to the factual condition of the world community in the post-war years, *i.e.*, the two great competing power blocs with their dominant bloc leaders and the lesser satellite or supporting countries and the relatively smaller group of variously neutralist, neutralized, or otherwise formally uncommitted countries. Whatever the condition of ideological tension between the two power blocs at any time and whatever the range and

6. Letter From Alf Ross to Edward McWhinney, Sept. 25, 1963.

intensity of their licit hostile activities against each other, at no time, even during the heights of Stalinism, have the conflicts escalated into an overt shooting war between the two bloc leaders. Peaceful coexistence in this sense, then, may be no more than a recognition of the elemental facts of life of the post-war world community—the absence of war or armed conflict between the two bloc leaders and the uneasy armed truce that has prevailed between the two blocs over the years of the cold war. It could be said to be, in measure, a legitimation and a prepetuation of the political *status quo* of the postwar years.

In quite another sense, however, peaceful coexistence has been rationalized by Soviet leaders and their jurists as some sort of stratagem or device to baffle and confuse Western leaders while the Soviet Union proceeds, in Premier Khrushchev's own phrase, to "bury the West." It is obvious from the record of successful Soviet maneuvering in international legal arenas like the United Nations Sixth (Legal) Committee, the International Law Commission of the United Nations, and also authoritative scientific legal bodies like the International Law Association that there has been considerable propaganda mileage to be obtained from the concept of coexistence, particularly with the neutral or uncommitted countries. This condition has been assisted by the sustainedly skillful and professional Soviet bloc legal performance in these bodies, in contrast to a frequently casual, indifferent, and amateurish juristic performance on the Western side. Even granted the best Western scientific legal representation in these bodies, it must be stated that the West has sometimes seemed to be laboring under a fairly considerable psychological disadvantage in attempting—as has been the general Western, official or governmental position in recent years—to counter the intensive Soviet drive for an immediate act of codification, *uno actu*, of the principles of peaceful coexistence.

The Western criticism that any such immediate act of codification would be no more than an exercise in natural law-type affirmations, with a real danger of semantic confusion between the two competing systems because of their different value structures and basic legal premises, is a rather sober and technical legal argument, perhaps requiring a certain amount of jurisprudential sophistication to appreciate its full intellectual validity and weight. Anyone who has looked in on the United Nations General Assembly in recent years can hardly fail to notice many delegates' proclivity for sounding highly poetic declarations of abstract general principle. There is a concomitant disinclination on the part of these same delegates to expend the time and patient hard

work necessarily involved in the study of actual working problems and in devising viable solutions on a basis of compromise or balancing the conflicting interests.

The difference between the a priori, natural-law-type approach and the more empirically based methods that seek to derive general principles only inductively from concrete cases and their concrete resolutions is, however, only in part a difference in the relative attractiveness and opportunities of the two methods for headline-hunters at the United Nations. It is a fact that the empirical approach has distinctive common-law origins and antecedents, whereas the a priori, conceptual methods are basically products of the civil law. Thus the differences between Soviet and North American operational legal approaches in international arenas are only in part—even if it be the most significant part—the product of ideological differences and the striving for cold war tactical advantage. It should not be forgotten that Soviet jurists are also Civilians and that they partake, therefore, of the inbuilt Civil-law predilections for codification or for a priori formulation of lists of general principles of law.

On the Western side, however, some of the recent, well-publicized, non-governmental ventures in the name of accommodation of the contemporary contending systems do not seem to follow in the full traditions of Western legal science. Furthermore, these ventures seem to reveal many of the technical deficiencies for which Western jurists have been accustomed to assail the Soviet forays in international legal arenas in recent years. Thus the most recent Western-based "Declaration of General Principles for a World Rule of Law," which was "adopted at the First World Conference on World Peace through the Rule of Law" at Athens on July 6, 1963,[7] seems to have all the disadvantages of vagueness and lack of clarity or precision—indeed of vacuousness—which characterized the original Soviet draft codes on coexistence presented to international legal conferences.

To be sure, a term like "rule of law" did have a reasonably precise, objectively determinable content and meaning in the "tight little island" of late nineteenth century England, where it was first formulated,[8] even though, as an exercise in constitutionalism in specific response to English society in the twilight of laissez-faire political and economic ideology, Dicey's original concept has been subject to increasing re-

7. World Peace Through Law Center, The Four Steps at Athens Toward World Peace Through Law 2-3 (1963).

8. Dicey, Introductory to the Study of the Law of the Constitution (1st ed. 1885).

examination and scrutiny by latter-day English and Commonwealth jurists.[9] Taken out of its original English or even its more general Commonwealth context, however, the rule of law seems to be an unpolarised legal concept of such a high level of generality and abstraction as to have little practical utility in specific problem-situations. Thus, it is surely trite to proclaim, as the Athens Declaration does in its opening statement, that "All States and persons must accept the rule of law in the world community" if one does not at the same time attempt to offer some guidance, in terms of more concrete secondary principles, about what that injunction would mean in practical terms in actual East-West conflicts. And if the answer in such specific tension-situations is to be solely in terms of distinctively Western-based legal values or legal method, although this might have some polemical significance in the East-West contest, it is hardly likely to be really useful in terms of any genuine search for accommodation and reconciliation of fundamental East-West differences.

The Relevance of Distinctive National Legal Thought-Ways in the Competition of Systems

Apart from the important fact, already noted, that Soviet jurists are Civil lawyers as well as being Socialists, whereas Western jurists are schooled in the common law, there remain a number of significant differences between Soviet and Western legal thought-ways[10] which are not solely referable to or explicable in terms of the cold war ideological conflicts. Some of these differences go to the formal sources of international law and to the related question of choice of the appropriate arenas for international-law-making. With respect to sources, the Soviet dislike of historically derived, custom-based international law is well-known, as is their conscious preference for treaties, and specifically bilateral treaties, as the prime source of present-day international law. The express rejection of ancient custom is readily understandable in the case of a purportedly radical, innovatory regime that has suddenly acceded to power after a major political, social, and economic revolution involving, necessarily, also a major revolution in

9. See, *e.g.*, Jennings, The Law and the Constitution (1st ed. 1933).

10. See generally the discussion of basic methodology of comparative East-West studies by the distinguished Socialist jurist, Professor Stefan Rozmaryn of Warsaw, in Revue Internationale de Droit Comparé 70 (1958) and McWhinney, *Toward the Scientific Study of Values in Comparative Law Research, in* XXth Century Comparative and Conflicts Law 29 (1961).

societal and general legal values. Thus, the Russian Communist leaders, having not participated in the creation of ancient custom, might readily echo Justice Holmes' old dictum that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." [11] It suffices, for present purposes, to say that as the beneficiary of the quite considerable territorial expansionism of old Imperial Russia in the nineteenth century, the Soviet regime in Russia today has itself quite considerable interests in the safeguarding of the political and economic *status quo* which customary international law, when too literally or unimaginatively applied, is assumed to preserve and effect.

The more substantial interest to be served today by customary international law—namely ensuring historical continuity in the progressive development and expansion of old rules—is a goal perhaps too often overlooked by Western jurists in favor of the interests in stability of settled expectations. Soviet jurists, by the same token, in proclaiming the principle of *pacta sunt servanda* as annexed to bilateral treaties tend to emphasize the conservative element in treaties, at the expense of those interests in change and growth in international law which the countervailing and Western-favored principle of *clausula rebus sic stantibus* facilitates and promotes. Perhaps, in the future, the rather rigid and unyielding Soviet hostility to custom-based international law may, for policy reasons similar to those which have determined its current attitudes as to treaties, undergo some significant modification. An alternative approach, in such case, might be for Soviet jurists to set up a dichotomy between "old" custom and "new" custom, rejecting the former by definition and including in the latter category only those traditionally based rules which seem to meet the special needs of the Soviet Union and which it, therefore, would "accept."

With respect to the general choice of arenas for international-law-making, the Soviet Union and the Soviet bloc generally show a marked distaste for the United Nations and international agencies like the World Court as really serious forums for settling substantial Soviet-Western differences. This particular Soviet bloc attitude is clearly a reaction to the political fact of life that the Soviet bloc is outnumbered and also fairly consistently out-voted in these bodies. They may be of limited usefulness for tactical maneuvering with a view to the incidental propaganda advantages to be obtained in the give-and-take of debate, but, on balance, their disadvantages for the Soviet Union would

11. Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 187 (1920).

seem normally, in Soviet eyes, to outweigh their assets. The Soviet *troika* campaign, designed originally to neutralize the discretionary decision-making power of the Secretary-General and extended now by Soviet jurists in principle and in terms to the General Assembly and even to the World Court, is intended tactically to equalize the respective bloc weightings and advantages in these bodies by formally according the bases of political representation, and hence voting powers, in these bodies with the basic fact of the contemporary world community, *i.e.*, the existence of the Soviet bloc, the Western bloc, and the smaller group of uncommitted countries.

Soviet leaders uniformly tend to regard Western moves to reform or amend the United Nations Charter or to expand the jurisdiction and competence of the World Court as being designed to cut down the few institutional safeguards that the Soviet Union now possesses in the United Nations (for example, the "big power" veto in the Security Council). In addition, they suspect the Westerners of trying to harass and out-maneuver the Soviet Union in arenas where the Soviet Union will inevitably be out-voted because of the particular affiliations of the group, or coalition of different groups, making up the majority. I think that this particular Soviet criticism exaggerates an element of anti-Soviet malice that Soviet jurists detect in certain Western legal writers and in Western special interest groups like the American Bar Association's Special Committee on World Peace Through Law.[12] This criticism also underplays significantly the tendency, certainly not confined to American or Western lawyers generally, to project that Charles E. Wilson-brand of simple, homespun philosophy that "what is good for General Motors is good for the country," *i.e.*, that special institutional devices that seem to work well in the United States must necessarily have similar success when exported abroad to other peoples in other legal environments.

The American faith in the judicial process as a solvent for varied social ills, and particularly the American faith in a judicially legislating supreme court, has perhaps been sufficiently vindicated by the record of the development of American constitutionalism to warrant this special American confidence in the workability of such a distinctively American institution as judicial policy-making. Certainly, American intellectual ideas, if not indeed direct political pressure during the Occupation years, were influential in causing the institution of judicial review

12. See generally INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, LAW IN THE SERVICE OF PEACE: TWO CONCEPTS (1963) (Soviet sponsored).

to be written into the Bonn Constitution of 1949 and into the postwar Japanese Constitution, on the general argument that the institution of judicial review is a prerequisite to the development of a viable democratic constitutionalism. The results in the case of West Germany have been notably successful,[13] while in Japan the developments seem at least promising.[14] On the other hand, it may be argued that there were certain essential preconditions, in both West Germany and of Japan, favoring the success of such a constitutional innovation—among these a certain prior acceptance of basic American constitutional ideas on the part of at least several of the Constitutional Court judges as well as of others in the legal establishment or *honoratiores*.

But judicial review and judicial policy-making in general have not been an altogether unqualified success in the Commonwealth countries, and they are not part of the English constitutional system. Moreover, the tentative ventures with judicial review and judicial policy-making generally in France and Italy and a number of other postwar democratic countries have either been stillborn or else developed in ways that cannot as yet be adjudged as viable.[15] The point is, of course, that courts and the judicial process are not the only arena for legal problem-solving, and Western countries other than the United States might even suggest that, in the light of their own legal experience, courts are not always the best arena for balancing conflicting societal interests. Thus, in some senses, the pressure in certain North American legal circles for expansion of the World Court's jurisdiction seems to be a species of, no doubt unconscious, Anglo-Saxon legal arrogance. One of the curiosities in this current North American campaign for extension of the World Court's jurisdiction, as Soviet bloc jurists and their supporters have not been slow to note,[16] is that some of the

13. See McWHINNEY, CONSTITUTIONALISM IN GERMANY AND THE FEDERAL CONSTITUTIONAL COURT (1962).

14. See Nathanson, *Constitutional Adjudication in Japan*, 7 AM. J. COMP. L. 195 (1958).

15. See MOSLER, VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART, LANDERBERICHTE UND RECHTSVERGLEICHUNG (1962).

16. In more recent times Mr. John C. Satterfield, who preceded Mr. Charles S. Rhyne as President of the American Bar Association, has defended the position adopted by Mr. Ross Barnett, Governor of Mississippi, in refusing to accept the judgment of the U.S. Supreme Court condemning racial segregation. And the U.S. Attorney-General himself, Mr. Robert Kennedy, speaking at a dinner given by the Law Faculty of the University of San Francisco on September 29, 1962, criticised the American Bar Association for failing to support the desegregation measures ordered by the Supreme Court.
INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, *op. cit. supra* note 12, at 7-8.

strongest adherents of the movement are also among the strongest opponents of the policy-making role assumed in municipal law by the United States Supreme Court in the school-segregation decisions.

Certainly, if such proposals are to be brought down from the level of the polemics of cold war legal competition, Western jurists must be prepared to give calm and sober consideration to measures for strengthening the general intellectual quality and legal expertise of the judges on the World Court. It is an understatement to say that the present rather casual methods of selection of judges for the Court, with their occasional elements of horse-trading and the thinly veiled political patronage in the case of the nominations of some countries, do not always—even in the case of the West—yield the intellectually best qualified and experienced jurists as the formal national candidates for the Court. As an indication of the absurdity and frequent unfairness in the present system of election to the Court, it is difficult for a Swiss to be elected, even if, as with Professor Guggenheim, he may be considered one of the great contemporary Western jurists. Perhaps the greatest of the continental Civil-law-trained jurists now living, Hans Kelsen, first as an Austrian and then as an emigré and finally as an American, was never able to secure selection; and the same is true of the distinguished Austrian, Professor Verdross of the University of Vienna. Even in the case of the Soviet bloc, it is well-known that men whom Western jurists, viewing the Soviet bloc legal establishment as objectively as possible, have considered to be intellectually the best qualified for nomination to the Court, have been kept at home by their own governments for "more important tasks."

It is also clear that, if the Court is to become an arena for attempted arbitration of the major East-West controversies—a type of problem, of course, that the Court, with its limited jurisdiction, hardly encounters at the present time—some more realistic consideration would have to be given to the "political" bases for selection to the Court. Representation according to informal principles that take account, in measure, of a balance between regional and geographical factors, religion, and professional expertise is, of course, an accepted element of the selection process for the United States Supreme Court, resting as that selection process does on the twin pillars of Presidential nomination and Senate confirmation. Certainly, Western governments have from time to time responded directly to a conceived "political" element in the World Court's jurisdiction and work by nominating the principal legal advisers of their foreigu ministries to the Court. For examples

one need not go beyond the several postwar American and British nominations to the Court—Judge Hackworth, the first postwar American judge, and Sir Gerald Fitzmaurice, the present British judge, among others—to find evidence of such a trend, which may, indeed, be accelerating.

If the World Court is to remain a strictly limited, "judicial" court, on the model of the British Court of Appeal, the French *Cour de Cassation*, or even the Soviet Supreme Court, then such a trend to assimilate the court and its judges more or less formally to the legal divisions of the various national foreign ministries seems regrettable. If, however, the Court is to assume a more expansionist "legislative" role on the model of the United States Supreme Court, then the selection of former foreign ministers, or of national ambassadors to the United Nations, or of foreign ministry legal advisers seems to be both rational and also perhaps inevitable. But, by the same token, the Soviet *troika* proposal, so far as it is concerned with the World Court and the political bases for representation of the competing power blocs on the Court, would cease to be of purely cold war polemical significance, as it has seemed to the present, and would appear at least to merit more than passing consideration by Western jurists.

Theory and Definition in Law—The Quest for Truth in Law and the Relation of Law and Social Change

It is clear that the intellectual preparation for any possible East-West legal accommodation must include some substantial comparative study of the differing roles and conceptions of legal theory and the definition of law in the main competing legal systems, as well as an examination of the relationship of positive law and general social change in those competing systems.

Certainly the operation of distinctive legal thought-ways as an inhibition to fruitful intellectual exchange has been observed even in situations such as conferences between common-law-trained and Western European Civil-law-trained legal philosophers, which are not complicated by cold war overtones.[17] It is apparent even in these non-cold war confrontations that the very novelty of the common-law-based, point-by-point system of legal argumentation presents special problems to Western European Civil lawyers.[18] As between Soviet bloc lawyers and

17. Falk & Shuman, *The Bellagio Conference on Legal Positivism*, 14 J. Legal Ed. 213 (1961). See also McWhinney, *supra* note 10; Rozmaryn, *supra* note 10.

18. Falk & Shuman *supra* note 17, at 216.

Western common lawyers generally, it is also clear that, cold war aspects to one side, there may be some special problems in communication because of distinctive elements inherent in common-law legal philosophy. One of these elements is the common-law distaste for abstract definitions formulated a priori and the concomitant common-law insistence that general principles, if they are to be meaningful in action, must be derived inductively from decided cases, which in this context means actual problem-situations and their concrete resolutions.

A second such element is the common-law notion of truth in law, which, in true pragmatist fashion, insists that truth is not an abstract quality inherent in a legal idea but something that happens to the idea in action. A legal idea or proposition, for the common lawyer, is only *valid*-ated in action, in actual experiential fact-situations. This element leads into a third element, perhaps the most decisive in terms of the possible accommodation of the competing legal systems—the notion of change in law, and of the necessary relationship or symbiosis between positive law and social change generally. The common lawyer, in true legal realist fashion, must focus on the central fact of life in the world community of the present era: society is in a state of flux and positive law, therefore, if it is to continue to be useful in solving problems of contemporary society and in balancing the conflicting interests present in it, must change in measure with the society. The test of goodness in law on this argument may be conditioned by the degree of correspondence or non-correspondence of that positive law with society, in this instance the international society or world community.

A few examples will indicate the extent to which simple problems of noncommunication between the competing power blocs, deriving in part from the fact that jurists in the competing blocs may live in different universes of legal discourse, can operate on and affect the problem of legal accommodation between the rival blocs.

Professor Gregory Tunkin, who as the principal legal adviser to the Soviet Foreign Ministry in recent years has been the spearhead of the legal campaign in behalf of the Khrushchev policy of peaceful coexistence, has charged in a recent article that I have been unfair to him and to other Soviet jurists in pointing out repeated instances of inconsistencies and all too often downright contradictions and *volte-face*, in the Soviet jurists' arguments in support of the peaceful coexistence theme.[19] Professor Tunkin is recognized in the West as a most thought-

19. Tunkin, *Printsip Mirnogo Sosyshchestvovaniya—Generalnaya Liniya Vneshne-*

ful legal scholar, quite apart from his governmental position, and so there is little doubt that his complaint here stems predominantly from scientific legal considerations and not cold war polemics.

The problem of communication in this situation is one of explaining that, in the full Holmesian tradition of testing the truth of an idea by its ability to survive the competition with other ideas in the general market place of ideas, Western legal scientists must examine current Soviet professions on peaceful coexistence in the light of the pedigree and general history of that concept in Soviet legal thought. If this investigation discloses unexplained conflicts or contradictions concerning the meaning of coexistence between different Soviet jurists at the same time, or even in *one* Soviet jurist over a period of time, the internal viability of those disputed ideas in terms of Soviet legal doctrine and Soviet foreign policy is necessarily cast into doubt. Furthermore, if Professor Tunkin intends his own more "moderate" position on peaceful coexistence to be considered, fully and seriously, in the West, he may be under some continuing obligation to join issue with or otherwise correct some of his more obstreperous colleagues whose statements seem to be aimed at undercutting the moderate position and who reiterate the theme that coexistence is just another stratagem to "bury the West."

As a further example of the problem of communication, one might cite the Soviet-bloc jurists' dominant opinion that custom-based international law exercises dead-hand control over the current aspirations and ambitions of revolutionary succession societies like, it is said, the Soviet Union or a fortiori the developing or "new" countries. Thus, in a current discussion by Soviet-bloc supporters of the role of judicial settlement of international disputes, it is asserted quite categorically, in relation to the recent dispute between Portugal and India involving the right of passage claimed by Portugal over Indian territory, that:

> If the [World] Court had indeed been called upon to decide the question of sovereignty over the former Portuguese colonies in India, these Indian territories would undoubtedly still be Portuguese, for the members of the Court, due to the origins and education of the majority of them, would have found considerable difficulty in admitting recognition of the right of the self-determination of peoples as a fundamental principle of international law.[20]

politicheskoi Deyatelnosti KPSS i Sovetskogo Gosudarstva, SOVETSKOE GOSUDARSTVO I PRAVO 26, 35 (1963).

20. INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, *op. cit. supra* note 12, at 33-34.

Apart from the cold war polemics, which are rather obtrusive, this assertion reveals a basic misunderstanding of the essential character of international law and the necessary relation between positive international law doctrine and societal change in the world community. For international law, from the best Western scientific legal viewpoints at least, is not a frozen cake of doctrine whose meaning jelled once and for all in a bygone age, but a continuous process of change and progressive adaptation of old rules to new social conditions. Accepting the strictly limited nature of the present jurisdiction of the World Court, it would still have been a highly unimaginative, intellectually sterile judicial approach for the Court to have ruled as the Soviet-bloc supporters so blandly allege. Such a decision would completely miss the dynamic character of custom-based international law and would substitute instead an essentially standpat juristic attitude that one hardly finds today except perhaps in some of the earlier, more timorous Soviet-bloc writings on the "dangers" inherent in the Western-favored doctrine of *clausula rebus sic stantibus* as a solvent for progressive legal change in the time-worn *treaty-based* rules of international law.

The Relevance of Law to Solution of the Major Tension-Issues of the Contemporary World Community

In his speech to the annual meeting of the American Society of International Law in the spring of 1963, former United States Secretary of State Dean Acheson suggested that the quarantine measures applied by the United States administration during the Cuban crisis were "not a legal issue or an issue of international law as these terms should be understood." [21] He continued:

> Much of what is called international law is a body of ethical distillation, and one must take care not to confuse this distillation with law. We should not rationalise general legal policy restricting sovereignty from international documents composed for specific purposes . . . .
>
> I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. . . .

21. Proceedings 13, 14.

> No law can destroy the state creating the law. The survival of states is not a matter of law.[22]

Mr. Acheson's suggestion that there are questions of ultimate power which are beyond the province of law—which are, in effect, pre-legal or meta-legal questions like the choice of Austin's sovereign or of Kelsen's *grundnorm*—was illustrated by him by examples taken from municipal law. He cited the historical refusal of English courts to pass on the validity of questions concerning the "king's own estate and regalie," and also referred (if not directly by name) to the American constitutional law doctrine of "political questions," which, as varyingly construed by the United States Supreme Court, has immunized certain questions of political power from judicial review.[23]

Mr. Acheson was specifically responding to a speech by State Department Legal Adviser Abram Chayes, in which Mr. Chayes quoted his erstwhile colleague at the Harvard Law School, Professor Henry Hart, to the effect that a legal system, in principle, is all-embracing, all-pervasive and that if there is truly no policy alternative to a suggested course of action, a viable legal system must provide satisfying legal support for the proposed action.[24] Does Mr. Acheson's necessary rejection of any conception of the all-pervasiveness of the contemporary system of international legal order, such as it may be, imply that law has no part to play in the actual resolution of tension-issues between the contending systems and, more specifically, that law had no role in the successful resolution of the Cuban crisis? Acheson himself suggested that the influence of legal principles in the Cuban quarantine measures was as "procedural devices designed to reduce the severity of a possible clash. Those devices cause wise delay before drastic action, create a 'cooling off' period, permit the consideration of others' views." [25]

Indeed, all the evidence seems to substantiate the significant part played by legal arguments in the resolution of the Cuban crisis. Deference to the legal realists' teachings, however, suggests that the decisive role of law in the crisis, for American decision-makers at least, was in indicating the limits of permissible political-military action and in demonstrating the extent to which the *données* of national policy—in this case, the paramount requirements of national survival—might be conditioned by consideration of permissible means for attaining those

22. *Ibid.*
23. *Ibid.*
24. *Id.* at 11.
25. *Id.* at 14.

same objectives. Granted the existence of at least several different modes of attaining the same policy objectives, each of these different modes being of an ascending order of violence or intensity, the legal adviser's role would properly be to stress the governmental decision-makers' obligation for prudent economy in the use of power—for deference to the Frankfurterian principle of employment of the "more moderate controls" where these would suffice to attain the national policy objectives.

Changing Law and Changing Society—The Limits of Classical International Law and the Congeries of International Laws Today

Mr. Acheson's pointed remarks on the non-pervasiveness of classical international law today draw attention to the fact that, surveying the contemporary world community in legal realist terms and seeking thereby to describe the law-in-action, it is hardly possible to speak any longer of one "world law." What we appear to have, instead, is a congeries[26] of separate and distinct bodies of more or less authoritative rules which may sometimes parallel or even overlap each other and sometimes be in direct collision or conflict. Thus, one might identify several types of "international law": (1) traditional international law in the sense of custom-based rules and general treaty law; (2) United Nations law, flowing from the United Nations Charter itself, resolutions of the Security Council and the General Assembly, and decisions of the World Court; (3) perhaps "regional" international law, in the sense of limited pacts or associations having their *raison d'être* in considerations of geographical propinquity, although these are becoming passé with the development of modern communications and with the cold war cutting across geographical boundaries; (4) certainly intra-bloc international law, flowing from more or less formalized associations for reasons of common political-ideological orientation or military security like the NATO Pact and the Warsaw Pact, and possibly including the Bandoeng Conference and the Charter of the Organization of American States; (5) perhaps "Socialist" international law in the special sense, going beyond the Warsaw Pact and purely intra-Soviet-bloc relations, that may claim to operate as an autonomous, self-contained, indeed even all-pervasive, body of propositions in opposition to traditional or classical international law.

To this list might be added a species of inter-bloc law which finds its

26. See Sohn, *The Many Faces of International Law*, 57 Am. J. Int'l L. 868 (1963).

roots in a series of *ad hoc* rules of conduct or public order between the two great contending power blocs. The Moscow Test-Ban Treaty is the first of these rules to be expressed in treaty form. This species of international law, to the extent that it is no more than a reflection of the mutually accepted or practised ground rules regulating the general relations or conduct *inter se* of the two great blocs, is generically related to traditional, custom-based international law which is so generally denigrated by Soviet writers. Perhaps we could characterize it as "modern" customary international law, to differentiate it clearly from the "old" custom-based international law which, without imaginative re-examination and rewriting by Western jurists, threatens increasingly to shrink in its area of appeal and effectiveness in the world community.

The operational problem for the present-day international lawyer who is genuinely concerned with the attempt to accommodate the contending legal systems may in some sense seem to reduce to an exercise in *comparative* law—*comparative international* law, if one wishes to be precise. This presents, of course, some special intellectual legal problems for the Western common-law-trained international lawyer, who usually has neither the necessary linguistic competence nor a sufficient background in foreign legal systems to understand the pervasive role of distinctive institutional biases and procedures and general thought-ways in shaping ultimate national positions in international law. Yet the problem is not nearly so serious or insuperable as one might assume from the apparently categorical Soviet rejection of customary international law rules except those which may be expressly "accepted" by modern states. A great many, if not indeed the great majority, of "old" custom-based rules make sense—in that their general utility and fairness is obvious—from the Soviet viewpoint as well as from the Western; and indeed these have never been seriously put in issue by the Soviet bloc. Moreover, there seems reason to assume that with the apparent aggravation of the Soviet-Chinese ideological conflict, the area of consensus between Soviet and Western jurists may increase still further; for the Soviet Union, as one of the "responsible" powers in the world today, has its own vested interests, quite as much as the United States, in that historical continuity in the development and refinement of legal rules which custom-based international law is generally regarded as serving. One of the prime operational tasks of any joint Soviet-Western legal task force of the future concerned

with the accommodation of the contending systems may be to identify and separate off those areas of law in which there is now, or likely will be in the near future, a Soviet-Western consensus from those areas of law where deep-seated Soviet-Western controversy exists.

With regard to the areas of Soviet-Western differences, the problems, while very great, are again not necessarily insuperable. One of the tasks will be to separate off the fortuitous (and therefore inconsequential) elements from the substantial elements. In this regard, I suggest that questions of distinctive institutional bias or preference of the different legal systems may well prove to be the least consequential. Does it really matter, for example, if the Soviet bloc leaders prefer not to settle their disputes with us through the machinery of the World Court if they do believe in dispute-settlement in the concrete case? Judicial settlement may not, after all, be the sole, or even in all cases the best method for settlement of disputes in the contemporary world community.

Again, does it matter if the Soviet bloc leaders prefer to reach fundamental accords with the West outside the arena of the United Nations, preferably through Summit Meetings *à deux* of the respective bloc leaders or their personal representatives? I need not attempt to give too hard-and-fast an answer in this Article. Obviously, a genuine and lasting Soviet-Western accommodation is the most vital objective for all of us at the present time. Yet we all also have interests in maintaining the United Nations as a viable institution, and if it be too frequently bypassed or cast into the limbo as an arena for settlement of international disputes, we may all be the losers in the long run. My point is simply that in any operational approach to Soviet-Western accord, Western jurists should keep their eyes firmly fixed on the substance of the accord and not allow prospects of such an accord to be vitiated by unyielding adherence to indigenously Western institutional preferences or procedural forms.

It seems clear that any agreement on matters of current Soviet-Western conflict will have to be attained on a basis of mutual give-and-take. But there is sufficient indication of mutuality and reciprocity of interest between East and West on a whole host of the tension-issues of the age—of which the recent Moscow Test-Ban Treaty is perhaps the most striking example—to make the sober exploration of the possibilities of compromise and bilateral exchange fully worthwhile at the present time.

THE BURDEN OF RESPONSIBILITY—CHALLENGES AND OPPORTUNITIES FOR THE TWO MAIN CONTENDING SYSTEMS OF WORLD PUBLIC ORDER

This text, then, has been neither a counsel of despair nor yet the Sermon on the Mount,[27] but rather an insistence on an essentially low-key, empirically based approach: through common study of common problems of East-West relations and their concrete solutions in each legal system to the induction of minimum principles of world public order common to, and so acceptable to, both contending systems. It is, in essence, a *jus gentium* approach in the full spirit of the original *Praetor Peregrinus* at Rome. It avoids the substantial immobility in the face of social change of both the old *jus civile* and the corpus of classical international law when too unimaginatively interpreted. Furthermore, this approach does not offer the heady wine of *jus naturale* type appeals to general acts of codification, *uno actu*, of the principles of world law. While these appeals are superficially attractive, they are likely to become exercises in name-calling between the two contending systems because of the different official legal premises or *grundnormen* of the different systems and because of the semantic confusion in dealing with purely abstract general principles isolated from concrete fact situations.

There is danger, of course, that any such inter-bloc, *jus gentium*-type international law will attempt no more than a settlement of fundamental Soviet-Western legal differences, *i.e.*, a legal rationalization of the political and military *status quo* between the contending systems. It would be tempting for the two bloc leaders to settle both their own differences and also the problems of world public order in general on such a basis, but it might prove to be an illusory settlement after all. While bipolarity may have been the general condition of the world community during the cold war era, there are sufficient signs of poly-polarity in emergence of new power groupings resulting from divisions within each of the two main competing blocs to make any new international law that purports to be solely a reflection of the twin (Soviet and Western) bloc system also run the risk of not adequately responding to the changing societal facts in the world community.

27. Compare STONE, QUEST FOR SURVIVAL: THE ROLE OF LAW AND FOREIGN POLICY (1961); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959). The same element of tempered optimism is, I think, present in Dean Hardy C. Dillard's thought-provoking presidential address to the American Society of International Law's 1963 annual meeting. See Dillard, *Conflict and Change: The Role of Law*, in PROCEEDINGS 50, 66-67 (1963).

The Soviet Union and the United States showed responsibility and leadership to the rest of the world in their display of mutual self-restraint in the peaceful settlement of the Cuban crisis; they have displayed the same qualities in remarkable measure in the recent achievement of the Moscow Partial Test-Ban Treaty. But if the new international law based on accommodation of Soviet-Western differences is to be more than a temporary truce between two rival power blocs, it must also seek to capture the new dynamic of a world community in revolution—the aspirations of the developing countries for full participation in a genuine international law of human dignity.