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# Law, Foreign Policy, and the East-West *Détente*

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if he overestimates the extent to which change has occurred. There was, after all, a Berlin crisis in the summer of 1961 and a Cuba crisis in the autumn of 1962, and it would be a rash man, certainly a rash policy-maker, who based all his plans on the assumption that similar crises cannot and will not occur again. The challenge from the Soviet Union is a changing one, and even if crises of this nature are not to occur again, it is well to remember that it is still a challenge.

# Canadian Initiatives in East-West Legal Relations in the United Nations

J. ALAN BEESLEY

DEVELOPMENTS AFFECTING East-West relations in legal and quasi-legal fields in recent years have been so rapid and so diverse that it is hardly possible to comment on all those questions of interest, such as the attempts to develop legal rules applicable to outer space, the dispute concerning financial responsibility of U.N. members for U.N. peace-keeping measures, the legal aspects of disarmament, and the current studies of the International Law Commission. The comments which follow therefore relate chiefly to the continuing debate concerning the feasibility and utility of attempting to codify the so-called "principles of co-existence." In selecting this question for discussion it is not suggested that it is necessarily of pre-eminent importance, but rather that its examination provides a useful and perhaps even essential background against which a number of less diffuse and more concrete topics can be considered.

There seems to be little doubt that Soviet legal theory is now well into a new phase. Vyshinsky and all his works

have been rejected. A vigorous campaign for the codification of the "principles of co-existence" has been launched. In attempting to determine what is involved in this new approach, it is useful to refer to an official Soviet definition of international law as laid down in a recent textbook on international law published by the Soviet Academy of Sciences, which reads as follows: "International law can be defined as the aggregate of rules governing relations between states in the process of their conflict and co-operation, designed to safeguard their peaceful co-existence, expressing the will of the ruling classes of these states, and defended in the case of need by coercion applied by states individually or collectively." Western jurists may, perhaps be forgiven if at first sight they are struck more by the similarities than the dissimilarities between the Vyshinsky definition and the current one.

The notion of class warfare is also still clearly evident, as is the view of law as an instrument of policy; the reference to coercion by states is somewhat difficult to reconcile with the clear-cut repudiation in a recent issue of *Pravda* of Vyshinsky's emphasis on coercion as a primary element in law; the major innovation, of course, is the emphasis on the concept of peaceful co-existence which is apparently central to the current U.S.S.R. view of international law.

It should not be thought that these issues are purely theoretical abstractions devolving sometimes into mere questions of semantics; Soviet legal theory has always been of significance to Western nations; this is especially true in the light of the strong efforts by the Soviet bloc (which will be referred to later) to persuade other states, indeed all the member-states of the U.N., to accept such theories, in particular the concept of peaceful co-existence. It is, as a consequence, necessary to consider what the term "peaceful co-existence" represents to the U.S.S.R.

The concept has strong ideological overtones, as appears



from a statement issued in Moscow in December, 1960, by eighty-one communist parties to the effect that "peaceful co-existence of states with differing social systems does not mean a reconciliation between the socialist and bourgeois ideologies. On the contrary, it implies an intensification of the struggle of the working class of all communist parties for the triumph of socialist ideas." This highly political interpretation received the imprimatur of Mr. Khrushchev in a statement issued not long afterwards in which he proclaimed that "the policy of peaceful co-existence is a form of intense economic, political, and ideological struggle of the proletariat against the aggressive forces of imperialism in the international field." Such pronouncements suggest that whatever peaceful co-existence may represent as a political concept to various non-communist states, particularly some of the less-developed countries who appear to have espoused the doctrine, it is wise for us to bear in mind that, as pointed out by the Secretary of State for External Affairs, the Hon. Paul Martin, in an address given to the Montreal Section of the Canadian Branch of the International Law Association on October 2, 1963, "From our point of view, the Soviet doctrine of peaceful co-existence may be said to comprise two main elements: (*a*) it provides a doctrinal basis for Soviet bloc assistance to the world revolutionary movement and for the extension of Soviet influence; and (*b*) it provides a doctrinal basis for the Soviet bloc in its relations with non-communist countries, both Western and non-aligned, while the revolutionary process is going on." Mr. Martin went on to suggest that "It is clearly in the interest of non-communist countries to encourage the second of these two elements and to discourage as much as possible the first. . . . For the time being, however, no non-communist country can afford to overlook the first element of the doctrine of peaceful co-existence."

In attempting to translate such a highly political concept

into understandable legal terms, it is useful to refer to the explanations given by the leading exponent of the Soviet version of co-existence, Professor Gregory Tunkin, Legal Adviser to the Foreign Ministry of the U.S.S.R. In his lectures at The Hague in 1958, which may still be taken as an exposition of the official Soviet view, Professor Tunkin stressed the following points: firstly, the embracement of the five so-called principles of peaceful co-existence, namely, sovereignty, non-aggression, non-intervention, equality of states, and peaceful co-existence, itself. Of these, only the principle of sovereignty and the concept of peaceful co-existence would seem to be distinctive of Soviet legal theory; the first because it exemplifies the classical or nineteenth-century "quasi-absolute" concept of sovereignty stressed by the Soviet Union from the time of its earliest writers, as distinguished from the more generally accepted notion of sovereignty subjecting it to the rule of law amongst nations (for example, as will be illustrated later, Soviet legal theory rejects such institutions as third party arbitration or compulsory acceptance of jurisdiction of the International Court of Justice as infringements of sovereignty); the concept of peaceful co-existence is, in Soviet legal theory, according to a statement published in *Izvestia* in April, 1962, by three eminent Russian professors of international law, a "Leninist concept comprising a specific form of the class struggle between capitalism and socialism." This affirmation of the bi-polarization of the world on the basis of two "diametrically opposed" economic systems, seemingly represents an attempt to rationalize international law with Marxism, and not the converse.

Other notable characteristics of Soviet legal theory as expounded by Professor Tunkin may be summarized as including: the elevation of treaties over custom as the primary source of international law; a treaty-like approach to customary international law, whereby a norm's validity



is confined to those states explicitly recognizing it as binding; the explanation of international law as a system of norms created by a collision of wills of ruling classes of different states, rather than as a set of normative principles to which states are subject; the rejection of "supra-nationalism" as an unacceptable limitation of state sovereignty and, hence, utopian; the relegation of the decisions of the International Court of Justice to a very subsidiary position as a source of international law; and the appropriation of widely recognized principles of international law as Soviet inspired and developed.

It can readily be seen that there are a number of important differences between Western and Soviet approaches to international law. In commenting on the latter, Mr. Paul Martin in his speech previously referred to, suggested that "It may be wondered whether such theories are not fundamentally inimical to the future development of international law along orderly lines."

What has made these theories of particular importance to us is the efforts carried out by the Soviet bloc in a number of governmental and non-governmental forums to bring about the codification of the "principles of co-existence."

As early as 1954, during the general conference of U.N.E.S.C.O., Soviet bloc representatives urged joint legal research between East and West on peaceful co-existence. Later the topic was raised in 1957 and again in 1958 in the General Assembly of the U.N., and in each case rejected as a specific topic for study. On the first occasion the U.S.S.R. introduced into the First Committee of the U.N. the item "Declaration concerning the Peaceful Co-existence of States." An alternative resolution introduced by India, Sweden, and Yugoslavia entitled "Peaceful and Neighbourly Relations among States" was passed in its stead. On the second occasion, Czechoslovakia requested that an item entitled "Measures aimed at the Implementation and Pro-

motion of Principles of Co-existence among States" be placed on the agenda of the General Assembly; the item adopted instead substituted the phrase "Peaceful and Neighbourly Relations" for that of "Peaceful Co-existence."

At the Sixteenth Session of the U.N. the topic "Juridical Aspects of Peaceful Co-existence" was proposed by Czechoslovakia and a number of other countries for inclusion in the agenda of the Sixth Committee. After considerable debate a resolution was passed substituting the phrase "Friendly Relations and Co-operation among States" for "Peaceful Co-existence."

During the Seventeenth Session of the U.N. a draft resolution containing a "Declaration of Principles of International Law" was tabled by the Czechoslovakian Delegation listing nineteen principles, including the well-known "principles of co-existence." A resolution emphasizing the importance of the rule of law amongst nations (rather than peaceful co-existence) and advocating the study of specific areas of the law in need of development and elaboration rather than the codification of general principles was tabled by Canada and a number of other delegations. The resolution ultimately adopted, after considerable general debate and subsequently lengthy negotiations between the delegations of Canada, Czechoslovakia, and Yugoslavia (which had also filed a resolution on the question) decided on a legal study of four principles, namely the duty to refrain from the threat or use of force, the principle of peaceful settlement of disputes, of non-intervention in domestic jurisdiction, and of sovereign equality of states. The resolution also affirmed the importance of the Charter of the U.N. in the continuing development of the rule of law among nations, but contained no reference to peaceful co-existence.

In the Eighteenth Session of the U.N., in the autumn of 1963, the debate continued on the four topics referred to, with the Soviet bloc delegation once again stressing the



"principles of co-existence" as the basis of the "new international law." The resolution eventually adopted agreed to the establishment of a sub-committee of the U.N. for the further study of these principles, once again with no reference to the concept of co-existence.

In the meantime, the subject had been introduced into the discussions of the International Law Association at the 1956 Conference at Dubrovnik, in a paper presented by Professor Bartos of Yugoslavia. The question was subsequently discussed by the Co-existence Committee, during the 1958, the 1960, and the 1962 Conferences of the I.L.A., thus far with no definitive conclusions. The debate continues, in the I.L.A. as in the U.N.

The foregoing brief outline of Soviet bloc efforts to have the "principles of co-existence" codified indicates the importance the communist countries attach to this matter.

It may, before concluding, be useful to consider how these principles are applied to certain topical questions. One example of continuing interest and importance is the efforts being made to bring about world disarmament. Such a complex subject can hardly be discussed adequately in the time and space available, but one or two illustrations may be helpful.

In an article by O. V. Bogdanov, which appeared in the September, 1963, issue of the journal *Soviet State and Law*, it is stated that "a solution of the problem of security of states in a disarmed world should be sought in the universally recognized principles of modern international law with the use of mechanisms to prevent violations of peace as envisaged in the United Nations Charter." This statement would appear to be consistent with the joint statement of the U.S.S.R. and the U.S.A. of agreed principles for disarmament negotiations of September 20, 1961, which reads in part "that such disarmament is accompanied by the establishment of reliable procedures for the peaceful

settlement of disputes and effective arrangements for the maintenance of peace in accordance with the principles of the Charter of the U.N." Later it is provided in the agreed principles "that states shall support and provide agreed manpower for U.N. peace forces"; later again it is stated that "to implement control over and inspection of disarmament, an international disarmament organization, including all parties to the agreement, should be created within the framework of the U.N." Another passage from the agreed principles provides that "progress in disarmament should be accompanied by measures to strengthen institutions for maintaining peace and the settlement of international disputes by peaceful means," and the necessary measures to do so are stated as "including the obligation of states to place at the disposal of the U.N. agreed manpower necessary for an international peace force to be equipped with agreed types of armaments."

The article by Bogdanov previously referred to goes on, after his opening statement, to say that "the Soviet programme of general and complete disarmament . . . rightly turns down the groundless argument that even under complete disarmament international security must be upheld by means of an armed centralized apparatus." The writer criticizes the Western approach to disarmament as being an attempt "to prove the need, in the existing conditions, to replace the now operating international law by a kind of 'world' law, and the U.N. organization by a kind of 'world authority' with extensive rights to employ compulsory measures against states." In Bogdanov's view, "the abolition of arms would decisively affect the very nature of the relations between states, eliminate the material premises which bring about war and hence also the necessity of applying armed force in international relations. This excludes the needs of setting up an unwieldy mechanism of armed constraint and the adoption as a basic thesis of the



premise that the security of states in a disarmed world can be guaranteed by the generally recognized principles of international law." In case it is felt that this represents a radical shift in the Soviet approach to the International Court of Justice, the writer states in a later passage that "the desire to use the International Court of Justice as a medium for the establishment of a 'world' law is typical of present day imperialist practices and for many Western lawyers who reflect this practice. The imperialist powers are banking on their majority in the International Court of Justice, reckoning that in the face of its becoming a body of binding jurisdiction they would be able to channel the development of international law in accordance with their wishes." Such Western jurists as Larsen, Clark, Sohn, and Fisher are all criticized in the article on the ground that they "want a 'world government' endowed with extensive legal and executive powers upon the people" which will "be established to dominate undividedly in a disarmed world," and that "they want relations between disarmed states to hinge on 'supra-national' enforcement which they consider to be an indispensable element in the operation of 'world' law." Bogdanov concludes that "any attempt to find some kind of contradiction between the conditions which still prevail in a disarmed world and the nature of the vital principles of present-day international law, such as sovereignty, equality of states, non-interference in their domestic affairs, and so forth, is profoundly artificial in their character. Disarmament will in no way undermine these principles; on the contrary, it will create the most favourable conditions for their consistent realization." The relationship between Soviet legal theory and the Soviet approach to this concrete issue is clearly evident.

Turning to another area of the law, a good deal of attention has been focussed recently upon the proposal by Mr. Khrushchev for an international agreement on the non-use

of force to determine border controversies. An interesting exposition of the legal basis of this proposal was given in an article by Professor Tunkin, published in *Izvestia* on August 22, 1963, which reads in part: "Marxism-Leninism has proceeded from the proposition that border issues must be solved on the basis of the self-determination of nations." Lenin is quoted as stating that "an annexation is a violation of the self-determination of a nation, is the establishment of the border of a state contrary to the wish of the population." Professor Tunkin goes on to relate these principles to current issues: "In relations between the countries of the world socialist system, resting on the principle of socialist internationalism, there are possibilities of settling a border question to the mutual satisfaction of the parties on the basis of friendship and understanding." He goes on to explain, however, that "Imperialism has left behind a great heritage in Asia and especially in Africa," since "the seizure of the colonies and their division among the imperialist states was done by force of arms so that the national borders were naturally not taken into consideration." Nonetheless, he concludes that "any border dispute should be settled only by peaceful means—such is the solely possible answer today dictated by the moral and juridical standards corresponding to the political expediency, expressing the wills of the people and serving the interest of the historical progress." He warns that should the new African nations try and settle their disputes by force of arms, "such a situation would suit only imperialists, it would lead not only to the weakening of the African states' struggle against imperialism, but would create conditions for these states' subjection to the imperialist powers for their alignment with the aggressive blocs of the Western powers. The Chinese-Indian armed border conflict is most instructive in this respect. This conflict not only spoiled the relations between India and China, not only hampered the struggle of the



progressive forces and stirred the most reactionary forces of India to activity, it created a new hotbed of international tension and hampered the struggle of the Asian peoples against imperialism." Since the announcement of Mr. Khrushchev's proposal, Professor Tunkin has found it necessary to add, in the January 7, 1964, issue of *Izvestia*, that "the principle of banning the use of force in international relations and the principle of a peaceful solution of disputes between states in no away affects the struggle of the peoples of colonial and dependent countries for their liberation. If in this struggle the peoples of the colonial countries are compelled to take up arms against foreign invaders, this is their sacred right. This is the exercise of the right to self-defence recorded in the U.N. Charter."

Such statements by the Legal Adviser to the Foreign Ministry of the U.S.S.R. are of assistance in interpreting developments such as the recent proposals by Mr. Khrushchev. They also provide evidence of the need for caution, referred to by Prime Minister Lester B. Pearson in his recent statement, in assessing the implications of the present improvement in relations.

How then are we to react to these consistent, determined, and often dynamic Soviet initiatives? Firstly, by recalling that international relations are not conducted in a legal vacuum; that over some three centuries a body of customary and conventional principles and rules of law has been developed, against which such proposals should be viewed. See, for example, the selected background documentation prepared by the U.N. Secretariat, to assist in the studies by the Sixth Committee of the four principles previously referred to.*

The first test, therefore, is whether such proposals show promise of making a genuine contribution to the development of international law along orderly lines. It is the view

*U.N. Doc. A/C. 6/L537, dated October 30, 1963.

of most Western nations, for instance, that attempts to codify general principles of international law on a high level of abstraction are of limited usefulness unless coupled with the will and the machinery for applying such principles to concrete tension situations. The fate of the 1949 Draft Declaration of Rights and Duties of States bears witness to the validity of this conclusion. Western and non-aligned nations have, as a consequence, put forth in the Sixth Committee of the U.N., counter-proposals for the further development of specific areas of the law considered central to the future development of international law along orderly lines, and for the further development of the machinery necessary for the peaceful settlement of disputes. It is felt that, quite apart from East-West differences, such studies can assist in determining how best to meet the legitimate desires of many of the non-aligned countries to play a more direct role in the development of international law.

A second test which might be applied is whether the proposals have been raised in the most appropriate forum. If the problem is a highly political one, which only member-states of the U.N. are competent to consider, then the motives in raising it in a private non-governmental organization may be open to question. If, on the other hand, the matter is a technical one, of an essentially legal nature, then it may be through the International Law Commission (of which Mr. Cadieux, the Legal Adviser to the Canadian Ministry of External Affairs, is a member) that qualified experts can best contribute to the progressive development and codification of international law. Other questions falling into neither category might appropriately be considered by the Sixth Committee of the U.N. This is not to suggest, of course, that such studies as are being carried out by the International Law Association, and by other non-governmental groups, concerned with the scientific analysis and development of international law, cannot also make significant contributions to a better understanding of the differences which divide us, and even of possible means of reconciling them. On the contrary, such free and informal discussions of the legal theory of Western and communist nations may not only be of educational value but can play an important role in the law-making process itself.



Let us therefore recognize the desirability of continuing the dialogue; but let us also remind our protagonists that a dialogue by definition should flow two ways; that a demand for the codification of the principles of co-existence, for instance, prejudges the validity of the conception; let us ask for a broader approach; let us ask that such proposals as the U.N. fact-finding study put forth by the Netherlands and co-sponsored by Canada and a number of other countries be received with less suspicion and hostility; let us continue to stress the diversity and complexity of the factors at play in international affairs, and to resist the narrower unilaterally held notion of divergency and of bi-polarization. It is thus that we can play a constructive role in the continuing evolution of world legal order.

It seems clear that there are winds of change blowing through the sometimes dusty halls of international law; equally clearly, they do not emanate from any single source. Consider, for example, the broad spectrum of views, many with possible significance for the future development of international law, presented by governments of member-states of the U.N. in their written comments and in the oral interventions of their representatives during the recently concluded debate of the Sixth Committee of the U.N. Compare, for instance, as further evidence of the diversity of forces at play, the lectures of Professor Tunkin at The Hague with the Encyclical *Pacem in Terris* issued by the late Pope John. (Not surprisingly, the differences may be more readily apparent than the similarities. Pope John wrote on non-intervention, on the requirement of fostering

friendly relations in all fields, on the juridical equality of states, self-determination, mutual co-operation, the solution of disputes by negotiation, and other questions dear to the heart of Professor Tunkin. Also, however, he wrote of the principles of natural justice, of the dignity of the individual, and of human rights in terms irreconcilable with Marxism, and called for the development of "a public authority having world-wide power and endowed with the proper means for the efficacious pursuit of its objectives.")

It should be obvious, on the basis of this brief examination of various trends in legal fields, that it is impossible for foreign ministries of Western countries to ignore certain fundamental differences in legal approach, and unwise to minimize them. It seems equally clear, however, as pointed out by Mr. Paul Martin in his speech referred to earlier, that "in the spirit of *détente* following the signing of the Test Ban Treaty there is nothing to be served by attempting to exaggerate these differences of approach to international law. On the contrary, the need is for renewed efforts to bridge the differences."

# Canadian Attitudes to Change and Conflict in the Soviet Bloc

H. GORDON SKILLING

PRESIDENT KENNEDY, in a major address at the American University on June 10, 1963, called upon his fellow-Americans to "re-examine our attitude to the Soviet Union" and "our attitude towards the cold war." Six months later, shortly after his tragic death, his Assistant Secretary of State for Far Eastern Affairs, Roger Hilsman, declared that it was time "to take stock . . . dispassionately" of the problem of China, and necessary to discard emotion and "look squarely at China." "Dislike of communism," he said, must "not becloud our ability to see the facts." The Canadian Minister of External Affairs, Paul Martin, has also spoken of "the winds of change blowing over the communist world" and the need to "face the facts of life." In a speech at the Canadian National Exhibition in Toronto, on August 24, 1963, he urged us to "try to understand these changes, for without that understanding we shall be unable to assess the nature of our opponent and of the contest."

It is in the spirit of these remarks that Canada, and the