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THE COLD WAR AND THE PEACEFUL SETTLEMENT OF DISPUTES: A COMMENT

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I agree with what I understand to be Professor Katz's main thesis: that cold war disputes are presently nonjusticiable. But I dissent from his conclusion that these disputes should be considered as entirely outside the mainstream of international adjudicatory developments. His position flows, I believe, from his willingness to attribute to the differences between the main powers a uniqueness which they do not, in any general appraisal, deserve.

Professor Katz admits that adjudication has unrealized potential, but simultaneously warns us against "wishful misapplication."[1] The struggles for power between Communist and Democratic regimes is obviously a predominate feature of contemporary international life. Settlement of differences here is a matter of prime importance; and success is dependent upon a realistic appraisal of traditional forms of peaceful settlement. Yet it is arguable that the future of international society depends as much upon the peaceful settlement of disputes which lie outside the cold war arena as it does upon an adjustment of struggles between ideological opponents. For example, a just resolution of war in the Middle East is, to many observers, a matter of urgency which parallels concern over Vietnam. Equitable settlement of the economic differences between the developed and emerging nations is also a matter of grave importance. The recognition of freedom in Southern Africa is uppermost in the minds of many international jurists and officials and it is fair to say that they believe that racial justice has a priority over such cold war issues as the Berlin question on the international agenda.

If cold war issues are seen as one part of an overall process involving many unresolved international disputes, we may not so quickly dismiss international adjudication and arbitration as being irrelevant to their solution. For in the non-cold war issues which I have enumerated the need for impartial settlement; the necessity of going beyond diplomatic bargaining, has become evident. In the Israeli war it is by now clear that the conflict will be interminable unless there is an effective United Nations presence; not only to keep the peace, but to effectively mediate or conciliate the dispute. In international trade disputes there is an obvious tendency to rise above bi-lateralism, as evidenced by the growth of the United Nations Council on Trade and Development,[2] and the establish-

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1. Katz, *The Cold War and the Peaceful Settlement of Disputes*, 6 DUQUESNE L. REV. 95 (1968).

2. See *Symposium*, 19 STAN. L. REV. 1173 (1967).

ment of a convention to arbitrate investment disputes.[3] Finally, in the human rights realm, the treatment of the recent apartheid litigation as nonjusticiable by the International Court in the *South West Africa*[4] cases is viewed, by most commentators, as profound setback for the ideal of peaceful settlement.[5]

In the non-ideological disputes I have discussed, either the orientation towards adjudicatory procedures is positively present, or its absence is lamented. And this is true in spite of the fact that they all, to the extent that they touch vital interests, can be said to possess non-justiciable features. In this light it is difficult to accept the suggestion that cold war disputants are outside the realm of the potentials of adjudication. Obviously cold war issues are formidable, and one may concede that these disputes are heavily imbued with political overtones. Yet the structure of international law demands universal perspectives. We should be able to perceive that adjudicatory procedures together with a tendency to rise above bi-lateral diplomacy, are woven into the very fabric of a developing international society. They give direction and purpose to our perennial quest towards the satisfactory resolution of conflicts which mar the orderly progression of human life, whether their roots be ideological or otherwise.

If the great powers are to be authentic participants in the emerging community, their conduct should be evaluated in terms of their contribution to its growth. Our energies should, therefore, be spent in evaluating how the United States and its cold war adversaries can contribute to the evolving processes of adjudication.

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3. Convention on Settlement of Investment Disputes Between States and Nationals of Other States, IV Int. Leg. Materials 524 (1965). Farley, *Commentary: The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 5 DUQUESNE L. REV. 19 (1966).

4. (1966) I.C.J. 7.

5. E. G. Friedmann, *Jurisprudential Implications of the South West Africa Cases*, 6 COL. J. TRANSNAT. L. 1 (1967), Murphy, *The South-West Africa Judgment: A Study in Justiciability*, 5 DUQUESNE L. REV. 477 (1967), Comment, The South West Africa Cases: *Ut Res Magis Pereat Quam Valeat*, 115 U. PA. L. REV. 1170 (1967).