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Soviet Tactics in International Lawmaking

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Soviet authors are turning their attention increasingly to the tactics of international lawmaking. Long gone are the days when international law was pushed toward the "museum of antiquities"[1] as of no concern to a working class society. Trotsky's expectation that the Commissariat of Foreign Affairs would soon become an anachronism, as fraternal relations between governing working class parties replaced the competitive relations of bourgeois states,[2] makes odd reading today in both East and West. Nation states are everywhere recognized as

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1. Engles used this expression to describe the ultimate fate of the state when the classless society had been achieved. *See* F. ENGLES, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE ch. 9 (1884). This passage caught the attention of the author of the first study of Soviet attitudes toward international law who concluded that not only the state but its handmaiden, the law, is doomed also to wither away. *See* T. TARACOUZIO, THE SOVIET UNION AND INTERNATIONAL LAW 5 (1935).

2. "I will issue a few revolutionary proclamations to the peoples of the world and then shut up shop." Quoted from Trotsky's autobiography in 3 E. CARR, THE BOLSHEVIK REVOLUTION 1917-1923, at 16 (1953).

fated to exist for long years to come, whether their leadership be in the hands of a Communist party or a non-Communist structure. Although Communist parties in various states are seen by Soviet authors to enjoy fraternal relations, the states they govern are interrelated through a network of norms they call "laws," just as are the states of the non-Communist world. Thus, although the quality of the norms is said to vary in accordance with the ends they are designed to serve, the norms are seen as constituting law nevertheless and are created and modified by a process recognized as "lawmaking."

It is that lawmaking process, especially as it relates to the restructuring of general international law applicable to relations between states of differing economic systems, to which this paper is devoted. Intrinsically, the Soviet process is of concern to Americans planning their own lawmaking tactics. Some may or may not be aware of changes that are occurring in Soviet practice and of explanations given by Soviet authors of that practice. Professor G. I. Tunkin, formerly chief of the Legal Department of the Soviet Ministry of Foreign Affairs, Dr. V. A. Movchan, who has recently been transferred from the Ministry to the academic halls of the Institute of State and Law, I. P. Blishchenko of the Legal Department of the Soviet Foreign Ministry, and V. A. Kartashkin, formerly of the United Nations Secretariat and now of the Institute of State and Law, are men to read, for all are close to the practitioner and to the scholar.

What are these lawyers saying that commands attention from those who have been following the literature on Soviet tactics ever since Lenin rejected Trotsky's "No war; no peace" formula in 1918 as an impractical posture to assume in dealing with the German victors? Lenin's acceptance of a treaty at Brest-Litovsk signalled adoption of the tactic of negotiating treaties to create law.[3] For subsequent decades the treaty was heralded as the primary and preferred source of law by Soviet international lawyers. But today there is emerging a new stance, one based on the evaluation of the changes in the international community. In the years between the two world wars, the U.S.S.R. stood alone as a Communist-led state, and inde-

3. The Brest-Litovsk negotiations are treated in detail in 1 L. FISCHER, THE SOVIETS IN WORLD AFFAIRS 26-78 (1930).

pendent states were few in Africa and Asia where the colonial system was still widespread. Now, the situation has greatly changed. The postwar expansion of the Communist-led system to a total of fourteen states soon after World War II and the constant addition of new states to the membership of the United Nations have brought new actors into the lawmaking process. This quantitative change is heralded as having introduced a qualitative change as well in the relationship of forces. On occasions when the Communist-led states find it possible to team up with the developing states, the resulting coalition outnumbers greatly the old states who constituted the bulk of the membership of the League of Nations and of the founders of the United Nations at San Francisco. In considerable measure, although by no means under all circumstances, the coalition creates a new majority with the capacity to make international law rather than solely to receive it.[4]

With this reversal of the early postwar majority, Soviet authors indicate that Soviet diplomats have opportunities previously denied Soviet tacticians. Consequently they are revising their positions on sources of law, and this revision has had its impact even on the legal philosophers, who are asking whether long-held attitudes toward the predominately bourgeois class nature of international law must be revised.

To begin with tactics: treaties have been the preferred source of international law for Soviet diplomats and scholars for the decades that have passed since Brest-Litovsk.[5] This attitude reflected a lack of confidence in custom as a source of law, and Soviet scholars frequently expressed this view in the years between the two world wars.[6] Authors based their reasons in part on Soviet Russia's early experience and in part on the Marxist philosophy of law which they espoused. The experience was clear: Western statesmen demanded that the fledgling Soviet Russian State recognize its legal obligation to pay full value for nationalized properties and that it recognize the established rule that successor states are responsible for the

4. Ambassador John A. Scali of the United States expressed dismay in the United Nations at the steady stream of votes against the West. *See* N.Y. Times, Dec. 7, 1974, at 1, col. 8.

5. T. TARACOUZIO, *supra* note 1, at 13.

6. *Id.*

obligations of predecessors. Westerners also argued that *pacta sunt servanda* was a principle to be applied to treaties almost without exception and that there was no basis for the Soviet leadership's early decision to pick and choose freely among the Tsarist treaties to find those that suited Soviet needs.

The Soviet denunciation of custom as a source of law had a philosophical base as well as a practical one. Philosophically, the Soviet leadership took the position that custom had developed over the nineteenth and early twentieth centuries among states governed by capitalists and that it inescapably reflected the interests of the capitalist classes that governed those states. This position was the logical extension of the Marxist concept, expressed in the Communist Manifesto of 1848, that law is but the will of the capitalist class made into a law for all.[7] This being so in Soviet minds, there was reason to reject international custom as a reflection of interests opposed to those of the working classes.

But in practice there was need to accept some elements of custom because these were protective of Soviet State interests. The most important was the customary law of diplomatic intercourse. Soviet envoys could claim no diplomatic protection of their persons or of their quarters if the customary international law on diplomatic privileges and immunities was not recognized. The problem was not solely theoretical, as became evident when some Soviet envoys were harrassed and even murdered, and their premises searched.[8] Thus, while custom was regarded as suspect from a proletarian point of view, some aspects of custom, as well as some treaties dating from Tsarist times, especially those creating the long frontier with China, had to be accepted to avoid unmanageable conflict. The difference in attitude toward treaty law and customary law, with preference for the former, was based on the simple fact that the Soviet diplomats could negotiate new treaties to their liking faster than they could change custom. Indeed, until the series of diplomatic conferences, held under United Nations auspices

7. COMMUNIST MANIFESTO § 2 (1848), *reprinted in* I MARX ENGELS SELECTED WORKS 44-51 (1950).

8. The most dramatic episode was the assassination of Plenipotentiary Vorovsky in Lausanne in 1923 during a conference on the regime of the Straits. *See* 3 E. CARR, *supra* note 2, at 489.

well after World War II, there was no indication that the nations of the world were prepared to review great bodies of customary law in multinational conferences and to codify them in treaty form.

The process of reformulating international law through newly negotiated treaties attracted the attention of Soviet legal philosophers in the early 1920s after the early period of resistance to international law in all its forms had ended. These philosophers thought it desirable to rethink hostile attitudes toward the nature of international law based on its origin among capitalist powers because they saw their own Soviet statesmen participating in the revision of some of the principles previously accepted. Eugene A. Korovin was the first to take the position that there was in formulation a new international law of the transitional period from capitalism to socialism, which was different in kind from what had existed before.[9] He was not prepared to say that it was wholly different, but he thought it a set of norms in process of transition, and therefore acceptable to him as a class-oriented legal philosopher and to the diplomats who directed Soviet international relations.

Still, Soviet policymakers wanted to present an image to the world of a state that was essentially different from other states, even though it had to act in accord with some of the established rules of international law in order to conduct its international relations with a minimum of friction. Soviet leaders certainly were not in a position to enforce their views by military means. They had to coexist with capitalists, even though they hoped eventually to overthrow them through world revolution. One of their most noted efforts to change the Soviet State's image among the peoples of the world was to reject the century-old ranking of diplomats established by the Congress of Vienna after the defeat of Napoleon. The Soviet Commissariat of Foreign Affairs refused to designate its diplomats as Ambassadors and Ministers, but called them "plenipotentiary representatives" *(polpredy)*. Other foreign offices did not know where to place such persons on their protocol lists, with the result that generally Soviet diplomats were ranked at courts and republic capitals below the traditionally designated diplo-

9. For a survey of early theories see K. GRZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW 4-6 (1970).

mats of other states.[10] This ranking irked Soviet authorities so that ultimately, even on this point, Soviet policymakers accepted tradition. The ranks of Vienna were reestablished in the Soviet diplomatic corps, and the evident contrasts in nomenclature between the diplomats of capitalist states and of the Soviet Union disappeared.

Korovin's sally into the realm of philosophy to define a law of the transitional period was subsequently rebuffed by another Soviet legal philosopher who came to the fore in international law toward the end of the 1920s, namely, Eugene B. Pashukanis.[11] He moved into the international field from the municipal field of law and carried over to the international field his basic point of view on law generally. This was that the law of the twentieth century was "bourgeois law" because it had been formulated by capitalists in the marketplace to foster the capitalist system of economy. Pashukanis admitted the need to introduce into a Soviet Union that had restored a measure of capitalism with Lenin's New Economic Policy in 1922 many of the principles of Western European law and, most especially, a conventional Romanist-type civil code. However, he looked for departure from the Romanist models as socialist concepts became a major feature of the political and economic culture of the new Soviet Union. His argument was simply that during the mid-1920s the Soviet policymakers would utilize bourgeois law for a time, but that this did not affect its character. It would remain bourgeois in form. He and his colleagues began to attempt to formulate a new legal system that would reflect socialist principles, and this they did by beginning to draft a code of "economic law" to replace ultimately the civil code and to systematize the rules relating to state enterprises functioning under a national economic plan. They also tried to draft a new criminal code which would establish no fixed penalities, for they thought such penalties were the heritage of a codification practice introduced by bourgeois draftsmen to reflect the market principle of their societies by assigning a cost value in terms of sanctions for every type of criminal act.

With his analysis that commonly accepted municipal legal norms were bourgeois, Pashukanis, when he turned his atten-

10. *See* T. TARACOUZIO, *supra* note 1, at 179-82.
11. *See* K. GRZYBOWSKI, *supra* note 9, at 6-9.

tion to international law, saw its norms also as bourgeois in character. He argued that international law could not become a law of the transitional period, as Korovin thought, but must remain bourgeois until Marxian-socialist principles were adopted widely throughout the world, creating a community within which international relations would be conducted on socialist lines. He admitted that existing principles of international law could be useful to Soviet policymakers; indeed, conformity to them was necessary to conduct international relations, but he could not see that this altered their character in a socialist direction.

Pashukanis' views completely supplanted those of Korovin among Soviet scholars so that Soviet utilization of norms of international law, both treaty-based and custom-based, was accepted as nothing more than application for utilitarian reasons of norms of bourgeois international law. Preference was still for treaty-based norms, and custom remained in a decidedly inferior position, being accepted only in limited situations after careful thought had been given to the consequences of acceptance of custom in future relations with hostile states.

Pashukanis, in turn, fell from favor in the early 1930s as Stalin departed from his flexible approach to the observance of municipal law by his junior officials and by the public generally. Although Stalin practiced flexibility in his own personal observance of the law which his Communist Party had inspired and his legislators had enacted, he began in 1936 to talk of "stability of law." This followed his denunciation in 1930 of the previously accepted concept of an early step-by-step withering away of the state and law as socialist principles were developed in society. He declared the incremental view to be out of keeping with a truly dialectical process through which, according to his explanation of it, the coercive power of the state could wither away only after the state had first become the strongest the world had ever known.[12]

Stalin's legal technician, A.Y. Vyshinsky, was given the task of purging the legal profession of the ideas of Pashukanis

12. Address by J.V. Stalin to the XVI Congress of the Communist Party (1930), *reprinted in* S. GOLUNSKII, V. LENIN, E. PASHUKANIS, M. REISNER, J. STALIN, M. STROGOVICH, P. STUCHKA, I. TRAININ, A. VYSHINSKY, & P. YUDIN, SOVIET LEGAL PHILOSOPHY 235 (H. Babb trans. 1951).

and his colleagues. Vyshinsky swung toward a brand of normativism in Soviet law and strict observance of statutes. He left unexpressed the exception that he must have known from his participation in the early purge trials for situations where Stalin dictated otherwise. This new normativist attitude, phrased always in class terms, was carried over to international law, as Soviet diplomats negotiated great numbers of treaties and began to build a body of precedent which favored Soviet interests. Hostility to customary law continued to be evidenced in Soviet texts and practice; philosophical opposition to custom, believed to have been created by bourgeois interests during preceding decades, continued to prevail.

The Second World War was extended by Hitler in 1941 into the U.S.S.R. in spite of his solemn pact of nonaggression with Stalin. Law in treaty form had failed Stalin, and, according to what had reached the West, he was surprised. In spite of this experience, he turned to treaties again as the war neared its end, and he expressed his willingness to Roosevelt and Churchill to enter into a treaty-based postwar organization in which he would play a major part in preventing the resurgence of Germany and of Japan. The United Nations was brought into existence by a Charter placing emphasis upon international lawmaking. Soviet scholars and diplomats were to be represented in its every agency, including the new International Law Commission, which was to codify and develop international law, and the restructured International Court of Justice, which was to apply it.

The Soviet Union thus became one of the lawmakers in concert with powers which it still considered to be bourgeois and even imperialist. It now had a world forum in which it could develop new tactics. It was no longer limited to the creation of advantageous law through bilateral and multilateral treaties, for its lawyers were functioning at the key coordination points through which the revision of international law was passing. The Soviet delegation's first steps within the United Nations were hesitant, for Stalin evidently did not trust his partners in an organization where his diplomats were sometimes outvoted. Not until Stalin's death in 1953 was the way opened for full change in the attitudes of Soviet leaders, and, even at that time, the change was not immediate. Not until 1956 when Nikita Krushchev declared that war between the

capitalist and socialist states was not inevitable and that the only possible policy was one of peaceful coexistence was the ground prepared for markedly new positions.

In the mid-1950s international lawyers of the Communist-led states began to speak of the law of "peaceful coexistence." The term was not new, for Lenin had invented it, but it had a new application. Initiative for development of the concept seemed not to come from the Soviet side, but rather from its Marxian-socialist allies. It was the legal adviser of the Yugoslav foreign office, Milan Bartoš, who introduced a proposal into the Dubrovnik conference of the International Law Association in 1956 calling for a study of this new law.[13] By 1961 the Communist Party of the Soviet Union which was prepared to conform to Khrushchev's views inserted in its new Program the proviso that the foreign policy of the Soviet Union would be based upon the principles of peaceful coexistence, albeit with continuing ideological struggle.[14] This stimulated Soviet international lawyers, together with their colleagues from other Communist-led states, to press for codification of international law as a law of peaceful coexistence.

Lawyers of the West feared that the new directions would ultimately unsettle, or perhaps even eclipse, traditional international law.[15] The committee of the International Law Association charged with preparation of a study of the subject heard charges from Western scholars that all international law was to be reconsidered under Soviet pressure and that much would be lost in the process. At this point G.I. Tunkin, who was the Soviet scholar on the committee as well as the legal adviser to the Soviet Foreign Ministry, came to the fore with the proposition that the norms of general international law were to remain intact, except for those that pertained to colonialism, those that legalized inequalities of states, and those that legalized

13. *See* intervention of Milan Bartoš (Yugoslavia) introducing for the first time in the I.L.A. a report on the law of peaceful coexistence. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FORTY-SEVENTH CONFERENCE 17-39 (1957). For a resolution of the 48th Conference requesting formulation of a definition *see* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FORTY-EIGHTH CONFERENCE xiii-xiv (1959).

14. Program of the Communist Party of the Soviet Union pt. I, § 8 (1961), *reprinted in* SOVIET COMMUNISM: PROGRAMS AND RULES 66 (J. Triska ed. 1962).

15. For an account of positions taken during the debate, *see* McWhinney, *"Peaceful Co-existence" and Soviet-Western International Law*, 56 AM. J. INT'L L. 951-70 (1962).

various forms of intervention in the internal affairs of states. To put his position in some detail, he had the Soviet Branch of the International Law Association, which he headed, prepare a draft of the principles which were to constitute the law of peaceful coexistence.[16] The American Branch of the International Law Association, in an effort to clarify the concept and to preserve essential elements of traditional international law, also prepared a draft,[17] emphasizing the need to program over time the independence of colonies and to foster and routinize through agreement the peaceful settlement of disputes, the expansion of commerce and cultural exchange, the granting of economic aid, and the achievement of disarmament subject to effective control. Out of these first steps taken in the informal halls of the International Law Association came the work of the United Nations, leading ultimately to the Declaration on Friendly Relations and Cooperation among States adopted by the United Nations General Assembly in honor of the twenty-fifth anniversary of the United Nations in 1970.[18] Without question, this Declaration, although accepted by the Western States, reflects in the main the interests of the Eastern European and the former colonial states. Soviet authors declare it to be a codification of the law of peaceful coexistence, in spite of the title forced upon them by Western States seeking to disassociate the subject from the purely Soviet concept.

Achievement of a United Nations declaration, shaped largely by Soviet diplomats in concert with those of the developing states, marked a notable turning point in the progress of the Soviet thinkers away from early attitudes toward international lawmaking, but it was not the first step in that direction. This is made clear by an extensive review of Soviet practice conducted by a Western author who concludes that in the main Soviet international policy has been moving for a long time toward heavy reliance on established custom for its implementation.[19] In reaching this conclusion, the author asks why such

16. The draft is published in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTIETH CONFERENCE 361-63 (1963) and Hazard, *Co-existence Codification Reconsidered*, 57 AM. J. INT'L L. 88, 92-93 (1963).

17. INTERNATIONAL LAW ASSOCIATION, *supra* note 16, at 344-45; HAZARD, *supra* note 16, at 93-94.

18. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*, [1970] U.N.Y.B. 789-92.

19. *See* R. ERICKSON, INTERNATIONAL LAW AND THE REVOLUTIONARY STATE (1972).

a change should occur? Does it mean that custom has become useful in implementing policy and, if so, why? He decides that the Soviet policymakers have become conservative in many ways, such as with their desire to maintain the principle of freedom of the seas under which their fishermen contribute significantly to Soviet food stocks, and their large navy is enabled to transit straits in much the same way as the United States Navy. In short, in his view the Soviet Union is no longer revolutionary in the sense of 1917. It is a Great Power with benefits to be gained from customary law which has long protected Great Powers, whatever their economic systems.

It is true that Soviet scholars have been taking positions friendly to customary law in their books and articles. G.I. Tunkin in his monumental study first published in Russia in 1970 indicates preference for the treaty as the basic source of international law, but he says that Soviet doctrine by no means denies the important role of custom.[20] He cites with evident approval decisions of arbitral commissions which have found acceptance of a modification of a treaty through acts of the parties, the establishment of custom superseding the precise words of the treaty. He recognizes that states may be bound by custom as much as by treaty. His concern, however, is that there be evidence of tacit acceptance of the custom.[21] He is not ready to accept all claims of custom as a source of general international law, but only those for which some form of tacit agreement may be found. Perhaps the difference between this position and the positions popular among Soviet authors in the 1920s is his willingness to accept a tacit rather than a specific agreement, but agreement there must be. This being so, Western lawmakers must concern themselves with what makes for tacit agreement, if they are to expect the Soviet side to observe a principle of general international law formulated by custom.

The question for the West now is: How can the world know what custom is acceptable or whether a tacit agreement has been evidenced? Tunkin has an answer which recognizes the change in the qualitative membership of the United Nations. He finds that a General Assembly resolution has become proof

20. G. TUNKIN, THEORY OF INTERNATIONAL LAW 136 (W. Butler trans. 1974).
21. *Id.* at 124.

of general acceptance of a new norm.[22] Of course, he recognizes that General Assembly resolutions are specifically denied the capacity to create international law by the Charter, but he argues that if the resolution has been supported by states of both the capitalist and the socialist worlds, the resolution is proof of acceptance of a new norm.[23]

The resolution becomes in words frequently used among approving lawyers "crystallized custom," which Tunkin sees as a definite stage in the formation of a customary norm of international law. Recognizing the advantage to be gained by such resolutions in support of a Soviet position, the Soviet tactician now seeks allies on issues coming before the General Assembly, when those issues are important to the implementation of Soviet foreign policy. The resolution must attract a majority or at least be unopposed by a majority.

This is the point at which Dr. Movchan adds his word in support of an increasingly popular form of approval not involving formal votes. It is the practice which is now widely used in the Sixth (Legal) Committee of the General Assembly, namely, the process of consensus. To Movchan, consensus has become the method by which the Sixth Committee participates in the development of international law.[24]

Consensus is not "voting" in Movchan's eyes; he opposes voting because he thinks it smacks of "arithmetical majorities." This is his adoption of a frequently used phrase among Soviet jurists in earlier years to denigrate the authority of votes dominated by the Western powers. Consensus is seen as something other than a majority vote, yet it is not a requirement of total approval. The latter would give a minority a veto power over a majority. Consensus approval is a procedure that requires explanation, and this explanation has been given by the Legal Counsel to the United Nations, Professor Erik Suy.[25]

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22. *Id.* at 165, 170, 172.

23. *Id.* at 172.

24. Movchan, *Detente and the International Legal Order* (in Russian), SOVETSKOE GOSUDARSTVO I PRAVO 94, 95 (1976).

25. *See* Suy, *International Law-making in the United Nations: A Look at the Future*, PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 23 (1976).

In Professor Suy's view the concept of consensus is not new; it is found in Roman law, but it has come to have a special meaning, for there have been cases in which delegates have taken the floor after adoption of a resolution by consensus to declare that, had it been put to a vote, they would have had to vote against it or abstain. In one case in the Sixth Committee, such interventions were made by twenty-five members, among which were the U.S.S.R., the United Kingdom, the United States, and Japan. Professor Suy sees in this event the utility and limitations of the consensus procedure, in that a resolution of importance was adopted without a vote, but the express reservations of the members who spoke subsequently indicated that the legal consequences of the adoption of the resolution were somewhat limited.

Professor Suy also considers the impact of consensus procedures upon the adoption of a treaty draft, since in this case the treaty can have no effect until ratified. He believes that when there has been a consensus on a draft, the text may have enhanced value as an instrument of guidance prior to entry of the treaty into force. It could not be such a guide had the draft been adopted by a two-thirds vote.

Although Professor Suy, as a Belgian, obviously does not speak for the U.S.S.R. and the Communist-led states, his reputation as a keen observer and interpreter of trends in international lawmaking gives some reason to believe that his observations are widely based. Dr. Movchan's support for consensus procedures in light of his government's practice to which Professor Suy refers suggests that for the Soviet diplomat there is a difference between an affirmative vote and acceptance of a consensus.

Dr. Movchan adds a qualifying comment to acceptance of the consensus procedure. He requires that within the consensus there be states from the three major groups in the world: the socialist states, the developing states, and the capitalist states. This is not the first time that need for such tripartite agreement has been expressed by Soviet scholars. It even found expression in the Soviet Government's proposal some years ago that the Secretary General of the United Nations be not one individual but a troika of three persons, each coming from one of the groups into which Soviet writers see the world presently divided. Dr. Movchan is explicit in saying that the U.S.S.R.

will accept no new principle in the formulation of which the agreement of the socialist powers has not been obtained.[26] Thus, resolutions of the General Assembly may be proof of recognition of newly emerging custom, but the Soviet authorities will not accept the new rule unless its diplomats have participated in its formulation to the extent that adoption of the consensus has been accepted.

Dr. Movchan assesses the Helsinki Declaration of 1975 in terms of consensus. He sees the Declaration as the result of such an agreement of all signatories establishing as a new principle the rule that frontiers of participating states are inviolable. He makes no reference to principles thought by the Western signatories to lie in the human rights provisions of "Basket III," over which there was much dispute during 1976. Here the issue seems to be not the binding nature of the consensus but dispute as to what the consensus concerns. From the Soviet point of view the issues are not as clear as they seem to be to those claiming that they have been violated.[27]

Another point of major concern to Soviet scholars at the moment is the limitation placed by *jus cogens* on the subject matter to which states may give their agreement in treaties. The issue came to a head at the Vienna Diplomatic Conference on the Law of Treaties when the Western delegates expressed doubt as to what the *jus cogens* principle means under contemporary conditions. Certainly in the United States scholars have not seen it to be the limitation on agreement that European scholars have felt it to be. Probably this is because the concept of natural law has not been widely accepted by contemporary international lawyers in the United States, where positivists reign almost supreme. The position in the United States has been that parties may agree to almost anything so long as agreement has not been prohibited by a constitutional or statutory provision. This position runs counter to that of proponents of natural law who exclude the possibility of making a binding agreement on a matter which is already established in natural law. Thus, natural lawyers will argue that bills of rights in constitutions are no more than the statement in a basic docu-

26. Movchan, *supra* note 24, at 99.

27. *See* Malinin, *The Helsinki Conference and International Law* (in Russian), PRAVOVEDENIE 20-29 (1976).

ment of what is already the law by virtue of general natural law, so that the amendment procedure established in the constitution may not be used to eliminate the bill of rights.[28] United States positivists can accept no such view, for to them anything may be changed in the constitution so long as the proper procedure is followed. All that positivists recognize is political opposition to elimination of a bill of rights. They surmise that the requisite vote could not be obtained from representatives of a public strongly imbued with a sense that human rights should be protected if a given system of government is to remain acceptable to the governed.

Soviet authors take the position that, while they cannot accept the concept of natural law, they are prepared to accept a position taken by the great majority of states, especially if taken by consensus in the manner already indicated. Such principles, when accepted, become so firmly fixed in the morality of the world community that no two or more parties may agree to the contrary. Thus, a treaty violating the *jus cogens* is a nullity in international law.

Professor Tunkin sees the United Nations Charter as one such norm-creating treaty, and it has become binding as *jus cogens* upon states even if they are not members of the United Nations.[29] Thus, Switzerland is bound although its government has refrained from joining the organization. Professor Tunkin goes farther; he sees the practice of states in executing other treaties as creating the norms of *jus cogens* which become binding on nonparties whether they like them or not. Not every bilateral treaty qualifies as generally norm-creative in Tunkin's view, for he explicitly excludes a treaty to which only two or a limited number of states are parties. Nevertheless, one has the impression from his text that if a large number of members of the United Nations ratify a multilateral convention, they have created a norm of the *jus cogens,* and this is then binding

28. This position was taken by B. Mirkine-Guetzevitch in saying, "Political regression requires taking up again today the first verities of democracy. A vote which is irreproachably regular, sincere, a popular vote in favor of totalitarianism is not valid, either politically, morally or even legally: liberty is inalienable, and a vote aiming at its suppression is a nullity." B. MIRKINE-GUETZEVITCH, 1 LES CONSTITUTIONS EUROPEENES 149 (J. Hazard trans. 1951).

29. *See* G. TUNKIN, *supra* note 20, at 147-60.

on nonparties who may wish to agree among themselves to act in some other fashion.

In the light of the emergence of the new majority within the United Nations, it becomes evident that in the view of Soviet scholars a new *jus cogens* is in the process of creation that will differ from the one European natural lawyers recognized in the past. Tunkin has already given some clues as to the basic norms now binding upon all: those establishing crimes against humanity as set forth in the Nuremberg principles, crimes against peace, and principles relating to the end of colonialism. He gives more detail in his chapter 3, including nonaggression, peaceful settlement of disputes, self-determination of peoples, peaceful coexistence, disarmament, respect for human rights, and the prohibition of war propaganda. Several of these, notably peaceful coexistence, cover a multitude of principles, not all of which have yet been clearly defined in spite of the Declaration on Friendly Relations and Cooperation among States.

The Vienna Diplomatic Conference on the Law of Treaties incorporated the attitudes of the new majority on *jus cogens*, in spite of opposition from the Western delegates. Thus, article 53 declares a treaty to be a nullity if it is in conflict with the imperative norms of international law, and article 71 establishes the obligation of states to conduct their relations in accordance with the imperative norms of general international law.[30] Dr. Movchan cites these treaty provisions with approval.

In reviewing consensus and *jus cogens,* Dr. Movchan concludes that never in previous epochs has there been a tendency in international law like the one evident today to seek out legal agreement on the system of principles and norms governing international relationships.[31] He sees everything pointing to adoption of the principles of peaceful coexistence in the establishment of which he declares the socialist states to be leading the way.

The way being plotted by socialist states seems not to be indicated solely by what they do in the United Nations, nor in

30. For the text of the treaty, *see* THE TREATY MAKER'S HANDBOOK 330 (H. Blix & J. Emerson eds. 1973).

31. Movchan, *supra* note 24, at 101.

their relations with states of the developing or Western worlds. It is also being sketched in what socialists do among themselves. While no one among the Soviet scholars argues that relationships between Soviet states have become moral rather than legal, there is a claim that they have become qualitatively different; they are creating a new socialist international law, fundamentally different from general international law applicable in relationships between the Communist-led states and those with non-Communist leadership.[32] Some Soviet authors have argued that these new relationships are being extended beyond the Communist-led states to those in the developing world which are following what Soviet analysts call a "non-Communist" path,[33] but this position has generally not been accepted by the established authors. The conservatives say that while the states of the noncapitalist path, such as Guinea in Africa, maintain relations with the U.S.S.R. different from those maintained with states such as the Ivory Coast, which make no claim to being socialist or noncapitalist, principles of socialist international law are not applicable to them. These principles are in force only between states that are accepted as being fully within the family of Marxian socialist political systems.

The variety of states now just over the border of the socialist group, whether they be on what is accepted as the noncapitalist path or under governments like that in Italy where Communist parties have an important influence upon policy, is causing Soviet international lawyers to rethink their philosophy. Should they now accept the conclusions of the 1920s and 1930s that international law is the creation of the bourgeoisie and essentially a hostile class law, although usable in specific situations, or should they recognize that a sea-change has occurred? It was to this topic that Dr. I. P. Blishchenko devoted his attention in a paper read to the Soviet Society of International Law in 1972.[34] That his view is not a generally

32. This interpretation of the Soviet position taken by the author in *Renewed Emphasis upon a Socialist International Law*, 65 AM. J. INT'L L. 142 (1971), was challenged in Butler, *"Socialist International Law" or "Socialist Principles of International Relations"]*, 65 AM. J. INT'L L. 796 (1971).

33. *See* Usenko, *The Principle of Democratic Peace Is the Most General Basis of International Law* (in Russian with English summary), [1973] SOVIET Y.B. INT'L L. 13, 35.

34. Dr. Blishchenko's paper, *The Class Struggle and International Law*, is sum-

accepted view among Soviet scholars is indicated by the report of the discussion from the floor that followed the principal paper, but the view may be a harbinger of attitudes to come. As such, it deserves attention.

Blishchenko argues that the content of general international law now reflects the will of the broad masses of peoples rather than the wills of the various ruling classes. He finds that contemporary general international law no longer serves capitalism and does not strengthen it. Rather, it improves the position of socialist tendencies in the contemporary world. Blishchenko looks at the same record as that examined by Dr. Movchan. He notes the swing toward the new majority, and he argues that general international law can no longer reflect the will of the "monopolist bourgeoisie" because the forces of peace and progress are not so strong that they can force the imperialists to accept the legal principles of peaceful coexistence. He notes that these masses are in the imperialist states themselves, and that the rulers of these states must take them into consideration in formulating policy. One can imagine that, seen from his position, the abandonment of the war effort in Vietnam must have been the result of demonstrations in American streets, leading finally to influence upon Congressmen and upon the press so that governmental policy had to be changed.

Blishchenko's rather daring departure from traditional class views of law as the law of a ruling class was echoed a year later by Dr. D. B. Levin who saw general international law today reflecting not only the interests of the peoples of socialist states and of the national liberation movement, but also of the popular masses of capitalist states with whom the ruling classes of capitalist states have to reckon.[35] He is not prepared to depart as completely as Blishchenko from traditional views, for he says that generally recognized international law is "neither bourgeois nor socialist, but is of a traditional democratic character which guarantees the presence in the international arena of states of the world-wide socialist system." For

marized in the Chronicle of the 1971 Conference held at the Moscow State Institute of International Relations. *See* [1972] SOVIET Y.B. INT'L L. 201.

35. D. LEVIN, AKTUAL'NYE PROBLEMY TEORII MEZHDUNARODNOGO PRAVA (Current Problems of the Theory of International Law) (1974).

him, international law still reflects class struggle, but, since it is the law of peaceful coexistence, its task is to prevent the struggle from breaking out into war. It has room for continuing ideological struggle, but this is not the same as war.

While it has become increasingly evident that Soviet authors think that the wind is blowing their way in international lawmaking, due to the new majority in the United Nations and the developing popular influence in the Western democracies, they are not prepared to accept entirely the results of currently perceived trends. Their hesitancy is most noticeable in the field of human rights law. While the Soviet position has been dramatically indicated in Soviet protests to President Carter's personal letter to Dr. Andrei Sakharov setting forth the President's policy with regard to espousal of human rights,[36] the position has been clear for some time. It is stated in detail in a monograph written by Dr. V. A. Kartashkin, a Soviet scholar who has served in the Human Rights Division of the United Nations Secretariat.[37] His analysis suggests that it is current Soviet policy to press for adoption of resolutions on human rights in the General Assembly in the areas where there is strong feeling by the new majority, but to resist introduction into international law of individualistic concepts similar to those already accepted by Western Europe under the Treaty of Rome, which created the Human Rights Commission and the Court in Strasbourg for appeals by citizens of Western European States against their own governments.

The argument is that the struggle to protect human rights under international law should focus on broad inhuman policies adopted by states in violation of those rights. Kartashkin singles out for attention policies devoted to aggression, fascism, colonialism, genocide, apartheid, and racism. His suggestion is that when such inhuman policies are pursued, they should be attacked by the world community through the United Nations and declared illegal. Although he does not indicate just what type of United Nations action is to be favored, it may be presumed that it is the resolution of the General Assembly. It has

36. *See* Hovey, *U.S. Stoutly Defends Letter that Carter Wrote to Sakharov*, N.Y. Times, Feb. 19, 1977, at 1, col. 6.

37. V. KARTASHKIN, MEZHDUNARODNAIA ZASCHITA PRAV CHELOVEKA (International Protection of Human Rights) (1976).

been Soviet Government practice to vote in favor of General Assembly resolutions devoted to the castigation of such policies. Examples of such resolutions are those incorporating the principles propounded at Nuremberg against aggression, the definition of aggression, anti-colonial and anti-racist statements, the genocide convention, and the persistent attacks upon apartheid. Dr. Kartashkin says nothing about Security Council action, and probably for good reason, as the Security Council has not pretended to develop new law but to enforce existing law. Also, he leaves untouched judgments of the International Court of Justice, perhaps because he and his government do not consider courts as creating law but only as interpreting and enforcing law in specific cases, as they do generally in states subject to legal systems based upon Romanist principles.

As for action by the specialized commissions of the United Nations, Kartashkin's argument is that these should be reduced in number, including the offices within the Secretariat which monitor human rights activity. It is argued that there is presently much overlapping of jurisdiction and heavy expense in maintaining the various commissions and agencies currently functioning. Kartashkin proposes that even the Human Rights Commission should hold fewer meetings, at two year intervals rather than every year. Under this arrangement the Human Rights Commission would necessarily be limited to discussion of broad, long-range policies rather than those currently in the news and likely to concern individualized problems.

Most importantly, the Soviet authors, and the Soviet Government as well, have opposed development of a law of individual petition. The argument is that individuals are not subjects of international law and have no right under the Charter or general international law to take their individual claims to an international body. Secondly, their concerns are those of the states in which they reside and not of the international community. This being so, to listen to individual complaints and to take international action to rectify any wrongs that might be discovered in the hearing would, in the Soviet view, violate article 2, paragraph 7 of the United Nations Charter, which prohibits intervention by the membership in the internal affairs of states. The proposed reduction in the number of meetings of the Human Rights Commission is to make clear to the

public that the Commission is not to be concerned with problems of individuals.

Dr. Kartashkin is opposed to the creation within the United Nations system of any specialized agency to consider and protest violation of the rights of individuals. Thus, the proposal from some Western advocates of human rights protection that a Human Rights Procurator or Ombudsman be created is resisted as creating a potentially super-state office. It is argued, further, that to put such power in the hands of one official would undermine the entire structural foundation on which the United Nations is based. The United Nations is seen as an assembly-type organization in which power is spread over the entire membership. This conception once led to the above mentioned Soviet proposal that even the Secretary General should be a "troika" representing the East, the West, and the developing states, rather than a single individual. Kartashkin's argument continues that it would be undesirable to expand the Secretary General's power by creating, as has been proposed by an American scholar, a Council for Human Rights responsible directly to him.

In short, the Soviet position is that the General Assembly, in which the Soviet diplomats find themselves in the company of a congenial majority, must not be bypassed, nor must it be replaced by a differently constituted body. This stance leads to opposition to a Western proposal that human rights matters be taken before a new assembly to be composed of members of parliaments rather than the delegates presently commissioned by the executives of member states. Probably, the fear is that parliamentary deputies might disregard an overall national policy of silence on an individual human rights issue as a tradeoff for cooperation on some other higher priority matter on which the executive concerned proposes to take an initiative; also, perhaps, that members of parliaments might represent minority parties out of power and, therefore, be irresponsible, whereas the delegates sent by executives could be expected to represent responsible parties in power.

The implications of Dr. Kartashkin's position are clear: the development of international law in the direction of protection of individuals is not desired because there could be no expectation that Soviet voices could guide its development through case by case formulation of new international law. As

has been seen, the method of creating international law proposed by Soviet authorities is the treaty. In second place is the General Assembly resolution, permitting the recognition of custom by a group now holding Soviet confidence. There is no third place for judicial lawmaking.

It is tempting to suppose that the Soviet position on the tactics of international lawmaking is inspired by the Soviet national legal tradition, which is the tradition of the Romanist legal systems. Rejection of judge-made law is routine among the Romanists, at least on the level of theory, if not in practice. But is such an explanation reasonable under current circumstances on the international level? A Western writer on the current prospects for the International Court of Justice weighs the relative impact of legal tradition and national interest with regard to the role of the Court and concludes, "National interest, rightly or wrongly understood, rather than cultural traditions, seems to be the decisive factor in the determination of policies toward international law and affairs."[38] Ever since 1917 Soviet diplomats have indicated consistently that the interests of their state require that control over lawmaking in the international arena be kept in their hands to the greatest extent possible. Only as the means of influencing results have multiplied with changes in the constituency of law-creating or law-influencing bodies has the Soviet acceptance of nontreaty tactics become evident.

Diplomats of Western states have also changed position in the postwar years. It is a long time since it has been argued that customary law should not be codified by diplomatic conferences or by the International Law Commission lest it be reduced to its lowest common denominator. It is even some years since resolutions on such topics as a definition of aggression or friendly relations were resisted because the topics were too vague to be defined. In consequence, there is today considerable correspondence in tactics of international lawmaking by both Eastern and Western diplomats, but the issue of human rights remains in great debate.

The debate is at its sharpest over the enforcement of the 1975 Helsinki obligations. In the West, governments have

38. Anand, *Role of International Adjudication,* in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 6 (L. Gross ed. 1976).

taken the position that the human rights issue has been recognized in treaty form, and Western diplomats and even heads of state are now demanding recognition of individual complaints. Soviet voices and the Soviet Government itself resist this argument. In consequence, human rights have become the major issue in the tactical field in debate between East and West. Why should there be such Soviet resistance, especially since the Soviet Government claims, and probably rightly so, that its dissidents have no large following among the population? Perhaps the answer is to be found in consideration of the impact of a cultural experience throughout long years of history which is even deeper than the rejection of judge-made law. One cannot forget that contemporary Soviet society is but the successor to a society where traditionally opposition voices have been feared. Dissidents may be seen to be more dangerous than Soviet leaders will admit publicly, and perhaps even to themselves.

A clue as to this motivation was offered some time ago by a Czech diplomat who rose in a public lecture to remark that Americans, who are satiated with opposing voices to such an extent that they pay little or no attention to them, cannot understand the attention a dissenting voice can receive in a society which has not heard such a plethora of comment. Perhaps, if this be so, the Soviet Union has yet to pass through a transition similar to that which occurred in Portugal after the gates to public expression had been opened with the ouster of Marcel Caetano. Chaos reigned until the public became used to hearing a multitude of voices. It took months before people found time to consider the merits of arguments before they rushed to follow one or another determined speaker. Transitions from strict control over dissidence are difficult in any country, and it can be expected that it will be some time before Soviet leadership can accept as a tactic the development of international law through a case by case review of individual complaints against the individual's own government.

In sum, if the record has been read aright, Soviet tactics, although still focused upon the treaty form, have been expanded to include acceptance of custom as well as of the treaty as a source of international law, so long as the custom is evidenced appropriately. Such acceptable evidence now includes resolutions of the General Assembly of the United Nations.

Further, there is determination to prevent lawmaking contrary to Soviet-perceived interests by non-Marxist diplomats. The argument is heard that a new *jus cogens* is coming into existence which prohibits development of law in certain directions, even if two or more parties would like to speed such development in agreements to which they alone are parties. Finally, there is complete rejection of lawmaking by courts or administrative bodies on the application of individuals complaining of violations of law by their own governments. Soviet authors and the Soviet Government itself continue to show themselves in recent proposals on the protection of human rights unwilling to accept a tactic of international lawmaking beyond their control or the control of those in whom they have confidence.