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# IDEOLOGICAL CONFLICT AND THE SPECIAL SOVIET APPROACH TO INTERNATIONAL LAW

*Edward McWhinney\**

Josef Kunz,<sup>1</sup> along with Filmer Northrop<sup>2</sup> and Harold Lasswell,<sup>3</sup> was one of the first Western scholars to foresee the important implications for an essentially Western-derived and Western-developed corpus of international law rules of the political coexistence of the Western countries with governments based upon political ideologies radically different from that of the West. The rules of "classical" (Western-derived) international law were now called upon to regulate the coexistence and at times the direct competition of different value systems (or *Weltanschauungen*) in the new World Community to be built on the wreckage of the pre-1914 European family compact. In place of the tidy cultural and ideological homogeneity, or at least compatibility, that had characterized the members of the essentially closed governing community of the pre-1914 classical international law era, there had appeared a new ideologically-based conflict with immediate political-military implications. If it is a clear historical distortion to

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1. Kunz, *Pluralism of Legal and Value Systems and International Law*, 49 AM. J. INT'L L. 370 (1955).

2. F. NORTHROP, *THE MEETING OF THE EAST AND WEST* (1947); *EUROPEAN UNION AND UNITED STATES FOREIGN POLICY: A STUDY IN SOCIOLOGICAL JURISPRUDENCE* (1954); *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 YALE L.J. 1430 (1950). Northrop is perhaps better known as a philosopher of mathematics and the natural sciences.

3. H. LASSWELL, *THE WORLD REVOLUTION OF OUR TIME. A FRAMEWORK FOR BASIC POLICY RESEARCH* (1951); *The Scientific Study of International Relations*, 12 Y.B. WORLD AFF. 1; McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959). Lasswell has brought to the study of international law considerable expertise as a methodologist of the social sciences.

assert, as some Soviet jurists would certainly do, that "modern" international law began with the October Revolution of 1917, there is no doubt that the downfall of the old Imperial dynasties after 1918 and their replacement by the new Central European "succession" states legitimated the political principle of self-determination and started a movement that culminated logically, after 1945, in the final liquidation of the Old European Colonial Empires and in the inauguration of national independence and self-government on a world-wide scale.

Josef Kunz, as a professional jurist in the strict sense,<sup>4</sup> has always recognized the existence of the three basic methodological approaches to law. To use Dr. Kunz's own terms, these are the analytical, the sociological-historical, and the axiological.<sup>5</sup> In approaching the issues of the immediate consequences of this very value pluralism in the contemporary world community and of the concomitant plurality of basic conceptions of the nature, instrumental techniques, and the institutional arenas of world public order, we will do well to bear in mind Dr. Kunz's three-way classification. In particular, we should take proper note of the prime lesson of the Continental European, and more recently the North American sociological schools of law,<sup>6</sup> namely: the basic distinction between the law-in-books<sup>7</sup> and the law-in-action.<sup>8</sup> Empirical study of the concrete records of Soviet and of American national practice in the arena of the United Nations tends to reveal that the distinction between what we might call the legal "folklore"<sup>9</sup> and the actual "living law"<sup>10</sup> may be quite

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4. The characterization "professional" is used to distinguish the approach of Kunz from that of thoughtful non-jurists like Northrop and Lasswell who have written meaningfully and purposefully on law.

5. Kunz, 49 AM. J. INT'L L. 370 (1955).

6. In the succeeding discussion, the present writer has felt free to draw upon some of his own recently published writings without the need for further direct citation, and in particular to draw upon the following works: "PEACEFUL COEXISTENCE" AND SOVIET-WESTERN INTERNATIONAL LAW (1964); INTERNATIONAL LAW AND WORLD REVOLUTION (1967); CONFLICT IDÉOLOGIQUE ET ORDRE PUBLIC MONDIAL (1970).

7. This is perhaps better described as what the ideological preconceptions of particular legal philosophers may seem to dictate.

8. The law as it is developed through actual practice is that which authoritative national decision-makers may actually choose to favor among the welter of competing societal interests present in any given, concrete problem-situation.

9. The *a priori*, high-level philosophical formulations of the legal philosophers as translated into a body of precepts.

10. The *de facto* attitudes and practices of governmental decision-makers which tend to coalesce into case law, precedent, and expectations of decision-makers.

as significant in the case of the United States as in the case of the Soviet Union. There is, in any case, with respect to both countries, no single, unbroken record of monolithic solidarity or consistency since the end of World War II. Rather, there has developed an occasionally fluctuating series of responses to rapidly changing power-political situations in the United Nations and in other specialized institutional arenas of Soviet-United States confrontation.

Nevertheless, since 1945, a sufficient consistency of national attitudes, expectations, and approaches has emerged between the Soviet Union and the United States to identify fairly easily a "Russian position" and an "American position". It is also possible to analyze the particular political and social facts in the post-1945 world community to which those respective national positions represent a response.

The Russian position is characterized, first of all, by an insistence on the untenability of any concept of a world state in the sense of a legally paramount international governmental or political-institutional authority, or of a world law conceived as a single, over-arching body of universally valid legal propositions and norms. The quest for "Mondialism," as Soviet jurists scornfully call it,<sup>11</sup> runs counter, in their view, to the elemental facts of life of the contemporary world community where we have no single, homogeneous political society<sup>12</sup> but rather a plurality of political, cultural, and economic systems dominated, of course, by the twin competing ideological blocs and their respective bloc leaders—the Soviet Union and the United States. To insist on a world state and world law as a national policy objective under immediate societal conditions in the world community is, in the view of Soviet jurists, at best thoroughly un-empirical; at worst, simply using the semantic confusion and cloudiness of a seemingly universal aspiration as a convenient cloak for naked power ploys. The Soviet response to its own denial of the possibility of "Mondialism" on any realistic basis

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11. Professor D.B. Levin is the best-known exponent of this particular Soviet philosophical position. See, e.g., Levin, *Ob osnovnikh napravleniakh sovremennoi burzhuaznoi nauki mezhdunarodnogo prava*, SOVETSKII EZHEGODNIK MEZHDUNARODNOGO PRAVA 88, 102 (1959).

12. Viable systems of internal, municipal or national law are predominantly founded upon such cultural homogeneity which provides a cohesive bond for community-derived law.

under present societal conditions in the world community, theoretically at least, is not a descent into any mere legal nihilism. It is, in many respects, a quite sophisticated, philosophically pluralistic approach that has some elements in common with contemporary Western concepts of pluralistic federalism in municipal or national law. The Soviet philosophy insists on proceeding from the factual or existential situation in the contemporary world community—the existence of different conceptions of world public order corresponding to the different ideological blocs or groupings—and seeking the “living law” international law of today in the complex of accords and arrangements and *de facto* relations between those different ideological groupings.<sup>13</sup> This distinctively Soviet conception of world public order, as theoretically formulated under the rubric of the Legal Principles of Peaceful Coexistence, has, of course, its own built-in elements of *a priori* Marxist dogma and philosophical absolutism.<sup>14</sup> Nevertheless, in its essential starting point—the plural nature of the contemporary world community—it begins with an empirical fact; and the empirical or existential has tended to be highly influential in terms of its concrete implementation in direct Soviet-United States confrontations involving actual problem-situations.

In concrete political-institutional terms, this distinctive Soviet approach has meant a denial that the United Nations Charter is the constitution of any new system of world government, to be interpreted broadly and beneficially in the

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13. Difference of ideologies has always existed. True, this difference at present is profound. But when States agree on recognition of this or that norm as a norm of international law they do not agree on problems of ideology. They do not try to agree on such problems, for instance, as what is international law, what is its social foundation, its sources, what are the main characteristics of a norm of this law, etc. They do agree on rules of conduct.

Tunkin, *Coexistence and International Law*, 95 HAGUE RECUEIL I (1958). See generally G. TUNKIN, *VOPROSI TEORII MEZHDUNAGODNOGO PRAVA* (1962); *IDEOLOGICHESKAYA BORBA I MEZHDUNARODNOE PRAVO* (1967).

14. See, e.g., *Soviet Association of International Law, Draft Declaration of Principles of Peaceful Coexistence*, in REPORT OF THE FIFTIETH CONFERENCE, INTERNATIONAL LAW ASSOCIATION 1962 (1963); Khrushchev, *An Account to the Party and the People*. REPORT OF THE CENTRAL COMMITTEE, COMMUNIST PARTY OF THE SOVIET UNION, TO THE 22ND CONGRESS OF THE PARTY, October 17, 1961; INTERNATIONAL LAW. A TEXTBOOK FOR USE IN LAW SCHOOL 17 (F.I. KOZHEVNIKOV ed. 1957). Compare THE LEGAL PRINCIPLES GOVERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN THE SPIRIT OF THE UNITED NATIONS CHARTER (Adrian Pelt ed. 1966); with LAW, FOREIGN POLICY, AND THE EAST-WEST DETENTE (McWhinney ed. 1964).

sense originally adumbrated by Chief Justice John Marshall of the United States Supreme Court. In Soviet eyes the Charter is not a constitution but a treaty. As a treaty, it is to be limited to the original historical purposes of its original drafters; and, as a treaty, it is to be interpreted strictly, even restrictively, in the fashion in which English judges traditionally interpreted statutes trenching upon the Common Law. It should not have been surprising that Judge Koretsky, an excellent jurist of Soviet nationality, joined with that arch strict-constructionist and disciple of Felix Frankfurter, Sir Percy Spender, in the essential principle<sup>15</sup> of the majority opinion of the World Court in the *South-West Africa Cases* in 1966;<sup>16</sup> or that Judge Koretsky dissented<sup>17</sup> with his Polish colleague Winiarski<sup>18</sup> in the *Advisory Opinion* on United Nations peacekeeping expenses, in 1962.<sup>19</sup>

This Soviet special position has also meant a denial of any role for the United Nations General Assembly as a sort of world legislature. The Soviet Union has not merely continuously denied any law-making authority to the so-called "Uniting for Peace Resolution" of the U.N. General Assembly adopted in the Korean crisis in 1951;<sup>20</sup> but even in recent years, when the erstwhile comfortably pro-Western voting majorities in the General Assembly have disappeared with the expansion of the United Nations to well-nigh universal membership, the Soviet Union seems to have resisted the temptation to try to institutionalize an "anti-colonialist"<sup>21</sup> voting line-up in the General Assembly. Soviet pronouncements on the legal efficacy of U.N. General Assembly Resolutions<sup>22</sup> are far more cautious

15. Judge Koretsky dissented, however, in the actual final vote, thus taking a position opposite to that of Sir Percy.

16. *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, [1966] I.C.J. 239 (Dissenting Opinion of Judge Koretsky).

17. The judge's dissent was based on grounds of strict construction.

18. The French judge and two other judges of the West joined in the dissent.

19. *Advisory Opinion on Certain Expenses of the United Nations*, (Article 17, Paragraph 2 of the Charter) [1962] I.C.J. 151, at 268 (Dissenting Opinion of Judge Koretsky). See also Tunkin, *The Legal Nature of the United Nations*, 119 HAGUE RECUEIL 1, 48 *et seq.* (1966).

20. Compare Tunkin, *supra* note 19.

21. It is argued that an anti-colonialist approach, primarily among former colonies and third World nations, will be inevitably anti-Western and pro-Soviet.

22. . . . If the General Assembly could make decisions on important problems of U.N. activities binding upon States which would be a kind of international legislation, such a supra-national authority would be

and reserved, even skeptical, than much of the writing by Western writers.<sup>23</sup> The Soviet position in the United Nations has consistently been one of insisting on the political and legal primacy of the Security Council in which, of course, the Big Power veto principle operates.

On the World Court and the principle of judicial settlement of disputes, and indeed on the principle of the third-party arbitration of disputes in general, the Soviet attitude has been consistently negative. Soviet municipal, internal law denies any general right of judicial legislation or judicial policy-making.<sup>24</sup> Soviet legal thinking goes beyond this to deny in institutional terms the possibility of any impartial third-party settlement, a position somewhat ruefully accepted by the British Foreign

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inconsistent with the nature of the United Nations as determined by the laws of development of society.

*Supra* note 20, at 37. See also G. TUNKIN, *VOPROSII TEORII MEZH DUNARODNOGO PRAVA* 121 *et. seq.* (1962); G. MOROZOV, *ORGANIZATSIA OBDINENNIIKH NATSII* 208 *et seq.* (1962); M. YANOVSKII, *SOVETSKAIA NAUKA O JURIDICHESKOI SILE REZOLIUTSII GENERALNOI ASSAMBLEI O.O.N.* (1964-1965); *SOVETSKII EZHEGODNIK MEZH DUNARODNOGO PRAVA* 81 *et seq.* (1966).

23. Compare *e.g.*, the Czech jurist, V. Pechota, *Valne Shromazdeni OSN a Projednavani Pravnich Zasad Mirovehi Souziti*, 7 *CASOPIS PRO MEZINARODNI PRAVO* 97 (1963). See also the detailed discussion by the eminent Polish jurist, Judge Manfred Lachs, in 18 *PANSTWO I PRAVO* 207 (1963), and again in the course of his Hague Academy lectures, *The International Law of Outer Space*, 111 *HAGUE RECUEIL* 1, 95-6 (1964). Judge Lachs' insistence, in pragmatist-realist fashion, on not worrying very much whether a claimed rule of international law fits into any closed list of *a priori* categories of legal "sources," but on examining instead whether the claimed rule is actually observed *de facto* in the World Community, finds echoes in his comments, in his Dissenting Opinion in the North Sea Continental Shelf Cases in 1969. He examines the role of a *general* consensus of the World Community as constituting the basis for the formation of a general rule of international law binding on all states. Judge Lachs here identifies number and representativeness as key elements in the formation of such a general consensus of the World Community, taking note specifically in relation to the Geneva Convention on the Continental Shelf that the conference that adopted it included: "States of all continents, among them States of various political systems, with both new and old States representing the main legal systems of the World." Judge Lachs goes on to conclude, on the basis of this reasoning, that the legal principles contained in the Convention may be binding on West Germany even though it had merely signed and never ratified the Convention. North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) in 8 *INTERNATIONAL LEGAL MATERIALS* 340, 420-21 (1969) (Dissenting Opinion of Judge Lachs). This point of view has also recently begun to be adopted by non-Russian Eastern European writers.

24. This position is commensurate with that of most Continental European, Civil Law-based or Civil Law-derived countries, and indeed some Common Law countries like England.

Office in the last half of the nineteenth century after Great Britain had consistently lost a series of frontier disputes, involving the then colony of Canada and the United States, which had been arbitrated by the German Emperor as neutral third-party arbitrator. "Do we give up the disputed territory immediately to the United States; or do we give it up after arbitration?" ran the wry British Foreign Office joke of the time. The intrinsically technical Civil Law-based opposition to judicial policy-making, revealed in the Soviet opposition to any activist, law-making role for the World Court, is reinforced by the Soviet institutionally-based hostility to any expansionist role for the United Nations in general. But this Soviet opposition has also gained strength by the simple political fact of life of the present underrepresentation on the World Court in bald voting terms and voting power of the Soviet Union and its principal allies. Being decisively outnumbered, up to the recent present, in the General Assembly and in the Security Council—the two electoral colleges for the World Court—the Soviet Union and its allies have generally been confined to being a small minority<sup>25</sup> on the Court; and so the Soviet Union and its allies were hardly in a position to influence or determine the substantive content of the "policy" in any judicial policy-making by the Court, even if they could have brought themselves to accept such judicial policy-making in principle.

With an invariably hostile attitude to departure from the strict letter of the Charter or from the known historical intentions of its drafters, the Soviet Union could hardly have been expected to be sympathetic to the attempts by U.N. Secretary-General Dag Hammarskjöld to expand his office into an activist, executive policy-making organ. The Soviet opposition, here, is manifested most strikingly in its intransigent position in the U.N. Expenses crisis;<sup>26</sup> and in its attempt to replace the Hammarskjöld-style "activist" Secretary-Generalship by a *troika* representing the three Worlds (Soviet, Western, and Third World) equally, and presumably subject to the veto of any one of them. These particular Soviet attitudes toward the United Nations are both readily understandable in

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25. Of fifteen judges on the World Court, only two are from Communist countries. They are Judge Koretsky of the Soviet Union and Judge Manfred Lachs of Poland.

26. Let it not be forgotten that the Soviets were joined by France in this position.



terms of past Soviet historical experience with international organization in general, and also explicable in pragmatic, experiential terms having regard to prevailing power line-ups in the World Community.

Beginning with the old League of Nations,<sup>27</sup> Soviet jurists have always had a profound skepticism, if not outright mistrust, of international organizations in which their own role is, in simple power (voting) terms, doomed to be a minority one. The pusillanimous performance of the Western European dominated League of Nations in regard to collective security measures intended to preserve the balance of power that the Western European powers had themselves so largely created,<sup>28</sup> hardly increased Soviet confidence in the long-range utility of the League. The League's signal failure to do anything to check Hitler's quest for *Lebensraum* in Central Europe, followed by the League's dying gesture of the expulsion of Russia because of its frontier war with Finland in 1939-40, completed the Soviet picture of a hypocritical double standard of law and morality, as applied by that first institutional venture in world public order and government.

The Soviet Union had, of course, participated actively both in the preliminary, private Big-Power meetings, and in the 1945 San Francisco conference which led to the formation of the United Nations. The built-in institution of the Big-Power veto in the Security Council was one instrument intended to protect Soviet special interests, especially with the strong weighting of effective political power under the United Nations Charter in favor of the Security Council at the expense of the General Assembly. In the General Assembly itself, intended in Soviet eyes as a purely subordinate institution, some extra sop to Soviet sensitivities to the Soviet Union's inevitable minority voting alignment status was provided by the separate representation and separate votes in the General Assembly of the two Soviet constituent republics of Byelorussia and the Ukraine.

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27. Soviet writers saw the League of Nations from the beginning (and perhaps, in historical retrospect, with some justice), as an instrument of Western European imperialism designed primarily to institutionalize the political consequences of the Carthaginian Peace Treaty of 1919 and its Eastern European (post-Russian Revolution) analogues.

28. The reference here is to the League's non-interference with the Japanese invasion of Manchuria in 1931, and later the Italian invasion of Ethiopia in 1935.

Nevertheless, from the outset of the United Nations,<sup>29</sup> the Soviet Union saw its policy options reduced to the maintenance of a defensive holding operation—through the medium of the Veto—in the Security Council, and to the playing of a largely impotent role in a General Assembly politically dominated by a pro-Western majority composed of a working coalition of the United States, the “old” (Western) Commonwealth countries, Western Europe, and the twenty-one Latin American states.<sup>30</sup> This was the era, of course, of the Uniting for Peace Resolution, passed through the General Assembly by the triumphant pro-Western coalition during the Korean crisis in 1951.

It was not until the late 1950's, by which time the proliferation of U.N. membership had eroded away the comfortable pro-Western majority and introduced a new fluidity and unpredictability into U.N. General Assembly voting, that the opportunity for Soviet improvisation and experimentation with an activist, adventurist “Socialist” foreign policy in the U.N. arena was presented for the first time. By that time, of course, the old-line Stalinist authority had been overthrown within the Soviet Union itself and a new flexibility had entered into Soviet policies at home and abroad, involving also the possibility of a new flexibility in Soviet-Western relations in place of the old rigidities of the earlier Cold War era.

In contrast to Soviet attitudes toward the United Nations, which were essentially negative from the beginning, the United States' original conceptions were both optimistic and expansionist. This optimism rested on the dual confidence not merely of an assured pro-Western voting majority in all main U.N. organs (including the World Court), but more importantly, on a certain wave of idealistic thinking in the United States, both during and after World War II, concerning the possibilities of building a better world through rationalized constitutionalism.

To outside observers, even those of us who are also from predominantly English-speaking, Common Law legal systems,

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29. The quick collapse of the World War II victors' own limited consensus of 1945 added considerably to the Soviet Union's somewhat intransigent position in the United Nations.

30. Until the 1956 “package deal” opened the floodgates to new members, the U.N. General Assembly was predominantly Western-dominated.

the most intriguing aspect of American international law thinking has always been the simultaneous coexistence of the Pragmatist and the Natural Law strains<sup>31</sup> in American jurisprudence.

It has always seemed to me that this more long-range American philosophic conception of the need to create a viable system of world public order, with its obvious historical debts to Woodrow Wilson's Fourteen Points, and to Secretary of State Frank B. Kellogg's pact to outlaw war,<sup>32</sup> and to Wendell Willkie's "One World," was the dominant element in the American approach in the early period of the United Nations.<sup>33</sup> Some of the wishful thinking of American leaders of the period is reflected in the rather simplistic projection into the World Community of institutional forms and patterns drawn from American internal constitutional law; as if, to paraphrase President Eisenhower's Secretary of Defense's later remark, "What is good for General Motors is automatically good for the country!"—that what works within the special legal community of the contemporary United States must automatically work when translated into the far broader, and far different, World Community of today. The genesis of the philosophical conception of the U.N. General Assembly as an all-powerful, all-embracing super-legislature—a conception taken up, in recent years, in some of the "new" Afro-Asian countries—is to be found in this particular era of American legal thinking; just as is the conception of the World Court as a legislating, policy-making tribunal on the lines of the United States Supreme Court.<sup>34</sup>

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31. The pragmatic approach involves the apprehension of the elements of American self-interest present in particular legal solutions of particular international problem-situations. Natural Law, as an idealistic jurisprudential approach, implies a conception of some more long-range and comprehensive goals of world public order that might even transcend the national self-interest in choosing one particular legal option rather than another among those present for solution of a particular conflict of interest on the international scene.

32. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, 94 L.N.T.S. 57 (effective July 24, 1929).

33. The early U.N. period lasted roughly from 1945 until the outbreak of the Korean conflict in 1950.

34. This conception emerges rather oddly from American thinking, having regard to the highly defensive, self-protective American approach to acceptance of the

I think it may have come as something of a surprise and a disappointment to American leaders of the immediate post-World War II era that their enthusiasm and high hopes for the embryonic United Nations organization were hardly shared, not merely by the Soviet Union, but also by the United States' main Western Allies. The explanation for the lack of enthusiasm of the Western Allies, and particularly the Europeans, for the United Nations is to be found, I think, in a certain time-lag as between American and European thinking. This discontinuity centers on constitutional forms and institutions as well as on the limits of law generally in controlling societal tensions, whether national or international.

The period between the two World Wars was the period, *par excellence*, of European faith in rationalized constitutionalism and in the attempt to control power through paper affirmations. It was the period of constitution-making—elaborate drafts, with poetic preambles, separation and balancing of governmental institutions and high-sounding Bills of Rights. Yet in the end result, these legal philosophers' drafts were impotent to control the onset of Fascism; and minority rights and claims were ruthlessly trampled on despite the poetic eloquence of the constitutional guarantees and formal protections. It is not surprising that European constitutionalists after 1945 felt a certain cynicism, born of their own bitter experiences, in regard to the American high hopes for the United Nations. A dominant law-making U.N. General Assembly, in which every country was accorded an equal vote, would run counter to the elemental constitutional principle of the necessary minimum relation between Law and Power, quite apart from the obvious damage it would do to the post-1945 victors' balance of power which rested on the wartime minimum consensus of the Soviet, U.S. and the Western Nations. The conception of a policy-making World Court ran directly counter to the dominant legal attitudes and experience of the main Western countries.<sup>35</sup> When presented as a constitutional absolute purportedly good for all seasons, it also

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compulsory jurisdiction of the World Court through the device of the Connally Amendment, 61 Stat. 1218, Aug. 14, 1946. This defensive approach, however, does not characterize all American policymaking.

35. That is to say, the European countries, both Common Law and Civil Law, excluding both the Soviet Union and the United States.

ignored the basic fact that not all international problem-situations are ripe for solution by legal, and specifically by judicial, means.<sup>36</sup> Indeed, it may be argued that the history of the World Court itself since its reconstitution after 1945 demonstrates that a legal solution, by giving an air of absolutism and finality to one party's position in a particular problem-situation, may sometimes seriously delay or impede a rational political solution to the dispute.

I think there is a perceptible change in the attitude of American decision-makers towards the United Nations, beginning perhaps with the Korean crisis and the successful vote of the U.N. Security Council taken in the absence of the Soviet representative, and with the Uniting for Peace Resolution passed by the U.N. General Assembly. American self-interest comes to be emphasized more openly; and there is a concomitant frankness and increasingly public acceptance of the principle of maximizing one's own tactical political advantages in confrontations with the Soviet Union (and the Soviet bloc generally) in all specialized arenas of the United Nations. This new dominant current in American legal thinking may be regarded as having been established with Secretary of State Dean Acheson's well-publicized growing disenchantment with the United Nations as a rational forum for decision-making on international tension issues.<sup>37</sup> This disenchantment brought with it, I think, a certain element of detachment or disengagement from U.N.-based, "One World"-type thinking; and a new tendency to regard the arenas and institutions and procedures for dispute-settlement as being necessarily subordinate to the actual dispute settlement itself. This intellectual attitude and outlook survived through Secretary of State Dulles' era, with its absolutistic, Natural Law-type undertones of an American mission to "roll back Communist Imperialism" on to President Kennedy's term, in which the contemporary United States' positions and general philosophy towards the United Nations may be said to have been developed or confirmed.

Looking back at both Soviet and American attitudes

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36. This is especially true in those cases in which the dispute-settling process would normally proceed by way of political bargain and, ultimately, of political compromise.

37. See, e.g., Dean Acheson's address to the Annual Meeting of the American Society of International Law in (1963) PROCEEDINGS OF THE AM. SOC. OF INT'L L. 13.

towards the United Nations over the generation since the U.N.'s founding in 1945, it may be suggested that the Soviet attitudes tend to reveal a somewhat greater degree of consistency and continuity, or at least of a long-range purpose. The initial Soviet skepticism<sup>38</sup> towards the United Nations and the Soviet denial of any World State role for the United Nations survived into the era of the "new" United Nations, commencing with the late 1950's and early 1960's. At that time, the proliferation of the U.N. membership would clearly have facilitated any Soviet Union adventurist policy of trying to build a determinedly anti-Colonialist, anti-Western coalition in the U.N. The Soviet Union seems to have resisted the temptations to try to profit from Western embarrassments at that particular time. This could have been explained in two possible ways. In Dewey's terms, there was a "terminal value" in the old Soviet legal ideas. Perhaps, the Soviet Foreign Ministry simply had not caught up with the fact of how much the change in U.N. membership had dated their own old stereotypes of a defensive, holding attitude towards the U.N. More imaginatively, Soviet officials may have accepted the principle that their long-range interests as a Big Power and as one of the two major nuclear powers at that, dictated a generally reserved, negative attitude towards the United Nations as a peacekeeping agency, and thus also dictated a continuance of the main elements of the Soviet Union's general post-1945 policy towards the U.N.

In the present context the interesting thing is that, starting with radically different *a priori* philosophical and tactical premises, the United States seems now to have ended up with something very close to the Soviet Union's special position *vis-à-vis* the United Nations.<sup>39</sup>

We may sum up the main elements of this Soviet-U.S. *de facto* accord as to the role of the United Nations before proceeding to consider its implications for the future of the United Nations and of its main organs.

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38. Born of bitter Soviet historical experience with the old League of Nations and of a recognition of the original, post-1945, political fact-of-life of the Soviet Union's hopelessly minority status within the United Nations and its main organs, the Soviet fears concerning the U.N. were perhaps well-founded initially, but persisted long after they ceased to be objectively justifiable. See *supra* notes 27, 28 and accompanying text.

39. This of course has been the long-range consequence of the ending of the Cold War, and of the achievement of the Soviet-American *detente* after the peaceful resolution of the Cuban Missile crisis of October, 1962.

First, both the Soviet Union and the United States seem now agreed that the United Nations is not a suitable arena for negotiating settlements of the most serious conflicts in contemporary international relations; and they seem agreed that to bring such conflicts to the United Nations—at least, before they are finally resolved—may actually harm the process of Big-Power adjustment and compromise and thus delay or impede dispute settlement altogether. Thus it is that key issues like the Cuban Missile crisis of 1962, the achievement of a ban on Nuclear Testing in 1963, the attempts at settlement of the Vietnam War and of the continuing Middle Eastern conflict, are either not brought to the United Nations at all, or are brought there only after settlement—as a polite afterthought or for the sake of protocol. The approved medium of settlement of such key issues is by direct bilateral Soviet-United States negotiation; and the preferred arena for resolution of Soviet-United States conflicts thus becomes the Summit Meeting *à deux*, far from the noise and distraction and the incidental playing to the gallery and, in the end, the sheer political irrelevance in Big-Power terms, of the U.N. General Assembly.<sup>40</sup>

Second, even where the Soviet Union and the United States attempt to negotiate within the framework of the United Nations,<sup>41</sup> the operational methodology for achieving the final settlement will be direct, bilateral Soviet-United States negotiations<sup>42</sup> with, in effect, the other countries presented with the final draft on a take-it-or-leave-it basis. This was in fact what was, quite crudely, done with the Moscow Test Ban Treaty of August, 1963: it was worked out and adopted by the Soviet Union and the United States (and Great Britain), and then presented to the rest of the World for signature. There was, however, no right on the part of other countries to alter or modify the Three-Power text. With other Soviet-United States

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40. Perhaps the inability of the General Assembly to resolve Big-Power disputes is at least in part a function of the size of that body, with its multitude of new members and mini-states whose voting rights are quite unrelated to their political power.

41. This has been done both with disarmament and in the context of a multilateral treaty.

42. In this type of negotiation, the Soviet and United States delegations consult constantly and exchange drafts of the proposed treaty or convention until, finally, substantive identity is achieved between the Soviet and United States proposals. The primary example of this type of interaction has been mutual space agreements.

approved drafts<sup>43</sup> the methods have been a little more veiled perhaps; but the original Soviet-United States "club" consensus has remained as the authoritative departure point, which may explain some of the political difficulties that the Non-Proliferation treaty project is now having in securing general ratification.

Third, in regard to the World Court, the Soviet Union seems to have decided *not* to try now unduly to politicize the process of election to the World Court (and so to attempt to build an anti-Western coalition as a basis for a future policy-making role for the Court, thereby reversing past Soviet doctrinal attitudes towards the Court). The Soviet approach to the World Court to date has tended to be dignified and restrained. The judges of Soviet nationality on the World Court have had intellectual calibre in their own right as scholars prior to their appointment to the Court. In the most recent *cause célèbre*, the *South-West Africa Cases*, Judge Koretsky, though dissenting from the majority opinion of Sir Percy Spender, seemed at pains to avoid polemics and to avoid trying to profit from a seemingly golden opportunity to take cheap political points against the West. Judge Koretsky's dissenting opinion in the *South-West Africa Cases*<sup>44</sup> is, in fact, a model of technical legal craftsmanship and of prudent economy of style and drafting. Judge Koretsky's opinion is also an example of the acceptance of the principle of collegial responsibility and respect that any one member of a court, even a dissenting judge, owes to his colleagues.

The United States now shows no hurry to rush into Court for settlement of its major disputes and disagreements with the Soviet Union. Indeed, to judge by both the concrete record of court cases and also, of course, by the *a priori* fact of the U.S. government's reservations to its own general adherence to the court's jurisdiction, the United States seems disposed to settle disputes and disagreements with other countries in general by other means. Here, again, we seem to have a tacit United States

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43. Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space, including the Moon and other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. 6347 (effective Oct. 10, 1967).

44. *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa) [1966] I.C.J. 239 (Koretsky, J., dissenting).



acceptance of the merits of the Soviet position<sup>45</sup>—that judicial settlement is only one among a number of different modes of dispute settlement. Judicial settlement has no special claim to hierarchical superiority to the other modes of settlement; in general, direct diplomatic negotiations are the most operationally productive mode of dispute settlement in a World Community characterized by deep-set ideological divisions and conflicts.

As a fourth point, and with particular reference to the United Nations' specialized agencies, the Soviet Union and the United States both seem agreed that the principle of mathematical equality of voting power is not a rational one where special obligations or commitments or expenditures are demanded of the Big Powers. This may be a function of their experiences with the General Assembly in recent years. In these cases, the Soviet Union and the United States seem agreed on the merits of reproducing the Security Council principle of weighted voting to approximate the special Big-Power interests and responsibilities. Thus the United Nations Conference on Trade and Development [*UNCTAD*] has followed the International Monetary Fund principle of according a specially-favored voting position to the Big Powers in direct relation to their disproportionately heavy financial responsibilities. It seems likely, in this regard, that any new International Telecommunications Satellites agency<sup>46</sup> will concede a special role and special voting rights and powers to the Soviet Union, apart from and in addition to the special role already accorded to the United States.

Both the Soviet Union and the United States can be expected to continue to view with reserve the pretensions of some of the current activist groups in the U.N. General Assembly to a law-making role that is supposedly inherent in the General Assembly. The juristic writing that argues for such a norm-making competence inhering in the General Assembly is predominantly from the Third World or from the supporting

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45. The Soviet point of view has been amply voiced in the United Nations Sixth (Legal) Committee and in the United Nations General Assembly's Special Committee on Friendly Relations and indeed in Soviet juristic literature generally.

46. A new agency would replace the present interim arrangements involving the *Intelsat-Comsat consortium*.

countries of Eastern Europe.<sup>47</sup> The Soviet juristic literature on the subject is appropriately guarded and hedges all its bets. The American official position in recent years has, reciprocally, tended to play down the legal value or utility of vague general resolutions adopted in the General Assembly, full of sound and fury and signifying nothing; and the United States has tended increasingly either to abstain on final votes on such resolutions or even to vote against such resolutions altogether.

It seems to me that the Soviet Union and the United States, responding directly to their own national self-interest, have ended up at very much the same general conclusions in regard to the United Nations. This situation evolved by pragmatic, empirical, problem-oriented, step-by-step methods of solving Big-Power disputes. Each seems to have concluded that the business of World peace-keeping is far too serious to be left to the United Nations proper, and that they must therefore jointly assume responsibility for it. In place of the old bipolar, hostile confrontation of the Cold War era, we thus seem to have a sort of Soviet-United States joint consensus as to the basic arrangements and conditions of world public order, paralleling the old Concert of Europe—the Holy Alliance of the post-1815, Congress of Vienna-shaped Europe.<sup>48</sup> Whether such a “gentleman’s agreement”<sup>49</sup> can survive for long in a World Community that has seen the condition of bipolarity give way to polypolarity, with the outright *Byzantinism* within the old NATO alliance on the one hand and the schism between Communist China and the Soviet Union on the other, is open to question. What is clear, however, is that as long as this Soviet-U.S. consensus survives, it is likely to provide the necessary minimum political base for effective world peace-keeping.<sup>50</sup> This

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47. See *supra* note 23.

48. These particular points are developed more fully in the author’s recent study, *Pax Metternichea: International Law and Power in the era of the détente*, in *FESTSKRIFT TIL PROFESSOR ALF ROSS: LIBER AMICORUM IN HONOUR OF PROFESSOR ALF ROSS 335 et seq.* (1969).

49. It has been called the Balance of Nuclear Responsibility, replacing as it does the old Balance of Nuclear Terror.

50. The interrelation or symbiosis (in Max Weber’s terms) between the logically formal rationality of any juridical system of world public order, and the *de facto* political order in the world community of its era, has been strikingly adumbrated by Georg Schwarzenberger in a recent analysis inspired by the Realist-Sociological school of the pre-1914 *Pax Britannica*:

It—the *Pax Britannica*—rested on the combined might of the City of London

at least has been demonstrated empirically in the years since the Soviet-U.S. *détente* was first achieved with the peaceful resolution of the Cuban Missile crisis in October, 1962. The United Nations seems likely to continue to be at best a rather subordinate, ancillary instrument for peace-keeping and for international problem-solving generally. As during the years of the Soviet-U.S. *détente*, the really big problems would be reserved for decision or compromise in other arenas. A continuous search for new *ad hoc* institutional machinery outside of the formal United Nations network should also be emerging. This continuing emphasis and trend in contemporary international law and relations may not be very good for the health of the United Nations organization as a whole, of course, but it may still be a viable approach to World public order in an ideologically-divided World Community.

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and the British Navy. In the last resort needy governments and private entrepreneurs had to take their cue from the City of London on what would-be "host" countries expected of the borrowers. If the countries concerned were within the reach of the British Navy, applicants for credit also knew that the minimum legal standards with which the centre of liberal capitalism expected them to comply could, if required, be effectively enforced.

Schwarzenberger, *An Evolving Economic World Order*, 1 RUTGERS-CAMDEN L.J. 243, 246 (1969).