

PROCEEDINGS, EIGHTIETH ANNUAL MEETING
THE AMERICAN SOCIETY OF INTERNATIONAL LAW
COMPARATIVE APPROACHES TO THE THEORY OF INTERNATIONAL LAW

Mark W. Janis, Chairman

WASHINGTON, D.C.
APRIL 9-12, 1986

reservations more flexible in order to encourage ratification of multilateral agreements by a larger number of states.

Another contribution of Latin America to the development of international law lies in the inter-American initiative to reinforce the emerging rules prohibiting the use of force in settling disputes. For this purpose, shortly after the Kellogg-Briand Pact, the countries of our region signed the Saavedra Lamas Treaty in 1933.

Although arbitration as a means of settlement of disputes has been known since the early history of international relations, its wide acceptance as an institutional method of settlement was due to the numerous arbitration treaties concluded among the American states. Those states extended that practice to their relations with nations in other parts of the world. Long before the First Hague Peace Conference of 1899, compulsory arbitration was a common practice in this hemisphere, and all disputes were subject to arbitration, with the exception of matters regulated by a state's constitution. During the same period in Europe, however, all questions concerning the honor, dignity and independence of states were excluded from arbitration. Those exceptions substantially restricted the applicability of arbitration for the European states.

The law of the sea is an area where the Latin American contribution has been very important. The doctrine of historical bays recognized in article 7 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone finds its early precedents in Drago's vote in the *North Atlantic Coast Fisheries Arbitration* of 1910, and in the award made by the Central American Court of Justice concerning the Gulf of Fonseca in 1917. The concept of a 200-mile exclusive economic zone, now considered a norm of customary law, is another example of the contribution made by the Latin American nations to the development of the international legal order.

In other fields of law the Latin American contribution appears not to be in the creation of new norms but rather in their codification or systematization. Indeed, one would have to include codification as one of the most important contributions of the inter-American countries to the development of international law, particularly in the first four decades of the 20th century.

Nowadays, the inter-American community appears to have lost some of the force and community of interests it formerly had in the creation of international legal norms. Due primarily to a plurality and diversification of interests of the American nations, the creative process that produced a number of principles and rules of international law have become less significant. The increasing financial and political difficulties encountered by a number of countries in the region seem to have given new impetus to their spirit of solidarity and cooperation, however. They have also reaffirmed the need to accelerate the Latin American process of economic and political integration. These new circumstances will stimulate new generations of international lawyers in our developing countries to revitalize the traditional contribution of the region to the progressive development of international law.

REMARKS BY DAVID W. KENNEDY*

Much international legal theory reads like an assessment of the status of forces in our discipline. When we talk about international legal theory, we usually speak a very Hobbesian dialect in which law ebbs and flows as order against chaos while the international legal theorist keeps score. We applaud the law, root for its victory, but re-

*Assistant Professor of Law and John Harvey Gregory Lecturer on World Organization, Harvard Law School.

main skeptical. We differ about the indicia and prospects for law's triumph and even bicker about tactics and strategy. I would like to use my time this afternoon to think about law's opponent in this struggle, momentarily setting aside the matrix of power, the social structure *within* which law does battle.

But I confront an immediate terminological problem. What *is* exterior to international law? Often we call law's other "politics," even "power politics," but this designation seems odd, for the entire struggle seems eminently a matter of both power and politics—of the relative power and politics of law and its adversary. I will begin with something much more basic—indeed, with the rather simple proposition that legal order, international or otherwise, is premised on the absence of violence. I would like to think aloud about the place of violence in our work.

Violence seems irrational and meaningless: it disrupts rational discourse and destroys the meaningful contexts of human life. Violence, like the terrorist's terror, lies outside international civilization. So far so good; this proposition seems initially to find support in many doctrines and much international legal theory. William Bishop, articulating arguments for the Connolly Amendment in terms familiar from recent U.S. arguments at the Hague in the *Nicaragua* case, distinguishes the law from "the great political issues of peace and war [which] are not susceptible of judicial settlement." Richard Falk's book title is also exemplary: *Legal Order in a Violent World*.

But these materials are troubling. The issues of "war and peace" seem, as Bishop says, "political," and although perhaps not justiciable, at any rate fully *within* the matrix of sovereign power. At the very least these issues have entered the legal fabric to be defined and excluded. If we think twice about Falk's title, its message is also more complex. The legal order exists within the world of violence, distinguishable—perhaps continually distinguishing itself, cleansing its hands—but associated, contextualized within violence. On reflection, excluding violence seems different from being premised on its absence. Indeed, even if "terror" seems outside or beyond law, the "terrorist" is excluded from legal personality and his exclusion determines both his status as legal object and the forms in which he performs his "terror." The logic of deterrence is similar.

It seems difficult to locate a violence outside the legal order. The law seems preoccupied with that which purports to be external to it. Law shuns violence, works for its exclusion and remains vigilant against its reemergence. Doctrinally, we might think of *rebus sic stantibus* or even *jus cogens* as performing ritual cleansings, seeking continually to remove from law at the source, but nevertheless, within the doctrine of "sources," any taint of violent or gross injustice. The American suspension of the Load Line Convention during wartime seems apt: in war, all bets are off. Yet, in the language of the Attorney General, the convention is "void" by automatic operation of the doctrine of *rebus* once the legal boundary between war and peace has been crossed.

War, violence, even terror: their exclusion seems law's continuing imperative. One might even say they remain present in the law as motive. In theoretical literature, this is a familiar theme. The nuclear holocaust lends urgency to the works of many contemporary legal scholars. Richard Falk's argument for a middle ground between neopositivism and neonaturalization in *The Status of Law in International Society* picks up momentum when he observes that "at present there is some danger of legal nihilism in world politics." His call for the "management of military powers" seems especially forceful when he invokes "the wide-ranging types of international conflict and . . . the capacity of principal states for mutually self-destructive forms of confrontation," or what he terms the "structural factor" of "the capacity" for "a nuclear power

... to inflict great destruction on all other states" and perhaps especially civilization's "unprecedented vulnerability to total and instantaneous destruction."

When we think of law struggling against war or violence, we acknowledge the motivational dimension of violence or war: it is the root of our team loyalty. But we think of law as able to displace its motive, to become the successor to violence. This very Hobbesian notion is expressed in many international legal histories. Henkin, Pugh, Schachter and Smit put it this way in the historical introduction to their 1980 casebook:

[B]y the beginning of the 17th century . . . the growing disorders and sufferings of war, especially of the Thirty Years' War, which laid waste hundreds of towns and villages and inflicted great suffering and privation on peasants and city dwellers, *urgently called for some further rules governing the conduct of war as well as of peaceful relations.* (emphasis added)

International legal theorists and historians, like municipal legal historians describing the "King's peace," customarily treat the law of the international institutional regime—that most highly developed branch of international law—as the displacer of its origin in war.

But the image of successor does not fully capture the continuing motivational presence of law's violent antagonist. Indeed, violence, having given birth to law, remains no stranger to it. Law continues during war, both innocent of and engaged with violence, specifying its terms, ambit and reach. It is surprising how often and unproblematically international law refers to violence. Whatever difficulties were encountered interpreting the phrase "foreign state" in the infamous British recognition cases of *Harshaw* and *Al-fin*, no one seemed troubled by the reference to violence in the British Patent Act which provided patent extensions when shortages resulting from "hostilities between His Majesty and any foreign state" affected the value of a patent grant. Similarly, we study the *Paquete Habana* for its ringing enunciation of the principle that "international law is part of our law" and its quaint approach to law's roots in custom, but find it unsurprising that the custom to which reference is made should be the practice of warfare.

Perhaps it would be better to say that international law is respectful of violence, its origin and constant companion. The opinion of the League Commission of Jurists in the Aaland Islands Dispute seems to begin by establishing the exclusion of violence as a precondition for "statehood" or sovereign authority: "[F]or a considerable time, the conditions for the formation of a sovereign state did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a state, even some elements of fact, were lacking"

Yet this exclusion is not a singular historical event. For legal purposes, the state comes into existence, in the terms of the opinion, "little by little." Moreover, "this certainly did not take place until a stable political organization had been created and until the public authorities had become strong enough to assert themselves throughout the territories of the state without the assistance of foreign troops"—until, in other words, the law had established a monopoly of violence. In this, international law comprehends as actors only continuing monopolies of force. The legal treatment of conquest or revolution comes to mind, in our own jurisprudence, perhaps most readily in the early cases of *Johnson v. M'Intosh* or *Dartmouth College*.

Law's continuing respect for what we think of as its antagonist is more striking in municipal recognition doctrine. In the *Russian Reinsurance* decision, Justice Lehman

adopts a de facto recognition policy, giving legal effect to the pronouncements of an unrecognized government out of respect for its violent foundation:

[T]he fall of one government establishment and the substitution of another governmental establishment which actually governs, *which is able to enforce its claims by military force . . .* and is obeyed by the people . . . must profoundly affect all the acts and duties . . . Its rule may be without lawful foundation; but lawful or unlawful, its existence is a fact, and that fact cannot be destroyed by juridical concepts. (emphasis added)

Or, later: "We do not pass upon what such an unrecognized governmental authority may do, or upon the right or wrong of what it has done; we consider the effect upon others of that which has been done." And, I should add, write those effects into law.

Perhaps the most classic acknowledgement of law's continuing participation in violence is Marshall's rightly celebrated opinion in the *Schooner Exchange v. McFaddon*. The pleadings on both sides suggest that refusing to attach Napoleon's warship would exclude or banish violence from the law. For the appellees: "[T]his vessel was seized by a sovereign, in virtue of his sovereign prerogative . . . [W]henver the act is done by a sovereign in his sovereign character, it becomes a matter of negotiation, or of reprisals, or of war, according to its importance." On the other side: "[Y]our own citizens plundered. Your national rights violated. Your courts deaf to the complaints of the injured." Yet Marshall neither excludes Napoleon's warship from the fabric of law nor regulates it. His argument is characteristically subtle. The war vessel, as a public extension of a foreign sovereign, is immune from attachment, not because the legal apparatus recoils before the instruments of violence, but because the web of implied contractual relations among sovereigns must be thought to include a waiver of attachment jurisdiction: "The perfect equality and absolute independence of sovereigns . . . have given rise to a *class of cases* in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction." (emphasis added) Turning to Napoleon's public armed vessel, he continues:

She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated . . . Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed . . . as containing an exemption from the jurisdiction of the sovereign, within whose territory *she* claims the rights of hospitality. (emphasis added).

The complicated and ambivalent relationship between international law and violence suggested by these texts (a relationship less of absence of combat than of coexistence, repeated exclusion, reference and regulation), although apparently a matter of common sense, is often forgotten in the rush to think of law as against some other. Indeed, international law itself often pays little attention to its relationship with violence. One can read the *Nuclear Test Cases* almost without noticing that the French unilateral declaration whose binding force was "at issue" related to nuclear weaponry. The case seems obviously to be about consent and the source of law, and only incidentally to have arisen out of a conflict about weaponry. Similarly, in *American Banana v. United Fruit*, Justice Holmes transforms a Central American military scuffle into a conflict of laws issue, writing violence into the definition of sovereignty: "The very meaning of sovereignty is that the decree of the sovereign makes law." Holmes reads the violent seizure of the American Banana plantation as if it were a deed, title, statute or other sovereign "decree."

But this forgetting simply reemphasizes law's involvement with violence. Brierly, in his short treatise, *The Law of Nations*, indicates that "[I]n practice, a title by conquest is rare, because the annexation of territory after a war is generally carried out by a treaty of cession, although such a treaty often only confirms a title already acquired by conquest." (emphasis added) The recent *Western Sahara* Advisory Opinion of the International Court of Justice (ICJ) is even more striking in this regard. The ICJ reviews the patterns of historical struggle in the western Sahara in excruciating detail only to conclude that the factual diversity has led to so complicated a set of legal relationships that the United Nations finds itself, somewhat paradoxically, confronting a legal tabula rasa, able to pursue its policy of decolonization. The very "complexity" of the historical situation has opened up a space for legislation.

All of this has taken us far from the Hobbesian struggle for legal order against the chaos of violence or war or terror. Indeed, each attempt to identify law's nemesis leads us back to law and back to the international intersovereign social system. It seems impossible to "set aside" the issue of power or the arena of struggle between law and violence. The vanity of the attempt to do so yields two insights. First, the Hobbesian image of law ebbing and flowing against violence seems impossible. There seems no violence against which the law can ebb or flow in which the law is not implicated. Nor does there seem to be a law from which violence is absent. Second, the image of a domain outside the social order, constantly threatening that order, seems just that—an image. Let me take up these two thoughts one at a time.

The first, the inseparability of law and that against which it imagines itself to be working, seems apparent in international legal doctrine. International legal doctrine about violence has taken a back seat to the "law of peace" or "cooperation" in recent years; as a technical subspecialty it can be excluded from general treatments of the field and when included, it is usually transformed into a concern with the institutionalization of "dispute resolution." Nevertheless, the law of war, whose main feature is the outlawing of force, and the law in war, which emphasizes the regulation of force, continues the ambivalent presence of war in law. The law of war suggests an international legal bulwark against force, but in its exceptions for self-defense or humanitarian intervention, harnesses that bulwark to the state as arbiter of violence. The outlawry of war, after all, is different from its banishment: violence must enter the law to be excluded. But once permitted into the framework of rationality, force becomes a continual threatening presence which must be defined and regulated. Hence the elaborate vocabulary of force presented by international law: "retorsion," "reprisal," "humanitarian intervention," "armed intervention to protect nations," "civil war" and so forth. The law in war regulates force as an instrument of the state—both in accordance with the boundaries of the legitimate state objectives and institutions (combatant/noncombatant, etc.) and in an institutional context which thinks of violence as meaningful—as symptomatic of "disputes" which must be "resolved." Legal doctrine seems to provide a vocabulary of violence, continually managing a presence for violence in each of its pronouncements.

This relationship between law and violence—the continued impossibility of law's premised alterity to violence—focuses our attention upon the terrain of law's struggle, a struggle which we might better think of as a struggle with itself. This terrain is institutional: the state in international society. Indeed, the ambivalent relationship between violence and the law seems explicable as an institutional practice. The *Western Sahara* case seems newly apposite: "self-determination," pursued as an institutional policy which will generate a state apparatus, seems possible precisely because of the multiplicity of violences which the Court has brought into the law.

Similarly, our major international institutional systems have thought of themselves as Hobbesian responses to war—the Concert, the League, the United Nations all come readily to mind. But this drive to overcome warfare—to institutionalize peace—seems, if not a continuation of violence (for we seem unable to locate the extralegal realm either temporally or spatially), at least a continual reference to and respect for violence. We might think of voting in the institutional plenary as a momentary reenactment of the status of forces—as the textual shadow of violence within the plenary. We might ask whether the drive to institutionalize internationally is more than a repetition of the municipal effort to unify violence in a legal monopoly, which might then continually defer closure, embracing both law and violence. Institutionalization has become a substitute both for “peace” as the other of violence and for “war” as the other of law.

All of this is familiar. Indeed, we need only return to a short essay by Jean Jacques Rousseau entitled, appropriately enough, “The State of War” to find our Hobbesian notion of a legal order external or posterior to violence undone. In this essay, Rousseau takes issue with Hobbes’ suggestion that the state of nature is a state of war from which civilization arises as Leviathan. Quite the contrary, he argues, the state of nature is both unstable and benign. Civil society arises as a general will develops which emancipates society’s productive and artistic or moral forces. But Rousseau does not simply reverse Hobbes. In *The Social Contract*, he writes:

The relationship between men in their primitive condition of independence is not sufficiently stable to constitute a state of *either war or peace*; and for that very reason men living in that condition are emphatically not natural enemies. War is a relationship between things not men, which is to say that a state of war cannot arise out of mere personal relations; it arises, rather, out of property relations. (emphasis added)

In his essay, “The State of War,” after dismissing Hobbes, Rousseau writes (and you will need to excuse my translation): “[W]e find, quite to the contrary of his [Hobbes’] absurd doctrine, that, far from being natural to man, the state of war is born of peace, or at least of the precautions which men have taken to assure themselves of a durable peace.”

This text is troubling. Let us read it more slowly. “Far from being natural to man”—so far a repetition of his dismissal of Hobbes—“war is born of peace.” But whence peace if primitive relations among men are “not sufficiently stable to constitute a state of either war or peace”? Rousseau senses the difficulty and adds “or at least of the precautions which men have taken to assure themselves of a durable peace.” Yet this qualification compounds the difficulty. What can these precautions be if not the institutions of civil society—and yet such a conclusion, suggesting that men institute civil society to ensure a “durable peace,” undoes his disagreement with Hobbes.

Although war and peace arise together with the instantiation of a general will as the state, peace, somewhat paradoxically, continues to locate its roots in war, and war its roots in civil society. War is not generated of peace as much as it, like peace, is produced in the precautions historically taken by men. To forget his roots in Hobbes—to do more than reverse Hobbes’ sense of causation—Rousseau develops a double movement in civil society. War arises from civil society which is produced by men anxious about the durability of peace. As a result, men are worried by the Hobbesian relationship between war and peace with which their civil society confronts them. They respond by enacting what they think will be a Hobbesian remove from violence, but their efforts originate war. The aspiration for a “durable” peace—a peace more stable

than the state of nature—produces a war more violent than the instability of primitive interpersonal relations.

This passage from Rousseau underscores our sense that both war and peace are creatures of a common institutional terrain. Rousseau's title ("L'Etat de Guerre") seems particularly apt, for the state or condition of war seems inseparable from the state or sovereign itself: "The perfection of the social order consists, it is true, in the concurrence [*concoure*] of force and the law. But it is necessary for this that the law directs force." Rousseau couples an acknowledgement of the interplay of law and violence as constitutive of the state with an assertion of law's continuing direction of force. In this, law's domination of force is workable only to the extent that it expresses force. As a result, international law seems chimerical: "As for what one usually calls the law of nations, it is certain that, without sanctions, its laws are but chimeras, weaker even than the law of nature." This is so unless, as Rousseau elaborates in his more familiar essay reviewing the Abbé de Saint-Pierre's "plan for a perpetual peace," it can recapitulate the municipal search for a more durable peace institutionally, through constitution of a League in Europe which could recapitulate internationally the move to civil society. Thought of in this light, it is not surprising that Rousseau's essay puts more effort into institutional detail than does Kant's later work on the same theme.

But Rousseau offers us more than a restatement of our growing sense of the common institutional terrain for war and peace. He gives us a clue about the recurring and puzzling image of a domain which could, impossibly, be *beyond* war and peace. This returns me to the second observation. The double use of peace—as the consort for war in civil society and as the more "durable" aspiration which motivates war—suggests that my initial attempt to pin down the other against which law operates was the chimerical effort. Perhaps, like a "durable peace," words such as "violence," "terror," even "war" populate our theory—like that of Rousseau—as motivations, or reminders of our Hobbesian imagination.

Seen this way, terms which international legal theorists use to assess the struggle between law and its other sustain their difference from one another by operating against a more hyperbolic extension or projection of themselves. Law seems to struggle against war because war operates both within the legal order and as the image of an absent, perhaps successfully excluded violence, in the same way that peace operates both as the terrain for law's struggle with war and as the image of a "durable" peace which might exclude violence. Bob Keohane's recent book *After Hegemony* illustrates this hyperbolic practice. Keohane considers "cooperation" within international "regimes," which he thinks of as simultaneously political, sociological, administrative, and psychological structures. "Cooperation," he insists, "should not be viewed as the absence of conflict, but rather as a reaction to conflict or potential conflict. Without the specter of conflict there is no need to cooperate." My suggestion is that we trace this "specter" in the institutional practice and doctrinal life of international law. Kunz, in his 1968 monograph *The Changing Law of Nations*, seems to have captured this image of law as simultaneously both other to and urgently against violence:

[T]he future of international law . . . may lie *between* the extremes of an ethically higher and more effective law of one world and the possibility of a rapid fall of the whole law of nations, a return to ages of anarchy and barbarism; in the light of the terrible effect of modern weapons, even the vision of an end of civilization, of a possible suicide of humanity, cannot be wholly excluded. (emphasis added)

Of course, all of this is hardly novel. Clausewitz, whose very Hegelian text we usually associate with the view that war is a "continuation" of policy, is also read as an analysis of peace as the "pause" in war. He releases the potential tension between these two dimensions of his work much like Rousseau. Clausewitz follows his famous statement that "War is nothing but a continuation of political intercourse, with a mixture of other means" some lines later with the rhetorical question: "Is not War merely another kind of writing and language for political thoughts?" His answer: "It has certainly a grammar of its own, but its logic is not peculiar to itself." The notion that war's apparent exclusion from law might be the product of its unique "grammar" within a shared "logic" suggests a continual relationship of exclusion and repetition of violence by law, rendering fantastic both the vision of a "durable" peace and the notion of an uncivilized violence. Both are already situated in—indeed, structured like—a language.

Nevertheless, and I will close with a policy proposal of sorts, I think that if we leave Hobbes for Rousseau in this way, acknowledging the impossibility, or at least the chimerical quality, of the struggle we usually make it our practice to assess, we might loosen our commitment to particular forms which have become associated with the struggle of law against chaos. In particular, we might be more willing to release our commitment to the institutions of international law and to the rigidity of a legal doctrine which aspires to universality. As international lawyers, we do seem quite taken with the ICJ, if no longer so surely the U.N. system, and for all the recent move in the literature to a more politically imbedded approach to international law, even rooted in a theory of games, we still seem attracted by doctrinal consistency and universality.

Put simply, I think we remain wedded to these institutional and doctrinal forms most firmly when our theoretical range is most limited to Hobbes and not-Hobbes—when we are struggling to accommodate the priority of law with the priority of power. Rousseau and Clausewitz suggest another path. I think we might be more willing to release our commitments to these particular institutional and doctrinal forms if we understood their rigidity not as a bulwark against violence, but as the continual regeneration of violence within a common framework of institutional power.

To a certain extent, of course, we are already headed in this direction. Politicians have moved from the United Nations and the ICJ, and the institutions themselves have begun in numerous contexts to develop more fractionalized, even schizophrenic, responses to local problems. The European Economic Community struggles to support devolution and decentralization of initiative. The U.N. High Commissioner for Refugees adopts a case-by-case approach to situations of refugee entitlement. The United States and the Soviet Union produce a relatively stable weaponry standoff and testing practice partly without resort to treaty or institution.

Of course, a more decentralized international legal order seems no less likely finally to resolve law's struggle with violence. The point is that we might become less uptight about the particularities of the legal order—more willing to open up the legal fabric to a proliferating, even a disintegrating, innovation—if we were not so afraid that each change required a reexamination of our tactics and strategy against that other threatening realm. Indeed, such fragmentation as is already occurring is something about which international law theorists feel uneasy. Even as we applaud diverse regional or municipal enforcement mechanisms for international norms, we feel uneasy about the diversity of interpretations which might result. This unease is as common among radicals as among centrists and liberals. Like Wolfgang Friedmann, who so firmly launched the era of decentralized international law theorizing while maintaining that "while there are many differences of degree in the attitudes of the world's major states

and cultural orders towards international law, there are no basic differences between them, with respect to the use of force, and the observance of promises . . .," so also Mohammed Bedjaoui, while calling for a "rejection of formalism," warns us that

it is even more necessary not to lose sight of the unity of international law, and to discourage any 'apartheid' of international law, that 'separate development' of a law which should govern the international community as a whole so as to correspond to the global nature of the world economy.

My sense is that we can unlock our commitment to a universal international normative and institutional order and open the way for a more invigorating heterodoxy—not a heterodoxy which abandons or rejects law's claims, but one which expands the range of legitimate legal resolution.

REMARKS BY GEORGE A. ZAPHIRIOU*

Introduction

The approach to international law is influenced by each country's national interest (political, strategic, economic and technological). This is particularly true in such practical areas as arms control, the law of the sea and the regulation of outer space. But what about the theory of international law, which is the focus of today's panel discussion?

It is my thesis that theory too is affected by national interest and also by the structure and jurisprudence of the relevant internal system which conditions legal thinking and influences greatly the approach to public international law.

As other panelists dealt with the English, European, U.S. and Latin American approaches to public international law, I shall attempt to illustrate and support my thesis by referring to the Soviet approach, with brief comparative references to the English and U.S. approaches.

The Soviet Approach

The Soviet approach, being dominated by the state, which leaves very little freedom to each scholar, is more monolithic, more unified than, say, the approaches of English, Western European or U.S. public international law scholars. Another factor in the monolithic Soviet approach to public international law is the application of the unified Marxist-Leninist methodology and determinism.

What matters most, however, is not what scholars write or say but what states do. It is states that enter into or refuse to enter into treaties, and it is state practice which has a decisive impact on the development of international law. State conduct is bound to be oriented toward national interest and policy.

As illustrations of Soviet handling of public international law theory I shall take the Soviet theory as to norm formation, and the Soviet approach to human rights.

Norm Formation

In the 1950s, the view of Soviet international scholars was in favor of treaties being the main source of international legal norms. Customs were developed over the years of imperialist and capitalist domination and supported the status quo. They were bourgeois products that did not fit within the Marxist-Leninist framework. As the

*Professor of Law, George Mason University.