

“PEACEFUL COEXISTENCE” AND LEGAL ASPECTS OF THE SOVIET-WESTERN DETENTE

1. *Coexistence as a political-juridical concept*

The main outlines of “Peaceful Coexistence”, as a political-juridical concept, are well-known by now.¹ Though Soviet jurists have sought, in recent times, in effect retroactively to establish an original Marxist-Leninist base and historically legitimate antecedents for “Peaceful Coexistence”, by invoking assorted aphorisms and *dicta* of Lenin and other earlier Soviet leaders, it seems clear that Coexistence had its prime source, as a serious juridical concept of modern times, in the 1956 reunion of the International Law Association, held in Dubrovnik, Yugoslavia.² Coexistence was then enthusiastically sponsored by Yugoslav jurists, perhaps less as a general solvent for fundamental East-West conflicts than as a limited and more immediately directed legal rationalisation of Yugoslavia’s clamant needs of that particular era, to “live and let live” with the Soviet Union free from the continuing threats, from the Stalinist era, of direct or indirect Soviet intervention or pression. The extraordinary development, since that time, both in international governmental assemblies and also in scientific legal conferences and juristic writings, of the general theme of Coexistence, stems in its turn from the conscious decision by Premier

¹ For earlier discussion by the present author, see, for example, “*Peaceful Co-existence*” and *Soviet-Western International Law*, 56 “*American Journal of International Law*” 951 (1962); *Le concept soviétique de “Coexistence Pacifique” et les rapports juridiques entre l’U.R.S.S. et les états occidentaux*, 34 “*Revue Générale de Droit International Public*” 545 (1963); *International Law in the Nuclear Age: Soviet-Western, Inter-Bloc, International Law*, [1963] “*Proceedings of the American Society of International Law*” 68. And see, also, my forthcoming book, *Peaceful Co-existence*, to be published in the Spring of 1964.

² See, for example, *Report of the Forty-Seventh Conference, International Law Association*, 1956 (1957), pp. 17-63; and especially the address by Professor Milan Bartos (Yugoslavia) at p. 17, and Dr. Vladimir Dedijer at p. 44.

Khrushchev³ and his advisers⁴ to make Coexistence the main talking-point of Soviet foreign policy in the conduct of Soviet bloc relations to the West, and also from the detailed Western responses to this new initiative in Soviet foreign policy.

Behind the apparent monolithic unity and discipline of Soviet foreign policy, of course, there is frequently, if not usually, division or at least ambivalence as to basic policy objectives and needs. Coexistence represents no exception to this, for it is clear that, in its actual patterns of development in the Khrushchev era of Soviet foreign policy, Coexistence has, for Soviet policy-makers, represented variously, a device or stratagem to baffle or confuse Western leaders as to the Soviet's real intentions while Soviet leaders prepare quietly (in Premier Khrushchev's own phrase) to "bury the West". At the same time, however, Coexistence has also seemed to represent for Soviet leaders a simple recognition, in true legal realist vein, of the factual, existential condition of the World today of the existence, side by side, of two great contending power blocs which, whatever the nature of the ideological tension and strains between them, have at least managed to avoid resolving their differences by resort to nuclear conflict or direct armed hostilities against each other. The extent to which Coexistence, for Soviet leaders, has represented on balance either the first, "Trojan horse", approach to the West, or the second, essentially realist recognition of the societal facts of the contemporary World Community, may turn on such factors as the prevailing balance of political forces within the Kremlin at any time-whether, for example, the younger, more pragmatically-minded, people remain in control, or whether the older, neo-Stalinist absolutists show signs of reviving; and also on the changing nature of Cold War temporary tactical advantage and disadvantage. A third position as to Coexistence and general Soviet-Western relations which hopefully has seemed to emerge since the amicable resolution of the Soviet-Western confrontation over Cuba in the crisis of October, 1962, and which the Moscow Partial Test Ban Treaty of the Summer of 1963 has served to highlight, may be some genuine, long-range desire on the part of Soviet leaders for some lasting accommodation or adjustment of differences with the West, a policy construct whose political viability in internal Soviet affairs it is clearly a little too early to predict firmly but which has undoubtedly been lent some extra weight and significance among Soviet policy-makers at the present time by the current great ideological conflict between the Soviet Union and Communist China.

³ See, for example, N. S. Khrushchev, *The New Content of Peaceful Co-existence in the Nuclear Age. Speech at the 6th Congress of the Socialist Unity Party of Germany*, Berlin, January, 16, 1963 (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, (1961), p. 32 et seq.

⁴ See, for example, G. I. Tunkin, *Co-existence and International Law*, 95 "Hague Recueil" 1 (1958).

2. *Coexistence and the contemporary World Order*

The interest in Coexistence as a juridical concept, apparently having tangible and immediate institutional and substantive legal consequences and implications in general international legal doctrine, stems from manifest weaknesses in traditional international law at the present day in terms of explaining or predicting the actual passage of events in the contemporary World Community. It is recognised that, in any legal society, there will be a certain and inevitable gap between the positive law as written—the law-in-books; and day-by-day occurrences and happenings in that society—the law-in-action. This has been one of the truisms of the North American Legal Realist and Sociological schools of legal philosophy;⁵ and the operational problem for the policy-maker in a strictly domestic legal contest is seen as one of establishing or defining the gap between law and society, and of designing appropriate remedial action to narrow that gap. Such remedial action may take the form either of remaking the positive law, in pure relativist fashion, so as to conform more closely to the societal facts, or else of devising more effective community control measures so as to ensure greater societal respect for the positive law, or more usually of applying some sort of balance or compromise between these two approaches. It is agreed, of course, that the essential starting point to any juridical approach that claims to be scientific is first of all to recognise affirmatively the essential distinction between the law-in-books and *de facto* community attitudes and practices. For while some degree of non-correspondence between positive law and societal facts is no doubt inevitable, and certainly tolerable, in any political community, there must nevertheless be a stage at which the degree of such non-correspondence becomes so great in a particular society that it ceases to be meaningful to speak of a legal order in the sense of what purports to be reflected by the old positive law. This is the condition represented, for example, in domestic society, by the successful political *coup d'état* or revolution—the *pre-legal* or *metal-legal* fact involved in the choice of Austin's sovereign or Kelsen's *grundnorm*; what ensues is that one legal order gives way to another, and that a new positive law, reflecting more or less accurately the new societal facts, will emerge. What is clear is that, under present conditions, if international law is to be studied meaningfully, the same rigorously scientific methods need to be applied to it as are applied to the study of domestic law, and

⁵ See, with particular relevance to International Law study, M. S. McDougal, *International Law, Power and Policy: A contemporary conception*, 82 "Hague Recueil" 137 (1953); McDougal and Associates, *Studies in World Public Order* (1960); H. D. Lasswell, *The Scientific Study of International Relations*, 12 "Yearbook of World Affairs" 1 (1958); F. S. C. Northrop, *Naturalistic and Cultural Foundations for a more effective international law*, 59 "Yale Law Journal" 1430 (1950).

that there is a prior obligation on the international law jurist to seek to describe the law-in-action before proceeding to postulate normative-based theories as to the positive international law.

Looking at the contemporary World Community in true Legal Realist fashion, what we seem to have, now, is not one single, universal, all-embracing World Law, but rather a congeries of different international laws,⁶ which sometimes overlap or complement each other, and sometimes may be in direct collision with each other. Among these we would certainly have to list *classical* international law in the sense of the corpus of custom-based rules or principles usually of Western European origin, and also general treaty-based law; *United Nations*-based law, in the sense of the principles flowing from the United National Charter itself and from international organs like the U.N. General Assembly and the World Court; *regional* international law, traditionally finding its *raison d'être*, in the era before modern air communication, in associations based on the accidents of geographical propinquity or else of past historical participation in a Western Europe-oriented colonial Empire, but, since the inception of the Cold War, at least, having to find justification in such latter-day elements as common ideological orientation or common military and defence needs; possibly *Socialist* International law in the special sense that, (separately and distinctly from the patterns of legal relationships between the Warsaw Pact countries), that might claim to operate as an autonomous and self-contained body of international law principles in opposition to classical international law; and finally *inter-bloc* international law, in the sense of the rapidly increasing body of tacit understandings or unofficial agreements—ground rules—, regulating relations between the two great contending power blocs.

It is *classical* international law which has been subjected to most attack and criticism by Soviet jurists in the Coexistence era of Soviet legal writing. Soviet jurists have gone so far as to assert, indeed, that no rule of customary international law is binding on a country unless it has first been accepted by that country⁷ meaning here, *expressly* accepted, without the benefit of any happy fiction or presumption as to tacit acceptance by countries not yet in existence at the time the customary rule in question first developed. And Soviet jurists have developed their own special theory as to the legal efficacy of treaty-derived rules of international law: this particular Soviet theory, while refusing to accept the Western-favoured doctrine of *clausula rebus sic stantibus*, nevertheless, in setting up the novel category of "unequal" treaties, would allow the Soviet Union, so to

⁶ Compare Louis B. Sohn, in [1963] "Proceedings of the American Society of International Law" 293; and see more generally McDougal and Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 "American Journal of International Law" 1 (1959; also Sohn, *The many faces of International Law*, 57 "American Journal of International Law" 868 (1963).

⁷ Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 "California Law Review" 419 (1961).

speak, selectively to accept or reject treaty-derived rules, *ad hoc*, according as those rules happened to correspond to the casual needs of Soviet foreign policy at the time.⁸ Western-sponsored attempts to approach imaginatively the problem of accommodating positive international law to the changing societal facts of the World Community, in acknowledgment of the necessary symbiosis between law and social change, have been viewed by Soviet jurists with an undue suspicion. Soviet jurists have, I fear, failed to appreciate the dynamic in Western-based international legal thinking. For this dynamic element, so far from being, as Soviet jurists tend to charge, developed by Western jurists to secure some casual, Cold War intellectual advantage, is essentially no more than a projection, in the international arena, of distinctive internal legal attitudes in Western law —of the Legal Realist-derived notion that society is in a state of flux, and that the positive law, if it is to continue to be meaningful in action, must change in measure with the society. There is at times, of course, an element of conservatism, even timorousness, in Soviet intrinsic intellectual legal attitudes, and a reluctance to depart from the known and from the legal *status quo*; and this element may derive some extra strength, under present conditions, from the Soviet Union's own clear interest, in certain contexts, in maintenance of the political *status quo*, for example in relation to the Soviet Union's own currently disputed territorial boundaries with Communist China in the Asian heartland.

As to *United Nations*-based law, the Soviet bloc preference for a restrictive interpretation of the United Nations Charter, and for strict limitation of the jurisdiction and competence of international organs like the U.N. General Assembly and the World Court, is by now well-known. The most recent instance of this distinctive Soviet bloc attitude is perhaps the dissenting opinions of the Soviet bloc judges in the World Court's Advisory Opinion in the U.N. Expenses case;⁹ and certainly it is no surprise, in this light, both to find Soviet bloc legal literature rejecting what is derisively styled by Soviet writers as "Mondialism",¹⁰ and also to find Soviet policy-makers preferring to by-pass the United Nations itself and other international organs in favour of direct "summit meeting"-type arrangements or accords with the Western bloc leaders, for purposes of negotiation or settlement of fundamental East-West differences. The Soviet bloc fear, evidently, is of being out-numbered or out-voted, or

⁸ See, for example, S. B. Krylov, *Les notions principales du droit des gens. (La doctrine soviétique du droit international)*, 70 *Hague Recueil* 407, at 433-4 (1947); I. I. Lukashuk, *SSSR i Mezhdunarodnie Dogovori*, [1959] "Sovetskii Ezhegodnik Mezhdunarodnogo Prava" 16.

⁹ *International Court of Justice, Advisory Opinion of July 20, 1962*. "I C. J. Reports", 1962, at 151 et seq. See, especially, the dissenting opinions of Judge Koretsky (Soviet Union) and President Winiarski (Poland).

¹⁰ See, for example, D. B. Levin, *Ob Osnovnikh Napravleniakh Sovremennoi Burzhuznoi Nauki Mezhdunarodnogo Prava*, [1959] "Sovetskii Ezhegodnik Mezhdunarodnogo Prava" 88, 101-2.

perhaps even worse from the Soviet bloc viewpoint, out-debated, in such open fora as the United Nations General Assembly or even the World Court. The Soviet countries have therefore tended consistently to block Charter revision and thus to rest with the more static, conservative, strictly un-democratic, elements in the United Nations constitutional machinery, such as the big-power veto in the Security Council. It is interesting, however, that the West seems partially to have accepted these particular Soviet bloc positions vis-à-vis the United Nations and its general utility as an arena for resolution of East-West differences, in that the West went along with the Soviet suggestions for using the International Red Cross, rather than the United Nations itself, as a preferred instrument for ending the Soviet-Western confrontation over Cuba in the crisis of October, 1962; while the West also concurred with the Soviet policy-makers clear preference, in the case of the Moscow Test Ban Treaty of the Summer of 1963, for settling the terms and the *modus operandi* of the treaty by direct "summit" negotiation, without any recourse to United Nations machinery until after all the essentials had been completed. This Western position is clearly sound statecraft so far as it may concentrate on the substance of agreement between East and West, without worrying too much for the moment about incidental questions of method and procedure. It will no doubt continue to be a correct operational approach for the West so long as the important things is the *fact* of agreement between East and West. But it must be remembered that too frequent or insistent by-passing of the regular machinery and institutional organisation for settlement of international disputes will run the risk of dissipating that interest in orderly *process* in international relations which the West shares quite as much as the uncommitted countries.

So far as *regional* international law is concerned, it is clear that, as a matter of law-in-action, traditional geographically-based clusters of legal relationships and rules have been profoundly riven in recent times, partly because the accidents of geographical propinquity which originally gave such regional associations meaning are no longer especially significant in the age of jet air travel; partly because the Cold War ideological contest has cut across traditional geographically-oriented loyalties. Inter-American, hemispheric law, it is clear, can never be quite the same since the advent of Castro-ism in Cuba, even if it be true that the Soviet Union, after the peaceful resolution of its confrontation with the United States in October of 1962, is tacitly abandoning its erstwhile substantial military-political investment in Cuba as being properly outside the Soviet Union's own accepted Cold War sphere of influence. The present, Cold War era, *regional*-type international law tends to follow Cold War societal facts and roughly to correspond to the Cold War military-political groupings. This might leave us, very much in accord with the Soviet *troika* anal-

ysis,¹¹ —with three main contemporary regional groupings— the Western bloc, the Soviet bloc, and the uncommitted or neutral countries. As against this, it must be noted that the West and the Soviet bloc have not been especially successful in their respective attempts, in effect, to federalise their military-political spheres off influence by expanding their blocs into closerknit political unions, or generally by promoting supra-national political-economic association within the bloc. *Nato* remains essentially a military alliance; and President Kennedy's grand design first for admission of Great Britain into the European Community of the Six, and then for the progressive expansion of the new European bloc so formed into an Atlantic free-trading community, founded on President De Gaulle's vision of French grandeur and the Paris-Bonn axis.¹² And the Soviet Union, for its part, apart from the ideological rupture with Communist China, is increasingly beset with fractionalism and with the pressures for Polycentrism in the Communist movement within the Warsaw Pact countries.

3. *Is a viable system of universal world order possible with widely differing value premises?*

In an interesting and thoughtful address to the United Nations Sixth (Legal) Committee in the Fall of 1963,¹³ the Polish representative, Professor Manfred Lachs, chided certain international lawyers, whom he did not specify by name, as variously sponsoring a "pluralistic approach . . . obviously lead[ing] to legal nihilism". It is readily apparent from Professor Lachs' general identification of these writers as being associated with the notion of the existence of a pluralism, or more strictly perhaps a dualism, of systems of world public order at the present day, and with the notion of the genesis at the same time of distinct patterns of inter-systems law between those contending conceptions of world public order —inter-Bloc law, in Cold War terms—, that he is referring to members of the contemporary North American Realist-Sociological (or "Policy") school of international law, and among these the present writer.¹⁴ Professor Lachs

¹¹ For the most recent Soviet juridical elaboration of the *troika* proposal, so far as it would affect, particularly, the World Court, see the remarks of Professor F. I. Kozhevnikov, as reported in B. Mikhailov, *Konferentsiya Iuristov-Mezhdunarodnikov*, [1963] "Sovetskoe Gosudarstvo i Pravo (no. 10) 147, at p. 148.

¹² See, for example, my discussion, "Classical" Federalism and Supra-National Integration or Treaty-based Association: the European Community Movement as a Case-study, [1963]" Proceedings of the American Society of International Law 241.

¹³ Statement by the representative of Poland, Profesor Manfred Lachs, delivered in the Sixth Committee of the General Assembly, United Nations, November 14, 1963. (Polish People's Republic Permanent Mission to the United Nations, New York).

¹⁴ That some of the contemporary difficulties in East-West International legal discussion may stem, in some measure, from failure to comprehend the general

contends, by way of advance reply to any such theories, that there exists at the present day what he styles as "an all embracing system of international law", which, he also insists, has "its firm basis not only in the facts of history but also in man's growing consciousness which constitutes a mighty force of our time".

Several comments here seem relevant, immediately, in answer to Professor Lachs' points. First, it seems clear that Professor Lachs misunderstands or misinterprets the nature and purpose of the North American Realist-Sociological school's characterisation of the condition of contemporary international law as amounting, effectively, to a dualism of contending systems of world public order. For the Policy school, in true Legal Realist fashion recognises that oprime tooks of international Legal-science, if it is to continue to deserve the name of a science —indeed the necessary starting point of enquiry— is to ascertain, calmly and objectively, the working facts of the world public order system of the present day. The Realist emphasis, here, is on the clarifying function of identifying the actual here-and-now of international law. If this scientific enquiry reveals that there is, indeed, a dualism of systems of world public order at the present day, then the nihilism that Professor Lachs condemns must lie in facts of contemporary international society and not in international legal science itself. In any case it would seem clear that Socialist legal science, not less than Western legal science, is under obligations to ensure some minimum degree of correspondence of its distinctive international law theories to societal facts of the world community, if really meaningful scientific legal discussions between East and West are to become possible.

But a further, and perhaps even more important, comment now seems called for in relation to Professor Lachs' remarks. For Professor Lachs appears to have resolved, *sub silentio* as it were, or perhaps more accurately *per incuriam*, the principal philosophical dilemma of Marxist legal theory when applied to the question of the nature of international law: since law is, in Marxist terms, a product of the market-place and

relevance of distinctive legal thoughtways and legal method of each system to particular international law positions, seems confirmed, I think, not merely by Professor Lachs' apparent misunderstanding of the basic nature of the North American Realist-Sociological approach when applied to international law, but also by some recent criticisms by Professor Tunkin of Western juristic appraisal of Soviet writings on Peaceful Coexistence. Such Western study, where it results in demonstration of manifest and unexplained inconsistencies, or even downright contradictions, in Soviet intellectual positions — as between different Soviet jurists, or even in regard to the same Soviet jurist over different time-periods — does not stem from any inherent Western hostility to Soviet legal ideas, but results, simply, from the distinctive Western scientific legal method, in the full Holmesian tradition, of testing the validity or truth of a legal idea in the first instance by its internal logic and self-consistency. See, in this regard, Professor Tunkin's complaint against the present writer, in *Printsip mirnogo sosyshchestvovaniya — generalnaya liniya vneshnepoliticheskoi deyatel'nosti KPSS i sovet'skogo gosudarstva*, [1963]" *Sovetskoe Gosudarstvo i Pravo* (no. 7) 26, 35.

each economic system thus gets the body of law appropriate to its stage of economic development, how may two different economic systems—liberal capitalism and Communism—yield identical bodies of international law doctrine, which a universal system of world public order would, by definition, require? Or, putting the same question in more traditional Marxist language, if international law, like national law, belongs to the superstructure and is determined uniquely by the base of productive relationships, how can radically different economic bases (liberal capitalist and Communist) yield the same superstructure of international law?¹⁵ Neither the early attempts of the great Soviet legal theorist of the 1930's, Pashukanis, (later to become one of the unfortunate victims of Stalin's great purges and general terror campaign of 1937),* to resolve the dilemma by making use of the distinction between *form* and *content*, nor Professor Eugene Korovin's latter-day ingenious formulations as to “identical norms of various legal super-structures”, have proved viable in terms of their ability to survive in the *sturm und drang* of Soviet legal science itself, Professor Lachs' own iteration of the existence today of an “all embracing system of international law”, which rests not on any purported demonstration in Marxist legal science terms but, in the ultimate, as it seems, on its simple postulation by Professor Lachs himself, has the advantage, however, in terms of possible East-West scientific legal exchanges in the future, of appearing refreshingly free from conventional Marxist dogmas: it is, indeed, from the strict Marxist viewpoint, rather heretical and un-Marxist. Our own reservations, from the viewpoint of Western legal science's own intrinsic methods, as to Professor Lachs' apparent lack of concern for the correspondence or otherwise of his theoretical construct to dominant societal facts in the contemporary world community, should not obscure the fact that Professor Lachs' conscious eschewing of Marxian dogmatics, in this way, represents a contribution in itself to East-West legal discussion. One may also note Professor Lachs express acceptance at the same time—and this seemingly in direct conflict with the dissenting opinions of the Soviet and the Polish judges in the U.N. Expenses case—of the possibility of “amendment” of the United Nations Charter through interpretation and practice;¹⁶ and also his inclination to acceptance more generally of a necessary

¹⁵ Compare, generally, R. Schlesinger, *Soviet Legal Theory. Its Social Background and Development* (2nd. ed., 1951) p. 273 et seq.; W. W. Kulski, *The Soviet Interpretation of International Law*, 49 “American Journal of International Law” 518 (1955); J. N. Hazard, *Pashukanis Is No Traitor*, 51 “American Journal of International Law” 385 (1957); L. Lipson, [1959] “Proceedings of the American Society of International Law” 41; McWhinney, 56 “American Journal of International Law” 951, at 960-2 (1962).

¹⁶ A somewhat similar position to Professor Lachs' is reflected in the opinions of Dr. Vratislav Pechota, the long-time Czechoslovak representative on the U.N. Sixth (Legal) Committee. Dr. Pechota's views are especially interesting, both as indications of possible changes in Soviet bloc attitudes to the United Nations as an arena for general international law-making, and also so far as they bear on distinctive

relationship or symbiosis between positive law and societal change. Professor Lachs' apparent juridical emancipation from the dead-hand control of the conventionally rather tired Marxian dialectics and Socialist legal formalism, may be, indeed, one of the more hopeful results of the deliberations of the Sixth (Legal) Committee at the most recent, 18th, Assembly of the United Nations.

4. *Socialist international law and classical international law*

Professor Lachs' express affirmation of the existence of an all-embracing system of international law also seems to repudiate, by inference, the claims advanced in recent years by certain Soviet jurists —and most notably Professor Eugene Korovin— in behalf of a Socialist international law which, going beyond the special body of rules of what might be called intra-bloc law under the Warsaw Pact arrangements, will express variously the —“epoch of struggle between two opposing social systems; the epoch of Socialist revolutions; the collapse of imperialism; the abolition of the colonial system; the transition on to the Socialist road of more and more peoples; and the victory of Socialism and Communism on a world scale”.¹⁷ It seems patent, of course, that this particular Korovin programme is a call to battle rather than any intellectual quest for the peaceful accommodation of contending systems of world public order. To the extent, therefore, that Professor Korovin would seek to invoke the magic formula of Peaceful Co-existence, it seems to be only in the special sense, referred to in our opening remarks, of a device or stratagem to baffle or confuse as to the Soviet leaders' real intentions while they prepare, in Premier Krushchev's original phrase, to “bury the West”. Fortunately, perhaps, for the prospects of viable accommodations between the different legal systems of the present day, Premier Khrushchev no longer speaks of “burying” the peoples of the other systems. And Professor Korovin, who has previously been publicly rebuked by his profes-

Soviet Bloc attitudes as to “sources” of international law. Dr. Pechota speaks of the development of the “juridical conscience of people” as acting on governments and thus creating international law norms — citing the origins of the “principle of general disarmament” and the “principle of the final liquidation of colonialism” as examples of such a process of creation of norms of international law: Dr. Pechota also differentiates between what he styles as “simple recommendations” and “solemn declarations” of the U.N. General Assembly, contending that the latter act upon the practice of States and thereby either engender new norms, or else change old norms, of customary international law. V. Pechota, *Valne Shromazdeni OSN a Projednavani Pravnich zasad Miroveho Souziti*, (The General Assembly of the United Nations and the juridical principles of Peaceful Co-existence), 7 “Casopis pro Mezinarodni Pravo 97 (1963).

¹⁷ See, for example, E. A. Korovin, *International Law Today*, “International Affairs, (Moscow), July, 1961, p. 19; Korovin, *Vestnik Moskovskogo Universiteta* (August, 1961) p. 64 et seq.

sional and scientific colleagues in the Soviet Union, and who has also had the experience before this of having officially to recant in public,¹⁸ would seem to be increasingly out of touch, in these particular published views, with some of his more flexible and pragmatic colleagues of the nature, for example, of Professor Gregory Tunkin and the younger group of jurists associated with him. We may take it that Professor Lachs' own thoughtful remarks to the U.N. Sixth (Legal) Committee will further assist in giving the quietus to uninhibited views of the nature of Professor Korovin's; for the latter is essentially an extremist approach which would seek to invoke "proletarian internationalism" only in the (in nuclear age terms) quite out-dated sense of coordinated and violent world revolution.

5. *Operational methodology for the accommodation of the contending systems of World public order*

If this particular aspect of Professor Lachs' intellectual approach seems, then, to be constructive and helpful, it must also be said that in his non-empirical unconcern for the law-in-action in the contemporary world community, Professor Lachs may run the incidental risk of obscuring and perhaps impeding the careful and well-considered, if on the whole not very fully publicised, scientific legal quest that is actually proceeding, between East and West, for the peaceful accommodation through legal means of the contending systems of the present day. For basic to any approach to accommodation is the clear and solier recognition of the factual, existential condition in the contemporary world community of Bipolarity and the twin military bloc system, and of the competing structures and principles of public order which simply reflect those facts. On this view, the most fruitful approach to peaceful accommodation of these contending systems of world public order does not lie in the attempt (as sometimes sponsored by Soviet jurists)¹⁹ at postulation of abstract codes or declarations of general principles: for these run the risk of being mere catalogues of natural law-type absolutes, with the further risk that classical or Western-based natural law, and natural law Soviet style, may not be the same. The solution is rather in the common East-West approach to the resolution of actual tension-issues of East-West relations: this is an essentially low level, empirically-based approach, which insists on studying concrete problems of international relations in their specific fact-contexts, looking to the concrete solutions actually applied by each legal system to such problems. Any general principles of East-

¹⁸ See, for example, the detailed criticisms made by Professor Tunkin of Professor Korovin's position. Tunkin, 95 "Hague Recueil" 1, 60 (1958).

¹⁹ See, for example, the debate between Soviet Bloc and Western delegates in the session on Peaceful Co-existence, at the 1962, Brussels, reunion of the International Law Association. *Report of the Fiftieth Conference, International Law Association, 1962* (1963).

West relations that may be arrived at on this basis will not be formulated *a priori*, in natural law fashion, but will be derived, so to speak, inductively, from the specific problem-situations and their specific solutions. A solution common to each legal system, on this basis, would have something of a *jus gentium* quality, very much in the nature of the law administered by the *Praetor Peregrinus* at Rome, more properly deserving the accolade of a general principle of international law than principles postulated in advance as the eternal truths of one or other system. In a sense, the present great debate between Western and Soviet jurists—in the United Nations Sixth (Legal) Committee, in the biennial reunions of the International Law Association, and in the scientific legal journals on both sides, recalls the great debate of the early 19th century over the projected codification of the German Civil Law, between von Savigny and Thibaut,²⁰ with, however, the weight of intellectual argument against the illusory certainty of any act of immediate and comprehensive codification seeming to be even stronger, as against the present, Soviet-sponsored campaign for an immediate codification of the “principles of Peaceful Co-existence”, than as against the original project for codification of German private law after the defeat of Napoleon’s armies.

The Moscow Partial Nuclear Test Ban Treaty is example of the pragmatic-empirical method in action, and generally of the more modest, step-by-step approach to resolution of East-West conflicts. Eschewing the temptations to try, in one fell swoop, to establish some more general or universal principles of World public order, the pragmatist, step-by-step approach chooses one out of the complex of major tension-issues of international relations of the present day and limits itself to that problem. In the face of a common interest of both East and West in the interdiction of further nuclear tests in the atmosphere, in outer space, and under water, the Moscow draft Treaty proceeded to make that particular formula the basis of the particular East-West accommodation as to nuclear testing that it in fact embodies. The Moscow Partial Test Ban Treaty is thus an accord that is strictly limited in subject matter, thereby reducing the possibilities of conflicts or discord in interpretation; and it is also an accord in which the elements of reciprocity and mutuality of interest and advantage, and give-and-take, as between East and West, seem clear and obvious, thereby facilitating the prospects of the Treaty’s being observed, in the letter and also in the spirit, by both sides in the future.

In one further respect the successful achievement of the Moscow Partial Test Ban Treaty seems to offer a major precedent for the future conduct of the quest for accommodation of fundamental East-West dif-

²⁰ See, in this regard, Thibaut, *Über die Notwendigkeit eines allgemein bürgerlichen Rechts für Deutschland*, in “Civilistische Abhandlungen (1814)”, at p. 404; von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814). And see generally Julius Stone, *The Province and Function of Law* (1946) pp. 430-438.

ferences. The Moscow Partial Test Ban Treaty is, in form, an open-ended, limited (here, tripartite) agreement. As a *limited* agreement, the Moscow Treaty, even though it is strictly a tripartite treaty (Soviet Union, United States, and Great Britain), and not a bilateral one, reflects the clear Soviet Union preference for summit meetings of the respective heads of State of the two main contending power blocs, and preferably summit meetings *à deux* unencumbered by the distracting, but generally not very substantial, presence of the lesser or supporting bloc members and their political leaders and *a fortiori* of international civil servants and U.N. dignitaries. As an *open-ended* agreement, even though negotiated, as to its substance and terms, strictly as a tripartite pact, the Moscow Partial Test Ban Treaty was open to subsequent signature and adhesion by other countries: some, like France, have refused to sign altogether, but the other countries, in overwhelming number, have concluded that the Moscow Treaty corresponds to their own best self-interests too, apart from reflecting the mutual self-interest of its three original sponsors and co-signatories. This is, in measure, I think, the nature of the working Soviet-Western *détente* of the present time and of the benefits flowing from it for the World community in general.

It would be ingenuous not to recognise that this substantial practical accord, or at least *modus vivendi*, now apparently achieved between the Soviet Union and the West, has not been received with unqualified enthusiasm by all countries. The influential French weekly, *L'Express*, referred recently²¹ to the ill-concealed stupefaction, or more precisely, it thought, the dismay, among certain of the so-called uncommitted countries who had often profited very handsomely in the past by playing off the United States and Russia against each other, and who now saw American power as being as calm and implacable as ever and the countervailing recourse to the Russians as more and more contingent or aleatory. Few of us will be inclined to shed a tear at the frustration of any such purely selfish attitudes. A more legitimate concern—legitimate in the sense that no one, clearly, has any right to regret a Soviet-U.S. *détente* so far as that may mean elimination of the dangers of nuclear war and the diminution of general East-West tensions—may be as to the extent to which any such essentially gib-power *détente*, between the leaders of the two great contending power blocs of the present day, may involve automatically a jelling of the political *statu quo* between the two power blocs, and a consequent "containment" of the general movement for political, economic, and social change and betterment in the World community today. It is good to reflect that the most recent, Eighteenth General Assembly of the United Nations, held in the Fall of 1963, will go down in history as the "session of the *détente*",—of the apparent practical Soviet-Western accord— but it would be a pity if that were to be regarded as having, by

²¹ *La peur de la détente*, "L'Express" (Paris), October 17, 1963, p. 17 et seq.

the same token, vitiated all the high hopes, from the 32 countries who signed the Charter of Addis Abeba for example, for more rapid progress in the field of decolonisation and independence. The dynamic of the contemporary Western legal ethic, however, involves a firm commitment and dedication to the principle of change—in society at large, and *a fortiori* in the positive law which exists to serve that society. One may rest assured, therefore, that from the Western viewpoint, the Moscow Partial Test Ban Treaty will be followed up by continuing pressure from the West for further East-West accords and accommodations, directed not merely to the further alleviation of fundamental East-West tensions and conflicts, but also, more affirmatively, to the establishment of joint, co-operative East-West endeavours looking to the raising of economic standards and conditions of well-being throughout the World community, and generally to promoting an international law of human dignity.²²

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²² See, in this vein, the remarks of Professor McDougal, in *Report of the Forty-Eighth Conference, International Law Association, 1958* (1959), pp. 437-440; McDougal and Lasswell, 53 "American Journal of International Law" 1, 11-15 (1959). And see generally Julius Stone, *Quest for Survival. The Role of Law and Foreign Policy* (1962); Hardy Dillard, *Conflict and Change. The Role of Law*, [1963] "Proceedings of the American Society of International Law" 50, especially at pp. 66-7.