EDWARD McWHINNEY

THE INTERNATIONAL LAW OF DÉTENTE

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THE INTERNATIONAL LAW OF DETENTE

Arms Control, European Security, and East-West Cooperation

by

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During the academic year 1976-7, the author presented lectures in French on the same general theme and in greatly expanded form, as graduate courses at the University of Nice, in the Institut du Droit de la Paix and also in the Institut Européen des Hautes Études Internationales. I am very much indebted to the Director of the Institut du Droit de la Paix, Professor René-Jean Dupuy and its Secretary-General, Madame G. Ringeard; and to the Director of the Institut Européen, Ferdinand Graf Kinsky and its Secretary-General, Claude Nigoul, for their generous hospitality throughout and for the stimulating intellectual atmosphere that they provided, together with their colleagues and graduate students, for further developing and refining the basic concepts.

Chapter 1 and Chapter 2 of the present volume are extended examinations of those questions of legal theory and of comparative (Soviet and Western) philosophy of international law that bulked so large at the opening of the East-West discussions and negotiations over *détente*. These chapters draw upon articles published by the author in the *American Journal of International Law* in 1962 (vol. 56, no. 4, at pp. 951-970), and in 1965 (vol. 59, no. 1, at pp. 1-15), during the earlier, more difficult years of the East-West "Great Debate", preceding *détente*; and they are used, for purposes of the present study, with the kind permission of the Editor-in-Chief of the *Journal*.

Chapter 7 is based upon a paper originally presented by the author in the Wolfgang Friedmann Memorial Series at Columbia University Law School in December, 1973, and published in the

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FOREWORD

Détente as a formal juridical concept originated at the beginning of the 1960s when it was offered by General de Gaulle as the key-note of the new period in intra-European relations—in the wider sense of a Europe now extending from the Atlantic to the Urals—that was now, quite obviously, beginning to succeed to the Cold War era with its concomitant division of Europe and of the World Community in general into two rival political-military blocs. The Gaullist conception of *détente* was in its classic sense of a general relaxation of tension in Europe across the old Cold War territorial frontiers. It was, however, in no sense a purely conservative approach, limited to the maintenance of the political *status quo* in Europe and nothing more; for it had its dynamic aspects that envisaged *détente* itself as only a stage of transition towards a larger, Pan-European spirit of *entente* and cooperation, transcending the old blocs and thus effectively ending the "post-War era" that de Gaulle himself regarded as having been sanctioned by the Big Three at Yalta in February, 1945, and then formally ratified by them at Potsdam in August of the same year.

The special Gaullist conception of *détente* has by now disappeared into history. Though the Soviet Union flirted for a time with the idea of an All-European Security Conference limited to the European members of NATO and to the Warsaw Pact countries, the political reality in the 1960s, in Europe not less than in the World Community as a whole, of Bipolarity and the predominance of the two bloc leaders, the Soviet Union and the United States, dictated that any European security conference without the presence of *both* the Soviet Union and the United States, could only produce an illusory *détente* at best. Hence, all subsequent discussion of *détente* has been in terms of a dialogue between the two military alliances viewed as involving, necessarily, at some point in time, the two bloc leaders, even in situations seemingly having more limited and immediate political-geographical areas or interests than the World Community as a whole.

As an operational concept from the beginning of the 1960s onwards, *détente* emerges under a number of different names or rubrics, and in a number of different problem-areas, and at quite different or varying levels of generality and philosophic abstraction.

First in point of time is the high-level, essentially abstract and theoretical, un-fact-oriented, Soviet campaign in behalf of an act of codification of the International Law Principles of Peaceful Coexistence–, a campaign that lasted more than a decade and that was finally consummated in October, 1970, in a formal U.N. General Assembly Resolution. This has some literary, if not philosophic links to the historically much more ancient Soviet drive to define, and hence to outlaw, aggression, a campaign that was itself fated also to be given a wholly verbal solution, and that some four years after Peaceful Coexistence.

Next in point of time–at least in terms of concrete results–is a highly empirical, problem-oriented series of bilateral negotiations between the Soviet Union and the United States directed towards control of nuclear weapons testing, strategic arms limitation, and measures of more general disarmament on a staged, reciprocal basis as between the two blocs. This round of accords begins, for really serious purposes, in August, 1963, and is characterised by further bilateral agreements, extending and building on the earlier agreement, on a step by step basis, at regular intervals thereafter and continuing right up to the present day.

A third main area for application and development of *détente* lies in questions of European security and the confirmation and legitimation of the *de facto* political-military frontiers in Central and Eastern Europe, established under the licence of the Yalta Conference and by the power of the advancing Allied Armies directly concerned. The path to *détente* through European security arrangements is parallel to, but separate and distinct from, the negotiations over nuclear disarmament and general arms control, and indeed also the "great debate" over Peaceful Coexistence which by now has been de-ideologised under the supposedly more neutral rubric of Friendly Relations and Cooperation among States. It involves different actors and different negotiating teams from the disarmament accords, and it is all legally consummated in a surprisingly concentrated period of time–, from 1970 to 1973. What succeeds it is a more generalised, Pan-European security conference which is given the task, essentially, of going over the same ground, but at a much higher level of generality and abstraction, and trying to synthesise the particularised frontier agreements into

more general security principles—this time, with the participation of the United States and with other European states—, mini-states, and even quasi-states—outside both the Warsaw Pact and NATO. This produces, in turn, the Final Act of Helsinki of August, 1975, which has been viewed by some as the *apogée of détente*,—its crowning achievement—and this even though the important business of strategic areas limitation and nuclear disarmament is by no means completed at that time.

Détente also involves—to its critics at least—various tacit understanding or *de facto* arrangements between the two military alliances and their leaders—a form of inter-bloc ground rules or "rules of the game" involving mutually and reciprocally tolerated actions on each side. One such group of inter-bloc ground rules may be the acceptance and respect on each side for "spheres of influence" supposedly either expressly sanctioned at Yalta or else flowing logically and inevitably from Yalta's political dispositions and from the military facts-of-life at the close of hostilities in Europe in May, 1945. This represents the conservative, some would say reactionary, face of *détente*; and it is linked to a seemingly excessive concern with maintenance of the political *status quo* in Central and Eastern Europe and of a nuclear and military-strategic balance between the two bloc leaders and, as far as possible, of a nuclear weapon monopoly on their part. It is one of the principal reasons why, at its moment of apparent greatest success as demonstrated in a plethora of highly concrete East-West accords that are being actively followed up and implemented, the spirit of *détente* and the Big Power hegemony that is seen as going with it are being actively contested and challenged, not merely by "neutralist" or Third World countries but even by elements within the core countries of the two erstwhile political-military blocs that have dominated Europe and the World Community as a whole since 1945.

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Chapter I

THE PHILOSOPHY OF DÉTENTE. THE SPECIAL SOVIET JURIDICAL CONCEPT OF "PEACEFUL COEXISTENCE"

Foreword

The Soviet campaign in behalf of Peaceful Coexistence coincided, in its origins in Soviet foreign policy, almost exactly with the official development and application of the de-Stalinisation programme in Soviet internal politics in 1956. As a foreign policy construct, Peaceful Coexistence was directed specifically to a general act of legal codification—of the so-called International Law principles of Peaceful Coexistence. These Soviet foreign policy initiatives were backed up, doctrinally, by a flood of scientific-legal publications in article and book form, highlighted by the contributions of the then principal legal adviser to the Soviet Foreign Ministry, Dr. Gregory Tunkin.

The first interactions with the West and with Western jurists seem to have come in private international legal arenas and through exchange of scholarly publications and the resultant East-West scientific-legal debates.[1] The joinder of issue, politically, was made at the beginning of the 1960s when Western foreign ministries, alarmed by the thought that the Soviet Peaceful Coexistence campaign might be a Trojan Horse device for talking of peace and thereby lulling the West into a false sense of security while Soviet rearmament and military expansionist drives continued apace, resolved on the need to develop a sophisticated legal counter to these presumed Soviet plans. It soon became apparent, however, that a general act of codification of the key concepts of International Law of our times, had some wider appeal,—transcending Cold War ideological frontiers as they existed,—among both Civil Law-trained international lawyers interested in the quest for postulation of *a priori*, ordering principles or ground rules of International Law, and also jurists from the newly decolonised and independent countries who had no especial reason for being satisfied with the old or "classical" International Law doctrine and who might find, in the Soviet proposal, a useful opportunity for cre-

ating new doctrine. One of the main tactical responses adopted by Western political leaders and their jurists, under the circumstances, was to sponsor their own codification-style campaign, but under a different rubric than "Peaceful Coexistence" and making use of a more neutral and universal arena than the bilateral-style negotiations favoured by the Soviet Union, namely the U.N. General Assembly and its specialised Committees.

Looking back, it may seem surprising that issues of nomenclature could bulk so large in the cautious approach, on both sides, to East-West *détente*: Lord McNair, writing to the author only several years afterwards, remarked how the term "Peaceful Coexistence", once anathema to Western foreign ministries, had begun to lose its controversial quality. For United Nations purposes, the somewhat inelegant but politically colourless euphemism, Friendly Relations and Cooperation among States, was soon developed, and the campaign for Friendly Relations (Coexistence) was soon institutionalized and given the U.N.'s official imprimatur with the creation, pursuant to General Assembly Resolution 1966 (XVIII) of December 16, 1963, of a 27-country (later 31-country) Special Committee charged, in terms of the Resolution, with the "progressive development and codification" of what were, essentially, the four principles specified in the original Soviet list of principles of Peaceful Coexistence.

In terms of the internal workings of the United Nations and its specialised committees and agencies, the debate over Friendly Relations (Coexistence) could hardly have come at a better time. In 1960/61, when the matter was initiated in the Sixth (Legal) Committee, that Committee was in the doldrums with very little of consequence for it to do;[2] while the prestigeful International Law Commission, which it was its nominal responsibility to oversee, was fully occupied with the necessarily very slow, since meticulous, classical mode of codification of highly technical areas like the Law of the Sea, and Diplomatic and Consular relations. There was a certain natural impatience of the "new" countries with these more traditional processes of progressive development and codification, and, linked to the Soviet and Soviet bloc pressures, it gave a certain momentum and *élan* to the work of the Special Committee. The task, however, of rendering precise and operational for purposes of application in actual problem-situations, of principles originally formulated by the Soviet Union at a very high level of generality and abstraction only, began to prove more demanding than had been expected in the first flood of enthusiasm following the formation of the Special Committee. Then, something rather

strange began to occur, as the original protagonist of a formal act of codification of Peaceful Coexistence, the Soviet Union, seemed to lose interest in the work of the Special Committee, in measure as Soviet differences with the United States and the West in general were resolved in concrete cases, as the East-West *détente* progressed and was extended. With the seeming decline in active Soviet involvement in the work of the Special Committee, there was hardly need for continuance of a reciprocal or reactive Western response. The Labours of Sisyphus of the Special Committee continued, the main political initiatives and also the intellectual dynamism being supplied by jurists from the lesser, "middle" countries, or the Third World. Some of these, like the Yugoslavs, led by the able and colourful Milan Bartos, saw in Friendly Relations (Coexistence) not simply a convenient vehicle for *détente* for the two bloc leaders, the Soviet Union and the United States, but also a juridical device for ensuring political self-determination, pluralism, or polycentrism, within each of the blocs and in the relations between the satellite or supporting bloc members and the bloc leader. "Why not Coexistence inside the blocs?", asked the Yugoslavs, with memories of their own bitter struggles with the Soviet Union in the Stalinist era. By the same token, imaginative Third World jurists like Krishna Rao of India, saw in the elaboration and extension of the principles of Friendly Relations (Coexistence) the possibility of protecting the non-aligned, neutralist countries of the World from Big Power hegemony,—whether Soviet or American, or even a joint (Soviet and American) bipolar hegemony as the *détente* should be attained.[3]

The Special Committee finally completed its work in 1970, and its achievement is recorded in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, formally embodied in U.N. General Assembly Resolution 2625 (XXV) of October 24, 1970. The Declaration enshrines the seven following principles:

> "The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;
>
> The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
>
> The principle concerning the duty not to intervene in mat-

ters within the domestic jurisdiction of any State, in accordance with the Charter;

The duty of States to cooperate with one another in accordance with the Charter;

The principle of equal rights and self-determination of peoples;

The principle of sovereign equality of States;

The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter."

In trying to assess the historical significance of the Friendly Relations (Coexistence) debate, it is necessary to distinguish between the Declaration of Principles of Friendly Relations itself, and the *process* of discussion and negotiation and compromise between East and West (with some interesting neutralist and Third World in-put, particularly towards the end), lasting for a decade, by which that Declaration was reached. On first sight, the 1970 Declaration seems as abstract and general—some hostile critics might say, as vacuous and open-ended—as the original Soviet list of principles of Peaceful Coexistence from which, ultimately, it stemmed. The American delegate who publicly hailed the Declaration as—"representing one of the major achievements of the Twenty-Fifth Anniversary of the United Nations",[4] and who went on to suggest that the various national foreign ministry legal advisers participating in the drafting of the Declaration had had their—"perceptions of the issues involved . . . clarified and sharpened",[5] was surely speaking tongue in cheek.[6] On the other hand, the opportunity that the whole process seemed to present to jurists from the supporting countries within the two blocs, and to jurists from the uncommitted or neutralist countries, to develop a legal base for a "live-and-let-live" philosophy as between the individual bloc leaders and the rest of the World Community, should not be under-estimated, even if these hopes may not have been fully justified or realised.[7] And, even more important, for the relations of the two bloc leaders *inter se*, the whole process of discussing *détente* in a necessarily intellectually disciplined way in yet another institutionalised international arena, may have helped in softening the rigidities of rival doctrinal legal positions that had been taken too categorically in the first place. In the end result, *détente* was achieved, progressively and empirically, between the two blocs, prior to and without the necessity of the formalized Declaration of 1970. When it was, in fact, finally achieved, the Declaration may fairly be said to have become a somewhat irrelevant afterthought or belated foot-note to historical events already long side

established by other, more low-level and prosaic, essentially problem-oriented methods.

1. The Pedigree of Peaceful Co-existence. Historical Antecedents (Soviet Style)*

In his address to the 22nd Congress of the Communist Party on October 17, 1961, Premier Khrushchev assured his listeners that the principles of peaceful co-existence, whose source he attributed to Lenin, had "always been the central feature of Soviet foreign policy" and he coupled these remarks with a call for "more extensive business relations with all countries," among which he specifically listed Britain, France, Italy, West Germany and other West European countries.[8] "Peaceful co-existence" and "peaceful economic competition," as identified by Mr. Khrushchev,[9] are thus firmly linked as the two major elements of the current Soviet diplomatic and political offensive in the West. Apart from its current significance in what might be called the polemics of East-West relations, the subject of peaceful co-existence has been on the agenda, and has been extensively debated, at the three most recent conferences of the International Law Association, in 1956, 1958, and 1960, and it was listed again for the meeting in Brussels in August, 1962, when the question of codification of the principles of peaceful co-existence was discussed.[10] The provisional agenda of the General Assembly of the United Nations for its Seventeenth Session (1962-1963) includes the question of "legal aspects of friendly relations and co-operation among states."[11]

Not the least intriguing feature of the current Soviet campaign is a resolute attempt by certain of the Soviet theorists to appropriate the term "peaceful co-existence" itself and the central conception of a legal condition of co-operation between capitalist and Communist societies which, according to these same Soviet jurists, it implies as a specifically Soviet invention. The most ingenious such attempt, perhaps, is Premier Krushchev's linking, in his 22nd Party Congress address, of the concept of peaceful co-existence to Lenin's choice of the hammer and sickle as the coat of arms of the Soviet Union, a ploy that is recorded as having been greeted with "stormy applause" by his audience.[12]

With somewhat more technical sophistication, Soviet jurists have attempted to establish, *ex post facto*, an historical line of

* Reproduced, with amendments, from 56 A.J.I.L. 951 (1962).