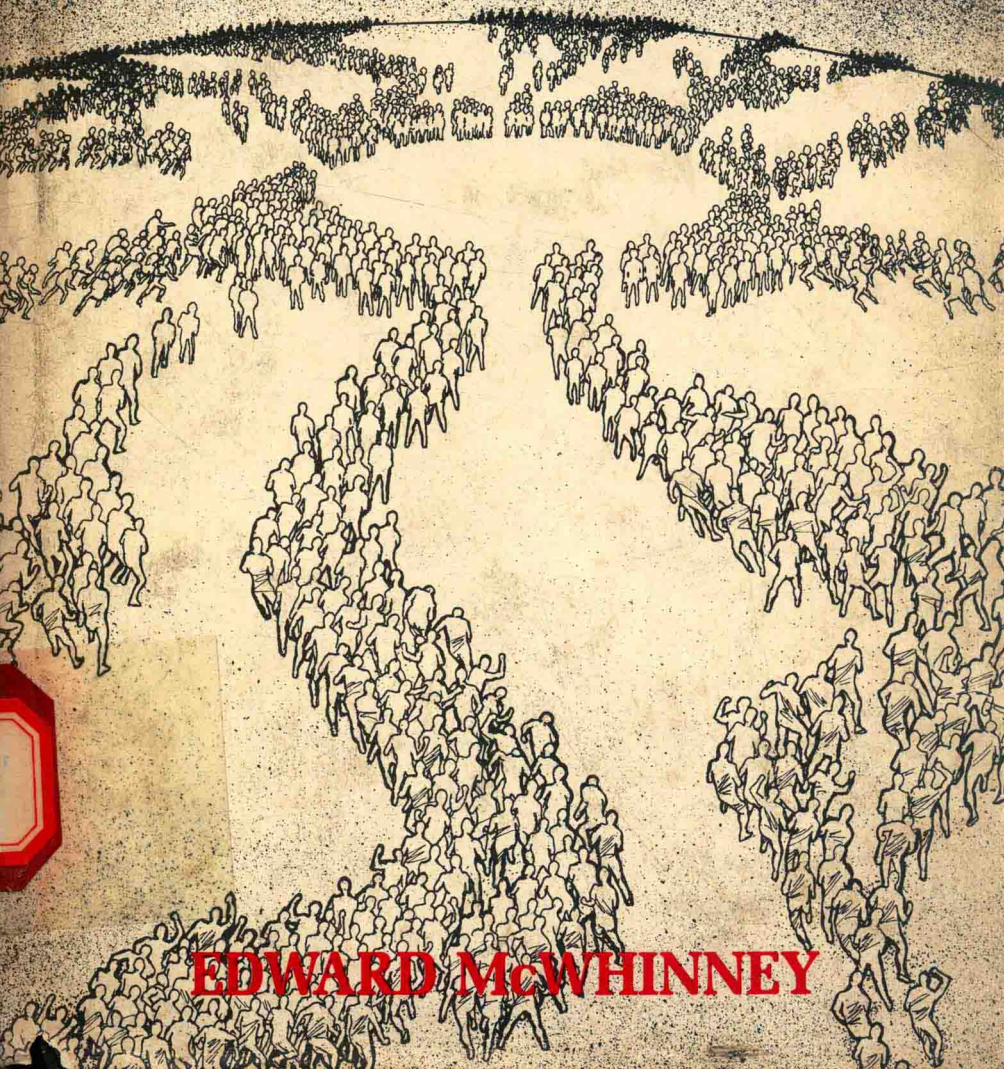


CONFLICT AND COMPROMISE

**International Law and World Order
in a Revolutionary Age**



EDWARD McWHINNEY

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in a Revolutionary Age**

Edward McWhinney



Holmes & Meier Publishers, Inc.
New York

To John N. Hazard

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By the same author

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Acknowledgments

Some of the propositions advanced in the present volume were tested, as experimental hypotheses, in lectures to the Centro de Relaciones Internacionales of the Facultad de Ciencias Políticas y Sociales of the Universidad Nacional Autónoma de México in Mexico City in May 1978. They were canvassed again, more recently, in seminars and discussions held in the spring of 1980, with faculty and members of the Institute of Law of the Chinese Academy of Social Sciences in Peking, the Department of Law of the Peking University, the East China Institute of Law and Political Science in Shanghai, and the Department of International Politics of the Fudan University in Shanghai. Acknowledgment must also be gratefully made of the opportunity to talk at length with senior officials of the Department of International Organization, Treaties, and Laws, of the Ministry of Foreign Affairs in Peking.

There are some extra problems and some extra intellectual advantages in trying to communicate one's particular, specialist, scientific discipline either to a highly literate but lay (non-specialist or else broadly interdisciplinary) audience in one's own cultural community, or to a group of specialists in one's own field but from a different culture, particularly if it be a third world culture. One finds, quickly enough, that what one thought of as eternal verities of international law and world public order in general are often no more than particular responses by one's own cultural community to particular social or economic problems of the world community at particular stages in its historical development. Far from being timeless absolutes in themselves, the principles or norms advanced may be rooted in their own space-time dimension, and therefore subject to critical scrutiny and re-examination in the light of new societal facts and new demands and expectations in the world community at large. There is, in fact, nothing like the intellectual challenge of having to defend, on a rigorously scientific basis, a proposition that

one may have been tempted, from one's special cultural and disciplinary background, to consider self-evident.

The new, transcultural, eclectic approach to international law and to world public order in general should permit us to establish a much-needed new balance between law and politics in the world community today. It should also allow us to separate what, in the congeries of existing rules and ordering principles of world public order, is purely relative and therefore subject to revision in the dry light of reason on the basis of a new, more genuinely equitable and inclusive (in transcultural terms) balance of competing societal interests; and what, by contrast, is of more general social utility, transcending its limited historical origins and therefore more likely to serve the interests of that larger and much more representative world community that has developed since the achievement of decolonization, independence, and self-determination on a world-wide scale.

Foreword

From Cold War, to Détente, to Dissonance and Pluralism

The roots of the present study go back to a group of seven public lectures given over the nation-wide radio network of the Canadian Broadcasting Corporation in 1966-67, and published in monograph form under the title *International Law and World Revolution*. The immediate political context of those lectures was the imminent end of the cold war era with the successful inauguration of the de-Stalinization programme within the Soviet Union and the opening up of direct, bilateral negotiation and exchange between the two great political-military blocs — Soviet and Western — that had dominated international relations since the conclusion of military operations in Europe in May 1945. Détente (although the term was, at that time, being used only by the ever-prescient President de Gaulle of France) was being achieved in a series of concrete measures between the two bloc leaders, the Soviet Union and the United States, using essentially pragmatic, empirical, step-by-step methods that were related, at all times, to mutuality of interests or reciprocal give-and-take between the two sides. The progressive unfolding of détente was obscured, for some commentators and political leaders, by the noisy, frequently polemical debate between the Soviet Union and the United States over what Soviet jurists called the international law of peaceful coexistence, and what some Western jurists viewed as a Trojan horse designed to lull the West into a false sense of security while Soviet leaders proceeded, quietly, to plan world domination.

Looking back on that earlier era of transition from cold war to détente, with all the advantages of retrospective wisdom, it is difficult not to be amused by the remnants of cold war rhetoric that one finds in some of the scientific-legal analysis and crit-

icism on both sides of the political-ideological conflict. By 1970, peaceful coexistence had finally become legitimated within the United Nations framework by its codification and adoption in a UN General Assembly resolution, albeit under the Western-favoured euphemism of "friendly relations and cooperation among states." In May 1972, President Nixon and Secretary Brezhnev formally inaugurated an era of *détente* that had been developing and, in fact, operational for some years, by formally signing a group of Moscow Accords. These included, among their more important agreements, the Anti-Ballistic Missile Systems Treaty and the Interim Agreement on Strategic Offensive Arms.

No sooner had *détente* become officially established as the basic premise of international law and relations of the post-cold war era than the seeds of decay, within the world public order system that it embodied and implied, became apparent. The United States, the Western bloc leader, was racked with internal dissension in the wake of the civil disobedience campaigns directed against the American military campaign in Vietnam and the strong, interventionist foreign policy bound up with American military involvement in South East Asia. The traumatic shock of the "Watergate" crisis, and the abortive impeachment campaign that nevertheless forced the resignation of President Nixon and indicted the activist, "imperial" presidency and foreign policy practised by virtually all American leaders since President Franklin Roosevelt, contributed to a weakening of the American commitment to military ventures overseas, even in the name of the collective security arrangements to which the United States was committed by treaty. At the same time these events produced increasing uncertainty among the United States' allies over the reliability of American foreign policy commitments abroad and over the American will to lead the great political-military alliance of Western powers that had so characterized the post-World War II era. The resulting factionalism within the Western bloc was balanced by a growing disaffection within the Soviet bloc, the Warsaw Pact countries of Eastern Europe, that was hardly contained by either repressive, governmental, police measures or direct, military intervention such as the Soviet Union's incursion into Czechoslovakia in August 1968. An aging, conservative, Soviet decision-making group seemed incapable either of adjusting gracefully to the stirrings of political pluralism within its own bloc, or of profiting with *élan* and imagination from evident dissonance within the rival Western bloc.

Paralleling the internal troubles of the two great political-military blocs and their leaders — more paradoxical because occurring when the cause of big power détente had achieved its apogee, and when the two rival blocs had essentially achieved political-legal accommodation on both the process and the main substantive issues of their past conflicts — were startling new developments in the world community at large. The political consummation of the “new” international law principle of decolonization and independence — in itself, a more concrete and urgent application of the nineteenth-century liberal principle of national self-determination — meant a very much larger world community than the narrower, post-World War II community that had been so largely congruent with the membership of the two rival blocs. Decolonization, independence, and self-determination, applied in conjunction with other “new” international law principles — national control of national economic resources, and the quest for an overarching, more genuinely democratic, new international economic order — meant that the new participants in the international legal process increasingly resisted the blandishments of the two big powers to rally around either bloc. The third world countries developed as an autonomous political force in their own right, independent of the two great political-military blocs. In the quest for their own distinctive arenas for political expression and political-legal interaction, the third world countries began increasingly to choose the United Nations and its specialized agencies as their forum, because of its relative openness and freedom from big power pressures. The admittance of the People’s Republic of China to full membership in the United Nations in 1971 highlighted and also accelerated this movement. We can thus see, at the same time, a de-emphasis of the rôle of the two big powers in the international law-making process as a whole, and a return to the original intention of the UN Charter, to make the United Nations organization the focal point of international organization and of the world public order system.

1 LAW AMONG NATIONS

The “Old” and the “New”

It is a commonplace, by now, to say that we live in a revolutionary age. In a sense, of course, the whole of recorded history has been a process of revolution or at least of change, for in no one era has mankind stood completely still. Even the mediaeval “Dark Ages” contained within them the seeds of the Renaissance and Reformation.

What characterizes the present era, however, and differentiates it sharply from earlier periods of historical development, is the very range and intensity of the changes, and the fact that they are occurring on so many fronts. One has, in this regard, to accept the fact that we are dealing with a world revolution that is really a series of continuing revolutions, finding outlets in numbers of different, if complementary, ways.

The first great revolution of our time, completing a process begun with the outbreak of World War I in 1914 and the subsequent downfall of the old dynasties and empires of Central and Eastern Europe, is what Marxist legal scholars like to identify as the “downfall of imperialism.” This began, of course, with the October Revolution of 1917 and the overthrow of the old czarist régime in Russia, and was followed up, after the Central Powers’ military defeat in 1918, with the abdications of the Sultan of Turkey, the Emperor of Austria-Hungary, and the German Kaiser. More important than the essentially symbolic replacement of a sultan or emperor by a republican president, were the political changes effected by World War I in the name of nationalism, independence, and liberalism. In deference to Woodrow Wilson’s Fourteen Points, the economically viable and politically stable (if unimaginative) dual monarchy of the Habsburgs was replaced by a group of weak and struggling, mutually intransigent “succession states” whose political dif-