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Soviet International Law: An Exemplar for Optimal Decision Theory Analysis

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NOTE

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I. INTRODUCTION

The Czarist contribution to the formation of international law in Russia amounted only to a passive social aggrandizement of the bourgeois institutions which were at that time actively fostered by the Western Nations. Nonetheless, by the early eighteenth century Russia had been accepted in the world community; and she continued to act under those institutions of international law which were, by then, as much a part of her legal system as they were of any other nation. With the Revolution in 1917 and the complete reversal of the social stratification within Russia, the dilemma arose as to how the Soviet Union should participate in international affairs without accepting the bourgeois institutions of international law that the deposed Czars had helped to establish. During the first half of the twentieth century, many attempts were made by the leading Soviet legal theorists to reconcile international law with Marxist doctrine. First Korovin, then Pashukanis, later Vyshinskii, and finally Tunkin tried to solve this dilemma. With Khrushchev backing the theme of peaceful coexistence, in 1956, a compromise of the divergent legal systems was acknowledged by the Soviet government. The latest shift in Soviet international legal policy has been from Khrushchev’s coexistence theme to Brezhnev and Kosygin’s theme of co-operation — a significant change in terminology and approach. Indeed, the current East-West détente era has created a “new” international law made up of consensually-based rules. Through all of these shifts in international legal theory, Soviet national interest has been the guideline for change.¹

¹ The Soviet theory of international law has undergone dramatic and far-reaching changes from the inception of the Soviet State until now. By far the largest part of this change is inextricably interwoven into the fabric of U.S.S.R. foreign and domestic policy. It is a remarkable record of tortuous weavings between the Scylla of reality and the Charybdis of theory. Snyder & Bracht, Coexistence and International Law, 7 INT’L & COMP. L.Q. 54 (1958).

See also Snyder, The Communist Theory of International Law, 2 VA. J. INT’L L. 80 (1962).
The Soviet’s pragmatic use of international law, when compared with the United States own foreign policy justifications, provides an exemplar for current optimal decision theory analysis. Such analysis attempts to determine the appropriate evaluative method for policy determination when information levels are imperfect and varied. The ideological glasses through which the East and the West view the world give distorted, if not false, pictures of international conflict situations. However, optimal decision theory analysis may provide the understanding for a mutual reevaluation of the espoused opposing ideological outlooks and may establish the basis for the necessary mankind perspective in this pluralistic international society.

The purpose of this Note is to delineate: (1) the Soviet heritage of Czarist Russia’s contributions to traditional international law; (2) the theoretical concepts which give rise to the Soviet dilemma of reconciling Marxist doctrine with international law; (3) the attempts by certain Soviet legal theorists to shorten the horns of the dilemma; and (4) the recent changes in the dominant theory of public Soviet international law. Modern evaluation and decision-making theory will be employed as a vehicle to explain differing approaches to international conflicts resolution, including the Soviet Union’s recent intervention in Czechoslovakia. A brief critical comparison will then be made between the Soviet "hang-ups" in effectuating a valid theory of international law and the inconsistency between the United States democratic ideals and American international relations. Finally, an operational sociological approach based on a trans-cultural consensus will be suggested as a potential solution to the dilemmas in international jurisprudence which have been created by a world of polarized ideological beliefs.

II. HISTORICAL PERSPECTIVE

Russia was slow coming into full intercourse with the Western Nations due to the continuance in the seventeenth century of her serfdom society and her ingrained isolationism, which in part was

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2 The Russian serfs were the mass body of unemancipated tillers of the soil. The expression "feudalistic society" is often used, or rather misused, by American writers to denote a society which is aristocratic and not democratic. Russia, unlike most of Europe, never knew the feudal system; and therefore, in the strict sense, there never was a feudalistic society in Russia. There was, however, a serfdom society. Compare J. Clarkson, A History of Russia 71, 203 (1962), with B. Pares, The Fall of the Russian Monarchy 40 (1961). See also J. Briery, The Law of Nations 2-4 (6th ed. 1963).
a reaction to the early Tartar domination and Teuton oppression.\(^3\) However, by the early eighteenth century, Russia had been received as a great power in the "family of nations."\(^4\) This recognition preceded that of the United States by only a little more than 70 years and was due largely to Peter the Great's innovations both in internal government and in international relations.\(^5\)

**A. International Law Under the Czars**

In the sixteenth century, Ivan III "the Great" (1462-1505) and Ivan IV "the Terrible" (1533-1584)\(^6\) attempted to gain recognition for Russia, but these rulers lacked not only Peter the Great's genius and energy but also the proper *Zeitgeist* — the external "time spirit"\(^7\) — and the internal means of production and coercive strength which would later allow Russia to change her position from that of a backward state to that of a recognized world power.

Russia's slow ascendancy to the family of nations did not mean that the Czars were slow to learn about the subjects of international law. First the Kiev government of southwestern Russia and then the Muscovy government, further north, maintained treaty relations with neighboring empires, kingdoms, and cities.\(^8\) The Czars had "sent and received ambassadors, drawn boundaries, negotiated rights of navigation and commerce, even insisted on occasion upon formal and substantive rules of war."\(^9\) The increase of inter-

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\(^3\) P. Sorokin, *Russia and the United States* 36 (1944).

\(^4\) See C. Fenwick, *International Law* 102 (3d ed. 1948). The "family of nations" is that group of nations recognized as having equal status under international law.


\(^6\) The dates in parentheses refer to periods of reign. See J. Clarkson, *supra* note 2, at 815-17.

\(^7\) *Zeitgeist* can be defined as a deterministic causal factor, "some quintessential spirit of the time, some intellectual atmosphere or 'climate' of opinion, some unitary force . . . ." R. Wellek & A. Warren, *Theory of Literature* 62 (1956). *See* note 10 *infra.* Compare with Weltanschauung as defined in R. Wellek & A. Warren, *supra* at 106 and note 134 *infra.*


In this early period nationalism was still very disjointed and cities could be considered *subjects* of what might then have been accepted as "international law," at least insofar as it was within the "sovereignty" of these cities to make trade and protection agreements. *See* C. Fenwick, *supra* note 4, at 10; J. Ralston, *International Arbitration from Athens to Locarno* 177 (1929).

For a discussion of present day "communities" not having the character of states as subjects of international law, see H. Kelsen, *Principles of International Law* 158-88, 264-79 (1952).

\(^9\) F. Corbett, *supra* note 8, at 83.
national trade in the sixteenth and seventeenth centuries eventually brought the now centralized Moscow government into relationship with all the European States.

Peter the Great (1682-1725), now referred to as "the first Bolshevik," did much to Europeanize Russia.\(^1\) He concentrated his expansionist energies in a series of successful aggressive wars which were concluded in treaties favorable to the growing Russian trade with other countries. "In one reign, Russia, a backward and ignored country, became a major power and a member of the European community of states — a historical development unparalleled until the rise of Japan in the late nineteenth century."\(^11\)

Despite the fact that the earlier Czarist governments appear at first glance to have done relatively little to further developments of international law, the Marxist interpretation of the history and origins of international law is greatly tainted with nationalistic pride and attributes many of the advances in this field, as in the

\(^{10}\) Some historians, however, prefer to give more credit to the Zeitgeist of that time than to Peter the Great:

"Although for propaganda purposes the legendary figure of Peter I has been kept alive, costumed anew as "the first Bolshevik," it has long since become obvious that the continuity of Russian history was unbroken by the reign of Peter. Irresistible forces, which owed little or nothing to the efforts of outstanding individuals, had before Peter's birth given form to an autocracy rooted in peasant bondage, to a Church wholly subordinate to the state, to a state-directed economy struggling to make headway against unfavorable geographic conditions, to the problem of progressive expansion of the limits of Russian power, and to the steady permeation of Russian life by the manners and customs of the more civilized West. All these fundamental tendencies continued their development through and long after the reign of Peter, without change of direction. J. Clarkson, supra note 2, at 187-88."

One is struck by the similarity of Clarkson's "irresistible forces" and Alfred Korzybski's "time-binding" principle:

[B]y nature we are time-binders and . . . the effectiveness of our time-binding capacity is not only a function of time but is . . . a logarithmic or exponential function of time — a function in which time \((T)\) enters as an exponent, as in the expression \(PT^2\), so that we humans are, unlike animals, naturally qualified not only to progress, but to progress more and more rapidly, with an always accelerating acceleration, as the generations pass. A. Korzybski, Manhood of Humanity 91-92 (1921).

The rational morality inherent in man's time-binding ability is discussed in text accompanying notes 345-85 infra.

Symbolic of Peter the Great's reforms was the enforced shaving of beards of the Russian nobility. J. Clarkson, supra note 2, at 193; Ulam, The Russian Political System, in Patterns of Government 593, 604 (2d ed., S. Beer & A. Ulam eds. 1964). Peter I also imposed a tax on beards — "those evidences that man is made in the image of God." J. Clarkson, supra at 201-02. "This tax was established as early as 1705 at rates graduated to the social importance of the wearer and in the case of peasants, contingent on whether they brought their beards to town or were content to remain at home . . . ." Id. at 202.

\(^{11}\) Ulam, supra note 10, at 604; but see discussion in note 10 supra.
area of physical science, to the Czarists. By the eighteenth and
teniteenth centuries, however, there did occur incidents of Russian
foreign practice which bear some resemblance to the patterns of
modern international intercourse. It is in these centuries that we
find some substance to the exaggerated claims of the Soviet legal
historians. For example, Catherine II (1762-1796) first formul-
ated the principle of armed neutrality in the Act of 1780. This
was the first practical step toward establishing principles of mari-
time warfare. Because of political circumstances, the neutrality
was abandoned in 1793, only to be revived again under different
pressures by Catherine's deranged successor, Paul I (1796-1801).
Paul's successor, Alexander I (1801-1825) reaffirmed the principles
of armed neutrality and from then on they were advocated by the
Russian governments.

Alexander I also made several proposals concerning interna-
tional codification, disarmament, and control of the slave trade.
In 1818 the United States and England turned to him for the
arbitration of their dispute over the ownership of slaves in Ameri-
can territory which had been occupied by English troops. This
was the first of a series of nineteenth century arbitrations that were
held with Russian umpires. Alexander II (1855-1881) and Alex-
ander III (1881-1894) figured in the determination of many other
disputes, and some of these proceedings served as models for later
international conventions.

In the nineteenth century, Russia displayed one of the first
classic examples of the repudiation of treaty obligations on the
grounds of rebus sic stantibus — "a material or fundamental change of circumstances." In 1870 Russia declared herself no

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12 "Recent Soviet writers have been at great pains to emphasize prerevolutionary
Russian contributions of doctrine and practice to the development of international law." P. CORBETT, supra note 8, at 83-84.
13 J. CLARKSON, supra note 2, at 250; 1 P. JESSUP & F. DEAK, NEUTRALITY 160
(1933); B. SUMNER, A SHORT HISTORY OF RUSSIA 385-86 (1949). See generally
15 P. CORBETT, supra note 8, at 87.
16 See J. RALSTON, supra note 8, at 87.
17 For example: "Proceedings under Professor F.F. Martens of the University of St.
Petersburg led in 1896 to a unanimous award in the famous boundary dispute between
Great Britain and Venezuela, and served as model for the Convention on the Peaceful
Settlement of International Disputes adopted at The Hague in 1899." P. CORBETT,
supra note 8, at 87.
18 For a discussion of this doctrine, see J. BRIELEY, supra note 2, at 335-39; G.
VON GLAHN, LAW AMONG NATIONS 442-45 (1965); Hill, THE DOCTRINE OF
REBUS SIC STANTIBUS IN INTERNATIONAL LAW, 9 UNIV. OF MISSOURI STUIDIES, No. 3 (1934).
longer bound by certain parts of the Treaty of Paris of 1856, which related to the neutralization of the Black Sea and placed restrictions on Russia keeping armed vessels in that area.\(^\text{19}\) Invoking the principle of *rebus sic stantibus*, Russia argued that "a material change in the conditions contemplated by the treaty had been brought about by the subsequent union of the Danubian principalities, acquiesced in by the Great Powers, as well as by the changes in the conditions of naval warfare incident to the use of iron-clad vessels."\(^\text{20}\)

**B. The Failure of the Brussels and Hague Conferences**

On the initiative of Alexander II of Russia, the Brussels Conference of 1874 was held to establish a comprehensive set of rules for land warfare.\(^\text{21}\) Because this Conference failed to establish any definite body of rules, Nicholas II (1894-1917), the grandson of Alexander II, brought together the Hague Peace Conference for

\[\text{See also The Free Zones of Savoy and Gex, [1932] P.C.I.J., ser. A/B, No. 46, at 156-58, reproduced in 2 M. HUDSON, WORLD COURT REPORTS 448, 553 (1953), and W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 198-208 (2d ed. 1962).}\]

For a specific Soviet example of the use of this doctrine, see text accompanying note 36 infra. Derivation of the doctrine itself may be attributed to either Machiavelli or Gentili:

Machiavelli's ideas may be linked to international law in so far as his perfect and cynical disregard of any political morality (not of morality in general) contrasted sharply with, and formed an extreme reaction to, the scholastic teaching which purported to subordinate the whole province of politics and especially the relations among rulers to the demands of moral theology. A. NUSSEBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 56 (1947).

\[\text{See N. MACHIAVELLI, THE PRINCE (circa 1513); N. MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS (circa 1513).}\]

Gentili's most important contribution to the [law of treaties] consists in his tenet that one has to read into a (peace) treaty always a tacit condition to the effect that the treaty is binding only as long as conditions remain unchanged. The far-reaching consequences of this so-called *clausula rebus sic stantibus* are evident. Ancient Roman law had not known that *clausula*. Gentili relies on the authority of Alciatus (1492-1550), an outstanding Italian writer on civil law, but the *clausula rebus sic stantibus* doctrine was several centuries older. It originated most probably in canon law, which tended to temper with considerations of equity the rigor of the Roman private law. The new tenet was adopted by the "civilians," and Gentili introduced it into international law. There it has stood its ground down to the present, whereas it has generally disappeared in its original province, private law. A. NUSSEBAUM, supra at 78.

\[\text{See generally A. GENTILI, ON THE LAW OF WAR (circa 1598). See also H. GROTIUS, DE JURE BELLi AC PACIS [ON THE LAW OF WAR AND PEACE] (1646) ch. XVI, § XXV (The Classics of International Law ed. 1925), citing POLYBIUS, HISTORIES ch. III, § XXV (3) (circa 120 B.C.).}\]

\(^{19}\) C. FENWICK, supra note 4, at 455-56.

\(^{20}\) Id. at 456.

\(^{21}\) P. CORBETT, supra note 8, at 87-88.
the same purpose on May 18, 1899. There the Convention Respecting the Laws and Customs of War on Land was drawn up, embodying most of the unratified Brussels' draft. This convention was eventually accepted by most of the world community.

But further attempts to outdo its predecessor destroyed the semblance of efficacy which the Peace Conference of 1899 might have enjoyed. The proof of such a conclusion is best exemplified in the establishment of the Hague Permanent Court of Arbitration, which was instituted so that sovereign states could submit their disputes to arbitration by a selected panel of impartial jurists. Aside from public opinion and a feeling of moral responsibility, there proved to be no sanctions which could compel nations to submit their disputes to this impartial tribunal, nor did this "court" have any means by which it could enforce its decisions.

The irony of establishing an idealistic body of rules which were to serve a court powerless to enforce them was commensurate with the personal inducement of the man who had convened the Conference. Nicholas II had publicly announced the objective of the Hague Conference of 1899 to be world peace. However, due to the relative weakness of the Russian army, fear of Germany's rising military strength, and the need to modernize armaments and to secure Russia's claims in the Far East, Nicholas' real motivating interests were international disarmament and a general limitation of armed forces.

Like the first Hague Conference, the Second International Peace Conference, which met on June 15, 1907, failed to strengthen the

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23 For the text of the convention, see *The Hague Conventions and Declarations of 1899 and 1907*, at 100 (J. Scott ed. 1918).


25 The Hague Court was superseded by the Permanent Court of International Justice which was established in 1920 in association with the League of Nations. This tribunal has now permanently been replaced by the International Court of Justice as part of the general framework established by the Charter of the United Nations in 1945. See W. Bishop, *supra* note 18, at 62; H. Lauterpacht, *Development of International Law by the International Court* (1958).


27 In 1899 the occupation of Port Arthur by the Russians was having dangerous repercussions. P. Corbett, *supra* note 8, at 88. See also J. Clarkson, *supra* note 2, at 347-48.
political structure of the international community. The convention drafted at the Hague Conference of 1899 was still in effect, but it was obviously lacking importance and some states felt that it was obsolete. Codification of several customary international practices in the multilateral treaties of the Hague Convention of 1907 resulted in only slight actual enhancement of those existing rules for world government.

While failing in their overall and idealistic objectives, these conferences and successive ones have had a mitigating effect upon belligerent practices, and credit must go in considerable measure to Russia for what these conferences have been worth. The fact that they were prompted by Russia's political or material needs does not make the contribution any less real. Governments, both Eastern and Western, seldom act upon motives of pure altruism.

C. The Revolution (1917)

The revolutionary government of Russia, contrary to what might have been expected, incorporated the bourgeois institutions relating to international norms which the deposed Czars had helped to establish and which were based upon the "old" social structure of Russia. From its beginning, in November 1917, the Communist government used the existing system, including the terminology and forms that went under the heading of international law. But

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28 By this time . . . the humanitarian aspect of the codification of the laws of war had become subordinated to the political; and the leading military and naval powers were primarily concerned with adopting rules from which they might derive a relative advantage in the coming war which they looked upon as inevitable. C. Fenwick, supra note 4, at 82. See also id. at 20.


30 The Hague Conference of 1907 carried on the work of codification, extending it to include the rights and duties of neutral powers and persons in maritime war. At the same time the Conference adopted a number of other conventions relative to the conduct of hostilities and the mutual relations of the belligerents. C. Fenwick, supra note 4, at 82. For the text of these conventions, see The Hague Conventions and Declarations of 1899 and 1907, supra note 23, at 41. See also W. Bishop, supra note 18, at 802-04, 815-17; text accompanying note 135 infra.

31 P. Corbett, supra note 8, at 88; C. Fenwick, supra note 4, at 545-46.

32 This incorporation, which gives rise to the Soviet Dilemma, is discussed in text accompanying notes 57-66 infra.

33 P. Corbett, supra note 8, at 88. See, e.g., Preliminary Treaty between the German Reich and the Russian Socialistic Federative Soviet Republic regarding the Enlargement of the Activities of the Delegations for the Care of Prisoners of War of Both Countries (May 5, 1921), in 2 Reichgesetzblatt 929, art. VI (1921): "Both dele-
the political use to which that system was assigned, in this new regime, illustrated what would soon prove to be a manifest change in the Soviet interpretation of world community jurisprudence. Almost immediately the new government complained of international law violations by capitalist countries against the Soviet Union.\textsuperscript{34}

In the Commissariat of Foreign Affairs\textsuperscript{35} an elaborate legal argument, based on the principle of \textit{rebus sic stantibus} — "a material change in circumstances,"\textsuperscript{36} was devised to avoid the claims for payment of the Czarist debts. The Marxists claimed that there had not only been a shift in government, but that the entire social doctrine and structure of the nation had changed so greatly that all rules of state succession were not now applicable.\textsuperscript{37} Marxian theorists did not admit, however, that such a change would logically also bring into question the state's succession to the rights and recognition of the former government.\textsuperscript{38} In fact, it was not until after the completion in 1933 of the Litvinov Assignment, which transferred certain Russian assets in final settlement of claims to the United States government, that the United States recognized the new government of the Soviet Union.\textsuperscript{39}

\textsuperscript{34}The revolutionary government of Russia complained of violations of international law by the capitalist states via military intervention. \textit{See generally J. Cudaby, Archangel: The American War with Russia (1924).} They also complained of such minor violations as the unauthorized entry of warships into Russian territorial waters. T. Taracouzio, \textit{The Soviet Union and International Law} 61, 63-64 (1935); also cited in P. Corbett, \textit{supra} note 8, at 88 n.8.

\textsuperscript{35}This political unit is roughly comparable to the British Foreign Office and the United States Department of State.

\textsuperscript{36}See text accompanying note 19 supra.

\textsuperscript{37}On January 28, 1918, Lenin publicly declared that the new Soviet state would not accept any pre-war obligations signed by the Imperial government. \textit{See Snyder & Bracht, supra note 1, at 55 n.2.} They also refused to adhere to treaties signed by the former Imperial and Kerensky governments. \textit{Id. at 55.}

\textsuperscript{38}It is true, nevertheless, that most of these "rights and recognitions" were based on territorial control which would not necessarily be affected by an ideological change in government. An obvious analogy can be drawn to the United States refusal to recognize the revolutionary government of Communist China today.

III. Theoretical Concepts: International Law and the Marxist Doctrine

From the start, the Soviet jurists were faced with the task of theoretically reconciling Marxist doctrine with the existing bourgeois institutions of international law. Vladimir I. Lenin epitomized his thinking on legal systems in 1916 with the statement: "A law is a political measure, it is politics." As was stated in the Communist Manifesto (1848): "Political power, properly so called, is merely the organized power [or means] of one class for oppressing another." Accordingly, the Leninist interpretation of the Marxist view regarding bourgeois law appeared as follows: "Law is the regulation of the relations between the classes of human society corresponding to the interests of the ruling class and sustained by its organized force."

A Marxist might define international law as the superstructure of norms and procedures, in any given society, that are based upon the economic organization of production and enter into the relationship of this given society with some other state. Marx him-

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40 Such a reconciliation was made more difficult by the somewhat obvious tendency of “bourgeois” institutions, such as capitalistically oriented trade agreements and typically “Western” international laws, to be teleologically self-perpetuating. Note that “[t]eleology need not necessarily imply that an ultimate end-out-of-view directs change, but generally the concept is associated with the doctrine that ‘goals or ends of activity are dynamic agents in their own realizations.’” O. Lewis, Modern Systems Theory and Judicial Behavioralism 20 n.114 (tent. ed. 1968), citing E. Nagel, The Structure of Science 402 (1961). See also C. Hall & G. Lindzey, Theories of Personality 96 (1957).


43 But do not quarrel with us measuring the abolition of civil property by your bourgeois ideas about freedom, education, law, etc. Your very ideas are products of the bourgeois relations of production and property, just as your law is but the will of your class raised to a legal norm, a will the contents of which reflect the material conditions of life of your class. F. Borkenau, Karl Marx 112 (German ed. 1956), cited in Snyder & Bracht, supra note 1, at 56 n.3.


45 P. Corbett, supra note 8, at 89-90. See also T. Taracouzio, supra note 34, at 12-13; J. Hazard & I. Shapiro, supra note 41, vol. 1, at 3-6, vol. 3, at 3.

A comparative Western definition of international law might be: [That] system of jurisprudence consisting of general principles of right, equity, and humanitarianism, founded upon established customs and acts of states and upon international agreements not inconsistent with standards of justice which Christian and civilized states recognize as obligatory in their relations and dealings with each other as well as with the citizens and subjects of each. A. Thomas, Communism Versus International Law 3 (1953). For a series of definitions of international law, see 1 G. Hackworth, Digest of
self defined the "state" as the instrument of the political power with which the dominant class controls the other classes, but he claimed that this definition applied only to "bourgeois" states. Perhaps, however, it applies in an even greater sense to communist states.

The Soviet view that the dominant class creates and sustains law as an instrument of the state for controlling the subordinate class or classes is decidedly in conflict with the general theory of law avowed by most states. To the more developed Western Nations, as opposed to the "have-nots" or less developed countries, it seems obvious that there is no such thing as an international society divided, across national lines, into exploiting and exploited classes. Therefore, the second part of the above suggested Marxist definition of international law, using Marx's own definition of "state," seems to resist application to a law of nations, for in reality — albeit Western reality — the norms and principles of international law apply to the conduct of persons acting for states regardless of their class background.

The Marxist-Leninist theory of international law is basically that of the sociological school of jurisprudence. Marx and Lenin

INTERNATIONAL LAW 1-3 (1940). See also von Verdross, On the Concept of International Law, 43 AM. J. INT'L L. 435 (1949).


47 Soviet Communism has, in fact, taken on precisely the form of state capitalism that Marx so bitterly criticized. The political leaders determine both the nature of the economy and the purposes for which it is to be used; the economy does not function independently of the political sector in response to the consumer demand on the market. That is why the Soviet Union is usually referred to as a totalitarian state. The Communist Party controls all phases of life: economic, social, cultural, scientific, and spiritual. In this system, there are — as Marx foresaw — no political channels through which the subjected masses can seek amelioration of their political, economic, and social grievances. J. Spanier, American Foreign Policy Since World War II at 267 (2d rev. ed. 1965).

48 P. Corbett, supra note 8, at 90; T. Taracouzio, supra note 34, at 12.

49 P. Corbett, supra note 8, at 90.

50 See A. Thomas, supra note 45, at 48-49. See generally T. Taracouzio, supra note 34, at 12-25.

51 In this school of jurisprudence are the "positivists," or those who regard the practice of the states as the only source of law. Opposed to these theorists are the "naturalists," who regard some fundamental norms of right conduct appealing to the mentality of mankind as the source of law. See J. Brierly, supra note 2, at 36-57, 49-54; T. Taracouzio, supra note 34, at 12-14; A. Thomas, supra note 45, at 15, citing W. Robson, Civilization and Growth of Law 25 (1935). For a brief general discussion of the early naturalists and positivists, see A. Nussbaum, supra note 18, at 112-25. See also Kelsen, Plato and the Doctrine of Natural Law, 14 VAND. L. REV.
were concerned with the ends of laws, the underlying functions, rather than the means, or in more Marxian terminology, the end justifying the means. This school of jurisprudence views law as an institution requiring a society; and that society is itself, by habit or avoidance of anarchy, a compulsion for its members to obey the law. The Marxist-Leninists go along with this theory, for they view social stratification and class structure as the basis of bourgeois society and feel that law is the product of the ruling class. For example, a societal-progression might be as follows: first, individuals group for some purpose (food gathering, common shelter, mutual protection); second, the way in which the persons within this "society" interact establishes rules and "laws"; then, once the laws are established, they are perpetuated by the "rulers" of the group in order to maintain the on-going function of the society as such and also to maintain their own position as the "ruling class." In the pure communist state, which has progressed beyond mere socialism, there would be no classes and therefore no class antagonisms and therefore no need for the "bourgeois" laws to maintain the ruling class.

Paradoxically, Soviet international law, in its attempt to achieve a pure communist state, has relied more on the customary international practices of the rest of the world than on inherent Soviet ideological constructs. As a new government the Soviets used the bourgeois institutions of international law to their own benefit, and yet theoretically they could not accept these institutions in toto for they were derived from, and structured toward, a class society. Logically, in the true communist state there should be no


Since a Marxist cannot conceive of an ideal law uniform for all classes, the naturalist theory is fundamentally incompatible with the Marxian political philosophy. Hence, the Soviets appear to have accepted the positivist theory by way of compromise. T. TARACOUZIO, supra note 34, at 12.

52 "Man can not fight or live outside of society. This is his immutable characteristic, one which Aristotle noted and explained, calling it 'political being.'" M. DJILAS, THE NEW CLASS 157 (1957); see THE POLITICS OF ARISTOTLE 111 (E. Barker trans. & ed. 1962).

53 See note 56 infra.

54 But note: "Ideological exclusiveness and intolerance are intensified after the [social] revolution. Even when it is able to reduce physical oppression, the tendency of the ruling party [that is, the new class of ruling bureaucrats] is to strengthen the prescribed ideology — Marxism-Leninism." M. DJILAS, supra note 52, at 27. "[A] more detailed analysis will show that only a special stratum of bureaucrats, those who are not administrative officials, make up the core of the governing bureaucracy, or, in my terminology, of the new class." Id. at 43. For a discussion of this new class, see note 59 infra & accompanying text.
need for law enforcement because there will be no class antagonism, but the capitalist states with their inherent class antagonism must have strong enforcement in order to secure obedience to the law. Therefore, almost in a manner of justification, Lenin expressed the belief that law was an instrument to be used in stabilizing society. Once the society had been stabilized, law was to be transferred from a means to an achieved end, there no longer being a need for law enforcement. All too obvious in Lenin’s construct is the nationalistic assumption that Russia is politically capable of implementing the means, derived essentially from bourgeois institutions, and that the capitalist states are not capable of such implementation. This leads us to the Soviet Dilemma, which is the result of the polarization of Western and Soviet views of international law, each differing in values and approaches due to the opposing ideological beliefs.

IV. THE SOVIET DILEMMA

Since the Revolution of 1917, Soviet legal theorists have attempted to solve the dilemma of a world community of diametri-
cally opposed social orders having a typically "bourgeois" or Western class origin for the international law of that world community. The functional problem with international law, which has caused the Soviet's dilemma, arose in the attempt to co-ordinate different social systems, namely the Western and the Communist, into a single working international order. One writer has succinctly stated the Soviet dilemma as follows:

Theoretically the communist conception of law as a law of inequality, of the state as a struggle of classes, and of international relations as a mutual cooperation of toiling masses in their common opposition to capitalism, results in a novel interpretation of international law as a provisional inter-class law which aims to further the interests of organized national laboring classes in their common struggle for proletarian world supremacy. Thus defined, international law does not fall within the scope of so-called natural law, nor is it a strictly legal science. It is not applicable to the intercourse of states exclusively, yet it does not allow individuals to become the sole persons in international law.

The new social order in communist states, as in the Soviet Union, has set these nations apart from the other members of the international community. The Bolshevists have been too real-

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57 P. CORBETT, supra note 8, at 90.
58 T. TARACOUIZO, supra note 34, at 12.
59 But note:

[The Communist revolution] was the first revolution in history in which the revolutionaries not only remain on the political scene after victory but, in the most practical sense build social relationships completely contrary to those in which they believed and which they promised. The Communist revolution, in the course of its later industrial duration and transformation, converts the revolutionaries themselves into creators and masters of a new social state.

M. DJILAS, supra note 52, at 33.

"Ownership is nothing other than the right of profit and control. If one defines class benefits by this right, the Communist states have seen, in the final analysis, the origin of a new form of ownership or of a new ruling and exploiting class." Id. at 35 (emphasis added). "More than anything else, the essential aspect of contemporary Communism is the new class of owners and exploiters." Id. at 58 (emphasis added). See also N. POPOVIC, YUGOSLAVIA: THE NEW CLASS IN CRISIS (1968).

After 9 years in prison for publishing his political ideas and criticisms of the Communist state, Milovan Djilas was released in 1967. The following is an excerpt from an interview after his release:

[Djilas] was asked if his thinking had changed.

"My ideas are not so black and white as before," he said, in clear but hesitant English. "Even 'The New Class' — I find something dogmatic about it. When I wrote it I had a vision of people fighting with banners and helmets to eliminate the evils that had grown up here and to restore a perfect society."

And now? . . .

"When I write a book about my ideas ['The Imperfect Society'] is what I will call it. 'The Imperfect Society' — that is, the ideal, imperfect, normal, with free development, with conflicts and troubles." . . .

"What is the way in which change must occur in Yugoslavia?" He
istic to openly deny the possibility (and often desirability) of compromise with the Western powers and the Western bourgeois concepts of international law. Hence, the dilemma has been whether to boycott or to collaborate with the Western Nations, or in legal terms, whether international law should be "regarded as essentially bound to certain general principles of internal order which are characteristic of the majority of states, or interpreted as 'system-neutral' so that there is a place within its framework for any social structure known at the present time." More simply stated, the problem for the Soviets has been whether to initiate their own principles of international law or to go along with the standards accepted by those states which differ from their own fundamental socio-political outlook.

Some sociologists rather abstractly contend that there are certain standards of municipal order which provide the only firm basis for that economic intercourse upon which the international community exists as an inter-related entity. While this statement summed up in a manner quite unlike that of the impetuous rebel of 10 years ago.

"We cannot think of a revolution for democracy here. I would put it this way: society must go nervously forward." N.Y. Times, April 2, 1967, at 20, cols. 1-4 (city ed.).

The recent developments in Czechoslovakia and other Soviet satellite countries have certainly been "nervous" steps in some direction. See Djilas, Yugoslavia Determined to Defy New Soviet Pressure, Times, London, Oct. 11, 1968, at 11, cols. 4-6; Schuster, Djilas is Hopeful on Liberal Trend, N.Y. Times, Oct. 6, 1968, at 7, col. 1.

It could be questioned at this point whether the Soviet Union tacitly recognizes the soundness of (or lack of a workable alternative to) bourgeois institutions when it "refuses" to initiate its own principles which could lead more readily into that true communist state. Perhaps the Soviets are merely recognizing the sociological nature of man and the similarity of that nature throughout the world. But see critique of Marx's sociological theory in note 62 infra.

It would be possible for us to differentiate for purposes of our man-made systems, varying levels of systems, and to recognize that the complex person system is an adaptive system (possessing the ability to interact with the environment in a manner that is eufunctional for the system's survival) that exhibits ultrastability (which constitutes the capacity to persist during "throughput" even though there occurs a change of structure and behavior).
is perhaps too general, it is apparent that there are many typically Western standards, such as the principle of private ownership of property,\(^{63}\) that are completely unacceptable to Soviet-Marxian theory. The difficulty is that if we were to restrict international legal concepts to the few firm and general principles which are acceptable to both the capitalist and the communist states, we would probably find that these general rules would not be definite enough to regulate even the most unimportant issues of present-day international intercourse.\(^{64}\)

Although the horns of the dilemma are apparent from both the capitalist and the communist viewpoints, the West sees that most of the world with which it trades is still basically capitalistic, and therefore the problem in the Western context is not as immediate as it is in the Soviet context. Within Soviet ideology the difficulty arises as to how international law as a “superstructure”\(^{65}\) can have a common existence upon fundamentally different social foundations. In this respect, it is interesting to note that the earlier Russian theorists were careful to avoid the obvious trap of creating too many absolute concepts as the basis for their jurisprudence. For example, the Marxist-Leninist description of the state as a social institution, an instrument of class rule,\(^{66}\) does not necessarily describe the state as a subject of international law, or as a class organization dealing, in its international relations, with other class organizations of a different type.

During the last 50 years, many attempts have been made by the leading Soviet legal theorists to reconcile traditional interna-

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\(^{64}\) This may be true, however, only because these nomothetic rules are not founded upon the most basic empirical standards that allow men to interact within a group. This conceptual approach is developed more fully in text accompanying notes 357-85 infra. See note 62 supra.

The terms “nomothetic” and “idiographic,” originally coined by W. Windelband, are now frequently used to differentiate the general or law-like from the individual or unique. See G. ALLPORT, PATTERN AND GROWTH IN PERSONALITY 8-9 (1961).

\(^{65}\) See text accompanying note 45 supra.

\(^{66}\) K. MARX & F. ENGELS, supra note 42, at 32; see note 44 supra & accompanying text.
tional law with Marxian doctrine. First Yevgeni A. Korovin, then Yevgenii B. Pashukanis, later Andrei Ya. Vyshinskii, and finally Grigori I. Tunkin tried to solve this dilemma.

A. Yevgeni A. Korovin: The Transitional Period and Constant Compromise

Following the Revolution, the first phase in the development of Soviet international jurisprudence was a realistic conception of state sovereignty, with the exception that ruling classes were taken to be characteristic of the state “personality” instead of the ruling figures or the prevalent ideology. Professor Yevgeni A. Korovin, the Soviet spokesman for international law in the post-revolutionary period, published a short monograph in 1924 entitled The International Law of the Transitional Period. Therein, Korovin pointed out that from a Marxist view natural law theory is inappropriate as a basis for international law, since a communist can neither recognize a law constituting a “supra-class” order, nor a compromise sanctioning the exploitation of labor by capitalists in non-communist countries.

This first phase of development can be termed realistic, for the Soviet jurists did feel that a partial international legal community was possible if based upon the common recognition of values that were not limited by sharply defined political and social forms. Under Marxist ideology, the new Soviet state would pass

67 A monarchical king and in some circumstances a nation’s president would constitute the ruling personalities or figures, while, on the other hand, “democracy” could be taken as an ideology that is characteristic of a state personality.

68 YE. KOROVIN, MEZHDUNARODNOE PRAVO PEREXHODNOGO VREMINI (2d ed. 1924), cited in P. CORBETT, supra note 8, at 91 n.11; J. TRISKA & D. FINLEY, SOVIET FOREIGN POLICY 396 n.4 (1968); Snyder & Bracht, supra note 1, at 56 n.5.

The transitional period was roughly from the end of the Czarist regime to the beginning of the governing proletariat (1905 to 1924 or thereabouts).

69 See note 51 supra & accompanying text.

70 T. TARACOUZIO, supra note 34, at 278. Korovin, in speaking of the International Labor Office, stated:

An organization believing in an illusory possibility of peaceful cooperation between [different] classes (the exploited and the exploiting) and in the possibility of solving social problems of a capitalistic economic order by an evolutionary process, is nothing but a bridge between the bourgeoisie and the “heads” of the bureaucratic professional unions, and [as such] a means to overshadow the class consciousness of the toiling masses. Id. at 278, citing YE. KOROVIN, SOVREMENNIOE MEZHDUNARODNOE PUBLICHNOE PRAVO [CONTEMPORARY INTERNATIONAL PUBLIC LAW] 128 (1926); also cited in J. TRISKA & D. FINLEY, supra note 68, at 404 n.16.

For an extensive treatise on “functionalism” and the International Labor Organization, see E. HAAS, BEYOND THE NATION STATE (1964).

71 P. CORBETT, supra note 8, at 91.
through a series of phases: from the capitalist system to socialism and finally on to true communism. It is in this respect that the principles underlying the first Soviet view of international law were necessarily transitional in character. Korovin tried to fit theoretical practices of Soviet relations with the outside Western world into a workable program that would not be "too patently heretical for Marxists." His attempts ultimately led him to an audacious pluralistic theory, in which he hypothesized that international law was nothing but the sum of several circles, differing among themselves and almost wholly separated from one another. The first circle consisted of that law controlling the reciprocal relations of the European states; the second circle was that of American international law; the third circle was made up of both the sum of several smaller circles destined for the second-class states (for example, the regime of national minorities) and that subcircle of legal systems governing relations between the capitalist states and their colonies or semi-colonies; and, lastly, the fourth circle consisted of those special relations between "the socialist state and its bourgeois partners."

Being politically unable to openly admit the subjection of the new socialist state to an established capitalistic law of nations, Korovin ran into a conceptualistic iceberg. He was now forced to substantiate the existence of what would basically be a Soviet system of international law. Through his pluralistic theory, the Soviet spokesman specified four different systems of international law: European, American, imperial-colonial and their colonies, and the Soviet-capitalist system. In each of the first three systems, a general solidarity of ideas and interests existed between the dominant classes which were essentially identical in nature, the states being, from the Marxist view, the temporary form of class domination. However, such a solidarity of concepts and interests did not exist between the fourth circle and any of the other circles. Korovin's insurmountable task was to make the Soviet sphere of international law a separate but distinct part of the overall international legal system.

72 See note 56 supra.
73 P. CORBETT, supra note 8, at 92. "[Korovin] justified application of the traditional rules of international law to relations between the [Soviet State and its capitalistic neighbours by saying, 'The proletariat did not destroy the old principles of international law but reformed them for its own use.']" Snyder & Bracht, supra note 1, at 56, citing YE. KOROVIN, supra note 68, at 2.
74 I. LAPENNA, STATE AND LAW: SOVIET AND YUGOSLAV THEORY 22-23 (1964).
75 P. CORBETT, supra note 8, at 92.
Since the state to the Marxist was only the personification of the dominant class — and it was this class, which, according to Korovin, constituted a person of international law — the state necessarily becomes a new person of international law each time a new class takes control.

Besides the dominant class, personified as the state, Korovin also recognized worker's associations, some proletarian organizations, the Vatican, the League of Nations, international unions and commissions, the Red Cross, and primitive peoples as persons of international law. It was this generous view that got Korovin into trouble, for Stalin was at that time trying to increase the stature of the Soviet state. Korovin's view of the state, as only the personification of the dominant class and as only one of the many persons of international law, greatly reduced, by Marxist standards, the importance of the Soviet state.

According to Korovin, Soviet international law — which constituted the fourth circle in his spheres of influence theory — during the transitional period was that "system of rules governing relations between the new Soviet State and its capitalistic neighbours" in the period when the Soviet ruling proletariat would continue to maintain the powerful position of the prior bourgeois state and its compulsive force in order to suppress the former class of suppressors. The Soviet government used the traditional theory

76 Id. at 93; see note 78 infra & accompanying text.

77 With this argument Korovin attempted to legally justify the Soviet government's refusal to pay the debts of the deposed Czars. The Soviets declared that the Czarist debts were res inter alios gesta — "business among other parties" — and did not have to be paid because the Revolution had changed Russia's ruling class and had terminated the state's continuity of personality. P. CORBETT, supra note 8, at 92; Snyder & Bracht, supra note 1, at 58, citing YE. KOROVIN, supra note 68, at 112. See notes 35-39 supra & accompanying text. For a thorough explanation of res inter alios gesta as a traditional principle of international law, see R. SCHLESINGER, supra note 60, at 276.

However, this negation of a continuous state personality did not correspond to the actual political practice of the Soviet government in concurrently attempting to preserve most of the rights and privileges that had been acquired by the former Russian regime. The new government even preserved some of the rights which were blatantly incompatible with the principles of Marxist-Leninist theory, as in the case of capitulations in Iran and China. See J. CURTIS, ESSAYS IN RUSSIAN AND SOVIET HISTORY 270-82 (J. Curtis ed. 1963).

78 P. CORBETT, supra note 8, at 93, citing YE. KOROVIN, supra note 68, at 33-34; YE. KOROVIN, supra note 70, at 19-23.

79 P. CORBETT, supra note 8, at 93.

80 Snyder & Bracht, supra note 1, at 57, citing YE. KOROVIN, supra note 68, at 8.

81 Snyder & Bracht, supra note 1, at 56-57, citing V. LENIN, State and Revolution, in 2 COLLECTED WORKS 175 (German ed. 1947). See notes 52-53 supra & accompanying text.
of sovereignty as a justification for protecting itself against being 
overpowered by its capitalist neighbors. "As long as a bourgeois 
encirclement exists outside the boundaries of the Soviet Union, 
every limitation of sovereignty would appear as a greater or 
smaller victory over the community of the socialistic society."^{82}

The transitional period and the limited use of strictly Soviet 
international law, as outlined by Korovin, would last so long as 
there was a "bourgeois encirclement of the Soviet state." Thus, in 
an effort to appease Stalin, Korovin went one step beyond Lenin, 
who had earlier prophesied that the temporarily incorporated bour-
geois institutions of "state" and of "law" would soon fade away in 
the Soviet Union.^{83} Korovin now conditioned the fading away of 
Soviet international law upon the precedent removal of the existing 
capitalistic encirclement. Stalin later employed this same argument 
to justify the continued use of the bourgeois legal institutions even 
after the state of socialism had been attained by the Soviet Union.

While identifying ruling classes and states as subjects of this 
temporary Soviet international law, Korovin assumed a community 
of ideology, such as might exist between identical classes in various 
countries, to be the necessary basis of international law.^{84} More-
over, since he also viewed international law as the means for balanc-
ing aggressive powers,^{85} treaties were stressed as the only reliable 
source or indicia of international law.^{86}

Korovin's view of legal relations between states as direct rela-
tions between the ruling classes of those states was sharply criti-
cized by his successor, Yevgenii B. Pashukanis. Korovin's theory pre-

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^{82} YE. KOROVIN, supra note 68, at 43, cited in Snyder & Bracht, supra note 1, at 58.
^{83} See notes 55-56 supra & accompanying text.
^{84} See text accompanying note 74 supra.
^{85} "[R]eal international law can only arise where there is one power meeting an-
other power with force." YE. KOROVIN, supra note 68, at 7, cited in Snyder & Bracht, 
supra note 1, at 56 n.8.
^{86} Thus, "customary" sources of international law were relegated to an inferior 
position. YE. KOROVIN, supra note 68, at 24.

So much stress was laid on the importance of the treaty as a source of in-
ternational law that strict obedience to the principle of pacta sunt servanda 
was enjoined. There was but one exception to this rule. Just as one legal 
order (for example, that of time of peace) might be replaced by one contrary 
to it (that of time of war), [e.g., killing a human being in peacetime is a 
crime; omission of such a killing, on the other hand, may become a crime in 
wartime,) there might come a time in the life of a nation when one legal 
order might be replaced by another of an entirely different type. This ac-
nowledgment of clausula rebus sic stantibus was confined, however, to the 
sole situation in which a social revolution in a State completely changed the 
social order. Snyder & Bracht, supra note 1, at 58 (footnote inserted), citing 
YE. KOROVIN, supra note 68, at 112.
supposed the existence of an ideology common to both the German capitalists and the Russian working class,\(^7\) and, as Pashukanis was to point out, this must mean interclass law, "a doctrine which, after an earlier provisional acceptance, [was] soon recognized as anti-Marxist."\(^8\)

Korovin soon found it necessary to abandon his concept of multiple systems of international law and the diversity of persons subject to it. In Korovin's case it was easier for the Soviet government to completely reject his theses and temporarily retire the theoretician than to reconcile his theories with the shift in Stalin's political outlook. Thus, he became obliged to disregard his own theories and interpretations of Soviet international relations during the transitional period and assume the new theory and interpretation that this period was one of constant compromise between antagonistic classes.\(^9\) This new interpretation clearly reflected the shift in Soviet political and economic tactics of Lenin and Stalin in their New Economic Policy for reviving the Soviet Union's economy through close co-operation in trade with capitalistic countries.\(^10\) Constant compromise was necessary to effectuate such economic co-operation.

The demise of Korovin was greatly brought about by the criticisms of Yevgenii B. Pashukanis.\(^11\)

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\(^7\) For a discussion of "Soviet Foreign Policy 1922-32, Russian-German Relations after Rapallo," see G. VON RAUCH, A HISTORY OF SOVIET RUSSIA 191-99 (1957).

\(^8\) P. CORBETT, supra note 8, at 92-93. Ironically, Pashukanis himself would later be attacked for this same reason. See text accompanying note 121 infra.

\(^9\) This interpretation corresponds with Crane Brinton's "Rule of the Moderates" and "Accession of the Extremists" periods. C. BRINTON, ANATOMY OF REVOLUTION 143-46, 155-84 (1952).

\(^10\) See R. SCHLESINGER, supra note 60, at 279; Snyder & Bracht, supra note 1, at 58-59.

With the New Economic Policy of 1921 began Russia's Thermidor[ean Reaction]. Lenin's death and the subsequent rivalry between Stalin and Trotsky led up to a second crisis, or rather relapse during convalescence, which we may date at the more acute periods of violent enforcement of the First Five Year Plan [beginning in 1928]. C. BRINTON, supra note 89, at 217.

In Stalin's victory Trotsky saw the Thermidoric reaction against the revolution, actually the bureaucratic corruption of the Soviet government and the revolutionary cause. . . . Trotsky was the first, although he was not aware of it, who in the attempt to save the Communist movement discovered the essence of contemporary Communism. . . . The Soviet Thermidor of Stalin had not only led to the installation of a government more despotic than the previous one, but also to the installation of a [new] class. M. DJILAS, supra note 52, at 51.

See also note 123 infra.

\(^11\) For a discussion of other critics of Korovin, mainly Sabanin and Hrabar, see Snyder & Bracht, supra note 1, at 59-60. "However, both Sabanin and Hrabar later suffered the fate of being called 'bourgeois theoreticians.' They were reproached for
B. Yevgenii B. Pashukanis: International Law as a Weapon of Class Struggle

In 1925 Yevgenii B. Pashukanis, a professor of law at Moscow University, published an article on international law in the *Encyclopaedia of State and Law* of the Communist Academy in Moscow. Although he appeared to be a more stringent Marxist than Korovin, Pashukanis depicted the essence of international law during the transitional period as that of temporary compromise. He gained perspective into the historical nature of the transitional period from the continuing "struggle of the capitalist States among themselves." The appearance of a Soviet state on the political scene, as he saw it, caused international law to become a constant compromise between the two antagonistic societies. This compromise, however, would last only so long as "the capitalistic system of international law was able to maintain a dominant power position in the community of nations."

While Pashukanis was achieving a foothold on the position of Soviet jurisprudential spokesman, the dominant ruling personality of Russia was also undergoing a change. After Lenin's death in 1924, Stalin began the development of a new theory of socialism which greatly influenced political and legal thought in the Soviet Union and also the Soviet concept of international law.

Stalin maintained that it was no longer necessary to adhere to the belief that final victory over capitalism could only be brought about by a world-wide co-operation of all proletarians. Such a view had been asserted by Trotsky and the left wing of the Russian Communist Party. In Stalin's opinion experience had proven that a socialist victory might first be achieved in one country only. For this reason, he felt it urgently necessary to secure a final socialist victory in Russia, using every available means.

having denied any qualitative difference between the international relations of the Soviet State and the 'normal' relations between capitalist countries." *Id.* at 60, citing "O burzhuaznykh vlianiakh v sovetskooy literatury mezhdunarodnovo prava [On Bourgeois Influences in the Soviet Literature of International Law]" (1930), in *CALVES, DROIT INTERNATIONAL ET SOUVERAINETÉ EN URSS* 99 n.2 (1953).


93 Snyder & Bracht, *supra* note 1, at 61, citing Pashukanis, *supra* note 92, at 862.

94 *Id.* See also note 215 infra & accompanying text.

95 In 1924 Stalin developed his theory of new socialism in a series of lectures on the bases of Leninism given at the Sverdlov University in Moscow. *See J. STALIN, On the Bases of Leninism*, in *QUESTIONS OF LENINISM* (German ed. 1947).

96 Snyder & Bracht, *supra* note 1, at 61, citing J. STALIN, *supra* note 95, at 37. Stalin's theory was embraced in a resolution of the XIVth Party Conference of the Russian Communist Party, *On the Task of the Comintern and of the Communist Party in*
Now Soviet theorists of international law were faced with the task of "finding legal expression for these new ideas and aspirations of a general [S]oviet policy; and of justifying and rationalising them in the international relations of the [S]oviet State with its capitalist neighbours." 97

Pashukanis sought to fill the void which had been created by the development of Stalin's new policy. In 1935 he published a textbook on international law, 98 in which he sharply criticized not only Korovin's original theories, but his own as well. In this work, Pashukanis developed a new theory by which international law was not considered the expression of a common ideology, 99 but rather it was an instrument used in the struggles between disputing states, including states differing in economic and social systems. 100 Consonant with this basic tenet, opposing socio-political systems could avail themselves of international legal forms and principles in pursuance of their own ends. This strictly pragmatic view was, perhaps, an overstatement of the national policy arguments that have been used by all countries to justify their international actions.

Bending under Pashukanis' sharp criticism, Korovin completely rejected his former theory of an international law of the transitional period. The deposed Soviet spokesman publicly confessed that there were "many mistakes in his former theory because of ... bourgeois influences which at that time were still prevailing." 101 Korovin further abased himself for not having realized the essential characteristics of international law at that stage of its historical development. Recalling that he had developed a theory of "superimperialism," he acknowledged that his greatest oversight had been in failing to recognize the legal nature of the state as the only subject of international law, and he discredited himself for having supplanted the state as the subject of international law with classes and other interest groups. 102

97 Snyder & Bracht, supra note 1, at 61.

98 Ye. Pashukanis, Ocherki po Mezhdunarodnomu Pravu [Treaties on International Law] (Moscow 1935), cited in P. Corbett, supra note 8, at 94 n.17; J. Triska & D. Finley, supra note 68, at 397 n.6; Snyder & Bracht, supra note 1, at 62 n.37.

99 See text accompanying note 84 supra.

100 P. Corbett, supra note 8, at 95.

101 Korovin, Pisma k Redaktsiyu [Letter to the Editor], Sovetskoe Gosudarstvo [The Soviet State], May 9, 1935, cited in Snyder & Bracht, supra note 1, at 62 n.35.

102 Snyder & Bracht, supra note 1, at 62.
Korovin's self-purgation at this time would later allow him to regain much of his jurisprudential eminence in the Soviet Union. His self-criticism clearly reflected Stalin's new socialistic policies and added credence to Pashukanis' attempts to conform Soviet international legal theory to the new Soviet policy.

Pashukanis gave a fairly accurate assessment of the role that legal institutions and norms play in the foreign policy of governments in general. They are used, he said, as weapons in the continuous struggle of both world classes against each other. To express the basic problem of international law enforcement, he reiterated Lenin's proposition that "[l]aw is nothing without a mechanism capable of compelling the observance of legal norms." Pashukanis syllogized that international law, therefore, must be regarded as nothing, since no mechanism exists such as would compel obedience to the norms of these laws — no legal system has meaning in itself, apart from the forces and sanctions behind that system. But these forces (and lack thereof) can be limitations on the purposeful functions of international law. Hence, he felt that the purpose of the Soviet science of international law was to insure the government a full knowledge of these essential limitations so that Soviet diplomacy might have full use of this knowledge as an auxiliary weapon.

103 H. BABB, SOVIET LEGAL PHILOSOPHY 244 (H. Babb ed. 1951).
104 According to Pashukanis, "[n]o legal formula, however solemnly proclaimed, has meaning in itself, apart from the relation of forces behind it. Thus, everyone should know that treaties of nonaggression or neutrality provide no guarantee that the Soviet Union will not be attacked." P. CORBETT, supra note 8, at 95. In a sense, this argument underlies the continuing nature of the Russian Revolution and provides the Soviet rationale for the delay in the attainment of the true Communist state. See note 56 supra; text accompanying note 116 infra.
105 This is a bastardization of the positivist theory discussed in note 51 supra.
106 For example, future-directed functions such as "world peace through world law" and "self-determination for all peoples."
107 Vyacheslav M. Molotov, for many years Soviet Foreign Minister, wrote in 1913: "A diplomat's words must have no relation to action — otherwise what kind of diplomacy is it? Words are one thing, actions another. Good words are a mask for the concealment of bad deeds. Sincere diplomacy is no more possible than dry water or iron wood." A. NEVINS, THE GATEWAY TO HISTORY 198 (1962). This same "remarkable skill in duplicity" can also be found in the behavior of the Soviet legal theorists.
108 "Law he insists, is one of the weapons of class struggle, one of the forms of the politics practiced by the ruling class." P. CORBETT, supra note 8, at 96, citing YE. PASHUKANIS, supra note 98, at 16.

According to Pashukanis,}

[...]he . . . task is the practical one of giving Soviet society a concise account of the forms and institutions of international law which the organs of the proletarian government can use. This will arm it for the defense of the in-
Pashukanis condemned the formal and scholastic international legal doctrines which were still current in Russia. These, he said, were the result of the "surviving influences of bourgeois-juristic methodology, in which law is treated as an independent essence." Pashukanis stressed nationalism, Pashukanis stated that “[i]nstead of abstract scholastic attempts to construct systems of ‘international law of the transitional period,’ Soviet internationalists should make it their task to learn and publicize the practice of the Soviet State and, from the basic principles of its foreign policy, formulate its international-law positions.” He rejected Korovin’s idea that international intercourse presupposes some community of values or similarity of economic systems and social orders. “In our epoch,” he claimed, “international law is a means of struggle [— a class weapon —] not only between competing capitalist States, but between different and opposing economic and social systems.”

In sum, Pashukanis believed that the norms of international law were little more than particular and subjective formulations of the immediate national interests of the governments concerned. They are only tentative legal propositions and lack the authority to make them valid. With this new interpretation, Pashukanis reduced international law to the expediency of using legal arguments as instruments or weapons of national interests, met the demands of the Soviet Commissariat of Foreign Affairs, and avoided the touchy question of how these instruments of policy become rules or principles which influence (and to some extent control) foreign policy.

Through Pashukanis, the Soviet government sought to establish a system of rules which would support its demands without compromising the doctrine it was ostensibly following. At this point in the political game, Russia could not withstand embarrassment in the prosecution of its aims. “Ordered to meet incompatible require-

- 109 Id. at 96, citing YE. PASHUKANIS, supra note 98, at 16.
- 110 Id.
- 111 Id.
- 112 A government committed to the doctrine that the norms of international law are only formations of government interests could hardly have maintained that these norms impose obligations. P. CORBETT, supra note 8, at 98. See also T. TARACOUZIO, supra note 34, at 13.

The danger to the stability of international law resulting from embracing such a view is manifest. The [S]oviet State must be entitled to abrogate a treaty as soon as a change in its interests makes it necessary. This was because the [S]oviet State must be considered the standard bearer of ideas which would inherit the future. Snyder & Bracht, supra note 1, at 63, citing YE. PASHUKANIS, supra note 98, at 160.
ments, Soviet jurisprudence still squirms on the horns of this dilemma."\textsuperscript{113} While Pashukanis did much to clarify Soviet international law \textit{in practice}, he only intensified the existing ambiguity of an integrated superstructure of international law \textit{in concept}. On the one hand, he viewed the substance of traditional international law as bourgeois and, therefore, totally unacceptable for the Soviet Union. At the same time, however, he maintained that Russia could still employ the traditional rules of international jurisprudence, not substantively, but in a formal and superficial sense. This view was partly the basis for Andrei Ya. Vyshinskii's attack on Pashukanis' theories as exercises in "legal nihilism."\textsuperscript{114}

C. Andrei Ya. Vyshinskii: Period of Revision

In the late-thirties, Soviet jurists were faced once more with the task of developing another new theory (or a new revision of an old theory) to meet the changing policy needs of the Soviet government. This time the theorists had to put forth a system which would effect a practicable co-ordination of the principle of "withering away of the bourgeois state and law" within the Soviet Union, as stated by Marx and Engels,\textsuperscript{115} with the economic and political situation at the time, which required the continuance of this "bourgeois-juristic methodology" in the relations of the Soviet government with the outside world. Pashukanis had said that the bourgeois law would fade away as the capitalist system was replaced in the Soviet Union and class antagonism ended.\textsuperscript{116} The government now required a new Marxist interpretation which would recognize the continuation, in at least some degree, of the bourgeois institutions even after the achievement of socialism.\textsuperscript{117}

"In 1936 the [S]oviet State entrenched itself so that it could weather the vagaries of a long-continued existence."\textsuperscript{118} A new Soviet Constitution, called the "Stalin Constitution," was proclaimed. This document solidified the strong state system in the Soviet Union and introduced the democratic principle, "which had played so large a

\textsuperscript{113} P. CORBETT, supra note 8, at 98.
\textsuperscript{114} Snyder & Bracht, supra note 1, at 62; see text accompanying notes 121-23 infra.
\textsuperscript{115} I. LAPENNA, supra note 74, at 15, 48.
\textsuperscript{116} P. CORBETT, supra note 8, at 99; see text accompanying notes 109-14 supra.
\textsuperscript{117} See note 56 supra.
\textsuperscript{118} Snyder & Bracht, supra note 1, at 63.
role in the Revolution, of election of the supreme legislative body by direct, equal, universal, and secret suffrage.””

The most important forces behind the political remodeling of the Soviet regime at this time were considerations of foreign policy.

At a time when the Soviet Union had lost her basic friendly relations with Germany and was wooing the United States and the former Entente Powers, the Bolsheviks could not well continue to flaunt the superiority of the [S]oviet system over “bourgeois democracy.” If seemed expedient now to develop the thesis that there was an impending world struggle to the death between “fascism” and “democracy.” . . . Both at home and abroad there was everything to gain from a change of façade, and nothing to lose so long as the building itself was not altered.120

Andrei Ya. Vyshinskii, the new Prosecutor-General of the Soviet state (later to become its representative at the United Nations), became the new spokesman for the party-line jurists. He condemned

119 J. CLARKSON, supra note 2, at 626. For a discussion of the Stalin Constitution, see id. at 625-32.

In effect the Stalin Constitution only provided for the democratic election of candidates who had been nominated by organizations in which the Communist Party was “the directing kernel.” Stalin made no bones about the meaning of “democracy” under the new Constitution:

I must admit that the draft of the new Constitution actually leaves in force the regime of the dictatorship of the working class, just as it leaves unchanged the present guiding position of the Communist Party of the U.S.S.R. If our respected critics think this a fault of the draft of the Constitution, then we can only regret it. We Bolsheviks think it a merit of the draft of the Constitution. Id. at 627, citing Stalin, Report on the Draft Constitution of the U.S.S.R., Part IV, Pravda, Nov. 26, 1936.

The Soviet position is not too far distant from Jules Feiffer’s dialog on American elections:

"First there are the primaries. The primaries are an elimination contest."
"You mean whoever loses is out?"
"No. Whoever runs is out. That leaves the field open to the serious candidates."
"Who are the serious candidates?"
"The serious candidates are the ones who are so strong they don’t have to take a chance on losing in the primaries."
"How do they come to be that strong?"
"By making deals for delegates with the party bosses."
"You mean the party bosses ignore the wishes of the people?"
"Only the meaningless people. The party bosses carry out the wishes of the serious people."
"You mean the serious people ignore the meaningless people and decide on a serious candidate for me to vote for?" "What kind of system do you call that?"

120 C. CLARKSON, supra note 2, at 625. It is interesting to note the use of the word “democracy” here and the apparent early alignment with typical Western-type political theory in opposition to “fascism.” See text accompanying notes 248-56 infra; note 119 supra.
as counter-revolutionary Pashukanis’ conception of international law as an interclass law, a compromise between two class systems.\textsuperscript{121} Pashukanis, he felt, had deformed Soviet jurisprudence with the belief that bourgeois law was to prevail in the transitional period, the period of proletarian dictatorship, before the bourgeois state had fully withered away.\textsuperscript{122} On January 20, 1937, an article in Pravda described Pashukanis as an enemy of the people who professed legal nihilism, and by 1938 he had been purged.\textsuperscript{123} But Vyshinskii was now faced with the awesome task of developing a theory which would stabilize socialist law and uphold its existence independent of the narrow concepts encompassed under the bourgeois headings of economics and politics. Moreover, in order to maintain the fiction of the continuity of the Russian Revolution, his overriding consideration had to be the adherence to strict Marxist-Leninist principles.\textsuperscript{124}

At the same time, Stalin in his speech at the XVIIth Party Con-

\textsuperscript{121} P. CORBETT, supra note 8, at 99, citing Rappoport, Protiv vrazdebnych teorii mezhdunarodnogo prava [Against Hostile Theories in International Law], SOVETSKE GOSUDARSTVO, Nos. 1-2, at 92 (1937); quoted in I. LAPENNA, CONCEPTIONS SOVIETIQUES DE DROIT INTERNATIONAL PUBLIC 100-01 (Paris ed. 1954); also cited in Snyder & Bracht, supra note 1, at 63 n.40.

\textsuperscript{122} P. CORBETT, supra note 8, at 99.

\textsuperscript{123} Id. at 98, citing Hazard, Introduction to SOVIET LEGAL PHILOSOPHY at xxix (Twentieth Century Legal Philosophy Series 1951), and Editorial Comment, 51 AM. J. INT’L L. 385 (1957).

The period 1936-1939 was called the “Yezhov period” in Russia, after the head of the secret police at that time. This was a period of terror and purges in the Soviet Union. C. BRINTON, supra note 89, at 239. See generally F. BECK & W. GODIN, RUSSIAN PURGE AND THE EXTRACTION OF CONFESSION (1951). The latent period of terror contributed to the theory that the Russian Revolution is a permanent revolution.

Yet it is difficult for us to dismiss the Russian Revolution as really finished . . . . In Russia . . . there certainly were after 1921 many signs of the Thermidorean reaction. But there has been no formal restoration of the old regime. . . .

To put the matter most simply, it looks to an outsider as if in Russia something like the Reign of Terror and Virtue, especially in the sense of continuous pressure on the individual to participate in the common thing, to be always “at the height of revolutionary circumstances,” has been recurrent in Russia. The horrors of enforced collectivization in the countryside in the early thirties, the trials, confessions, and purges in the years 1936-39 . . . even the current [1952] tightening of the line between East and West exemplified in such phenomena as Lysenkoism [belief in the hereditability of acquired characteristics] and the party line in music and painting, all add up to something that does indeed seem like “permanent revolution.” C. BRINTON, supra note 89, at 238-39.

See notes 89-90 supra. For a comment on Lysenkoism, see K. LORENZ, ON AGGRESSION 289 (W. Wilson trans. 1963); C. CLARKSON, supra note 2, at 718.

It is interesting to note that Pashukanis as a Soviet jurist has been posthumously rehabilitated by the Soviet government. See Editorial Comment, 51 AM. J. INT’L L. 385 (1957).

\textsuperscript{124} H. BERMAN, JUSTICE IN RUSSIA 45 (1950).
ference, in March 1939, explained that although the Soviet state had attained socialism, the bourgeois institutions would have to be maintained because of the imminent danger from the capitalistic encirclement. Thus, Soviet jurists had to find an interpretation of international law that would not only be acceptable to Soviet foreign policy but would also correspond to Stalin’s newest ideological expression. Hampering their attempts at such a discovery was the fact that according to the Marxist-Leninist doctrine, law can only exist where there is an apparatus of compulsion to enforce the observation of its rules. Such an apparatus does not exist in international law even today.

Vyshinskii asserted that there was a Soviet system of international law; and, after making slight changes in wording and theoretical justifications, he reproduced with the approval of the government the old theories of Pashukanis. "Law is, of course, 'a political category,'" Vyshinskii said. 'At the basis of Soviet law lie the political and economic interests of the workers and peasants.' ‘But nevertheless it is impossible to reduce law to politics, as it is impossible to identify cause and effect.’ Still, when it came to elabo-

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125 J. STALIN, Report to the XVIIIth Party Congress, in QUESTIONS OF LENINISM 728 (German ed. 1947), cited in Snyder & Bracht, supra note 1, at 64. Note the comparison between this continuing "imminent danger from the capitalistic encirclement" for the Soviet Union and the continuing state of declared "national emergency" for the United States. The United States has been in a continuing period of declared national emergency since President Truman’s Proclamation No. 2914 of December 16, 1950. 64 Stat. 454 (1950). This proclamation referred to the Korean crisis and the world menace created by the forces of Communist aggression.

A declared national emergency was accepted by the Second Circuit in 1966 as a valid basis for the freezing of Cuban-owned assets in the United States. Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, cert. denied, 385 U.S. 898 (1966). In this case Judge Friendly stated: "While the courts will not review a determination so peculiarly within the province of the chief executive, there can hardly be doubt as to the existence of an emergency today when thousands of United States troops are in action and many more are in readiness around the globe." Id. at 109.

128 Snyder & Bracht, supra note 1, at 64, citing 2 V. LENIN, SELECTED WORKS 234 (German ed. 1947), and S. KRYLOV, Les Notions Principales du Droit des Gens. La Doctrine Soviétique du Droit International de la Haye, in 1 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 417 (1947) (Krylov was formerly the Soviet judge on the International Court of Justice).

The Diplomatic Dictionary, an international legal publication edited by Vyshinsky in 1948 in Moscow, visualized such an apparatus in the self-assistance carried out by various States to suit their own ideas and purposes. Thus it would be possible to enforce rules of international law as long as they were generally accepted. Snyder & Bracht, supra at 64.

127 P. CORBETT, supra note 8, at 99-100. See Vyshinskii, Mezhdunarodnoe pravo i mezhdunarodnye organizatsii [International Law and International Organizations], SOVETSKOE GOSUDARSTVO I PRAVO, No. 1 at 22 (1948), cited in P. CORBETT, supra at 100 n.27.

128 H. BERMAN, supra note 124, at 46.
rating a positive theory of law, and not merely renouncing the negative and nihilistic theories of Pashukanis and his predecessors, Vyshinskii could scarcely get beyond platitudes:

“Our law is the embodiment in statutes of the will of the people,” he wrote. “In capitalist society reference to the will of the people serves as a screen which covers the exploitative character of the bourgeois state. In our conditions the matter is in principle otherwise.” “Our laws are the expression of the will of our people as it directs and creates history under the leadership of the working class. The will of the working class with us is fused with the will of the whole people.”

Such generalities hardly constitute a theory of law, but perhaps this is why Vyshinskii gained popularity in the government.

The claim of Vyshinskii that there was a Soviet system of international law was in vain. There was no general recognition of Soviet international law, and recognition of a law or a principle of international law is essential to its functional use. Moreover, each time the Soviet government referred in their diplomatic notes and negotiations to international law, they were referring (and still are) to that general system of law recognized by the Western Nations. Indeed, it is doubtful whether the Soviet international law would be acceptable today even to other Communist States, such as Red China or Czechoslovakia.

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129 Id. See also 1 J. HAZARD & I. SHAPIRO, supra note 41, at 7.
130 In 1949 Vyshinskii achieved the high rank of Minister of Foreign Affairs. P. CORBETT, supra note 8, at 100.
131 See J. BRIERLY, supra note 2, at 41-45.
133 On Sino-Soviet relations the following excerpts from a recent Soviet foreign policy speech by Foreign Minister Andrei A. Gromyko to the Supreme Soviet (Parliament) are especially apropos:

The decisions of party congresses and plenary meetings of the Soviet party's Central Committee contain a profound and principled appraisal of the splitting and adventurist position of Mao Tse-tung's group in international affairs, its provocative, anti-Leninist line in the international Communist and worker's movement. . . . Everything possible is being done from our side to prevent a deterioration of state relations with China.

This year the Soviet Government presented concrete proposals to the Chinese Government on questions of trade, on joint utilization of border rivers for shipping and on some other questions. But Peking remains deaf to any initiative reflecting concern for the present and future of Soviet-Chinese relations.

Through the fault of the Peking authorities the volume of Soviet-Chinese trade has shrunk 95 per cent since 1959 and has reached a trifling size. Cultural ties between our countries, not to mention public contacts, have actually been severed. . . .

It has more than once been said from the Soviet side that we are in favor of good relations with the United States, in favor of cooperation in solving topical international problems. N.Y. Times, June 28, 1968, at 12, col. 8.
During the period of revision, Yevgeni A. Korovin had regained much of his former influence. Seizing upon the proper Weltanschauung, he noted that peaceful co-operation between the Soviet Union and the capitalistic countries was vitally necessary at this time and that this fact had been acknowledged by the Soviet government in accepting the humanitarian principles established at the Hague Convention on the rules of warfare in 1907, even though these conventions had been signed by the representatives of the Imperial Russian government.

The Soviet view of international law thus changed in two decades "from a mere temporary compromise to a fundamental and even active co-operation between the two world systems of property." Vyshinskii, during this period, defined international law as "the collection of rules regulating the relations between States in the course of their struggle and co-operation, expressing the will of the ruling classes in these States and protected by compulsion carried out by States individually or collectively." Although this definition placed stress on the legal sanctions of international law, the rules of this law were considered by the Soviets to belong to a socialistic legal system. Therefore, the Soviet Union would now exclusively apply socialistic norms in its international legal relations.

The basis of these international legal relations lay in important international treaties. Legal effect was conceded not only to

On American-Chinese-Soviet relations, see note 227 infra. On Czech-Soviet relations, see text accompanying notes 229-34 infra.

134 Weltanschauung is an ideological world view. Compare with Zeitgeist, defined in note 7 supra.

135 Snyder & Bracht, supra note 1, at 64-65, citing E. KOROVIN, KRATKY KURS MEZHDUNARODNOVA PRAVA [SHORT COURSE IN INTERNATIONAL LAW] 10 (Soviet Union 1944); also cited by Hazard, The Soviet Union and International Law, in SOVIET STUDIES 192 (1950). See note 30 supra.

136 Snyder & Bracht, supra note 1, at 65.

137 Id. at 70, citing A. VYSHINSKII, VOPROSY MEZHDUNARODNOVO PRAVA I MEZHDUNARODNOI POLITIKI [QUESTIONS OF INTERNATIONAL LAW AND INTERNATIONAL POLICY] 480 (1949); also cited by Korovin, SOVETSKOE GOSUDARSTVO I PRAVO [SOV. GOS. I PRAVO], No. 6, at 41 (1954). Compare with S. KRYLOV, supra note 126, at 417.

138 Snyder & Bracht, supra note 1, at 65, citing Rappoport, Suschchnost sovremen

ternational practice, a relatively stable concept, but also to *de facto* relations between States. These were unstable and subject to change almost from day to day. On the other hand, international practice was considered to rest mainly on international custom.\textsuperscript{140} . . .

Most important was the emphasis placed on the role of the State in international law. Only those relations in which States took part as bearers of the highest sovereign rights were considered legally binding.\textsuperscript{141} This view clearly revealed the great importance that modern [S]oviet legal theoreticians attribute to State sovereignty. This conception is a consequence of the official [S]oviet doctrine of the necessity of the continuation of a strong State in Russia because of capitalistic encirclement. The old idea of class struggle was not yet abandoned.\textsuperscript{142}

D. Grigori I. Tunkin: The Modern Political Instrument of International Law

After Vyshinskii's death, Grigori I. Tunkin became the official spokesman for the Soviet jurists, and the fourth period in the development of a theory of international law in the Soviet Union began.\textsuperscript{143} The basic interpretation of Soviet legal theory went through no major changes after Vyshinskii. However, shortly after Stalin's death in 1953, Tunkin revealed an apparent shift and strengthening of emphasis onto international law as an *instrument* of politics, a tool of achievement for the political state. According to the new Soviet legal spokesman, international law was not merely a fund of principles and norms binding upon states. Like all law, it was also an instrument of policy, which both the socialist and capitalist states could employ in the execution of their foreign policies. "The generally recognized principles and norms being democratic in essence, [could] only be used as an instrument of policy within limits determined by the content of these norms."\textsuperscript{144}

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\textsuperscript{140} Kozhevnikov, *supra* note 139, at 636.

\textsuperscript{141} *Id.*

\textsuperscript{142} Snyder & Bracht, *supra* note 1, at 65 (footnotes renumbered and rewritten).

\textsuperscript{143} Note, however, that Tunkin was much favored while Vyshinskii was still living, but at that time he was not greatly in the public eye because the views he expressed generally conformed to Vyshinskii's.

Tunkin maintained that Soviet legal thought had remained constant with the theories of Vyshinskii; but he stressed that there was a general system of international law, with rules that apply to all states regardless of their particular social systems. Earlier, in 1951, Tunkin and Vyshinskii had defined this law as the "will of the ruling classes, expressed in a body of norms, treaty or customary, regulating the legal relations between States, developed in the process of their struggle and cooperation and guaranteed by individual or collective State compulsion." This definition can be recognized to be, in effect, the same as was put forth by Korovin and then later Pashukanis, only now the evil words interclass and compromise had been expurgated. Note, however, that there is an inconsistency in this definition, if it is correctly translated; Tunkin is evidently a Marxist and, as such, he should not have permitted himself to define international law as the will of the ruling classes and as a general system. A true Marxist would refuse to admit that the Soviet Union also has a ruling class, and it is mere polemics to assert that there is a general system of international law which is not by its inherent nature an interclass law.

The Soviet dilemma was now to reconcile international law as an instrument of Soviet politics with international law as "a body of rules and principles of action which are binding upon civilized states in their relations with one another." In reality (Western and Eastern), this had been the dilemma since the Soviet government's accession in 1917. However, it was not until the 1950's that Soviet jurists thought it necessary, and perhaps possible, to make the full reconciliation in their theory.

V. THE SOVIET'S USE OF INTERNATIONAL LAW AS A WEAPON AND A RECONCILIATION

For the Soviet government, international law is not only an instrument of politics but it may be used as a weapon in the struggles between states. Russia readily admits that all states utilize interna-
tional law as a weapon. From her vantage point, however, there appears to exist a dichotomy in the respective approaches to such utilization: while the Soviet Union employs international law as a means for strengthening the "democratic principles of law and peace in international relations," the capitalistic states use it as a "means of deceiving the peoples, of concealing imperialist designs of expansion and aggression." It is difficult to imagine one integrated body — a superstructure — of principles that could encompass such opposed purposes.

A brief glance, in retrospect, at the groping and disjointed development of jurisprudential theories in Russia may reveal the probability and necessity of achieving such an integration. Karl Marx had viewed the means of production as the basis for regulation of the material life of a society. In his opinion the various relations of this production were "... the real basis upon which is erected a juridical and political superstructure and to which certain forms of social consciousness correspond." Then Stalin, in the early 1950's, promoted the concept of international law as part of a superstructure over both the capitalistic as well as the socialistic economic basis. As the integrated superstructure naturally and eclectically evolved, according to Soviet ideology, the socialistic basis would eventually replace the capitalistic one and there would then be one true international law which would necessarily have a socialistic character.

In accordance with the present [S]oviet policy regulating international relations three different types of international law are supposed to exist. First, a capitalistic system regulating relations between capitalistic States; second, a socialistic system regulating relations between socialistic States; and finally, a common system

150 P. Corbett, supra note 8, at 101, citing Mezhdunarodnoe pravo, supra note 146, at 3. See note 151 infra.

151 Recognizing that such an integrated superstructure has not yet been effected, the Soviets rationalized their dichotomy by asserting merely that: "Economics and policy, philosophy and law represent at the present time an area of struggle of the two camps. . . . International law also represents such an area." Mezhdunarodnoe pravo, supra note 146, at 3-4; translated in Gzibowski, Propaganda and the Soviet Concept of World Order, 31 Law & Contemp. Prob. 479, 498 (1966). See also note 181 infra.


153 J. Stalin, Marxismus in der Sprachwissenschaft 7 (German ed. 1951), cited in Snyder & Bracht, supra note 1, at 67 n.58. See also R. Schlesinger, Soviet Legal Theory 19 (1951).

154 Kozhevnikov, Nyekotorye voprosy mezhdunarodnoy pravo [Some Questions on International Law], Sov. Gos. I Pravo, No. 6, at 29 (1951), cited in Snyder & Bracht, supra note 1, at 67 n.65.
regulating international relations between capitalistic and socialistic States.\footnote{Snyder \& Bracht, supra note 1, at 68, citing Kozhevnikov, supra note 154, at 33.}

This threefold concept of international law was adhered to by Korovin in an article published in 1951.\footnote{Korovin, Ob obshchepriznannykh normakh mezhdunarodnovo pravo [On Generally Recognized Norms of International Law], Sov. Gos. j PRAVO, No. 9, at 17 (1951), cited in Snyder \& Bracht, supra note 1, at 68 n.67.} However, his views were sharply attacked the next year when the Soviets proclaimed that there was but one universal system of international law. Under this system there were said to exist two totally different types of policy, namely, the policy of the capitalistic as opposed to that of the socialistic states.\footnote{Snyder \& Bracht, supra note 1, at 68, citing a review of this discussion the comment by Gaidukov, in Sov. Gos. j PRAVO, No. 7, at 69 (1952).} Korovin revised his thinking accordingly\footnote{Korovin, Nyekotorye osnovnye voprosy sovremennoi teorii mezhdunarodnovo pravo [Some Basic Questions of the Present Theory of International Law], Sov. Gos. j PRAVO, No. 6, at 34 (1954), cited in Snyder \& Bracht, supra note 1, at 68 n.71.} and enunciated a new Soviet definition of international law: "The collection of rules regulating relations between States and protected by them, developed in the course of international cooperation or struggle and aiming at the satisfaction of the material and spiritual needs of States in the interests of ruling classes of these States."\footnote{Korovin, supra note 158, at 41, cited in Snyder \& Bracht, supra note 1, at 69.} Once again Korovin was criticized, this time for ignoring the Marxist doctrine that law could exist only where there was compulsion and for failing to mention the will of the ruling class in international law.\footnote{Snyder \& Bracht, supra note 1, at 70.} In effect, Vyshinskii's definition of international law was to continue as valid according to the Soviet legal theorists.\footnote{Snyder \& Bracht, supra note 1, at 68, citing text accompanying note 137 supra.}

As was noted above, it is in the writings of Tunkin, in 1956, that we find the first concrete reconciliation of the Soviet dilemma appearing in Soviet legal theory. This appearance went along with Khrushchev's conciliatory tone in Soviet international relations throughout most of 1956.\footnote{See H. Shaffer, The Soviet System in Theory and Practice 177-82 (H. Shaffer ed. 1965) (excerpt from P. Fredenko, Lenin's Views on War and Peaceful Coexistence, BULLETIN, INSTITUTE FOR THE STUDY OF THE U.S.S.R. 27-36 (March 1963)).} In a moderate article titled Peaceful...
Coexistence and International Law,¹⁶³ Tunkin rejected the Western jurists’ view that international law can become real law only with the development of a world government; for this, he claimed, is contrary to the laws and principles of Soviet development.¹⁶⁴ Tunkin conceded that international law cannot consist solely of socialist principles, for if it did, capitalist states would not be able to carry on international relations under it. Being a good ideological Russian, Tunkin therefore claimed that the present development of international law was under the influence of the Soviets. In part he was correct, for the capitalist states have had to reconcile their positions with that of the socialists.¹⁶⁵ But Tunkin also attributed to Soviet initiative two “great advances” of international law: the prohibition of aggressive war and the reinforcement and extension of the Hegelian principle of national self-determination.¹⁶⁶ The thrust of Tunkin’s claims may be interpreted as an attempt to obviate the seeming necessity of affording capitalist ideologies a substantial place in the integration of that superstructure which is international law.

In order to justify both its jurisprudential theories and the concurrent political positions, Soviet doctrine has often made much of sovereignty and self-determination. It is with these terms that the Soviets rationalized the repression of Hungary in 1956.¹⁶⁷ The Hungarian tragedy stands out as just one among many of the Soviet Union’s uses of international law solely as a tool or weapon for self-aggrandizement.¹⁶⁸

From 1956 on, we find the Soviet jurists agreeing more and more in theory with what occurs in practice. The dilemma of a world divided between two great socio-political systems is still present; but, due to the conciliatory utilization of international law as a weapon, the issue of projecting an integrated superstructure of international law has lost its immediacy.¹⁶⁹

¹⁶³ Tunkin, supra note 144, at 5. See P. CORBETT, supra note 8, at 102.
¹⁶⁴ P. CORBETT, supra note 8, at 102.
¹⁶⁵ This is more fully discussed in text accompanying notes 269-95 infra.
¹⁶⁶ Tunkin, supra note 163, at 7-8, cited in P. CORBETT, supra note 8, at 103. See also Korovin, supra note 158, at 38-41, cited in P. CORBETT, supra note 8, at 103 n.34.
¹⁶⁷ P. CORBETT, supra note 8, at 103-04.
¹⁶⁸ See W. WALSH, RUSSIA AND THE SOVIET UNION 520, 522 (1958). For an excellent discussion of a recent attempt by the Soviet Union to use law as an instrument of revolutionary change in Central Asia, see Massell, Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia, 2 LAW & SOC’Y REV. 179 (1968). See also notes 254 and 284 infra, discussing latent dysfunctionality.
¹⁶⁹ In 1957 Milovan Dijas wrote:
Because the present world conflict is unfolding mainly on the basis of op-
VI. THE "FIVE PRINCIPLES" OF PANCH SHILA AND PEACEFUL COEXISTENCE

Tunkin's attempts at a theoretical reconciliation were based on a new theme for Soviet juristic discussion which was brought forth in a joint communique issued by Nehru of India and Chou En-lai of the Chinese People's Republic over the status of Tibet on July 1, 1954. This Chinese-Indian Treaty of 1954 listed "Five Principles" of Panch Shila which were proposed as the basis for international law. Shortly afterwards, at the Bandoeng Conference of 1955, held by a great number of Afro-Asian countries, including Communist China and India, these five principles were formally adopted as representative of their collective aspirations.

The first, and most important, of the principles is the maintenance of mutual respect for the territorial integrity and sovereignty of other states. From this penultimate guideline, the remaining four principles naturally follow: nonaggression, that is, the mutual obligation not to attack other states; the mutual obligation of non-intervention in the internal affairs of other states; mutual equality and the granting of equal advantages; and peaceful coexistence. These five principles are reminiscent of Points III, VI, and XIV of President Woodrow Wilson's famous "Fourteen Points," and, ironically, they reflect only a verbal identity with the Panch Shila of Buddhism. In fact, the principles of coexistence enunciated at

position between [socio-political] systems, it has more of the character of a class conflict than of opposition between nations and states. Any future war would be a world-wide civil war rather than a war between governments and nations. M. DJILAS, supra note 52, at 196; see note 59 supra.

170 P. CORBETT, supra note 8, at 106; Editorial Comment, Co-existence Bows Out, 59 AM. J. INT'L L. 59 (1965).

171 W. FRIEDMANN, supra note 139, at 322; Editorial Comment, supra note 170, at 59. See J. TRISKA & R. SLUSSER, supra note 139, at 26 n.68.

172 It has been remarked that:

One of the most complete statements of the mutual duties of non-interference in each other's internal affairs by the Soviet Union and capitalist governments was the exchange of notes between [Soviet Foreign Commissar] Maxim Litvinov[y] and President Roosevelt of November 16, 1933, preliminary to re-establishing diplomatic relations between the United States and Russia. Grzybowski, supra note 151, at 485.

The Soviet note, which is identical in substance to the American reply, is reproduced in id. at 485-86, and in 28 AM. J. INT'L L. SUPP. 3-4 (1934).

173 P. CORBETT, supra note 8, at 106; W. FRIEDMANN, supra note 139, at 322. See also Editorial Comment, Legal Research on Peaceful Co-existence, 51 AM. J. INT'L L. 63 (1957).


175 The Panch Shila of Buddhism commands abstinence from destroying life, from theft, from unchastity, from lying, and from the use of intoxicating liquor. Cf. H.
Bandoeng represent no more than the fundamental tenets of classical international law. The only significance of the Conference was the emergence of a "political manifesto by nations that believed themselves to be united in their anti-colonialism, their hostility to Western capitalism, and the community of their interests."176

The Soviets not only embraced these five principles but also claimed that they were applicable to both the socialistic and capitalist states. One may speculate that again Russia was confronted with what it interpreted to be the proper Weltanschauung and thus seized upon the pronunciation by her fellow socialistic states as a means to aid Soviet jurisprudence in its groping development toward practicability.177 Objectively speaking, this action was logical in its relation to the background of Soviet politics. As one knowledgeable author has pointed out, the Soviet theory of international relations is grounded upon the Clausewitzian model of politics which views peace as the pursuit of policy by nonmilitary means.178 After the period of foreign intervention, when Stalin was forced to rationalize the international position of the Soviet government, he stated that "the period of the open war was re-
placed by a period of peaceful struggle." In this context, moreover, it must be kept in mind that coexistence itself necessitates some form of struggle. Indeed, those inferential expressions in 1918 by Georgi V. Chicherin — the Soviet People's Commissar for Foreign Affairs — that the Soviet regime's raison d'être was bound up with a struggling coexistence which manifests itself most strongly in anticapitalist propaganda, still remain demonstrative of Russia's political position.180

Once the doctrine of the inevitability of war lost its cogency in the eyes of Soviet theoreticians, propaganda became the chief vehicular technique in the peaceful ideological struggle between the two worlds of socialism and capitalism.181 Premier Khrushchev, in 1957, stated that the ideological struggle was an indispensable condition to the peaceful relations of socialist countries with capitalist nations:

Messrs. [C]apitalists accuse us of simultaneously proclaiming the policy of peaceful coexistence and talking about the struggle between the communist and bourgeois ideologies. Yes, this struggle goes on because it expresses the interests of different classes. This is fully legitimate. Capitalists... defend by all means the private ownership of the means of production. . . . We communists... are opposed to private ownership of the means of production. . . . But the capitalist and socialist countries are situated on the same planet; they cannot depart anywhere from this planet. This means we must coexist. . . . Our ideas will conquer mankind.182

Reflecting the Clausewitzian ideal and stating Khruschev's point a different way, the following statement had appeared in Pravda:

Peaceful coexistence is not a conflictless life. As long as different social-political systems continue to exist, the antagonisms between them are unavoidable. Peaceful coexistence is a struggle — political, economic, and ideological. . . . Coexistence means that one does not fight the other, does not attempt to solve international disputes


180 See Grzybowski, supra note 151, at 486-87, 497. On Chicherin, see C. CLARKSON, supra note 2, at 577; J. TRISKA & D. FINLEY, supra note 68, at 36, 419. See also Lenin's Marginal Notes on a Letter from G.V. Chicherin (March 14, 1922), and Letter from V.I. Lenin to G.V. Chicherin (March 14, 1922), in V. Lenin, supra note 177, at 227 and 236.

181 Grzybowski, supra note 151, at 498. "Peaceful co-existence does not extend to the sphere of ideology . . . ideological struggle between the two social systems cannot cease because it is part and parcel of the class struggle," Izvestia said in a leading article on May 27." Soviet News, June 4, 1968, at 126. For a discussion of the effect of propaganda in international law, see J. WHITTON & A. LARSON, PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS (1964); Davies, The American Commitment to Public Propaganda, in Symposium on International Control of Propaganda, 31 Law & CONTEMP. PROB. 452 (1966).

182 Pravda, April 16, 1957, cited in Grzybowski, supra note 151, at 498 n.66.
by arms, but that one competes through peaceful work and cultural activities. But we would cease to be Marxist-Leninists if we forgot the elementary laws of social life, the laws of class struggle.\textsuperscript{183}

In the Soviet view, peaceful coexistence and ideological struggle represent the inherent and inseparable rudiments of international relations between socialist and capitalist states.\textsuperscript{184} In a letter to the *Revue Générale de Droit International Public* (Paris),\textsuperscript{185} eight Soviet professors — among whom was the late Yevgeni A. Korovin — expressed the opinion that the comprehensive schedule of the Communist Party must necessarily attribute a large portion of its policies to the theme of *peaceful coexistence*. To implement this general theme in the international arena, according to the eight theoreticians, different political, economic, and cultural variations of class struggle are employed by the Party in exclusively peaceful techniques. The new program of the Communist Party in 1961 ultimately reflected the viewpoint of these Russian intellectuals when it defined peaceful coexistence as a "peaceful competition between socialism and capitalism on an international scale" and as a "specific form of class struggle."\textsuperscript{186}

The "Five Principles" of *Panch Shila* fitted in well with the coexistence theme popular with the Soviet government under Premier Khrushchev and, therefore, with the Soviet legal theorists of this era in Soviet foreign policy.\textsuperscript{187} In referring to these principles after the peaceful resolution of the Cuban Crisis in October 1962,\textsuperscript{188} Khrushchev acknowledged a profound awareness that there can be no ele-

\textsuperscript{183} Pravda, Feb. 13, 1957, cited in Grzybowski, supra note 151, at 498 n.67.

\textsuperscript{184} Grzybowski, supra note 151, at 498.

\textsuperscript{185} The letter is reprinted in E. McWhinney, "PEACEFUL COEXISTENCE" AND SOVIET-WESTERN INTERNATIONAL LAW 128 (1964), cited in Grzybowski, supra note 151, at 499 n.68, who also lists the following citations:


\textsuperscript{186} Grzybowski, supra note 151, at 499.

\textsuperscript{187} W. Friedmann, supra note 139, at 330.

ment of trust in the relations among states unless the norms of international law are observed and accepted commitments are fulfilled. Without trust, he further stated, there can never be true peaceful coexistence. In order to solidify the Soviet position and gain acceptance in the eyes of the world, the soon-to-be-deposed Premier concluded his attempt at saving the socialist image by announcing that Russia had always upheld the principle of peaceful coexistence and would continue to assert herself in defense of the norms of international law where relations among states were involved.\textsuperscript{189}

The Soviets had thus attained a new and definitive level of jurisprudence which was now evidenced by the typical statement that: "Peaceful coexistence was inconceivable without international legality, [for p]eaceful coexistence is international law in action."\textsuperscript{190} In an article by Korovin, F.I. Kozhevnikov, and G.P. Zadorozhny, published in 1962 and entitled \textit{Peaceful Coexistence and International Law}, the following clarification appeared:

Peaceful coexistence means ensuring sovereignty, territorial inviolability, political independence and equality of all peoples and states, respect for systems chosen by the peoples, and recognition of the right of every people to choose, in conformity with its sovereign will, one or another form of government, as well as a new socio-economic system, without interference in one another's internal affairs and without export of revolution and counterrevolution.\textsuperscript{191}

The "Five Principles" of \textit{Panch Shila} are clearly evident in this statement. In an article by Grigori I. Tunkin, published the same year, there is a further exegesis of this phase in Soviet international legal theory:

"Peaceful coexistence," the Party Program states, "presupposes: rejection of war as a means of solution of problems in dispute between states, which are to be solved by negotiations, equality, mutual understanding and confidence among states, with due consideration for each other's interests . . . ."\textsuperscript{192}

\textsuperscript{189} Korovin, Kozhevnikov & Zadorozhny, \textit{Peaceful Coexistence and International Law}, Izvestia, April 18, 1962; translated in \textit{Current Digest of the Soviet Press}, May 9, 1962, at 8-9; reprinted in H. Shaffer, supra note 162, at 193. \textit{See also Soviet Foreign Policy}, supra note 177, at 266-68.

\textsuperscript{190} Id.

\textsuperscript{191} Id. "Peaceful co-existence," as the Soviet lawyers think of it means as a minimum the condition necessary to keep non-Soviet power from penetrating into the Soviet orbit. It may also mean the relaxation of barriers to Soviet propaganda of her ideas and influences across the frontiers of her orbit." Editorial Comment, \textit{Legal Research on "Peaceful Co-existence"}, 51 Am. J. Int'l L. 63, 71 (1957).

VII. "COEXISTENCE" TO "CO-OPERATION": A CHANGE IN TERMINOLOGY AND APPROACH

The latest shift in Soviet international legal policy has been from Khrushchev’s coexistence theme to Brezhnev and Kosygin’s theme of co-operation. As was noted above, in 1954 the Soviet Union began promoting the theme of peaceful coexistence. By 1956 they had succeeded in having the subject placed on the agendas of several international associations of scholars. Many Western members in these associations wanted to substitute a topic to be called “peaceful co-operation” for the Eastern European favorite.\(^{193}\)

A. A Change in Terminology

At the General Conference of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in 1954, an Indian draft resolution was submitted as a topic for UNESCO-supported research. On this resolution the Conference substituted the words “peaceful co-operation” for the words “peaceful coexistence.”\(^{194}\) A year later, at the round table meeting organized by the International Political Science Association in Stockholm, August 20-30, 1955, the “distinction was drawn between co-existence without collaboration on the one hand, and active co-operation between states on the other.” But due to the sharp variation in views as to whether coexistence represented only a compromise between open conflict and cold war or whether it meant total harmony in the relations among world states, the attempt to arrive at a uniformly acceptable definition was tabled.\(^{195}\)

The battle of definitions re-emerged when law professors of East and West met at UNESCO House in Paris, February 17-21, 1956. At this meeting the Eastern European delegates argued to no avail for the resubstitution of the “coexistence” theme.\(^{196}\) Yevgeni A. Korovin, the Soviet representative, wrote a report on the meeting in which he criticized the efforts of the American representative to further establish a theme relating to peaceful co-operation rather than peaceful coexistence.\(^{197}\) Korovin suggested that the

\(^{195}\) Editorial Comment, supra note 193, at 64.
\(^{196}\) For an account of this debate, see Hazard, International Tensions and Legal Research, 9 J. LEGAL ED. 29-30 (1956).
\(^{197}\) See Korovin, The UNESCO Jurists Conference, NEW TIMES, No. 15, April 5, 1956, at 20-23.
American representative was possibly remembering "that Secretary of State [John Foster] Dulles had said that 'co-existence' was a word to be shied at, to be on one's guard against." He further argued that the American was trying to avoid discussion of the relations between nations belonging to different socio-political systems.\textsuperscript{198} It was too early at this time, only 3 years after the death of Stalin, for the Soviets to ideologically embrace the theme of mutual cooperation.

In August 1964, the International Law Association's Tokyo Conference followed UNESCO's lead, as well as that of the United Nations,\textsuperscript{199} and changed the name of an item which had been on its agenda for 8 years from "Juridical Aspects of Peaceful Co-existence" to "Committee on Principles of International Security and Cooperation."\textsuperscript{200} The Soviets accepted the change as part of a compromise.

A further compromise was necessary to overcome the fear on the part of some of the Conference members that the work of the committee, as set forth in its list of sixteen principles of peaceful coexistence in dogmatic form, would be understood as creating the basis for "new" law. To meet this objection, it was declared by the committee that the change in name was made "without prejudging the issue of the definitive character of the list of principles contained [in the committee's report] or the question whether these principles shall be deemed to be juridical principles of peaceful coexistence or principles of international law."\textsuperscript{201} With this statement the question as to whether new law was being created was avoided. The proponents of "peaceful coexistence" could continue to call the pronouncements of the committee what they willed, "while the rest of the

\textsuperscript{198} Editorial Comment, supra note 193, at 65.


\textsuperscript{201} Editorial Comment, supra note 199, at 61.
world could think of them as burning problems in the field of traditional international law.\textsuperscript{202}

B. The "New" Approach and the "New" International Law of the Détente Era

The Tokyo decision was more than a "new move in a wide-ranging dispute over terminology."\textsuperscript{203} It was a manifestation of a change in the basic approach to international lawmaking. The coexistence theme of the Cold War era implied a static or quiescent approach to East-West legal relations. While the Soviets stressed ideological struggle, class conflict, and fear of capitalistic encirclement,\textsuperscript{204} the Americans in this era underwent the purges of McCarthyism and the Red Scare tactics which instilled mass fear of "monolithic" Communism and "creeping socialism."\textsuperscript{205} In direct contrast, the co-operation theme of the post Cold War era has implied a dynamic, mutual, and consensual approach to East-West legal relations. This latest era, being that of a Soviet-Western détente, has established "new" international law.

In a sense, the international law of the détente, constructed on a pragmatic basis of inter-systems agreement or consensus, and demonstrated empirically in the actual record of such \textit{de facto} accommodations and give-and-take, represents a species of "new" international law.\textsuperscript{206} At least, it represents a new gloss on the old customary international law, albeit a gloss that is specially concerned, in the special societal conditions of the contemporary world community, with considerations of security, of stability of settled ex-

\textsuperscript{202} Id.
\textsuperscript{203} Id. at 59.
\textsuperscript{204} See text accompanying note 182 supra.
\textsuperscript{205} Thus, domestically, the Communist threat in the early 1950's led to McCarthyism, a search for heresy in which the end goal of eliminating alleged un-American attitudes and behavior justified any means, including disregard for "due process of law," which is the basic guarantee of all our civil liberties. At times, this hunt went to frightening lengths, as when the United States Information Agency actually burned books that might be suspect. . . . In foreign policy, our reaction to the Communist threat to the American way of life was to support almost any "anti-Communist" regime. Thus, the United States associated itself with traditional regimes whose days were numbered because they had alienated mass support: Bao Dai in Indochina and King Faisal in Iraq were just two examples of such regimes. J. SPANIER, AMERICAN FOREIGN POLICY SINCE WORLD WAR II 191-92 (2d rev. ed. 1965).


pectations, and of certainty and the avoidance of surprise in inter-
group (more accurately inter-systems) relations — the old "Watch-
man's State" legal virtues.207

The "new" international lawmaking, in the pluralistic world of
legal value-systems, concentrates on the pragmatic, empirically
based, problem oriented, step-by-step — or disjointed incremen-
talistic208 — approach to conflicts resolution.209 Practical application
of this particular approach requires peaceful, consensual change as
the operational methodology. Nations faced with particular ten-
sion-issues of the present-day world community must avoid "temp-
tations to abstract, a priori, natural-law-type exercises in general
acts of codification, uno ictu, of asserted principles of coexistence
[(friendly relations)]."210 Any efforts at deductive postulation
from the seemingly self-evident general principles of Soviet-West-
ern juristic relations could only result in a natural law-type absol-
utism. In view of all the possibilities of semantic confusion and
normative equivocality between the two systems, such exercises
would be of little practical value when contrasted with the actual
conduct of international relations.211

While an attempt to create codified world law and the suprana-
tional power necessary to its enforcement would violate Marxist

207 McWhinney, The "New" Countries and the "New" International Law: The
United Nations' Special Conference on Friendly Relations and Co-operation Among
States, 60 AM. J. INT'L L. 1, 2 (1966) (footnote renumbered and rewritten).

208 Let us describe this kind of political decision-making in more detail. It is
decision-making through small or incremental moves on particular problems
rather than through a comprehensive reform program. It is also endless; it
takes the form of an indefinite sequence of policy moves. Moreover, it is
exploratory in that the goals of policy-making continue to change as new ex-
perience with policy throws new light on what is possible and desirable. In
this sense, it is also better described as moving away from known social ills
rather than as moving toward a known and relatively stable goal. In any
case, it is policy-making that chooses those goals that draw policies forward in
the light of what recent policy steps have shown to be probably realizable; the
utopian goal, chosen for its attractiveness without thought of its feasibility, is
not a heavy influence on this kind of policy-making. In the frequency with
which past moves are found wanting and new moves debated, it reveals both
man's limited capacities to understand and solve complex problems and an un-
settled, shifting compromise of conflicting values. D. Braybrooke & C.
The disjointed incrementalistic strategy is the operational methodology for a high
integration index in information processing. See H. Schroder, M. Driver & S.
Streufert, Human Information Processing 22 (1967); Figure 1, at pp. 242-45
infra. The strategy and the four index levels of information processing are more fully
discussed in text accompanying notes 389-406 infra.

209 McWhinney, supra note 207, at 2.

210 Id. See note 307 infra.

211 McWhinney, supra note 206, at 1-2. For a discussion of Soviet legal theorists'
ideological abhorrence to natural law theory, see note 51 supra.
rules of dialectic development at this stage of history, the establishment of "new international Law" \(^{212}\) between the Marxian-Socialist and capitalist states is viewed currently by the Soviets as a necessary result of the dialectical process. This position is elaborated in a 1967 Soviet textbook on international law by Grigori I. Tunkin, \(^{213}\) who rejects the school of thought that saw no possibility of creating an operative international law because of the conflict between socialist and capitalist states. Tunkin sees the dialectical process in full swing: the capitalist thesis is meeting the counter-thrust of the Marxian-Socialist antithesis, and a new synthesis is coming into being. "One need not wait until the achievement of the new thesis to have international law: it is here already and it is progressive because it marks a transition from an outworn epoch of history to the epoch of the future." \(^{214}\) Tunkin acclaims the development of the "new" international law through consensus, but views the principal impediment to an even speedier development in the policy of "from positions of strength," which he attributes to the President of the United States and to American legal theorists generally. \(^{215}\)

\(^{212}\) Professor Grigori I. Tunkin has insisted that what the Soviet Union is advocating is "new international Law" only, and that it has certainly called "neither for a 'new international law' nor for a 'revolution' in international law." Tunkin, Letter to The Times, London, Feb. 25, 1963, \textit{cited in} McWhinney, supra note 206, at 3 n.10.

The actual basis for distinction between "new international Law" and a "new international law" would appear, in the context in which Professor Tunkin was discussing this question in his letter to The Times, to have been the distinction between, on the one hand, a species of more or less evolutionary international law-making that would accept the corpus of classical international law doctrine as a necessary minimum starting point for legal innovation and creative adaptation of old rules and principles, and on the other hand, some more radical approach that would presumably consider classical international law as \textit{per se} outdated and without any juridical effect and significance in present-day terms. McWhinney supra.


\(^{214}\) Book Review, supra note 213, at 209.

\(^{215}\) \textit{Id.} For an example, see generally W. KINTNER, PEACE AND THE STRATEGY CONFLICT (1968). Note also the following editorial comment:

\begin{quote}
The very day after Republicans had stalled Senate Foreign Relations committee action on the nuclear nonproliferation treaty, the House shouted down an effort to slow up deployment of the Sentinel anti-ballistic-missile system. The House then overwhelmingly passed a record $72.2-billion defense appropriation. . . .

A House majority — Republicans and Democrats alike — apparently believes it is demonstrating America's determination to keep guard against world Communism by giving the nuclear arms race a new upward spiral. In this error it echoes not only Mr. Nixon but Defense Secretary Clifford, who contends that in deploying a light Sentinel system the United States will build \textit{a position of strength} for negotiations. Editorial, N.Y. Times, Sept. 15, 1968, § E, at 14, col. 1(emphasis added).
\end{quote}
The self-initiative function is another important aspect of the "new" approach in the era of the East-West détente which bears mentioning. In a rare interview with the Western press, Premier Krushchev epitomized this aspect by the phrase: "politic of mutual example." His reference was indeed an apt one to indicate that category of international lawmaking which typically involves a unilateral initiative by either the Soviet or the Western bloc in the confident expectation that pressure from world public opinion will inevitably force the other bloc to follow suit. An early example of this "self-initiative" aspect was the Moscow Partial Test Ban Treaty of August 1963, which "simply ratified and concretized in certain particulars a fundamental accommodation or détente that had already occurred de facto between the two systems." The Western initiative leading to the establishment of the "Hot Line" emergency communications system between the Kremlin and the White House, and the similar initiative leading to the Soviet-Western accord on preventing the orbiting of nuclear weapons in space vehicles, which itself was embodied in a United Nations General Assembly resolution, are two other examples.

The process of international lawmaking incorporated by the "self-initiative" or "politic of mutual example" is also apparent "in the rapidly successive Soviet and Western decisions as to reduction in arms expenditure; as to the cessation of interference in each other's radio propaganda programs; as to the reduction in uranium production and even the closing of nuclear reactor plants."

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217 McWhinney, supra note 206, at 8.

218 Id. at 1.


221 McWhinney, supra note 206, at 8.

President Johnson avowed a "principle of mutual example" in attempting to provoke the Soviet Union into following the United States initiative in cutting back uranium production and in the closing of atomic reactor plants in 1964. Foster, U.S. Proposes Curb on Spread of Nuclear Weapons, 50 DEP'T OF STATE BULLETIN 376, 379 (1964). The State of the Union, Address of the President to the Congress, Jan. 8, 1964, printed in 50 DEP'T OF STATE BULLETIN 110 (1964). See also President John-
Other examples of the "new" international law of the détente era which reflect the step-by-step, or incremental, approach to resolution of Soviet-Western conflicts and the reliance on exemplary unilateral action to effect mutual change, are the United States—Soviet Consular Treaty of 1965, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, which was signed at Washington, London, and Moscow on January 27, 1967, the United States—Soviet Agreement on a Non-proliferation of Nuclear Weapons Treaty (January 18, 1968), and the recent steps toward a mutually advantageous East-West trade agreement.


When Premier Khrushchev replied to the Western initiative, it was "to announce not merely a reduction in Soviet uranium production but also the immediate suspension of the construction of two large new atomic reactors for the production of plutonium."


224 On January 18, 1968, the United States and the Soviet Union agreed on the complete draft of a nuclear weapons nonproliferation treaty. N.Y. Times, Jan. 19, 1968, at 1, col. 1; Cleveland Plain Dealer, Jan. 19, 1968, at 5, col. 1-6. "The new treaty is the first significant arms control measure that has been taken to curb the nuclear arms race itself." N.Y. Times, Jan. 21, 1968, § 4, at 1, col. 7. The text of the draft treaty is reprinted in 62 AM. J. INT'L L. 817 (1968). The United States Senate Foreign Relations Committee action on this treaty has been recently stalled. N.Y. Times, Sept. 12, 1968, at 1, col. 3 (city ed.); see note 215 supra and notes 227 & 280 infra. See also Mallison, The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars, 36 GEO. WASH. L. REV. 308 (1967); Gilpatrick, Are We on the Brink of Another Arms Race?, N.Y. Times, Jan. 15, 1967, § 6 (Magazine), at 32.

225 See, e.g., S.J. Res. 169, 90th Cong., 2d Sess. (1968) (modifying certain controlling regulations and financing restrictions so as to permit "an increase in trade in peaceful goods between the U.S. and the nations of Eastern Europe"). See discussion of this resolution in 114 CONG. REC. S5251 (1968). For an extended discussion on current East-West trade, see 114 CONG. REC. E3825-37 (1968). See also Rajski, The Law of
The détente era of peaceful co-operation has greatly increased amicable relations between the Soviet Union and the United States. For the first time persons can fly direct from one country to the other. In the shifting and restructuring of world power conditions in the emerging Third World, it appears that the Soviet Union and the United States may eventually, once more, be allies. It could be hypothesized at this point that if the Vietnam conflict were brought to a “just and honorable peace,” the Soviet Union might have the following choice: (1) either to create a new focal point for emphasizing the frictions of a world polarized in its ideological convictions; or (2) to openly ally with the Western countries against the supposed growing menace of Communist China.  

While the


226 N.Y. Times, July 16, 1968, at 1, cols. 4-7 (city ed.). “The fact that the flights could take place despite Soviet-American antagonism, particularly over the war in Vietnam, was a source of some encouragement to officials of both countries.” Id. at 1, col. 4. See also Johnson Hopeful About a Detente by U.S. and Soviet, id. at 1, col. 3. For the text of the international agreement which made the East-West air flights possible, see Amendment to U.S.-U.S.S.R. Civil Air Transport Agreement, May 6, 1968, DEP’T OF STATE PRESS RELEASE NO. 94 (May 6, 1968); reprinted in 7 INT’L LEGAL MATERIALS 571 (1968). The text of the Civil Air Transport Agreement, Nov. 4, 1966, T.I.A.S. No. 6135, is reprinted in 6 INT’L LEGAL MATERIALS 82 (1967).

227 The steady withdrawal of Great Britain from its positions of power throughout the world and its movement toward integration with Western Europe, including eventual membership in the European Common Market, will mean the end of the Grand Alliance between Great Britain and the United States. This development will be strengthened by the movement of Russia to economic integration with the West. For the economic development, and the consequent power position, of Russia will be much more dependent upon interaction with the West than the East or South. Indeed, the East, in the form of the growing nuclear threat of China to Russia’s position in Asia, will inevitably drive Russia eventually to alignment with the West, including the United States. Carlston, World Order and International Law, 20 J. LEGAL ED. 127, 137 (1968).

The future threat of Communist China has been used to justify the elaborate “Sentinel” missile defense system in the United States:

The Sentinel system, moreover, was originally advocated by [the Secretary of Defense] Mr. McNamara as a “light” defense against Chinese Communist nuclear threats — not Soviet. Though the Soviet threat was cited in last week’s Senate debate more often than the Chinese as justification for the Sentinel system, the Administration’s reasoning is that an agreement with Moscow would reduce — but not obviate — the need for missile defenses. N.Y. Times, June 28, 1968, at 12, col. 4.

See note 215 supra and note 280 infra.

One subtle problem with establishing China as our enemy is that if the rather shaky Mao Tse-tung regime were overthrown by a more Western-type democratic government, the United States as a nation could not easily re-channel its fear. Even today, the belief that China is our enemy may in itself be teleologically (see note 40 supra) effectuating that very situation. This effect could be latently dysfunctional. See notes 254 & 284 infra. “Curiously enough, Peking insists the Vietnam conflict is but part and parcel of a Soviet-American conspiracy to share world dominance by ‘collusion for nuclear monopoly and nuclear blackmail.’” Sulzberger, Foreign Affairs: The Three-
actual choice would not be so clearly idiographic or concrete, an important general direction of the step-by-step process involved in the development of new international relations could be established.

The recent “step in and step out” of the Soviet Union in Czechoslovakia, and the possible revision of the Warsaw Pact (the Soviet-led East European military alliance) to meet the Czechoslovak and Rumanian demands are in vast contrast to the repression of East Germany in 1953 and Poland and Hungary in 1956. These are a concrete manifestation of the changing foreign policies of the Soviet Union. The Czechoslovakia affair is an example of the effective application of the disjointed incrementalistic strategy. On August 18, 1968, the Soviet Communist party expressed apprehension “that the Czechoslovak leadership appeared to be losing control in the country.” Two days later the Warsaw Pact troops were in Prague and the Czech party leader, Alexander Dubcek, was linked to “treacherous perfidy.” But within a week, the Soviets had reinstated the pro-Soviet government and had begun an astonishing about-face on its invasionary tactics. It is still highly probable that the Soviet Union will use the liberalized Czech government and country as a stepping stone for furthering co-operation with the Western Nations.

Way Ploy, N.Y. Times, Jan. 20, 1967, at 42, col. 5 (city ed.). “The ruling group of China is trying to set the USSR and the United States on a collision course, to provoke a nuclear conflict, and to take this opportunity to establish its domination in the international arena . . . .” Soviet News, June 4, 1968, at 1. It is difficult to discern the extent to which China’s current use of the United States as a “common unifying enemy” is forcing American policy to view China similarly. On common unifying enemies, see note 236 infra & accompanying text. See also Chin, Communist China’s Attitude Toward International Law, 60 AM. J. INT’L L. 245 (1966).

228 The problem is a multivariate or polycentric one. “A problem is ‘polycentric’ when it involves a complex of decisions judgment upon each of which depends upon the judgment to be made upon each of the others.” H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 669 (tent. ed. 1958); also quoted in Lewis, The High Court: Final . . . But Fallible, 19 CASE W. RES. L. REV. 528, 561 n.138 (1968).

229 See Conquest, Communist Has To Democratize or Perish, N.Y. Times, Aug. 18, 1968, § 6 (Magazine), at 22.

230 See note 208 supra; text accompanying notes 357-77 infra.


232 N.Y. Times, Aug. 20, 1968, at 1, col. 1 (city ed.).


234 “From the post-mortem of the Czechoslovak tragedy, a commendable public consensus seems to be emerging which endorses a continued policy of détente and bridge-building toward Soviet Russia and Communist East Europe in general.” Borsody, Letter to the Editor, N.Y. Times, Sept. 12, 1968, at 46, col. 3 (city ed.). See also
The first choice for Russia, as stated above, would ideologically and functionally be the easiest. There are indications that various geo-political areas are being kept "warm" for possible future conflagration.\textsuperscript{238} Such conflicts (Vietnam, Korea), and war in general, have the functional effect of unifying peoples and nations \textit{against} a common enemy and \textit{for} a common goal or cause.\textsuperscript{238} "Capitalist imperialism" has long been used as the common enemy for the communist peoples. Thus, it may be historically too early for the Soviet Union to choose any other alternative. However, if Russia should choose Communist China as the focal point for friction, then that vast but internally disrupted socialist state might be used as a "common enemy" to eventually unify both the peoples of the United States and the Soviet Union.\textsuperscript{237} The United States and the Soviet

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\textsuperscript{236} See note 227 \textit{supra}.

\textsuperscript{237} The following substitute institutions, among others, have been proposed
Union could once more be dancing partners.

It should be stressed that such a hypothetical choice, as stated above, would be greatly affected by current Western international political thought, not to mention many other possible impact variables. The United States might react to the termination of the Vietnam conflict by re-entering a period of national isolationism, or the United States itself might seek another focal point for conflict.

Finally, admitting the obvious lack of a general world sophistication which might place intelligent men on a political level of effectuating a valid all-encompassing peace for the peoples of this spaceship we call Earth, it has been suggested that "war" is an innate characteristic of man240 and that even when we are able to

for consideration as replacements for the nonmilitary functions of war. . .

1. Economic. a) A comprehensive social-welfare program, directed toward maximum improvement of general conditions of human life. b) A giant open-end space research program, aimed at unreachable targets. c) A permanent, ritualized, ultra-elaborate disarmament inspection system, and variants of such system.

2. Political. a) An omnipresent, virtually omnipotent international police force. b) An established and recognized extraterrestrial menace. c) Massive global environmental pollution. d) Fictitious alternate enemies.


4. Ecological. A comprehensive program of applied eugenics.

5. Cultural. No replacement institution offered [or necessarily needed].

Scientific. The secondary requirements of the space research, social welfare, and/or eugenics programs. IRON MOUNTAIN REPORT, supra note 236, at 84-85.


238 See, e.g., Alternatives for American Policy, in id. at 83-116.

239 In the last few decades, mankind has been overcome by the most fateful change in its entire history. Modern science and technology has created so close a network of communication, transport, economic interdependence — and potential nuclear destruction — that planet earth, on its journey through infinity, has acquired the intimacy, the fellowship, and the vulnerability of a spaceship. B. WARD, SPACESHIP EARTH at vii (1966); see note 336 infra.

Compare with: "Except for productive human labor, our globe is too small to support the human population now upon it," A. KORZYBSKI, MANHOOD OF HUMANITY 7 (1921). The concept of a mankind perspective is discussed in text accompanying notes 386-407 infra.

240 That man is an aggressive creature will hardly be disputed. With the exception of certain rodents, no other vertebrate habitually destroys members of his own species. . . Although we may recoil in horror when we read in newspapers or history books of the atrocities committed by man upon man, we know in our hearts that each one of us harbors within himself those same savage impulses which lead to murder, to torture and to war. A. STORR, HUMAN AGGRESSION 1 (1968); reviewed in Ardrey, Accomplices to Violence, N.Y. Times, July 14, 1968, § 7 (Book Review), at 1.
neurologically control man's basically aggressive nature the peripheral effects would be so individually destructive that such action could not be justified.²⁴¹

Five years ago [1961] a Norwegian statistician set a computer to work counting history's wars. The machine quickly, competently and a bit contemptuously announced that in 5,360 years of recorded human history there have been 14,331 wars, or, as the computer pointed out, 2,6135 a year. Of 185 generations of man's recorded experience, the machine noted . . . only ten have known unsullied peace. And even as he always has, man these days is fighting man. Time Essay, On War as a Permanent Condition, TIME, Sept. 24, 1965, at 30.

Compare with A. Toynbee, War is Not the Normal Condition of Man, N.Y. Times, Nov. 7, 1965, § 6 (Magazine), at 122. Toynbee sophisticatedly concludes that while "pugnacity and aggressiveness may well be built-in elements in human nature," [w]ar can be waged only by states, and it takes at least two states to wage it. In a world in which there is just one state — a world state embracing the whole of society — international war is an impossibility. There can still be civil wars, revolutions, insurrections, riots, disorders, because social justice is never likely to be perfect, and because man is a pugnacious animal. Id. at 126, col. 5.


²⁴¹ As we move along from the more rigorous physiological evidence to the behavioral effects, we unfortunately can find no crucial, direct evidence that an action on behavior is produced by any of these transmitters [acetylcholine, norepinephrine, dopamine, serotonin] acting locally at specific sites. Most of the evidence depends upon a large number of pharmacological studies, which have utilized drugs as tools in studying behavioral effects of amines in the central nervous system. It is important to bear in mind certain drawbacks of this approach. No pharmacological agent produces only one effect; each has both the desired effect and a host of side effects. Kety, The Central Physiological and Pharmacological Effects of the Biogenic Amines and Their Correlations with Behavior, in THE NEUROSCIENCES 444, 447 (G. Quarton, T. Melnechuk & F. Schmitt eds. 1967).

For a discussion of latent dysfunctionality, see note 254 infra.

Aggression may be the perverted face of ambition or a "motivational" driving power — an individually constructive attribute. K. LORENZ, supra note 236, at 43. If aggression were biologically removed from man, the human race might become like Tennyson's soporific Lotus-Eaters: "Surely, surely, slumber is more sweet than toil, the shore / Than labour in the deep mid-ocean, wind and wave and oar; / O rest ye, brother mariners, we will not wander more."

We do not know how many important behavior patterns of man include aggression as a motivating factor . . . . What is certain is that, with the elimination of aggression, the "aggregi" in the original and widest sense, the tackling of a task or problem, the self-respect without which everything that a man does . . . would lose all impetus; everything associated with ambition, ranking order, and countless other equally indispensable behavior patterns would probably also disappear from human life. K. LORENZ, supra at 278.

See also Sears, Maccoby & Levin, The Socialization of Aggression, in READINGS IN SOCIAL PSYCHOLOGY 350 (E. Maccoby, T. Newcomb & E. Hardy eds. 1958). For a discussion on the development of anti-aggression pills, see B. BARBER, DRUGS AND SOCIETY 161-64 (1967); N.Y. Times, May 10, 1967, at 27, col. 1. See also Lewis, supra note 228, at 568 n.169; Reinhold, Evolution Control: A Genetic Advance, N.Y. Times, Sept. 8, 1968, § 1, at 1, col. 3; note 324 infra & accompanying text.
C. Summary

Beginning with the Czars and continuing with the Soviet Union, we have noted how both form and content of Soviet international law have changed with the major shifts in Soviet national policy. Soviet jurisprudence has been the ready servant of Moscow's propaganda, and the writings on international law by Soviet jurists may often be read as merely political tracts.

Over the years, Soviet jurists have attacked from many angles the dilemma of meeting the outside world in international intercourse under a system of law that has been basically unacceptable to Soviet-Marxian ideology. It was not until 1956 and the writings of Grigori I. Tunkin that a partial reconciliation was made by the Soviet legal theorists. Only then did they recognize a compromise of principles which would allow the theories of international law to agree with the practices of international relations that had been going on for many years between the capitalist and the socialist countries.

The present Soviet-Western era of the détente can be characterized by the “new” approach to international lawmaking, which concentrates on the pragmatic, empirically based, problem oriented, step-by-step — or disjointed incrementalistic — approach to conflicts resolution.242 The “new” approach itself gains strength and efficacy from the de facto acquiescence — through normative patterns of reciprocal deference and the “politic of mutual example” — of both sides. Consensually-based rules of jurisprudence are the focal points for this “new” international law.

[T]he new consensually-based rules are at least founded on reasonableness, rather than (in positivistic terms) on any mere conformity to pre-existing authority; and the reasonableness of the rules is necessarily in terms of both main competing systems, since reciprocal self-interest is the raison d'être of those rules. There may be, therefore, a greater prospect of the rules being observed, long-range, by both sides.243

The Soviets still view and use international law as a tool, and sometimes as a weapon, to further their own national interests. The Western Nations, however, are not totally exempt from this accusation either.244 The Soviet dilemma is a reflection of the

242 See notes 208-09 supra & accompanying text.
243 McWhinney, supra note 206, at 14.
244 For example, the United States justification for intervention in Vietnam. Compare Memorandum of Lawyer's Committee, 111 CONG. REC. 24902 (1965), and Meeker, Legality of United States Participation in the Defense of Viet-Nam, 60 AM. J.
polarization of the world into two great socio-economic-political systems. Change is an inherent variable in these systems. Still, amid all the theoretical shifts concerning the Soviet dilemma in international law, there has been, and will continue to be, one constant for the Soviet jurist: His government is always right.

The Soviet Union has not been the only nation faced with a dilemma in meeting international situations that require actions and justifications which are contrary to nationalistic ideology. The United States has also been faced with a foreign policy dilemma. A critical comparison can be made between the Soviet “hang-ups” in effectuating a valid theory of international law and the inconsistency between the United States democratic ideals and American international relations. This comparison will provide the basis for suggesting an operational sociological approach based on a transcultural consensus coupled with the evaluative strategy of disjointed incrementalism as a potential solution to the dilemmas in international jurisprudence which have been created by a pluralistic world of polarized ideological beliefs and which increasingly threaten the continuing existence of the human species.

VIII. THE AMERICAN DILEMMA?: AN INTERJECTION

Foreign policies demand scarcely any of those qualities which are peculiar to a democracy; they require, on the contrary, the perfect use of almost all those in which it is deficient. . . . [A democracy] cannot combine its measures with secrecy or await their consequences with patience.

ALEXIS DE TOCQUEVILLE,
DEMOCRACY IN AMERICA (1835)245


245 Compare this statement with a similar observation by Dr. Hans Morgenthau, also looking at foreign policy from a European point of view with special reference to the United States:

It is the peculiar quality of the conduct of foreign affairs in the United States that it maximizes the weaknesses inherent in the formulation and execution of foreign policies under democratic conditions and that it aggravates these inherent weaknesses by some unique constitutional devices and political practices. Morgenthau, Conduct of American Foreign Relations, 3 PARLIAMEN-
On a somewhat superficial level of interpretation, the Soviet dilemma has been the result of the Communists' dogmatic acceptance of the Marxist-Leninist ideology and refusal to compromise their socio-political beliefs with the Western world. However, a more integrative analysis shows that the dilemma results more from the attempts of the Soviets to keep their Marxian ideology and at the same time accept whatever portion of Western-oriented international law they view as not inconsistent with their socio-political outlook. In other words, there is a problem of emphasis here, and the Soviets to some extent can rightly argue that traditional international law, with its heavy Western orientation, is also dogmatic ideology. In a sense the Western Nations have had to meet the Soviet dilemma; but, as mentioned previously, the West sees that most of the nations with whom it trades are still capitalistic. Therefore, the West has not had to compromise ideologically to any great extent in meeting the Soviet dilemma. Of great importance, in this respect, is the question of the extent to which Western Nations are willing to compromise in the future in order to make international law truly "international." There is also the further question of the extent to which the Soviet and the American views of international law can be synthesized.

The purpose of this interjection is not to disparage the United States government or traditional American democratic theory, but rather to show by a few brief examples that the United States, like the Soviet Union, has faced a dilemma in attempting to effectuate a valid and working foreign policy which is not inconsistent with its basic national ideology and political theory. While the term "An American Dilemma" has been used to refer to the inconsistency between American race relations and American democratic ideals,246 the term may also apply to the inconsistency between American international relations and Western democratic ideals.247 In other words, the United States may also be faced with the di-

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247 See Q. WRIGHT, supra note 245, at 273. This raises the further question concerning the extent to which the United States is able to act consistently with the rules of international law it helped to establish. By way of contrast, the Soviet problem concerns the extent to which the Soviet government is able to accept rules which it had very little part in formulating and rules which contain basic values quite different from those of the Soviet state.
lemma of having to meet world situations with actions that are inconsistent with her particular democratic ideology.

A. American Foreign Policy and Mass Democracy

Democracy is both a political system and a theory to explain and justify that system. Operationally, "a democratic political system is one in which public policies are made, on a majority basis, by representatives, subject to effective popular control at periodic elections which are conducted on the principle of political freedom." In a UNESCO sponsored study on democracy, after World War II, which obtained the views of more than a hundred scholars, both Eastern and Western, it was found that "there were no replies adverse to democracy. Probably for the first time in history, democracy is claimed as the proper ideal description of all systems of political and social organization advocated by influential proponents." Both Soviets and Americans profess their beliefs in general democratic principles, but there is a conflict as to the "true" definition of those principles. This conflict gives rise to the differing theories or ideologies used to explain or justify the particular Eastern or Western democratic political system. Admittedly then,

248 H. MAYO, supra note 236, at 70 (emphasis added).
Two similar definitions might be mentioned. Democracy is "the name for a form of government by which the ultimate control of the machinery of government is committed to a numerical majority of the community." J. MORLEY, ORACLES ON MAN AND GOVERNMENT 29 (1923). Democracy is "government of the whole, by the majority, generally through representatives elected by secret ballot of adults." E. CARRITT, ETHICAL AND POLITICAL THINKING 150 (1957), cited in H. MAYO, supra at 70 n.5. But see R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES (1967).

249 DEMOCRACY IN A WORLD OF TENSIONS, A SYMPOSIUM PREPARED BY UNESCO 527 (R. McKeon ed. 1951), cited in H. MAYO, supra note 236, at 21 n.1.
The ideas of equality and brotherhood among men, which have existed in varying forms since human society began — and which contemporary Communism theoretically accepts — are principles which fighters for progress and freedom will always try to achieve. To criticize these ideals would not only be reactionary and ugly, but futile and foolish as well. The wish to attain them for mankind is inextinguishable. M. DJILAS, THE NEW CLASS at vii (1957).

Summarily, Soviet democratic theory is that of "democratic centralism" — a communist system or principle of hierarchic organization that seeks to combine democratic participation of the rank and file in the discussion of policy and the election of officers, and of delegates to the next higher unit with strict obedience by the members and lower bodies to the decisions of the higher units and with absolute authority residing in fact at the apex of the hierarchic structure . . . . MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY 600 (3d ed. 1961).
the definitional conflict is a necessary correlate of the pluralistic world value systems, for international intercourse may affect and change ethnocentric value systems and even give birth to a relatively new ideology.

The political system and theory of a nation or group of nations may also undergo a metamorphic change or development within the particular democratic state. For example, the United States, which was founded on the governmental theory of republicanism, is currently undergoing a cataclysmic social revolution which is effectuating a tremendous change in the American democratic theory and system.

A large part of the American foreign policy dilemma emanates from the failure to understand the culturally differing attitudes, attributes, and levels of structural-intellectual development of the peoples of foreign nations.

In regard to democratic government, it is clear that such a government, if operated by a people wholly unprepared to understand the sources of social evils and the effects of proposed reform, may enact policies which produce chaos and result in reactions toward

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251 Yet even as late as the latter part of the 18th century, democracy was not thought well of by most people, and certainly not by most of the educated or ruling classes. For the most part, it was also used with disapproval by the Founding Fathers of the American Constitution, who preferred republicanism as a word and a theory of government, though some of them occasionally gave the name "republicanism" to what would often be called "democracy" today. H. Mayo, supra note 236, at 25.

252 The Negroes' assertion of the right to equality and the effort to establish a minimum annual wage are only two manifestations of the current American social revolution. It is interesting to note that Alexis de Tocqueville, writing in 1835, stated:

If ever America undergoes great revolutions, they will be brought about by the presence of the black race on the soil of the United States; that is to say, they will owe their origin, not to the equality, but to the inequality of condition. A. de Tocqueville, Democracy in America 314-15 (H. Reeve trans., F. Bowen ed., 4th ed. 1864).


absolutism and tyranny. For this reason Aristotle questioned the value of pure democracy. History is full of the ill effects of premature popular institutions. Effective democracy, in the sense of popular participation in government, depends upon adequate preparation in the society of means of communication, of social understanding, of economic opportunity, and of political tolerance.

254 Latent dysfunctionality may arise in all policies which attempt to solve polycentric social problems. Success in a democratic government must be concerned with multidimensional effects. No social catalyst produces only one effect; each has both the desired effect and a host of side effects. The latent dysfunctional problem is to control and direct future sequential effects. For a recognition of this problem in the area of the physiological sciences, see note 241 supra.

Sociological and behavioralistic analysis may provide the understanding necessary to control and direct future sequential effects.

Sociology need not make men wise or even prudent. But, through its successive uncovering of latent social problems and through its clarification of manifest social problems, sociological inquiry does make men increasingly accountable for the outcome of their collective and institutionalized actions.

There is a further use of this distinction between manifest and latent social problems, between the social conditions currently judged by designated categories of men in society to be undesirable and the social conditions that would be so judged, were their multifarious consequences known. Among other things, the distinction helps sociologists themselves recognize how they can move beyond prevalent social beliefs, practices, and judgments without entering upon the misplaced career of trying to impose their own values upon others. Merton, Social Problems and Sociological Theory, in Contemporary Social Problems 697, 710 (R. Merton & R. Nisbet eds. 1961), citing G. Myrdal, supra note 246, at 1035-64; G. Myrdal, Value in Social Theory (1958).


For a Soviet example of latent dysfunctionality because of only unidimensional success in socially engineering a change in female mobilization in Central Asia, see Massell, Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia, 2 Law & Soc'y Rev. 179, 221 (1968). For a discussion of latent dysfunctionality in democracies preparing to meet a "common enemy," see note 284 infra.

284 See Barker, Introduction to The Politics of Aristotle at liii-iv (E. Barker trans. & ed. 1962). "Democracy is liable to change from the older and more moderate forms to a new and extreme type. This is largely due to the courting of the people by eager candidates for office." Id. at 214.


On the other hand, optimistic doctrines of the historical inevitability of democracy must be rejected. There is no guarantee of success or failure for any political system, and so democracy, too, must be regarded as a "calculated risk." And democrats will merely fall into the same pit of irrationality as any fanatic if they adopt the dogma that evolution will underwrite the values of democracy. "[W]e can feel no assurance that the peculiar arrangements that define the American system will hold some special place in the affections of an indulgent Province." [D. Truman, The Governmental Process 535 (1951).] Yet although there need be no such implied belief as Tocqueville's — that democracy is inevitable — the democrat must
Hence, on a rather sophisticated and abstract level, it might be operationally questioned whether the American people themselves are adequately prepared for what can be termed "utopian democracy" on a national or domestic scale — let alone an international or supranational scale. Domestic policy within the United States continues to reflect and, in a sense, perpetuate the mass American white middle class prejudices which tend to be only quasi- if not blatantly anti-democratic\textsuperscript{257} The rigid stratification of social classes within the United States is itself a paradox to the mouthed unrestrained egalitarian theory.\textsuperscript{258} Furthermore, the Electoral College and the state-qua-state, as opposed to population ("one man, one
vote"), apportionment in the United States Senate remain as patent vestiges of historical republicanism in this supposed era of enlightened democracy.\textsuperscript{250}

Under the ill-defined principles of modern democracy, success in American foreign policy is measured by the degree of fulfillment of three primary goals: "the absence of military conflict throughout the world; the development of foreign governments and institutions in the light of, or at least not antagonistic to, American ideals and values; [and] the continued assurance of our domestic security."\textsuperscript{260} The growing problem in the United States, which reflects the maturation of public opinion since World War II and of which the populace is becoming increasingly aware, concerns the extent to which the public can control foreign policy and participate in policy formulation for achieving the above mentioned goals.\textsuperscript{281}


The United States Supreme Court has held that both state legislative houses must be apportioned on a population basis. Lucas v. Forty-Fourth Gen. Assembly of Colorado, 377 U.S. 713 (1964). In Reynolds v. Sims, 377 U.S. 533 (1964), the Supreme Court stated:

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. . . . The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. \textit{Id.} at 574.

See also Baker v. Carr, 369 U.S. 186 (1962) (the equal protection issue raised respecting state legislative apportionment plans presents a justiciable issue); Gray v. Sanders, 372 U.S. 368 (1963) (the county unit system used in the State of Georgia for the nomination and election of United States Senators and statewide officers is invalid under the equal protection clause); Westberry v. Sanders, 376 U.S. 1 (1964) (Article I of the Federal Constitution requires Congressional seats to be apportioned equally on a population basis so far as practicable); Fortson v. Morris, 385 U.S. 231 (1966) (if provided by statute, then state legislature may elect the governor when in a general election no candidates received a majority of votes); Avery v. Midland County of Texas, 390 U.S. 474 (1968) ("one man, one vote" applies also to the municipal corporation level). See generally R. McKay, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION (1965).

On "republicanism," see note 251 \textit{supra} & accompanying text. In light of the 1968 National Conventions, it might be cogently argued that these too are institutions of another era. \textit{See Newsweek}, Sept. 6, 1968, at 24-50.

\textsuperscript{250} Ellenport, \textit{American Foreign Policy and Mass Democracy}, 36 AM. SCHOLAR 589 (1957).

\textsuperscript{260} \textit{Id.}; E. Lefeve, \textit{Ethics and United States Foreign Policy} 162-80 (1957).
Since World War II, three “publics” have, in effect, emerged within the United States. The first group maintains only a minimal interest in foreign affairs, and thus either acquiesces in the President’s actions without thought or deems his program to be correct. Another group of the populace remains concerned with foreign policy, but has collectively resigned itself to the fact that mere citizens can do nothing. Even though members of this group often sense that a different approach should be taken on certain problems, they refrain from action. The third group is highly concerned about America’s foreign policy. Significantly, this last group is steadily growing in numbers and volume, on both wings of the political spectrum, and is attempting to affect policy operations directly.

Playing the game of big power politics or “from positions of strength” can no longer suffice in America’s attempts to achieve her three basic goals in foreign policy. “Direct dealing with small nations and regions are replacing the old spheres of influence. This is reason enough even without third public ‘idealism’ for asserting that cultural and sociological understanding of foreign affairs must be incorporated into foreign policy formulation.”


See note 215 supra & accompanying text.

Ellenport, supra note 260, at 592-93. The author concludes:

If mass democracy has no direct role to play in controlling foreign policy, the executive has a duty, a commitment, to represent American ideals and values in its policies. The government should profit from some criticism instead of denouncing all dissent. To help find success, the government must adopt measures to insure a creativity and generosity on its part, to humanize its power and programs abroad, to win friends and not just influence peoples. Id. at 593.

But note, the “duty” of the Executive may be shaped by his own teleological self-prediction:

Yes, it makes a difference who is in the White House — and particularly in the area of foreign policy. . . . On the domestic front, what is possible is determined by the relative political strength of the contending interests and the President will look like a fine leader if he has an absolute majority for his programs. . . . But there is no such precision of alignment when it comes to international questions and the President can create, rather than obey, his consensus. Harrington, in Symposium: What’s Happening to America, 34 PARTISAN REV. 13, 17 (1967).

On the methodological problems of prediction, optimal decision, and determination of human values, see C. CHURCHMAN, PREDICTION AND OPTIMAL DECISION: PHILOSOPHICAL ISSUES OF A SCIENCE OF VALUES (1961). For a definition of teleology as used in the above context, see note 40 supra.
As noted above, until quite recently the American public had made relatively no effort to control or directly guide foreign policy. Furthermore, the American populace is not exonerated by merely saying that they have been uninformed or misinformed, or that American foreign policy has not been shaped by any democratic process, or that, so far as foreign policy is concerned, the American democratic process has been suspended. "The majority of American citizens have been too concerned with their own private affairs to notice, much less to protest against, being manipulated rather than consulted."²⁶⁵ The United States Senate itself has recently demanded a greater voice in determining foreign policy commitments.²⁶⁶ If the American people had been given or had demanded a voice in shaping their government's postwar foreign policy, "instead of suffering themselves to be indoctrinated and led like sheep, the resulting postwar policy might not have been much wiser at the beginning, but its unwisdom would probably not have become frozen into inflexibility for so long a period."²⁶⁷

In a manner of emphasizing the American dilemma, one writer

Note also the following statement by Gunnar Myrdal:

After two decades of continuous study, I have come to the conclusion that foreign-policy decisions are usually less well-founded on the available facts and alternatives than domestic-policy decisions; that they are, in general, much more influenced by irrational motives. In my opinion, this is true in all countries. But the consequences are much more damaging, of course, when less than rational foreign-policy decisions are taken by a superpower like the United States, which feels responsible for (and is interfering with) developments all over the globe. Myrdal, "With What Little Wisdom The World Is Ruled," N.Y. Times, July 18, 1965, § 6 (Magazine), at 20, 20-21.


The resolution which emerged from the recent hearings in the Senate Foreign Relations Committee expresses a similar sentiment:

Resolved, That a commitment for purposes of this resolution means the use of, or promise to a foreign state or people to use, the Armed Forces of the United States either immediately or upon the happening of certain events, and

That it is the sense of the Senate that, under any circumstances which may arise in the future pertaining to situations in which the United States is not already involved, the commitment of the Armed Forces of the United States to hostilities on foreign territory for any purpose other than to repel an attack on the United States or to protect United States citizens or property properly will result from a decision made in accordance with constitutional processes, which, in addition to appropriate executive action, require affirmative action by Congress specifically intended to give rise to such commitment. S. Res. 187, 90th Cong., 1st Sess. (1967).

See generally Note, Congress, the President, and the Power to Commit Forces to Combat, 81 HARV. L. REV. 1771 (1968).

²⁶⁷ J. WARBURG, supra note 265, at 290.
SOVIET INTERNATIONAL LAW

has made the following suggestion for including the third public in the foreign policy-making structure:

The real answer lies in internal changes within the policy-making structure. Basically it lies in eliciting and employing a new body of foreign policy formulators, a group of professionals embodying minimally the traits of those who are often called to Washington for their thoughts and advice. This elite will have to be less rigid and narrow in its views than the present State Department officials are; it must be capable of resisting manipulation. It must, in short, be based on more than the services of that temporary, well-meaning, yet amateur adviser-analyst-policy maker.268

The United States adherence to the Domino Theory as the rationally deductive principle for determining foreign policy in Southeast Asia and the United States refusal to sign the international human rights treaties are examples of the American foreign policy dilemma.

B. The Domino Theory: An Exercise in Rational-Deductive Thinking

The inappropriateness of America's rigid adherence to the Domino Theory can be more fully understood by the analytical technique of game theory. Game theory provides interesting insights and analogies for analyzing the effectiveness of various approaches to decision-making in foreign policy.269 Basically, game theory is the study

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268 Ellenport, supra note 260, at 592. Such a body of foreign policy formulators has been suggested in the past:

Insisting that [President] Johnson would have to declare his decision not merely to reevaluate but also to "redirect" the commitment to Viet Nam, [Senator Robert Kennedy] suggested that the President should then appoint a commission for the purpose of proposing a new policy. Kennedy's suggested members for the group included himself and such men as Yale President Kingman Brewster, former Ambassador Edwin O. Reischauer, former Deputy Secretary of Defense Roswell Gilpatric, Generals Lauris Norstad and Matthew Ridgway.

[Defense Secretary Clark] Clifford carried the proposition to Johnson, who immediately objected that 1) it was the kind of political deal that no President could or should enter into; 2) it would say, in effect, that he had been wrong, and Hanoi would thus receive an immeasurable lift; 3) the President would be surrendering his responsibilities to a committee; 4) the names Kennedy proposed constituted a "stacked deck"; and 5) in any event, he had already heard the views of some of those on Kennedy's list. TIME, March 22, 1968, at 18.

See also Loftus, supra note 254; Schmeck, supra note 254.

269 It is understandable why, in the period following the close of World War II, when so much attention was paid, especially in the United States, to the impending power struggle between the Communist and the non-Communist worlds, the appearance of game theory on the scientific horizon was hailed with enthusiasm and with great expectations.
and analysis of conflict relationships. Much depends on the choice of values, criteria, notions of what is "rational," and the communications and relationships established with other parties of the "game." These choices themselves have relatively little connection with the particular game being played. "They are not strategic choices, i.e., choices rationalized in terms of advantages they bestow on [the parties] in a particular conflict. Rather they are choices which we make because of the way we view ourselves, and the world, including the other players."\textsuperscript{270} Game theory presumes at least two players, that choices as to moves will be "rational" and in accordance with certain prescribed rules, and that the utilities — or that which is gained or lost — are measurable on some scale.\textsuperscript{271}

War, or war-like conflict relationships, can often be analyzed as a zero-sum game.\textsuperscript{272} Thus, the United States implementation of its foreign policy in Southeast Asia might be viewed through the application of game theory. It must be kept in mind, however, that while such an analogy may lend insight to the policy analysis, the imposition of a zero-sum construct on such intra-specific aggression can be criticized as intellectualizing what might be viewed as "irrational" behavior, as not accounting for "desire" or "bluff" or other nonstrategic choice variables, as not accounting for multiple configurations and the inter-play with other actions or conflict relationships, and as falling prey to the reductionistic fallacy.\textsuperscript{273}

People had witnessed the increasing abstruseness of the sciences geared to military applications. World War II was called the physicists' war. Toward its final phases, World War II was rapidly becoming a mathematicians' war with cybernetic devices and electronic computers beginning to play a decisive role. It is assumed in many quarters that World War III (which many feel to be a matter-of-fact culmination of existing trends) will be truly a mathematicians' war. A. RAPOPORT, TWO-PERSON GAME THEORY: THE ESSENTIAL IDEAS 189 (1966).

\textit{See also} SYSTEMS ANALYSIS AND POLICY PLANNING (E. Quade & W. Boucher eds. 1968).

\textsuperscript{270} A. RAPOPORT, supra note 269, at 214.

\textsuperscript{271} See generally A. RAPOPORT, supra note 269; E. VENTITSHEL, AN INTRODUCTION TO THE THEORY OF GAMES (J. Wristian & M. Slater trans. 1953); Rapoport, Use and Misuse of Game Theory, SCIENTIFIC AM., Dec. 1962, at 108. For a discussion of ordinal, ordinal with natural origin, interval, and ratio scales, see W. TORGERSON, THEORY AND METHODS OF SCALING 15-21 (1958).

\textsuperscript{272} "A game is called a zero-sum game if the sum of the payoffs is zero, that is, if one side loses exactly as much as the other side wins. In zero-sum games, the interests of the players are completely opposed." E. VENTITSHEL, supra note 271, at 2.

\textsuperscript{273} The reductionistic fallacy is the falsification of knowledge and theoretical concepts through oversimplification. The other extreme is reification or "thingifying." See note 62 supra & accompanying text (example of Marxian reductionism); note 319 infra ("rattamorphism").

Furthermore, the analogy may be fallacious if the Vietnam conflict is not a zero-
Arguably then, the Domino Theory in American foreign policy\(^\text{274}\) and the generalized fear of an international communist movement are premised on the assumption that the East and West are playing a zero-sum game, that the "game" itself will not be changed or abandoned, and that the players (East and West) will not compromise or co-operate but will play until there is an ultimate loss which terminates the conflict situation.\(^\text{275}\)

The Domino Theory in America's foreign policy is an example of rational-deductive thinking as opposed to the high integration index of the disjointed incrementalistic strategy.\(^\text{276}\) With the zero-sum game. See T. Schelling, *Arms and Influence* (1966). A nonzero-sum game analysis might then be appropriate — but inherently more complex.

\(^\text{274}\) The Domino Theory, in American foreign policy, posits that a communist takeover in one country among a group of relatively neutral nations will, by force of physical and psychological pressures, inevitably lead to successive communist takeovers in all neighboring countries — the other nations will fall, like a row of dominoes, under communist domination. (Note, however, this definitional attempt may be an exercise in reductionism, for the Domino Theory may be only a small rationally deductive segment of some larger disjointed incrementalistic strategy.)

\(^\text{275}\) Conversely, both sides would play until there was a "win."

But the word "win" is another of our leathery words which can stand reexamination for precision of meaning. In one connotation the word "win" is used to suggest a comparison of the immediate postwar position of a country with its prewar position. In this sense none of the initial contestants "won" in the First World War or in the Second World War. It is probable that no one could "win" a third world war, in the sense of being richer, happier or better off after such a war than before it, even if no atomic weapons were used. If atomic weapons were used in all-out, city-to-city attack by both sides the conclusion is certain.

In another connotation the word "win" is used to suggest a comparison of the postwar position of one of the adversaries with the postwar position of the other adversary. In this sense it is quite possible that in a general nuclear war one side or the other could "win" decisively. Even a small initial imbalance in relative capabilities, other things being equal, could grow rapidly into a decisive imbalance as the war progressed. Nitze, *Atoms, Strategy and Policy*, 34 FOREIGN AFFAIRS 187, 189-90 (1956).

Similarly, both sides might play until a "draw" or "stalemate." For this discussion, the possibility of a change in "payoffs" and the creation of a new "saddle point" will be omitted. But see note 273 *supra*.

\(^\text{276}\) The disjointed incrementalistic strategy has been described in note 208 *supra*. When we speak of disjointed incrementalism as a strategy for analysis, we mean only to describe one set of practices that, however subtly and idiosyncratically each mind works, represents a point of convergence for policy analysts in their adaptations to the difficulties of problem solving and evaluation. The set of *adaptations* is relatively simple, crude, almost wholly conscious, and public; it can be discussed with the same concepts and language that were employed in discussing the synoptic ideal. We do not need to use the language, for example, of sensor-motor coordinations, perceptive organizations, or concept formation (as psychologists study it). D. Braybrooke & C. Lindblom, *supra* note 208, at 82 (emphasis added).

The "adaptations" mentioned in the quote above are discussed in text accompanying notes 357-60 *infra*. The "synoptic ideal" is the attempt at all-comprehensiveness in problem solving.
tional-deductive approach, one aspires to construct a set of principles sufficient to generate an answer to each evaluative problem.\textsuperscript{277} The Domino Theory establishes naive principles concerning the necessity of the United States to imperialistically intervene in the internal affairs of foreign countries in an effort to protect her own territorial imperative. These naive principles delimit the structural content of the United States foreign policy and impose, to some extent, a rational-deductive approach on our foreign policy decision-making processes.

Without questioning the moral and legal aspects of the role of the United States in Vietnam,\textsuperscript{278} it can be argued that the naive priorities\textsuperscript{279} or glorified rational-deductive approach in our foreign policy decision-making should be changed. Such a change would not necessarily mean that present goals would be changed, but if the change were to a more highly integrative evaluative method, then at least the goals would not necessarily have to be used to justify the means. To assume the all-conclusiveness of the Domino Theory is to make the same flight into fantasy as is made when assuming a

Comprehensiveness is often seen as logically necessary for rational choice; in fact, rational choice comes close to being defined as a choice that, \textit{inter alia}, responds to a comprehensive consideration of all relevant variables. Herbert A. Simon has written, "Rational choice will be feasible to the extent that the limited set of factors upon which decision is based corresponds, in nature, to a closed system of variables — that is, to the extent that significant indirect effects are absent."

It is generally conceded, of course, that such comprehensiveness is an ideal rather than an achievement. \textit{Id.} at 39, \textit{citing} H. Simon, Administrative Behavior 83 (1959); \textit{see} note 357 \textit{infra}.

The synoptic ideal and its adaptive failures are discussed in text accompanying notes 357-60 \textit{infra}.

\textsuperscript{277} D. Braybrooke \& C. Lindblom, \textit{supra} note 208, at 31-32. Let ultimate values be expressed in general principles satisfactory to everybody who is ready to attend to the arguments identifying them — or, if there is no hope of that, satisfactory at least to those who are now undertaking a specific job of evaluation. Let these principles, which may embody notions of happiness, welfare, justice, or intuitive notions of goodness, be stated so exactly that they may be arranged intelligibly in an order of priority that indicates precisely which principles govern the application of others and when. Then derive within the limits of such a system intermediate principles that are suitable for application in particular cases, and that — allowing for rare cases of equality in net benefits — will indicate unambiguously which of alternative policies is to be chosen, according to the values they would promote. \textit{Id.} at 9.

This rational-deductive approach is suitable for problems involving a moderately high integration index of information processing. See H. Schröder, M. Driver \& S. Streuffert, \textit{supra} note 208, at 20; Figure 1, at pp. 242-43 \textit{infra}; text accompanying notes 398-401 \textit{infra}.

\textsuperscript{278} But see note 244 \textit{supra}.

\textsuperscript{279} The naive priorities and naive criteria methods for policy determination are discussed in note 306 \textit{infra}.
zero-sum game construct on war and war-like conflicts. The principle criticism of the rational-deductive approach is that it does not allow for structural change and is ill-suited for games, or problem-situations, of imperfect information. In war-like conflicts there is not only imperfect information but there is not even clear knowledge as to the prediction of future moves by either party. The Vietnam conflict, for example, has sequentially snow-balled into an ever-increasing political dilemma for the United States government. This dilemma may have been intensified because of shifting policy determinations which were caused by continuous reinterpretations of the imperfect information input and which had been constrained to the deductivism of the Domino Theory.

Certainly, the irony of a rigid adherence to the rational-deductive Domino Theory is apparent when one envisions the political theorists of the communist countries sitting around a table discussing Vietnam or, better, Czechoslovakia's liberalization efforts in terms of forestalling successive Western victories. Still, the United States continues to exude concrete manifestations of its total submission to naive priorities and rational-deductiveism. Although the American government did voice its respect for the Czech efforts, in so doing it seemed to ignore any consideration of mankind's precarious position, for at the same time the United States Congress blocked approval of the Nonproliferation of Nuclear Weapons Treaty and quickly supported, to the tune of $5.5 billion, the dangerous folly of the (ineffective) Sentinel anti-ballistic missile system.280

The apparent use of simplistic evaluative approaches is espe-

280 Concerning the Czechoslovakian situation, see notes 231-34 supra & accompanying text. On the Nonproliferation of Nuclear Weapons Treaty, see note 224 supra & accompanying text. On the anti-ballistic missile system, see notes 215 and 227 supra & accompanying text. See also Coffey, The Anti-Ballistic Missile Debate, 45 FOREIGN AFFAIRS 403 (1967); Inglis, The Anti-Ballistic Missile: A Dangerous Folly, SATURDAY REV., Sept. 7, 1968, at 26.

The plain fact is that the only long-haul safety for the United States — and for the world, including the Soviet Union — lies in extending the kind of careful negotiations that produced the nuclear test-ban treaty in 1963 and the nonproliferation [draft] treaty this year. The Sentinel defense not only will not improve American security — the testimony of scientific experts is massive on this point — but it will destroy the prospects for those vital negotiations, in addition to placing in jeopardy the progress represented by those two treaties. Editorial, N.Y. Times, Sept. 15, 1968, § E, at 14, col. 1.

"The weaponry of the past is no longer relevant, for man's battle in this era of overkill is for social improvement. He must arm himself accordingly." Gavin, The Weapons of 1984, SATURDAY REV., Aug. 31, 1968, at 13 [the author is Lt. Gen. James M. Gavin, USA (Ret.)].
"Comrades, do you realize what will happen if we do not honor our commitments in Czechoslovakia? Imagine a set of dominoes ..."
cially fallacious in light of our professed democratic ideology, unless that ideology is meant only for domestic consumption. War itself is antithetical to basic democratic theory, which stresses humane and potentially universal principles and values — especially those of peace, order, compromise, and political equality — extending beyond the Western tradition out of which democracy grew.

Other bodies of modern thought — secular humanitarianism, Marxism, socialism — regardless of how internationalist their principles, have also been unable to prevent war. Neither, for that matter, has religious unity or theology been able to do so. (It is, of course, open to anyone to argue that some or all of these systems of thought do in fact contain recipes for permanent peace if only men would choose to apply them.)\(^\text{281}\) The principles and values of democracy, however potentially universal, are clearly not enough to ensure peace, even if all the countries of the world became democracies.\(^\text{282}\) It is possible for a democracy to be nationalistic and aggressive as well as internationalistic and pacific.\(^\text{283}\)

Indeed, democracy has been criticized as being inherently warlike and, therefore, prone to the creation of conflicts in international relations. Exponents of this criticism argue that war and international conflicts are necessary to preserve a democratic state. In Sir Robert Filmer's words:

As [democracy] is begot by sedition, so it is nourished by arms: it can never stand without wars, either with an enemy abroad, or with friends at home. The only way to preserve it is to have some powerful enemy near . . . for the common danger of an enemy keeps them in better unity than the laws they make themselves.\(^\text{284}\)

\(^{281}\) For a possible reason why man has not chosen to apply these peace recipes, see discussion on human aggression in notes 236-37 supra & accompanying text.

\(^{282}\) Compare this statement with Professor Arnold Toynbee's sophistical, yet relatively naive, statement in note 240 supra.

\(^{283}\) H. Mayo, supra note 236, at 296.

\(^{284}\) J. Locke, Two Treatises of Government 247 (T. Cook ed. 1947), cited in H. Mayo, supra note 236, at 296 n.10. See note 245 supra.

But there are latent dysfunctional effects which arise from the preparation to meet the "common enemy":

This preparation . . . tends to convert the democracies themselves into dictatorships. Rising expenditures tend to governmentalize the economy, to centralize government — thereby reducing the degree of local autonomy and individual freedom — and to augment the position of the executive, especially that of the defense department, at the expense of the legislature and the courts. The increasing role of the military, and its consciousness of the needs of security and the dangers of subversion behind the lines, tend to reduce civil liberties, to block channels of information, to broaden the inquisitions of investigatory agencies, to reduce the influence of public opinion and parties, and to create an atmosphere of secrecy and suspicion. Freedom of communication, of science, of economic enterprise, of social relations is likely to be diminished. By this process the need for defense, if serious and protracted, tends to convert free societies into "garrison states." Q.
In our search for some common unifying enemy, our foreign policy is directed against some mythical "demagogic" state personification, the fear of which justifies attempts at neo-imperialism and geo-political domination by force. This incongruence of the American foreign policy dilemma is best stated on the protestor's button: "Kill for Peace," and more existentially: "Love Hate Not War."

To recapitulate, in one sense the Domino Theory imposes a zero-sum construct on America's Vietnam policy by establishing a general monolithic principle which dictates unambiguously the policy or strategy to be followed in a particular conflict-situation, without allowing for the fact that the information inputs in the policy-making process are imperfect and the fact that structural variables may change, thus necessitating a change or shifting of goals. The United States, in an effort to meet the inadequacies inherent in its deductive rationality, has recently adopted an open option policy


See also Lasswell, The Interrelations of World Organization and Society, 55 YALE L.J. 889 (1946).

For further discussion of common unifying enemies, see note 236 supra & accompanying text. Note, however, that this "search" is historically difficult to justify, e.g. America's century of isolationism as opposed to her "tradition of violence."

[Our foreign policies will lead us — in Asia and in Latin America — into an increasing neo-imperialist role. The cant will be different from that of nineteenth-century imperialists — though not all that different — but the result will be persistent attempts to manage the political and economic directions of the underdeveloped countries. Hentoff, in Symposium: What's Happening to America, 34 PARTISAN REV. 13, 25 (1967) (emphasis added).

A leading Soviet physicist, Andrei D. Sakharov, has recently issued a plea for worldwide rejection of "demagogic myths" in an urgent program to avert nuclear war and famine. TIME, Aug. 2, 1968, at 26; Cleveland Plain Dealer, July 11, 1968, at 19, cols. 4-6; Cleveland Plain Dealer, July 22, 1968, at 6, cols. 1-8. Sakharov's prognosis was rebutted in an Izvestia article by the Soviet economist, Dr. Viktor A. Chepראkov. N.Y. Times, Aug. 19, 1968, at 1, cols. 6-8 (city ed.). For the full translated text of this rebuttal, see id. at 12, cols. 2-7.

It might be argued that it is the existing zero-sum game condition or viewpoint which superimposes the monolithic principle. If the communists were in fact to view international policy as a zero-sum game, then it might appear that the Domino Theory is a fairly accurate reflection of reality.

Concerning changes in the structural variables, note that:

Some game theorists will probably feel that "inductive game theory" is properly not game theory, any more than experimental mathematics deserves the name of mathematics. The crucial factor to be introduced is that of an environment (including the other player) which is not given at the outset but which is to be found out in the process of playing the game, whereby one reacts to what one learns and by these reactions modifies the environment.

A distinction between structural and content variables is made in note 402 infra.

Rationality may bifurcate into individual rationality and collective ration-
to allow for change in the effectuating means without restructuring the professed end-goals. As one writer has stated:

The open option policy may possibly be viewed as a restatement of America's earlier practice of waiting and finally reacting to foreign affairs. Nevertheless, it has proved itself unable to achieve the consistency basic to any foreign policy. Such a lack is seen in the appearance since 1964 of a credibility gap created by contradictory official statements or demonstrably false ones. This has resulted from [President'] Johnson's effort to substitute a rhetorical consistency for a real one in foreign policy. This in turn has led to another unique aspect of this Administration, namely, that it is finding itself committed to its publicly stated policies and promises whether these are its real goals or not (for example, true democracy in South Vietnam).289

Using the disjointed incrementalistic strategy on the international level would at least allow the government to shift goals to reflect structural change. The United States might then want to, and at least would be able to, stop playing "Vietnam" and play "Africa" instead.290 If the United States government were not, in fact, participating in what has the appearance of a zero-sum game, then its initiation of the Paris Peace Talks in an effort to solve the Vietnam crisis could indeed be viewed as another example of "politic of mutual example."291 But peace talks and peace movements

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\text{ality, and so unambivalent intuitively acceptable normative solutions are no longer available.}
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\text{Once "rationality" acquires more than one meaning, we must specify context . . . \{We\} shall define an inductive rationality, as contrasted with deductive rationality on which the entire formal theory of games has been based.}
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\text{Classical logic distinguishes between deductive and inductive reasoning as follows: the former proceeds from general principles to particular instances, while the latter proceeds in the opposite direction. A. RAPOPORT, supra note 269, at 146.}
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\text{See discussion of rational choice and comprehensiveness in note 276 supra.}
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289 \text{Ellenport, supra note 260, at 591 (emphasis added).}
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290 \text{It can be cogently argued that if the rational-deductive Domino Theory is a viable principle, then it exists perhaps to an even greater extent in Africa, with the fulcrum presently centering on the Biafran-Nigerian civil war. See Garrison, The "Point of No Return" For the Biafrans, N.Y. Times, Sept. 8, 1968, \S 6 (Magazine), at 29. See also Fellows, The Unknown War In the Sudan, N.Y. Times, Sept. 22, 1968, \S 6 (Magazine), at 25.}
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291 \text{See text accompanying note 216 supra.}
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\text{Despite the wearying lack of progress so far, leaders of the American delegation to the Paris peace talks still believe the Vietnam war will be settled here.}
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\text{After five months of the talks, there would seem to be every reason for [the American delegates] to feel ennui and frustration. But the air the [sic] project remains one of determined optimism.}
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\text{The reason is evidently their belief, unchanged by these propagandistic months that the North Vietnamese really do think it is in their interest to}
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in a self-initiated zero-sum game, such as dominoes or war, are of little value, except for the ideological propaganda they may provide for either or both sides.\footnote{292}

Finally, an incremental approach to foreign policy conflicts might allow for more craftsmanship in gaining the popular support for a national war effort by allowing policy feedback in the on-going morphogenetic decision-making process.\footnote{293} Certainly, the need

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\footnote{292} Ordinarily, one thinks only of nonzero-sum games as negotiable. It would seem that since in the zero-sum games the interests of the players are diametrically opposed, there is nothing to negotiate. However, in the larger context of negotiation, namely that of joint analysis of the situation, zero-sum games can also be "negotiated."

As an example, imagine a situation in a game of Chess in which one player clearly sees that he must win. If his opponent is a sufficiently competent Chess player, then he, too, will agree that inevitably victory must go to the first player. At this point it seems futile to continue the game.

In the days when war was the "sport of kings," negotiated settlements were the rule rather than the exception. Often the strategic potentialities open to the contending forces were taken into account in the negotiations. Even in our days of total and ideological wars, demands for surrender are sometimes coupled with appeals to humanitarian rationality, e.g., "to avoid useless bloodshed." These appeals are bids to recognize the nonzero-sum character of the conflict. If defeat of one side is inevitable, it often seems (especially to the prospective victor) that both sides ought to take advantage of a rational appraisal of the outcome and to avoid useless losses. A. Rapoport, supra note 269, at 212.

The long, drawn-out Paris Peace Talks on Vietnam and the stalemated peace talks in Addis Ababa on the Nigerian-Biafran conflict may be viewed as examples of fruitless efforts to negotiate peaceful settlements in zero-sum games. Concerning the resolution of the Vietnam conflict, one commentator has stated:

The war in Vietnam will come to an end, not through the efforts of the peace movement, but because Realpolitik in either Washington, Hanoi or Peking demands it.

The détente with Russia will then proceed at a faster rate and result in significant disarmament moves.

Within the United States, the outbreak of relative peace will be the occasion for a fierce debate on economic and social policy. Harrington, supra note 264, at 19 (emphasis added).


\footnote{293} Karl Deutsch has termed this aspect \textit{goal-changing feedback}:

[Goal-changing feedback] ... includes feedback readjustments ... of those internal arrangements which implied [the system's] ... original goal, so that the net will change its goal, or set itself new goals which it will now have to reach if its internal disequilibrium is to be lessened. Deutsch, \textit{Some Notes on Research on the Role of Models in the Natural and Social Sciences}, \textit{7 Synthese} 506, 515 (1948-1949).

\textit{See also} O. Lewis, \textit{supra} note 40, at 54; note 333 \textit{infra} (positive and negative feedback); text accompanying notes 403 and 406 \textit{infra}. Morphogenetic is defined in note 333 \textit{infra}.\footnote{333 infra}
for such an approach is apparent, for the United States is seen now through the eyes of the world as a perpetrator of basically "undemocratic" actions in its international policies and its determination of those policies. Refusal to approve the international human rights treaties has only served to perpetuate this image and is another example of the American foreign policy dilemma.

C. International Human Rights Treaties:
Why Won't the United States Sign?

On December 10, 1948, the United Nations General Assembly, responding to American initiative and American leadership, approved overwhelmingly the Universal Declaration of Human Rights. Only a few countries abstained — the Communist bloc, Saudi Arabia, and the Union of South Africa. Today, 20 years later, only three of the original 51 United Nations members have failed to ratify more than one of the dozen or more conventions embodying the basic principles included in the Declaration of 1948. These three are Spain, the Union of South Africa — and the United States.

The principal arguments given for the United States refusal to sign international human rights treaties, and the rebuttals to these arguments, are as follows:

History reveals that the problems which the Executive Department is now facing are not new:

As to the mode of terminating the war and securing peace, the President is equally wandering and indefinite. First, it is to be done by a more vigorous prosecution of the war in the vital parts of the enemy's country; and after apparently talking himself tired on this point, the President drops down into a half-despairing tone, and tells us that "with a people distracted and divided by contending factions... [we] may fail to secure a satisfactory peace."


295 The United States Senate has given its advice and consent to the Supplemental Slavery Convention, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, T.I.A.S. 6418, Sept. 7, 1956 (entered into force with respect to the United States on Dec. 6, 1967).

(1) A Covenant of Human Rights which did not go as far as the constitutional Bill of Rights would be unconstitutional if ratified by the United States and could reduce the internal effectiveness of the constitutional guarantees. Such a covenant, however, could be viewed as stating minimal standards and would not prevent any nation from giving more liberty to its citizens.

(2) Permission given to sovereign states by an international covenant allowing exceptions to individual freedoms beyond those exceptions permitted the federal government by the Constitution would enlarge the powers of Congress. This argument is also refutable, for Congress' power to implement a treaty obligation of the United States does not permit Congress to legislate in violation of established constitutional guarantees.

(3) An international covenant on human rights may impose higher standards than those required by the Federal Constitution. If this were the case, then "[u]ndoubtedly the United States could properly be criticized diplomatically or in the United Nations if individuals were denied in this country rights guaranteed to everyone by a Covenant of Human Rights ratified by the United States." If the United States is to participate effectively in international legislation especially on


Insistence by the United States that its standards must be accepted in such a covenant would prevent general acceptance of the covenant and furthermore would manifest a failure of the United States to appreciate that much variation in the relation of the individual to the state exists in different parts of the world, and complete uniformity is neither to be expected nor desired. Q. WRIGHT, supra note 245, at 282, citing Mead, World Culture, in THE WORLD COMMUNITY 51, 58, 66 (Q. Wright ed. 1948).


See Q. WRIGHT, supra note 245, at 283.

Id. at 284 (emphasis added).

subjects such as the protection of human rights, normally within the power of the states, the supremacy of treaties over state law should be maintained.  

(5) "Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States." This long-standing regulation of the Department of State has been put forth as an ultimate reason why the United States should not sign human rights conventions. Such an argument seems overly naive, for the United States interests can be advantageously promoted by such internal changes in foreign countries.  

The dilemma of a nation which seeks to proselytize other nations and peoples to a democratic theory based on human rights yet which refuses to sign international human rights treaties is, to say the least, diplomatically embarrassing. The human rights treaties can be viewed as attempts at a minimal codification of principles denouncing those crimes against "higher laws of humanity" for which men were prosecuted at the Nuremberg trials. Moreover,


305 Raymond, Don't Ratify the Human Rights Conventions, 54 A.B.A.J. 141 (1968).

306 In evaluative theory, such an argument would fall into the naive criteria or naive priorities approach: "One primitive approach that might be called 'the naive criteria method' holds that merely announcing a few general values — 'security,' 'employment,' and 'price stability,' perhaps — supplies enough evaluative machinery to propel descriptive knowledge toward definite recommendations." D. Braybrooke & C. Lindblom, supra note 208, at 6.

A common gesture toward improving the naive criteria method — but one that is itself clearly defective — takes the form of "the naive priorities method." This method takes the difficulty about conflicting values into account. Its defect is that it goes no further than merely ranking all the values considered in order of priority. It may put "freedom" ahead of "economic growth" and "economic growth" ahead of "equality"; or "combating unemployment" ahead of "combating inflation" and both of them ahead of "re- storing competition." Id. at 7.

The naive criteria and naive priorities methods compare with the low integration index and the moderately low integration index, respectively, in general information processing systems. H. Schroder, M. Driver & S. Streufert, supra note 208, at 15 and 18. Compare these methods with the disjointed incrementalistic, supra notes 208 and 276, and the rational-deductive, supra note 277. See Figure 1, at pp. 242-43 infra; text accompanying notes 390-405 infra.

307 In relation to the Nuremberg trials it is interesting to note that: The fact that a defendant had acted under an order of his government or of a superior was not to free him from responsibility for having carried it out, although superior orders could be considered in mitigation of punishment if the tribunal decided that such would be in the interest of justice. In this provision the charter of the tribunal took care of what was certain to be
embarrassment in the conduct of its international policy is not the only undesirable by-product of the United States abstention from ratifying the treaties. Such abstention has also foreclosed the possibility of our registering an actionable complaint against any ratifying power which fails to implement the convention, or worse, grossly abuses the principles promulgated thereunder. "Only those who are contracting parties to a convention are in a position to 'blow the whistle' on violations of treaty obligations by an acceding state." 8

Failure to sign the human rights treaties, however, is but one, a chief defense of many of the accused. A clause expressly prohibiting the carrying out of inhuman or illegal orders had prudently been inserted in the military manuals of the British and American armies only a year before. Up to that time the accepted doctrine of both armies had been that a soldier must obey the orders of his superiors whether he liked them or not. With the trials coming up, the regulations were changed to provide that no order that offended a soldier's conscience need be carried out. (Curiously, the German Army had a similarly phrased order. The German soldier in World War I and even under the Nazis was told in his book of military law that he was not to carry out orders he knew to be illegal.) E. DAVIDSON, THE TRIAL OF THE GEHRMANS 20 (1966) (footnotes omitted).

Compare Case of Dithmar and Bolt ["the Llandovery Castle case"] 16 AM. J. INT'L L. 708 (2d Crim. Sen., Imperial High Ct. of Germany, 1921) (officers who followed orders of superior found guilty for machine-gunning lifeboat survivors), with Case of Commander Karl Neuman ["the Dover Castle case"], 16 AM. J. INT'L L. 704 (1922) (accused found not guilty for torpedoing hospital ship in obedience to superior orders). See also S. GLUECK, WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT 153 (1944).

Compare United States v. Holmes, 26 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842) (accused threw persons off lifeboat, sentenced to six months hard labor and fined $20), with United States v. Carr, 26 F. Cas. 306 (No. 14,732) (C.C.S.D. Ga. 1872) ("A soldier is bound to obey only the lawful orders of his superiors.") Id. at 308).

Article 90 of the Uniform Code of Military Justice, 10 U.S.C. § 890 (1952), provides that any member of the armed forces who "willfully disobeys a lawful command of his superior officer" is subject to the death penalty in time of war and "by such punishment, other than death, as a court-martial may direct," in time of peace. "A person cannot be convicted under this article if the order was illegal; but an order requiring the performance of a military duty or act is presumed to be lawful and is disobeyed at the peril of the subordinate." MANUAL FOR COURTS-MARTIAL, UNITED STATES § 169, at 321 (1951). See Y. KAMISAR, CRIMINAL LAW CASES AND MATERIALS ch. II, at 35-38 (tent. ed. 1967). See also Mora v. McNamara, 373 F.2d 664, cert. denied, 389 U.S. 934, reharing denied, 389 U.S. 1024 (1967) (questioning the constitutionality of United States military activity in Vietnam presents political questions beyond the jurisdiction of the Court).


albeit major, manifestation of how the introspective policy outlook of the United States has culminated in the American Dilemma.

Our difficulty is that we have not understood the complexity of the problem. We have been too much obsessed with our own culture and our own Constitution when we have thought of a law-governed world. We have tended to think of the ideal institutions of the world as our institutions made universal. We have been too prone to think that a world "safe for democracy" means a world all of which is democratic as we interpret the term.

We must think, instead, of the American society and the world society as two entities, which are distinct, though they cannot be separated because one contains the other, and which consequently must mutually adapt to one another if either is to be secure. We must ask how the world constitution may be modified to give greater assurance that international law will be just and will be observed, and how our Constitution must be modified in order that we may preserve our basic institutions and may make our appropriate contribution to the maintenance of such a world.309

Perhaps a possible solution to the Soviet and American dilemmas, as well as the general dilemmas of a pluralistic world, would be to base international law on underlying sociological, "critical morality,"310 standards. If we can believe Professor Marshall McLuhan, the world — or this spaceship earth — is becoming one large retribalized village, due to the total integration of extensional cybernetic processes and the mass electronic communications media.311

309 Q. Wright, supra note 245, at 277. "To our Western ideological heritage also belongs the belief that [American] political democracy is the right road to progress and that progress will strengthen democracy." G. Myrdal, An International Economy 159 (1956). For a criticism of this view, see note 256 supra.

310 Morality is a term that may refer to that which is desired or that which is desirable, to a "practical socio-cultural fact in respect to matters of right and wrong, good and evil, and [to] ... theories about the ends, standards, principles according to which the actual state of affairs is to be surveyed and judged." J. Dewey, Reconstruction in Philosophy 19-20 (Mentor ed. 1950). Professor Hart proposes that we call the existing mores of any given social group "positive morality," and those general moral principles or ideals used as criterion for evaluation of positive morality and other social institutions "critical morality." H.L.A. Hart, Law, Liberty and Morality 20 (1963). Abraham and May Edel use a similar dichotomy in their conclusion that "the general lesson of our inquiry would seem to be that ethical concepts, no matter how detached they are felt to be in consciousness, have cultural roots and cultural functions, and their meaning is to be found in the offices they perform. And criteria would seem to have a similar character. The criteria in any evaluation of virtues, goals, ideals, needs, and so on, are other virtues, goals, ideals, needs, more abstract or more concrete, which have become enlisted on behalf of the ethical concepts to carry out their office in the given context." A. Edel & M. Edel, Anthropology and Ethics 226 (1959). O. Lewis, Modern Systems Theory and Judicial Behavioralism 67 n.328 (tent. ed. 1968). See C. Churchman, supra note 264, at 21, 370-71; L. Fuller, The Morality of Law 13-19 (1964). On the possible bifurcation of rationality, see note 288 supra.

311 M. McLuhan, Understanding Media: The Extensions of Man 24 (5th
At some not too distant date, international law, or what the Hon. Phillip C. Jessup, the United States representative at the Hague, calls "transnational law," or perhaps "supranational law," may have to be based upon simplistic tribal norms. A possible effectuating or operational sociological solution to the existing dilemmas of international law might be that of a transcultural consensus.

IX. TRANS-CULTURAL CONSENSUS: A SUGGESTED SOCIOLOGICAL APPROACH TO INTERNATIONAL LAW

No man is an Island, intire of it selfe; every man is a piece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any mans death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; It tolls for thee.

JOHN DONNE,
DEVOTIONS UPON EMERGENT OCCASIONS, XVII (1623).

ed. 1966); M. McLuhan & Q. Fiore, THE MEDIUM IS THE MASSAGE 63 (1967). The term "cybernetic processes" is used here in the sense of an internal systems extension, i.e. content variables may be expanded but structural variables remain basically unchanged. This will later be defined as an example of the "first" cybernetics. See note 333 infra. On structural and content variables, see note 402 infra. It should be noted, however, that these "integrative processes" are the basis for a morphogenetic process — the distinguishing differentiation being the role of feedback. See note 333 infra. For a comprehensive discussion of McLuhan's theories, see McLuhan: PRO AND CON (R. Rosenthal ed. 1968).


313 For a discussion of the tribal norms of the Tiv and Barotse tribes and the role of cultural anthropology in law, see Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia, in JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 90 (G. Schubert ed. 1964); Bohannan, Justice and Judgment Among the Tiv, in id. at 110. See also E. HOBBEL, THE LAW OF PRIMITIVE MAN 3-66 (1954) (employing Hohfeldian terminology and analysis); W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (W. Wheeler ed. 1964).

Professor Harry W. Jones has suggested the following four jurisprudential theorems which, if true with respect to the actual functioning of law in any national society, may provide needed clues as to what must be done to put law and the idea of law to the full service of the community of mankind: Theorem I, The unique task of law is the resolution of the conflicting interests, competing demands, that are inevitable in any society; Theorem II, In the establishment and maintenance of a legal order, dispute-settling machinery is prior to and more important than substantive rules and principles; Theorem III, Compromise — the reasoned accommodation of opposed points of view — is a central and indispensable technique in the practical operation of a legal order; Theorem IV, In any form of adjudication, the judges are even more important than the legal doctrines on which they draw for decision. Jones, LAW AND THE IDEA OF MANKIND, 62 COLUM. L. REV. 753, 759-70 (1962).
A. The Problem: On Aggression and the Territorial Imperative

Every man is a product of two complex heritages — his genetic and his socio-cultural. In general, nonetheless, man is under fewer phylogenetic constraints than lower level adaptive systems. "The behavior of other animals is primarily determined by genetic coding whereas in the case of man ontogenetic mapping is much more determinative."\(^{314}\) Due to the very fact that man is so little constrained by his genetic heritage and the fact that man's past experience influences his present behavior, so much so that "the child is father of the man" and culture is the mother, he can plan for his future not on the basis of what he is but of what he can become.\(^{315}\) Indeed, it may soon be possible for man to alter his genetic constraints. Unfortunately, however, man will still lack the superhuman prescience necessary to determine what genetic changes are desirable, except within the context of his immediate socio-cultural constraints.\(^{316}\) Genetic manipulation and neurological controls will not provide an easy means for programming man's basic nature to circumvent his probable species self-annihilation.\(^{317}\)

\(^{314}\) O. Lewis, supra note 310, at 37. Walter Buckley has made this point as follows:

[J]ust as biological evolution represents the phylogenetic mapping of the variety and constraints in the physical and biological environment into the physiological structure of species via genetic coding, and learning represents the ontogenetic mapping in somewhat greater detail of this variety via neurological coding, so human cultural development and group socialization represents the extrasomatic mapping in much greater detail and potential fidelity of the physical, social and psychic variety in the environment via symbolic coding. This latter, by virtue of its extrasomatic component is thus freed from many biological constraints, and underlies the phenomenon emphasized in Mead — man as an interpreting, defining, choosing, deciding being. Buckley, Self-Regulation and Self-Direction in Psychological Systems, in Modern Systems Research for the Behavioral Scientist 313, 316 (W. Buckley ed. 1968).

\(^{315}\) See O. Lewis, supra note 310, at 38 and 42.

\(^{316}\) Id. at 37-38. The prescience required would be that which would anticipate the ethical demands of the new culture produced by genetic manipulation. This is reflected in Churchman's definition that X ought to do A on ethical grounds as "A is what X would do if he knew the consequences of his acts, and if he knew what future men will want." C. Churchman, supra note 264, at 22 (1961). Note the parallel between this statement and the duty to a "higher law of humanity" required at the Nuremberg trials discussed in note 307 supra.

Konrad Lorenz argues that the socio-cultural and genetic heritages of man are complementary:

[M]an's whole system of innate activities and reactions is phylogenetically so constructed, so "calculated" by evolution as to need to be complemented by cultural tradition. . . . The equipment of man with phylogenetically programmed norms of behavior is just as dependent on cultural tradition and rational responsibility as, conversely, the function of both the latter is dependent on instinctual motivation. K. Lorenz, supra note 236, at 265.

\(^{317}\) For a discussion of aggression and its control, see note 241 supra. See also
The two current aspects of international relations which provide the greatest obstacles to world peace, namely nationalism and regional collective security, can be viewed phylogenetically as overt manifestations of man's intra-specific aggression and territorial imperative social patterns. In order to more fully comprehend and attempt to constructively change the prevailing societal behavior as evidenced by these phylogenetic traits, one must first acquire an understanding of man's basic animalistic instincts.

Konrad Lorenz has noted that animals, man included, tend to be far more aggressive toward their own species than toward any other. Lorenz defines this intra-specific aggression as "the fighting instinct in beast and man which is directed against members of the same species." Normally, intra-specific aggression fulfills an important species-preserving function, and for this reason it has

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318 It is a tragedy of our time that nationalism has become a compelling slogan again, that the charismatic leaders of the emergent countries of Africa and Asia are nationalists and rarely libertarians. In the perspective of mankind, nationalism, regionalism, and emotional patriotism are forces working against the possibility of an international rule of law. Jones, *supra* note 313, at 756.


"The prevailing pattern of twentieth-century nationalism is its power orientation. In effect, there seems to be a fairly direct ratio between the totalitarian characteristics of the government and the relative virulence of its people's nationalism." A. GYORGY & G. BLACKWOOD, *supra* at 174.

319 We must be careful, however, in contrasting man with other animals, to realize that the respective mechanisms and inherent attributes are quite different. See Figure 1, at pp. 242-43 infra. To suggest that they are the same is to commit the zoomorphic [see L. VON BERTALANFFY, ROBOTS, MEN AND MINDS 15 (1966)] or rammomorphic [see A. KOESTLER, THE ACT OF CREATION 560 (1964)] fallacy, the converse of the anthropomorphic fallacy whereby human attributes are ascribed to lower forms of life. See O. LEWIS, *supra* note 310, at 81 n.429.


321 *Id.* at ix.

322 The danger of too dense a population of an animal species settling in one part of the available biotope and exhausting all its sources of nutrition and so starving can be obviated by a mutual repulsion acting on the animals of the same species, effecting their regular spacing out, in much the same manner as electrical charges are regularly distributed all over the surface of a spherical conductor. This, in plain terms, is the most important survival value of intra-specific aggression. *Id.* at 31.

With the exponential population explosion, such spacing will become increasingly more difficult and may lead to the venting of new aggression unless, of course, the food supply diminishes to the point (as in India today) that the people are virtually
become phylogenetically programmed into man as a norm of social behavior. However, with man this aggressive force could lead to total annihilation of the human species. Due to rapid and widespread technological advancement, man has become the only animal, it seems, to have lost (or never evolved) an instinctive inhibition to terminate aggressive action before the particular species is made extinct. All other animals have such an instinct which is commensurate with their killing power. The remoteness of modern weaponry in distancing the button-pusher from the gore of his "kill" enhances further the danger of inherent inhibitions being ineffective in controlling man's intra-specific aggression.

In the modern community there is no legitimate outlet for aggressive behavior. "To keep the peace is the first of all civic...

See Lelyveld, Can India Survive Calcutta?, N.Y. Times, Oct. 13, 1968, § 6 (Magazine), at 58 ("In this tragedy, political analysts see... at stake... the future of democracy throughout the entire subcontinent." Id.). See also note 337 infra.

K. LORENZ, supra note 236, at 253. For citation to criticism of Lorenz-Ardrey pessimism, see note 240 supra.

In human evolution, no inhibitory mechanisms preventing sudden man-slaughter were necessary, because quick killing was impossible anyhow; the potential victim had plenty of opportunity to elicit the pity of the aggressor by submissive gestures and appeasing attitudes. No selection pressure arose in the prehistory of mankind to breed inhibitory mechanisms preventing the killing of conspecifics until, all of a sudden, the invention of artificial weapons upset the equilibrium of killing potential and social inhibitions. When it did, man's position was very nearly that of a dove which, by some unnatural trick of nature, had suddenly acquired the beak of a raven [or, one might add, hawk]. K. LORENZ, supra note 236, at 241.

Professor Ivo Feierabend, who has analyzed internal political violence in 84 nations over an 18-year period, reported recently on the apparent "relationship between aggressiveness on the one hand, and rapid socio-economic development and unsatisfied wants on the other," in testimony before the National Commission on the Causes and Prevention of Violence. Loftus, Aggression Tied to Global Wants, U.S. Panel Told, N.Y. Times, Oct. 3, 1968, at 38, cols. 1-4 (city ed.).

If moral responsibility and unwillingness to kill have indubitably increased, the ease and emotional impunity of killing have increased at the same rate. The distance at which all shooting weapons take effect screens the killer against the stimulus situation which would otherwise activate his killing inhibitions. The deep, emotional layers of our personality simply do not register the fact that the crooking of the forefinger to release a shot tears the entrails of another man...

The same principle applies, to an even greater degree, to the use of modern remote-control weapons. The man who presses the releasing button is so completely screened against seeing, hearing, or otherwise emotionally realizing the consequences of his action, that he can commit it with impunity — even if he is burdened with the power of imagination. K. LORENZ, supra note 236, at 242.

"The obverse of this phenomenon is responsible for the principal combat problem of present-day infantry officers: the unwillingness of otherwise 'trained' troops to fire at an enemy close enough to be recognizable as an individual rather than simply as a target." IRON MOUNTAIN REPORT, supra note 236, at 45 n.9.
duties, and the hostile neighboring tribe, once the target at which
to discharge phylogenetically programmed aggression, has now
withdrawn to an ideal distance, hidden behind a curtain, if possible
of iron." 326 Thus, man has been forced to acquire redirected activ-
ities of intra-specific aggression. The most sociologically disrup-
tive manifestation of such redirections is termed "militant enthu-
siasm" — a specialized form of communal aggression 327 whereby instinc-
tive appreciation for life and the instinctive inhibitions against
hurting or killing a member of one's species become superseded by
the "higher" duty to destroy those designated as enemies. 328 It is in
this collective aggression of one community (or nation) against
another that Lorenz finds the greatest danger to the survival of the
human race. 329

Interrelated with man's collective aggression is his territorial
imperative — that behavior pattern evolved as a kind of defense
mechanism emphasizing the necessity of protecting a specifically
bounded area from external hazard. According to Robert Ardrey,
man's territorial imperative is culturally determined and is the
foundation for human morality. 330 He sees an inverse relationship
between the fall of hazard and the rise of enmity. "Perhaps it has
merely been that with growing control over our physical environ-
ment we have been left with more free time for killing each
other."

326 K. LORENZ, supra note 236, at 253.
327 Id. at 268.
328 Militant enthusiasm is particularly suited for the paradigmatic illustration
of the manner in which a phylogenetically evolved pattern of behavior inter-
acts with culturally ritualized social norms and rites, and in which, though
absolutely indispensable to the function of the compound system, it is prone
to miscarry most tragically if not strictly controlled by rational responsibility
based on causal insight. Id. at 268.

Note the relationship between militant enthusiasm and the "ritualized" common enemy
discussed in note 236 supra & accompanying text.
329 K. LORENZ, supra note 236, at 157. See note 318 supra.
330 [T]he territorial imperative . . . is the biological law on which we have
founded our edifices of human morality. Our capacities for sacrifice, for
altruism, for sympathy, for trust, for responsibilities to other than self-
interest, for honesty, for charity, for friendship and love, for social amity
and mutual interdependence have evolved just as surely as the flatness of our
feet, the muscularity of our buttocks, and the enlargement of our brains,
out of the encounter on ancient African savannahs between the primate
potential and the hominid circumstance. Whether morality without territory
is possible in man must remain as our final unanswerable question. R.

On morality, see discussion in note 310 supra.
331 R. ARDREY, supra note 330, at 349.
seem, the necessity for common unifying enemies; but this gives rise to a further predicament:

The human predicament contains two forces: On the one hand that balance of terror, the *pax atomica*, compels a general peace, or at the least insists that a general peace be observed until accident or cynicism end it. In any event, war as we have known it has become both an impractical outlet for our innate psychological needs and an impractical external pressure enforcing our [intercommunal] social amity. But on the other hand man's cultural achievements have long since pressed him beyond a point of possible return, and if he is to survive on his irreversible course of technological mastery, specialized skill, and consequent interdependence, then he becomes with every passing year, every passing day, more at the mercy of social amity and mutual co-operation.  

Assuming there is functional validity in the concept of man's intra-specific aggression and territorial imperative (at least as manifested in nationalism and regional collective security), then as international relations become totally integrated and man's external morphogenetic processes become inter-circuited through the mass

Without doubt our superb technological achievements have presented us with superb opportunities for wholesale murder denied the ancient world. But even making proper allowance for the manifold inducements, temptations, and opportunities more grandly expanding our natural satisfactions derived from mutual massacre, I cannot eliminate from my estimates the necessity for enemies which falling hazard compels.

And so we must face the unanswerable question: What will happen if the control which we exert over our physical environment ever totally eliminates natural hazard? Will man become the temperamental opposite of the emperor penguin? When hazard approaches zero, will enmity approach infinity?  


333 Magoroh Maruyama has distinguished a "first" cybernetics concerned with morphostasis (deviation-counteracting mutual causal relationships) from the "second cybernetics which is also concerned in addition with morphogenesis (deviation-amplifying mutual causal relationships). Maruyama, *Morphogenesis and Morphostasis*, 48 *METHODOS* 12 (1960).

The deviation-counteracting mutual causal systems and the deviation-amplifying mutual causal systems may appear to be opposite types of systems. But they have one essential feature in common: they are both mutual causal systems, i.e., the elements within a system influence each other either simultaneously or alternately. The difference between the two types of systems is that the deviation-counteracting system has mutual negative feedbacks between the elements in it while the deviation-amplifying system has mutual positive feedbacks between the elements in it. Maruyama, *The Second Cybernetics: Deviation-Amplifying Mutual Causal Processes*, 51 AM. SCIENTIST 164 (1963).

While negative feedbacks appear to be deductive in that they are structure maintaining, positive feedbacks allow for end-goal or structural change. It is, therefore, only with the deviation-amplifying mutual causal processes that you arrive at the highest
media of communications, several alternatives for international and world power domination will arise. First, the United States and the Soviet Union might divide the rest of the world and its resources virtually between themselves. Such a bipolarized state of existence, coupled with the exploitation of lesser powers, is not too far distant from the present day state of world affairs. Second, smaller nations might continue to combine into regional defense organizations, such as NATO, the Warsaw Pact group, and the Organization of American States, thus pooling their respective powers and resources. In effect this alternative is not unlike the first, for if the multitude of sovereign states eventually merged their defense systems into only two or three collective defense mechanisms, "corresponding to the super-states of Orwell’s 1984, national sovereignties would be correspondingly reduced in number, but the change would be from the power balances of numerous big and small national states to the more massive and potentially more destructive balance of power between two or three blocks of super-Powers."

A third alternative, which would also theoretically meet man’s behavioral patterns of collective aggression and territorial imperative, would be to "territorialize" the entire world, or this spaceship earth, against some externalized enemy such as mythical or real invaders from outer space. A fourth alternative, similar to the

integration evaluative level. On goal-changing feedback, see note 293 supra and text accompanying note 406 infra. For a graphic comparison of the complexity levels of morphogenetic and ("first") cybernetic models, see Descriptive Models for high integration index and moderately high integration index, in Figure 1, at pp. 242-43 infra. See also O. Lewis, supra note 310, at 20 n.116 (discussing the first and second law of thermodynamics in relation to information processing); N. Wiener, Cybernetics 50 (1948) (defining feedback as "output information" in place of "output energy"); Deutsch, Toward a Cybernetic Model of Man and Society, in Modern Systems Research for the Behavioral Scientist 387 (W. Buckley ed. 1968) ("Positive feedback adds to the input signals, it does not correct them." Id. at 399 n.2); Wiener, Cybernetics in History, in id. at 31.

W. Friedmann, supra note 139, at 258. On regionalism, see text accompanying note 264 supra. Note also the following statement:

[The "spheres of influence" doctrine] is a device for keeping the great powers from getting into critical disputes in areas where one or the other feels it must risk war to defend its vital interests. It is not a fair doctrine, for it puts the small neighbors at a serious disadvantage. . . . "Recognition of spheres of influence," Walter Lippmann wrote several years ago, "is a true alternative to globalism. It is the alternative to Communist globalism which proclaims a universal revolution. It is the alternative to anti-Communist globalism which promises to fight anti-Communist wars everywhere. . . . [It] has been the dominant foundation of the détente in Europe between the Soviet Union and the West. Eventually it will provide the formula of coexistence between Red China and the United States." Reston, Spheres of Influence or Spheres of Domination?, N.Y. Times, Sept. 13, 1968, at 46, cols. 3-6 (city ed.).

See note 237 supra.
third, would be for the entire world to join in "war" against the common unifying enemy of an insufficient amount of oxygen, water, and food for the exploding world population.\textsuperscript{336} From a Malthusian point of view, the sheer lack of space may force the total infusion of the seething world masses, making it virtually impossible to define territorial boundaries.\textsuperscript{337}

\textsuperscript{336} Professor Paul Ehrlich, among many others, has emphasized that the "time of famines" is upon us and will be at its worst and most disastrous by 1975. "The first move must be to convince everybody to think of the earth as a spaceship that can carry only so much cargo. When we have determined the proper size of the crew then we can design the environment to suit." Cleveland Plain Dealer, Nov. 17, 1967, at 12, cols. 4-5. \textit{See also} Millions to Starve, Biologists Told, Cleveland Plain Dealer, Sept. 4, 1968, at 20, cols. 1-2 (Report of 19th Annual Meeting, American Institute of Biological Sciences, Ohio State Univ., Sept. 4, 1968); World Food Crisis Is Reaching Critical Stage, Cleveland Plain Dealer, May 23, 1968, at 53, cols 1-8. On water pollution and the water crisis, see Reitze, \textit{Wastes, Water, and Wishful Thinking: The Battle of Lake Erie}, 20 CASE W. RES. L. REV. 5 (1968) (this issue); Book Review, 20 CASE W. RES. L. REV. 315 (1968) (this issue). On the limited nature of the earth's air envelope and air pollution, see \textit{The Air We Breathe} (S. Farber & R. Wilson eds. 1968); R. SCORER, \textit{AIR POLLUTION} (1968). \textit{See generally} R. CARSON, \textit{SILENT SPRING} (1962).

Man's ability to adapt to the "quality" deterioration of his environment has ominous implications:

\begin{quote}
[T]he worst pathological effects of environmental pollutants will not be detected at the time of exposure; indeed they may not become evident until several decades later. In other words, society will become adjusted to levels of pollution sufficiently low not to have an immediate nuisance value, but this apparent adaptation will eventually cause much pathological damage in the adult population and create large medical and social burdens. Dubos, \textit{Adapting to Pollution}, SCIENTIST AND CITIZEN, Jan.-Feb. 1968, at 1, 3. \textit{See also} Reitze, \textit{supra} at 84 n.436.
\end{quote}

\textsuperscript{337} Exponentially viewed, it will not be long before the earth's surface is packed solid with humans, the whole mass standing in individual refrigerated capsules on a thick layer of immovable automobiles. Babies will issue from this mass in a constant stream to stand on the shoulders of their parents. Suddenly, atomic fusion is achieved by the central computer which runs this horror and the mass dissolves into a small exploding universe of positive and negative electrons, neutrinos and antineutrinos, baryons and leptons, all moving apart at relativistic speeds. Before this, of course, we shall have all killed one another off by the exponential rise in the crime rate, by radiation diseases, and, lacking all exercise, by dying shortly after birth from the ultimate pollution, namely, the inability to move away from our own excrement. Cowan, \textit{Law and Technology: Uneasy Leaders of Modern Life}, 19 CASE W. RES. L. REV. 120, 122 (1967); \textit{also cited in Lewis, The High Court: Final . . . But Fallible}, 19 CASE W. RES. L. REV. 528, 539 n.46 (1968).

Note also the following statement concerning Marx versus Malthus and the threat of hunger:

In its preoccupation with the doctrine of Karl Marx, the United States has until recently all but overlooked the more relevant Malthusian specter. In the face of mounting hunger, the United States has permitted the war against communism to bring it into alliance with feudal, land-owning oligarchies, where it should have been insisting upon land reform as a condition for American aid. If the war against hunger is lost, it will not be for lack of knowledge as to how it could be won; it will be because of lack of cooperative effort on the part of the developed nations which, in turn, has been
As the essential elements for survival become more scarce, it may be realistically questioned whether "democracy" in the American sense as a political form and a means for effectuating policy can remain a functionally operative system for allocating the limited life-sustaining resources. Inherent in the unrestrained egalitarian tenet of majority democracy (with its concept of total consensus) is the basic disadvantage which is also found in species "herding":

We know that the drive forcing the animals together is a tremendously strong one, and that the attraction exercised by the herd over the individual or over smaller groups of individuals increases with the size of the herd, probably in geometrical proportion. Thus in many animals, for example bramblings, a deadly vicious circle may arise. Under the influence of fortuitous external conditions, such as a particularly good beechnut harvest in a certain area, the flocking together of these birds may far exceed its usual extent, the avalanchelike swelling of numbers may exceed the ecologically supportable limit, and the birds may starve in masses.

The purely quantitative, and in a sense democratic, action of the herding process called "social induction" by sociologists means largely though not wholly due to American preoccupation with a crusade waged with the wrong means and in the wrong places. J. WARBURG, supra note 265, at 209.

Similarly:

The war system makes such an abstracted response possible in nonmilitary contexts as well. A conventional example of this mechanism is the inability of most people to connect, let us say, the starvation of millions in India with their own past conscious political decision-making. Yet the sequential logic linking a decision to restrict grain production in America with an eventual famine in Asia is obvious, unambiguous, and unconcealed. IRON MOUNTAIN REPORT, supra note 236, at 45.


As to consensus, the extreme of "too little" consensus raises the danger of the destruction of democracy from within by social, economic, cultural, and other conflicts. The other extreme of a "complete" consensus is a social conformity that makes liberties meaningless. Democracy hovers forever between these two poles. In most of the existing democracies the danger is perhaps greatest, in a time of international crisis like this, from too much stress on consensus and unity. One thinks, for instance, of the damaging effects of self-conscious "Americanism" upon liberties during the last decade. At any rate, we do well to fear that we may be reading our own future in the features of totalitarian states, whenever, like them, we stress unity at the expense of freedom. So it is not out of place to deplore the frenzied search for a unifying creed in the democracies. H. MAYO, supra note 236, at 308-09.

Note also Raymond Aron's statement that: "The free world would be guilty of a fatal error if it thought that it possessed a unique ideology comparable to Marxist-Leninism." R. ARON, THE OPIUM OF THE INTELLECTUALS 316 (1957). For a view greatly differing from Mayo's majority democracy, namely that of pluralistic democracy, see generally R. DAHL, supra note 248.
that a mass group is less resolute the more individuals it contains and, correlative, its herd instinct becomes stronger. Because this same behavior is readily observable in human groupings, one might assume a pessimistic outlook on the future of mankind as the world population continues its exponential explosion. However, it should be noted that the intra-specific aggression and the herd attraction work as counteracting forces so that a balance or societal equilibrium is maintained. The important effect of intra-specific aggression, namely the dispersing and spacing out of the animals of a species, is essentially opposed to that of herd attraction. "Strong aggression and very close herding exclude one another, but less extreme expressions of the two behavior mechanisms are not incompatible."

In sum, "pure" democracy on a world level, without some authoritarian variable such as the trans-cultural consensus (which will be suggested later), would run the risk of subjecting the entire human species eventually to a slow "rationed" death as the diminishing life-sustaining resources were divided equally among all persons. Such a result assumes, of course, that the herd instinct would have become so ingrained that anarchy and the suppression of the weak by the strong would not subvert the "democratic" process, and that typically undemocratic programs such as eugenics and survival selection would not be instituted. Democracy on such a world scale would mature into a monster and collapse from the ineluctable modality and logic of its own laws.

B. The Obligation: Responsible Morality

It is the unique adaptive characteristic of man that he can "time-bind" his past and present knowledge in accretive socio-cultural processes so that he can plan for his future not only on the basis

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340 K. LORENZ, supra note 236, at 145.
341 See generally E. WALKER & R. HEYNS, AN ANATOMY FOR CONFORMITY (1962).
342 K. LORENZ, supra note 236, at 146. See also discussion of social stratification in note 258 supra.
343 On an individual level, the moral hypothetical can be raised as to what a man should do in a nuclear attack if there were only enough food in the bomb shelter for the persons who were already in it and another person or persons knocked at the door. See discussion of morality in note 310 supra. See also discussion of the "calculated risk" nature of democracy in note 250 supra.
344 See note 237 supra.
345 A. KORZYBSKI, MANHOOD OF HUMANITY 91-93 (1921) (discussed in note 10 supra).
346 Just as traditional jurisprudence has been greatly concerned with the con-
of what he is but of what he can become. "Aggressive behavior and killing inhibitions represent only one special case among many in which phylogenetically adapted behavior mechanisms are thrown out of balance by the rapid change wrought in human ecology and sociology by cultural development." It is the function of responsible morality to reestablish a tolerable equilibrium between man's phylogenetic instincts and the requirements of a culturally evolved social order. In a sense, man's unique time-binding ability imposes a rational responsibility on man to plan his future so as to prevent the self-destruction of the species.

A distinction should be made here between positive international law and morality. It has been argued that moral obligation to obey international law is the "foundation" of that law. On the other hand, it is recognized that there is an international morality distinct from law, "violation of which gives no formal ground

sistency of legal doctrine, so too have scientists been primarily interested in
the elaboration of a coherent, systematic, and consistent set of scientific con-
ccepts. Professor Barber has observed that the function of scientific reports is necessarily accretive in that they supplement the existing body of scientific knowledge. The scientists who write these reports do not indicate there-
in how they arrive at their conclusions. [See Barber & Fox, The Case of the Floppy-eared Rabbits: An Instance of Serendipity Gained and Serendipity Lost, 64 AM. J. SOCIOLOGY 128 (1958:)] Very little has been accomplished by scientists, including behavioralists, to ascertain the extent to which the cultural matrix in which a scientist is embedded, or his personal attitudes, influence the growth and elaboration of scientific theory, [see Merton, Foreword to B. BARBER, SCIENCE AND THE SOCIAL ORDER 7, 9 (rev. ed. 1962)] although it is clear that these factors do affect scientific behavior. [See R. DUBOS, LOUIS PASTEUR ch. VIII (1950); E. NAGEL, Naturalism Reconsidered, in LOGIC WITHOUT METAPHYSICS 3, 5 (1956); Barber, Resistance by Scientists to Scientific Discovery, 134 SCIENCE 596 (1961); Barber & Fox, supra at 253.]

Another obvious similarity is that just as legal doctrine provides a topos, or point of departure, for judicial reasoning, [see Stone, Reasons and Reasoning in Judicial and Juristic Argument, 18 RUTGERS L. REV. 757, 775 (1964); Tammelo, Syntactic Ambiguity, Conceptual Vagueness, and the Lawyer's Hard Thinking, 15 J. LEGAL ED. 56, 58 (1962)], so too does scientific innovation and progress involve extrapolation from existing scientific knowledge. It is this accretive process that moved Newton to paraphrase Bernard of Chartes's statement: "We are like Dwarfs sitting on the shoulders of giants." Kuhn has said that "normal science" means research firmly based upon one or more past scientific achievements, achievements for a time as supplying the foundation for its further practice. [T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (1962). For an analysis of the mental processes involved, see S. FREUD, Instincts and Their Vicissitudes, in 4 COLLECTED PAPERS 60-61 (1925).] Book Review, 20 RUTGERS L. REV. 162, 163 (1965) (original footnotes incorporated into quote).

847 K. LORENZ, supra note 236, at 246.

The latter proposition may appear, at first glance, to be an overstatement of the definitional dichotomy; but it does seem to represent the position closest to practical reality. Professor H.L.A. Hart gives the following reasons for not classifying the rules of international law as "morality":

1. "[S]tates often reproach each other for immoral conduct or praise themselves or others for living up to the standard of international morality. No doubt one of the virtues which states may show or fail to show is that of abiding by international law, but that does not mean that that law is morality."

2. "The rules of international law, like those of municipal law, are often quite indifferent."

3. "Though the effect of a law requiring or proscribing certain practices might ultimately be to bring about changes in the morality of a group, the notion of a legislature making or repealing moral rules is an absurd one."

4. Finally, in discussing the foundations of international law, the opinion has often been expressed that any set of basic rules must rest, in the last analysis, "on the conviction of states that there is a moral obligation to obey them; yet, if this means more than that

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349 E. Hall, A TREATISE ON INTERNATIONAL LAW 14-15 (8th ed. 1924).

350 H.L.A. Hart, supra note 310, at 222.

351 Id. at 223.

352 Id. at 224.
the obligations which they recognize are not enforceable by officially organized sanctions, there seems no reason to accept it.\footnote{353} It is, therefore, the task of men exercising their \textit{responsible morality} to create and maintain in a future-directed fashion accretive socio-cultural inclinations which will effectively control natural instincts that might otherwise become self-destructive. Representative of an approach to this task are the growing number of "welfare" functions which have been added to the bulk of traditional inter-state relations.\footnote{354} A new body of social international law has been created because of increasing needs in the areas of health, food, transportation, and conservation of life-sustaining resources. Concurrently, a totally new field of international economic development aid has been thrust into being by a rising apprehension over the minimum standards of living on an international, as opposed to a national, scale. "The administration of all these new international interests has produced a multitude of public international organizations, the internal administration of which requires a fast-developing body of international administrative law."\footnote{355} These recent manifestations of a broadening perspective and concern over the welfare of all men provide the basis for a qualified avowal of optimism.

Nonetheless, in attempting to fulfill his rational responsibility, man's approach must be self-consciously eclectic. Too much specialization leading to compartmentalized learning has occurred. The need today is for more integrative analysis. Erwin Schrödinger has succinctly stated the problem as follows:

\begin{quote}
We have inherited from our forefathers the keen longing for uni-
\end{quote}

\footnote{353} \textit{Id.} at 225. \footnote{354} \textit{See} B. Röling, \textit{International Law in an Expanded Society} (1960).

Planning for welfare is ubiquitous. Egalitarian norms inspire it, and state intervention is, in fact, universally recognized as the agent for attaining it. But international integration suffers in proportion to the success of national welfare planning. What integrates each nation around the ideal and the processes of successful planning causes global patterns of competition, discrimination, and inequity. \textit{E. Haas, Beyond the Nation-State: Functionalism and International Organization} 461 (1964).

Gunnar Myrdal has given the following prescription:

\begin{quote}
The plain fact is this: \textit{When once the national Welfare State has come into existence and built its moorings firmly in the hearts of the peoples who in the democracies of the Western world have the political power, there is no alternative to international disintegration except to begin, by international cooperation and mutual accommodation, to build the Welfare World.} G. Myrdal, \textit{Beyond the Welfare State} 176 (1960) (author's emphasis). \end{quote}

fied, all-embracing knowledge. The very name given to the highest institutions of learning reminds us, that from antiquity and throughout many centuries the universal aspect has been the only one to be given full credit. But the spread, both in width and depth, of the multifarious branches of knowledge during the last hundred odd years has confronted us with a queer dilemma. We feel clearly that we are only now beginning to acquire reliable material for welding together the sum total of all that is known into a whole; but, on the other hand, it has become next to impossible for a single mind fully to command more than a small specialized portion of it.

I can see no other escape from this dilemma (lest our true aim be lost forever) than that some of us should venture to embark on a synthesis of facts and theories, albeit with second-hand and incomplete knowledge of some of them— and at the risk of making fools of ourselves.356

With Schrödinger's point in mind, an operational sociological approach based on a trans-cultural consensus and employing the strategy of disjointed incrementalism can now be suggested as a potential means for solving the dilemmas in international jurisprudence, which have been created by a world of polarized ideological beliefs, and as a potential means for effectuating a future "world democracy."

C. The Strategy: Disjointed Incrementalism

The search for a strategy which would allow for optimal decision in the evaluation and choice of policies is not new. But today the need of such an approach for international conflicts resolution and for preserving the welfare of mankind in general has reached ominous proportions. The ideal strategy would be synoptic, all-comprehensive, totally integrative, and account for all variables (even future) and all changes (linear and extensional, as well as structural). The synoptic ideal is, however, only an ideal.357 In-

356 E. SCHRODINGER, WHAT IS LIFE at vii (1949), also cited in O. LEWIS, supra note 310, at 42-43. Note also Glendon Schubert's recent statement:

The most general projection that one would make, on the basis of present trends, is that beyond the frontiers of judicial research lies the field of behavioral jurisprudence: empirical in its approach toward data collection; quantitative in its methods of data manipulation; eclectic in its interdisciplinary ties within political science; pandisciplinary in its theoretical orientation; and cross-cultural in the scope of its interests. Schubert, Behavioral Jurisprudence, 2 LAW & SOC'Y REV. 407, 428 (1968).

357 D. BRAYBROOKE & C. LINDSTROM, supra note 208, at 49; see note 276 supra. Even electronic computers are unable to provide practical synoptic solutions. A. L. Samuel's checkers-playing machine would require \(10^{21}\) centuries, supposing that it worked as fast as the fastest imaginable computer, to explore every possible path leading to the end of a game of checkers. [Samuel, Some Studies in Machine Learning Using the Game of Checkers, 3 I.B.M. J. RE-
evitably, failures in adaptation lead to failures of any proposed synoptic strategy. Messrs Braybrooke and Lindblom have discussed the following eight adaptive failures: The synoptic ideal is not adapted to (1) man's limited problem-solving capacities, (2) the inadequacy of information, (3) the costliness of analysis, (4) failures in constructing a satisfactory evaluative method (such as a rational-deductive system), \(^{358}\) (5) the closeness of observed relationships between fact and value in policy-making, (6) the openness of the systems of variables with which it contends, (7) the analyst's need for strategic sequences of analytical moves, and, (8) the diverse forms in which policy problems actually arise.\(^ {360}\) The failure to adapt to teleological variables and also latent dysfunctionality might also be added to this list.\(^ {360}\)

Bentham's utilitarian felicific calculus of the "greatest happiness for the greatest number" can be viewed as an example of the synoptic, or all-comprehensive, strategy for decision-making.\(^ {361}\) The intelligibility of utilitarianism — that doctrine in which the useful is the good and the determining consideration of right conduct should be the usefulness of its consequences — has been criticized for failing to encompass all functional variables.\(^ {362}\) More specifica-

\(^{358}\) The rational-deductive approach is defined in note 277 supra.

\(^{359}\) D. BRAYBROOKE & C. LINDBLOM, supra note 208, at 47-57.

\(^{360}\) On teleology, see note 40 supra. On latent dysfunctionality, see note 254 supra.

\(^{361}\) The attempt at all-comprehensiveness of the synoptic ideal is discussed in note 276 supra.

\(^{362}\) See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-31 (1907) (reprint of 2d ed. 1823).

The felicific calculus, it will be recalled, presumes that the utility of an action (or policy) can be reduced to the "value of a lot of pleasure or pain." The value of a lot is to be measured by first taking each pleasure and pain that the action will produce and considering, for each person affected, its intensity, duration, certainty or uncertainty, propinquity or remoteness, fecundity, and purity, and then considering the number of persons to whom it extends. The plus measurements of the pleasures in the lot and the minus measurements of the pains are combined to reach an algebraic sum or "balance,"
ly, several general objections to this approach have been posited: the lack of a definite interpersonal calculus (in spite of Bentham's proposals),\textsuperscript{363} the lack of a rule for cutting off accounts of consequences,\textsuperscript{364} and the lack of a rule for specifying the reference group for which consequences are to be considered.\textsuperscript{365}

Furthermore, utilitarianism can be sharply criticized as being end or goal dependent. "While the conventional view of problem solving is that means are adjusted to ends (policies are sought that will attain certain objectives), it is a significant aspect of policy analysis as actually practiced that, in certain specific ways, the reverse adjustment also takes place."\textsuperscript{366} Thus, Nagel has stated the doctrine that "goals or ends of activity are dynamic agents in their own realizations."\textsuperscript{367} Messrs Braybrooke and Lindblom note that, "[s]ince the reverse adjustment is superimposed on the conventionally conceived adjustment of means to end, the net result is a reciprocal relationship between means and ends or between policies and values that is different from that envisaged in the synoptic ideal."\textsuperscript{368} It can be suggested that the end goal in Bentham's synoptic calculus of the "greatest happiness for the greatest number" could only be

\begin{quote}
which, if on the side of pleasure, will give the general good tendency of the act, with respect to the total number or community of individuals concerned; if on the side of pain, the general evil tendency, with respect to the same community." Thus in principle, every policy in any set of alternative policies can be ranked vis-a-vis all the rest according to the score that the calculus assigns to its consequences. D. BRAYBROOKE & C. LINDBLOM, supra note 208, at 214.
\end{quote}

\textsuperscript{363} It might be asked what the functional use of such a calculus would be if in fact it could be made definite. It would first be necessary to draw attention to the difference between specification or description of the problem-solving strategy, on the one hand, and of a solved problem on the other; and, perhaps for the simple reason that the strategy is a part of the process itself, it cannot be made functionally definite. For example:

\begin{quote}
... Michael Polanyi calls attention to the difference between specification ... and [on the other hand] a solved problem. ... To ride a bicycle, he says, it is necessary at any given angle of unbalance for the rider to give a turn to the front wheel that is by some measure inversely proportional to the square of the speed at which he is proceeding. If this method specifies a solution for the cyclist, would anyone try to ride by making these calculations? D. BRAYBROOKE & C. LINDBLOM, supra note 208, at 44-45, citing M. POLANYI, PERSONAL KNOWLEDGE 49-50 (1958).
\end{quote}

\textsuperscript{364} This would necessitate closing the value system so that inputs will stabilize for processing and the decision itself can in fact be made. The policy-proposals as well as the policies themselves are constantly changing — being superseded or reshaped.

\textsuperscript{365} D. BRAYBROOKE & C. LINDBLOM, supra note 208, at vii.

\textsuperscript{366} Id. at 93.


\textsuperscript{368} D. BRAYBROOKE & C. LINDBLOM, supra note 208, at 93. "Although there is a fundamental sense in which ends govern means, there is an equally fundamental sense in which the proximate ends of public policy are governed by means." Id.
attained by equally humane means, since the operational methodology employed to effectuate a policy will necessarily have an intrinsic effect upon that very policy. 369 The Soviet Dilemma can be viewed as an example of this teleological phenomenon.

A basic tenet of Marxian ideology is that the end justifies the means, 370 but "if the end must be used to condone the means, then there is something in the end itself, in its reality, which is not worthy. That which really blesses the end, which justifies the efforts and sacrifices for it, is the means: their constant perfection, humanness, increasing freedom." 371 The revolutionary government in Russia was able to overthrow one form of society and despotically set up another.

At first it was guided by the most beautiful, primordial human ideas of equality and brotherhood; only later did it conceal behind these ideas the establishment of its domination by whatever means. . . . Thus, by justifying the means because of the end, the end itself becomes increasingly more distant and unrealistic, while the frightful reality of the means becomes increasingly obvious and intolerable. 372

Although this criticism is somewhat naive, 373 it can also be levelled

369 Throughout history there have been no ideal ends which were attained with non-ideal means, just as there has been no free society which was built by slaves. Nothing so well reveals the reality and greatness of ends as the methods used to attain them. M. Djilas, supra note 147, at 162.

Note, however, that a valid and "just" means for attaining an ideal goal, such as equality of the sexes, may be dysfunctional to the extent that it encourages hopes that it cannot satisfy or precipitates cataclysmic retaliation to the specific change. An example on point is the use of law as an instrument of social change in traditional Islamic societies under Soviet rule in the late 1920's. Massell, Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia, 2 LAW & SOC'Y 179, 221-26 (1968).

370 See text accompanying notes 50-52 supra.

371 M. Djilas, supra note 249, at 162. See also notes 52 and 147 supra.

372 M. Djilas, supra note 249, at 163. Milovan Djilas also states:

The ultimate results of a social struggle can never be of the kind envisaged by those who carry it out. Some such struggles depend on an infinite and complex series of circumstances beyond the controllable range of human intellect and action. This is most true of revolutions that demand superhuman efforts and that effect hasty and radical changes in society. They inevitably generate absolute confidence that the ultimate in human prosperity and liberty will appear after their victories. The French revolution was carried out in the name of common sense, in the belief that liberty, equality, and fraternity would eventually appear. The Russian revolution was carried out in the name of "a purely scientific view of the world," for the purpose of creating a classless society. Neither revolution could possibly have been created if the revolutionaries, along with a part of the people, had not believed in their own idealistic aims. Id. at 32.

373 See discussion of naive criteria and naive priorities approaches to decision-making in note 306 supra.
at the Soviets' pragmatic use of international law to achieve their purportedly ideal ends.

The criticism does, however, reemphasize the need for an effectuating strategy which *would* facilitate an adjustment of the ends or objectives of policies to the means. Similarly, it can be argued that nationalistic goals, such as regional supremacy and ideological implantation, may have to be adjusted or foregone to new goals, such as species preservation, if the means for achieving the new goal can be operationally established. In the final analysis, such a change will come about only if parochial attitudes and naive values are replaced with a *mankind perspective*. Even if the world were viewed as a spaceship with limited resources for sustaining the crew, survival of the human species would still depend upon some means of decision-making which is in turn founded on a complex and high level of integrative evaluation.

Messrs Braybrooke and Lindblom have convincingly argued that the disjointed incrementalistic strategy for decision-making,

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874 In recent years nearly every literate person has become cognizant of the "quality" deterioration of our environment. However, this knowledge has not been translated into the meaningful societal actions necessary to halt the fouling of our habitat. This destruction of our environment was at one time an aesthetic problem. Today it involves the survival of mankind as a species. Man has been on earth for a very short period. His technological changes involve only a little more than a century so that his myopic view should not obscure the insignificance of their span of time. Assuming he survives his radiological, biological, and chemical war toys, he still must face the long term effects of pesticides, air pollution, destruction of the soil, etc. Man should not be sanguine. Address of Arnold W. Reitze, Jr. at the Research Conference on Nucleation, Precipitation and Solidification, sponsored by the U.S. Dept of Interior, Cleveland, Ohio, Sept 23, 1968; see Reitze, *supra* note 336, at 85 n.447.

See also G. TAYLOR, THE BIOLOGICAL TIME BOMB (1968); B. WARD, SPACESHIP EARTH (1966); note 239 *supra*.

"Pollution may well be the nation's most broadly based and democratic effort."


Our ecological crisis is the product of an emerging, entirely novel, democratic culture. The issue is whether a democratized world can survive its own implications. Presumably we cannot unless we rethink our axioms. . . .


To meet the cost of mankind planning, Barbara Ward has suggested a progressive international income tax by which all advanced nations would contribute 1 to 2 percent of their annual national income. Ward, *To Widen the Base of World Wealth*, N.Y. Times, March 14, 1954, § 6 (Magazine), at 11; see J. SPANIER, AMERICAN FOREIGN POLICY SINCE WORLD WAR II 187 (2d rev. ed. 1965).

875 The disjointed incrementalistic strategy is defined in notes 208 and 276 *supra*. Compare with *naive criteria* and *naive priorities* evaluative methods, defined in note 306 *supra*, and the rational-deductive method, defined in note 277 *supra*. See also Figure 1, at pp. 242-43 infra.
whereby marginal dependent or incremental choices are decided singularly in an on-going but reversible order, is the best suited for such polycentric and multivariate problems.\textsuperscript{376} This incremental strategy seems able to accomplish what the synoptic ideal could not, for it is not only remedial and serial, but also has the advantage of being exploratory. In other words, the incremental strategy can overcome the general objections which have been offered to refute the synoptic ideal insofar as it directs policy toward specific ills (remedial), provides for segmented and long-term change (serial), and its goals can be adjusted to reflect new experience (exploratory).\textsuperscript{377}

D. The Methodology and Point of Departure: A Trans-Cultural Consensus

As was discussed earlier, the emerging "new" approach to international lawmaking, in our pluralistic world of legal value systems, concentrates on that same pragmatic, empirically based, problem oriented, step-by-step — or disjointed incrementalist — strategy for conflicts resolution.\textsuperscript{378} Soviet foreign policy is typically carried forward by endless small moves; and the recent step-in and step-out of Czechoslovakia by the Warsaw Pact troops is a clear example of the adaptability of the strategy,\textsuperscript{379} albeit by subverted means to accomplish a subverted end.

Peaceful (or, better stated, nonviolent) consensual change is the operational methodology of the "new" approach to international lawmaking in this era of the détente. Significantly, Messrs Braybrooke and Lindblom have suggested overcoming the peremptory objections to utilitarianism by abandoning Bentham's felicific

\textsuperscript{376}D. BRAYBROOKE & C. LINDBLOM, supra note 208, at 111-43. For a discussion of polycentric and multivariate problems, see note 228 supra.

\textsuperscript{377}Inherent in the disjointed incrementalist strategy are a number of adaptations which overcome the adaptive failings of the synoptic ideal. These failings are discussed in text accompanying notes 358-60 supra; see D. BRAYBROOKE & C. LINDBLOM, supra note 208, at 47-57. The adaptations inherent in the strategy are: (1) margin-dependent choice, \textit{id.} at 83; (2) restricted variety of policy alternatives considered, \textit{id.} at 88; (3) restricted examination of consequences for any given policy, \textit{id.} at 90; (4) adjustment of objectives to policies, or ends to means, \textit{id.} at 93; (5) reconstructive treatment of data, \textit{id.} at 98; (6) serial analysis and evaluation, \textit{id.} at 99; (7) remedial orientation of analysis and evaluation, \textit{id.} at 102; and (8) social fragmentation of analysis and evaluation, \textit{id.} at 104.

\textsuperscript{378}See text accompanying notes 205-06 supra.

\textsuperscript{379}See text accompanying notes 229-34 supra. "In the Soviet system ... foreign policy, for example, is typically carried forward by endless small moves; economic planning too is a process of unending calculation and step-by-step adjustment." D. BRAYBROOKE & C. LINDBLOM, supra note 208, at 69.
calculus for the notion of a felicific census in alliance with the strategy.  

Under the strategy, evaluators express their concern with meliorative themes without necessarily, or even usually, formulating rules to embody the themes. Likewise, they express concern with distributive themes without formalizing their procedures to the point of exhibiting rigorous deductive arguments. . . . The general form of a conclusive distributive test is that of a census — a comparative census when what is to be tested is whether one group of people exemplifies a given distributive property to a higher degree than another group, a prospective census when what is to be compared is the state of a given group with respect to a distributive theme under one policy with its predicted state under another.

Thus, to determine what distributive test (the census notion or some other) should be employed to determine policy, the policymakers of any given nation should resort to a national value consensus. This would be established in the form of a minimum agreement on the “fundamental” attitudes which may be necessary in order that the governing system may work smoothly, or work at all. On a national scale, one basic tenet of mass democracy is that the value consensus must in fact play an effective role in the determination of foreign and domestic policy. “On a deeper level the national value consensus defines the limits within which the government must act and sets the goals which our leaders are morally obligated to pursue.” But, that which is regarded as “fundamental” changes through time; and it is for this reason, among others, that the disjointed incrementalistic strategy, with its inherent ability to adapt to structural changes, is well suited for an alliance with the consensus approach.

We have now only to make the next logical step and suggest that a trans-cultural consensus is the means by which a “world democracy” can be sustained. A trans-cultural consensus necessarily implies a mankind perspective — a view of the earth as a space-
ship with all peoples as the crew and with a limited supply of food and oxygen. In a sense the functional logic of such a consensus has already been successfully applied through international welfare organizations affiliated with the United Nations. The present détente era of East-West relations has itself given rise to a "new" international law which in effect employs a limited trans-cultural consensus.\textsuperscript{384}

At this point it should be stressed that the immediate national value consensus and, on the man qua international society level, the trans-cultural consensus are merely points of departure. Their normative and prescriptive content is subject to change as the determining units of inquiry (persons, groups, communities, nations) change. Only from this perspective does the final dialectical step acquire its functional validity.

The object of man's quest is now a comprehensive trans-cultural consensus. But in our analysis it must be kept in mind that, while such an achievement would be, perhaps, the only viable means for effectuating a "world democracy,"\textsuperscript{385} the question still remains as to whether man's intra-specific aggression and territorial imperative can be redirected to insure the stability of such a democracy.

E. Mankind Perspective: An Avowal of Optimism

In light of man's phylogenetic behavior patterns, his means for mass destruction, the equally destructive population explosion, and the exhaustion and pollution of the limited life-sustaining resources, one might assume a pessimistic outlook on the future of man as a continuing species. If carried to its logical conclusion, such pessimism would necessarily lead to the fatalistic realization that no action employed to abate the onslaught of human species annihilation could be either worthwhile or ultimately effective. Why, then, don't we all become hippies and yippies and espouse an international carpe diem philosophy of life, or take Schopenhauer's advice and stop procreating and bring this whole farce to an end?\textsuperscript{386} The answer lies in the simple fact that any espousal of a pessimistic outlook, with its resulting fatalism, may teleologically predicate the

\textsuperscript{384} See text accompanying notes 208-11 supra.

\textsuperscript{385} In suggesting an implementation of the fourth and highest information integrative index level of disjointed incrementalism, through means of a trans-cultural consensus, the writer feels that he has documented his presentation sufficiently so that he will not be attacked for arriving at a solution via the naive criteria or naive priorities approach.

\textsuperscript{386} See W. DURANT, THE STORY OF PHILOSOPHY 258 (1953).
doom which it avows. Given this fact, we should realize that it may be possible to utilize the same teleological phenomenon in an avowal of optimism. If an optimistic avowal is based on some cogent underlying rationale, it might then be used to effectuate that which is relatively positive — namely the accretive socio-cultural development of the human species.

Education has been used as an effective cultural equalizer and as a means for instilling nationalism and for purging our pluralistic society of ethnocentric values and beliefs which might question the all-conclusiveness of American democracy. Since man's phylogenetic behavior patterns of intra-specific aggression and the territorial imperative are culturally determined, it is only logical to postulate that they can also be culturally terminated. Education — as our cogent underlying rationale — can be used to effectuate an international consensual (and species-saving) democracy by orienting both the American and the world populace toward a mankind perspective.

Nationalism has heretofore been a necessary and viable concept in the preservation of opposing Nation States which have operated under culturally determined, and rationally deductive, value systems. Now, however, international situations and conflict relationships have become too complex and too integrated to be comprehensively handled by such simplistic evaluative methods. Nationalism and that methodology under which it both operates and serves to perpetuate must be sacrificed in the interests of species preservation, lest all mankind fall victim to the inexcusable failure to employ the more integrative and selectively open evaluative

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388 Cf. Cavers, Legal Education in Forward-Looking Perspective, in LAW IN A CHANGING AMERICA 139 (G. Hazard ed. 1968). Children can be most easily educated toward a mankind perspective before parental prejudices are firmly implanted. Cf. R. McHale, R. McCardle, M. Himes & R. Murray, SPELLING 3 (The New Laidlaw Spelling Series 1967) (compares Roman, Greek, Russian, German, Arabic, and Hebrew alphabets and words). "It is even possible that electronic systems will help create a single human and machine speech, better than Esperanto...." N.Y. Times, Jan. 2, 1968, at 23, col. 2 (city ed.) (from an interview of Viktor Glushkov, vice president of the Soviet Academy of Sciences, which was published in Pravda).
**Figure 1. — Information Processing**

<table>
<thead>
<tr>
<th>Perspective:</th>
<th>Integrative Index Capacity:</th>
<th>Appropriate Evaluative Method for Policy Determination:</th>
<th>Methodology and Points of Departure (PoD):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Man qua International Society</td>
<td>Mankind</td>
<td></td>
<td>PoD: Trans-Cultural Consensus</td>
</tr>
<tr>
<td>Man qua National Society</td>
<td>National (Pluralistic)</td>
<td></td>
<td>PoD: National Value Consensus</td>
</tr>
<tr>
<td>Man qua Community and Group</td>
<td>Ethnocentric</td>
<td></td>
<td>PoD: Existing Cultural Values</td>
</tr>
<tr>
<td>Man qua Man</td>
<td>Egocentric or Self-referent</td>
<td>High Integration Index</td>
<td>Disjointed Incrementalism</td>
</tr>
<tr>
<td>Simulation-Programmed Computer</td>
<td>Moderately High Integration Index</td>
<td>Rational-Deductive</td>
<td>Comparative Coherence; More Complexity of Ordering and Variations</td>
</tr>
<tr>
<td>Primates</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Complex Machine, e.g., servo-mechanism, thermostat</td>
<td>Moderately Low Integration Index</td>
<td>Naive Priorities</td>
<td>Ranking Order</td>
</tr>
<tr>
<td>Organ</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cell</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Molecular Interaction</td>
<td>Low Integration Index</td>
<td>Naive Criteria</td>
<td>Fixed Responses</td>
</tr>
<tr>
<td>Simple Machine</td>
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<td>Amoeba</td>
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</table>
Analytical Model:

Systems Model or Morphogenetic Attributes:

- Increased Degrees of Freedom;
- Transacting rather than Reacting
- Structure for Generating Complex Relationships;
- Selective Openness;
- End-goal Feedback;
- Allowance for Structural Change

Cybernetic

- Internal Awareness;
- Self-reflexive

- More Complex Rules for Comparing and Relating

Cybernetic or Homeostatic

- Less Dependence on Environment;
- More Internal Differentiation and Interdependence
- Emergence of Alternate Combinations

Equilibrium

- Relatively Closed;
- Little Deviation
- Fixed Criteria for Ordering, e.g., phylogenetic behavior patterns

Century of Ascendancy:

- [21st]
- 20th
- 19th
- 17th-18th
method of which it is capable and which is most suited for optimal
decision and prediction.

As shown on Figure 1, man has the unique capacity which en-
ables him to process information on a high integration index level. The problem is that he seldom employs the highest and most com-
prehensive evaluative method for policy determination. Failure to
capitalize on his unique potential is most evident on the interna-
tional scale, where the inherent complexity of problem situations
requires a method, such as the disjointed incrementalistic strategy, 
which operates on the high integration index level. National value
determinations have heretofore constrained man in the area of in-
ternational policy determinations to operation on only a moderately
high integration index level, thus resulting in a "refusal" to em-
ploy the higher methodology. Only on the high integrative plane
can man hope to reach optimal decisions, which are necessary for
ultimate species preservation and adaptation. A brief explanation
of all the index levels and their representative evaluative methods
and analytical models will reveal the efficacy of operating on the
highest integrative level. Furthermore, it will illustrate the ability
of the disjointed incrementalistic strategy to transcend cultural de-
terminations in its evaluative approach to the necessary optimal de-
cisions.

"There exists a continuum of adaptive systems ranging from a
low to a high degree of openness, differentiation, and interdepend-
ence."

For analytical purposes it is possible, however, to identify
four benchmarks along the continuum at which man is capable of
functioning — the high, the moderately high, the moderately low,
and the low integration index levels. At the man qua man level of relationship-complexity, where the perspective is generally egocentric or self-referent, each individual seeks, over and above his biological needs, his own integrity and destiny. However, when he employs the naive criteria evaluative method with its inherent low integration index, he necessarily limits his analytical model to that of a closed system with fixed responses and little deviation (equilibrium). Intra-species aggression and the territorial imperative are examples of phylogenetic behavior patterns which operate at this low integration index level; and, characteristically, an individual's dogmatic and narrow-minded thinking is done at this naive criteria level.

At the moderately low integrative index level, man acts with less dependence on his environment and mentally fixed responses, and, concurrently, with more differentiation in his thought processes. The naive priorities evaluative method with its ranking order methodology is characteristic at this level of information processing, and the appropriate analytical model is the homeostatic or simple cybernetic. This level differs from the low integration

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392 These four levels are identified and discussed in H. Schröder, M. Driver & S. Streufert, supra note 208, at 15-23. See also O. Lewis, supra note 310, at 28 n.144.

393 At this level the adaptive system is minimally open to the environment and exhibits a low degree of differentiation and interdependence, although there is a high degree of order, few degrees of freedom, and concomitantly the behavior of the system is quite predictable. The constrained variety of the environment (dimensions or perspectives) are ordered in a static or fixed way and minimally affect the system's information processing operations. O. Lewis, supra note 310, at 29 (footnote omitted).

394 See Figure 1, at pp. 242-43 supra.

The term "homeostasis" was coined by Walter Cannon, for whom it signified "a condition — a condition which may vary, but which is relatively constant." W. Cannon, The Wisdom of the Body 24 (1939). He rejected the term "equilibrium," explaining that "[t]he constant conditions which are maintained in the body might be termed equilibria. That word, however, has come to have fairly exact meaning as applied to relatively simple physico-chemical states, in closed systems, where known forces are balanced. The coordinated physiological processes which maintain most of the steady states
index level insofar as a structural variable is added here which enables the system to generate alternate organizations of the constrained variety of information inputs. It should be noted, however, that there is still no way "to relate the different content variables, other than rough integrating rules based on conditionality." As Messrs. Schroder, Driver, and Streufert have pointed out, "[t]his does not involve the simultaneous use of schemata by superordinate rules other than conditional principles. In this sense, once a rule is engaged, moderately low integration index structure functions much like low integration index structure except that other schemata are available."

The next level of complexity is that of the moderately high integration index. This level permits comparison, combination, and other manipulations of the content variable organizations. Thus, the system is self-reflexive: various thought-patterns can be used to reach the same decision. Moreover, by use of this system, the decision-maker can simultaneously take several points of view and, therefore, can "observe the effects of [its] . . . behavior . . . and weigh the effects of taking different views." "The internal processes take on a more significant role at this level, and the system becomes more autonomous and less predictable with the increase in degrees of freedom." At this level the rational-deductive approach to policy determination, which is characterized by its comparative coherence, is appropriate. Due to the inherent limitations of processing information on a moderately high integration index scale, the rational-deductive method does not allow for structural change. An example of this method of integration would be a
simulation-programmed computer which does not allow for end-
goal change, and the analytical model is that of the first cyber-
netic.\footnote{See Diagram 2, D. BRAYBROOK & C. LINDBLOM, supra note 208, at 78.}

Finally, the high integration index level is identified by its in-
creased interdependence, differentiation, selective openness, and de-
grees of freedom. A further integrative step emerges at this level
for generating complex conceptual relationships and thus altering
structural variables.\footnote{See Figure 1, at pp. 242-43 supra. For differen-
tiation between "first" and "sec-
ond" cybernetics, see note 333 supra. Simulation-programmed com-
puters may have the capacity, given sophisticated programming, to behave at the highest integrative
index level. Recently an electronic machine was invented by British engineers which
simulates human learning processes. "Hope was expressed that, subjected to
figurative rewards, inhibitions and punishments, the machine might learn to exercise fore-
See also N.Y. Times, Oct. 29, 1967, at 56, col. 1 (computer being "raised" like a child);
McKay, Towards an Information-Flow Model of Human Behavior, 47 BRITISH J.
PSYCHOLOGY 30, 40 (1959) (outline for programming self-organizing computer sys-
tem capable of growing in complexity "at a rate comparable with that of the learn-
ning process in human infancy"). It may eventually be possible for simulation-programmed computers to transcend
those structural variable constraints which are inherent in man's symbol systems, for
in reality man's "time-binding" characteristic limits his decision-making to an on-going
and theoretically reversible process. A computer with no memory or cultural heritage
might be able to construct new structural variables without being affected by man's
"time-binding" constraints. Such new structural variables would allow for alternate
options which would not otherwise be readily perceived by man whose eyes are cata-
racted by his own social matrix. See also note 406 infra.}

Here we have what Karl Deutsch has termed goal-changing feedback — readjustments of the internal structural
variables which implied the system's original goal, so that the sys-

tem as a whole will change its goal, "or set itself new goals which
it will now have to reach if its internal disequilibrium is to be les-

sened."\footnote{Deutsch, Some Notes on Research on the Role of Models in the Natural and
Social Sciences, 7 SYNTHESI 506, 515 (1948-1949). See also note 293 supra &
accompanying text (goal-changing feedback); note 333 supra (positive and negative
feedback); text accompanying note 377 supra (goal-changing nature of the incremental
strategy).} The analytical model which describes transactions at this
high integration index level is the systems or morphogenetic
model.\footnote{See discussion in note 333 supra. See also Easton, A Systems Analysis of
Political Life, in MODERN SYSTEMS RESEARCH FOR THE BEHAVIORAL SCIENTIST 428
(W. Buckley ed. 1968).}

As has been discussed earlier, the disjointed increment-
listic strategy, with its ability to direct policy toward specific ills
(remedial), provide for segmented and long-term change (serial), and adjust its end-goals to reflect new experience (exploratory), is the most appropriate for policy determination at the high integrative index level.\footnote{405}

Although man's cognitive system can operate at all levels of the continuum, in attempting to solve polycentric or multivariate problems, such as those which arise on the international or transnational level and which affect the future of the entire species, man has the affirmative obligation to use the highest level of evaluative method in order to reach optimal decisions. On the man \textit{qua} international society level, a trans-cultural consensus can be employed as the operational methodology for the incrementalistic strategy. Note, however, that this consensus is not existential in its existence. Its utility lies in the fact that it is merely a \textit{point of departure}: the consensus itself may structurally change during the decision-making process as a result of end-goal feedback and internal changes in the content variables.\footnote{406}

Man's accretive socio-cultural processes, which we have termed "time-binding,"\footnote{407} allow him to control not only his present condition but also his destiny and the destiny of his species.

It is clear that most human institutions were created and exist to fulfill [the'] neurophysiological need of the human brain for certainty and meaning, for orientation in time and space. It is this characteristic of human mind which makes the probability of thermonuclear war so great. Only by the most radical break with tradition and the past, only by the most intense, sustained human efforts to create a new human institution, to produce a \textit{human synthesis} based on the concepts of organic evolution and the objective analysis of human history and social evolution,\footnote{408} only by these heroic and demanding efforts to unite all men, women and children across national, ideological, religious, racial, and economic

\textit{\footnote{405}See text accompanying note 377 \textit{supra}.}

\textit{\footnote{406}For a distinction between structural and content variables, see note 402 \textit{supra}. See also note 287 \textit{supra}.}

\textit{\footnote{Note, however, it might be said that the evaluative approach or evaluative structure along with the information inputs teleologically (see note 40 \textit{supra}) determines the end-goal feedback and therefore the ultimate decision which will be made. The high integrative index evaluative method would then be subject to the deterministic criticism of the lower integrative levels. This of course raises the perplexing problem of an infinite regress that confronts all deductive conceptual analyses that aspire to complete comprehensiveness. See E. Nagel & J. Newman, \textit{Godel's Proof} 6 (1960). See also O. Lewis, \textit{supra} note 310, at 16 n.84. Such an attack can be rebutted by the fact that the information in the system is imperfect and therefore it is impossible to determine the essentially unpredictable deviations.}

\textit{\footnote{407}See note 10 \textit{supra}; text accompanying note 345 \textit{supra}.}

\textit{\footnote{408}See, e.g., discussion of phylogenetic behavior patterns in text accompanying notes 314-44 \textit{supra}.}
barriers and conflicts can the disastrous World War III be prevented.\footnote{Brewer, Political Effects of the Material Basis of Human Thought, 9 AM. BEHAVIORAL SCIENTIST, June 1966, at 9, 14.}

But do we care enough to educate our children and the general populace in this manner?

The ability of any individual human brain to relate to another person is influenced by the input of years of experiences indelibly inscribed in millions of complex reverberating neuron circuits, and the problems of world brotherhood and peace are directly related to solution of the problem of the education and family training of children in the broadest, most realistic and truthful world view. Whether an American child can relate himself to a Chinese or Russian child as a fellow human being to work with or as an "enemy" to be hated, feared, and destroyed depends upon the authorities who define values for the child, the authorities who condition him. . . . Whether a capitalist's child can relate to a Communist's child as a fellow human being or as belonging to the "bad people" involves the same neurophysiological mechanisms.\footnote{Id.}

A trans-cultural consensus is beginning to permeate the area of international relations, and an avowal of optimism can be made that we will realize the necessity of applying this "time-binding" ability by using the means of education to lift our children's eyes to a MANKIND PERSPECTIVE.

X. Conclusion

The delineation of the changes in the dominant theory of public Soviet international law and the critical comparison of the Soviet "hang-ups" in effectuating a valid theory of international law with the inconsistencies between the United States democratic ideals and American international relations have provided an exemplar for applying modern decision-making theory as an analysis tool for understanding differing approaches to international conflicts resolution. As our world becomes more like a \textit{spaceship earth} and as decisions on the man \textit{qua} international society level increasingly continue to affect the future of mankind as a species, the need for a decision-making process with a high level integration index becomes more compelling. It has been suggested that the disjointed incrementalist strategy coupled with a trans-cultural consensus may be the necessary operational approach for determining the solutions to the dilemmas which have been created by a world of polarized ideologies and which increasingly threaten the continuing existence of the human species.

\footnote{Brewer, Political Effects of the Material Basis of Human Thought, 9 AM. BEHAVIORAL SCIENTIST, June 1966, at 9, 14.}
The Bell is tolling. The time for a mankind perspective is now — we have the technology and ability to control the quality and destiny of our world environment, but unless we begin programming our social, political, and economic relations to include all of mankind, the day after tomorrow will not belong to us.

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