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## The effect of international law and international institutions on the place of war in society in the 20th century

### Thesis

How to cite:

Jones, Edmund Eric (1991). The effect of international law and international institutions on the place of war in society in the 20th century. PhD thesis The Open University.

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UNRELEVANT

Title:

THE EFFECT OF INTERNATIONAL LAW AND INTERNATIONAL INSTITUTIONS  
ON THE PLACE OF WAR IN SOCIETY IN THE XXth CENTURY

Offered for:

The Degree of Doctor of Philosophy

Discipline:

History

Submitted on:

August 1990

Author's number: M7019902  
Date of submission: 28 August 1990  
Date of award: 25 March 1991

# THE EFFECT OF INTERNATIONAL LAW AND INTERNATIONAL INSTITUTIONS

## ON THE PLACE OF WAR IN SOCIETY IN THE XXth CENTURY

### ABSTRACT OF THESIS

Competing claims for primacy by national and international interests traditionally accommodated a sovereign national right to use force in international disputes. At the same time binding international law was being developed to limit wars and mitigate their excesses.

The two World Wars emphasized a need to curtail unfettered national sovereignty and increase co-operation between States. The creation of an international regulatory institution open to all States, designed to foster a climate in which peaceful resolution of international disputes was the norm would, it was hoped, eliminate a place for war in Society. Accordingly, the unsuccessful League of Nations (1919), superseded by the United Nations Organisation (1945), were created.

Since 1945 the number of independent States in membership of the United Nations has multiplied but the organization has been dominated by two blocs formed on two nuclear powers with opposed ideologies. The effect of developing technology, and lack of consensus in both General Assembly and Security Council has been that wars have continued, weapons have become more powerful and more readily available, and States continue to put their national interests before the interests of the global society the organization was designed to protect. Technology continues to ensure a danger of nuclear war, and States continue to feel it essential to arm for defence and deterrence.

With these contemporary influences in mind this thesis considers:

- (a) the International Laws of War and their application to International Law and Order,
- (b) arguments which sought to justify or abolish wars, and
- (c) means extant and proposed to define and confine the legal limits of war, and conduct in war, through humanitarian law, arms control and disarmament,

with a view to concluding whether international law and international institutions have affected the place of war in society in the XXth Century.

THE EFFECT OF INTERNATIONAL LAW AND INTERNATIONAL INSTITUTIONS  
ON THE PLACE OF WAR IN THE XXth CENTURY

TABLE OF CONTENTS

CONTENTS AND NOTE ON CHRONOLOGY	Page 1
LIST OF ABBREVIATIONS	Page 2
LIST OF WORKS CITED	Pages 3 - 14
PART I: LAW AND WAR	Pages 15 - 113
PART II: WAR: JUSTIFICATION OR ABOLITION	Pages 114 - 195
PART III: THE MITIGATION OF WAR: THE MODERATION OF THE EFFECTS	
(A) by Humanitarian Law	Pages 196 - 248
(B) by Arms Control and Disarmament	Pages 249 - 323
PART IV: CONCLUSIONS	Pages 324 - 357
FOOTNOTES	Pages 358 - 393
TABLE OF CASES	Page 394
TABLE OF TREATIES, &c	Pages 395 - 397

NOTE ON CHRONOLOGY

The title of this thesis embraces the XXth Century but the emphasis principally is placed on the period from 1945 to 1989. Some events prior to 1945, however, have been cited as incidental to, and illustrative of, specific points in the discussion.

## ABBREVIATIONS

ABM	Anti-ballistic missile(s)
ADIU Fact Sheet	Armament & Disarmament Information Unit, University of Sussex
AJIL	American Journal of International Law
ANZUS	Pacific Security Treaty (Australia, New Zealand and the US)
ASEAN	Association of South East Asian Nations
ATBM	Anti-tactical-ballistic missile(s)
BAEE	British Army Equipment Exhibition
CENTO	Central Treaty Organization
CEP	Circular error probable
CFE	Conventional Forces in Europe
COCOM	Co-ordinating Committee for Multilateral Trade
CPSU	Communist Party of Soviet Union
CSCE	Conference on Security and Co-operation in Europe
ECECS	European Security Study Report: Strengthening Conventional Deterrence in Europe 1983
EEC	European Economic Community
Enc Brit	Encyclopaedia Britannica
FOFA	Follow-on-Forces Attack
GA	United Nations General Assembly
GA Res	Resolution of the United Nations General Assembly
GCD	General and Complete Disarmament
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ILM	International Legal Materials
INF	Intermediate Nuclear Forces
IRA	'Irish Republican Army'
League	League of Nations
MBFR	Mutual and Balanced Force Reductions
NATO	North Atlantic Treaty Organization
NPT	Non-Proliferation Treaty
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
RUSI J	Journal of the Royal United Services Institute
Res	Resolution
RPV	Remotely piloted vehicle
SC	United Nations Security Council
SDI	Strategic Defence Initiative
SEATO	South-East Asia Treaty Organization
SIOP	Single-integrated operations plan
SIPRI	Stockholm International Peace Research Institute
SLBM	Submarine-launched ballistic missile(s)
TNW	Tactical nuclear weapon(s)
UKTS	United Kingdom Treaty Series
UN	United Nations Organization
UNESCO	United Nations Education, Scientific and Cultural Organization
UNRRA	United Nations Relief and Rehabilitation Administration
UNTS	United Nations Treaty Series
USTS	United States Treaty Series
WPO	Warsaw Pact Organization (or WTO = Warsaw Treaty Organisation)
YB	Year Book

## LIST OF AUTHORS CITED

- ALTENBURG, W: Conventional Defence: Issues and Prospects: RUSI Whitehall Paper 1987  
Arms Control and the Needs of NATO Armed Forces: RUSI J133.3 (Autumn 1988)
- ARANGIO RUIZ, G: The UN Declaration on Friendly Relations: Netherlands, Sijhoff Ancordhoff, 1979
- ARKIN, W: see PRINGLE P & ARKIN, W
- ARON, R: Peace & War: A Theory of International Relations: London, Weidenfeld & Nicolson, 1966
- BALL, D: Targeting for Strategic Deterrence: Adelphi Paper No 185 (Summer 1985)
- BARNETT, C: The Audit of War: London, Macmillan, 1986
- BARTON, J H & WEILER, L D: International Arms Control: Issues and Agreements: Stanford UP, 1980
- BAJUSC, W: Deterrence, Technology and Strategic Arms Control: Adelphi Paper No 215 (Winter 1986/87)
- BEAUFRE, A: Deterrence and Defence: London, Faber, 1965
- BEESTON, N: Torture scars one nation in three: Times, 5 Oct 1988
- BELL, C: Crisis Diplomacy: In MARTIN, L, 1979
- BERTRAM, C: Arms Control and Technological Change: Adelphi Paper No 146 (Summer 1978)
- BEST, G: Humanity in Warfare: London, Methuen, 1983
- BETTEZ, D J: Unfulfilled Initiatives: Negotiations and the Hague Peace Conferences of 1898 and 1907: RUSI J. 133.3 (Autumn 1988)
- BINNENDIJK, H: Time to patch up NATO: Times, 15 Nov 1988
- BINYON, M: Critical Congress puts pressure on Reagan to observe SALT II terms: Times, 5 June 1986
- BLACKWILL, D: Conventional Stability Talks: Survival XXX.5 (Sep/Oct 1988)
- BLAINEY, G: The Causes of War: London, Macmillan, 1973
- BLUTH, C: The Evolution of Soviet Military Doctrine: Survival XXX.2 (Mch/Apl 1988)
- BLIX, H: Area Bombardment: Rules and Reasons: British Year Book of International Law XLIX (1978)
- BOEKER, E: Defence in a Peaceful Europe: ADIU Report 9.2 (University of Sussex) (Mch/Apl 1987)

- BRIERLY, J L: International Law and Resort to Armed Force: 4 Cam LJ (1930)  
 The Law of Nations, 2nd Ed.: Oxford, 1936  
                                   3rd Ed.: Oxford, 1942  
                                   6th Ed.: Oxford, 1963  
 The Outlook for International Law, Oxford, Clarendon, 1944
- BRIGGS, H W (Ed): The Law of Nations, 2nd Ed. New York, Appleton Century Crofts, 1952
- BROWNLIE, I: International Law and the Use of Force by States: Oxford, Clarendon, 1963  
 Principles of International Law: Oxford, Clarendon, 1966  
 Basic Documents in International Law: Oxford, Clarendon, 1967  
 (Ed) Basic Documents on Human Rights: Oxford, Clarendon, 1971
- BULL, H: Disarmament and the International System: In GARNETT, J (Ed): Theories of Peace and Security: London, Macmillan, 1970
- BURCHARD, E M: Sanctions and Neutrality: 30 AJIL (1936)
- CANON LAW: The Code of: London, Collins, 1983
- CARRINGTON, Lord: 1983 Alastair Buchan Memorial Lecture: Survival XXV 4 (Jul/Aug 1983)  
 NATO and the Warsaw Pact: RUSI J 132.4 (Dec 1987)
- CARVER, M: Conventional Warfare in the Nuclear Age: In PARET, P (Ed): Makers of Modern Strategy, Oxford, Clarendon, 1986
- CHALFONT, A: Forword to Occasional Paper No 19: Legalised Lawlessness: Soviet Revolutionary Justice: Institute for European Defence & Strategic Studies, 1986
- CHALKER, Mrs: Speech at Liverpool 4 Mar 1988: Arms Control and Disarmament Research Unit Quarterly Review No 9 (April 1988): London, Foreign & Commonwealth Office
- CHONGWHI, K: The Security of North-East-Asia, Part II: Adelphi Paper No 218 (Spring 1987)
- CLAUDE, I: Disarmament as an Approach to Peace: In GARNETT, J (Ed): Theories of peace and Security: London, Macmillan, 1970
- CLAUSEWITZ, C Von: see GRAHAM, J J  
                           see HOWARD, M & PARET, P  
                           see RAPAPORT, A
- COCKETT, R: Twilight of Truth: London, Weidenfeld & Nicolson, 1989
- COHU, J J R: see NOTLEY, C R S
- COLLINS, J M: Grand Strategy: Practices and Principles: Maryland, US Naval Inst., 1983
- COLOGERO, F: Dynamics of the Nuclear Arms Race: In ROTBLAT, J (1982)
- COLLIER, T W: see SLIP, J
- CORDESMAN, A H: The Iran-Iraq War and Western Security 1984-87: London, Jane's 1987  
 US Defence 1988: The Morning After: RUSI J 133.1 (Spring 1988)  
 Creating Weapons of Mass Destruction: Armed Forces Journal Feb 1989

- CRAIG, G L: Super Powers in Decline: Towards a New European Order: London, Seaford House Papers, 1988
- CREVALD, M: Supplying War: Cambridge UP, 1972
- CROWE, W J: US Military Power and Global Security: RUSI J 131.4 (Dec 1986)
- de LUPIS, I D: The Law of War: Oxford UP, 1987
- de MADRIAGA, S: Disarmament: Oxford UP, 1939
- de VISSCHER, C: Theory and Reality in International Law: Princeton UP, 1968
- DAHLITZ, J: Nuclear Arms Control: London, Geo. Allen & Unwin, 1983
- DICEY, A V: Law and Public Opinion in England, 2nd Ed: London, Macmillan, 1962
- DICKINSON, E D: The Law of Change in International Relations: XI Proceedings of the Institute of World Affairs, 1933
- DICKENSON, G L: The International Anarchy 1904-1914: London, Geo Allen, 1926
- DOCKRILL, M: see PASKINS, B
- DOUGHERTY, J E: Arms Control for the late Sixties: in TRAGER, F N & KRONENBERG, P S (1973)
- DRAPER, C I A D: in TOLSTOY, N (1986)
- DUNBAR, N C H: The Responsibility of Junior Officers to the Laws of War: RUSI J XCVII.586 (May 1952)
- DUNCAN, P: see HOWLETT, R
- EDWARDS, A J C: An Introduction to the Theory of Mutual Deterrence: London, Seaford House Papers 1979
- ELSE, D H: America's History: Its Future and the NATO Alliance: RUSI J 131.4 (Dec 1986)
- EMDEN, C S: Selected Speeches on the Constitution, Vol II: Oxford UP, 1939
- ERICKSON, J: Stalin's War with Germany, Vol I: The Road to Stalingrad: London, Panther Books, 1985  
Vol II: The Road to Berlin, London, Grafton Books, 1985
- EVANS, M: Life or Death Games of Accountancy: Times, 19 Nov 1987  
Britain's biggest arms deal: Times, 9 July 1988  
US wins hi-tech transfer ban: Times, 30 Jan 1988
- EVANS, C: Re-appraising Third World Arms Production: Survival XXVIII.2 (Mch/Apl 1986)
- FALK, R A: Legal order in a Violent World: Princeton UP, 1968
- FALK, R A and MANDLOVITZ, S H (Eds): The Search for World Order: Vol II: New York, World Law Foundation, 1966



- FAWCETT, J E S: The British Commonwealth in International Law, London, Stevens, 1963  
 The Law of Nations, 2nd Ed: London, Penguin, 1971  
 The UN and International Law: in TWITCHETT, K J, (1971)
- FENWICK, C E: International Law, 2nd Ed: New York, 1934
- FERGUSON, J: Disarmament: The Unanswerable Case: London, Heinemann, 1982
- FIGUERES, J: Some Economic Foundations of Human Rights: (UN Doc A/CONF. 32/L.2 of 8 Feb 1968): in BROWNLIE, I (1971)
- FINNIE, J: Natural Law and Natural Rights: Oxford, Clarendon, 1980
- FIGORE, P: International Law Codified and its Legal Sanction: New York, 1918
- FISK, R: Cold War rages on in a corner of the Pentagon, Times 9 Oct 1988  
 Soviet wind of change: Times, 15 Oct 1988
- FRASER, D: Alanbrooke: London, Collins, 1982
- FREEDMAN, L: The Evolution of Nuclear Strategy: London, Macmillan, 1981  
 The First Two Generations of Nuclear Strategists: In PARET, P (Ed) (1986)
- FRIEDMANN, W: The Changing Structure of International Law: London, Stevens, 1964
- FULLER J F C: The Conduct of War 1789-1961: London, Eyre & Methuen 1972  
 The Decisive Battles of the Western World: Vols I & II, London, Paladin, 1972
- GALLIE, W B: Philosophers of Peace & War: Cambridge UP, 1978
- GALVIN, J R: The INF Treaty: no relief from the burden of defence: NATO Review 36.1 (Feb 1988)  
 The Continuing Validity of Flexible Response and Forward Defence: RUSI J 133.2 (Summer 1988)
- GARNETT, J (Ed): Theories of Peace and Security: London, Macmillan 1970
- GENOVA, A C: Can War be Rationally Justified? In GINSBERG, R (Ed) 1969
- GINSBERG, R (Ed): The Critique of War: Chicago, Henry Regnery Co., 1969
- GOLDBLAT, J: Arms Control Agreements: A Handbook: London, Taylor & Francis, 1982
- GRAHAM, J J: On War: London, Routledge, 1966
- GREEN, O (et al): Nuclear Winter: Cambridge, Polity Press, 1985
- GREENWOOD, D: The Economics of the 'East of Suez' Decision: Aberdeen Studies in Defence Economics, No 2 (Oct 1972)
- GRIEG, I: They Mean What They Say: London, Foreign Affairs Research Institute, 1981
- GROSS, L: The UN and the Rule of Law: International Organizations, Summer 1965

- GROSSER, A: The Western Alliance: European-American Relations since 1945: London, Macmillan, 1980
- GROTIUS, H: The Rights of War and Peace: trans. CAMPBELL, A C: New York, M. Walter Dunne, 1901
- GUELFF, R: see ROBERTS, A
- HALL, W E: International Law: A Treatise, 7th Ed: Oxford, 1917
- HALBERSTAM, M: Recognition, Use of Force and the Legal Effect of UN Resolutions: Israel Law Review 19, 3-4, 1984
- HALPERIN, M H: Defence Strategies for the 1970s: Boston, Little Brown & Co, 1971
- HAMLIN, M: MPs refuse to act as regime's puppets: Times, 14 Oct 1985
- HARDING, P: Prospects for Air Power: RUSI J 132.3 (Sep 1987)
- HARE, J E and JOYNT, C B: Ethics and International Affairs, London, Macmillan 1982
- HART, H L A: The Concept of Law: Oxford, Clarendon, 1961
- HARTIGAN, R S : The Forgotten Victim: A History of the Civilian: Chicago, Precedent Publishing, 1982
- HAYAK, F L: The Constitution of Liberty: London, Routledge & Kegan Paul, 1963
- HEARN, R: see STEVENSON, M
- HEIBERG, R and HOLST, J J: Peacekeeping in Lebanon: Survival XXVIII.5 (Sep/Oct 1986)
- HERSHEY, A S: The Essentials of International Public Law and Organization: New York, 1930
- HESELTINE, M: Leading from strength: Times, 13 Oct 1988
- HEWLETT, R and DUNCAN, P: Atomic Shield 1947-1952: Washington, DC, US Atomic Energy Commission, 1972
- HILL, C: The doctrine of rebus sic stantibus: International Law, U of Missouri Studies (11), 1934
- HINE, P: The Impact of Arms Control on the Balance of Nuclear and Conventional Forces: RUSI J 132.4 (Dec 1987)
- HIRST, C: The Collected Papers: London, Stevens, 1950
- HOCKADAY, A: The Strategic Defence Initiative: New Hope or New Peril: London, Council on Christian Approval to Defence and Disarmament, 1985
- HOLLIS, C: A History of the Jesuits: London, Weidenfeld & Nicolson 1968
- HOLST, J J: (1) see HEIBERG, R  
(2) Domestic Concerns and Nuclear Doctrine: How should the Nuclear Posture be Shaped? Adelphi Paper No 183 (1983)
- HORNE, A: A Savage War of Peace: London, Macmillan, 1977

- HORNSBY, M: Pretoria Outlaws organized opposition to conscription:  
Times, 22 Aug 1988
- HOWARD, M: Studies in Peace and War: London, Temple Smith 1970  
(Ed). Restriants on War: Oxford UP, 1979  
Defence and Consensus: The Domestic Aspects of Western Security:  
Adelphi Paper No 184 (Summer 1983)  
The Gorbachov Challenge and the Defence of the West: Survival XXX.6  
(Nov-Dec 1988)  
The Causes of War: London, Unwin Counterpoint, 1984  
One small perilous step: Times, 26 Nov 1987
- HOWARD, M & PARET, P (Eds): von Clausewitz on War: Princeton UP, 1976
- HOWLETT, G: NATO and European Interests Worldwide: Britain's Military  
Contribution: RUSI J 130.3 (Sep 1985)
- HUDSON, M J H: Selection and Training of Commanders in the Israeli  
Defence Force: RUSI J 131.3 (SEP 1986)
- JACKSON, R H: Address to International American Bar Association, 27 May  
1941: 35 AJIL (1941)
- JACKSON, W: How the war was lost: Times, 7 Jan 1989
- JAMES, R R: Eden at Suez: Times, 27 Oct 1986
- JENKS, C W: A Modern World of Law: London, Longmans, 1969
- JENKINS, I: Social Order and the Limits of Law: Princeton UP, 1980
- JESSUP, P C: Should International Law Recognize an Intermediate Stage  
between Peace and War: 48 AJIL (1954)
- JOHNSON, J E: Report on the Conference on Contemporary Problems of the  
Law of Armed Conflicts, 1969: New York, Carnegie Endowment, 1971
- JOHNSON, J F: Just War Tradition and Restraint of War: Princeton UP,  
1981
- JOHNSON, J T: Ideology, Reason and Limitation of War: Princeton UP,  
1975
- JONES, J W: Historical Introduction to the Theory of Law: Oxford,  
Clarendon, 1956
- JOYCE, J A: Letter: RUSI J 128.2 (June 1988)
- JOYNT, C B: see HARE, J E
- KATZENBACK, N: in FALK & MANDLOVITZ (1966)
- KELSEN, H: General Theory of Law and the State: Cambridge, Mass.,  
Harvard UP, 1949
- KEMP, P E: see HAGGIE, P in KENNEDY, P M (Ed) (1985)
- KEMPLEMAN, M: The US and Arms Control: International Implications:  
RUSI and Brassey's Defence Year Book 1988
- KERHANE, R O and NYE, J S: Power and Independence: Survival XV.4  
(Jul/Aug 1972)

- KENNEDY, P: The Realities behind Diplomacy: London, Fontana, 1981  
The Rise and Fall of the Great Powers: London, Unwin & Hyman, 1988
- KENNEDY, P M (Ed): The War Plans of the Great Powers 1880-1914: London and Boston: Allen & Unwin, 1985
- KING, R: The Iran-Iraq War: The Political Implications: Adelphi Paper No 219 (Spring 1987)
- KINGSTON, R C: From RDF to CENTCOM: New Challenges: RUSI J 129.1 (March 1984)
- KISSINGER, H: Nuclear Weapons & Foreign Policy: New York, Harper & Row, 1957  
Strategy and the Atlantic Alliance: Survival XXIV.5 (Sept/Oct 1982)  
Address to Seminar, Brussels, 13 Jan 1984: Times, 18 Jan 1984  
The White House Years: London, Weidenfeld & Nicolson, 1979  
The Years of Upheaval: London, Weidenfeld & Nicolson and M Joseph, 1982
- KOLKO, G: Anatomy of a War 1940-75: London, Geo Allen & Unwin, 1986
- KOLLICK, T; For Jerusalem: A Life of Teddy Kollick: London, Weidenfeld & Nicolson, 1978
- KOLNAI, A: The War Against the West: London, Gollancz, 1938
- KRONENBERG, P S: see TRAGER, F N
- LEVANTIN, A V: The Myth of International Security: Jerusalem, The Hebrew University, 1957
- LEVIN, B: Times, 11 Nov 1980
- LIDDELL HART, B: quoted by CARVER, M: (1986)
- LIDER, J: On the Nature of War, Farnborough, Saxon House, 1977  
Military Theory, Concept, Structure, Problem: Aldershot, Gower, 1983
- LILIENTHAL, D: Atomic Energy Years 1945-50: New York, Harper & Row 1964
- LIPAWSKY, A et al (Eds): see ROLING, B V A
- LONG, E L: War and Conscience in America: Philadelphia, Westminster Press, 1968
- LOTHIAN, Lord: Arms Control and Disarmament: RUSI J 117.665, March 1972
- LUNS, J M A H: Taking a Parting Look at NATO: NATO REVIEW 32.2 (April 1984)
- LUTTWAK, E: A Dictionary of Modern War: London, Penguin, 1971
- MCDUGAL, M S et al: Human Rights and World Public Order: New Haven & London, Yale UP, 1980
- McKENDRICK, R: Flexible Response: Is there an alternative? RUSI J 131.1 (March 1986)
- McMAHON, M M: Conquest and Modern International Law: New York, Kraus, 1975

- MCWHINNEY, E: International Law and World Revolution: Leydon, 1967
- MARWICK, A: War and Social Change in the XXth Century: London, Macmillan, 1974
- MARSTON, R: "Not Ordinary White People": The Origins of Rhodesian COIN Theory and Practice: RUSI J 131.4 (Dec 1973)
- MARTIN, L: Arms and Strategy: The Military Book Society, 1973.  
Is Military Force Losing its Utility?: In America's Defence Policy: 5th Ed: Baltimore, Johns Hopkins U. 1982  
Strategic Thought in the Missile Age: London, Heinemann, 1979
- MASON, R: Political and Military Requirements and the Management of Technology: RUSI J 132.1 (March 1987)
- MIDGLEY, E F B: The Natural Law Tradition and the Theory of International Relations: London, Elek, 1975  
The Crisis of Modernity in International Relations: Year Book of World Affairs, 1981
- MILAM J H and RUIZ PALMER, D A: Conventional Forces in Europe: What's in the Graph? Armed Forces Journal International, Jan 1989
- MILLMAN, R: British Foreign Policy and the Coming of the Franco-Prussian War: Oxford, 1965: cited by KENNEDY, P (1981)
- MITCHAM, S W Jnr: Hitler's Field Marshals and their Battles: Guild Publishing, 1988
- MONTGOMERY, Viscount: A Concise History of Warfare: London, Collins, 1972
- MORALI, T: The Dimensions of Strategy: London, Seaford House Papers, 1985
- MORGANTHAU, R: Politics Among Nations: New York, Knopf, 1948.  
In Defence of National Interest: Washington, UP of A, 1950
- MÖLLER, A: International Law in Peace and War, Pt I, trans. PRATT, H M, London, 1931
- MILITARY BALANCE, The: 1988/89, London, IISS
- MILITARY LAW, MANUAL OF: Part III The Law of War on Land: HMSO, 1958
- NEF, J U: War and Human Progress: London, Routledge & Kegan Paul, 1950
- NEVILLE JONES, P: Military Power and Foreign Policy: Foreign Policy Objectives and the Parameters of Military Power: London, RUSI Whitehall Paper, 1987
- NISIHARA, M: The Security of N-E Asia, Part I: Adelphi Paper No 218 (Spring 1987)
- NITZE, P: Security and Arms Control: A Number of Good Beginnings: NATO Review 36.6 (Dec 1988)
- NIXON, R: Memoirs of Richard Nixon: London, Sidgwick & Jackson, 1978
- NOEL BAKER, P: A Programme for World Disarmament: London, Stevens, 1958

- NORTHEGE, F S: The Use of Force in International Relations: London, Faber & Faber, 1974  
The International Political System: London, Faber & Faber, 1981
- NOTLEY, C R S and COHU, J J R: Armour/Anti-Armour in the Future: RUSI J 132.1 (March 1987)
- NUECHTERLEIN, D E: The Concept of National Interest: A Time for New Approaches: Orbis, 23.1 (Spring 1979)
- NUSSBAUM, A: A Concise History of the Law of Nations: Revised Ed: New York, Macmillan, 1954
- O'CONNELL, D P: The Influence of Law on Sea Power: Manchester UP, 1975
- OPPENHEIM: International Law, Vol I; 8th Ed: London, Longmans, 1967  
International Law, Vol II: 7th Ed: London, Longmans, 1965
- ORGOKIEWICZ, R: International Defence Review, 12 Feb 1979
- OSGOOD, R E: The Entangling Alliance: London & Chicago: The U of Chicago Press, 1966
- OSWALD, J R R: see MCKENDRICK, R
- OTIS, G K: Future Concepts and Capabilities in NATO's Central Region: RUSI J 133.4 (Winter 1988)
- OTT, D H: Public International Law in the Modern World: London, Pitman, 1987
- OUDENAREN, J van: Deterrence, War-fighting and Soviet Military Doctrine: Adelphi Paper, No 210 (Summer 1986)
- OWEN, R: Schultz and NATO share European arms dilemma: Times, 21 April 1987
- PARET, P (Ed): Makers of Modern Strategy: Oxford, Clarendon, 1986
- PARET, P & HOWARD, M (Eds): Clausewitz on War: Princeton UP, 1976
- PASKINS, D and DOCKRILL, M: The Ethics of War: London, Duckworth, 1979
- PARRY, C: The Sources and Evidences of International Law: Manchester UP, 1965
- PHILIP, R: Some Reflections on Desuetude: (1931) 43 JR 260
- PHILLIPSON, C: Termination of War and Treaties of Peace: London, 1916, quoted by McMAHON, M M (1975)
- PEARSON, M: The Knowledgeable State: London, Burnett Books, 1982
- PIERRE, A J: The Global Pattern of Arms Sales: Princeton UP, 1982
- PIPES, R: How Vulnerable is the West?: Westfield Press Survey 29.2 (Summer 1984)
- PRINGLE, P and ARKIN, W: SIOP: Nuclear War from the Inside: Sphere Books, 1983
- PRINGLE, P and SPIGELMAN, J: The Nuclear Barons: London, Sphere Books, 1981

- QUESTER, C: Offence and Defence in the International System: New York, Willy, 1977
- RAMSEY, R: Towards a Strategy for Fighting Low Intensity Conflict: Army Quarterly 116.1 (Jan 1986)
- RAPAPORT, A: Clausewitz on War: London, Penguin, 1968
- RAWL, J: A Theory of Justice: Oxford UP, 1980
- RED CROSS, International Review of Geneva 28.2 (Mch-Apr 1988)
- RENTON, T: Arms Control & Disarmament Quarterly Review No 3: Foreign & Commonwealth Office (Oct 1986)
- RIVKIN, D B: The Soviet Approach to Nuclear Arms Control: Survival XXIX.6 (Nov-Dec 1987)
- ROBERTS, A: The Critique of Nuclear Deterrence in Defence and Consensus: Adelphi Paper No 183 (Summer 1983)  
Rethinking Deterrence: RUSI J 132.1 (March 1987)
- ROBERTS, A and GUELFF, R: Documents on the Laws of War: Oxford, Clarendon, 1982
- ROBERTS, J M: A General History of Europe 1880-1945: London, Longmans, 1981
- ROGERS, B W: Follow-on-Forces Attack: Myths and Realities: NATO Review 32.6 (Dec 1984)
- ROGERS, T: Afghan Refugees and the Stability of Pakistan: Survival XXIX.5 (Sep-Oct 1987)
- ROLING, B V A: The Limited Significance of the Prohibition of War: in LIPAWSKY, A et al (Eds): The Search for World Order: New York, Appleton-Century-Crofts, 1971
- ROPELEWSKI, R R: US Back Pedaling on B2 Relocatable Target Mission: Armed Forces Journal International, (July 1989)
- ROTLAT, J (Ed): Scientists, The Arms Race and Disarmament: London, Taylor & Francis, 1982
- RUIZ PALMER, D A: see MILAM, J H
- RUSSELL, B: History of Western Philosophy: Book Club Associates, 1979
- SCHWARZENBERGER, G: Power Politics, 3rd Ed: London, Stevens, 1964  
International Law and Order: London, Stevens, 1971
- SHERR, J: Soviet Power: The Continuing Challenge: London, Macmillan, 1987
- SIEBERT, B de: Entente Diplomacy and the World, quoted by DICKINSON, G L (1926)
- SLESSOR, J: Air Power and the Future of War: RUSI J XCIX.595 (Aug 1954)
- SLIP, J and COLLIER, T X: Revolutionary War: in PARET, P (Ed): 1986

- SMITH, T B: The United Kingdom and the Development of its Laws and Constitutions: Scotland: London, Stevens, 1955
- SORENSEN, M: Hague Rec III (1960)
- SOUTHERN, R W: Western Society and the Church in the Middle Ages: London, Penguin, 1978
- SPEED, F W: Developments in East Asia: Army Quarterly 109.1 (Jan 1979)
- SPIGELMAN, J: see PRINGLE, P
- STARKE, J G: Introduction to International Law: 6th Ed: London, Butterworth, 1967
- STEELE, R: Pax Americana: New York, 1977 - quoted by CRAIG, G L (1988)
- STEVENSON, M and HERN, R: The Nuclear Case Book: London, F Muller, 1983
- STEWART SMITH, D G: The Defeat of Communism: London, Ludgate Press, 1964
- STRACHEY, J: On the Prevention of War: London, MacMillan, 1962
- SWINTON, Lord: Sixty Years of Power: London, Hutchinson, 1966
- SIPRI: (Stockholm International Peace Research Institute): Disarmament or Destruction? Armaments and Disarmament: Stockholm, 1975  
Preventing Nuclear-Weapon Proliferation, Stockholm, 1975  
The Law of War and Dubious Weapons: London, Taylor & Francis, 1976
- STRATEGIC SURVEY: 1981-1982: 1985-1986: 1988-89: London, IISS
- TATE, M: The Disarmament Illusion: New York, Macmillan, 1942
- TAYLOR, T: Nuremburg and Vietnam: An American Tragedy: New York Times, Bantam Edition, 1971
- TECHMAN, B: The American People and Military Power in an Historical Perspective: Adelphi Paper No 173 (Spring 1982)
- THATCHER, M: Speech: Arms Control & Disarmament News Letter No 25: (Jul-Sep 1985): Foreign & Commonwealth Office
- TILLOTSON, H M: BAEE 1988: British Defence Industry looks outward from a Shrinking Home Market: Army Quarterly 118.3 (July 1988)
- TOLSTOY, N: Victims of Yalta: London, Corgi Books, 1986
- TOOKE, J D: The Just War in Aquinas and Grotius: London, SPCK, 1965
- TRAGER, F N and KRONENBERG, P S: National Security and American Society: University Press of Kansas, 1973
- TWITCHETT, K J (Ed): The Evolving United Nations: A Prospect for Peace?: London, Europa Publications, 1971
- URQUHART, B: Alastair Buchan Memorial Lecture: Survival XXVIII.5 (Sep-Oct 1986)
- VACHON, G K: Chemical Weapons in the Third World: Survival XXV1.2 (March-April 1984)



- VAGTS, A: A History of Militarism: London, Hollins & Carter, 1959
- VALLELY, P: How the West's food aid keeps a tyrant in power: Times, 29 Oct 1986
- VAMVOUKIS, A: Termination of Treaties in International Law: The Doctrine of Rebus sic stantibus and Desuetude: Oxford, Clarendon, 1985
- VAN DER VEEN, M: Air Power: RUSI J 132.2 (June 1987)
- VANSITTART, R: Black Record: Germans Past and Present: London, Hamish Hamilton, 1941
- VITORIA : De Indis III; Prof III
- VUONE, C E: The US Army is a Strategic Force: Armed Forces Journal International (Dec 1989)
- WADE, H W R: Constitutional Fundamentals: London, Stevens, 1980
- WAILER, L D: see BARTON, J H
- WALKER, C: How US arms industry has come to depend on Israel's experience: Times, 6 Sep 1982
- WALZER, M: Just and Unjust Wars: London, Penguin, 1978
- WILLIAMS, E S: The Soviet Union in 1988: Fundamental Change?: RUSI & Brassey's Defence Year Book 1988
- WÖRNER, M: Managing European Security: Survival XXX.1 (Jan-Feb 1989)
- WRIGHT, Q: The Role of International Law in the Elimination of War: Manchester UP, 1961  
A Study of War: University of Chicago, 1965  
Contemporary International Law: A Balance Sheet: New York, Random House, 1966
- YOST, D S: France's Deterrent Posture and Security in Europe: Adelphi Paper No 194 (Winter 1984/85)  
Radical Change in France's Defence Policy?: Survival, XXVIII.1 (Jan-Feb 1986)
- US CATHOLIC BISHOPS' PASTORAL LETTER: "The Challenge of Peace": London, Catholic Truth Society, 1983
- CHURCH OF ENGLAND WORKING PARTY REPORT: "The Church and the Bomb": London, Hodder & Stoughton, 1983
- EUROPEAN SECURITY STUDY REPORT: "Strengthening Conventional Deterrence in Europe": London, Macmillan, 1983
- INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES REPORT: "Common Security": London, Pan Books, 1982

## PART 1

## LAW AND WAR

Introduction.

In its evolution human society has deployed a continuing history of armies, violent acquisition and the use of force as a method of resolving disputes. If there is some evidence today that reliance on the use of armed force may be in a state of transition violence has not yet been universally abandoned. The pervasiveness of opposed interests in society accompanied by a violent source of turbulent energy has affixed the vocabulary of military operations to everyday speech especially in relation to commercial intercourse and litigation. One thinks of 'dawn raids' and 'defences'. Some similarity of tactics is also employed in both military and civil affairs.

Of war as a legal instrument of politics Clausewitz said 'it must be looked upon as a part of another whole' so 'taking on its character' from that whole, for if war has a 'grammar of its own its logic is not peculiar to itself'.<sup>1</sup> The same is true of law. Politics, however, is not necessarily grounded in ethical rectitude or even good faith: this affects both law making and war making.

In considering law and war there are the similarities of 'righting wrongs' and 'recovering property or territory' adduced as easy rationales for propagandists of war whilst they remain fundamental to law and order. Similarly, to punish offenders against international law is one ready argument evinced for offensive war leaving in practice only post-war retrospection at the bidding of the victor to effect some element of retribution.

Service in the regular army followed by reading law and strategic studies combined in this writer to induce recognition of a failure to emphasise a necessary co-existence and contiguity of law and war as positive factors in the international system when general arguments

common to issues of defence and war and peace are represented to electorates.

It is true that military law may be studied by the soldier as a subject for promotion and Staff College examinations. But experience, particularly in peacetime, was that acquaintance with aspects of military law referred more closely to courts martial procedure and the periodical reading of a section of the Army Act as a parade requirement. Public international law for first degree law students is a subject of great breadth and complexity in which the Laws of War form only one element. Legal (as opposed to purely moral) aspects of military planning and operations arise in strategic studies but such aspects are more commonly concerned with natural law as well as Thomist concepts. The fundamental purposes of the International Laws of War - the elimination of war, or, failing that, the abatement of unrestrained human conduct and the proscription of certain and indiscriminate weapons - may be overlooked in the study of the practical difficulties which current situations generate.

Thus personal experience and retrospective thought led to some study of the juxtaposition of law and war in international relations, and to the related problems and conflicts which have arisen from the demands of sovereignty or centralized authority within the international system. As a result this thesis addresses such problems and how they have been resolved or exacerbated in terms of peace and war by legal influence exerted on the place which war traditionally has held in society.

As both the international system and its constituents are greatly affected by history, environment, and human nature all of which have combined to promote a nationalistic approach to the practical working of international relations, it might prove possible to determine whether the consensus which results in international law and its institutions has had a bearing on the place of war as recognised by individual States. It was necessary to consider the major hurdles which man has erected by his

behaviour as individual and as society in his endeavours to avoid or prevent conflict or to make its effects less inhumane. We have to consider the extremes urging the exercise of untrammelled sovereignty in the interests of nationalism at one end and the collective direction of international relations by a system embracing the United Nations (UN), its institutions, and the International Court of Justice (ICJ), at the other. This is a continuing subject and its possibilities remain unexhausted at any time. For practical reasons, however, actions and situations only up to July 1989 could be taken into account here.

It followed that the structure of this thesis was to some extent dictated by the elements selected for consideration and to their relationship with the wider subject matter involved. In what follows, Part I deals with the interaction of law and war in general terms. It briefly considers the International Laws of War and their application to international law and order, to the United Nations, and to military operations and the use of armed force. Thereafter Part II considers in more detail some of the arguments proposed by schools of thought which seek to justify or to abolish war. The respective positions are illustrated by concepts of Just War on one hand and the Rule of Law on the other. Between these two possibilities is a third which is examined in terms of the strategic doctrine of deterrence. That doctrine supposes the prevention of wars by the display of armed forces in relevant circumstances forcing decisions to be made as to cost/benefit probabilities. The doctrine's rationale is shown to lie in scepticism about the likelihood of abolishing war whilst at the same time disputing the fundamental practicability that any modern war can (in Christian terms) be just, especially when nuclear weapons form the basis of defence, deterrence or retaliation.

Part III discusses the means extant and proposed to confine and define the legal limits of total war and to affect conduct in war so as to avoid the worst consequences which experience shows are likely to

follow the outbreak and progress of war today. Such means are twofold: first, humanitarian law, and second, arms control and disarmament. Both are direct applications of legal agreements. In practice the extent of such agreements is shown to fall below what is necessary if war is to be abolished or its effects really curtailed in the interests of humanity and specifically of non-combatants and their property. The uninhibited manufacture of arms, and the weakness of legal provisions which necessarily depend on observance or non-observance of international law by individual nations are shown as promoting possibilities for conflict between and within States and in the United Nations.

This leads to the conclusions of Part IV which suggest that the direct effect of international law both as to the abolition of war and the prevention of any specific war, and on conduct in war and use of the weaponry falls short of the undertakings of the member States of the United Nations Organisation (UN) as contained in the UN Charter. It appears to be the case, however, that in an atmosphere of argument between wars' effects and international law and order an equation of loss and gain, rather than of moral evaluation, has been the rule. Experience shows that if war is not prevented it is not likely that conduct in it will or can be controlled effectively within the scope of the Laws of War whatever retrospective action is possible against those who breach the Laws. Regretfully, therefore, the conclusion is reached that international law and international institutions have not as yet displaced war from a leading role in international calculations and actions.

A problem of this thesis, arising from its genesis within my experience, and from its drawing from law, politics and international relations, is that it may fail to satisfy someone versed only in one of these three aspects. Nonetheless, the interaction of the disciplines, and the insights which each can contribute to the generality of facts, may be found to be useful. The thesis shows that perhaps none of the

disciplines have been as successful in diminishing the place of war in modern society as the enthusiasts of each discipline sometimes claim.

Notwithstanding a time scale ending in July 1989, this thesis cannot be left without reference to the momentous political movements and events which have taken place in Europe since that date. These events may well have major influences on the place of war for European States generally and for the North Atlantic Treaty Organisation and the Warsaw Alliance in particular. Apart from any movement towards the re-unification of the two Germanies, one effect will be to heighten interest in arms control and expenditures on military forces. Extension of the range and acceleration of the current negotiations for arms control measures between the members of the two European alliances is to be expected. Another consequence will be an increase in co-operation between East and West in Europe in economic intercommunication and trade.

In such changes, as noted in the conclusions above, it cannot be claimed that international law was the essential initiatory influence. The reason lies elsewhere in the economic realities which have forced themselves to the attention of Russian leaders and the peoples of their satellite States. These realities stemmed not only from political policies but also from an economy organised primarily for military production. At the same time Russian attitudes, and public opinion in the satellite States, have been influenced by the overt effects which flow from the standards of, and administration within, the Western system of law and order - including economic order - compared with their own.

The International Rule of Law.

The society of nations is governed today by an amalgam of individual State's rights and collective international agreements. It is only loosely referred to as constituting an international system for it falls somewhere between individual State sovereignty and the principle of central authority which has yet to be consummated. Technological evolution has ensured that inter-communication and inter-dependence

between States reduces the political exercise of much practical and independent sovereignty except the nominal sovereignty to accede to agreements which events and relative propinquity force on States. Because the actions of each individual State may have increasingly widening effects on other States in any case the scope for inter-national dispute and war on a wide - even global - scale is increased.

Recognition of these developments has led to movements (a) designed to improve the international relations system to ensure international law and order, and (b) to eliminate war as an instrument of international 'litigation'. In these endeavours it is believed by some that (a) cannot be effected whilst provision of the means by which war is made possible is a matter for national sovereign decision. It is also believed that to ensure (b) will entail the introduction of an effective central authority with the means to enforce law and order.

The ideas are not new. The analogy of the impossibility of order without law in municipal administration canvassed in the international scene was resisted before the first World War. At that time it was still considered that peace was a state designed by the nation, on the nation's terms, and to be fought for on that basis if necessary. Eminent jurists increasingly disagreed. Some saw chaos in a rule of law applied internationally and considered that it was for each State to secure for itself, in conjunction with its allies, or by its balance of power policies, its own conception of peace, security and place in the global pecking order. Such a conception of international law and order was supported by the idea that the Law of Nations was to be applied by States not to themselves unless in the national interest and in conformity with traditional concepts of national sovereignty otherwise the matter might be tested by war.

Brierly sub-titled his study of the Law of Nations 'An Introduction to the International Law of Peace' but, like others, he could not omit from his survey reference to the law of war no matter in what light he

regarded war in international relations. Oppenheim on the other hand devoted more or less equal space to Peace (Vol I) and to Disputes, War and Neutrality (Vol II) in his treatise on International Law. In the index to Brownlie's Principles of Public International Law the words 'peace' and 'war' have no place and he concentrates on the peaceful settlement of disputes albeit with reference to war crimes and international criminal responsibility.

The reality is that there is no neat division but rather much interaction between war and peace and the law governing the two conditions. If that law is the product of times of peace much of it has grown out of experience of war and its aftermath.

War and peace are concerns of States in the exercise of their sovereignty but there is a prior principle to be observed:

"the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissible rule to the contrary - it may not exercise its powers in any form in the territory of another State."<sup>2</sup>

In general invasion by armed forces is a breach of that principle: incursions at the invitation or with the agreement of the invaded State is another and sometimes disputed matter. The steps leading to such action are taken in time of peace and include the creation and maintenance of the means to make and conduct war if the situation develops to the stage where peaceful solution becomes unlikely in the traditional climate of inter-State diplomatic negotiation.

Over the centuries changes in means of destruction have changed the nature of war. Following the 'total world wars' of this Century, and the obvious danger of any war taking on a global scale today, the necessity for a change in the organization of international relationships and the method of settling disputes has become increasingly apparent. Ultimately such change must involve the rejection of war as a tool of State practice if it is to become effective.<sup>3</sup> Acceptance of change, however, depends on attitudes to what is to be exchanged for what. In substituting law for war high ideals are not always reflected in statements about the



effectiveness of international law and about how it is to be observed.

As Oppenheim pointed out,

"It is important to distinguish between the criticism of International Law and that of the science of International Law. The latter cannot be responsible, to any appreciable degree, for the shortcomings of International Law whose growth and authority must depend on the willingness of States to accept, through progressive limitations of their sovereignty, the normal restraints of law".<sup>4</sup>

'Willing acceptance' must be borne in mind when considering change already accomplished. The UN, like its predecessor the League of Nations, was founded both on the rejection of an unrestricted right of individual states to make war and, instead, for an institutional authority dedicated to the peaceful settlement of inter-State disputes. From its inception the task of the UN, in addition to furthering observance of the already established Laws of War, was to develop international law especially in connection with these three major issues:-

- (a) Prevention of war by concentrating effort on changing the nature of international relations through an effective forum in which individual State actions could be examined.
- (b) Legality of State actions by an understanding that "the progressive development of international law requires effective organization of the community of states".<sup>5</sup>
- (c) Conduct not only in war itself but through continuing efforts to limit weapons both qualitatively and quantitatively pursued to eventual elimination and disarmament. To this end to restrict the right of States to research, design, develop, manufacture, deploy and generally to sell armaments.

Experience has shown that war is not likely to be eliminated before States observe the common individual and collective standards of an international Rule of Law such as is ordained by the UN Charter. Whatever hopes to the contrary the founders of the UN may have nurtured, States still regard themselves primarily as independent, equal and subject practically to the dictates of their national interests and their conception of comprehensive security even if loosely within a world community where consensus is an amalgam of interests held in common rather than of a communal global interest.<sup>6</sup> Independence and equality, however, are draftsmen's terms not necessarily reflected in reality but

expressing the ideals of the UN Charter (Art 2.1). It follows that not only are States still judges in their own causes but that they compete for leadership or influence within their political level or geographical area, and for such resources as they need to foster their interests. The majority maintain armed forces, whether for survival as independent States or to bolster whatever plans they have for their own futures. Overall, the emergence of super powers with opposed ideologies but great reserves for patronage, aid and encouragement, dominate the international system.

The contemporary system has recognized and so far tolerated this situation seeing some correlation between a place for war and the use of force. Until the system changes from one of individual self-interest into some form of international community, military power and self-help are likely to remain arbiters in inter-State dispute.

In spite of pretensions of equality, in practice the system of independent States is dominated by the bi-polarity of the Russian and American super-powers, with opposed political and economic philosophies promoting not only competition in their respective ways of life and outlook, but rivalry for the leadership of groups of other States. Such competition to attract a political grouping has tended to obscure reasons and causes, often of long-standing and indigenous, for inter-State conflict.

To such long-standing causes of friction are added the stresses of positive ambition and national interests, although some of the stresses may lie in a belief in, or wish for, that equality promised in the UN Charter (Art 2.1). Movement towards equality, when interpreted domestically, may involve the changing of social systems to industrialization and urban living. Increasingly this is to be seen in the struggle of the 'have-not' States (more and more encumbered by external debt) in their efforts to become 'have' States. Added stresses are inherent also in the challenges and disruptions created by

intra-state violence and terrorism introduced by factions within the State. Such violence and terrorism may be promoted by, or be susceptible to, external interference which political and other interests can foment and encourage with the aid of arms transfers and commerce in illegal drugs.

Change in the international system, or in domestic party political alignments, does not imply change in national ambition and long-term politics. In any case, change proceeds at an uneven rate and at different velocities for different States.

In the Hobbsian situation national interests demand as a minimum:-

- (a) Capability for internal security and external defence.
- (b) Economic well-being to maintain existing political standards.
- (c) Maintenance of values, material and spiritual, which the citizens believe to be essential, and
- (d) a world community within which these values can be universally maintained.

This amounts to a concept of comprehensive security extending to the military, political, economic, ideological and psychological in a system demanding a degree of inter-dependence between States. In such inter-dependence the lawyer may view relationships only as legal connections accepting that war is immoral but discussing only its legality. The soldier's view may be limited to military situations and relations whether in war, or in what passes for peace and internal security, conceding the unethical nature of indiscriminate weapons whilst wanting to retain (or, perhaps, obtain) nuclear weapons either as a war-fighting factor or because he feels safer with the weapon than without it. In the long run it is not possible for the political and social aspects to be ignored, for to the lawyer and the soldier both are essential to inter-societal survival and for the continuing survival of the State. Collins defined such a situation as,

"Political power over the minds and actions of men at home and abroad, geographic strengths and weaknesses; the economy, particularly natural resources, industrial capacity, and finances; the people, including their numbers, location, temperament, morale and education; the scientific and technological base; the military establishment, active and reserve; and, as the integrating factor, leadership"<sup>8</sup>, making up the power of the State.

There is no mention here of law, but the place of law is more easily understood if it is accepted that the overriding and rational object of a State is the well-being of its peoples. That would be impossible without a regime of law and order. There is no general or necessary agreement on the means to be employed either within a society or between one society and another, to attain such an objective. This is not the result only of inadequacies in the international system or of the concept of national sovereignty, but rather that national interest is easier to understand than global interest and takes priority in national political action.

In projecting from the municipal to the international it follows that agreement is not invariably desired for it might be thought likely to result in too great a diminution of national sovereignty. This might be the case if it leads to a

"belief that war has become unprofitable for self-advancement, unnecessary in self-defence, and at the same time unprecedentedly dangerous" for it would "constitute a powerful case for neglecting military preparations".<sup>9</sup>

This might especially raise fears that a common approach to method, means and international processes was likely to lead to international government. Such a belief has been frustrated so far, even directly between the super powers. Indeed on a global view the situation is more accurately described as follows:

"The legal revolution worked by the United Nations Charter has had, in some respects, an unfortunate effect on international legal thinking since 1945. Many jurists and official bodies (including the United Nations International Law Commission) accepted the Charter's prohibition on the use of force at its face value. The prevailing attitude seems to be that since international war was outlawed it would cease to exist; ergo, there was no necessity for rules governing war. Those rules that were in existence, such as the Hague Conventions of 1899 and 1907, were considered historical reminders of a bygone and more barbaric era.

The facts speak otherwise. Despite the theoretical prohibitions of the Charter, war in one form or another continues to plague mankind. Indeed, in recent years there has been a recrudescence of violence".<sup>10</sup>

Of course, the maintenance of law and order has to be striven for, and no student of inter-war history was likely to take the Charter merely at its face value. Yet somewhere between the extremes of violence and peaceful persuasion the need for international law and order remains vital to the continued evolution of world society. This is manifest from the increasingly destructive capabilities of weapons and their growing potential for surprise attack; the intensification of the interdependence of States; and the incidence of continuing violent conflict involving both inter-State and civil wars.

Whenever illegality occurs in inter-State disputes, inaction by the UN, absence of sanctions against offenders, and justification or mitigation through erosion of time will often give an appearance of sanctifying the original breach of order. Indifference or absence of response to UN resolutions regarding specific disputes show similar attitudes of non-co-operation. Yet if the relationship between prevailing attitudes and existing law and custom sometimes seems remote, law and custom are constraints in international relations, even if changed circumstances may be advanced on occasion to offer escape from the duty to honour treaty obligations which is vital to law and order.

Since 1945 there have been many incidents of hostile acts and the use of force, or of coercion short of war such as armed reprisals by one State against another. There have been armed interventions which have not always been in defence of minority rights. These are generally incidental and not basic to the place of war, though they may lead to war. Such incidents are not considered in detail here, although areas of reprisal and coercion short of war, as well as concepts of neutrality, are well documented even if contentious in international law. They are provided for in the UN Charter.

By definition neutrality is a limitation on the use of force directly affecting only the neutral State and not the place of war in

general. Neutrality is at risk today through the expanding technology of weapons and growing parochialism in the international society. Attitudes towards the use of force short of war may be changing in favour of representation at the UN with perhaps a growing acceptance of the proscription of armed interference in another State (although cases still occur). Participation by avowedly neutral States in UN Peacekeeping Forces indicates that the concept of neutrality is also changing as a consequence, and in favour of collective UN action. But the defence of neutrality dictates the maintenance of a military capability as Sweden and Switzerland show.

Factors which have been identified as vital to an international relations system of law and order include:

Limitation of the use of force proposed by the UN Charter.  
 Abolition of the acquisition of territory by conquest.  
 Recognition of governments and States.  
 Treaty relationships, the concept of rebus sic stantibus, and the UN Charter and its subsidiary instruments.

These factors are all dictated or affected by public international law which is now discussed.

#### Public International Law: Definition.

For the purposes of this thesis law may be sufficiently accepted without elaboration as being,

"The body of rules, whether formally enacted or customary, which a state or community recognizes as binding on its members or subjects".<sup>11</sup>

Admittedly that definition leaves unargued any difference of opinion as to whether any rule or body of rules not recognized as binding is indeed law.<sup>12</sup> A definition of international law is not simple, and there are schools of thought regarding the validity of international law in the absence of a central authority and central law-making institutions.

For at least three reasons it would be now otiose to construct a new definition of international law. First; there are sufficiently adequate definitions already which fit contemporary conditions.<sup>13</sup> Second; some schools of thought about international law are unlikely to agree on any new definition whilst they remain undecided as to whether

international law is law or the mere expression of morality. Third; whilst the Purposes and Principles of the UN, if accepted and observed without reservation, would have involved changes in the traditional system of international relations and its concept of unfettered sovereignty, there is as yet little obvious and real universal desire for a more centralised direction of world affairs.

Even within the conflicting schools of thought where there is doubt as to the source of international law, there is a general acceptance of a concept of binding agreements between States the provisions of which are to be observed honestly. If there is less general acceptance universally of the European inspired concepts of jus ad bellum and jus in bello they are sufficiently respected in the international community to form the basis of a law of peace and war. Observance may be another matter.

#### Public International Law: Scope and Limitation.

The circle of those whose lives are concerned with public international law; those whose unfortunate circumstances are the direct results of its failures and lacunae; and of those others who connect philosophical legal concepts and international relations, is circumscribed. So too are the numbers who consciously regard public international law as fundamental bedrock. Certainly international law may be considered a conventional system for those engaged in international diplomacy or, at least, as a convenient framework for disposing of disputes falling short of those disagreements between States which might otherwise lead to conflict. The system might apply also in relation to activities and relationships between alliances such as NATO and the Warsaw Pact Organization (WPO) for these also should be conducted in the light of international legal regulation.

Outside that circumscribed circle the connection is likely generally to be dismissed, for people do not customarily order their affairs and existence with strict legalities in mind. Nor do they regard the UN Charter as a manual of State behaviour and deportment. They may

have one overall view, however, that law is what is imposed by a legislature acting within the general bounds of some form of national approbation which includes the real possibility and procedure for subsequent amendment and repeal. If so, they miss the essential difference that international law results from consensus obtained at one time, remains binding at another, and is difficult of amendment or repeal having itself - if observed - become customary usage.

Failures of international law in peacetime, especially when related to failures in the UN, are seen as inability to change both human nature and claims for the primacy of national interest. International law, therefore, may stand or fall for many on its ability to prevent war, all else being regarded as mere administration. It may also be dismissed by those who find international and reciprocal concepts of political asylum and refusal of extradition where overt terrorist activities are judicially interpreted as political, as failure to enforce internationally desirable standards. Domestic analogies of sanctuary are now largely abandoned but yesterday's terrorist may be today's pontiff or prime minister. The effectiveness of international law may be doubted also by those who, studying the palsy forced upon the Security Council through exercise of veto powers, see only UN failures and so discount its peace-keeping successes.

If they are resolved at all, disputed situations are resolved by consensus or by force. Both consensus and force are of legal connotation for legislation - as opposed to decree - is by consent in practice although administered by force if necessary. In international relations questions arise constantly: solutions even when obtained by consensus are imposed notwithstanding that the parties may freely accept such solution. This is the case where the backing of one side representing a majority of numbers or of potential force of arms, has advantage. It leads to Starke's 'ordered rather than a just system'<sup>14</sup>, and remains the



case whether the matter is administered under international law applied domestically, or by international organizations.

In practice, like municipal law, international law represents a conflict or co-operation between the politician - as politician and legislator - and the judiciary or the national representation in international fora. Domestically the politician or bureaucracy often tries to withhold what the Constitution or Basic law bestows. In the international situation, because national interest is the substance of dispute at the UN and The Hague, conflicting national views often inhibit the imposition of the sanctions upon which the law relies.

Can there be law without sanction? Is any supposed difference between law and force really only a philosophical abstraction? The fact that legislation whether municipal or international is the fruit of compromise does not of itself exclude a necessity for force to ensure its administration even though, as Dicey said,

"The existence and alteration of human institutions must, in a sense, always and everywhere depend upon beliefs or feelings, or in other words, upon the opinion of the Society in which such institutions flourish".<sup>15</sup>

Where there is no general agreement - as is often the case in international society - although there is free and voluntary subscription to it the effectiveness of particular legislation must rest on a general agreement for imposition of sanctions where necessary. Where there is no sanction law and justice may prove to be insubstantial words.

Consensus of opinion in international relations is difficult to obtain but a factional opinion will not sustain international lawmaking. This highlights a difference with municipal law-making for in a democracy the will of a majority, however expressed, will prevail. In other States naked force not votes cast may decide as formerly in Haiti or the Philippine Islands. But all law is imposed whether by consensus or force, and law is law only so long as it is imposed. But the enforcement of international law is a complex matter of state responsibility and of international institutional direction or control.

Where the universal enforcement of common methods and standards is essential to the utility of an international measure the creation of an international agency with global powers may be agreed by States. In principle such an institution should serve two purposes: first, to ensure that the law is applied universally and is observed: second, to enforce the binding nature of obligations which might in some cases be selectively viewed by States so nullifying the purpose of the law. The UN is such an institution. It shows, however, that power to act in principle is not the same as approval to act in practice. In another field the Atomic Energy Agency, working under the UN and the powers afforded by its Statute of 1956 and the Non Proliferation Treaty of 1968, demonstrates an issue where the enforcement and verification would be ineffective if applied only by individual States.

Political consensus in the UN, as elsewhere, is often lacking as to ends as well as means despite the over-arching objectives of international law. On the other hand, the passing of dictatorial national leaders may be largely unlamented at the UN -(though some like the late Shah may be subjected to greater opprobrium than others like Amin). Changes of governments by force have been received easily in international relations for States must deal with the realities of other States. The same may apply to international institutions. The UN has conferred respectability on the Palestine Liberation Organization (PLO) even in the absence of an agreed territorial base, and it did not withdraw recognition from Iran, in spite of the terrorist activities of both. But such instances merely illustrate various approaches to the political rather than to the legal aspects of such situations.

Dethronement of constitutional monarchs and the displacement of elected governments are still sanctions imposed by weight of numbers or force. Such action may leave Statute Books unimpaired, or the existing law may be abandoned if only in theory and new law may be enacted. The new enactments are then the law however obedience may be motivated, but

domestic change will not affect the obligations of States towards international law.

For the purposes of argument, however, Hart's lead may be followed, appealing perhaps to Thomas Erskine and reason and to natural law.<sup>16</sup> Like others Hart dismissed the question: is international law really law, as being a trivial question about the meaning of words mistaken for a serious question about the nature of things.<sup>17</sup> If he is right, Hart's suggestion that it is 'for each person to settle (the matter) for himself'<sup>18</sup> is related to doubts which obtain about any definition of law itself as well as the conventions which are evidence of it.

Public International Law: Custom, Treaty and Acceptance.

Although in recent years much customary international law has been the subject of international conventions the principles derive from:

- (a) The Law of Nations which evolved from a consensus on behalf of the common good of all established with the authority of the greater part of the whole world.<sup>19</sup>
- (b) A societal law developed naturally from international law in its potency.<sup>20</sup>
- (c) The valid development of the Law of Nations in accord with and binding in virtue of natural law.<sup>21</sup>

If it is accepted that natural law promotes the common good the contemporary state of international relations should accord with the state of law. The former is dominated by politics, and international law must at all times wait upon political consensus for administrative powers as well as for expression. But international law is unlike municipal constitutional law in that it is not a set of formal rules classifying certain fundamental principles of an expressedly permanent nature. Apart from the UN Charter, public international law consists mainly of treaties to which States parties have subscribed voluntarily, as well as some customary principles inter alia as to sovereignty, territory, freedom of the seas, and the conduct of war. The customary principles, whether codified or not, are enduring and Kelsen held that the constitution of international law was embedded in the principle pacta sunt servanda. Others, however, cite rather the clausula rebus sic stantibus for

expression of permanence in treaties in practice, as opposed to custom, is less usual.

Public international law accordingly is divided between the permanent customary law; universal conventions which are subject to amendment and are sometimes codifications of customary law; and treaties (which some believe are subject to unilateral abrogation through material changes of circumstances).

The above three definitions of international law all refer to principles, rules or actions legally binding upon States. Much has reference to treaties freely entered into between States. As Briggs says.

"From the dawn of documentary history, treaties have been made between political entities on the assumption that they created binding obligations which would be observed". But he adds, "perhaps treaties have been violated from as early a date in history".<sup>22</sup>

A first point about custom is as regards violation and withdrawal from treaties on which Briggs observed,

"If treaties were made solely to be violated on convenient occasions, it would be difficult to explain why hard-headed statesmen, serving their national interests, should bother to engage in the laborious undertaking of drafting and concluding hundreds of new treaties each year".<sup>23</sup>

But treaties are entered into for a diversity of reasons and with a variety of motives of which subsequent violation may be one. Even so-called permanent treaties often include escape clauses, but these also have been violated. Hitler had constantly and publicly identified Russia as Germany's enemy and it was not surprising that the Russo-German Pact of 1939 was quickly violated by Germany.

Professional diplomacy has an 'industrial' content for expediency is a normal impellent of politics and the will is often mistaken for the deed. Some diplomatic discussion turns on interpretation and States will seek what favours their interests. The precaution of including reference to the interpretative function of the ICJ is not always taken, for the gamble of judicial interpretation may be less desirable than unilateral

appeal to rebus sic stantibus when a State cannot fit its own interpretation of the provisions of a treaty to that arrived at by the other parties.

The subject of the clausula is referred to later, but interpretation of the texts and of changing circumstances is not a matter of drafting for in practice both violation and withdrawal are politically inspired issues.

Nevertheless, whatever views are held about international law in theory,

"the great majority of rules of international law are generally unaffected by the weakness of its system of enforcement, for voluntary compliance prevents the problem of enforcement from arising altogether. The problem of enforcement becomes acute, however, in that minority of important and generally spectacular cases...in which compliance with international law and its enforcement have a direct bearing upon the relative power of the nations concerned".<sup>24</sup>

Debate about such cases was common in the League of Nations but has now moved away from any effective or judicial tribunal to the General Assembly where sides are taken but which reflect ideology rather than the relative power of the parties at issue. Apart from a State's relative power it is "will to enforce" which may be lacking.

Brierly had the view that,

"the best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States may often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law".<sup>25</sup>

There are exceptions: States initiating aggressive war are really claiming to be above the law whatever justifications they offer. Wilful breach of Art 2 of the UN Charter would also constitute such a claim.

Perhaps Briggs is right in saying that the,

"phenomena of international law have survived all the wars and all the dictators of recorded history".<sup>26</sup>

but from time to time States seek to by-pass it and justice may take a long time to be recognized and applied.

The concept of an international law in the present international system has not gone unchallenged. There is still some sympathy for a

view that the Austinian definition should be followed. Others hold that there is no international law if effective sanctions are not readily available, and that international relations therefore are matters of societal arrangements. But the reviving interest in jihad and janissarial organization within States is in direct opposition to concepts of law and human rights. More perceptive observers realistically see what obtains in international relations where choice of law in private international law in practice is accepted by States just as custom and treaty are accepted in public law. Some may claim that this is the fruit of agreement and is binding only when the parties so agree and it is not law but merely a kind of morality. That view is misconceived: international law is binding because it is in the interests of the international society in which care for the concerns of the citizens is a fundamental of statehood. As Hirst said

"...our modern conception of a state is itself the creation of international law, and it is by the canons of international law that the rights and duties of the state are defined".

Definition is one thing, but how are the rights to be upheld?

Hirst had no difficulty in perceiving a sanction procedure for in

"the case of international law the primary sanction is the formal protest or presentation of a claim by a state which considers itself injured by a violation of law. This method implies precise definition of terms and logical consistency, among them, assuring an identity of meaning among all parties".<sup>27</sup>

In the case of intervention in the affairs of another state the primary action of the injured State is prescribed by the Charter as peaceful negotiation rather than armed action. This Hirst could claim is not only a legal system but an effective one in principle. It is those cases where the primary sanction is rejected and armed conflict is preferred to voluntary arbitration or judicial decision which expose the weakness of any final international enforcement in practice.

#### The Status of International Law.

Public international law is binding on States: if it were not so it could not be law. It represents a triumph of agreed common purpose over individual State sovereignty and, moreover, in a majority of cases

requires no enforcement powers beyond reciprocity (which is well as there is an absence in major issues of an effective and reliable enforcing authority or agency). Observance by one side as a quid pro quo for observance by the other is sound enough in bilateral relationships but hardly sufficient in matters affecting all, or a number, of States at the same time. That is not to criticize the law itself, for that may serve international purposes generally. It is failure to observe it in individual cases which leads to war.

Disputes are most likely to arise in matters where sovereignty is most determinedly pursued as regards territory, independence and the right to make war. The areas most neglected by legal provision as yet are those concerned with how and at what level a State should be armed, and how the use of force may be regulated: that is, arms control as a legally enforceable system.<sup>28</sup> It is here, at the fundamental conflict of the national interest of a State in relation to another, in an ineffectively co-ordinated international milieu, it is most obvious that difficulties will be resolved only by political action and not by legal theory. Legal theory points to the binding nature of treaties but does not at the same time provide for those States that have not expressed consent to be bound by any specific treaty provision beyond the possibilities of constraint in already existing relevant custom duly recognized as such.<sup>29</sup> At the same time the proper political action will be that which conforms to international law.

International law, however, does not prescribe a universal method of adoption and enforcement, or of precedent. In consequence States adhere to their customary and differing formal procedures to give effect to what they have agreed and ratified as to their relationships with other States. Nevertheless, the contemporary nature of international political and economic inter-dependence, and the effects of the actions of one State on others, make it increasingly difficult to avoid the logic of agreements even when they remain unratified.<sup>30</sup>

It is not necessary to spend much time with inquiry as to the status of the Law of Nations so far as the United Kingdom is concerned. As to customary international law, Abbott, CJ, said of English law that the law of nations must be deemed a part of the common law.<sup>31</sup> It has also been said that,

"so far as the Courts (of England and Wales) are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law".<sup>32</sup>

This infers that the "agreements of nations which constitute international law" will be accepted and adopted. Alverstone, LJ. said,

"whatever has received the common consent of civilised nations must have received the assent of our country".<sup>33</sup>

and this interpretation is generally followed in the British Commonwealth, although Canada stresses the primacy of legislation. The views of Rand, J. in that connection should be observed as against "the virtual repudiation of the concept of inherent adaptability"<sup>34</sup>, for statute law is paramount in Britain even if contrary to international law.<sup>35</sup> Yet there is a presumption that legislation is not intended to contravene international law, so that a statute designed to give effect to a treaty will be interpreted from the treaty.<sup>36</sup> But a treaty is not binding on the courts if it changes the law, extends the powers of government, or creates direct or financial obligations. Such a situation can arise because treaty making is a prerogative power and it is for the legislature to remedy it. It is not thus in the US where duly ratified treaties are binding on the courts unless a subsequent statute overturns the treaty provisions.

For Scotland, however,

"there is no such thing as a standard of international law extraneous to the domestic law of a kingdom...international law so far as this (High Court of Justiciary) is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland".<sup>37</sup>

Thus it is apparent that there is a weakness as between one State and another for a negotiating representative on behalf of a State in international 'law making' may not be the domestic legislating authority



and, in effect, the latter may over-rule the former in a manner which would not necessarily arise in domestic legislating.

Procedural differences between States as to adoption and implementation of international law are less important than consistent observance and enforcement nationally. It is here that a weakness is apparent in Hirst's appreciation which whilst dealing with issues between States neglects issues affecting only the relationship under international law of a State and its citizens. This is relevant to the Laws of War as is explained below.

International law is intended to relate to real situations by way of prohibition, restraint, endorsement, interpretation and even encouragement. It does not initiate change in international relations but rather delineates boundaries within which situations should be contained. It must be alive to changes not only in scientific and technical development but in aspects of any system of inter-State relations that may be affected by such developments. This is true particularly of the means of making, waging, and preventing war.

The absence of legislative processes for the systematic development of international law has made necessary a circuitous arrangement for attempting modification and development. The innate difficulties presented by conflicting interpretations of existing law and custom are not lessened when parties concerned refuse the judicial interpretation facilities of the International Court of Justice (ICJ), and codification is not always a solution, for simple collation of any particular issue may entail 'new' law for some States. The difficulties were illustrated by the 1930 Hague Codification Conference where there was little agreement, and what minor agreement was reached remained unratified by many States.

All this was recognized by the founders of the UN for Art 13 of the Charter makes provision for both codification and development. This resulted in the establishment in 1947 of the International Law Commission as part of the machinery of the UN. The Commission has submitted several

draft conventions initiating tortuous proceedings intended to effect progress towards international agreements on means to secure peaceful solutions to inter-State disputes.

Yet if such legislation is to be effective it must engender respect not only for the statutory provisions enacted but also for the legislature and legislators, the causes, and the enforcement measures. Disregard of international law is often displayed in the General Assembly, especially as characterized in the public media, even if not in the Official Record. It is not public media reporting which is reflected in and reflects the attitude of peoples to cause and organization. Attitudes also embrace,

"certain fears and uncertainties, some inherited from the past, some rooted in paranoia, and others based on reality".<sup>38</sup>

Such attitudes are especially affected when the law and fact of war is debated although war is subject to law and the custom and conventions form part of international law.

#### International Law of War.

The principles of law concerning the making of war are now included in the UN Charter: those referring to the conduct of war form part of the Judgement of the International Military Tribunal at Nuremberg in 1946; and those addressing some of the effects of war are the subjects of Conventions and Protocols. This codification, and the subsequent international instruments, followed world wars in this Century the total nature of which necessitated consideration of the combatants and their actions in modern war but also, and more particularly, the situation of civilian populations now inevitably affected directly by modern warfare.

When war was a more simple art or science implying declaration of formal intention, mobilization, concentration and approach marches at a foot soldier's pace, civil rather than military law more often obtained for the processes were well provided for in municipal legislation. Until the conscriptions of Frederick the Great and Napoleon and the creation of

standing military forces, soldiers other than mercenaries were civilians lightly uniformed and contemporary jurists applied themselves to concepts of international law accepting the notion that a Prince's right to make war was generally unlimited in law.

As a first task they sought to place formal restrictions on how the right should be exercised and in what circumstances. They then considered what should constitute moral standards in the actual fighting. Thus their early discussions were about:

- (i) Just (lawful) and unjust (unlawful) war, and
- (ii) the conduct, methods and weapons of warfare.

Whilst they did not solve the question as to who ought to be the rightful judge of justness and legality other than a prince who was necessarily judge in his own cause, they did evolve a 'highly sophisticated law of neutrality' with which to arbitrate between belligerent and non-belligerent. But there was still no real effort to forbid war as an instrument of national policy, and efforts to control progress in the technology of weaponry were unsuccessful.

Today war remains subject to the same necessities which seemed striking to the earlier jurists, but law has evolved as to formal declaration, as to classification of aggressive (and therefore unjust) war, and as to how war should be conducted. In addition, through the purposes of the UN, the need to abolish war is formally recognized.

Law and war have similarities. Both are grounded in or by group culture. Both pre-suppose discipline and the enforcement of disciplinary codes, as well as centrally controlled administration. Both have basic philosophical backgrounds of society directed by its strongest element. Both necessitate taxation for funds to effect their aims. Both take toll of natural resources.

There are also incompatibilities. Law's purpose to protect life and property is the oldest aim of most public law. War's ultimate objective may be similar but the essentially destructive nature of war,

whatever its ultimate protectionist objective may be, is opposed to law's fundamentally peaceful methods. Thus, war should never be regarded as an operation of law for law prescribes other methods for the settlement of disputes and the administration of international justice.

Good faith (uberrima fides) is fundamental to legality in human relationships: aggressive war usually signals a breach of such morality.

More than three centuries ago Grotius claimed that,

"good faith....is not only the principal hold by which all governments are bound together, but it is the key-stone by which the larger society of nations is united".<sup>39</sup>

Three centuries later the founders of the UN concluded that,

"to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained..."<sup>40</sup>

was essential if peace was to be encouraged and wars avoided.

War and violence and the forceful acquisition of territory marked the three centuries during which an absence of good faith was a frequent precursor of war. Good faith must be evidenced today by actions which fall within the consensus reached between nations to which expression is given in international agreements and 'other sources of international law'. The standards are more demanding and the actions more transparent for they can now be more quickly monitored with the aid of modern surveillance technology. Such technical apparatus will be available whether the international system is one of individual sovereign States applying international law within their respective jurisdictions, or whether a central authority enforces the law universally with the consent and assistance of member States. The alternative, supersession by an imposed central and imperial authority ruling by military force is less thinkable, or practicable, under modern conditions and nuclear arsenals.

In his study of the History of Warfare Field Marshal Montgomery said that,

"The true objective of Grand Strategy must be a secure and lasting peace".<sup>41</sup>

That same history demonstrates how often this has been frustrated in reality for wars have resulted rarely in the permanent solution of disputes. But although he noted that "modern war is "total war""<sup>41</sup> Montgomery found no place for the instruments of abatement in his historical study.

Similarly, when defining war as an act of violence, Clausewitz had been able to dismiss international law as

"self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed the usages of International Law, accompanying it without essentially impairing its power".<sup>42</sup>

Von Moltke the Elder thought little of the Institute of International Law's model code of war (1880),

"The ability of codes of law to control what happens in war is very limited: there was no sovereign to enforce it".<sup>43</sup>

Such an attitude was carried into the XXth Century in the planned disregard of legal obligations respecting neutrality by Germany.

Fuller, however, in discussing the conduct of war devoted some space to a review of the international law of war, the League of Nations (L of N) and the UN.<sup>44</sup>

Despite von Moltke and other Clausewitzians there is now in the UN an enforcing authority to supplement any attention which States may individually direct to the study and enforcement of the Laws of War. Military institutions generally encourage great respect for tradition and custom. A possibility that Clausewitz's dismissive attitude to 'the usages of International Law' persists should not arbitrarily be dismissed. Lawyers and legislators, however, may take a different view than military men being more wedded to the spirit of law than to concepts of military necessity.

The effects of differences in the respective hierarchical situations of civil and military advice-giving channels have to be considered also. In civil affairs a Minister of State and a Law Officer are likely to be members of governmental decision-making bodies. The Commander in the field has a different relationship with his legal and

political advisors for he is himself the decision-maker, and, if subject to political control, nevertheless retains some measure of freedom of action. There is also a gulf between the effects of political expediency and the possible bloody effects of military necessity as seen by armed forces. This difference may be seen in attitude to the letter as well as to the spirit of international legal restrictions.

Law in general is not necessarily or invariably prohibitory. In civil application laws are often permissive especially in promoting co-operation between States. The Laws of War are intended to restrict the sovereignty of States and their operations of war as well as the conduct of commanders, individuals - and sometimes governments - in and with regard to war. Such restrictions are no longer - even if they were when Clausewitz wrote - the 'almost imperceptible and hardly worth mentioning' restraints he dismissed. Indeed, Clausewitz's observation may have been confined to military operations and to any restraints which it was customary for Commanders to impose on their forces in both warfare and military occupation of enemy territory rather than in wider issues of international law and the usages of war. But the difference between the generality of international law and the international laws of war may have some influence on military attitudes.

The effect on the place of war of legal restrictions imposed by international law may vary between States. A State under military government, or one in which the military dominates the political (as in pre-1914 Germany), may react differently than will the more politically governed State. The planning of acts of state (including war) may really reflect the strongest influence on government in its attitude to externally imposed restrictions even when they had been nominally accepted by the State. Despite the provisions of the Vienna Convention on the Law of Treaties of 1969 <sup>45</sup> national actions may depend on interpretations of legal instruments coloured by intention and ambitions rather than on good faith.

International Law and the Concept of War or Peace.

Whatever a State's intention had been in exercising its right to use armed force in pursuit of its policies it was not always easy to determine in legal terms whether a State was at peace or at war. This was not a matter solely of the convenience of the belligerents and their relationships in law with non-belligerent States but was conditioned by the scale of hostilities and where they took place. Later the question of whether any form of armed conflict was permissible to the signatory Powers to the Kellogg-Briand Pact((1928) UKTS 29 (1929) Cmd 3410) was determined by their condemnation of "recourse to war for the solution of international controversies" (Art 1), and to their agreement "that settlement or solution of all disputes or conflicts, of whatever nature ...shall never be sought except by pacific means" (Art II).

Another effort was made to strengthen peace by the General Act on Pacific Settlement of International Disputes (1928 UKTS 32 (1931) Cmd 3930). This provided for conciliation, arbitration or reference to the Permanent Court of International Justice (PCIJ). There was little support for the Act in practice, and a simple definition of 'a State at war' still seems elusive.

Since 1945 the place of war has been affected incidentally by the adoption of the concept of 'conflicts' rather than the more traditional 'wars' in the UN Charter. There has also been a widening of the conventional definition of war and the application of humanitarian law to it.<sup>46</sup> Traditionally the laws of war applied on a narrow interpretation, for example to

"a state of force between States with suspension of peaceful relations."<sup>47</sup>

Today a more comprehensive coverage extending to war and civil war has resulted from humanitarian considerations recognized as necessary in all modern warfare and its effects. Thus, whereas Geneva Protocol I of 1977 (UK Misc 19 (1977) Cmd 6927) refers to 'International Armed Conflicts' Protocol II relates to 'Non-International Armed Conflicts'

"which take place....between the armed forces and dissident armed forces or other organized armed groups....which exercise....control over part of its territory".<sup>48</sup>

Such definitions, embracing both inter State and civil conflict, are really in terms of the effects of war especially on individuals rather than of war itself as was in point in earlier, narrower definitions.<sup>49</sup> The wider definition is not universally accepted for it might include internal armed conflict by self-styled 'liberation forces' encouraged and supported materially from external sources.

Is a simple view of international legal concepts of peace and war now possible? If the former is regarded simply as the law of peaceful settlement of disputes whilst the latter is of imposed settlements, a simple division may be apparent which in reality is confused. In international law increased acceptance of peaceful settlement as the norm reduces the risk of imposed settlements. It is clear that settlements may be imposed by law as well as by force although some legal settlements such as by the Treaty of Versailles ((1919) 225 CTS 118) are the result of force. But settlement by law demands acceptance of a legal system whilst imposed settlement is a direct antithesis of consensus. The rationale of economic practice may be clear if only in the short term, but the rationale of peace and war even in economic terms is less simple than first impression suggests, as Russia now realises.

Brierly believed that the Kellogg-Briand Pact prohibited the use of force short of war.<sup>50</sup> Oppenheim is fairly non-committal on the question of the meaning of 'war' and 'resort to war'<sup>51</sup> in the context. There were several interpretations: for instance that 'war' did not apply where there was no formal declaration, but

"the findings of the Nuremberg Tribunal make the assumption that the phrase in the Pact has no lasting effect".<sup>52</sup>

With reprisal and other forceful action short of formal declaration well established it is not possible to reject the possibility that at the time these acts were to fall outwith the Pact's terms, but that the events of 1937-1945 made it desirable to include them.<sup>53</sup>



That is to draw a distinction between 'peaceful means' and 'forcible means': both require stringent definition. But the Pact contained some ambiguity in further referring to the renouncing of war as 'an instrument of national policy'. Clausewitz would have had some difficulty in visualising even a defensive war as not being of national policy. Kelsen's view that war waged as a reaction against a violation of international law is for the maintenance of law and not war as an instrument of national policy would also have surprised him, for such a view neglects the contrary view that it is national policy to uphold international law and order.<sup>54</sup>

It was formerly the situation that war was only war when it was so recognized by the belligerents. The Soviet Union and China in 1929 did not consider themselves at war any more than they have done over border incidents since 1945. The Sino-Japanese incidents of 1931 and 1937 were not regarded as war either by the belligerents or the League of Nations. Is the criterion to be recognition by other States of the situation as war? Greene, MR. preferred a 'common sense view' rather than reliance on the writings of various authors on international law that 'war' has a technical meaning in the principles of international law. Nor could he find any definition of 'war' in English law in relation to the matter before him which concerned the Sino-Japanese situation of 1937.<sup>55</sup> But Briggs points out that,

"The Charter of the United Nations has gone beyond the League of Nations Covenant; instead of providing merely for the regulation of resort to war, it makes illegal the threat or use of force contrary to the purposes of the United Nations".<sup>56</sup>

The use of terms such as 'recourse to', 'resort to', 'outbreak of' to thinly disguise, particularise, or render technical any threat or use of force, is not now regarded as 'peaceful settlement of dispute', and in any case now falls outside the limitation of Art 2.3 of the Charter. 'Self-defence' is also stigmatised, as States can no longer be judges in their own cause on this issue, for

"whether action taken under the claim of self-defence was in fact aggression or defensive must ultimately be subject to investigation and adjudication if international law is to be enforced".<sup>57</sup>

As an expression of a judicial nature this is hopeful for the future, but motives for supporting one side or the other in the General Assembly in a dispute make it rather less so. It might have been easier earlier when it seemed possible to define war as a state of international illegality falling within the limitation prescribed by the UN Charter, especially Arts 2 and 51. But in the light of contemporary practice that would now attract the criticism that illegality invites prescriptive action by the relevant lawful authority. Within the limits of existing international practice such action cannot usually be expected except, perhaps, in retrospect as at Nuremberg. The problem may remain a real one despite the UN and until the adage 'prevention is better than cure' is taken to heart as regards war, arms transfers and the international arms trade.

International Law and Military Action.

In the context of war and peace it has been shown that international law is a congeries of concept, custom and consensus, and (like other legal systems) of restriction. Parallel to other branches of international law the laws of war developed haphazardly and adventitiously over a long period of time as circumstances indicated or demanded, and without any fundamental or continuous view of the abolition of war itself. Neither has the system been the product of legislative planning of a comprehensive programme. Now not only does the modern concept of the elimination of war have its seat in the UN, but the possibility exists there for the formulation of programmes to keep pace with technological development in weapons and political change which might make feasible control of the place of war in the international system.

Although sometimes infringed or eluded international law expressed in treaties, conventions and agreements is generally acknowledged by States. Whatever the possibilities for the future the present seems to indicate that the idea of continuing necessity for the use of force as a

norm in inter-State relations has not been changed by any contemporary concern for ethical standards, or human rights and dignity, notwithstanding international declarations. Nevertheless, although some conceptual contents of international law are rejected at times by some States they are accepted generally even if with reservations. Examples are that wars of aggression, the use of indiscriminate weapons, and the taking and killing of hostages, are now held to be wrong in principle.

Enforcement of international law, however, is affected by national interest and conscience. Consensual inter-State agreements are negotiated within a framework of national interests, and enforcement, which remains a matter generally for the State, follows that pattern. The obligations contained in universal instruments such as the UN Charter in practice also fall to be respected by States individually even where the Charter has provided for collective action. Peacekeeping forces have been deployed only with the prior acceptance of the States concerned.

A fundamental recognition of legal standards designed to prevent war is inherent in the UN Charter. Similarly restriction on the conduct of war is accepted by adherence to conventions and other relevant instruments. Whereas the UN Charter is applicable to all States (Art 2.6) conventions and treaties generally affect immediately only those who sign and ratify. Bi-lateral treaty provisions may have some effects also on third parties and Art 102 of the Charter is intended to give publicity to such situations. The conduct prescribed in such instruments (if accepted as normal conduct in international relations) could come to be regarded as custom with general application in the laws of war.

Continuing development of international law implies that whilst changes of circumstances or alliance may result in changes in a State's obligations to other States it will remain bound by the general provisions of the universal laws despite vagaries of interpretation.<sup>58</sup> In the general provisions for the treatment of prisoners of war, for example, during the Second World War the Geneva conventions of 1929 (Treaty Series No 37(1931) Cmd 3941) applied but neither Germany nor

Russia complied with them. Russia had not subscribed to the Conventions and Germany responded by treating the Conventions as not being applicable to Russian prisoners of war. Russian practice and custom differed from German usage which normally would have conformed to the Conventions (which were applied to prisoners of war of other nationalities taken by Germany). Thus, the conduct of both States departed from the Conventional standards so that neither could have been either correct or obligatory.<sup>59</sup> In any case conduct antithetical to established custom, even if normal usage of a specific State, cannot become universal custom.

In the Second World War the Japanese had also failed to adhere to the 1929 Conventions in their treatment of prisoners of war and civilians. The fact that Japan did not recognize any right of surrender by members of their own forces explains the national attitude without condoning it.

International delinquencies of this kind do not have any immediate effect on the place of war. They do, however, affect international relations, inter-State attitudes and conduct when they fall within obvious policies of a State and are not aberrations of individuals.

It was unlikely that the incidence of war crimes would be less in wars since 1945 despite the International War Crimes Tribunals which followed the Second World War. A 1952 UN Resolution<sup>60</sup> criticized the treatment of allied prisoners in Korea. Of the US-Vietnam conflict Telford Taylor said that,

"numerous reports of North Vietnamese torture and general mistreatment of prisoners persisted throughout the course of the war".<sup>61</sup>

Public display and humiliation of prisoners in the Iraq-Iran war was a constant subject for television exposure.

Whatever the incidence of war crimes since 1945 the International Tribunals have not been repeated. This was due possibly to the circumstances that the Chinese, Vietnamese and Koreans were following normal customary practices and that there was no clear cut victory and defeat as the conclusion of hostilities. The Iraq-Iran situations formed

part of psychological warfare planning which took advantage of world television opportunity.

Concern with the treatment of prisoners of war and civilians displaced through the operations of war has been continuous since 1945 as the 1949 and 1977 Conventions and Protocols, and the 1978 Red Cross Fundamental Rules<sup>62</sup> show. It seems, however, that concern with principle regarding war crimes is not carried into international action by the States not engaged in war. If this was not so a standing UN War Crimes Commission and Tribunal might have come into existence with some effect in the training of armed forces.

#### International Law of War: Prevention, Legality and Conduct.

In the modern history of war three aspects of international law as they developed impinged upon national attitudes regarding the use of force in the settlement of inter-State disputes. Prevention, legality and conduct have been referred to traditionally as jus ad bellum and jus in bello. Today, war is no longer accepted unconditionally as a normal matter of international relations; its legality is questioned, and emphasis has shifted from justification of war to efforts directed towards its abolition. But the legality of war is questioned by those who consider that one side or the other must be an aggressor and in breach of Art 2 (3) of the UN Charter rather than by those who regard war as an expensive anachronism. In the reality that war has not yet been outlawed, international law seeks to provide for the limitation or elimination of some of the more indiscriminate strategies, deployments, and tactics, as well as weapons.

In practice this more general concern with limitation of weapons, and in Europe with tactics, numerical size of forces and rates of financial expenditure on them is responsible for much formal documentation. The substance of these arguments which have been made regarding such attributes of armed forces whilst intended to regulate manning, armament and deployment in peacetime also has peacekeeping - if not abolition of war - in mind.

1 Prevention. Following the Second World War which the League of Nations had failed to prevent, the UN, as noted above, was established with purposes which included the prevention of war by collective action, and by the development of friendly relations between States (UN Charter (Art 1)). Disarmament and the limitation and regulation of armaments were to be considered in the search for war prevention (Arts 11 and 26). In addition, the Security Council was to,

- (a) determine the existence of any threat to peace and apply peaceful means of resolution, (Arts 34, 40 and 41).
- (b) take military measures if (a) failed (Art 42), and
- (c) set up a Military Staff Committee to advise and assist it (Art 47).

The collective machinery provided has not fully been utilized. Perhaps this does not imply that States generally have lost individual appetite for peace even if the urgencies of their own immediate situations may weaken their resolve for the application of collective action against other States. Whether the passing of Res 177 (II), adopted on 21 Nov 1947, was seen more as supporting the successful Allies in bringing enemy leaders before a Tribunal to answer for their actions is debatable, but the precedent of the Nuremberg and Tokyo Tribunals has not been followed.<sup>63</sup>

The UN Law Commission later submitted draft Principles of International Law Recognized in the Charter and Judgement of the Nuremberg Tribunal which included provisions similar to Art 6 (a) on Crimes against Peace<sup>64</sup> of the Tribunal Agreement.

It may be said that the inclination in favour of peaceful settlements shown in the Covenant and the Pact of Paris<sup>65</sup> and carried into the Charter was fortified by a criminal code in respect of offences against peace.<sup>66</sup> However, following events since 1945, and failures to implement the provisions of the Charter, the Non-Proliferation Treaty ((1968) 7 ILM 809) (Art VI)) seemed to fortify moves to secure peace, but practice proved disappointing. The 1985 Review Conference on that Treaty reported:

"B (1) The Conference concluded that, since no agreement had been reached in the period under review on effective measures relating to the cessation of an arms race at an early date, on nuclear disarmament and on a Treaty on general and complete disarmament under strict and effective international control, the aspirations contained in perambular paragraphs 8 to 12 had still not been met, and the objectives under Article VI had not yet been achieved".<sup>67</sup>

Disarmament tends to be delayed by prospects of progress in the technology of weaponry. Whether the arrival of new weapons has an effect on existing strategic and tactical theory, or whether the doctrines initiate search for new weapons, the effect on disarmament - and abolition of war - seems identical. This sometimes affects international agreements, for example, the Anti-Ballistic Missile Treaty 1972 (11 ILM 784) where debate on the US Strategic Defence Initiative and on Anti-Tactical Ballistic Missiles will be carried into the Third NPT Review Conference on the Treaty which is due to take place in 1990.

2 (a) Jus ad Bellum - Legality. Theories of just war are considered in Part II of this thesis. Of the traditional law only that dealing with declaration is pertinent here.

Declaration of War was regarded as the next logical step when peaceful negotiation proved unavailing, for commencement of hostilities without 'previous controversy' and without attempted settlement by negotiation was a violation of the Law of Nations.<sup>68</sup> By the beginning of the present Century declaration "as far as circumstances allow" was regulated by the 1st and 2nd Hague Conventions (for instance Convention III of the Second (1907) Conference.<sup>69</sup>) Since then commencement of hostilities without declaration of war has been the rule rather than the exception.

Modern weapons lend themselves to pre-emptive action and to strategies of surprise making it probable that formal declaration will be unusual in future. Omission of declaration with a view to immediate and conclusive success through surprise (some modern weapons are designed for such a first use) may not avoid inquiry into the legality of action or

any breach of neutrality involved. That might not have been possible formerly for the 1907 Convention bound only the contracting parties. Now the UN Charter applies to all States. In any case, in the sense that States are regulated as to war-making by the UN Charter rather than by self-determination, to make war is no longer a 'right', and a guilty belligerent may no longer be permitted to attain, retain or expect any rights, or to benefit, from his unlawful act. The maxim ex injura jus non oritur applies although it must be noted that Israel has not forcibly been deprived of conquered territory.

2 (b) Arms control agreements. International law is also concerned with the exclusion and limitation of weapons and, less often in the past but increasingly in NATO - WPO negotiations, with tactics and the size of defence expenditures and numbers of weapons. Arms control falls within both jus ad bellum and jus in bello, for the effect of bi-lateral measures negotiated between States in peacetime also includes peacekeeping between those States. Some such agreements will be abrogated in war although, as Draper has pointed out,

"The laws, whether international or municipal, are certainly not 'silent' in time of war. In fact, there is a great deal of extra law applicable only in war. The international law of war is far from simple, as one would imagine from its long history".<sup>70</sup>

Thus, general (multilateral) treaties effecting limitation in arms or conduct carry on from peace to war. Examples can be found in the Hague and Geneva Conventions and Protocols and UN Conventions which are referred to later.

The volume of the whole range of international treaties is formidable but omissions are glaring. For instance, the Agreement on the Prohibition or Restriction on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effect (UN Convention of 1981)<sup>71</sup> excludes by definition the most indiscriminate weapon of all. Again, notwithstanding the Preamble of the Non Proliferation Treaty of 1968, and especially the Declaration of Art VII to "undertake effective measures in the direction of nuclear



disarmament", the Third Review Conference referred to above remained pessimistic.<sup>72</sup>

(iii) Conduct - jus in bello. Like universal provisions concerning limitation of arms, formal provisions governing conduct in war are contained in the Hague, Geneva and other Conventions. The possible development of an international criminal code is referred to below. Prior to the first World War it was left to national tribunals to punish individuals for the infringement of the customary and the later conventional laws of war. Summary punishment might be meted out also on belligerents taken in the field in the act of breaching the law. The XXth Century growth of the popular press and development of psychological warfare with information and disinformation, claim and counter-claim regarding the actions of governments and the military in war, increased general interest in war crimes. With increasing involvement of civilian populations in war the conduct of the belligerents was given a more immediate and general notoriety.

After the first World War the responsibilities of individuals for war crimes were referred to in the Treaty of Versailles ((1919) 225 CTS 188 Arts 227-230). During the second World War the Allied Governments issued several individual and joint declarations relating to the future punishment of war criminals,<sup>73</sup> stating that the punishment of war crimes was a principal war aim. The establishment of the International Military Tribunal followed as did trials of ex-enemy personnel by Allied occupying forces courts. In effect such procedure introduced a more formal criminal code into the jus in bello.

In addition to jurisdiction as regards crimes against peace, the international Military Tribunal Charter afforded jurisdiction also in respect of war crimes and crimes against humanity.<sup>74</sup> This world forum in which leading Germans, Japanese and others were tried for war crimes ideally could have become a precedent for the future. This was especially relevant to Vietnam and Cambodia for the Tribunals had a

further purpose. In addition to war crimes they had jurisdiction in respect of crimes against humanity including such crimes committed before as well as during war.<sup>75</sup> That jurisdiction was wide and included crimes with political objects and whether infringing domestic legislation or not. To continue in the vein of the Nuremberg and Tokyo Tribunals Charter was a purpose indicated in UN General Assembly Resolution 177 (II), but there have been no international prosecutions for war crimes or crimes against humanity in respect of wars fought since 1945. Similarly those States that have acceded to the Convention on the Prevention and Punishment of the Crime of Genocide ((1948) 78 UNTS 277) confirmed that

"genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". (Art I).

Pol Pot's present situation of negotiating power in Cambodia is only one example of international disinclination to pursue any precedent which might have arisen from Nuremberg.

The precedent was avoided in post war international instruments (notably the four Geneva Conventions of 1949) and there has been a reversion to national jurisdiction and prosecution. At the same time the introduction of international legal interest in civil war by the Geneva Protocol II of 1977 did not widen the area defining war crimes which could be accountable to international tribunals for the jurisdictional limitation of Art 3.1 prescribes national prosecution.

The position now seems to be that unless the victorious in war want to initiate international tribunals, war crime prosecution will be left to national procedures, especially in instances of limited war between two States as has often been the case since 1945.<sup>76</sup>

Behaviour in war may not be indicative of behaviour to be anticipated in peace especially where the normal place for war in a State is dictated only by the reasonable necessities of defence. Behaviour in war may reflect human psychological inclination carried over from peace. However, any licence allowed in war to the fighting services or to

civilian services accompanying armed forces, whether with or without superior orders, may be reflected in attitudes to law and order in a State when peace is regained. This is especially likely if known breaches go unpunished and if a different standard of conduct to that normally obtaining in the armed forces of a State is permitted or encouraged when in occupation of enemy territory. The post 1919 experiences of Russia and Germany, and the present situations of Lebanon and Cambodia demonstrate the danger.

Strict enforcement of disciplinary rules of combat will be necessary in cross-border and other military reprisal operations short of war where normal armed forces rather than specialist police-type military bodies are employed. An atmosphere of punishment may prevail in such operations for which normal armed forces have little training. Political policies of the bombing of villages (even though due warning is given) are bound to affect the civilian population.

#### International Law and Military Action Short of War.

Military engagements between the armed forces of States, or the use of armed force by a State, do not lead inevitably to war. Custom in international law has cognizance of incidents of violation of sovereignty, retorsion and reprisal and other coercive means taken towards a settlement of inter-State dispute. The adoption of the UN Charter has not eliminated the custom or practice.

A comment quoting incidents in 1985 was that

"Whereas in the past breakdowns in international law and order were localized in wars, intervention, and traditional border incursions, there now emerged a broader willingness on the part of major powers to disregard the territorial sovereignty of other States, and, as a matter of deliberate policy to place military or police expediency above compliance with international law".<sup>7</sup>

The incidents were quoted as follows,

- (a) In the aftermath of the seizing by terrorists of the MV "Achille Lauro" US forces forced an Egyptian civil air liner to fly to and land in Italy with the surrendered terrorists.
- (b) Israeli military aircraft breached Tunisian airspace and bombed what was allegedly the Headquarters of the Palestime Liberation Organization.

- (c) French Military Officers sank the British registered MV 'Rainbow Warrior' in Auckland Harbour.
- (d) Following invasion of Lebanon and subsequent partial withdrawal of her forces Israel made several raids by land and air on villages in South Lebanon.
- (e) South Africa made several armed incursions into Angola.
- (f) US military aircraft made bombing strikes on Libya.
- (g) There were many reported instances of Afghan or Russian military aircraft breaching Pakistani air space and bombing targets in Pakistan.
- (h) Russian submarines deliberately violated Scandinavian territorial waters.
- (i) A South Korean civil air liner strayed into Russian airspace and was shot down by Russian military aircraft.

Breaches of sovereignty such as these may be common but the law is not invalidated because incidents of the kind (if not warranted as reprisal or retorsion) go unpunished. This is a grey area for the UN Charter does not directly address the subject of reprisal and retorsion which, if lawful in any circumstances, must fall within either Art 2.1 (as an attribute of sovereignty and the equality of all member-States) or Art 51 (the inherent right of self-defence against armed attack). What constitutes 'armed attack' may be debatable in the context, but terrorist attacks sponsored by or connived at in adjacent States may come within the term.

#### Reprisals

"are such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency."<sup>78</sup>

The term 'exceptionally permitted' seems to assume some international standard of reference bringing the action within Art 1.1 of the UN Charter (ie, in conformity with the principles of justice as well as international law). But Oppenheim also said that

"reprisals involving armed forces are prohibited with the exception of action taken in self-defence or, in pursuance of properly authorized international action".<sup>79</sup>

He noted that this statement was contained in a resolution adopted by the Institute of International Law at Paris in 1934 within the terms of the League Covenant. It might stand today in interpreting the UN Charter although it may be argued that the Charter fails to deal with the problem of self-defence and how it should be defined in this context.

Nevertheless national action under Art 51 short of war and actual invasion should be preceded by reference to the Security Council or General Assembly under Art 35. It is, perhaps, a measure of the attitude of member-States to how the Security Council has been allowed to operate that self-help actions have been taken by way of reprisal as well as of open war.<sup>80</sup>

Reprisals today may have a more general application to terrorist activities planned, mounted and provisioned from adjacent States. The continued use of antagonistic military force, however disguised as 'freedom fighters', operating in and from neighbouring States through neglect of effective prohibition - or with active support from the host State - could lead not only to reprisals but to war. The mere presence and non-expulsion of such bodies of nationals of another State, especially where extradition agreement does not exist or is stultified on political grounds, will at least breach good relations. But reprisal even for overt illegal acts "must be in proportion to the wrong done",<sup>81</sup> suggesting some scale of judicial judgement rather than what probably will be an act of armed force, or as in the case of Israel and Syria (and the PLO), invasion and acts of war. But international disturbance may arise from economic difficulties as well as from situations involving the use or threat of hostile armed action.

International debt and failure to meet interest charges and repayment dates may be met by methods of retortion such as tariff discrimination or blockade although those are less likely today and an atmosphere of mutual settlement, write off and rescheduling makes actions such as in the Venezuelan Preference Case<sup>82</sup> outdated. In any case

governments do not show enthusiasm for use of retortion in aid of non-governmental banking transactions even when effected through their encouragement. As Jessup said,

"....even before attacking the major problem of the right to resort to war, international law succeeded in surrounding the employment of hostile measures short of war with certain legal restraints."<sup>83</sup>

Although much of the discussion was political not legal, argument regarding the American action against Libya (1986) confirms Jessup's statement. Indeed, any action involving the use of armed force may constitute resort to conflict in terms of the UN Charter.

There is perhaps a relevant question regarding the application of the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide ((1948) 78 UNTS 277) in the light of Arts 2.4 and 103 of the UN Charter. Art VIII of the Convention does not seem to exclude individual State action under Art 1, but in that case the soldier's position as to 'lawful orders' could be caught between the unilateral action of his State with reference to the Convention and the international provisions of the Charter. In theory the question might have arisen as to Vietnam's interference in Cambodia had that been merely for the prevention and suppression of genocide. Telford Taylor said that it was in the spirit of

"a government's treatment of its own nationals can be so contrary to civilized standards as to constitute an international crime".

that President Eisenhower pledged support to South Vietnam in 1954.<sup>84</sup>

Law, Order and Defence: Alliances and Treaties.

In the past international law and order had a regional flavour. Regions such as South East Asia and the Middle East are areas where breach of international peace is a constant problem. One traditional method of promoting a regional state of peaceful relations was by the application of balance of power policies by States. The proposals for equilibrium were evidenced by treaties of alliance. The composition of earlier alliances, in comparison with those of the post-1945 period, changed relatively frequently as the history of Europe shows.

The legal instruments generically referred to as 'treaties' may be drawn to cover any form of transaction in the scheme of international relations subject to formal rules as to validity, legality and possibility of purpose, proof and ratification. Treaties of alliance form one category giving agreement to legal obligations which may affect the likelihood of war. The concept of alliance is not a matter of legal principle but of reality relevant to international law, the place of war, and thus, to international law and order.

Alliance by treaty seems to have a simple basis that two or more States with common purpose join forces to further that purpose. Simplicity may be more apparent than real for the common purpose is not likely to be all-embracing and may exclude matters of disagreement as well as national purposes not disclosed, or relevant, to the other parties. As an example, the North Atlantic Treaty ((1949) 34 UNTS 243) is considered. It envisaged an alliance of interests and territory, but the question has been raised: if the US is willing to provide military support to ensure the security of Western European Allies should not the West European Allies in return support the American interests elsewhere in the world? But a complexity of the alliance is that US troops are in Europe to support US vital interests whilst NATO is a defensive alliance of collective security against external aggression in the North Atlantic Area (ie, Europe and North America as stated in Art 5 of the Treaty). Strategically, therefore, the question also seeks clarification as to whether the terms of the alliance embrace 'out of area' action if only as a matter of means for securing the objects of the alliance.

There are other disagreements between NATO Allies relating to political and economic as well as military means. Kissinger has said of this,

"...if the Atlantic Alliance is reduced to its legal context, it will sooner or later fail even in the area covered by formal obligations. The lifeblood of the Alliance is the shared conviction that the security, in the widest sense, of each ally is a vital interest to the others; in crises they must not have the attitude that they will check with their lawyers to determine their legal duty".<sup>85</sup>

The objectives of treaties do not require legalistic interpretation if there is common purpose, although the methods and means adopted by individual allies may be subject to dispute. Strict interpretation is less important than the political effects for in an alliance in which adhering States are of differing political outlook some disagreement on means is likely. The Western European Allies have governments ranging from socialist to conservative, but both the North Atlantic Treaty and the Brussels Treaty of 1948 provided for co-operation in the economic as well as the defence field. Both rely on political consensus and co-operation. Similarly, the Treaties of Rome of 1951 to 1957 have as one objective the maintenance of peace as well as economic and political integration. These treaties were constructed in the spirit of the preamble to the UN Charter and, in consequence, with the objectives of the Charter.<sup>86</sup> Detailed examination of performance under the Treaties of Rome show it has not entirely lived up to the standard the Pearson Committee set for NATO, ie

"An Alliance in which the members ignore each other's interests or engage in political or economic conflict, or harbour suspicions of each other, cannot be effective either for deterrence or defence".

NATO has heeded the warning and so upheld its main purposes whilst some of NATO's member States as members of the EEC have sometimes forgotten the ideal.

One of the difficulties experienced in alliances is that member States may be thought to be equal and with equal voice. In fact allies are rarely equal one with the others, especially in economy, geography and demography. Absolute equality in burden-sharing is impossible and a danger of confusing protection in defence with protectionism in economies has to be avoided. In NATO this is particularly true of Turkey. As yet it is not a full member of the EEC and lacks the economic advantages States that are members of both alliances enjoy. Of course, it would have been tidier had membership of one alliance required membership also of the other, but international systems are rarely so comprehensively



planned. In any case a concept of collective defence within an EEC Treaty had not then been accepted.

The practical danger of conflicting interests in a plethora of treaty engagements entered into by any one State is underlined in Art 103 of the UN Charter. Experience seems to show that there may be a difference in the attitude of States to either the spirit or letter of a treaty negotiated between a limited number of States, in which national interests can be accommodated (as in treaties of alliance) and an instrument of a universal character such as the UN Charter.<sup>88</sup> This distinction is coloured by the matter in point and if, and how, it affects a particular State. A subsidiary question is whether there is any different attitude toward a treaty to which a State has been a negotiating party or toward a treaty which was signed and in force prior to a State adopting it. In the latter case a State has to accept the existing treaty (including anything which it may not like about it) if revision cannot be agreed before entry.

In NATO this has had the effect of not exactly accommodating a newcomer's national outlook. This can be seen in the initial non-integration policy of Spain. There is the conflicting aspect that to create an effective alliance some irregularities have to be accepted as in NATO in the nuclear ban of Norway, Denmark and Spain as well as the withdrawal from integration of forces of France. Such an outlook may be encouraged by Art 3:

"the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack".

Neglecting any question as to whether 'individual' and 'collective' in Art 3 might be mutually exclusive,<sup>89</sup> not only do States differ on procedures and attitudes to treaties, but even in alliances it is politically difficult to set aside the rivalries which influence the commerce and economies of States. Such differences raise burden sharing problems in NATO. Apart from the NATO States different reactions to SDI,

deployment of cruise missiles, and modernisation of nuclear weapons, there is also the repeated reservations of their positions of Greece and Spain in the Defence Planning Committee and the Nuclear Planning Group. There are also divided attitudes to both 'out of area' policies and appreciation of new Russian attitudes.

Disagreements in an alliance are not limited to inter-State attitudes but include the discordant effects of internal disagreements affecting the cohesion and, therefore, the virility of the alliance. SALT II provides an example. Signed on 10 June 1979 by the US and USSR, Congress refused to ratify the treaty but the administration decided that the US would abide by its provisions. In December 1985 the US President submitted a report to Congress on Soviet Non-Compliance with Treaties.<sup>90</sup> The USSR denied the accuracy of the instances as reported. In May 1986 the President said that from some future date the US would no longer abide by the provisions of the Treaty, but that was opposed by Congress which threatened not to support the President on the issue.<sup>91</sup> The European member-States of NATO with their considerable interest in the US nuclear guarantee also opposed the President's position.

Thus, sectional views of national interest can give rise to disagreements extending beyond the State. It is also possible that a bilateral treaty although freely entered into by a legitimate government may be regarded as inimical to their minority interests by a minority most immediately affected in a member-State. Any dispute which arises in consequence within the State concerned may affect the operation of the treaty. The Anglo-Irish Agreement of 1985 is an example. The geographical position of the Kurds split between three States is another. The situation of Greek and Turk in Cyprus being, or being regarded as, minorities of Greece and Turkey could be affected similarly by any future bilateral treaty between Greece and Turkey.

Whether by accident or design positions of minorities have been provided for incidentally under Art 39 of the UN Charter. In relation to

Palestine in 1948 the point was raised that the word 'international' was omitted by oversight from the phrase 'any threat to the peace, breach of peace...'. That view was rejected and the way was opened for UN intervention where internal disputes threatening peace externally (or internationally) arise.<sup>92</sup>

Attitudes to treaty making are carried into General Assembly debates. The UN Year Book discloses the range of the political and security subjects discussed in the Assembly and its committees. Many show the voluntary nature of obligations envisaged and ease of withdrawal from engagements entered into demonstrating different enforcement measures between municipal and international law.

As to ease of withdrawal from undertakings there is the example of a draft treaty text submitted to the UN by Sweden<sup>93</sup> banning nuclear weapon test explosions in all environments. Of eleven articles two (ix and x) provided escape avenues one of which was of the continued legitimacy of primary national interests. This is normal practice and such escape clauses as,

"Each party in exercising its national sovereignty would have the right to withdraw if it decided that extra-ordinary events relative to the subject matter of the treaty had jeopardized the supreme interests of its country"

may be no more than rebus sic stantibus in political practice.<sup>94</sup>

Leaving aside the point that alliances may be offensive as well as defensive, a traditional bedrock of international law and order in positive and procedural terms has been fashioned in treaties and alliances directly between States. To some extent the multilateral embrace of the UN has now overtaken the tradition. Ideally now direct military action between States should be obviated. Practically, however, the working of the UN may make for indecision, prevarication and delay because whilst causes of dispute may be geographically limited, their ramifications in the global views presented at the UN may make consensus among its member States impracticable. That illustrates one difficulty in promoting international law and order, and it may be explained by the

difference in approach by States as regards means although all may have sights on a common international end.

In the State (or Empire) the authority equated the elimination of violent crime, insurrection and rebellion with control of the means by which such breaches of peace could be aided. Legislation such as Explosives and Firearms Acts introducing registration and licensing became common when effective civil war was made less possible. Legislation prescribed punishments and State controlled means were created to enforce them.

Traditionally (and until the Covenant of the League) limitation in the use of force in international relations had been sought on a basis of avoiding war rather than in means to make it more difficult, impossible, or illegal. Forms of restrictions on certain weapons were suggested only in regard to the conduct of war. There was from very early times a major difference between State and international community in that any restrictions on war agreed by international consensus would be self-imposed and policed by States, not enforced by central authority.

Efforts in the League and the Kellogg-Briand Pact to restrict or outlaw war were ineffective in controlling the means for making war. Such efforts encouraged a notion that enforcement of international law and order requires not only the elimination of war by and on behalf of States (as opposed to the world community) but also the essential supporting factor of verifiable arms control and disarmament measures. Limitation of the ability to use force is not yet implicit in arms control measures for these so far seek levels and balances in national arsenals. However, doubt about the utility of modern military operations to attain, and retain, objectives of political ambition which other means have failed to secure or retain may be a more potent constraining factor.

Limitations on the Use of Force.

International law and order ideally promote the peaceful settlement of disputes between States: the alternative is the use of force either by

States or international institutions. In such a choice the earlier unfettered right of a State to make war has been restrained and restricted by two factors introduced in this Century. First, there is a series of treaty obligations in instruments such as the League of Nations Covenant (225 CTS 195), the Kellogg-Briand Pact ((1928) UKTS 29 (1929) Cmd 3410), the Argentine Anti-War Pact ((1933) USTS 881) and the United Nations Charter ((1945) 1UNTS xvi). All were designed to prevent aggression and aggressive war or intimidation by threat of war. Second, the increasing destructive effects and environmental dangers of nuclear and other weapons, makes their potential effect a deterrent to use. But the use of force by States continues as a consequence of the inability or reluctance of States as an international society to prevent it. This seems especially true in circumstances in which a State sees no other methods by which its just cause may prevail or its security may be secured.

Ideas about the prevention of war are not new. There were prohibitions in the Constitutions of France, Venezuela, Ecuador, San Domingo, Brazil, Uruguay, Portugal, the Netherlands, and Spain.<sup>95</sup> Some modern Constitutions - Japan's for example - seek a war-free future. States with such constitutional inhibitions remain in the minority today, and more than at any time in the past, these words of Clausewitz need reflection:

"now, the first, the grandest, and most desirable act of judgement which the Statesman and General exercises is rightly to understand in this respect the War in which he engages, not to take it for something, or to wish to make of it something, which by the nature of its relations it is impossible for it to be",<sup>96</sup>

and, referring to political policy.

"war (is) only the instrument, not the reverse. The subordination of the military point of view to the political is, therefore, the only thing which is possible".<sup>97</sup>

But if war is undertaken it must be realized that,

"of all branches of human activity (it is) the most like a gambling game."<sup>98</sup>

Emphasising the political nature of war, and referring to limited war, Kissinger said,

"The prerequisite for a policy of limited war is to re-introduce the political element into our concept of warfare and to discard the notion that policy ends when war begins or that war can have goals distinct from those of national policy".<sup>99</sup>

This has applied to all war in the past, but would exclude all-out nuclear war as being without meaningful political object. The elimination and abolition of war will be a political act when, and if, politicians and circumstances can be brought to contemplate such an end. Until then, coercion in international relations by armed force is circumscribed by two counter-policies,

- (a) Deterrence: the threat of the use of armed force including nuclear forces.
- (b) Limited war: ie, limited to conventional weapons, but with danger of escalation to total war.

and by four limitations,

- (c) Legal: Anti-war provisions of the Kellogg-Briand Pact and the UN Charter, with the possibility of collective action.
- (d) Military: threat of nuclear devastation involving the calculation of 'profit and loss' especially as impinging on the interests of the superpowers.
- (e) Economic: the cost of maintaining armed forces and their equipment and the opportunity costs thereby involved.
- (f) Psychological: world public opinion.

These limitations are discussed below.

(a) Deterrence.

This is dealt with more fully in Part II and it is necessary here to point to two limiting aspects regarding the use of force in deterrent theory. First, so long as deterrent measures succeed the use of force remains unnecessary. Second, where deterrence theory is based on the threat to use nuclear weapons the threat is supported by planning in peacetime which includes the targeting of centres containing civilian populations. Possession of, targeting with, and threat to use nuclear weapons may not be illegal per se, but actual use would contravene international humanitarian law as expressed in General Assembly Res 1653 (XVI) of 24 January 1961.<sup>100</sup> That Resolution stigmatized the use of

nuclear weapons as violating the Charter, constituting a crime against mankind and civilization. If this does not seem to affect the actual deterrent threat the law is obfuscated rather in the manner which obtains in the British interpretation that,

"While there is no rule of international law dealing specifically with the use of nuclear weapons....their use is governed by general principles of international law".<sup>101</sup>

Of course, the discussion would be unnecessary if circumstances permitted unvarying acceptance of Chapter VII of the Charter, and "the general responsibility of the Security Council for the maintenance and the restoration of peace".<sup>102</sup>

(b) Limited War.

'Limited war' is an expression of objectives not specifically of means and method, although these may be limited incidentally. For example, the

"philosophy of the Israeli Defence Force is very clear - to win, and win decisively - for the State to survive it is insufficient not to lose a battle, victory must be absolute. Israel is committed to the belief that 'wars cannot be won by remaining on the defensive' against an enemy employing mass and momentum and having superior material resources, a prolonged defence is seen as courting disaster".<sup>103</sup>

The limitation there is in the objective of total victory in battle not the subjugation of the enemy people and territory even if conquered territory incidentally acquired has not been surrendered willingly or gracefully. But objectives of Israel's military operations have always been limited even when pre-emptive operations have been the means, as in Lebanon. Weapons, too, have been limited to the conventional.

Nevertheless, to describe any war as 'limited' is probably a misnomer and a relic of time when the description was a euphemism for military action which a State did not wish to describe as giving rise to a 'state of war'.<sup>104</sup> Any war, for whatever limited objective, and by whatever limited means or geographical restriction, is always liable to become general, uncontrollable and total today, unless means of ending it are foreseen from the start.

Modern limited war is not a matter merely of a limited use of force. The

"world situation is characterized by the existence of conflicts which are limited, not only geographically, but also with respect to the size of the belligerents and the means used by them".<sup>105</sup>

But with nuclear and biological weapons especially in mind,

"consciousness about limited war as an instrument of policy has emerged in reaction to the growing capacity and inclination of States to wage general, total war".<sup>106</sup>

Limited war may be said to be war in which the object is to seek the settlement of a dispute rather than to subjugate an enemy, but the difficulty of controlling such a war is obvious as can be seen in the Iraq-Iran conflict. The Korean and Vietnam wars may have been intended to be limited by the UN/US, but both North Korea and North Vietnam were prepared to accept the effects of total war. This was not readily understood by their opponents.

(c) Anti war: legal provisions.

In the settlement of disputes the legal duty of States is set out in the UN Charter. States are not required to meet military aggression merely passively: the use of forceful resistance is permissible, Art 51 being a necessary bridge between the ideal and the reality. Law and fact are often 'a discordance'<sup>107</sup>, so that whilst States subscribe to the anti-war provisions they muster their own national precautions either as individual States or in alliances. They must do this because if the Security Council does not enforce the provisions of the Charter, and if it remains possible to use Art 51 to support a chosen course of armed action, States have no alternative for even neutrality must remain at risk. In any case, it is war not preparations for defence to which the legal provisions apply.

(d) The 'profit and loss' calculation.

Acceptable loss in relation to possible gain is likely to be a military-economic assessment for the relation of national means to national ends through war can be determined realistically only by



reference to the probable cost of attaining the political objective, its worth when attained, and the subsequent maintenance costs. Such calculations are usually untrustworthy and they go beyond the loss of men, material and, perhaps, territory, but they are unrelated to any consideration of law. Fuller put it that,

"there is always a relationship between force and aim. The first must be sufficient to attain the second, but not so excessive that it cancels it out. This is the crux in nuclear warfare".<sup>108</sup>

The probability of meaningful political gains from nuclear warfare depends on the calculation of the escalation level likely to be reached in conflict, but

"from the point of view of any sane political aim, all out nuclear war is nonsense".<sup>109</sup>

In circumstances which are likely at some stage to involve directly larger industrial States, Fuller's words could be applied to all out conventional war.

There is a further point: in the past there have been legalistic justifications offered for the use of force, as well as euphemisms providing legal characteristics to obscure a 'state of war' differentiating it from a 'state of peace'.<sup>110</sup> War was earlier primarily a matter for belligerent States with some customary practice regarding neutrality and neutral rights and duties. The fundamental approach today, however, is that the earlier probability of keeping a war limited to the original participants and their territories (including maritime areas) is more difficult to ensure.<sup>111</sup> In such unforeseeable circumstances the loss/gain calculation may be even more unreliable as experience in this Century indicates.

(e) The cost of maintaining armed forces and their equipment.

War is a matter of money, but the economics of defence procurement and maintenance generally are not constrained by international law. It is not proposed to pursue the topic here but merely to point out that in this, as in all matters connected with national defence, States are not completely sovereign.

The security of a State rests on successful defence policies which, in turn, are derived in part from the morale, health and economic well-being of the citizens. The maintenance of each of these aspects must be taken into account in the competition for national expenditure. States which unduly favour defence expenditure at the expense of other, social, votes, or through excessively high taxation, are often those with serious internal unrest. Further, attention to Human Rights issues not only involves consequential and competing financial provision, but also promotes attitudes which are inimical to war and the use of force.

In addition, there is a danger that costs being of first importance in defence policies, the will o'the wisp of nuclear weapons and forces being cheaper than large conventional forces may be pursued as it has been in NATO and with similar problems of conventional/nuclear funding.

It may not yet be entirely possible to make war solely on external credit, though the national debts of many States are evidence of war-making on credit. The comparative ease with which re-supply can be obtained on government-to-government basis, as instanced by both Israel and Egypt, is a factor affecting the place of war. Cost, however, remains a constraint on the use of force for it is the constant in any profit and loss calculation.

#### (f) World Public Opinion

'War in the sitting room' has been made practicable by the instant communications systems now available to the public. It is no longer possible to divorce war from other news being reported through these direct systems although censorship of some kind may still be locally possible. International relations tend increasingly to be conducted in public although it is often difficult to disentangle fact from speculation especially where situations are simulated by information media and are not always what they purport to be. Subject to such imperfections, the reactions of a better-informed public are quickly made known. This is not decisive, for some States more or less effectively

continue to limit access by their citizens to unbiased reporting and media and, instead, limit the viewers and readers to the government's prejudiced views.

Peoples have been led (particularly by politicians) to believe that the principal purpose of governments is to further improve the citizens' economic standards and social well-being. It follows that unless governments can induce by propaganda a 'siege mentality' or a spirit of expansionism and conquest, the notion that expenditure on war is necessarily wasteful becomes increasingly dominant even at a time when violence also seems to be increasing in many countries. But daily presentation by television of incidents from war zones, as in the US during the Vietnam war, may promote a revulsion against a State's policies or the methods used in war to carry them out. It is important for both State and television to maintain a proper perspective so as not to submerge the real action and policies by a 'what is seen on television' simulation for the actual battlefield action. There is also a danger of "indigenous dynamics at work" (as in the Third World) "tending to bring about an environment where the use of force may become a way of life".<sup>112</sup>

The international system is bedevilled by changing alignments and relationships affecting local balance: these need to be explained to the public. The fundamental task from a government's point of view, however, is to put forward arguments and perspectives to support what it sees as the national interest. The reciprocal is that governments will also want to curb views contrary to their own. In States with relatively 'free' media there is a difference between what can and will be tolerated in peace and what in war. Overall, however, the promotion of freedom of speech and a free press by the Universal Declaration of Human Rights (Art 19), and the American Convention on Human Rights (Art 13) and other such Conventions, may also promote movement in favour of limiting the use of force.

## The United Nations and the Place of War.

The major purpose of the association of States in the UN was to affect the place of war, or the abolition of any place for war, in the international system. After nearly fifty years the question may be asked whether the UN has materially influenced the nations towards the end desired. If not, have the Purposes and Principles been rejected in intention or fact, or is it that the machinery of the UN is deficient and incapable of giving effect to them. The answers may be coloured by views as to whether it is unreasonable to expect the acceptance of a society fully conforming to the ideals within some defined tract of time. Or is a continued progress towards the ideal all that ought to be expected, in which case, is such progress apparent.

The UN ideal is based on the practicability of a consensus between States which will allow a form of central world control. In any society such control raises contentious issues, objections to central control or supervision of matters impinging on national sovereignty were not new in 1945 when the UN was conceived of as the

"centre for harmonizing the action of nations in the attainment of their common ends", and was established "for realistic as well as spiritual reasons".<sup>113</sup>

However, like its predecessor, the League, the UN is subject to what M Rouvier observed in 1906 of the proposed Conference of Algeciras, namely that,

"It would be inconsistent with the dignity of a Great Power to submit itself to what might be the decisive voice of some secondary State such as Sweden or Denmark".<sup>114</sup>

He was not alone in such thought: in Spring 1912 Turkey, for good reasons, closed the Dardanelles giving rise to the question whether the Turks had the right to exclude merchant ships. Then, as later,

"...the Russians were not in the mood to rest their case on international law alone". 'Public opinion' their Ambassador said..."would not concern itself with the responsibility of Turkey or Italy, nor with any treaty rights, but would simply and unanimously demand that the Straits be opened to Russian trade, and the Government would certainly have to yield".<sup>115</sup>

Views reflecting national strength had relevance for the UN which, although established to ensure

"a peace which will afford to all nations the means of dwelling in peace in safety within their own boundaries",

could reach that goal only if the actions taken were not against the perceived interests of one or all of the five Great Powers. That was the justification for the right of veto power in the Security Council, and was intended to ensure such a peace and attain the ideal that,

"all of the nations of the world...must come to the abandonment of the use of force as the alternative in a world of over population and over production which can be corrected by the age old scourges of famine and war in a world organized for power and ruled by fear".<sup>116</sup>

There is a clear dichotomy between (a) the views of Rouvier and the Russians on the right of other States (for such rights include "self-preservation, independence, equality, respect and international commerce"<sup>117</sup>, all of which are enshrined within the UN Charter, and (b) the surrender of the right to ensure those rights by a State's own efforts rather than in a collectivity with the help of others but being subject to a central authority. Within an international relations system, however, the interpretation of rights is not a matter solely for unilateral decision whatever national interest demands. Nevertheless, a veto right exercised is an expression of national interest.

Stalin had something of this in mind when he demanded in the UN,

"absolute assertion of the rights of the 'Big Three' against all the bleating of the small powers that their rights were at risk" even if this "did not preclude participation in a concert of the 'Big Three' to protect the rights of the smaller but without that right to sit in judgement on the great".<sup>118</sup>

At the same time he insisted on "nothing less that unanimity among the greater powers" in the Security Council, and Gromyko in stating that

"such an organization could in no wise exist if a great power were to be denied the right to vote in any dispute irrespective of its role in that dispute"<sup>119</sup>

thought to preclude the legal possibility of any one power attaining (or exercising) world dominance.

Accordingly the veto power was established (by Art 27 of the Charter) and, all too frequently because of it, limitations on observance

of international law are highlighted through the disproportion between the evocative instrument and the real achievements accomplished by it. The reality, indeed, has been more in line with the Russian view expressed by A T Vishinsky of

"international tribunals organized on the basis of 'modern bourgeois international law' which he said is a law which "serves to veil the serfdom of weak nations to the dominant classes of powerful nations".<sup>120</sup>

But the exercise of sovereignty today is no longer unconstrained, although De Visscher wrote that,

"Between doctrine and fact there is a great and ever widening gulf....Thus, in the modern perspective of international relations and under the pressure of facts more than of theories, the new distribution of power developed....Born of a claim for equality and will for emancipation from common supremacy, modern sovereignties rest upon a negative idea...whilst the State seems to attract to itself the whole of public life, sovereignty at the same time claims recognition of the supreme force and asserts its independence of any law."<sup>121</sup>

It might then seem that the major stumbling block in the UN is not what the organization and the law are or were intended to ensure, but rather what the individual founding States intended. Sooner or later States may find it necessary to return to first principles as regards intention in the UN examining both attitudes and the machinery to see what inhibits fulfilment of the Principles and the major means to unhold them contemplated in Art VI of the Non Proliferation Treaty. Some reasons why such an examination may be necessary may emerge from what follows herein.

Law, international or municipal, is a normative concept prescribing conduct as it ought to be. The results to be expected from failure to conform to norms of behaviour are less clear especially where means for enforcing the norms are ineffectual. After 36 years of its operations the Secretary-General of the UN, Snr Perez de Cuellier, in presenting his Annual Report asked nations to reverse "their exceedingly dangerous course" and urged them "to render the UN more capable of carrying out its primary function" of preserving international peace and security. He said the central purpose of the UN is a "capacity to keep the peace and

to serve as a forum of negotiations", but the UN had been set aside or rebuffed. Frequently the Security Council could not act decisively to remove international conflict, but even its unanimous resolutions were "increasingly defied or ignored by those....strong enough to do so".<sup>122</sup>

The UN Charter from the beginning had presented the desirable - an ideal for international relations which it was hoped States would aim for - in defining the sole basis on which the lawful use of force might be permissible both in upholding the Charter and in self-defence. Had the original members of the UN,

"decided on making the organization a success, no power on earth could resist their combined might." But "if they (continue to) choose the path of dissention, the UN (is) predestined to degenerate into another system of power politics in disguise."<sup>123</sup>

Dissention amongst members has been disruptive: the acceptance of any place for war entails the armed forces and armaments of disruption. But, the place of war as defined by the Charter is not of itself an indicator of readiness for war - or appetite for it - whether on national or collective behalf as an arbiter in disputes. The Charter also draws attention to the resources of a State for dealing with disputes by peaceful means (Art 33). War, therefore, remains only one course among many.<sup>124</sup>

Experience, nevertheless, has shown that maintaining a place of war expressed by military and arms expenditures may seriously affect other resources and especially the national economy. This has been the experience not only of the USSR but also in arms races generally and particularly for Israel, Syria, Jordan and Egypt with dangerous repercussions for the Lebanon.

All resources of international politics tend to become increasingly sophisticated through improved communications systems and increasing inter-dependence between States accentuated in the extending embrace of regional and multi-national organizations. Power politics accordingly continues to be an active element in the realities of nationalism and

internationalism. This often leads to courses of action dictated by opportunity and views of historic mission rather than to courses of contemporary justice.<sup>125</sup> The UN has been provided with the means of containing this but only if the member-States will those means. Experience has so far indicated only a grudging and partisan attitude to many of the issues which have confronted the UN. In such attitudes failures of the League caused by the impotence of lack of support seem consistently to have been forgotten in the UN.

#### International Law and the United Nations.

The failures of the League of Nations were still remembered at the closing stages of the Second World War when the UN was founded with hopes that international support for international law and its administration (which the strong Constitution envisaged) would facilitate some central control of the proclivities for war which nations had always exhibited and the League had failed to curb.. Consideration of the nature of international law rather than debate about its validity, viability and varied acceptance would be more rewarding for the promoters of peace.

Hart's prophecy that,

"the law enforcement provisions of the Charter are likely to be paralysed by the veto and must be said to exist only on paper,"

needed less precipience in 1961 than in 1945 and it is still apt.<sup>126</sup> The organization of an effective world authority sustaining the global society of States is still remote and one reason seems to be clear. There is speculation rather than a clear and common view of what the universal common good ought now to be or will be in the future.<sup>127</sup> In consequence nations seek to be prepared for every contingency: contingencies foreseen in human experience have tended to become self-fulfilling prophecies eventuating at inconvenient times.

In the founding of the UN and drafting of its Charter there is point to Russell's assertion that,



"Ever since men became capable of free speculation, their actions, in innumerable important respects, have depended upon their theories as to the world and human life, as to what is good and what is evil...To understand an age or a nation we must understand its philosophy...There is here a reciprocal causation: the circumstances of men's lives do much to determine their philosophy, but, conversely, their philosophy does much to determine their circumstances".<sup>128</sup>

The statement is also true of the evolution and acceptance of international law related to the place which war should at any time have in society. Quincy Wright for instance thought it the duty of states to co-operate for social, cultural and economic welfare. He conceived of this as a moral rather than legal duty to be complied with whatever the consequences and their effect on the need for a place of war in national priorities.<sup>129</sup> In fact the Charter is clear and the member-States should be assumed to have accepted its provisions and the duties imposed by them on the basis that the duties and the membership are voluntary acts of sovereignty. This has brought the duty into the legal consequences of membership and those consequences are no longer merely moral.

Despite the voluntary assumption of the obligations and the fact that Art 2.6 of the Charter extends its obligations to States which are not members, there has been a continuing ineffectiveness in the operation of the Charter. Much of the ineffectiveness may have been due to the veto powers of the permanent members of the Security Council, but a lack of support for the ideals has also been evident, national interests being placed before international good. Of the many examples, the nine years of Russian military intervention in Afghanistan can be cited. Only when the USSR was ready to withdraw its armed forces in its own interests was the UN negotiator given proper support. The emphasis on national interest which is usually put before the strict obligations of the Charter ensures constant changes of attitude (and even of fashion) and in particular cases renders more remote the impartial treatment which member-States ought to give to the world community.

Is the UN a half-way house between a system of individual States and one of world government as regards peace and war? If so it should be able to exert influence on every aspect of inter-State relationships. International law on the other hand places obligations and duties on individual States, and only in the immediate circumstances likely to lead to war are any such obligations placed on the world community collectively by the UN Charter. There is need, therefore, for simplicity as well as authority in the administration in the UN. In practice this is not as evident in the deliberations and actions of the UN as it appeared in the simple statement in the Charter's Preamble of ideals and how they are to be attained through expressed Purposes, Principles and methodology of action.

Proliferation of non-binding resolutions, regulations and sources of regulation lead to uncertainty in interpretation and action. An attitude of disrespect leading to avoidance can be engendered such as happens with revenue and taxation law.<sup>130</sup> There is need for care that the bulk of international law intended to assuage contemporary problems does not work to law's disadvantage. Problems include regulation of some effects of the increasing interdependence of states, the growth of institutions operating within various codes of international law, and some arise from the desire of smaller states to limit the influence of larger or more powerful states. Care is also required to ensure that areas in which law and enforcement are particularly necessary (as in matters of arms control and arms transfers) have strong institutions of global authority rather than having to rely on inter-State agreements in the absence of global policies. Sanctions resolved by the UN still fall to be policed by national governments.

The potential for armed conflict still imposes on member States a practical choice between ensuring means for self-help or reliance on the provisions of the Charter. Traditions of sovereign authority with bias toward national interest remain antagonistic toward a central authority.

National interest in survival will continue to view the danger of surprise attack with modern weapons as being unrelieved in the present time lags occasioned by the deliberations and delays of collective action. Since 1945 wars of aggression have been fought on almost Second World War scales of weaponry and intensity even if limited geographically. There are many examples: Korea, Vietnam, the Middle East, South East Asia, Argentina, and they include clear cases of aggression. Instances of pre-emption which sought justification as self-defence were seen in Israel's Six Day War and in its 1982 airstrike on an alleged Iraqi nuclear plant.

A definition of 'aggression' was finally agreed in the UN in 1974 and interpretations of it have been used to justify attacks such as the Israeli airstrike mentioned which was argued to come within Art 3 (b) of the definition.<sup>131</sup> The definition, however, has attracted criticism: Paskins and Dockrill said that it,

"lays down neither a workable content nor a workable procedure whereby the justice of particular causes can be determined".<sup>132</sup>

In some cases the remoteness of cause and immediacy of operations clearly indicate the aggressor to the unbiased, but generally neither the provisions of the Charter nor the definition of aggression has had any prohibitory effect. Belligerents continue to profess the necessity for self-help as they do the justice of their cause. Pre-emptors profess their situation demanded the necessity for self-defence. But self-help actions are mainly dictated by the absence of belief in the preventative powers of the UN or lack of confidence in the speed of decision and deployment of collective security measures by the UN. A lack of confidence that the attacker's case was likely to find sympathy (or justice) may also affect a State's action.

Failures by the UN to inspire confidence in its ability to prevent or confine potential war situations have not arisen from any failure of international legal provisions. Rather they have arisen from failures to honour the Charter. Exercise of veto power in the Security Council has

promoted disbelief in its ability either to act quickly or without bias, for the involvement or interest of a permanent member in the instant dispute has been obvious in many cases.

Sometimes there has been a lack of interest or an element of neutrality on the part of some States. This seemed obvious during Vietnamese expansionism and in the Iraq-Iran conflict, evincing that inter-World War philosophy,

"of minding your own business (which) has not yet been improved upon as a way of peace, sanity and tolerable life".<sup>133</sup>

That philosophy - the negation of ideals of collective action - has been UN experience since the Korean war despite the part it played in the failure of the League of Nations.

There are also underlying failures, for war has not been eliminated or weapons universally controlled, and weapons show little sign of reaching finality in indiscriminating and destructive potential or technological creativity so that it has become impossible in many military targets to draw a distinction between armed forces and civilian populations.<sup>134</sup> It is not surprising, therefore, that whilst power politics continued to vie with desire for international order the UN task of eliminating armed conflicts would invite failures as the Kellogg-Briand Pact has continued to do (if it is still in force as the Nuremberg Tribunal ruled<sup>135</sup> and Oppenheim supports). Of the Tribunal's ruling Oppenheim said that,

"Being permanent in its nature....the Pact.... must be regarded as continuing in being and is one of the corner-stones of the international legal system".<sup>136</sup>

But today reference to the Pact seems only to broaden the gulf between renunciation and elimination emphasising at the same time failures of the UN in the face of national interest in approaches to problems of defence and foreign policy. Michael Jobert, when Foreign Minister of France in 1972 was of the opinion that,

"Every Government, this like any other, is confronted with the same necessities, the same obstacles, and driven to the same solutions as it defines and implements its policies. In my eyes, a specific foreign policy for this Government does not exist, and no other Government has had one."<sup>137</sup>

The same factor underlies both reservations: they stem from the fact that events dictate despite projected national policies and precedents which, if confined within a continuing national outlook, must increasingly take note of alliance, federation, and international institutional outlook. International institutions usually result from ideals and are intended to translate ideals into working policies. In the case of the UN the design sought the ideal but the reality is reflected in the situations debated and in the attitudes taken to the UN by national representatives. For example, at the time of the Yom Kippur war in 1973 President Nixon referred to the regional interests of the EEC and to American global interests. His aim was to stop Israel from invading Egypt for fear that Russia might intervene and direct confrontation between the two super powers result. But the US attitude was not anti-Israel and the US remained its principal aid and arms supplier during and after the conflict.

Because repercussions from one military action by one State will extend to other States the recognition of potential effects and the safeguarding of neutral States from potential consequences justifies the concern and intervention which international law now reserves for the UN. This modern prescription reflected a change of attitude from the uninhibited use of force which States had assumed as sovereign right - (subject theoretically to the moral limitations of just war theory) - and without much regard for third party States. From this change of attitude in 1919 the League was established, to be superseded by the UN in 1945 with the important difference that whereas the League's writ ran only to its voluntary membership, in the case of the UN,

"The organization shall ensure that States which are not members of the United Nations act in accordance with those principles as far as may be necessary for the maintenance of international peace and security".<sup>138</sup>

The constitution of the UN in its Charter detailed the machinery by which it would operate and by which its essential tasks could be performed given a basic standard of co-operation by the member States.

Strictures on the operations of the UN often attribute its failures to the use of the veto in the Security Council as though that alone was the cause of the failures. It is true that the machinery of the UN, as provided for by the Charter, is hampered in use by the veto, but as stated above the membership generally often compounds the failure of the Security Council by remaining on the sidelines during inter-State war (except for the supply and re-supply of munitions of war). The Iraq-Iran war is only one example. The practical experience of intervention in Korea (perhaps regarded by some as civil war) may be remembered, but ostensible neutrality in international conflicts may be long-term and intentional, even if altogether without reference to either burden sharing or some perceived danger of superpower confrontation. This ought to be remembered in reviewing the machinery of the UN.

The Machinery and Institutional Authority of the UN.

To give effect to the Principles and Purposes of the UN which the peoples of the United Nations determined to accomplish there was instituted,

- (a) A Security Council of fifteen members with the "primary responsibility for the maintenance of international peace and security".<sup>139</sup>,
- (b) A General Assembly of all the members with power to make recommendation either to the Security Council or to the membership at large as to any matters brought before it, and
- (c) A Secretariat headed by the Secretary-General whose duties include bringing to the attention of the Security Council "any matter which in his opinion may threaten the maintenance of international peace and security".<sup>140</sup>

The sovereign equality of members is dictated by Art 2.1 but practical equality may be affected by,

- (i) concepts of representative democracy (which) require a special cohesion unattainable in many developing countries".<sup>141</sup>, and
- (ii) the Statement of the Four Sponsoring Powers on Voting Procedure in the Security Council which provides an effective veto for the permanent members of the Council.<sup>142</sup>

The truth of (i) may be inferred from the groupings of States dominated by more powerful States which has been evident in voting patterns in the General Assembly. The effect of (ii) has been as foreseen by Hart<sup>143</sup>, for although the Security Council ex proprio motu or by reference of matters to it has procedural authority as the primary organ of the UN, cases where the veto has stultified action have multiplied. In some instances it has been necessary for the General Assembly to exercise its more limited powers in the face of inaction in the Security Council. It would be exaggeration, however, to suggest that this was the main cause of weakness. A resolution or direction of the Security Council initiating action is only a first step; it depends on member States and their resources and finances to implement the action so initiated. It is, nevertheless, a major cause which, unfortunately and by definition, cannot be rectified by the Secretary-General under Art 99.

The provision of UN machinery is no index of its use. UN resolutions naming specific States are liable to be disregarded. This is not new. Referring to the effect of the Security Council Brian Urquhart said,

"...there have been occasions when the Security Council was able, under the pressure of events, to agree on important matters...its actions on the Middle East in 1948. There are a number of important issues for which the Council has prescribed basic guidelines - Kashmir, Lebanon in 1958, the Congo in July 1960, Cyprus in 1964, the India-Pakistan War of 1965. Resolution 242 on the Middle East problem in 1967, Rhodesia and Sanctions, the 1973 war in the Middle East and the subsequent arrangements, Namibia, South Lebanon in 1978, apartheid, and...international terrorism...in a majority of cases the Council's decisions were, or are being, ignored with impunity by one or other of the parties, and the Council can do little or nothing about it. This is not to say the decisions were useless. On the contrary they are important international guidelines and objectives and install conflict control mechanisms. But the teeth are largely missing".<sup>144</sup>

The statement makes clear the essence of the UN's enforcement problem: lack of international will restricting UN action to what the member-States will allow, with some of the difficulty dictated by negative action in the Security Council. For example, following Russia's

intervention in Afghanistan (1979) the Security Council on 9 January 1980 resolved that,

"Taking into account the lack of unanimity of its permanent members at the 2190th Meeting has prevented it from exercising its primary responsibility for the maintenance of international peace and security, decides to call an emergency meeting of the General Assembly to examine the question". (SC Res 462).

On 14 January the General Assembly called for

"the immediate unconditional and total withdrawal of all foreign troops from Afghanistan". (GA Res ES 6/2).

Further General Assembly Resolutions followed, but the Russian withdrawal in 1989 was unilateral and under compulsion of events rather than as a result of UN action.

Some other examples are:

Lebanon: Conflict in 1978 and 1982 - still continuing - between Israel, the PLO and Syria led to the setting up of UNIFIL (SC Resolutions 425 and 426 of 1978). Res 425 called for Israel to respect Lebanon's territorial integrity and political independence, to cease military action, and to withdraw. UNIFIL after eight years, which included the arrival and departure of a multi-national force not under the UN, on occasion successfully prevented or inhibited renewed fighting but that would revive following any withdrawal of UNIFIL. Israel still occupies unlawfully a part of South Lebanon, and its

"concerns for UNIFIL, the UN or for relations with countries contributing troops are clearly less important than its national interests and objectives in Lebanon".<sup>145</sup>

As time goes on will continued occupation eventually be regarded and recognized as conquest despite the UN Resolutions?

Iran/Iraq. Security Council Resolution 497 on 28 September 1980 called on Iraq and Iran to refrain immediately from any further use of force and settle their dispute by peaceful means. But the war continued until pressure of events made a cease fire possible in 1989.

South East Asia. The situation here has continued to be dominated by Vietnam successively with France, the US, and with neighbouring States



including China, Cambodia and Thailand. There has been consistent failure to comply with UN Resolutions. For example GA Res 35/6 (1980) regarding Vietnam's invasion of Kampuchea was followed by invasion of Thai territory. Only in 1988 were troops withdrawn from Laos. Some withdrawal from Kampuchea is reported in 1989 as part of Vietnam's own policies leaving open the possibility of civil war by the re-emergence of the Khmer Rouge.

Indian Ocean Area. In 1971 the idea of an Indian Ocean Zone of Peace was adopted at the UN (Res 2832), but the Resolution has yet to be implemented.

Examples continue to show that the enforcement of international law in the present system is likely to be effected more through world opinion and action by super and other powers outside the UN than by collective action within it in conformity with or directly inspired by international law. If disregard for UN Resolutions is obdurate in certain members, success and failure should be considered in perspective for even the long-running Namibia problem now seems near to solution. It is to be expected that successes will be soon forgotten in continuing disquiet engendered by questions and disagreements remaining unresolved. Kashmir remains a case in point.

In the meantime a problem of reality versus legitimacy affecting civil war situations and post-war settlements arises regarding the customary law of State recognition. Recognition is a matter for each State's discretion by whatever standard of "sufficient suitability" it may apply. Many States, including the United Kingdom, do not differentiate substantially today between the two customary concepts, for recognition de facto is reality and sooner or later may acquire the status of recognition de jure. This was a workable method of dealing with the matter before questions of recognition by, and admission to membership of, the UN arose. For different reasons the cases of China and Taiwan and Israel and Arab States are relevant.<sup>146</sup>

The matter of China and Taiwan is not definitively settled as far as China is concerned even if many States have recognized Taiwan. The continued refusal of recognition of Israel by Arab States, (if no longer by the PLO), continues to raise questions of legitimacy as far as the Arab States are concerned notwithstanding the obligations of the UN Charter and the fact of General Assembly Resolution 242 of 1967. The situation may indicate weakness on the part of the UN standing as it does between UN recognition of Israel and customary law. The UN position may not indicate a progressive attitude to support for self-proclaimed new States, although the question of any possible admission to membership of the PLO must constitute recognition of a new State of Palestine. Whilst individual states can adjust their relationships with others according to how they recognize each other, their material relations within the UN and its voting systems will need clarification if State discretion is again to be a matter for majority voting in the UN. Guidelines as to "sufficient suitability" will also be required. In practice, however, and if the Middle East situation is a precedent, differences in attitude to the recognition of a State may lead to war, for if passive non-recognition is probably peaceable active refusal to recognize may provoke active response, for active non-recognition may be the expression of such animosity that war may be inevitable as was the case in Vietnam and Korea where the division of each country into two separate States was not recognized by the North.

#### United Nations 'Law'.

'Law and order' may be a term without material content if considered only to infer that order is dependent upon law, or that law necessarily ensures order. This is particularly true in the operation of international relationships where if law is prescribed but not enforced disorder is likely, although in most international inter-relations order does not essentially depend on legal definition. What international law

does is to make clear what is not legitimate in the inter-actions of States.

In relation to the maintenance of peace between States the UN Charter amplifies existing international law and formalizes procedures having the object of ensuring observance of its provision by means of:

- (i) a surveillance system intended to make all States (and not merely the disputants) have concern with potential or actual conflict or interventions by one State in the sovereignty of another. (Arts 2, 11 and 35).
- (ii) the exercise of an internationally authorized power to intervene on behalf of the international community in inter-States disputes to uphold international peace and security, and, if necessary, to take punitive measures to that end. (Arts 25, 37, 41 and 42).
- (iii) the organization and deployment of armed force in implementation of its decisions. (Arts 43, 45 and 48).
- (iv) an ability to make recommendation governing disarmament and the regulation of armaments; international co-operation in all aspect of societal relations; and the development of international law. (Arts 11 and 13).

The system of law enforcement outlined in the UN Charter has proved powerless to maintain the machinery necessary to assure the citizens' and States' security, or a general atmosphere of law and order, whenever the Charter's provisions have not been followed. The co-operation of the member-States is fundamental to the enforcement of international law at present, requiring a moral climate not merely a passive acknowledgement which ignores or challenges rather than actively observes the Charter.

Even morality is not enough for an ethical basis is essential in the circumstances that the merits of any dispute must be debated at the UN before the powers of the Charter can be invoked. In the Security Council decisions depend on fifteen members: the membership as a whole may bring their views and interests into the decision-making process in the General Assembly. Debate in the UN cannot resemble judicial proceedings, and it would be unreasonable to believe it could in any case approximate to municipal decision-making whether that decision-making is through one-party government, inter-party agreement, or by majority vote.

But it is not the debate itself which is pertinent here, it is the application of lawful procedures to the decisions arrived at.

Systems of law are accepted generally within moral and ethical bounds because it is recognized that societies as conceived today cannot exist without them. That a similar basic philosophy is generally accepted also in international relations is evident from subscription to the UN Charter which created one system by which States can live and do business together. It is imposition and enforcement of the 'legislation' that gives rise to problems. Even the legislation can be mystifying to the people, if understandable to governments. An analogy of remoteness and apparently undemocratic governance in the UN and the EEC may be observed in the nomination of representatives to the former and commissioners to the latter. A similar perception of remoteness and authoritarian attitude in international institutions leads to public disinterestedness in the proceedings of such institutions. It is noteworthy that States are rarely pushed by popular demand into the national positions taken at the UN except sometimes when the State's own interests are the instant case.

'Peaceful co-existence' and 'friendly relations', however, might pre-suppose for some people a system of inter-State law to deal at least with day-to-day happenings which impinge on the public law. A comprehensive system as is envisaged by Cap VII of the UN Charter might be regarded as being in place making it difficult to understand the fact that in reality States are more often than not left with self-restraint, self-defence and balance of power policies.

Much blame for this might be ascribed to the antecedents of the law and the States. Universal homogeneity is unlikely and whereas one school avers that there is no international law, another holds that three different systems exist. The three are classified as Western or European; Socialist; and a third which does not follow either the first or second and may relate to Latin-American, African or other so-called

'developing' States.<sup>147</sup> If there are such separate systems, the UN Charter - if not entirely Western - falls between all three.

In interpretation as in debate the USSR has exhibited one viewpoint; the developing States have tended to follow - not necessarily dogmatically - the views of their 'patrons'; and the West, which more than the others influenced the form of the Charter, does not follow it slavishly. Politicians of all shades of opinion, however, have accepted the Charter but often as a theoretical guide book while adopting contrary practices, whether wholly from different views of international law or different interpretations of the Charter. A lack of unanimity of viewpoint does seem to have been demonstrated by the attempts made to clarify (or obfuscate?) some provisions of the Charter when meeting real situations and in elaborate Resolutions seeking to expand, explain, and provide doctrines inclusive of the three viewpoints but based on the already clear provisions of the Charter.

Despite differing attitudes, together with the humanitarian laws of war and the Nuremberg Tribunal Statute the Charter remains international law and, perhaps, the definitive jurisprudential law of international relations affecting war and peace. The Statute and the Charter are statements about the legality of war, but the Charter also justifies a place for war. A contrary expression that war has been illegal ab initio would confound the earlier institutional writers. The terms of the Charter nevertheless relegate the place of war to self-defence and as ordered by the Security Council. In reality the member States of the UN have not been prepared so far to carry this change to its logical conclusion following the parties to the Kellogg-Briand Pact who also failed to carry into practice their renunciation of war as an instrument of national policy.

Events since 1945 show the feeling has not been finally abandoned that a State's own national interests ought if necessary to be supported by 'might is right' policies.<sup>148</sup> Events have also shown that States are

not yet prepared to leave 'just war' as a matter for the UN and treat aggressive war as a crime to be dealt with by collective action. Thus, UN 'law' and UN practice have on occasion parted company, and a balance between declaration, intention and action has become obvious in the actions of States and in the consequential failures of the Security Council even when faced by defiant, as well as contrary, actions by some members. But a continuing place for war in the face of non-enforcement of international law remains patent.

Whatever may be said of pluralist views on law there are aspects of international law and relations which have been common to all societies. No society has considered that its vital interests should be left undefended or unprotected, and if defence entailed the use of force or of pre-emptive operations these were considered to be within legal bounds. There were refinements it is true: declaration of war, ransom of prisoners, safety of non-belligerents, and so on. But all subscribed to an international law of war as far as it went among the civilised States. That was a first element of sovereignty and is what is disputed in the essence of 'UN law'. The continuance of that subscription may be at the root of indecision in the Security Council and rhetoric-without-action from the General Assembly.

It has become customary to blame the permanent members of the Security Council for its paralysis, alleging that the use of the veto makes effective working of the Council impossible in a continuing bi-polarity, but it is not impossible to abandon last ditch defences even in a collectivity.<sup>149</sup> A power of veto (not enshrined in the Treaty of Rome) was normally accepted in the EEC but steps toward majority voting have now prevailed.

It may not be possible in the Security Council to abolish the veto for it would necessitate agreement to amend Art 27 of the UN Charter.<sup>150</sup> There is a procedure under Cap XVIII but difficulty can be anticipated for, if the US and USSR could agree, China might not, and France and

Britain would not lightly surrender the Great Power label which veto power gives. There is a difference, however, between deliberate dissent and the normal working of the international system.

Because treaties of wide general consequence, embellished with normative principles with which all can agree often avoid their logical conclusions, precept and practice in international relations are sometimes at arms length. Those who formulate the wording of such agreements hope to translate the political ideals in a way which will effect the desired consequences by means of principles canalised within unbreakable procedural programmes. The politician as idealist is rarely the same as the politician as political actor. It is relatively easy, therefore, for politicians to complain that principles are sacrificed for procedures by international bureaucrats, and for international bureaucrats to complain that workable procedures are subordinated to political ends. In fact, the difference is likely to be that whilst the international bureaucrats may be working - in spite of their respective and varied nationalities - for the international institution and toward the consequences of the treaty provision, the representatives of the member States, in their role, may not easily depart from the brief they bring to the UN and which exploits or defends their national interests.

In the ICJ and the EEC jurists and commissioners cannot entirely shed their national background and prejudices, but they are more concerned with making international co-operation work than with principles of international co-operation. In that concern they may comprehend a simplification of three systems on logical grounds:

1. Euro-American expressing capitalist ideas and the right to defend them;
2. Russian embracing communism and the right to defend it;
3. Third World and right to aid from 'wealthier' states not only as quid pro quo for supporting a patron in the UN but as a genuine need for development. Whilst common contents are to be seen in the rules a

right to defend could not be condoned at the same time as a right to supplant or propagate worldwide under a cloak of international co-operation.

A system of international law will be administered within the conflicting ideologies of the administrators reflecting traditional and continuing causes of war, and the political circumstances and organization under which the administrators have been influenced. Also reflected are attitudes towards the acceptability in national life of party politics as opposed to party government whether military or civil. These differing attitudes are carried by national representatives and delegates (as well as by the administrators) into the international institutions they serve.

Conflicts within the administration, however, often stem from political rather than legal differences, but such conflicts themselves may be, or become, breaches of international law. The dogmatic internationalist must be scrutinized lest he consider the international institution only for itself, thus neglecting concern for its consequences.

From their own interests States may be right to resist binding agreements on a wide scale. Increasing sources of regulation, inevitably proliferating through the interdependence of modern economics and communications, impose stresses on domestic government which are not always favourable to State and citizen everywhere.<sup>151</sup> Duplication and re-duplication of layers of government and administration impose financial burdens even where they do not obfuscate the boundary between law and administration. Arangio-Ruiz pointed to,

- (i) "confusion between international relations and international law",
- (ii) an "error brought about by the theory of international law as a 'primitive' stage of the law of mankind (in lieu of a very sophisticated stage of private law of co-existence among sovereign States)", and



- (iii) an "arbitrary conception of international law as a kind of constitutional or public law of mankind" which leads to transposition "into international law (of) normative elements which belong to the national public law of given States or groups of States and only affect international law...through the internationally relevant conduct of the State or States concerned".<sup>152</sup>

This argument seems to deal with a comprehensive body of law as though directed toward a complete system as provided by municipal law, or by the aggregation between federal law and state laws of the respective federated states. That, however, is not what international law amounts to.

#### UN Resolutions, Declarations and Treaties.

In municipal systems of law statute law is elaborated and clarified through judicial interpretation and statutory or other subsidiary instruments all of which are of binding nature. The UN Charter is similarly elaborated and clarified but by Declarations and Resolutions of a general nature which, however, have no similar binding qualities. Opinions of the ICJ given at the request of the Security Council or General Assembly on any legal question are advisory (Art 96)<sup>153</sup>. Binding agreements emanating from the UN take the form of treaties and conventions.

Proliferation in federal and municipal law-making is an index of governmental concern with a wide and increasing number of aspects of the people's lives. In everyday terms the citizen as an individual is not in a position to resist this proliferation for all modern political parties have the same instinct for legislating.

There is not the same degree of proliferation of the basic laws of war. This may reflect a reluctance by States to accept interferences with their sovereignty, and may extend to States' attitudes to accession to treaties which if not overtly opposed may still be treated with some measure of passivity.

Within the UN there is need to avoid confusion between international law and international relations and this may be effected by

differentiating between treaties on one hand and resolutions and declarations on the other. If this is accepted there will be no great necessity to examine here the legal effectiveness of the General Assembly Resolutions. In any case, this has been done by others including Arangio-Ruiz, Gross, McWhinney, Parry, Friedman and Sorensen.<sup>154</sup> Lauterpacht described the original concept of the functions of the General Assembly as,

"essentially those of initiative, of discussion, of study, and of recommendation" but "it is clear that the Assembly is not invested with legislative powers".<sup>155</sup>

That remains the case but Lauterpacht did not foresee that the Assembly would be required to give decisions on such issues as Kashmir, Cyprus or Lebanon. It is unlikely too that he visualized the incidence of resolution-making which would engage the Assembly. For example,

"most of the 45 resolutions on arms control by the General Assembly" (from 1946 to 1982) "have made little impact on the course of negotiations".<sup>156</sup>

This alone makes it necessary here to limit discussion to only the last of three kinds of resolutions, namely those of universal and general interest. Those of administrative effect within the UN and those related to specific and individual issues, including issues of disputes between States are considered elsewhere herein. In the context of the binding nature of resolutions the administrative is taken as a direction to the Secretariat. The individual issue involves a complex procedural cycle of events to acquire any effective quality.

From the detailed arguments of the authors cited above it seems that general and universal resolutions must be regarded as declarations of principles which, by being generally adhered to, could form a basis of international customary law. There is no unanimity of view for,

"Whether a resolution by a particular organ of the United Nations is to be regarded as law is...today widely regarded as a function of many variables, including the policy content of the resolution, the compatibility of that content with existing customary international law, the numbers and characteristics of the supporters and opposers of the resolution, the expectations stated about the legal character of the resolution by its supporters, and so on".<sup>157</sup>

To subject a resolution to such an inquiry would seem to render its wording almost irrelevant. Parry made the point differently,

"when it comes to assessing proceedings as a source of international law there is no need to attempt to force the whole operation into the shape of a function of a treaty, or even to ponder particularly upon the 'binding force' of resolutions of the General Assembly or of any other international body. It falls very adequately into place as part of the practice of the States. Sometimes that practice results in...treaties ...Sometimes, more often indeed, it does not, but produces political agreements, still intended to be binding but lacking that strict legal content, or simply expressions of view".<sup>158</sup>

It is in the nature of Resolutions and Declarations that supporters may feel some binding quality should be inherent in them whilst opposers reject any legal content. Such agreements do seek to provide for what ought to be done, but as Dr Kissinger observed, opponents tend to show

"the weakness of any position by comparing it with some ideal world, but who (feel) no similar compulsion to analyse what would happen in the absence of an agreement".<sup>159</sup>

Similar experience can be garnered from UN debates but there is equally opportunity to correct utopian views.

A tendency for general and universal treaties to emerge from initiative in the UN does not foreclose the promotion of treaty negotiation outside the UN as happened with the Treaty of Antarctica initiated by General Eisenhower.<sup>160</sup> But Art 13 of the UN Charter should not be overlooked in the context of lawmaking, for that is a process only concluded by the formal passing of the statute or signature and accession to the convention. Continued and determined pressure applied in the UN may be rewarded as in the development of the Outer Space Treaty which was preceded by General Assembly Resolutions 1721(XVI), 1884(XVII), 1962(XVIII) and 2222(XXI).<sup>161</sup> Speed in the development of a treaty however, may be crucial to the legality of a weapon at any time and may affect military operations just as the use of cyanide and mustard agents by Iraq to contain Iranian 'human wave' attacks, and the threat to use chemical missiles against Iranian cities, affected the war between Iraq and Iran.

Speed in the formulation and completion of general declarations and treaties depends on the immediate applicability of the provisions. The Outer Space Treaty could immediately directly affect only a few technologically advanced States. Where all States are likely to be affected from the time the instrument comes into force - as with the 40-Nation Committee on Disarmament's proposals for disarmament, arms control and chemical weapons - progress is likely to be slower. Disarmament is a contentious and often emotional subject and speed of progress is not the most important aspect. Speed, however, should not be allowed to obscure the scope of agreements which have been reached on major general issues by way of 'formal and solemn' Declarations.<sup>162</sup>

That member-States of the UN are concerned to amplify the provisions of the Charter is implicit in the varied subjects on which Declarations have been agreed. From the Charter in association with the Declarations can be seen what the States intend, and sometimes disregard, as to the legal place of war. The re-statement of legal positions in Declarations is important in reminding member States that they are expected to abide by the terms which usually express what they undertook on membership for they are not the voluntary codes of conduct familiar in municipal law but steps leading to customary law. The variety of subjects may be seen from the random selection of General Assembly Declarations which follows:

- |               |  |
|---------------|--|
| 375 (IV).     | On the Rights and Duties of States.  |
| 1614 (XV).    | On the Granting of Independence to Colonial Countries and Peoples.   |
| 1653 (XVI).   | On the Prohibition of the use of Nuclear and Thermo-Nuclear Weapons.   |
| 1962 (XVIII). | On Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.                              |
| 1904 (XVIII). | On the Elimination of all forms of Racial Distinction.   |
| 1963 (XVIII). | On International Co-operation in the Peaceful Use of Outer Space.  |
| 2131 (XX).    | On Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. |

- 2625 (XXV). On Friendly Relations and the System of the Sources of International Law.
- 2750 (XXV). On Reservation Exclusively for Peaceful Purposes of the Seabed and the Ocean Floor, and the Subsoil thereof, underlying the High Seas, beyond the limit of present National Jurisdiction and the Use of their Resources in the Interests of Mankind, and convening a Conference on the Law of the Sea.
- 3201 (S-VI). On the Establishment of a New International Economic Order.
- 3281 (XXIX). Charter of Economic Rights and Duties of States.
- 31/91 (14.12.76). On Non-Intervention in the Internal Affairs of States.

Apart from such General Declarations the Assembly has approved Declarations and Resolutions relating to specific disputes, to matters of peacekeeping, and to the restitution of territory. (For example, there were some twenty Resolutions on Rhodesia (Zimbabwe) between 1962 and 1979). Some Declarations, 2750 (XXV) for instance, have been the basis of subsequent conventions.

The Declaration on Friendly Relations (2625 (XXV)) clarifies and expands the Charter provisions intended to promote a system of international relations in which the elimination of disputes is a major aim and the peaceful settlement of disputes, (should any arise under such a system) the norm. The Declaration merits more than a glance at the title. The principles enumerated are:

- (a) refraining from threat or use of force.
- (b) peaceful settlement of disputes and safeguarding international peace and security.
- (c) non-interference with other States' domestic affairs.
- (d) co-operation in accordance with the Charter.
- (e) equal rights and self-determination.
- (f) sovereign equality.
- (g) fulfilment in good faith of the obligations of the Charter.

These principles are contained in the Charter, but the Declaration avers that "The principles of the Charter which are embodied .... constitute basic principles of international law".<sup>163</sup> That alone should be sufficient, but the final exhortation,

"consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of strict observance of these principles",

is expressive of a voluntary organization and a reluctance to express law as law. In consequence some commentators think that consensus not consent is the binding factor, so that unanimity would have greater legislative effect than a mere majority, and that those who voted in favour would be more closely bound. Such a reaction is tantamount to saying that law is what one voted for and what one voted against is not law. Alternatively, does it reflect an obfuscation between the mandatory provisions of the Charter and their detailed application - or that it has less relevance to legislation than to potential customary law?

There are problems about strict observance and enforcement of both the principles and the Declaration. Principles of general application must necessarily be adapted to circumstances where there is neither a universal governing authority nor a guarantee of universal observance. Adaptation to circumstances may prove to be uneven in practice. If so, actions by States may not automatically follow what is 'right' according to principles but rather what is 'right' (best) in the circumstances. For example it was alleged that the African National Congress had bases and received encouragement in States adjoining South African territory. The Palestine Liberation Organization had similar extra-territorial enclaves. Unfriendly incursions by armed forces into South African and Israeli territory were mounted from such bases. Where pre-emptive, inhibitory or retaliatory actions were carried out by South African or Israeli forces it was claimed that they were counter-actions within Art 51 of the UN Charter against acts which had infringed Art 2.4. States that harbour foreign forces or terrorist groups relying on lack of mandatory action on the part of the UN following condemnatory Resolutions must be prepared for unilateral opposition.

Some States have shown disinclination to submit to the attentions of an international institution or force set up by the UN to observe or enforce action resolved by the UN. Equally action in the UN regarding

such a point of conflict as external intervention may be weak. For example,

"...the Security Council has not been concerned with UNIFIL problems in any consistent way but only intermittently in connection with renewals of the mandate. No attempts have been made to re-consider the mandate in the light of changed circumstances. The permanent members of the Security Council have from the point of view of UNIFIL failed to follow up the original decision to establish the Force with political pressure on the parties concerned to comply with the mandate, particularly Israel with regard to military withdrawal".<sup>164</sup>

Failure to enforce a Resolution in the face of refusal or neglect by a named State to implement it would, on case by case examination, weaken the hope that Declarations may develop to form a basis of customary law.

It would follow, as Arangio-Ruiz suggests, that

"Except perhaps in the presence of very special circumstances, and notably when it is a matter of asserting a law-making role of the Assembly as presently constituted, the member States are actually opposed ... to any further step in the organization of their relations, let alone the organization of the world or even of the so-called 'society of States'".<sup>165</sup>

As proof he points to the record of the UN and particularly "the purely normative content" of the Friendly Relations Declaration. He compares the language of the Draft Declaration on Rights and Duties of States (375 (IV)) with experience and concludes that,

"Nationalism and preservation of sovereignty are the main concern, except when vague statements about 'common heritage' are made with regard to Outer Space or the Seafloor and Subsoil".<sup>166</sup>

Ruiz's conclusions may characterise attitudes adverse to authoritarian interpretations of the Charter and of Declarations intended to clarify certain of its provisions. The rejection of the idea that the International Court of Justice should have interpretative power regarding the Charter supports such a notion.<sup>167</sup> If members believe they individually retain a right to interpret the Charter in their own way, experience has shown that they may have to have regard for the view of one or other of the major powers, but outside the UN. In any case a State's UN voting record does not of itself reflect its attitude to a war, or to a dispute. Similarly, voting attitude especially on general issues does not necessarily reflect a State's actions, particularly where

these are immediately and directly affected by a general Resolution. There is - or may be - a difference between attitude to what it is understood should be, and what will be in the State's own interest. It is the practice of States not their voting record which forms the basis of any customary law.

Voting and acting inconsistently are not the prerogative of the smaller States. Both the US and the USSR have acted outside the spirit of the Charter and sometimes not in accord with the letter of Resolutions. Consider the USSR's actions in Eastern Europe, Berlin and Afghanistan; the US in Grenada, the Dominican Republic, Central America and Lebanon; and their support for others in like case such as by the US for Israel and the USSR for Vietnam. Further, whereas the USSR had an illiberal attitude to the ICJ, the US has tended recently in that direction. The two cases of Nicaragua v US (Jurisdiction) ((1984) 24 ILM 59) and Nicaragua v US (Merits) ((1986) 25 ILM 1023) resulted in American termination of its Declaration on Compulsory Jurisdiction under Art 36 (2) of the Statute of the ICJ.<sup>168</sup>

As between the US and the USSR (and their allies in NATO and the WPO) a combination of nuclear threat, an instinct for the long-term necessity for the UN and the Charter, and economic realities, has developed from the times of confrontations of Berlin, Korea and Cuba to containment, detente, and now to glasnost and perestroika. In the process some regional pacts such as CENTO, SEATO, Baghdad, and now - possibly - ANZUS, have not survived. No doubt covert and opposed policies continue, but it might seem that attitudes to, rather than appeals to, international law may have a more important influence on the place of war. But the incidence of war makes it apparent that the effect of the Charter on the place for war has been very mixed. Art 51 has provided a justification for both offensive and defensive operations showing that universal ideals continue to be relegated in favour of national interests as Ruiz suggested.



Voting attitudes in the UN are affected by a State's foreign policy interests, but the use of force is exceptional for most States. Most disputes which have led to conflict have related to political and geographical areas in which most States had no immediate and direct interest. Their co-operation otherwise in the UN might have been different. British Defence Statements have often been marked by correlation between national interest and commitments with scanty emphasis on what might be required for the UN. Declining interest in the 'East of Suez' debate of 1966 was influenced by a coming to terms with weakening imperium.<sup>169</sup>

The deployment or use of armed force following UN Resolutions is designed to deal with specific political and military situations. In NATO some allies have difficulties regarding 'out of area' policies particularly expressed by the US but not the UN. Most States, including the majority of NATO members, maintain standing forces for defensive purposes including, perhaps, an element allocated for internal duties in aid of their civil power. They might find some difficulty in providing a permanent increment for other purposes. States such as the US, the USSR and China, on the other hand, apart from their homeland defensive forces also maintain 'power projection' forces. The US has currently some 174,000 military personnel in Japan, Okinawa, Korea, and in naval ships in the Pacific and Mediterranean, as well as the force it allots to NATO. Russian military formations including those in East Europe are also deployed in or available for 'power projection' roles and, like the US, naval deployment (and its air component) is especially important in the 'power projection' strategy.

These forces are not related or assigned to UN roles or held necessarily or primarily to satisfy any requirement of Art 24 of the UN Charter. No doubt they could be so allocated, but they represent the possibility for action independent of, or at the worst contrary to, UN global policy. At the same time Resolutions dealing with specific

disputes have been disregarded by offending States usually without sanctions. Kashmir, Israel and the Arab States, Cyprus, Cambodia and Lebanon are continuing areas of dispute.

What seems clear is that if the provisions of the Charter cannot be, or are not, enforced, or if enforcement measures cannot be made possible except after a lengthy lapse of time, the war prevention basis of the UN loses respect. Such a view may be too facile: experience shows that offensive action in breach of the Charter, or against the spirit or text of UN Resolutions, usually spawns much justificatory rhetoric as though acknowledging fault. But in some cases to wait for action by the UN procedures would be to leave a situation too late for rescue.

Thus there is point in complaints about timing occasioned by the operation of veto power as well as by ideological and partisan voting patterns and overt promotion of national interests in the Assembly. On occasion issues have been pre-empted by the time they can be raised in the UN as in the cases of Afghanistan and Grenada, and it has been said that if the Security Council

"were to start functioning regularly and effectively, ie, if it were to take action in cases of threats to the peace, breaches of the peace and acts of aggression, and if the bulk of the nations were habitually to co-operate and obey, thus acknowledging its authority, the proscription of the international use of force would be effectively sanctioned and so become a rule of law".<sup>170</sup>

That statement of the ideal is not remarkable but law is not immovably fixed in time and a problem lies between law and usage. The Charter prescribes action by the Security Council (especially by Art 24), and also for States under Art 51. Ignoring or failing to comply with Resolutions is in breach of the law prescribed by the Charter. Ineffectiveness on the part of the collectivity in the face of State sovereignty is also in breach of that law, but how is either to be punished? The founders of the UN in effect reserved to the five permanent members of the Security Council the authority to police the means by which the responsibilities conferred by the Members under Art 24.1 should be used. In this way power to decide if, when and how

aggression under Art 51 should be dealt with was also in effect taken by the five permanent members. The intention was that these powers should be exercised through the UN but they have often been exercised independently and, in practice, often from self-interest. But the authority given was also intended to be a limitation on the use of force by member States and difficulties have arisen because it has not been exerted systematically or invariably. Nevertheless some limitation on the use of force has been discernable though how far any such limitation is dictated by pressure of international law, public opinion or an increasing inability of military action to achieve desired political ends remains debatable.

One element in the debate refers to that aspect of international relations by which right to territory could be attained by forceful occupation, and this is now considered.

Conquest, Recognition and Rebus sic stantibus.

The place of war for a State is a matter of priorities in foreign policy and fiscal allocation so that it will be governed by the constant factors of probability and finance. When offensive or coercive action is required or considered there is necessary a calculation of the cost/benefit equation. That calculation includes not merely the cost of attaining political objectives but also whether the international society will countenance retention of the gains effected. This leads to examination of three further areas of international law all of which are the progeny of customary views of State sovereignty, and have a history antithetical to the elimination of war. Some have given rise to long-standing disputes and the acceptance or rejection in specific cases of either concept has caused war in the past and continuing debate since 1945.

These concepts may be summarized as:

- (a) Acquisition of territory by conquest.
- (b) Recognition of States and governments.
- (c) Treaty determination and rebus sic stantibus.

Today these concepts are more closely circumscribed by international law and, in consequence, may affect calculations about the possible effects of a war.

What is debated about these three concepts are the legality of:

- (i) war.
- (ii) gain by conquest.
- (iii) continued occupation and governance of conquered territory,
- and (iv) if (a) has been accomplished through the agreed provisions of a peace treaty however imposed, the sanctity of treaties.

The realities are whether:

- (1) legal rights can be acquired by use of force and, if so, is initial force purged by a prescriptive or other period of time.
- (2) the territory can be held in the face of non-recognition by individual States or in defiance of Resolutions and absence of force by the UN as global authority.
- (3) the terms of a peace treaty can be abrogated unilaterally in changing circumstances or because peace treaty terms including cession of territory are illegal ab initio today.

Opinions have changed in the light of legal obligations accepted in multilateral treaties especially the UN Charter. But different treatment seems to be applied as to whether the territory was acquired before or after 1939.

### Conquest.

Acquisition of title to territory by conquest was a relic of the Roman Law of Property as is implicit in Hall's definition:

"Conquest consists in the appropriation of the property in, and of the sovereignty over, a part or the whole of the territory of a state, and when definitely accomplished vests the whole rights of property and sovereignty over such territory in the conquering state".<sup>171</sup>

That definition may not have been a statement of what the law was at the time, but it was a statement of the reality. Territorial expansion and to regain territory previously lost were principal war aims in the rise and fall of empires, in revolutionary wars, and in the trade wars which colonial conquest initially supported. Provided that the reality of the conquest was recognized by other States Hall's definition stood, but the

uninhibited exercise of sovereignty was and is curtailed by non-recognition.

Conquest and subsequent recognition still have their place in the international system. The concept of acquisition by conquest is reprobated today however, but recognition as an international legal concept remains in law and practice.

Various territories of Europe and Africa as delineated today result from conquest in the past whether there was then or later the acquiescence of the conquered peoples. Most States that were sovereign before 1939 have been indebted to, or have suffered from, a rule of international law that one of the

"five modes by which a State may acquire a legal title to territory (was) the incorporation of foreign territory...after subjugation by armed forces".<sup>172</sup>

Conquest and acquisition, therefore, gave rise to cycles of war, reconquest and restitution of territory. In any case, conquest was not always universally accepted as a valid way of acquiring territory. Hershey, Moore and Briggs among the North Americans, and Oppenheim, Phillimore, Westlake and Hall among the British supported the idea but Bonfils and Fiore among the Europeans had earlier rejected it.<sup>173</sup>

Fiore at the end of the last Century described the reality,

"Although conquest per se cannot constitute a legitimate mode of acquisition, nevertheless, when it is accomplished, when the new conditions have by degrees been gradually accepted by the population, and when the fact, illegal in its origin, has been gradually legalized, conquest may result in the acquisition of conquered territory, by reason of the necessity of accepting an established condition strengthened by time and of respecting accomplished facts".<sup>174</sup>

Hall's definition "when definitely accomplished vests the rights" amounts to no more than Fiore's "gradually legalized".

Phillipson questioned the ethics of conquest but accepted the reality saying,

"title by conquest is now generally considered the least desirable" ..but is "juridically valid".<sup>175</sup>

The validity of the title might even then have been challenged but to change the fact would entail further conflict which for the defeated was not immediately possible but might later become so and lead to re-acquisition. The period of time between conquest and re-acquisition did not affect Phillipson's hypothesis.

Between the two World Wars and with the coming into force of the Covenant of the League of Nations, the Kellogg-Briand Pact, and the Saavedra-Lomass Treaty of 1933<sup>176</sup>, Moller considered the illegality of a war but the possible legality of its fruits,

"...positive international law by virtue of an inner contradiction, recognizes the right of conquest, as a means not only of maintaining justice or of protecting suppressed nationalities but also of increasing power (wars of conquest)",

but he also pointed out that

"...an important limitation has been set to this right of conquest by the Covenant of the League of Nations...particularly Article 10...".<sup>177</sup>

But Hershey referring to Art 10 said it

"does not formally abolish title by territory based on future conquest, its observance would make aggression and conquest practically impossible".<sup>178</sup>

Brierly agreed, saying in 1936, of conquest and cession,

"...both these titles will disappear from the law if the future practice of states is in accordance with their solemn undertakings in the Pact of Paris, 1928".<sup>179</sup>

But in 1963 he added,

"What in that event is to be the attitude of the law towards conquest or enforced cession will become important".<sup>180</sup>

At that stage little inhibition had resulted from the change in legal position.

The position before 1914 was clearly that if a war was terminated by a treaty of peace which concluded for cession of territory that transfer of title was acceptable. Colonial conquest had similar results. Between the two World Wars armed might was forbidden and to be foregone through accession to international agreements to that effect. In practice Japan invaded China in 1931 and 1932 and again in 1937. Italy

invaded Abyssinia in 1935 and 1936. Both were dispossessed of their territorial gains only as the result of war.

The situation between 1945 and 1989 as illustrated by the USSR appeared to be similar to that obtaining before 1945. Except for Russian withdrawal from Azerbaijan the USSR retained what it had occupied during the Second World War in the Pacific and in Europe. But during this period territorial gains by Israel, and military occupation of Afghanistan by the USSR, were reprobated in Resolutions of the UN. It had seemed that there would be a dividing line between what resulted from the Second World War and what transpired thereafter but there were exceptions. India's occupation of Junagahd, Hyderabad and Goa entailed show of armed force but without serious objection in the UN.

Russia's occupation of European States is being questioned today although more by the indigenous populations than by other member-States in the UN. Japan has continued to seek the return of Sakhalin and the Kuriles. What will result has yet to emerge, but the results will not have been prompted only by argument as to the legality of the Russian position.

Brierly's 1963 point is still valid. Israeli withdrawal from the Gaza Strip and the Jordan West Bank (following the examples of Vietnam from Kampuchea, Russia from Afghanistan and South Africa from Namibia), and a Russian withdrawal from the Baltic States would offer some evidence towards the acceptance of a general policy in the UN, and for peaceful settlement. Alternatively the provisions of Art 4 and Cap VII of the Charter afford clear sanctions and non-recognition. How such remedies are in practice applied will have a direct bearing on the cost/benefit equation which States will need to calculate when contemplating aggression with a view to territorial gain. It is the fact, however, that in this Century only the adventitious circumstance of world war (but not of initial war aims) has influenced the restitution of territory acquired and occupied by force of arms. This was true of Japan and

Italy; remains in dispute in Kashmir and Cyprus; but has not been necessary in cases of temporary occupation since 1945 in the cases of 'voluntary' withdrawal already mentioned.

The principle may fall to be considered in relation to older cases such as Gibraltar, but, in general, in Europe and the Near East cycles of conquest and restitution have been such that in most cases it would be difficult to adjudicate fairly on the merits of one possessor against another without some kind of prescriptive title, or by referendum to provide the basis for 'self-determination'. What seems clear is that if the member-States are not prepared to support the simple principle Brierly's "discordance between law and the facts which in the long run would merely advertise the impotence of the law"<sup>181</sup> could encourage Iraq-Iran type of conflicts.

#### Recognition.

Recognition is a procedural method of formal acceptance by one State of (a) a new State, and (b) a new government in an existing State. Acceptance is not automatic and in the UN a diversity of views can be expressed in any one case about the merits of recognition. Such expressions may frustrate uniformity in the UN and may inhibit individual States from recognizing a new State or government as in the case of Israel and some Middle Eastern States.

Recognition is a matter of fact rather than of law although a State may withhold recognition of another in obedience to treaty obligations which may stem, for example, from the UN Charter.

Non-recognition inhibits normal relations between States and governments with detrimental effects on the activities of individuals. The effects on individual citizens, however, may be tempered by that 'respect for human rights and fundamental freedoms' which is enjoined by the UN Charter. But only the effect of recognition on the place of war is in question here for knowledge of the disabilities likely to result from non-recognition, and the likelihood of adverse UN Resolutions and



consequential adverse world opinion, affect calculations of the benefits of conquest today.

Basic to the concept of recognition now is the respect for the 'self-determination of peoples' which is a Purpose of the UN (Art 1.2). In respect of the acquisition of territory the method of acquisition may be crucial, but it is doubtful now whether recognition can give "legal validity to what has become an accomplished fact".<sup>182</sup> if the fact arose from conquest or coercion.

The general tenor of post war opinion can be described as conforming to the 1932 Stimson Doctrine of non-recognition<sup>183</sup>; to the Saavedra-Lomass Treaty's definition of reason for non-recognition, (that is, an acquisition 'not obtained by pacific means' (Art 1)); and the Convention on the Rights and Duties of States ((1933) USTS 881) which included the expression 'which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measures' (Art 11). The Saavedra-Lomass Treaty and the Convention on Rights and Duties of States were American measures and the former was adhered to by eleven European States including Italy. The provisions of the Convention were enforced as to the Chaco War between Bolivia and Paraguay, the American States by Declaration of 3 August 1932 warning the belligerents that they would not recognize territory 'obtained through occupation or conquest by force of arms'. On the other hand, the League of Nations Resolution of 11 March 1932 in terms of non-recognition of territory occupied or conquered by force of arms was disregarded by Italy and Japan before 1939 and by Germany from 1938. Further, the factual result of the Potsdam - Yalta 'sphere of influence' understandings between the Allies of the Second World War implicitly denied the League principle.

The Bogota Treaty ((1948) 46 AJIL Supp 43) replaced the Saavedra-Lomass Treaty and included the term 'either by force or by other means of coercion' (Art 17) which introduced economic coercion into the

principle of non-recognition. But the fundamental of the 'self-determination of peoples' has been tested constantly since 1945 especially in decolonization issues. The Brezhnev Doctrine<sup>184</sup> clearly opposed such a principle but now the Baltic States again raise the issue of self-determination calling in aid,

(a) A declaration to the Secretary-General of the League in 1933 by the USSR stating an

"...essential principle of its policy...the right of all peoples to self-determination in conditions of freedom to manifest their desires",<sup>185</sup> and

(b) A statement of Molodtsov that

"Soviet opinion regards the incorporation of the Baltic States as an example of self-determination based upon the consent of the populations concerned".<sup>186</sup>

In 1939, States including the US refused to recognize the Russian incorporation, but followed the 'spheres of influence' decisions referred to. Now there will be a problem for the UN not only as to recognition itself but also as to whether non-recognition on grounds of coercion or armed force can be required of member-States despite the customary law, if UN General Assembly Res 2625 (XXV) is to be followed.

Leaving aside Wright's view of the League of Nations Palestine Mandate ('the Mandate and all that flowed from it was illegal')<sup>187</sup> Israel was established as a State by the UN in GA Resolution 181 (II). This did not force recognition of the State on member-States, or establish that non-recognition by some members would necessarily bar an applicant-State from membership of (or as in the case of the PLO from some form of association with) the UN. The situation of non-recognition, however, is not to be confused with a state of armed hostility, although that is the case with Israel and some non-recognizing member-States. But the reason for non-recognition is the crux of the argument and, as Wright suggested, the Arab States' objection was that Israel's territory was acquired by force.<sup>188</sup> Recognition is a positive act: non-recognition is negative but

may indicate a casus belli, as might the withdrawal of recognition or movements to that end.

The severing of diplomatic relations is not the equivalent of withdrawal of recognition but may be as far as a State can go whilst the other State continues in existence. In any case although peaceful solutions may be found the place of war may be affected in a precautionary way.

Rebus sic stantibus.

The sanctity of treaties in international relations is an extension of the Prince's 'word and bond'. It was often breached in Machiavellian terms before as well as after the 16th Century. Nevertheless the strict observance of treaty obligations makes for predictability and stability in international relations. Orderly withdrawal in agreement with all the parties to a treaty maintains the concept of the sanctity of treaties. Conduct contrary to these customary usages may affect the place of war.

In the development of a law of treaties it was inevitable that a parallel development of a law of contract would affect the concept of international agreements. For instance it has been argued,

"the rules governing the conduct of individuals cannot be extended to treaties... Why should a State be bound indefinitely by a treaty when it is not so bound by a statute or administrative decree?"<sup>189</sup>

But that confuses the sovereignty of parliament over its own laws and the substance of international law.

There have been two schools of thought as regards the duration of treaties. One supporting the principle of pacta sunt servanda: the other relying on the clausula rebus sic stantibus. The first school has the backing of customary law, but a general theory that treaties contain an

"implied term or clause - to the effect that treaty obligations subsist only so long as the essential circumstances remain unchanged".<sup>190</sup>

also persists.

A direct confrontation between sanctity and the clausula concept would seem to leave unilateral withdrawal without notice as offering a

ground for action, especially in cases where one party was markedly disadvantaged. To uphold the clausula would not in any way further efforts to eliminate causes of war.

Although the "practice is inconsistent" and "the exact scope and application" of the clausula "are uncertain"<sup>191</sup> the most powerful objection lies in the combination of national rather than international interest and the practical possibility of withdrawal without notice.

Following Chesney Hill, Briggs cited customary international law which

"lays down the rule that a party who seeks release from a treaty on the ground of a change of circumstances has no right to terminate the treaty unilaterally".<sup>192</sup>

It might have been thought that the clausula - in Hyde's term 'an unhelpful guide' - might have been extinguished by the UN Charter both as to the Declaration on 'respect for the obligations arising from treaties', and Art 2.2 ('shall fulfil in good faith the obligations assumed by them ...'), but neither Art 62 of the Vienna Convention on the Law of Treaties ((1969) 8ILM 679) nor the Fisheries Jurisdiction Case (Merits) ((1974) ICJ Reps 3)<sup>193</sup> has wholly resolved the argument. The judgement of the ICJ indicated only that Art 62 is in many respects a codification of customary law on the question. Equally, Art 62 deals only in a restricted way with it.

Ott points out that Art 62

"gives a limited right to a state to terminate or withdraw... because the circumstances under which it became a party no longer exists".<sup>194</sup>

Whilst the Article sets out the contingent conditions, it is really making the point that prudent drafting of treaties ensures the inclusion of a procedure for review and termination in an orderly fashion in order to avoid dispute and its effect on a state's place of war.

Both recognition and the clausula in practice show examples of how confused and changing international relations may be perceived when looked at through the eyes of those who must be prepared for war and who must in consequence rely on facts rather than law.

## PART II

## WAR: JUSTIFICATION OR ABOLITION

Attitudes to War.

NATO's objectives of collective defence and the preservation of peace and security demand that,

"Military forces should exist to prevent war and to ensure self defence, not for the purpose of initiating aggression and not for purposes of political or military intimidation".<sup>1</sup>

This philosophy has little historical support where national military forces are concerned. What it may more nearly represent is a philosophy for a UN force, or the military force supporting an international authority's powers of sanction. The main reason for making such a distinction between national and international military force is that investment in a national force is designed to afford at least the possibility that advantage can be taken of circumstances, as for example by the USSR in Afghanistan and India in Goa and East Bengal (East Pakistan), and as an inhibiting factor against possible aggression against the State. Deterrent policies demand more than weak military capability vis-a-vis a potential enemy. On the other hand collective strength, both physical and moral, which military forces in support of an international legal authority would deploy, is more likely to be effective because of its political and military aggregation.

In international relations military forces still dictate the place of war on either a specific or a continuing basis, just as the place of war dictates a need still for national military forces. The proposition may be viewed from the standpoints that:

- (i) Wealth is needed to underpin military power, and military power is usually needed to acquire and protect wealth.
- (ii) In the early 1980s the nations of the world were spending \$1 million each minute on armaments "equal to the total amount spent by all nations ... on essential foodstuffs ... equal to the total GNP of the poorer nations ... it is escalating at such a rate that if it is not halted, by the end of the Century it will equal the present total wealth of the world".<sup>2</sup>

These statistics would seem to indicate that some States perceive or fear a continuing place for war despite such assertions as General Eisenhower's that,

"War in our time has become an anachronism. Whatever the case in the past, war in the future can serve no useful purpose ... any risks there might be in advancing to disarmament are as nothing compared to the risks for not disarming".<sup>3</sup>

This continuing place for war exists alongside desires for disarmament and ideas of collective security. It indicates that, like other instruments of national policy, force, or its threat, is promoted by conceptions of national sovereignty and survival. In an ideal world the use of other, peaceful, instruments might preclude resort to war, but that is not prescriptive in a world which deals with opposed, rather than allied, forces, spheres of influence, ideologies and objectives. Yet, within the antagonism some common factors dictate agreement in some immediately important areas of international relations whilst not dismissing basic ideology or the concept of the supremacy of national sovereignty. International law is established within these areas of agreement but, unlike the ability of states in their domestic policies to initiate, amend and repeal their own legislation as their political persuasions dictate, international law can only be effected and effective by agreement between States.

The place for the concept of the over-riding nature of national sovereignty within the opposed forces and objectives of States is not quite secured today any more than it was in hey-deys of Victorian small wars and European colonialism. Depreciation of the sovereignty of individual nations and States in reality - if not in concept - necessarily follows (as it has always done) from the effect on international relationships of opposed and antagonistic 'super' (or Great) powers. Now, the US and the USSR with other States attracted within their respective leaderships, dominate the international system. This leadership, if not colonial in the earlier sense, is today the centre of power and technological imperialism in the combinations of States in

which the US and the USSR have ascendancy. It is important within the context of both war and law, therefore, to consider the aims of these two super powers.

A US Chief of Staff Committee Chairman explained his country's aims as having the objective,

"To preserve the independence, freedom of action, and territorial integrity of the United States and of (its) allies. To support US and Allied vital interests abroad. To encourage an international order in which freedom, democratic institutions and free enterprise can prosper".

To this end he pointed to the "array of instruments, unilateral, bilateral and multilateral, (which) were developed to serve these goals". The promotion of the aims he explained in terms of military power,

"... an American presence, strong and forward deployed was essential to protect them (i.e. the US Government leaders) from interference and coercion as they work to build free and functioning societies. American strength has undergirded the full range of Washington's foreign and security policies".<sup>4</sup>

Stalin expressed the view that,

"...besides the right of nations to self-determination there is also the right of the working class to consolidate its power, and to this latter right the right of self-determination is subordinate. There are occasions when the right of self-determination conflicts with the other, higher right - the right of the working class that has assumed power to consolidate its power. In such cases ... the right of self-determination cannot and must not serve as an obstacle to the exercise of the right of the working class to dictatorship. The former must give way to the latter".<sup>5</sup>

This was not contradicted by the Brezhnev Doctrine (perhaps now somewhat muted), and the method of attaining the socialist goal is in these terms,

"The CPSU is invariably true to the Leninist principle of solidarity with the people fighting for national liberation and social emancipation. As in the past, the fighters against the remaining colonial regimes can count on our full support. The Congress attaches special importance to extending co-operation with countries taking the Socialist orientation".<sup>6</sup>

The means involved were explained by General Yepishev,

"By its social nature and historical design, the army of the Soviet Socialist State represents part of the international revolutionary liberation force ... Today the Defence of the socialist fatherland is closely tied to giving comprehensive assistance to national liberation movements, progressive regimes and new states who are fighting against imperialist domination ... In our day Soviet

armed forces serve as a mighty support for revolutionary peoples in their struggle with intervention by world imperialism in the internal affairs of the countries which have risen in wars of liberation against foreign dominion, colonialism and social oppression ...".

Again,

"The men of the Soviet army and navy are indoctrinated in ... their international duty to the working class and to all who struggle against the capitalist yoke for their social and national liberation. The invincible might of the Soviet army and navy has emerged today as one of the most important factors in determining the role and influence of the Soviet state in the world arena".<sup>8</sup>

From such different objectives it follows that conceptions of justification for war would also differ as between two States. The US acknowledge the concept of just war evolved by European Christian humanitarian ideas: the Russian concept (as expressed by Gen. Yepishev) is rather that,

"The nature of a given war ... that is, whether it is just, liberation, aggressive, or reactionary war - depends on what political aim is pursued in it. A war is just if it is the continuation of a policy of the defence of the people's revolutionary achievements, freedom and independence, and of the cause of Socialism and Communism. A war is unjust and reactionary if it is a continuation of a policy aimed at suppressing the revolutionary struggle, freedom and independence of any people and the working people's Socialist achievements, and at subjugating any country".<sup>9</sup>

If the words do not mean exactly what they say, and if the aims are by no means open ended, an area exists within which there is at least implicit agreement between the super powers. Threats to their domestic security are met more by urgent consideration of military modernisation programmes than by modernising programmes to render international law more effective.

Thus whilst war and law can be considered together there is little coherent advancement of the latter in parallel with the modernisation of military forces and armaments. Argument about the Strategic Defence Initiative and the ABM Treaty ((1972)11ILM 784) is in point.

#### War and International Law.

In historical and contemporary terms war is both a subject of, and is subject to, international law and custom, but it has always been the



instrument of political action and decision.

International law legitimates political decisions and institutionalizes customs by reducing them to written and authenticated form whether as international 'statutes' - (if multilateral agreements like the Charter of the UN can be so called) - or as conventions<sup>10</sup>, general treaties<sup>11</sup> or bi-lateral treaties<sup>12</sup>. International law also recognizes Opinions and Judgments of the ICJ<sup>13</sup>, and in general terms, treaties, conventions, international custom and general principles of law recognized by civilized countries. That the Soviet bloc apparently prefers bi-lateral to general treaties, and has been loath to use the offices of the ICJ, has an effect on the realities of the system but not on its legality.<sup>14</sup>

War also has its formalities and legalities grounded likewise in custom and in written instruments.

A simple comparison between war as an expression of disagreement, and international law as an expression of agreement between States disguises many steps on the way to either situation.<sup>15</sup> It is in these steps that some effects of international law on war will be found. In war's causes there are narrow areas of conflict of fact, failure or absence of communication, conceptions of local advantage<sup>16</sup>, and apparently intractably opposed points of view. In the case of law there is political solution institutionalized by law and custom but, equally, the result of resolution of those same areas of conflict. For law offers not only a modus vivendi for peaceful solution of disputes, but is also intended to provide for enforcement.

It is the ultimate ends which should differentiate law and war that have to be resolved and this entails accommodation to the other's view by both sides. The difficulty is whether the ultimate necessary accommodation seems too great to be absorbed by peaceful resolution of the differences. There is a build-up to the conclusion which may take a long time as in the case of the Law of the Sea, or may be long awaited as

in the Soviet revenge on Poland for the invasion of 1919-20 and on Japan for 1904-05.

As one purpose of international law is to express political agreements it is States that negotiate<sup>17</sup>, and States are sovereign with 'territorial integrity and political independence'<sup>18</sup>. It is in the concept of sovereignty that the difference between States and individuals makes direct comparison of municipal and international law sterile. State sovereignty has been regarded as unlimited and the various Declarations of Human Rights as well as national Constitutions however liberally expressed necessarily gave paramountcy within the state to the State under a concept of common good to which the individual is subordinated. Nevertheless, sovereignty can be limited both as to itself and to its administration. Thus it can be affected by voluntary relinquishment, as in bi-lateral treaties, or by compulsion such as arises from conquest (as in the 1919 Versailles Treaty), or it may necessarily arise as an adjunct of imposed or voluntary treaties (such as the US-Japan Security Treaty of 1954 or the European Communities (Amendment) Act 1986). The State may also voluntarily limit its administrative sovereignty by allowing itself (or the Crown) to be sued for example; but also by upholding the independent judiciary in its interpretation of what sovereignty consists.<sup>19</sup>

In the context of peace and war even if a State declines to join the UN it may still be required to "act in accordance with (the) Principles" if circumstances arise necessitating enforcement of that provision.<sup>20</sup> That would involve a curtailment of sovereignty just as membership of the UN involves a voluntary limitation of the right of a State to go to war except in the circumstances prescribed by Art 51 of the Charter.

#### The Analogy of the State and the Individual.

It would be misleading to consider State sovereignty without considering also the liberty of the individual in the state for there is

a direct comparison to be made of State and individual as regards breaches of laws. For the State the UN Charter envisages the imposition of sanctions (Art 41), or other action (Art 43), as well as suspension or expulsion from membership (Arts 5 or 6), but the major threat to delinquency is collective action by the other members under Arts 48 to 50. But a State may hope to escape punishment through the support of others in the General Assembly, or through exercise of veto powers in the Security Council.

The individual lawbreaker may hope - or expect - to escape his just deserts with the aid of influence in the State hierarchy, or he may hope for exculpation through other means. The individual with grievance against the State, nevertheless, may lack the persistence, or the material means, to fight the State. One State may be in a similar position vis-a-vis another, but whilst Art 11(2) of the UN Charter may be invoked the aggrieved State must organize its own support in the General Assembly.

States usually have civil and criminal, and may also have canon law, courts all with due process and powers to enforce the law. The findings of such courts are mandatory on those within the jurisdiction. It is not thus for States, for in international law the instruments may prescribe a system of arbitration (as, indeed, in civil municipal law), but in general for States the jurisdiction of the International Court of Justice (ICJ) is voluntary. On the other hand, just as actions of interdict to restrain action on the part of individuals, as well as other actions ad facta praestanda, may be raised in municipal courts, they are paralleled in some degree by Art 36 of the Statute of the ICJ ((1945) 1 UNTS xvi) but whereas procedure under municipal law is judicial, under Art 36 it is administrative.

Two comparisons are relevant here. Jurisdiction may be disputed in municipal courts under a regulated procedure but the court will decide if it can lawfully proceed. Further, despite anomalies arising from

social practice in some States, normally citizens generally are not above the law. Permanent members of the Security Council by exercising their power of veto under Art 27 of the UN Charter legally put their actions outwith any effects that might arise from their examination, and they can exercise the veto power on behalf of their friends and client States. Again, whilst justification in municipal law is often a mitigatory plea, for the individual is responsible for what he does, justification in inter-State relationships is an Act of State and a matter of sovereignty. It is individuals who will be brought to account, however, for the actions of the State if proceedings ensue as at Nuremberg and Tokyo. In any case, the individual on his own account exercises his standard of morality: in acting for the State the individual may exercise in public life a different standard.

Perhaps it would be fruitless to pursue any common impulses there may be between restrictions imposed by municipal law and governmental regulation on the liberty of action of individuals<sup>21</sup> with a desire for regulating the actions of States. The former is dictated by restrictionist philosophy in the belief that this is for the common good, whereas in the case of the State in the context of peace and war it may reflect a desire to free individuals from the dangers and costs of war.

The duties and rights of the individual are regulated by custom and legislation imposed by government and expounded by the courts. The individual and his influence on the process through electoral franchise is remote. States, on the other hand, have a direct role in treaty-making.

Treaties are not in themselves law, but are expressions of it when accepted into municipal law by whatever process is constitutionally proper to a State. Treaties are sources of international law and may give rise to custom in due course.<sup>22</sup> It is facile to believe, however, that treaties are effective - as opposed to binding - only between the parties to them for they may affect third parties whether that is

intended or not. What is more, third party apprehensions of intentions or capabilities arising from treaty provisions may give rise to some form of reciprocity. For example, action by other 'frontline' States in Southern Africa as a result of the Landa and Nkomati Accords of 1984 between South Africa and respectively, Angola and Mozambique. Such apprehensions are more easily aroused when conflicting ideology is concerned, as was the case in Southern Africa as well as when the US considered the Treaty of Friendship between the USSR and Cuba. Even if treaties by and with member States must be deposited with the UN under Art 102 of the UN Charter, there is no restriction on the general terms of inter-State treaties, subject to consistency with the Purposes and Principles of the UN. Even so, fundamental intentions do not always become apparent merely from the text of an agreement.

In sum, the scope for international law extends in reality to, and depends on, political decisions reached between States. But the areas in which effects might beneficially be felt seem to be based upon the concepts of municipal law in terms of authority, enforcement of it, and providing the social and economic conditions under which such authority and enforcement become acceptable and effective.

It seems important to make comparisons between law for the citizen and law for the State in its international relations, for it is development and change in the State which give rise to ideas for development and change internationally. In the histories of States internal change was generally brought about violently because one section of the society desired to take control of the society both as to power and possessions: that is to say, the development, wresting power and possession from the paterfamilias, often with violence, on the part of family or individual. When, eventually, ideas of common good prevailed, change became less violent, but it required active control, and equal control, of all by representatives of all.<sup>23</sup> That situation has yet to be reached in some societies, for States and nations were not at, or have not remained at,

the same stage of development, so that violent overthrow has continued in some States whilst peaceful development is normal in others. It did not follow that such development became fixed in history for any State. Some have alternated between peaceful and violent practice<sup>24</sup> and the role of authority and police has to be considered in relation to peaceful as well as violent policies. It may not follow that the desire of the many is accommodated where peace, law and order, apparently prevail. Could it be said of Pakistan, Syria, Nicaragua or China?

#### Peace: A State Policy?

If war is really an instrument of last resort peace should be the normal policy of States. War can be forced upon a State (as, no doubt, both Iraq and Iran aver), but it is generally entered as a conscious act of aggression or of defence from aggression. Peace for an individual State is not an absolute matter for if nominally at peace it can be affected by conflicts between other States at any time, as the Gulf States feared during the Iraq-Iran conflict.

Peace at any price cannot be a condition of absolute peace for such a policy will be opposed by some as was evident regarding the Boer War, the Suez conflict, and the war in Vietnam.

The study of peace, however, may be intensifying especially in the form of 'peace research' as an academic subject, perhaps through causes such as Marwick describes,

"Two world wars and the other conflicts since 1945, have taught men to be less optimistic about human behaviour and more rational in their study of it".<sup>25</sup>

But a change of attitude might also reflect fear of advancing technology and its threat of ultimate danger to environment and species, whilst not affecting any change towards nationalism. Britain today would not be without support for a policy which Clarendon described in relation to the Austro-Prussian War of 1866,

"We are willing to do anything for the maintenance of peace except committing ourselves to a policy of action".<sup>26</sup>

A policy of action now should be dictated by international law provided for in the UN Charter, but distancing oneself from military involvement whilst engaging in trade and arms supply with belligerents is not a policy of peace.

A State's place of war can be ascertained by reference to its foreign policy, defence budget and military planning. The absence of military budgets and planning might be thought to indicate a policy of peace. In reality, however, the place of war is the real indicator of the place of peace for if one is planned it is likely that the other is merely reaction to it.

Subscription to a policy - following Vegetius - of "Let him who desires peace prepare for war" has ensured a continuation of armaments, arms races, and capability for war rather than the assurance of lasting peace. Even the peace of neutrality may owe more to forbearance by belligerents than to the neutral State's defensive possibilities.

Marwick's statement above may raise questions as to (1) whether wars can be just for the people in whose names they are initiated and by whom they are fought; (2) whether nuclear war can in any case be just war; and (3) whether a policy of being prepared for peace by being armed for war has failed and should be replaced by disarmament. Continuance of the historical policy seems only to institutionalize Mr Chadband's question: What is peace? Is it war?

A balance sheet of a kind could be drawn up purporting to show how many inter-state disputes have been resolved without violence by international legal institutions such as mediation in the League of Nations and the UN, arbitration, judicial process, and other peaceful media. Similarly in disputes which were not resolved by peaceful means, the incidence of breaches of international law as reported could be listed in a fairly general manner. The difficulty with this methodology is that it fails to disclose real attitudes towards international law and the fundamental causes of failure to ensure permanent and universal peace.

This is a problem in the UN for States approach disputes as to whether they are likely to be involved or not and their attitude to one differs from the other. They may reprobate military action where they are not involved, but where their own interests are at risk they are more likely to seek a military solution if compromise 'on their own terms' is not forthcoming. Such may be the case even when a proportion of the citizens are opposed to military action, or to the kind proposed. Of course, when national opposition assumes such a proportion that political party loyalty is threatened (as the weight of opinion in the US during the Vietnam war changed) the opposition attitude may come to prevail.

Such a position has a parallel in the UN. In the Korean dispute it acted impressively to prevent an aggression and violation of international law. The Security Council's Resolution of June 1950 condemning the invasion of South Korea (and calling for the North Koreans to withdraw and for member States to send armed forces to Korea) was subsequently condemned "with considerable legal justification" that the Resolution was invalid as it did not have Soviet support.<sup>27</sup>

The position may be that a State may have a policy for peace through collective security. Such a policy will continue to demand the provision of armed forces, if only to comply with Art 43 of the UN Charter.

#### War and Law: Practicalities.

"In any highly sophisticated society the interaction of mutually supporting elements - however diverse and even contradictory they may be in their origin - is an essential feature of the working of that society".<sup>28</sup>

In States as in Churches the supporting elements include leadership and discipline. Leadership without which the mutually supporting elements cannot be brought together; discipline to help to keep them together. Neither element is solely related to personal qualities: both are affected by the quality of the fundamental objectives and the means to be used to attain them. Clemenceau is said to have believed that leadership consisted of two things that matter: to love and to be loved, and



to be intellectually honest.<sup>29</sup> Accepting respect for sentimentality and honesty is the disciplined response to leadership. The international system consists of many societies and whilst leadership among international statesmen may be possible discipline among them is more difficult of attainment. If leadership requires both of Clemenceau's attributes as well as inspiration, audacity and the art of communication, international discipline involves compromise, trust and faith in others.<sup>30</sup>

This may sound remote from the substance of international law, but that substance comes into being only as a result of the exercise of those leadership qualities because it is by the leadership of statesmen that negotiations and actions emerge which lead to the development of custom and law. The evolution of society and the evolution of law of necessity have been parallel in time, but it is uncertain whether human society has arrived at its present mutation by some conscious scheme of things or by unconscious co-operation with planned or unplanned forces of nature. Similarly undetermined is whether the conduct that gave rise to what is now established custom and customary law was designed from the start to reach the present conclusion. If not designed, what hypothesis should be advanced for permanence in what was adventitious?

Leadership is relevant also in the context of this thesis, for if the human race is to advance in co-operation and harmony on a planned basis some modus vivendi not yet apparent will have to be proposed and agreed, as will the ends to which both the human race and its politics are to be directed (or pointed).<sup>31</sup> This is necessary because, in one sense, international law is an expression of compromise between political ideologies and the hopes and desires which arise from them. To that extent, international law has to act as a modifying element in the opposed political beliefs deployed at any time within the international relations system. In another sense, it is an attempt to soften emphasis on welfare-state policies as an alternative to military expenditure, for

States now generally follow one or other spending pattern. In a third sense, it is an effort to eradicate the modern tendency towards a philosophy of 'human rights' without obligations, and without immediate possibility of complete satisfaction, and with that associated basis of violent usage to obtain such 'rights' which is as obvious in the international as the municipal scene. Further, it represents some, as yet rudimentary, steps towards harnessing technological 'advance' to beneficial purposes by diverting scientific effort to that end and away from the malign purposes to which it may be put in armament proliferation.

Intellectual honesty must be brought to bear on this, for modern war affects all mankind. Yet war as an instrument of politics, and law as expressing decisions of politics, represent a limited interest for the generality of mankind, and interest in one is not necessarily reflected by an interest in the other by the same person, although an inter-relationship seems clear enough. Patience is required to render the intricacies of modern technology - especially that which is only as yet envisaged and not yet substantial - into water-tight legal agreements between States. People, on the whole, are not imbued with patience in this context, and if some lose interest through impatience, others condemn law as being too slow in comparison with technology in any race to reduce the risk of war. It is necessary always, therefore, to recognize a conflict of timescale between arms-making and law-making.

In any consideration of leadership toward planned aims for society, and in the progress of technological weapons and machines, legal measures must play a part if only in relation to the biological aims of the proponents of a 'brave new world'.<sup>32</sup> This is not because of the increasing pace of military technology although that plays a part due to the growth of computerisation and robotics. That growth also accompanies research into genetics and experimentation with the manipulation of animal cells to be followed by systematic cross-breeding

of different animal species. Scientists will not stop short of human experimentation - as Hitler's 'scientists' proved - and the urge to improve artificial intelligence machines is paralleled by ideas for 'improving' the human species (with military possibilities as yet unthought of?). Improving techniques of embryo implanting has made commercial human breeding practicable and profitable, even in States which have eliminated the sale of infants and young girls. Perhaps there is danger of a race between human and artificial intelligence development with a view to the elimination of human mistakes which are as much a factor of military practice as of industry.

In spite of this largely individual and not centrally planned outlook, societal attitudes toward war continue to be dominated by domestic and nationalistic factors. These factors and their associated tactics are slow to change, for changes in rules need not only political leadership but also force of circumstances. Even where acceptance of change is taken to the point of written agreement, and despite the fact that

"Ethical codes have always preceded ethical conduct ... A certain time is needed for education and adaptation. Even afterwards perfection is never attained",<sup>33</sup>

and acceptance is not always turned into performance or even observance. The League of Nations, the Kellogg-Briand Pact, and the United Nations have all demonstrated that. At the time it was possible to say of the Nuremberg Charter and Tribunal that the only innovation which that Charter had introduced was to provide machinery to carry out existing law. But it has had little relevance since other than in the discussions of the General Assembly, especially in relation to the tasks set for the International Law Commission. The argument today, all too often, is not as to the relevance of the charges, or of the findings of the Tribunal but as to the legality of the process, the selection of the accused, and the selectivity of the subjects of the charges, in spite of the retrospective adoption of Charter and Judgments by the General Assembly (Res. 95(I)).

If there was popular clamour for war crimes trials it hardly arose from considerations of the laws of war despite hopes that open judicial investigation could induce revulsion against war and lead to the punishment of those convicted. Questions of leadership and discipline were prominent even if the Tribunal itself was a rationalizing device for reasons of alliance and popular appeal, as well as a warning for the future. Like positive law, however, in the longer term the Nuremberg and Tokyo Tribunals have not achieved the aims, for in the context of war crimes the conflict between jus necessarium and jus voluntarium remains, and the precedents of the Tribunals have not been followed in wars since 1945.<sup>34</sup> Indeed, contemporary demand for the prosecution of alleged war criminals resident in Britain refers only to crimes of the second World War.<sup>35</sup>

Most national systems make it difficult for the citizens to ensure the worthiness of those they elect to lead them whether in pluralistic or one-party electorates. One political safeguard lies in any provisions made for ejecting an unworthy party and a no-longer wanted administration. Leaders who wish to retain office are adept at legislating accommodation for continuance sometimes by nominations, sometimes by introducing martial law. Some States, however, are prepared to deal with such leaders even if initially bad judges of them. Early favourable impressions of Nasser by Dulles were later retracted - too late.<sup>36</sup> As history discloses, contemporary assessment of Pol Pot, Amin, Marcos and Khomeini has undergone change, and this will be the case with Mengistu according to Vallely.<sup>37</sup>

It may often be difficult to assess the honesty of views of national interest against desire for personal power: that is, intellectual honesty in practice. In the present state of international law and relations power, personal or national, is relevant to the policies adopted by the State. The lack of congruity between principle and practice is carried from municipal into international affairs and to

debates on international law and its development. This is no isolated problem for it is reflected in lawmaking which, even if for party advantage, will be promoted as being in the national or the global interest. If politicians are sometimes held in contempt as being merely obedient servants of party they do not help their cause by being contemptuous of the legislation they promote. The inclusion of 'entrenchment' in the European Communities Act 1972 enacting what was known to be without substance or regard for reality is an example. But the Scottish members of the Commons did not seek justification in any claim to have been influenced by memory of Lord Cooper's statement that,

"the unlimited sovereignty of Parliament is a distinctly English principle, which has no counterpart in Scottish constitutional law".<sup>38</sup>

Different points of view are expressed in problems of interpretation after legislation has been enacted, as for instance with the Constitutions of the US and of France and in contemporary controversy regarding taxation by community charge and the relevance of the Act and Treaty of Union of 1706-7. It is natural that nationalism and party politics should be applied in discussion of international law following cynicism expressed in retrospective legislation and Acts of State in domestic situations. Such attitudes appear in international relations as claims that 'what we have done is justified'. Patterns of action form a basis of custom; they need not be universal practices but only sufficient for the law to be drawn from them. But majority political systems have tempted powerful groups,

"to disobey Acts of Parliament, knowing their political friends would ensure their repeal when next returned to power".<sup>39</sup>

Recent practice in Pakistan has afforded examples.<sup>40</sup>

The Suez conflict may present a picture to illustrate how easily a parliament may be led, how circumstances may be dictated by party advantage, and actions be made to conform to sectional interests. An Israeli view is,

"What we have in Israel is political liberty and freedom of expression. But of democracy - in the sense that people have an influence on the legislation - we have very little".<sup>41</sup>

It would seem unlikely that in discussing and promoting international relations national leaders would adopt a different philosophy. In that case, how can one be sure that all steps have been taken to resolve differences by peaceful methods before a war is initiated? Or whether, in an atmosphere of secrecy, the war is just for either side?

The Just War Tradition.

In no area is lack of influence by the ordinary citizen more obvious than in the decision to initiate war. Even such an example of so-called popular demand as the myth of the 'War of Jenkins' Ear' (referring to the War of the Austrian Succession), shows that a period of seven years (1731-1738) elapsed between the loss of the ear and the outbreak of the war, and the causes of that war were many but not mainly popular demand.

Whatever the motive power, the interplay of law and war, including the right to make war, has a long history. If in this Century, and more particularly since 1919, emphasis has been on international institutions and written agreements, in earlier time custom had evolved a humanitarian approach to the conduct of war, and some general concepts by which the condition of a state of war could be initiated and recognised.

These approaches have become known as the Just War Tradition, and its essential characteristics are:

1. LAST RESORT. "All other means to the morally just solution of a conflict must be exhausted before resort to war can be regarded as legitimate".
2. JUST CAUSE. "War can be just only if employed to defend a stable order or morally preferable cause against threats of destruction".
3. RIGHT ATTITUDE. "War must be carried out with the right attitude".
4. PRIOR DECLARATION. "War must be explicitly declared by a legitimate authority".
5. There must be a REASONABLE HOPE OF SUCCESS.

6. NON COMBATANTS must have IMMUNITY.

7. PROPORTIONALITY. There must be a reasonable expectation that good results will outweigh the horrors of conflict.<sup>42</sup>

Concepts of 'Just War' - that in some circumstances war could be morally just - are of great antiquity,<sup>43</sup> and may be said to provide the origin of modern law of war. The concepts, however, grew from moralizing about war itself and not through discussion about prohibiting it as a political instrument. The debate was limited for it was about what was considered best for the 'common good' of a society or alliance and not the common good of international society. Yet the obvious parallel is with formulae such as that of Hobbes who justified the state as saving people from the condition of continual danger from other individuals. Whilst contemporary moralists can ponder the practicalities of just war today the concepts are products of a period of human history in which war itself was considered licit as well as normal. That is, during a time when property was more important than the moral issues involved in inter-state dispute. Just war concepts sought, (a) to reverse the distinction and to differentiate between circumstances in which war was legitimate and when illegitimate, and (b) having accepted that war could be legitimate only in some circumstances, to emphasise humanity in the conduct of it.

(a) Thomas Aquinas, for example, prescribed conditions for just offensive war as being lawful authority, just cause and right intention. This line of thought followed a parallel right of those properly in authority to punish criminals and to make war against external enemies who had injured the State.

(b) Advocates of just war theories hoped to mitigate its rigours by introducing measures of arms control and proportionality, as well as pointing to the sanctity of certain property and the persons of non combatants.<sup>44</sup>

Just war was limited, therefore, to war for the 'common good', and in its conduct the limitations of jus ad bellum and jus in bello were to be observed.

Initially, no doubt, jus ad bellum grew out of philosophical reasoning, but it is too easy to regard the subject as encompassing a universal acknowledgement. The philosophy is basically European, Christian, and from States that were - at least nominally - part of the Holy Roman Empire, for by far the most sustained efforts in practice to advance the concepts came during the Middle Ages when Church and Empire were strongest. But elsewhere custom differed from the European Christian generality - in Russia for example - especially where the outlook was towards the east, or the state was in conflict with Muslim or Moghal; or was in course of effecting colonial conquest.

It was convenient for most European states to accept just cause and declaration of intent for the Prince was judge of the justness of his own cause and commander of his forces. Similarly, when the interests of the Church and the State coincided a similar convenience arose, for the Church's cause was assumed to be just. At the same time, declaration gave an interval in which mobilization and concentration could be effected for surprise was considered unjust. But, of course, right intention was another matter.

Jus in bello must be regarded as primarily humanitarian, but other motives are possible as may be seen today in arms control negotiation. The position of the State, as opposed to that of the individuals who do the fighting, is a powerful element of such negotiations. The prohibition of making war against civilians takes no account of how armed forces were, and are, recruited: conscripts and pressed men obviously were not regarded as meriting exceptional treatment.<sup>45</sup> Not unnaturally, their resentment showed in practices of looting, rape and arson. The servilities of the feudal system and what was due to the superior in the chain persisted in a recruiting system based on what was said to be due



to the State. Early arms control concepts were not signally successful, and efforts to enforce them generally failed.

A cynical view might be that jus ad bellum offered justification for war rather than its prevention, and the timing of declarations of war was such that the aggressor had concentrated his forces before his enemy had started his mobilization. Jus in bello, on the other hand, could be regarded as making war palatable (even if not desirable) by considering that excesses could, in practice, be curbed. In fact, it is more likely that experience and intention fell somewhere between two extremes of excess and chivalry. This is reflected in the scepticism which the concepts have aroused, and still arouse, due at least in part to the attitudes of statesmen in justifying their wars. In part also from the spectacle of the Church promoting just war theories whilst using the State to persecute civilians in the name of religion they nominally supported.

It is necessary also to consider whether definition of war for the purpose of qualification as just war includes only declared war between States, or at least between settled communities, or whether armed conflict falling short of such inter-State war is included. Thus, for example, the Korean War and the Falkland Islands conflict were not wars at all by some standards. It is a matter for consideration whether the methodology of strategists, whether consciously or otherwise, is designed, or has the effect of, defeating a general prohibition by a classification under which justification could be perpetuated. For instance, not only is a difference indicated between just and unjust wars, but between limited and total,<sup>46</sup> colonial and liberating,<sup>47</sup> inter-State and civil, insurrection and rebellion,<sup>48</sup> direct and surrogate, and, most ominous of all, between nuclear and conventional.

Definition and classification of war having been propounded it remained necessary to decide on its justness, justice and sanctions<sup>49</sup>. An authority able to so rule should be able to enforce by coercion,

threatened or actual, complete prohibition of war as by logical development the UN was ideally intended to do.

This was not the classical intention, however, for the theories were to limit war's scope and moderate its harshness not to remove any right to initiate just war. In practice the developments led towards total war, for all the jurists as well as politicians and princes envisaged a continuing right to make war whilst more effective killing processes were following scientific advancement. The technology of weapons and communications completed the development, making clear the truth of Ayala's view that it is a matter of politics and equity to decide on justness of cause, and not merely the means used.

Early classical just war theories, like later law, products of feudal and theological philosophising were founded in hope, no doubt, but without effective enforcement were hit or miss in reality as the text writers' differences show. Vittoria concentrated on right authority and whose decision was necessary, but still within the boundaries of intention, proportionality, and subject to the belief that other methods of negotiation had been exhausted. But the authority's right to make war was an essential expression of sovereignty. War should then have the purpose of achieving peace: but Carthage, too, was peace - like Stalingrad or Berlin at a later time. There was always an element of reciprocity as well as of religion in the justification. Today, if that includes avoidance of enslavement to political extremes, or a 'live and let live' basis of armed detente, it does not prevent wars between co-religionists whether Christian or Muslim.

Grotius introduced an idea of sanctions by not aiding the unjust side or hindering the just, an idea that is followed on more predictable lines in the UN. Neutrals were to police justice: an earlier hope of collective security.

Pufendorf believed neutrality should be neutral in respect of both sides as against being neutral only against whichever side was considered unjust.

Such theorising was swept away by balance of power alliances which made just war theory incompatible with collective security. For about one and a half centuries up to the 1920s,

"war was not a question of law but of fact; the issue of its justice, or legality, was non-justiciable in the broadest sense".<sup>50</sup>

The situation changed for those States which ratified the League of Nations Covenant for its provisions added a legal aspect in terms of when war was legitimate, in which circumstance justness would be taken for granted. But justness of war can be equated to justness of law for, as Finnis has pointed out, to say a law is unjust is merely,

"a critical judgment of practical reasonableness whether correct or incorrect".<sup>51</sup>

Advocates of this proposition might say the same of war, for the side supported by law, like the side victorious in war, applauds the 'practical reasonableness' whilst remaining blind to correctness. But, does it follow that if a law satisfies other legal and constitutional rules it is law and must be obeyed? There is a contrary view which denies the collateral obligation to uphold all laws which, if followed generally, would spell doom for legal systems. On the other hand, literal following and obedience to all laws would spell doom to civil war and uprising. This argument is carried further as to international law, where there is a school of thought that it is not law at all. In any case,

"... any group ... is motivated toward civil disobedience when it becomes persuaded that in some significant area of social life, what is legally valid is in violation of the authority relationship".<sup>52</sup>

Such frustration can be alleviated by legal methods where such are available to the citizens of a State. Not all States' governmental systems tolerate political opposition or any form of civil disobedience, non-violent or otherwise. In war, however, even war undertaken by volunteer forces, frustration caused by the leadership can also arise. In a conscript force in the particular circumstances of conflict where each man is fighting his individual battle for survival rather than for moral or political principles, and whatever his wider beliefs may be, the

frustration, personal and immediate, is unlikely to have urgent regard for niceties of just war or other humanitarian tradition.<sup>53</sup> It is in the echelons separated from the actual fighting, as well as in civilian circles, that such arguments have been debated. In each generation, and despite Articles of War and Manuals of Law for Active Operations, in practice each fighting man has to make his own tradition of battle actions within the background of nation, regiment, and so forth.

This is not to say that, if custom has the force of law in the sense that tradition enters into the legislative process, and if custom or law is disregarded, punishment should not follow. It may have been thought that this was settled at Nuremberg, even if in a rather one-sided and selective manner. But it still remains likely that if victory cannot be achieved in a traditional way, (that is, an essentially legal way) other means will be sought. In addition there are the impulses which the crudities of military action that battle imposes upon, or brings out from, men under great stress and fear. This, in a way, is a reversion to knightly conduct which was more lauded in retrospect than recognised by the mass of people at the time of 'chivalry' and of hand-to-hand, and face-to-face, conflict. Slave-taking and ransom were important elements of that time; now distance and weapon-power have added a miasma of indirect killing leading to irresponsibility, and leaving only a distant prospect of advancing infantry occupying wastelands.

Knightly conduct in action can be seen from the non-observance of the Papal interdiction of crossbow and bow and arrow from general use in wars between Christians by the 2nd Lateran council of 1139. Siege machines were similarly subject without avail to such interdiction. Then, as now, availability of weapons make obedience to such ideals selective in conflict, especially when interdictions did not extend universally but were limited to some circumstances not extending to 'battle against the heathen'. Even so, the Council was an early

promoter of arms control, lack of success in which - apart from setting some quantitative or qualitative standards - has been a pattern since.

Johnson comments that,

"The consensus reached by the end of the Middle Ages in the protection due to non-combatants still forms the basis of legal and moral attempts to protect civilian society from the destruction of war".<sup>54</sup>

But it is not the basis which is in doubt, it is the sincerity as well as the effectiveness of the attempts. Technological and engineering developments in weapon potential are not impeded as SDI and its repercussion on the ABM Treaty seem likely to show. Further, whilst efforts are made to limit the use of chemical and bacteriological weapons, radioactivity from nuclear fallout is a poison, chemically produced, and cannot be seen, smelled, or touched, but it is not referred to in connection with chemical weapons control.

Just as the 2nd Lateran Council's consensus on arms control was clerical rather than military - (though the Church had a military place in the feudal system holding not only by frankalmoignage but also by knight service in some cases) - so the protection of civilians had reference to civilians of Christian States. It did not extend to any prohibition of despoiling the Egyptians or smiting the Amalekites. Johnson omits the basis of military service then involved which, in effect, was a rape of civilians, for the vassals and serfs paid either in blood or tax or both.

The development of bellum from duellum was a necessary attribute of the authority of princes, and of princely quarrels, but underlying causes, often personal, were generally in respect of property and territory. The knightly code of chivalry was not necessarily universal or universally observed even among Christians, nor was it necessarily the basis of the laws of war for the code did not embrace more than a minority. That may well be the fact today: the leaders not having the power in battle which they enjoy out of it. There is too idealistic an

air about the theory of just war, for wars were being fought a la outrance whilst tournaments occupied the ostentatious display of the elite, as well as being their training ground. Burghers, however, were still mulcted even if not worthy of knightly sword thrust, and manorial courts permitted no 'non-combatant immunity' without penalty in that way of life. The different approaches can be seen in considering war and rebellion, and the application or non-application of general rules of war to the latter, for humanitarian rules in civil conflict are of modern conception. Yet, in both, the main question of authority and possession remains the same. In any case, practice of the laws in earlier days suggests that jus in bello was rather a matter of individual resort than a universally accepted canon: lex lata 'laid down', but in practice lex ferenda - the desirable - prevailed rarely.

The horrors of siege and sack should not be obscured by traditions of honourable surrender, for, if defeated armies may have marched out with colours and drumbeat, the burghers still had a bill to pay.

If there was justness in war it was rather in limited objectives related to limited resources, confining the actual battle as far as possible to human visual observation and control by one commander on each side. The advent of modern means of transportation, communications, and long-range weapons, and the haphazard development of concepts of total war raised stakes, objectives and casualties. Yet total, and therefore unjust, war was not curbed by the League of Nations although that organization theoretically had the capability of preventing war, for there could be no question of last resort if the Covenant was observed. Only collective security measures could ensure that last resort was not a solution for inter-State dispute. That situation has not changed yet, even in the face of the general acceptance of the UN Charter, which would make all war unjust.

A final factor in just war theory, as in all matters of war and law, is the advance of technology and its apparently necessary effect on

contemporary morality. The progress of the technology is so rapid that moral considerations and, hence, legal restraints, can be decided upon only after each forward step has been taken in technology and engineering, and when the consequences arising from it become obvious. The results are to be seen in pollution, embryology, and exhaustion of natural resources, as well as in nuclear technology itself, where, apparently, effective ground rules cannot be laid down in advance. This is shown by the failure to deal with the international development of atomic energy. Notwithstanding the Non-Proliferation Treaty, States individually can still acquire knowledge of nuclear bomb-making in spite of international efforts to limit the utilisation of atomic energy to 'peaceful' purposes and humanitarian ends. The convenient excuse of 'breeder-reactor experiment' no longer offers justification for nuclear materials transfers, but it is the availability of reserves of uranium, as well as control of the development of nuclear weapons, which is a reason for the non-proliferation provisions.

Elimination of the possibility of disasters such as Chernobyl cannot be guaranteed and the consequences of them cannot arbitrarily be confined. A conflict between 'atoms for peace' and 'atoms for war' is now an abiding problem transcending 'normal' international relationships. This is a political matter affecting the possibility of just war, and one which may be impossible to solve by collective action, for nuclear warfare and logic may not be easy bedfellows. Israel, South Africa and Brazil may be nuclear-knowledgeable; both Israel and South Africa have well-advertised will to survival<sup>55</sup> as well.

President Eisenhower's 'Atoms for Peace' policy was the first step to nuclear proliferation, and is an example of a good intention masking its likely consequences. Just war theory illustrates a similarity, and it ought not to be necessary to look beyond the excesses of the One Hundred and the Thirty Years' Wars, and the 2nd and 3rd Crusades, to perceive the selectiveness - and, all too often, the adventitiousness - of practice.

A Modern View of Just War.

Is there a modern view of just war beyond the now disputed Art. 51 of the Charter? Whilst European, including Turkish and Russian, colonial empires were in being, the discussion could have been related mainly to civil strife or to wars between colonial powers. Recurrent wars in South East Asia were hardly noticed outside French interests, or in Central and South America outside the American geographical area subsequent to the tacit acceptance elsewhere of the Monroe Doctrine.

It is at least doubtful if deeply-seated concepts of justness, in spite of Burke's warning<sup>56</sup>, impelled the British to accept the result of the American rebellion of 1775-7. Britain and other colonial powers only gradually acknowledged the logic of anti-colonialism. Even then they did so from fact rather than from difficulties in conforming to just war theories in dealing with insurrection and rebellion by colonial peoples. Time will tell whether ex-colonial states of Asia and Africa will themselves seek expansion by colonization even if it is restricted by immigration barriers.

There may be justifiable doubt as to whether there is a logical place for discussion about just war in the debate about war and peace today, but for a different reason than colonial ambition. Just war theories were products of their time, influenced by contemporary ethics, dominated by the configuration of national leadership and international relations as they were, and disputed, disregarded, vilified or supported by philosophers, soldiers and jurists, from time to time. The Church's relationships to political power as well as to the people was then stronger. Clerical theories had their part in political practice. This is rarely the case today outside emerging orthodoxy in Islamic States whatever sectional interests in Central and South America seem to demonstrate in relation to the Catholic hierarchy. During this century less regard has been paid to the theories: the result, total war, may



have stemmed in part from that neglect. Total war, however, is not a negative or accidental happening arising from fashions in philosophical thought. Rather, it follows industrial development, scientific knowledge as it unfolds, engineering persistence, and technological supremacy over moral values, all as political instruments in international relations. This industrial development and scientific advance has re-introduced some contemporary interest in just war theory and into scientific thought as means of countering the total threat arising from it.

War can only be a practical (or even practicable) instrument if it is possible by its means to secure and hold the objects for which it is used. The technologists, perhaps against their original judgment but constrained by fears of pre-emption by Germany, have, quite fortuitously, produced in the nuclear weapon and its various means of delivery, the weapon of deterrence. Initial nuclear use and the consequences of retaliation and escalation would negate possibility of attaining and holding the objectives fought for. That is not to say that there is today any certainty about possible future use of nuclear weapons.<sup>57</sup>

This position of superior strength raises the possibility of nuclear blackmail against non-nuclear States. Such strategems of threat were not unknown in earlier days when superior resources and forces offered opportunities for intimidation as, for example, by the Western powers against China in the Nineteenth Century, and by both France and Britain in Egypt also at that time. But if policies of threat did not, and do not, fall within a definition of war the vacuum in the theories evident in colonial policy continues today. Of course, international law in the shape of the UN Charter, as opposed to just war theory, has relevance to the aspect of war without war - cold war as it is sometimes termed.

Although concepts of ownership vary from time to time and State to State, war has always had some relationship to such concepts for property and territory were objectives of war. Modern war, whether conventional or nuclear, does not respect principles of ownership, and if there can be no guarantee that nuclear weapons will not be used, whether in conflict with theories of just war or not, it is certain that conventional weapons will (with their great and increasing destructive power and indiscrimin- ation). There is the view that nuclear weapons, unjust or not, for other reasons should not remain in the arsenals of States. Some politicians take a view from practical rather than ethical standards, that if nuclear weapons are abandoned by a State there will be no nuclear threat made to it. That view may be straying from reality: it also takes little account of the totality of modern conventional war.

All experience of the continuing duration of concepts and conduct of war in the face of relevant international law, accepted or presumed, must lead to a belief that today's practices are not dissimilar to those demonstrated in the actings of warring forces and States under earlier jus in bellum and jus in bello. Attitudes to, and human nature concerned with, aggression, oppression, fear for survival, and lust for conquest, are unlikely to have changed through the centuries even if accepted standards of morality have fluctuated to accord with contemporary practices.<sup>58</sup> It is necessary to consider only civilian immunity, for of

"...those who died as a result of war events ... civilians formed around 5% in the first World War; 50% in the second World War; perhaps 60% in the Korean War and even more in the Vietnam War",<sup>59</sup>

to show that even if the armed combatants were not directly responsible for all the civilian casualties the effects of war on civil populations are such that proportionality in war is minimal.

There are reasons for the lack of certainty about justness in war in contemporary circumstances three of which are noted here. The view of the scientist Oppenheimer was that

"When you see something that is technically sweet, you go ahead and do it and you argue about what to do about it only after you have had your technical success ... that is the way it was with the atomic bomb".<sup>60</sup>

A political view was stated by Senator McMahon but without any reference to just war theory. Strategic bombing,

"with nuclear weapons was the keystone of our military policy and foundation pillar of our foreign policy as well".<sup>61</sup>

There was the cri de cour from President Truman,

"It is a terrible thing to order the use of something ... that is so terribly destructive ... you have got to understand that this isn't a military weapon ... It is used to wipe out women and children and unarmed people and not for military uses ...".<sup>62</sup>

But, as Lilienthal said,

"... the choice to use science for good or evil was being blurred by political ideology".<sup>63</sup>

This political, rather than military, ability to differentiate in scale between conventional high explosive delivered from the air, and nuclear explosive similarly delivered, neglects jus in bello as to indiscriminate weapons used against civilian populations. It is not new, for blockade as a weapon had similar attributes as a political weapon. The acceptability of a weapon to the military might be regarded as falling within a duty to provide the most effective defence of the state. At that stage of provision questions of whether use falls within just war theories are not raised. The question of when and how the weapon is to be used is generally political after considering the military arguments, as was the case in 'area bombing' in the second World War. 'Living off the country' was a policy of Napoleon as Emperor not as General and as a weapon against the civilian population. Denying the enemy subsistence by a 'scorched earth' policy was a political decision (about which the Burmah Oils saga explains such Acts of State).<sup>64</sup> The Nacht und Nebel orders of Hitler however notorious followed Napoleonic precedents.

### Just War and the Churches.

A weakness of the hypothesis that some wars are just is that however hedged around by limiting factors 'the Prince' might be, he had the right to declare war especially when backed by the Church. His followers (and these, as some are still, may have been under compulsion) might have little information as to the Prince's intentions and motives. They could fight in what they believed to be a just war as they saw it even if the Prince's intentions were not wholly just. The Iraq-Iran war, its causes, and its protagonists demonstrate that such a situation is not unknown today.

Churches even if divided on the morality of a claimed right to make war, and equally on whether, even if war can be just, clerics should actively participate in it,<sup>65</sup> in the event give wars support, and give States support in war-making. In this divided opinion some would argue the merits of each specific war. Others would argue that a Church must make the best of the bad or irrational job politicians and diplomatists have done in declaring or initiating a war. Some, however, will regard it as a patriotic duty to support it, and those who fight - under compulsion or voluntarily - will be fortified by the Church's apparent approbation of the war and the implied, if tacit, approval of its justness.

From the opening tendencies of the evolution of the hypothesis there were difficulties - and evolution is blind to the future. There was an early belief that it was permissible for Christians to serve as soldiers in peacetime but this did not extend to violent fighting in time of war. Secretan noted the difference between militare (to be a soldier in peacetime) and bellare (to fight). Again, according to Cadoux, God's appointment of a particular person or institution for a particular work does not necessarily guarantee the goodness of that person, institution, or work. The just ruler thought of by Paul is always a pagan ruler and so justified in a way it would be impossible if he were Christian.<sup>66</sup>

The fact is that when Christianity became the official religion of the State, the Church paid for her position by compromising the purity of some of her ideals, particularly her pacifism.<sup>67</sup> But the legality of war was accepted and, like Cicero, the Church could make "an explicit relation between the doctrine of natural law and that of a just war".<sup>68</sup> Albert the Great, teacher of Aquinas,

"held that it is obviously more natural for man to be rational than irrational".<sup>69</sup>

Why should this be so? Rationality is a quality, but a quality possessed in different degrees and differently exercised on different occasions by different persons. War is the province of politicians, but rationality in politics is to hold office. If the rational is natural, disputes not only about means - for which there may be alternatives - but also about rational ends would be otiose. In politics decisions are as liable to be irrational as rational, whether more natural or not. The difficulty is compounded by contemporary circumstances and knowledge, making today's rationality irrational in retrospect. Further, if the rational end is the common good the means must necessarily be a matter of dispute for the common good in international relations appears different according to the varied national interests involved. There remains, of course, the dichotomy of the moral sense versus the animal nature. We may believe that war is natural to man, as it may be said that self-interest is natural to man. Selfishness and survival are common bed-fellows and national interests and survival are also. Rationality and morality as applied to law only commence when the purpose of the law, and the purpose to which the law is to be put, is clear. This would always have mitigated against just war theory for it can never have been lawful and moral at the same time to kill others except in self-defence and when no alternative presented itself. How could 'the Prince' make that decision for all his subjects unless also providing an outlet for conscientious objection?

The place of war is still affected strongly by the attitudes of the Churches and as, in the ordinary way, Churches are respecters of the law, it is difficult to see how they can support war in defiance of existing international law when war becomes fact. This is altogether apart from a general conscientious objection to war itself. Yet the Christian Churches, divided as they may be on the subject of war, generally have inclination towards avoiding it, rather than promoting it. There is, however, a general tendency on the part of the protagonists to assume that global allegiance to (a) peace parties, and (b) socialist ideology and practice, is inevitable. There may be little evidence to support such hypotheses, but the hypotheses may, nevertheless, be self-fulfilling especially if not debated rationally whether as a law-abiding or a moral (or theological) rationality.

The emphasis has shifted, however, from interpretation of the vague 'just war theory' to the difference between aggressive and defensive war. This has not resolved doubt or clarified issues, for in considering the causes of any war the aggressor is not always easy to identify. This is, in any case, rather a reversion to the situation of St Augustine who, according to Tooke, seems to have given

"scant consideration to a war of defence, presumably because he took it for granted that such a war is immediately and obviously justifiable, and even obligatory".

On the other hand, "He neither seriously doubted the permissibility of war itself, nor was he shocked by its intrinsic evil. A just war of aggression, however, must be carried out by the authority of the prince, and must have both a just cause and a right intention".<sup>70</sup>

All these aspects require interpretation and are conditioned by points of view, but the political evaluation made in international relations cannot be avoided.<sup>71</sup>

It seems fairly clear that there is danger of misunderstanding the principles of the just war concept if they are looked for in the historical incidents rather than directly from their logic and morality. The principles, with all their limitations of Christian exclusivity, were

rarely exercised comprehensively and entire in the wars of the tradition-building period, or, indeed, since. Today the provision of arms by one state to facilitate another to wage an unjust (or an illegitimate) war against a third is a breach of the principles even if an almost incidental transaction in a pattern of contemporary trading. The just war concept is universal and permanent; it is the practice which is local and transient.

#### Law and War: Control or elimination?

Like law the preparation and waging of war are part of the political operations of all-embracing government. In considering how war can be affected by the non-military aspects of society law may appear to have only a subsidiary role and economics an ever-increasing importance. Modern war is more and more a matter of industrialisation and technology, and in both the containing factors are economic up to the point at which taxpayers may revolt, and potential conscripts refuse to bear the costs of governmental policies. But the containing factors include many other demands upon the society the priorities for which are decided by governments in their efforts to avoid human resistance points. Long-term policies are as important, therefore, as short.

Thus war and peace are dependent on a manipulation of economic factors, and this has had two conflicting effects in the past. First, affluent States, with less difficulty, could afford to prepare for war on a larger scale than the less wealthy. Second, on the contrary, the less wealthy could adjudge a situation in a manner which seemed to present war as being a possible way in the circumstances to ensure the economic position which was thought desirable. The expenses of war are daunting, but sometimes overriding economic factors may be disregarded in the hope or expectation of aid from interested States, and of rehabilitation at the expense of others if defeat eventuates as a result of the economic and military gamble. For States generally the economic prospects, however, must appear to preclude war in any case but especially on a view

of possible intervention by a super power.<sup>72</sup> Debtor States must also consider International Monetary Fund and World Bank conditions and international bankers' attitudes. Economic considerations alone, however, are not the constant factor in the decision making for that remains political.

Other factors include the effect on the industrial wellbeing of the State by the distribution and size of its armaments industry, and the demands of the armed forces and armaments producers especially for skilled labour. Such demands may be conflicting in war and may affect export trade and arms transfers in peace.

The manipulation of the people by means of the communications industry is a factor connected with the fact of war as a contemporary instrument of national politics. This manipulation in closed societies is all-embracing, continuous, planned toward definite ends, and without any mitigation by organs of the state. In other States it may be diffuse, of many interests, and directed towards many commercial and societal ends. It is not always easy in the latter case to recognize the source or ultimate purpose of the manifold messages. Churches as well as other sectarian and secular institutions may be involved with secular and religious themes and objectives interspersed with governmental and commercial communications. Disentangling the political from the commercial may be difficult as North Americans have come to realise in connection with the subject of war and preparation for it, for communications can be pointed in either a pro- or an anti-war direction. The domestic media of the US during the Vietnam War is an example.

Beyond economic and communications factors, with the latter including educational, historical, traditional and cultural overtones, law constitutes an important factor. It is affected by, and affects, both the economic and information factors, but it is especially affected by the latter in resisting or promoting movements for change and development.



How the three elements (law, economics, and communications) – basic to the political approach to war as a continuing concept in international relations – work seems reasonably clear. They either support continuance or abandonment. The difficulty is that, in certain vital circumstances, what is promoted in theoretical terms may be denied in a practical situation. So that, if (a), support is for continuing the concept of war as a political instrument of international relations, the economic and communications elements will dominate argument: law will be justificatory and circumscribing. If (b), support is for abandoning the concept, law will be prohibitory. That is, law can legalize and legitimize whatever political decision is made. But if a State in practice by its actions opposes the abandonment of war, domestic legislation cannot expunge international law on the subject whatever the procedure for receiving international law into the domestic situation may be.

Effects following the choice include:

- (a) Continuance. Jus ad bellum will be limited to the 'Prince's' will. The principle of declaration of war is already abandoned, for although in the first World War there were 56 declarations and only 3 omissions, in the second World War Germany invaded Poland in 1939 and Russia in 1941: Japan 'invaded' US in 1941 as it had Russia in 1904: all without declaration. The advent of modern ballistic weapons has rendered superfluous long warning time through mobilization and deployment thus promoting state necessity as a guide line.

Jus in bello and humanitarian practices will assume influence proportional to the distance from which the protagonists bombard each other. The greater the geographical separation the less will regard be had to the 'courtesies' of the battlefield, and the safeguarding of civilians, which successive Conventions have prescribed. The matter of the weaponry to be used will continue

to engage political argument, but advocacy for war will entail continuing pressure for improved and ever-more destructive weapons, and an enlargement of the concept of justifications for military necessity in the indiscriminatory purposes and uses of such weapons. Mitigating factors, such as arms control and prohibition, with other humanitarian initiatives such as the International Red Cross, eliminating weapons or devices producing unnecessary suffering, regulating the treatment of a broader definition of prisoners of war, and, possibly, relief for the victims of nuclear fallout - even in neutral States - more than ever will require expansion.

- (b) Abolition. On the other hand, the abolition of war as a factor in international relations involves dominance by an authority capable of ensuring both abolition and prohibition whether such an authority is consensual as the UN might be, or as the result of global military domination by one State or a combination of like-minded States.

#### The Role of Law in either Case.

The role of law in either possibility is to give effect to the political decisions, but this demands also the power to enforce. It is on the note of power to enforce that there is not so much active disagreement as disregard and disenchantment permeating the existing system of international relations. It exposes law as a political instrument with teeth only so far as governments are prepared to uphold it and furnish the means to that end.

What, then, is wanted from political decision? Abolition of war possible only by collective security measures in the first place, and a continuing threat of security measures, by collective action, thereafter - that is, the ultimate universal theory of deterrence. But this obtains theoretically under the UN Charter, and if a written instrument

giving effect to a political solution is required it is already available.

Whatever is sought of international law in regard to peace and war, therefore, cannot provide the will which is lacking to enforce the existing law. Unenforced law will not command the will either. Some have sought an answer in approbation of just war and condemnation of unjust war, but condemnation is not sufficient - many UN Resolutions demonstrate that - and judgments about the justness of a war are difficult.

Strategists, militarists, politicians and moralists may have different standards in relation to national defence, national objectives and global security and not all will be directed toward abolition of war or toward some tribunal that might lead in that direction. Lawyers on the other hand if pointed toward the abolition of war lack means whereby to advance the concept in any practical way.

Whether consciously or otherwise the methodology of strategists often has the effect of directing attention away from efforts to outlaw war. They do this by appearing to perpetuate justification for war in either political terms or by arms control proposals which may obscure the miniscule effect on contemporary war-fighting capabilities which have emerged so far. Thus, just or unjust, small or large, colonial or liberating, wars, or the use of force short of war, remain largely uninhibited.

First approaches to just war theory had morality in their forefront. Today war and property are increasingly subject to legal provisions which are not necessarily based on moral standards. There is inescapable antagonism, however, between law as dealing with existing situations and prospective law proposed to deal with developing but, as yet, future situations. Difficulties inherent in developing common law interpretation in the evolution from a feudal system where superiors had rights and inferiors duties, to today's asseverations of inherent rights

for all and comparative silence as to duties, are increasingly seen in 'human rights' litigation. Again, in the Common Law States commissions of one sort or another are set up to review existing legislation and prognosticate about future requirements and, sometimes, to propose laws to deal with foreseen happenings and consequences. The Wolfenden Committee (Cmnd 247) was one such, and it achieved above average success for such exercises for its recommendations under para 355 (a) were largely instrumental in guiding early legislation. Similarly, early thought about nuclear usage and possibilities, e.g. 'Atoms for Peace' and 'electricity too cheap to meter', have proved either deleterious to mankind or revealed themselves as exaggeration.<sup>73</sup>

The weakness, therefore, is not in the idea of legislating in advance of technological development, or even in attempting to change moral standards, but in the practical ability of individuals correctly to forecast the future. This is no less a problem in international relations than in domestic or personal affairs. Indeed, in the field of international relations the International Law Commission lies under the further disability of serving a variety of masters who may obfuscate situations by design or accident, and are concerned more with immediate affairs than what the future may bring.<sup>74</sup> In this emphasis on immediate problems, or in the blind progressions of scientists as to the ultimate consequences of their work, a natural truth is apparent: as evolution is blind to the future so are the consequences of national public policies including their approaches to the conduct of war.

#### Public Policy and Just War.

States have been guided in their policies by a desire to maintain their individual sovereignty and, when it seemed feasible, to extend its scope and range. Because States formed part of a collection of States, restraints on conduct as well as threats against national interests, were always present. Sovereignty embraces many diverse political concepts, so that whilst there could be general agreement about the ends which are

desirable for mankind, there will be great differences in the means proposed by politicians for the political attainment of such ends. This means that while a State follows one political path or another it does not necessarily dwell happily with its neighbours. This follows not only because of differences in political or economic methods pursued, but also because of different views held as to what constitutes national interests at any time.

Historically some conflicts of interest were resolved by diplomacy, failing which by war, so that "war as a continuation of policy by other means" has been a commonplace, commonly accepted as the normal and continuing process of international relations. In political terms, therefore, the role of war in a society can be deduced from factors of historical continuity of intention allied to current actings. Conduct in war is liable to follow a similar pattern.

Defence is a matter of public policy for each State, but is subject to constraints under international law whether through collective decisions of the UN, treaties of many kinds, and the availability of resources such as are envisaged under the Law of the Sea. Defence may be the concept in mind, but it is war that is being considered, for defence is only a euphemism for war in the context of public policy. In that context it is not morality which dictates the nomenclature, although social desires of communities may explain a wish to avoid the word war. At the same time, there seems to be no universal definition of public policy, or even a systematic method of arriving at it. It seems, rather, to be an especially nationalistic concept founded on each State's ambitions, desires and morality, not with an independent worldwide policy in mind, and so supporting the view that there is not a big world, merely a collection of small worlds.

The British have offered an approach:

"...in the course of ascertaining the legal position, the Court may resort to established public policy which itself may be based on some social, moral and other non-legal judgment".<sup>75</sup>

This is a very wide definition leaving scope for all shades of moral interpretation and political leanings. But in practice in municipal affairs, public policy is subject to law and the constitution of the State. That may be especially true in those States which enjoy an effective administrative law, for it is particularly on the point of law enforcement that the relationship of public policy and international relations and international law in respect of peace and war is important.

In the context of peace and war the policy can be compared with the ends desired in international relations by the policies applied by States to such relations. But all States do not necessarily approach international relations problems in the same spirit of what is desirable for the common good, for law and order, or for the peaceful resolution of disputes, as they approach disputes within their sovereignty. Attitudes to judicial settlement of disputes where the State exercises control of the judiciary in appointments to the Bench, and by 'correcting' legislation, can be compared with voluntary and reluctant acceptance of the jurisdiction of international tribunals.

The expression of the source criteria of public policy cited above is really no more than similar expressions regarding international law. By adding sub-sec 2 to Art 38.1 of the Statute of the International Court of Justice, namely the power of the Court (if the parties should ever agree to it) to decide a case ex aequo et bono, there is implicit the 'social, moral or other non-legal' ingredients for judgments in international, as in municipal, policy. Similar expressions have been included in international legal instruments in relation to the law of war. Further, where the law or instrument is silent the criteria will speak for itself and this is as true of international as of municipal policy.

There is the problem that jurists may have a common interpretation of what is meant by morals, but it does not follow that this would be

recognized universally by politicians when considering public policy matters, including the concepts of just war to be followed by them. Whose morality sets the standard and the precedent to be followed? The question is complicated by differences between ideas of political and theological morality. In matters of divorce, abortion and certain sexual practices, secular and canon law are not always congruent even in one State, and they differ between one State and others. This may imply that a strict moral interpretation may dominate one kind of law, but a different - albeit moral by some standard - morality may guide another. The promulgation of canon law stems from very differing practices as, for example, between the Synod of The Church of England and the Code of Canon Law of the Roman Catholic Church which has the force of law for members of that Church because the Pope so orders,<sup>76</sup> whereas the Koran determines the law of fundamental Islamic States without question or representation but not necessarily its interpretation. Secular law, generally speaking, however, is whatever can be pushed or pulled through a secular legislature. Even in the theological States dissension between strict observance of the religious law and the desire for a secular Code has led Muslim States towards Codes of Civil and Criminal Law, although such a movement is in course of reversal in some of the Islamic states. It would be strange in these circumstances of manifold methods of arriving at law and public policy if there was general legal agreement as to the conduct of war.

The earlier theories of just war, as of the law of peace and war, emanated from scholars and diplomatists who were trained in the embracing civil/canon law regime, whereas contemporary dissidents to proposed measures at peace conferences and similar gatherings have tended to be secularists and often atheists. This poses a question as to whether there is any necessary connection between the earlier concepts embracing the right to war but subject to certain restraints and duties, and the current concepts which embrace defence and deterrence. If so, the

further question arises: is current attitude the result of belief that just war is impossible today with today's weapons, and avoidance (even if not yet abolition) sought because those weapons cannot be limited in use to defence. That is, has armament technology embracing a multitude of possible irrationalities inspired some rationality as well as fear? The juxtaposition of satellite development in association with ballistic missile defence and what is called Strategic Defence Initiative (SDI) in the US is, plainly, defence. Satellite development itself has, and is intended to have, offensive capabilities, whilst ballistic missiles speak for themselves on the issue.<sup>77</sup> But SDI allied with a nuclear arsenal has a potential offensive connotation whatever the developers may say. The nub of the argument may lie in the fact that all armed forces are as concerned with the offensive as with the defensive use of their weapons systems and military policy. Indeed, without knowledge of the offensive use and power of such systems how could they deploy defence against them?

Thus, it is reasonable and rational, in terms of means, to allude to 'war' rather than defence in considering those means related to the public policy concerned with defence. In that case jus in bello cannot be neglected (and may inspire renewed consideration of the morality of modern weapons). The attitude that defence itself is necessary, or even desirable, against encroachments is philosophical as well as physical, and some schools of thought would consider the policies and ideologies of the encroacher before deciding on military defence. Means as well as ends affect the decision. In the light of Art. 51 of the Charter which governs the legal place of war, and constitutes modern jus ad bellum, armed defence by a State is only an alternative to collective security, so that any war might be unjust because it would have been unnecessary if the Charter provisions were observed.

Weapons and modes of warfare which have been the subject of controversy: dum-dum bullets, aerial and naval bombardment, and submarine warfare have always had a probability of infringing strict concepts of



jus in bello even before any relevant and specific international rules were adopted. The futility of arguing whether a weapon system is solely or primarily defensive can be seen from debate about the submarine. At the Washington Treaty negotiations in 1920,

"there was a strong trend of opinion ... favouring the complete abolition of submarines considered as a means of warfare inconsistent with the laws of war". Opponents, "mainly<sup>78</sup> France, considered the submarine a legitimate defensive weapon".

Apart from the merits of the argument, and whether inconsistency is illegality, the issue has been clarified in wars since 1920, and history has shown that weapons are tools of war and not merely of defence.

If weapons by their nature are incompatible with just war canons, and if they cannot be totally abolished or their technology lost, contemplation of their use in war must outrage just war concepts. But the submarine situation was left unresolved and remains as an example of international inability to adopt restrictive solutions in the face of reality and technical 'progress' in weapons design and lethal propensity.

The argument itself, and the antagonistic positions taken, whether logical or illogical even as far as national interests are concerned, seem to deny immediate possibility that evolution 'from national development to global community' which some scholars, (not least Karl Deutsch), advocate and foresee, or others fear, remains for the distant future.

#### Jus in Bello: Realities.

Despite past unfulfilled hopes, in 1981 the UN agreed on humanitarian principles which were to be embodied in a Convention<sup>79</sup> acknowledging humanitarian problems and expressing a desire for amelioration as well as the,

"need to continue the codification and progressive development of the rules of international law applicable in armed conflict".<sup>80</sup>

The Preamble to the Convention included the following:

"Basing themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury and unnecessary suffering ... Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by any other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law".<sup>80</sup>

The Convention was signed on 10 April 1981: has yet to become effective, and should be read in conjunction with reports of the continuing realities of modern war. For example,

"Over the past five years, the number of armed conflicts - international, internal and a combination of both - has risen sharply... The conflicts... have not only grown in number but have also tended to last longer... Not only are conflicts increasing in number and length, but practices prohibited by international humanitarian law are becoming more and more common: the taking of hostages and sometimes their subsequent murder, acts of terrorism, torture and other ill-treatment of detained persons, and people reported unaccountably missing; it has even reached the point where whole civilian populations are subjected to starvation for the purposes of war... But it is not enough to speak of these problems without considering why there are so many conflicts in the first place, without considering the general state of international relations; for there too the situation is alarming".<sup>81</sup>

Acquisition of weapons and training of armed forces are basic to theories of deterrence and aggression both of which envisage their use in war. The list of international agreements prohibiting or limiting such use may seem somewhat pointless if only contemporary practice is considered, but development and procurement, if relatively unfettered, can breed only further development and acquisition. Nevertheless, much effort has been expended in the UN, and elsewhere in bilateral negotiation, seeking to reduce or eliminate weapons of mass destruction (nuclear, chemical and biological), and certain weapons which inflict 'unnecessary' injury (including mines, booby-traps, and other similar weapons which if not the cause of mass casualties are particularly likely to cause indiscriminate civilian casualties).

Efforts to reduce or eliminate weapons are not made today with any view of just war, nor are they part of a planned abolition of war. They reflect growing concern about environment as well as of the

inhumanitarian consequences to be expected of modern war. They, however, leave untouched the question of whether modern war could be "just war" even in the absence of the weapons referred to.

In discussing war avoidance theories and non-provocation, defence policies are sometimes categorized as active or passive. Active as of continuing improvement of forces, equipment and strategy; passive as incapable of aggression. The armaments in both cases are nevertheless similar, and both envisage the possibility of war. In either case preparations are not made because in the event one war might be just whilst another might be unjust, although there might be a tacit assumption involved either as to the justness of war or as to the justness of a State's contemporary position. In the latter case conflicting party political views might be debated as occurred in Britain in regard to Gibraltar, Ireland and the Falkland Islands.

Deterrent policies have been evolved which differ substantially from the traditional threats of meeting force with force. Retaliation direct on the heartland of the enemy overleaping his ground forces has now to be feared. The essence of such policies must be evident in their obvious capabilities to perform what is threatened and in the sustained expenditure needed to maintain the capabilities. No doubt the implicit threat is defensive of the status quo ante, (although that might itself be unjust), but consideration of the justness of deterrence policies is avoided for as long as the policies succeed in preventing war. The contemporary issue is whether the means involved are themselves just especially where the policy is based on nuclear weapons.

DETERRENCE

Deterrence Theory and Legal Systems.

A policy designed to avoid war by deterring a potential antagonist is as ancient as warfare itself, for if military theory held that a society initiating war had the advantage of time, place and conditions of its choosing, one object of deterrence was to deny those advantages. In consequence deterrent measures include not only perceived defensive potentialities but also the possibility of pre-emption, or of delaying tactics with a view to obtaining a more favourable time-scale.

In those circumstances deterrence was comprehended merely as a strategem within measures adopted for the defence of the society there being no specific technology adapted by politicians or defence forces beyond the generally accepted principles of war. Now deterrence is studied as a subject with its own concepts, literature and methodology, and embraces a wide variety of tactics which to some extent are independent of fundamental defence policies. Defence policies nevertheless still seek to deter if possible and to defend if necessary.

Prior to the acquisition of nuclear weapons by the USSR, interest in theories of military deterrence was limited mainly to military students and historians. Since 1945, however, 'war studies' have attracted a considerable body of academic and military analysts, not excluding theologians. Deterrence and defence - not necessarily distinguishable from one another - now play an increasing part in national political debate. The interest is mainly concerned with aspects of nuclear deterrence rather than with the abolition of war as a primary objective. The interest is partisan and sharply divided between supporting politicians, academics and military strategists with a sprinkling of theologians and moralists on one side.<sup>82</sup> A firm body of theological and moral opposition, supported by a sprinkling of academic

and military strategists, as well as a growing public awareness, on the other side tends to focus on the nuclear weapon rather than on the strategy. There is also a legal aspect.

Deterrence strategy is usually thought of as military although its economic content should not be neglected. It is an element of defence policy and fundamental to the national place of war. Unless a treaty of alliance is involved international law has no formal part in deterrence theory except that deterrence today is clearly related to a capability for missile warfare to effect by surprise devastation on a scale which might foreclose the ability or will to respond militarily. Surprise missile attack with nuclear, chemical or biological warheads would chiefly have consequences for the civil population and would violate international law both as to aggression and as to the weapons used.

Thus, the theory is one of worse case possibilities, although a scale of strike and response is provided for in both massive assured destruction and flexible response doctrines.

Deterrence strategy need not be limited to threat - which is the usual basis of nuclear deterrence theory. Capacity for defence and subsequent counter-offensive forms part of the substance of the deterrent threat, and this has led to conventional weapon build-up by nuclear as well as non-nuclear weapon States.

What is implied for nuclear States by the adoption of deterrence policy is that the States accept that war remains possible, that it may be nuclear, and defence measures must include the threat of nuclear or chemical response in present circumstances.

Deterrence is a costly element of defence policies for two aspects have to be funded:

(a) Denial - to make it appear in any case that the enemy could not win.

(b) Retaliation - to indicate what the cost of attempting would be.

Deterrence and defence are two sides of the same coin: one presupposing

peace - armed, it is true - and the other resolution of disagreement by the use of force.

Deterrence Theory and Just War.

Measures of deterrence were earlier incidentals of the diplomatic planning of alliances and balance of power evaluations supported by some system of raising military forces as necessity or ambition dictated: for example, the feudal system, the militia system, and the press gang. Because of opposition engendered by fear of the nuclear weapon and its as yet unknown consequences, it has become necessary to consider nuclear deterrence in the light of the just war tradition, and as if it is a finite factor compared with deterrent measures based on conventional weapons. It is the nature of the nuclear weapon and its probable long-term consequences that are important in this connection.

Interest in non-nuclear deterrence is concerned with a range of conventional weapons especially in increasing interest in chemical and biological as well as high explosive weapons. These have their place in debate not only regarding deterrence between NATO and the WPO but as to proliferation of chemical weapon capability worldwide. Non-nuclear States can found their defence and deterrent measures on and in relation to conventional and chemical weapons even if with the proviso in cases such as Israel and South Africa that nuclear weapons may be possessed although unacknowledged. Deterrent strategies, therefore, separate concern with nuclear or with non-nuclear opposition. From Edward Long's seven criteria\*\*, even if it is possible to remain within just war principles with response limited to conventional weapons, it will not be if nuclear weapons are used.

The arguments made as regards nuclear weapons, are first, that they are immoral per se: second, that threat to use them in retaliation is also immoral. In terms of the UN Charter war is generally likely to be illegitimate today, and nuclear war would make both the hope of a

\*\* See pages 131 and 132

successful outcome unlikely and immunity of non-combatants impossible. There is a continuing gulf between the Just War Tradition and the conduct of war.

Deterrent measures in any case, especially nuclear deterrence, depend on an assured second strike capability and the firm intention to use that capability if necessary. It also requires recognition of the difference between pre-emptive and preventative war: that is between aggression and war to dissuade perceived active aggressive intentions. It is not a unilateral measure. For example, if Russia could feel absolutely secure only if the West disarmed unilaterally the West could by no means safely accommodate that feeling. Further, nuclear deterrent means are susceptible to subversion from external sources so that deterrence must be safeguarded by internal security and countermeasures including psychological measures.

Effective deterrent measures are intended to ensure that planned defence strategies, and any consequential counter-attack, do not have to be put into active effect, and weapons, legal or otherwise, do not have to be used. For some this resolves argument regarding moral issues, except for the major premise that a hypothetical decision to unleash massive retaliatory measures against non-combatants is not compatible with just war tradition.

It would be trite and misleading to say that deterrent measures are taken only because a State fears aggression from a potential enemy. Deterrence can be a cloak behind which aggressive capabilities may be built up. Intentions may be either offensive or defensive but may alternate with circumstances. In one case it remains a moral issue as to the means which it is planned to use in deterrence. In another intention offends just war tradition and defies the objects of the UN Charter. One may applaud Walzer's categorical statement that,

"Nuclear weapons explode the theory of just war".<sup>83</sup>, but, "We threaten evil in order not to do it, and the doing of it would be so terrible that the threat seems in comparison to be morally defensible",<sup>84</sup>

as true only if deterrence is a defensive posture with sufficient capability to deter. If the intention is to build up to war fighting posture with inherent danger of precipitating accidental war the comparison lapses for,

"...as a theory, deterrence is fraught with difficulty. Since deterrence is a psychological phenomenon, its effectiveness depends upon the<sup>8</sup> rationality and the value system of the opponent to be deterred".<sup>5</sup>

On the other hand,

"War-fighting presents precisely the opposite problem. In theory, winning a nuclear war is straightforward. Victory can be attained either by pre-emptively destroying the other side's nuclear weapons or by surviving a nuclear strike or by a combination of these. The practical implementation of this theory, however, presents problems".<sup>8</sup><sup>6</sup>

It is easy to see, therefore, that even before the possibilities and means of deterrence are considered, moral issues within a State are liable to engender bi-partisan approaches to defence policies in a way straightforward defensive measures in the past have not. This is partly a question of time factors and the impingement upon them of actions by other States. Because of external threats the conduct of both war and peace are now determined by national strategy. This is evident in long-term education and indoctrination in times of peace to ensure national will and fighting capability if war eventuates and decisions are to be effected by force rather than by negotiation. But the national strategy is a political conspectus of wants and resources, and if, as Clausewitz said, war is a chameleon-like character, so is national strategy especially in a multi-party State. The blurring of distinction between absolute peace and cold war, as well as the strategies to be adopted on a continuous basis, make readiness essential, but the urgencies and consequences are such that differences of opinion on the means to be adopted are, perhaps, inevitable.

For the nuclear States the consequences to be expected from nuclear war indicate that the utility of military force has changed from fighting to win a war to a capability to deter war. It may not be true of



non-nuclear powers where the emphasis is still on occupation of territory or annihilation - as in the Iran/Iraq war - in a total war.<sup>87</sup>

In military terms deterrence normally is a passive concept requiring the provision of the means by which the deterrent policies can be effected, including the build-up of the means and the training of forces. But there are also more active aspects of pre-emption and intimidation. The passive role is not affected specifically by international law except as regards arms restriction of any kind that may have been agreed. In the active role the provisions of the UN Charter apply.

The means of defence and deterrence are not identical in all particulars. Related arms control initiatives and negotiations may have relevance to one more than to the other, and might stifle the escalation dominance which technological advantage may bring. Escalation in scale and weaponry must be planned, for if deterrence is largely a matter of arms control not war aims, the material demands for a conflict escalation policy if deterrence fails must be provided for. In any case, deterrence is not only a defensive strategy: to attain credibility it must contain the seeds of a counter-offensive policy.

The concept of offensive capability combined with a defensive posture has encouraged the study of deterrence as an independent subject since 1945 for four major reasons. First: a general inclination not to let post World War II 'cold war' situations of opposed political systems deteriorate into active global military conflict in which the opposed systems necessarily confronted each other directly. Second: the advent of thermonuclear weapons and a growing realisation of what their use in war would involve. Third: the conscious, or sometimes unconscious, hope that the experience of the League of Nations will not be repeated in the UN. Fourth: economic interdependence as an increasingly important factor in and affecting national policies. Of course, the four are inter-related and some points are more important to some States than to

others. If there was ever incentive to avoid war, hopes of long term international co-operation have fluctuated being influenced especially by the attitudes of the US and the USSR.

Deterrence is merely a means to an end and is not an end in itself. It must be supported by the means with which to obtain and ensure its credibility. These are arms, standing military forces, and the will to use them alone or in alliance with other States. Here too the ever present problem of government arises for the cost of deterrence must not jeopardize other national interests if deterrence is to be effective in an overall survival policy. Equally, expenditure should not be so extravagant that instead of deterrent policies being perceived offensive build-up is more likely to be inferred.

That just war theory played a part in preventing direct war between the super powers is doubtful. It is more likely to have been the result of direct deterrent measures and the cost calculations of indirect confrontation which surrogate conflicts provided.

As the object of deterrence is to avoid war - at least for the time being - if the Just War Tradition is to be invoked in respect of deterrent measures it can only be because if deterrence fails some element of means or method would offend against the Tradition. It seems likely that the debate would be limited to the threat, and the potential use, of indiscriminate weapons, rather than the rules enjoining right attitude and intention, non combatant immunity and proportionality. However, if nuclear weapons are the means by which direct confrontation is avoided are they illegitimate at that stage? Or should the debate consider methods of pre-targeting, surveillance, laying of minefields and possible pre-emption, for all are included within the means and methods of deterrence? How is the public policy of deterrence to be investigated to see whether it is the real intention, or whether that is not to avoid war but merely to postpone it? Some people would feel that it is more profitable to concentrate on the restraints imposed by international law

on deterrence theories and practice and leave the less debatable area of just war to conflict situations. This would allow the debate to concentrate also on the terms of the UN Charter, arms control measures supporting deterrence, and especially on collective action.

Although the debate is about security, deterrence and defence are necessarily matters of armament, force and arms control, and are intended as limiting factors as well as war preventing elements. Halperin explained that disarmament in practice was a different concept

"carried out separately from the search for security through armaments...Those who worked for disarmament did not study questions of military strategy and tended to assume that the problem was simply to get rid of the weapons...those who were responsible for seeking security through armaments tended to view disarmament as a threat to their interests".<sup>88</sup>

The subsequent establishing of the US Arms Control and Disarmament Agency (1961) - later followed in other countries - was an effort to maintain an overall view of national security whilst pursuing arms control agreements as a measure of deterrence.

Arms control measures - significantly lowering the level of arms remain a major element in deterrent strategy. Arms control designed to reduce risk of accidental or inadvertent war or war through miscalculation may incidentally include reduction of arms levels for which arms limitation measures are specifically negotiated. They are also necessary elements in the calculation of the requirements of security.

Kissinger talked of 'containment' and of balance of power policies<sup>89</sup> but did not contemplate indefinite nuclear deterrence. He thought it wrong to believe "that nuclear weapons had made the balance of power irrelevant", or that "it was possible to stake the nation's security entirely on a policy of nuclear confrontation".

Michael Howard on the other hand thought that,

"The long term implications of depending on weapons of mass destruction for national security worried only a politically insignificant minority".<sup>90</sup>

Such a view may have reflected a long term triumph of cost over moral considerations. Increasingly the insignificant minority view has grown it being recognized that nuclear weapons, if used as threatened, would destroy all that they were intended to safeguard. The cost consideration then was affected by realisation that conventional forces were also required. At the same time social stability as well as defence remains an essential element in the cost calculations. To contemplate one without the other is seen to be absurd.

Kissinger presumably was thinking of deterrence by balance of terror being credible only when supported by a conventional build-up, but rejecting the idea of limiting deterrence to armed force, he also said that "some ground rules for co-existence are essential".<sup>91</sup> Such rules, however, could be moral, financial, political or legal. Nuclear deterrence has less to do with either morals or law, than with economics: in the short term it costs less than conventional defence. Relationships between States are political and economic not legal except in a procedural sense. They are conducted on a diplomatic plane and the diplomat is the servant of the government arguing usually, but not invariable, within a legal framework. In the total practice of international relations procedural agreements have to be formalized, and this is what Kissinger intended. As such agreements include arms control treaties and humanitarian measures as in the Helsinki Final Acts, they go some way toward rules for co-existence. But are they deterrents?

What if bi-lateral agreements are abandoned or disregarded? They are often short-term and often include escape clauses. They are also subject to the doctrine rebus sic stantibus.<sup>92</sup> It is because of these limitations setting up indeterminate time scales, as well as the situations in which agreement proves to be impossible, that nuclear deterrence may continue indefinitely. What is to take its place is a question which, related to the earlier failures of conventional deterrence, offers little comfort if disarmament and collective security

are impossible. The attitudes of some Allies of the US, notably New Zealand, and the practical threat to remove nuclear weapons from Britain, have to be viewed with the American strategic deterrent still in mind. What is implied, however, is that preparedness for war, which is the basis of deterrence theory, will continue indefinitely with the resultant financial burdens for both sides which such preparation necessarily involves. Arms control measures projected to eliminate only some nuclear weapons from Europe do not invalidate such an implication. At the same time,

"Opponents of deterrence...have traditionally been in favour of lower defence spending overall. But they now find themselves advocating alternatives such as an improvement in conventional defences...which would require higher spending in total - or would do so if it was to provide conventional forces with anything like the same power to deter as nuclear weapons possess".<sup>93</sup>

Because both NATO and the WFO have invested in nuclear and conventional weapons and forces, with NATO's doctrine of flexible response implying nuclear use, and the WFO's concept of the nuclear weapon as merely one of the elements of its arsenal implying as normal the inclusion of nuclear weapons in all-arms strategies, both might seem to have interests which stretch beyond merely deterring each other from initiating war.

Over 40 years of peace between East and West appear to support de Gaulle's statement that,

"...deterrence exists as soon as one can mortally wound the potential aggressor and is fully resolved to do so, and he is well convinced of it",<sup>94</sup>

even if there is more to the strategies as envisaged.

"One cannot believe in (nuclear) deterrence and at the same time not believe in it; found one's defences on nuclear weapons and prepare for a conventional war. The exercise has no interest except for that which might be called archaic war, a war which would have the adversary behaving as if nothing had happened since the epoch when Hitler's panzers broke through the breaches on the northern front. Today we have the means to render this war unthinkable".<sup>95</sup>

This does not represent current thinking in the US and in NATO the emphasis is on conventional forces and balance. There is growing doubt

about nuclear escalation but the knowledge of the technology of weapon making, the stocks of nuclear weapons available, and the flexible response doctrine ensure that the threat of escalation cannot be avoided. Yet there is no certain identity of views by all the NATO allies regarding nuclear deterrence. It was argued that French nuclear planning was

"more oriented towards the political management of crisis than towards military effectiveness".<sup>96</sup>

The policy has persisted, however, and it accords with President Truman's belief that nuclear weapons are political and any decision to use them will be political. What may be indicated is a belief that even if war between the US and the USSR may be inevitable in an unchanged international system, nuclear war may be avoided because politicians will not authorize the use of nuclear weapons even if requested by their military commanders. If this was more than mere conjecture it might be said that nuclear weapons in one sense supported international law, but for all the ambiguities it would be amazing if French nuclear targets were not aligned with particular reference to the potential enemy's control structure (as is done by the other nuclear powers) even if not co-ordinated within American or British single integrated operational plans.

#### Restraints on Deterrent Measures.

Deterrence is a matter for individual States (alone or in alliance). To be effective it must be planned in respect of 'worse case' scenarios and specific potential enemies. It follows that it presupposes breach of Art 2.4 of the UN Charter which enjoins States including non-member States (Art 2.6) to

"refrain in their international relations from threat or use of force against the territorial integrity or political independence of any State...",

As Martin pointed out, States supporting the fundamentals of the Charter

"are not concerned with winning wars as avoiding them, or, at least, containing them".<sup>97</sup>

As a minimum this demands a UN capability to prevent an aggressor from winning, but the deterrent measures of the UN reside only in the words of the Charter unsupported as yet by effective enforcement. It follows that the promise of Cap VII of the Charter is still elusive, and measures of self-help continue to be judicious. Within the consensus of international law threat of collective action against aggression is intended as a form of deterrence but the means must also be afforded and experience has shown little will for that.

Concentration on deterrent measures as opposed to build-up for aggression affects the place of war even if it does not markedly alter allocations to defence votes. But are legal restraints influential in the choice of one policy or the other.

Protestations of observance of international law when policies are in dispute, especially when in clear opposition to the facts, are rarely taken seriously by the other party. Each knows that law may be appealed to when clearly in the right, but rarely by a State in the wrong: when in the national interest rather than when not. The value of a reputation in international relations for rigid adherence to international law is still to be proved where interests rather than morals are paramount. Would unilateral and invariable adherence to law by a State ensure that right triumphed: more relevant, would it deter? Rightness of cause in any case is subject to interpretation. If States freely accepted judicial adjudication would both parties with conflicting national interests be satisfied, and satisfied permanently? Yet, although there are many reasons for the failure of deterrent policies the cause lies in breach of international law by one side or the other.

It is not yet prudential to rely on immediate and effective collective security measures through the UN but international law and opinion still imposes criticisms of means and methods adopted by States in their deterrence strategy. For instance, there is unease about the technology of weapons especially the arsenals of nuclear weapons. The

threat of chemical warfare is increasingly debated. These are problems of law as well as of strategy and nuclear deterrence. Stability might be increased with equal access to technical information and knowledge, but denial of access to technology is a matter of municipal not international law, and is itself a deterrent policy.<sup>98</sup>

Neutral States by definition should not need to be deterred from military action, but they have need to plan their own deterrence and defence policies. If they have no logical grounds for aggression their economic policies and practice could promote inter-State dispute - even if not forming a casus belli.<sup>99</sup>

Pre-emption, reprisal and retaliation short of war are all elements of deterrence and examples have been noted since 1945. Such actions may be illegal on both the facts and the principle. Those who contravene the UN Charter (Art 2.4) by such means look for support from Art 51 on the grounds of their right of self-defence following attack or danger of impending attack.

Deterrence is not merely a matter of the denial of territory. All States, especially the highly industrialized, seek to deter encroachment on what they consider their vital interests wherever they may be. This is a permanent process and provides rationale for :

- (i) retention of armed forces and readiness to adopt self-help policies resulting from
- (ii) doubts about the likelihood of timely UN intervention and early collective security measures by the UN as the alternative to (i).

In its turn this produces a continuing concern about the intentions as well as the capabilities of a potential enemy. Thus, the classic incitements for arms races are implicit in deterrent postures making arms control measures an essential part of the strategy.

Deterrent measures are limited usually to threat with an obvious capability for enforcement. Nuclear weapons in this role are not unequivocally condemned in spite of the obvious possibility of use at some later time. Deterrence whilst successful must also include what is



planned if it fails. Although nuclear weapons may be the basis of the deterrent threat it does not follow that they will be used immediately if aggression is limited to conventional attack.

Nuclear States will not want to be forced to adopt a nuclear strategy against non-nuclear States so that they must be able to deter aggression by conventional as well as nuclear capability. Even if non-nuclear States are unlikely to attack nuclear States there is no guarantee that they will refrain from aggression against other non-nuclear countries. Korea, Vietnam, Suez and the Falkland Islands disputes may point in one direction but the rationale for flexible response could lead to nuclear war against an otherwise overwhelming conventional attack by a non-nuclear State. Such scenarios might include States with nuclear capability as yet unacknowledged.

An ability to inflict unacceptable damage may be calculated in economic terms. Whereas the infliction of such damage by military means will be aimed incidentally at the non-combatant, the whole economic attack would be directed at the civilian population. It is pointless to consider a deterrent strategy divorced from economic means.

Deterrent policies do not stop at threat for the will to use all means and available capabilities is implied. States whilst still at peace must conform to traditional preparation and readiness and,

"must have everything so arranged that nothing remains to be done but to set the machinery in motion; it will be too late then to attempt to work out the plan of campaign, or to collect the necessary material".<sup>100</sup>

Whilst military deterrence may be regarded as passive in the sense of being limited to threat, economic measures can be continuous. In the military case it is not legal but political restraint which will dictate the use of nuclear weapons, but in the economic case such agreements as GATT will have to be taken into account.

#### Means of Deterrence.

The means of deterrence coincide with those of defence in many aspects, but there are also major differences. Defence supposes a degree

of readiness for war, but if deterrence may require such readiness to be obvious, its purpose is to preclude war. If deterrence fails it does not follow automatically that active measures of defence will be pursued. What follows unsuccessful attempts to deter a potential enemy from hostilities may be either defence or non-resistance.

Deterrence supposes forces in being, but forces in being of themselves must not be taken to indicate the value a society places on war as a political instrument. If what is really desired is a projection of an "image of war winning capability" which "appears to deny to 'adversaries' the prospect of successful resistance",<sup>101</sup> it may be a successful deterrent, but there need not have been a real intention to engage in war at all.

The position is clearer when Soviet policy is considered. Of this it is said,

"A serious capacity to wage war is viewed as an extremely credible deterrent posture. Such a posture would be desired by both sides in the event of war. So it is logical in Soviet thinking, and not contrary to deterrence rationales, to deploy such a posture in peacetime".<sup>102</sup>

In that case requirements for war fighting and for deterrence are identical. Indeed, the Soviet concept of the structure of armed forces is that it embraces requirements for deterrence, political influence, and waging war. It has no necessary relevance to the ideals of the Charter.

Propositions have been advanced that a nuclear deterrence policy is weakened by a 'no first use' declaration unless both sides can be bound in such a measure. Further,

"in the age of strategic parity and modern nuclear weapons the degree of social 'acceptability' of deterrence is inversely proportional to that of its operational credibility".<sup>103</sup>

Operational credibility is a matter of means and intention. Means are tangible: intention is not only intangible but its deterrent value is what an enemy perceives it to be at any time.

Emphasis on particular means of deterrence change from time to time and not only in military terms. Economic pressures vary with the

emergence of new materials and technology and the supply of raw materials, uranium for example.

Before 1914 the British Navy was Britain's deterrent as in practice it had been the prop of the US Monroe Doctrine. Now deterrence has a different look with Britain relying on the US for alliance and strategic protection in conjunction with NATO, although the problem of the protection of the sea lanes remains. Military means are fundamentally different from earlier weapons: different procedures and moral imperatives are necessary for fighting them especially as the effects of some are conjectural. There is a feeling, however, that the very existence of nuclear weapons, and the risks entailed by their use, deters; peace in Europe being ascribed mainly to the US strategic nuclear policy.

The US and the USSR deploy a 'triad' of nuclear weapons and delivery means within their strategic policies. That triad is composed of bomber aircraft, ballistic missiles and submarines, and it is noteworthy that each of the vehicles, aircraft, missiles and submarines, have been subject to consideration as unlawful in use in the past. Further, by making use of the territories of allies and client States in the deployment of their triad of nuclear weapons the area to be covered by their respective extended deterrence is widened and the involvement of the States of deployment made certain. At the same time, some non-nuclear States have turned to chemical weapons as a deterrent,<sup>104</sup> describing them as the 'poor State's nuclear bomb'.

Any emphasis by Third World States on what weapons are available may be influenced by the fact that attempts to forecast long-term trends in armaments and military equipment must contemplate a time scale of a

"ten-year development cycle and in-service life of 15 to 20 years, as the norm for Western equipment",<sup>105</sup>

as well as exponential increase in cost.

In the competition between technological advance in weaponry and efforts to curb both the arms race and unbridled lethality and indiscrimination of modern weapons, economics is an important factor.

In the early stages of proposals for arms control agreements, or for the introduction of legislation to ameliorate a situation, law may offer only a theoretical solution to a problem without effecting a real solution. In domestic law this is a reason for consulting the experience of societies which have legislated on the matter, and comparative law is actively studied. It is not necessarily a formula for successful legislation but it is relevant to the initiation of international solutions where some regional measures affecting similar circumstances have already been successful. Similarly the full effects of technological advance in weaponry can only be seen in war so that much is made of 'proving grounds' such as those provided by the Middle East and other conflicts of the past 40 years.

Fortunately in terms of nuclear deterrence there have been no such 'proving grounds', so that lack of experience with, and consequential apprehensions about, the weapon and its effects may be a major reason for the success of nuclear deterrence so far.

Treaties affecting nuclear weapons have also had to be negotiated with only what knowledge of the potentialities of the weapon was available at the time. Even if such treaties could be relied upon and had no escape clauses, and if further international nuclear agreements outlawing nuclear weapons were adopted, it seems unlikely at present that perpetual and universal renunciation would follow. The technology would not be lost, and advantage might be gained, or defeat avoided, by threat or use of such knowledge, even if none could be sure as to the similar possibilities on the other side. If safety could be assured by international agreement to renounce the weapon, it would be possible only on the basis of a foolproof verification system universally accepted as such. Even after the renunciation of the weapon and its elimination from national arsenals any question of the creation of a nuclear arsenal under

UN control would seem to offer too many hostages to fortune. Because of these factors and current moves toward improving verification procedures between the US and the USSR nuclear deterrence may remain the basis of strategy between the nuclear states.

The matter does not rest there: a deterrent force does not exist until it is capable of retaliation as well as surviving an enemy attack. This is not reversion purely to a strategy of mutual assured destruction as the foundation of deterrence for that strategy was never accepted by the USSR. Russia preferred a strategy not of 'deterrence by vulnerability' but one which included both active and passive defence measures and belief in survivability. This is a reason why international negotiations and legal initiatives must envisage what a 25-year future might hold. A look into such a future is necessitated by the basic definition of deterrence (and, suitably worded, of law and order):

"...defensive capabilities that would make the choice of war clearly and deeply unattractive to (a potential enemy) and thus also make (such an enemy's) attempts at intimidation unrewarding".<sup>106</sup>

It is only if the peoples perceive an enemy with hostile intentions that such capabilities by a State would offer reassurance in a way in which treaty obligations may not. But any notion that deterrence will put the danger of war at a level below that of 'a stand-off' defence is ill-founded. The necessity is for deterrence measures to convince a potential enemy of the costs to be paid for aggression. International collective action should be a part of the sanction which, to be effective, cannot be limited to purely defensive action.

#### Strategic Nuclear Deterrence.

The attitude of some Americans to the situation in Europe in the 1930s was influenced by an American view that by the Treaty of Versailles the

"allies helped themselves to new colonies, carved the defeated empires into unrecognizable pieces, and awarded themselves impossible reparation payments".<sup>107</sup>

There was American support for Germany in war and defeat and the American view did not take much account of European apprehensions.

The American attitude affected in turn French and British governmental attitudes leading to inaction when Germany re-armed and when the Rhineland was re-militarized. It led to the continued American absence from the League of Nations and that organization's diplomatic failures. Those mistakes were recognized after 1945 but on a global rather than a purely European basis, including American membership and dominance of NATO. But the North Atlantic Treaty Organization is not a unilateral guarantee of European security: self-help is increasingly required of the European partners and without it the alliance would be of less assistance to the US in its own security problem.

American security must be planned, however, on a wider basis than that of the North Atlantic area. The Middle East, Africa, South East Asia and the Pacific have to be considered. For a different reason than global security the Russian position has similarities.

Disregarding the part in defence policies which trade dictates, (which eventually may change American emphasis from the North Atlantic to the Pacific with some adjustments of the practical aspects of defence planning), it is reasonable to see strategic nuclear deterrence theory as related solely to super power superiority on a global scale. If so, the lengthening list of conventional wars since 1945 shows that the strategic deterrent's primary purpose is to prevent direct war between the super powers. In this the nuclear capabilities of France and Britain are masked by their disposition which is dictated by alliance considerations as well as home defence policies. The result may be that if the US policy is in danger of being decoupled from Europe<sup>108</sup>, (and the force of the strategic nuclear 'guarantee' has never been accepted overtly by the French whatever the reality), the British and French nuclear deterrent policy might not prevent conventional war in Europe. That would remain affected by the continuing threat of US intervention even in the absence

of a North Atlantic Treaty. On the other hand, the WPO States can be reasonably assured of Russian strategic and tactical nuclear guarantee for that underpins the basic Russian security policy requirement of territorial buffer space.

Thus, it may be said that nuclear deterrent strategy is founded on international agreements both in NATO and the WPO which are designed to safeguard the two super powers from the possibility of nuclear war in Europe leaving each free to develop (or to prevent development) elsewhere.

The basis of this strategic nuclear deterrence is being increasingly challenged not only because of the holocaust which would result if it failed, but because of the nuclear weapon itself both in its threat and its use. This may as clearly be seen in current negotiations to reduce nuclear weapon numbers (because of the possibility of their use not because of their threat), and to ensure conventional balance as the developing strategic policy.

#### Threat, Intention and Hostage-taking.

The difference between the traditional policy si vis pacem, para bellum and a general concept of deterrence is that the latter if passive in action is offensive in the context of threat which is its basis, but the former policy is construed and organized as defensive. Two issues are involved in the comparison: first, a separation of threat and intention: second, the hostage-taking which is implicit in the threat. Both must be considered in their relationships with modern missile technologies and the laws of war.

Because states generally do not assume that others will observe the law there has developed a well established method by which a potential enemy's probable intentions can be paired with perceived capabilities. From this assessment can be made as to the likelihood of war. The capabilities, however, may be mere reaction to external pressures, and if intentions are then misperceived arms races are likely to escalate with a danger of pre-emptive operations.

The reactions of the potential enemy must be linked to one's own actions so that positive and negative factors affecting both capabilities and intentions can be taken into account. This is a continuing study for it is always the place of war at the moment of examination which is relevant, and for assessment purposes it is futile to take a retrospective view. If stability is to be maintained the means must never fall below assurance of effective retaliatory capability of sufficient strength to cause unacceptable damage notwithstanding the enemy's first strike. That capability must be made obvious to the potential enemy.

The assessment of deterrent measures and capabilities will be the index of the probability of war but there is the difficulty that defensive reactions by one side may be regarded as offensive moves by the other. A potential enemy might not support a view that a force such as that deployed by the US in Grenada (1983) - a Force maintained in being at a high rate of readiness - is other than an offensive force despite the US commander's explanation that his Force's role was not intervention but deterrent.<sup>109</sup> The legality of intervention, whether deterrent or otherwise, makes such categorization much less than obvious. Antecedent circumstances are relevant, but in so far as a force is not under UN control it must indicate that a vital national interest is involved.

Whatever deterrent measures are adopted there is always some danger of intentions being miscalculated either in an isolated incident or in a chain of events. It is not political policy about war, however, but the concept of war itself which ensures that even if the incidental causes of a war are the result of miscalculation the decision to fight is consciously determined at some level of a society. In this it is unlike contemporary philosophy which dictates that statute law in some States be interpreted not as placing the onus for negligence but indicating which party should effect insurance cover. In deterrence theory it is the State with no aggressive intentions that must deter the potential



aggressor. This is a function - now better understood - of arms control and confidence building measures. It is because there is always some danger that in changing action/reaction situations war may be precipitated through miscalculation that the direct communications link was established between the US and the USSR.<sup>110</sup>

### Threat and Intention.

Assessment of enemy capability may obscure a debate about a State's own intention to use a particular weapon about which moral or legal objections have been raised.

In defence of the possession, if not the use, of nuclear weapons a philosophical argument is put forward which extends to nuclear deterrence strategy. The argument is based on a hypothesis of a moral distinction between threat and intention. That is, a threat to use a weapon can be made without there being any formed intention to use it.<sup>111</sup> The essential legality of a weapon is also affected, for availability is the keynote to opportunity if circumstances arising demand that a decision be made as to actual use.

This kind of moral approach may be misjudged or, at least, equivocal and reminiscent of the view that,

"No use of nuclear weapons which would violate the principles of discrimination or proportionality may be intended in a strategy of deterrence".<sup>112</sup>

But such a strategy to be credible necessarily implies deployment and targeting, and

"...to have a nuclear arsenal deployed is to be committed already to using it in certain circumstances".<sup>113</sup>

So that, "If it is the very use of nuclear weapons which is morally unacceptable, then a nuclear arsenal can be justified only if it is both intended and likely to prevent such use".<sup>114</sup>

The view of the Church of England - at variance with that of NATO - was that,

"a nuclear component in deterrence is not sufficiently compelling to outweigh the huge moral imperative against using nuclear weapons at all".<sup>115</sup>

That view related not only to "a reliable and morally acceptable approach to the future of the world" but also to crisis management as an "integral part of deterrence...which may mean in effect going to the brink...relying on fallible human judgment operating under tremendous strain".<sup>116</sup> The horror of the weapon seems in this case to have blinded the reporters to the fact that deterrence is not a one-way street - each State deters the other - but if one fails so does the other even if unilateral surrender is considered preferable and intention and likelihood are conditional.

It would strain the argument to hold that intention is absent from NATO and the WFO although both alliances would claim that the threat is conditional on the actions of the other. Given the conditions obtaining, a formed intention to use nuclear weapons seems obvious from the doctrines of both sides. But the doctrines are military, authority to use is political. As regards NATO,

"We do not plan for the integrated use of conventional, nuclear and chemical weapons...We make a clear distinction between conventional and mass destruction weapons. Any use by the Alliance of either chemical or nuclear weapons would always be in accordance with release procedures approved by Alliance political authorities".<sup>117</sup>

Leaving aside that distinction between 'conventional' and 'mass destruction',

"We have no intention of suggesting that we do away with NATO's option to be the first to use nuclear weapons...The price of an attack on Western Europe must remain the possibility of triggering an incalculable chain of nuclear escalation".<sup>118</sup>

It is not to be supposed that a Russian view is markedly different, and on both sides a

"Substantial portion of the world's most able scientists...(is) constantly engaged in further extending and perfecting the weapons".<sup>119</sup>

Evaluation of the will of a State to utilize its nuclear capability is for the other side to make. Detente and glasnost can be promoted as tactical methods of weakening resolve not only to entertain the possibility of using nuclear weapons, but also of maintaining adequate

defences. On the other hand failure to observe international law should be counter-productive whether in obligations such as those under Basket 3 of the Helsinki Final Act ((1975) 14 ILM 1292), or interference in other States as in Afghanistan.

There was no breakdown of inter-alliance deterrence as a result of intervention in Grenada or Afghanistan, but,

"Wars occur through miscalculation: but even in the cat's cradle of deterrent theory it would be stretching the doctrine of diminished responsibility much too far to argue that a breakdown of deterrence which had led to an aggressive act was less the responsibility of the aggressor than the aggressed".<sup>120</sup>

Deterrence to be effective must point directly to the deteree: Nicaragua as a centre for disaffection in Central America might prove to provide a different experience.

Enforcement of law is subject to legal limitation, but the State is the Judge of the limits in its domestic jurisdiction. Collective security has played little part in the sanctions of international law, and submission to the ICJ is voluntary and partial. Deterrence similarly is a matter for limitation by the State and until nuclear weapons are prohibited by universal consent - international law - the threat and intention will continue.

#### Hostage-taking.

The basis of deterrence is that the civil population of one side is held hostage by the other side, and to a degree unknown before the long-range missile, nuclear warheads, and biological weapons were available for military arsenals. If the threat holds consequences similar to those which follow conventional bombardment will ensue, but it is the scale and range of the weapons and their consequences that engage debate.

International law has sought to protect civilian populations in war by prohibitions against hostage-taking or being killed as a hostage.<sup>121</sup> Geneva Protocol I of 1977 sets out the legal position.

"Art 48 . Basic Rule: In order to ensure respect for and protection of the civilian population and civilian objects, the Parties...shall at all times distinguish between the civilian population and combatants...and accordingly shall direct their operations only against military objectives".

Can nuclear weapons conform to that in practice?

Between the taking and killing of hostages in armed conflicts and the making of hostages by nuclear deterrent policies there is the difference that one is actual whilst the other remains a threat outside the definition of war and armed conflict in the Conventions. If the threat is to be credible the intention to carry it out must be perceived, but, it is argued, so long as the threat is effective the civilian population is neither taken nor killed. The legality of the weapon in that case is immaterial. If the weapon is actually used questions of its lawfulness would arise too late. The conflict of opinion is illustrated by an exchange between two American strategic analysts:

- (a) Ickle condemned the "current smug complacency regarding the soundness and stability of mutual deterrence resting as it did on a form of warfare universally condemned since the Dark Ages - the mass killing of hostages".<sup>122</sup>
- (b) Panofsky, on the contrary, said that, "however it might be to rely on the threat of mutual destruction as a source of peace, it had seemed to work, and that in any case this state of affairs was a fact of life and almost beyond policy".<sup>122</sup>

The argument was developed offering the justification of improving technology. By the early 1970s,

"the growing capacity of communications, command, control and surveillance systems, and, most of all, the ability to hit quite small and protected targets with astonishing accuracy all contributed to a sense that nuclear weapons were increasingly becoming instruments that could be used with precision and discrimination".<sup>123</sup>

Such a view of theatre nuclear weapons (TNW), and even of increasing accuracy of strategic nuclear weapons, could have little effect on the area of nuclear fallout especially if the use of TNW led to escalation to strategic nuclear warfare. Ickle's argument remains fundamentally based on the pre-targeting policies of the nuclear States in peacetime, and the necessary connection such planning has with an inability to distinguish between military targets and the civilian

population adjacent, as well as the area which will be affected by fallout.

In a curious way the place of war, in Europe at least, has been affected for 40 years by the absence of an absolute prohibition of nuclear weapons.

#### Deterrence and Arms Control.

Where does nuclear deterrence lead? Adam Roberts<sup>124</sup> answered that question by quoting Freedman,

"An international order that rests upon a stability created by nuclear weapons will be the most terrible legacy with which each succeeding generation will endow the next. To believe that this can go on indefinitely without major disaster requires an optimism unjustified by any historical or political perspective".<sup>125</sup>

Roberts makes the further points that the existence of

"nuclear weapons (being large in their effects, but relatively easy to conceal) makes general and complete disarmament an even more unattainable goal than it was before",<sup>126</sup> but

"nuclear weapons are already subject to several types of restraint and control...if we are going to go on living with them, further limitations will have to be accepted".<sup>127</sup>

Art VI of the Non-Proliferation Treaty is dismissed as indicating mere "obligation to pay lip-service to the possibility of a better world".<sup>128</sup>

Proliferation has not been halted by the Non-Proliferation Treaty although it may have been made more difficult.<sup>129</sup> There is a continuing worry that States which may want to have nuclear weapons may find others willing to help either to obtain them or to create the production facilities essential for their manufacture. The legal position is clear but in this, as in other arms trading transactions, enforcement of international prohibitions is less than effective. In the long-term, debate can only underline the truism that knowledge of how to make nuclear weapons having been acquired it cannot be wished away, and if materials such as uranium are made difficult to obtain this will not make proliferation impossible.

Roberts had the view that,

"The relationship between nuclear weapons and the Laws of War is an area of vast complexity, and deep moral ambiguity in which the layman fears to tread".<sup>130</sup>

Is he wrong? In their Reservations to Geneva Protocol I of 1977 the US and the British understood the rules were not intended to prohibit or regulate the use of nuclear weapons. That view was at variance with the wording of a Press Release by the US Delegation to the UN General Assembly on 10 December 1968 in which the

"US recognized that the principles of law relative to the use of weapons in war 'apply as well to the use of nuclear and similar weapons'".<sup>131</sup>

The Reservation seems also to negate the entire intention and the explicit wording of Art 35 of the Protocol, and Roberts was rightly emphasising "a degree of tension" between the underlying "ideas of the Laws of War... and of nuclear deterrence" which are to 'limit wars' and only alternatively to 'prevent wars' by making war so "frightful that States will fear to resort to it". It is a failure of commentators in referring to nuclear weapons in the context of the Law of War when they omit reference to the legal position under the UN Charter<sup>132</sup>. Not only first strike, but any use of nuclear or other weapons, except under specified circumstances, is illicit under Caps VI and VII.

Roberts attempted to justify NATO's diffidence in adopting a "no first nuclear use" policy by arguing that Soviet advantage in conventional weapons merely avoids discussion of NATO's ability, but reluctance, to counter that advantage. But in any case 'no first use' declarations have no force until translated into firm agreements acknowledging the position under the UN Charter. Unilateral declarations obscure the real issue of the legality of the nuclear weapon whether in deterrence or in use, or even as a bargaining counter in arms limitation negotiations. Nuclear weapons have not obviated the need for conventional forces, and budgetary shortfall rather than moral reasoning

may control expenditure on nuclear weapons (as is being suggested in Britain as regards Trident).

If nuclear weapons are regarded as merely one kind of weapon of many available for use, (as is said to be the view of the USSR), there are strong reasons for believing that in the foreseeable future nuclear deterrence will continue to propound "ethical dilemmas of threatening the destruction of even ordinary people in retaliation for a similar attack". Without the threat nuclear deterrence would prove ineffective. Even a perceived diminution in the nuclear threat seems to indicate potential ineffectiveness. For instance, Roberts thought the ability of US nuclear force in deterring Soviet nuclear or conventional aggression in Europe or against Japan has correspondingly diminished as a result of the US-USSR nuclear balance on US extended deterrence policy. This remains unproved, but fears and ethical worries continue with regard to the nuclear weapon. This concern, which is not eased by a general reluctance by governments to discuss nuclear policy, leads to moralistic side-taking, and consensus on moral issues is difficult to obtain for the issue is not about the ends but the means. There is also a tendency to say, as Holst does,

"Governments (therefore) cannot ignore the question of what to do if deterrence fails".<sup>133</sup>

The separation of national (or regional) deterrent policy and capability from a global (UN) deterrence is usual, and the question is not (as ideally it should be) what should the UN do, or what collective action should ensue. The discussion, therefore, returns as it must in the present international system to the national State. Would a nuclear State which had refrained from using nuclear weapons in combat (as the USSR did in Afghanistan, the US in Vietnam, and Britain in the Falkland Islands) use the weapon as a first or other strike against a UN collective opposition? But the dilemma remains a national position: Holst, as moralist, attempts an answer in pointing out that,

"There is a difference in accepting the possibility of large-scale destruction as a consequence of war and accepting its deliberate creation as a legitimate purpose of policy in the event of war".<sup>133</sup>

Large scale destruction immediately on the outbreak of war seems now to be always planned if only as incidental to land/air operations, and the difference is one of degree - that is, destruction by nuclear or by conventional weapons - rather than a moral difference. In any case, non-combatants are hostages in all wars whether nuclear weapons are used or not: Beirut is as pertinent as London or Coventry, Hamburg and Hiroshima.

The policy cannot be limited to empty threat,

"Deterrence is not, and cannot be, bluff. In order for deterrence to be effective we must not merely have weapons, we must be perceived to be able, and prepared, if necessary to use them effectively against the key elements...".<sup>134</sup>

In the context effective use would include 'first use' and its reciprocal, 'launch on warning'. Time difference between the two may be slight, but the deterrent factor may be impressive. Of course such policies (and their attendant theories) presuppose that interference in communications, malfunctions in equipment, and natural 'frictions' will not be so crass as to generate false alarms and consequential fatal action or war by accident. That risk will always play a part in decision taking and is now a continuing factor in peace as well as threat of war.

In the international system there is clear differentiation between what is legal by way of preparation and planning for defence and the illegality of putting war plans into operation. In an international situation in which a state of 'cold war' remained continuous, preparations for war could not be separated from means and deployment for defence and deterrence. The nature of missile technology eliminating the necessity for, and time factor of, mobilization, together with the time-distance capability factor of nuclear missiles, make peace merely a state of non-war. Surveillance from space and improving means of verification slightly mitigate the likelihood of pre-emption but are themselves evidence of the uneasy nature of peace and some may be illegal in use in the absence of 'Open Sky' agreements.



In the circumstances, it would be re-assuring if it was realistic to take the deed, rather than the will, of General Assembly Res 1653 (XVI) of 24 Nov 1961. But, in that connection, possession of, threat to use, and actual use are differently treated, and paragraph 1(a) of the Declaration of the Resolution is limited to 'use'.<sup>135</sup>

"The fact that the survival of human civilization is predicated on such a policy (ie, 'balance of terror'), may, in the long run result in the disintegration of the ethical basis of civilized society".<sup>136</sup>

This demands definition of 'civilized society' and invites pessimistic comparisons of policies which have been advanced by various political theorists from Christian ethics to 'final' solutions.

Civilized society ought to be an ethical society with aggressive war forbidden (as by the UN Charter and just war tradition), and a clear understanding that the use of nuclear weapons would render a war unjust. This would not eliminate war but would indicate the circumstances and means by which war might be ethical. By contemporary standards that has been done by Art 51 of the UN Charter which, however, leaves the threat of nuclear use even if it would be difficult to equate the size of nuclear stockpiles - far beyond what is required solely for deterrence - with the mere threat policy which, so far, has been accepted in some quarters as not entirely outraging an ethical base.

Behind this is a military reality. If it is accepted that nuclear war is unlikely to attain a war's objectives and, therefore, has neither political nor military justification, conventional force remains. To that extent war will not have lost its place in the policies of society. Some of the problem of size of stockpile is numerical not ethical. The general tendency of military analysts to overestimate the capabilities of a potential enemy and to underestimate their own has an 'ethical' basis of a kind. Analysts are obliged by prudence to make 'worse-case' calculations as counters to the occupational optimism of politicians secure in a belief in their policies,<sup>137</sup> of diplomats with trust in their

negotiating skills, and to the parsimony of treasury subventions for military purposes as seen by the military analyst.

Theories of deterrence can be convoluted and involved. The more involved the less credible. The more emphasis on defence the less credible as deterrence with consequential danger of pre-emption. Adam Roberts returned to the subject again in 1986,

"...nuclear deterrence is not a stable state of affairs but a dynamic one, in regard to military technology, strategic doctrines, political perception, and the number of countries involved. The argument that nuclear deterrence has only to fail once to fail altogether is a strong if not totally incontrovertible one".<sup>138</sup>

He rejects moral fundamentalism (indiscriminate in moral as well as physical effects): "nuclear weapons seem to have the capacity to make sinners of us all".<sup>139</sup> But he concluded that

"To move away from existing conceptions of deterrence and defence to different and less offensive ones is urgently necessary, but it is doubtful whether the Strategic Defence Initiative or the Labour Party's defence proposals as at present outlined are the way to achieve these objects".<sup>140</sup>

The Labour Party's proposals have since been developed and arms control negotiations on nuclear and conventional weapons in Europe are proceeding, but the conceptions of deterrence and defence are as yet unchanged. That does not imply a general agreement between political parties on either conception or means. Indeed, there is a tendency for some political parties in the West to press for "idealistic aspirations for effective but non-provocative conventional defences".<sup>141</sup> In West Germany the Social Democrat Party called for armed forces that are "structurally incapable of aggression"<sup>142</sup>, but what that would entail even in a defensive war seems to offer only an indecisive performance. The Danish Social Democrats look for a purely "defensive defence" without specifying how the military operations might develop.<sup>143</sup>

If there is an air of unreality about such proposals it is that whilst falling strictly within the spirit of the UN Charter they contribute nothing to the fundamentals of arms control and disarmament being unilateral in themselves, and are made - perhaps - with an eye to

burden-sharing arrangements within the NATO Alliance. As Father Gilbey pointed out, political decisions "are not wholly reducible to rules of morality, nor, for that matter, to any rules at all...".<sup>144</sup> But the political nature of the evaluations made in international relations cannot be avoided for

"the complex set of characteristics includes the ostensibly ethical assessment of the given war...ie, its just or unjust character...this is essentially a political evaluation, since the just or unjust character of war depends on the character of the social forces which wage war and on their aims, as well as on whether the war aims accord with the interest of socialism and national liberation. Thus just wars are at the same time progressive and the unjust are reactionary".<sup>145</sup>

according to communist thinking. It is doubtful if the basic thinking in anti-communist politics - names apart - is markedly different. In any case moral relativism may be only a justification, as may be the case with the 'invitation to intervene' claimed by the USSR in Afghanistan.

It seems, therefore, that if nuclear forces are the "ultimate deterrent against aggression"<sup>146</sup>,

"arms control and disarmament have a central role in the achievement of the goals in the United Nations Charter, including international security, and that means measures to enhance security at the lowest possible level of armament are vital...".<sup>147</sup>

Those measures include the strategic aspects of deterrence, and the specific deterrent apparently implicit in the stability to be expected of a nuclear balance between East and West. There are passive measures also, including law and morality, and arms control.

Mrs Thatcher once observed that after 40 years since the UN Charter was launched,

"we have not seen the emergence of an effective and enforceable body of public international law".<sup>148</sup>

She did not overlook the effect on public opinion which concepts of law and morality have had in relation to nuclear weapons. Neither was she unaware of the treaties of arms control which have been agreed even if some remain unratified. Rather she voiced a general concern about the

ideals which have yet to be attained but which would affect all indiscriminate weapons. She said that,

"Deterrence and arms control are complementary and integral parts of the security policy of the Alliance. NATO therefore seeks a stable balance of forces at the lowest possible level to strengthen peace and international security through militarily significant arms control agreements which are both equitable and verifiable".<sup>149</sup>

It is because deterrence is not based solely on force that law and the legality of positions taken by governments are also considerations to be taken into account in assessing the place of war. On one hand are the implications of retaliation by nuclear or other missiles; on the other only threat of moral sanction.

If collective action can be discounted in present circumstances, and if the threat of retaliation is not believed, deterrence is likely to fail. During this Century neither moral obloquy nor fear of retaliation has deterred States from 'conventional' aggression - even against States the defence of whose neutrality had been guaranteed and to which guarantee the aggressor was party. The many wars since 1945 have been fought without the use of nuclear weapons available at least to one side, as in Korea, Vietnam, Suez, the Falkland Islands and Afghanistan. Proponents of nuclear deterrence claim this as a result of a balance of terror and fear of unacceptable punishment in kind. Opponents of that hypothesis, seeing exaggeration of the influence of the armed forces in foreign policy planning and implementation, look for a change in the super powers relationship.

If relations between the US and the USSR are now changing one reason is in the recognition by both sides that whatever may be effective about today's nuclear deterrence it is a policy which requires change. But general acceptance of the current policy has delayed alteration since the possibilities of anti-ballistic missile technology led to the curtailment policy of the ABM Treaty (1972) as a measure of promoting stability. Now the promise of a defensive system needs examination and development. The Hoffman Committee's view that,

"the President's goal of complete defence against strategic ballistic missiles (is) at best a long term aim...in the long term such system might prove a nearly leak-proof defence against large ballistic missile attacks"<sup>150</sup>,

has been sufficient to encourage expenditure on research into ideas which, at the most optimistic, would negate first strike as now developed. But the idea offers hostages to anti-satellite war and wars in the atmosphere as well as a continuing arms research and development race.

Scientific investigation may have its own morality, but its products will be expected by some to conform to conventional morality (and law) and to provide the benefits forecast for them. Nuclear energy, however, has not provided the cheaper electricity forecast for it but it has produced relatively cheaper explosive power. If nuclear weapons on the whole have proved cheaper than conventional weapons in respect of fire power comparisons they have also proved more controversial and strategically demanding. The gloomy view that,

"For the next thirty or forty years, the best that even a successful defence could achieve would be to protect America's retaliatory capacity"<sup>151</sup>,

only paints a 'last ditch' picture. Fear of overwhelming retaliation in kind is the major factor in nuclear deterrence theory, but reluctance or willingness to be the first to use a weapon (as with chemical weapons in the second World War), if logical, springs from military rather than moral reasoning. There has not been a reluctance to use the 'air' weapon, the submarine, or the missile since their introduction into warfare. Attempts at control (as for example by the Air Warfare Rules of 1923<sup>152</sup>), have failed mainly because of the military utility of weapons. Increasing use of chemical weapons, and of missiles of varying range, has followed that pattern in recent combat.

Evaluation of deterrent capability is related to the perception of threat which, if inaccurate, probably overstates in order to be on the safe side. It is in the will to carry-out the threat, rather than the

weight of the moral values involved in the threat, that miscalculation is likely.<sup>153</sup> Revision of perceived threat is a normal method for justifying reductions or increases in military spending making calculations of relative nuclear and conventional costs more important than comparison of the morality of the weapons themselves.

The argument, like the theory of deterrence, is related to means. These range from threat of punishment of an unacceptable kind to the security of alliances and balance of power arithmetic. But the introduction on the one hand of long-range bombardment by aircraft and ballistic missiles, and, on the other, opposition to war, has posed questions for moralists and strategists. The nuclear argument added to those problems. For the strategist questions of surprise and pre-emption: for the moralist questions of observance of the UN Charter, humanitarian law, proportion and discrimination and their relationship with military necessity.

For nuclear powers and their consideration of justification of war or the alternative of abolition the compromise has been in a change in the use of military force from war-fighting to ability to deter. This is not true of non-nuclear States where emphasis remains on occupation of territory and towards annihilation in total war as in Iraq-Iran. So far nuclear weapons do not seem to have discouraged non-nuclear belligerents whether in Korea, Vietnam or Afghanistan for, in the circumstances, any potential threat of nuclear weapon engagement was, apparently, incredible whether from a military or moral or political point of view.

Proliferation of nuclear weapon States might produce a different pattern of nuclear usage if any of the potential nuclear states has fears for survival. Openness in the nuclear deterrent threat has effected a peace in Europe: secrecy about nuclear possession will make for instability.

## PART III

## THE MITIGATION OF WAR - THE MODERATION OF THE EFFECTS

## (A) By Humanitarian Law

Law is founded in rationality although a degree of irrationality and variability is inevitable in its administration. War is founded in emotion which is often of greed and power on one side and fear for survival on the other.

However logically they are planned military operations are executed and battle conducted in a highly-charged atmosphere which is the very abnegation of law and order as understood in terms of domestic law. Domestic law concedes a place for emotion in human conduct but only as regulated by the law and the exercise of lawful authority. Logically it follows that so long as wars persist international law should also seek to regulate human conduct (emotion) in the war.

Regulation of conduct in war has been attempted in the provision of a code of conduct and humanitarian practice which has emphasised the effects of weapons rather than the fact of the weapons. This emphasis draws attention to the need for limitations in usage whilst somewhat neglecting to acknowledge that the availability of weapons is the reason for limitations and prohibition in their use. Indeed, it is the availability of weapons, flowing from prolific arms industries internationally uncontrolled and often nurtured by governmental ownership or encouragement, which makes modern wars possible.

Despite legal impediments designed to prevent it, war remains a feature of international dispute resolution. The availability of weapons and the consequential need to maintain some readiness in defence has promoted theories of deterrence to prevent war by imposing a calculation of probable loss against possible gain as a result of war.

The calculation is military-economic, amoral and without consideration of legal concepts. The motives of a State for planning a deterrent posture rather than preparing for aggression may, nevertheless, be based on moral and legal standards and just war theory. The provisions of the UN Charter may induce a government to support the limitation of armament in peacetime and observance of the Laws of War if war eventuates. But observance of the Laws of War will not directly affect the place of war in the same way as will a policy of general and complete disarmament. The Laws of War deal with formal declaration of, and conduct in, war but the prohibitions of the UN Charter are modified by Art 51 and the variety of interpretations which States have placed on it.

However, the humanitarian laws (jus in bello), by affecting the legality of weapons, could be argued to bring military strategy within legal boundaries. Thus in the cases of nuclear, chemical and biological warfare recognition of illegality could be a factor in decisions on war policy, for there is a relationship with legal provisions governing agreements between States to control, limit or eliminate specific weapons and a State's war-making policies. The voluntary nature of war policy has to be contrasted with the universal nature of the essential illegality of a weapon proscribed by general agreement in a Convention.

If modern weapons and their effects make it impossible now to fight wars and simultaneously comply with humanitarian law, the place of war in society will be affected to a degree by which bilateral agreements and arms control treaties have not succeeded in affecting it.

The humanitarian law emphasises fundamental illegality whilst arms control treaties usually affect only the arms inventories in one way or another.

#### Humanitarian Law: Scope.

The humanitarian law of war has regard for working possibilities for civilized conduct rather than to actual conduct, for the gulf in war between civilized and barbarous actions is bridged by State policy as



well as perceived and believed courses of action dictated by military necessity.

Whatever regulations were necessary in the past, standards of human conduct have not improved sufficiently, and the dangers of war have not decreased enough, to reduce the necessity for continuing concern with humanitarian law in peace and war.

Surprise is a strategic principle of war, and pre-emptive operational planning is common to all armed forces in both strategic and tactical doctrine, nuclear and conventional. If one effect of international law has been to confine the legitimacy of war to only defensive war, as would appear from Art 51 of the UN Charter, the danger of war being initiated may have been reduced.<sup>1</sup> Pre-emption in circumstances in which a State had genuine cause for fear of impending attack might be regarded as defensive, falling within the 'inherent right of individual or collective self-defence'. In that case it would also fall outwith the UN definition of aggression.<sup>2</sup> Pre-emptive action, however, should follow and not precede what is prescribed under Art 11 of the UN Charter.

The impossibility of correctly forecasting the future actions of other States, or the possibility of future aggression by them, necessitates that every State which maintains military forces for defence and survival must plan for the possibility of having to adopt a pre-emptive policy and strategy. In the event, such strategy might take such forces into enemy territory and impose duties upon them as occupying forces. Or that might follow from successful defensive operations.

In present circumstances a continuation of defence - counter-attack - occupation-strategy is probable and with it a necessity for regulation to continue under existing international law. There must also be provision for the law to be kept abreast of technological and military developments and their potential effect upon populations and environment. States and individuals are bound by the existing law expressed in the

Conventions which are codifications of the customary law of war. Even if the codifications lack universal ratification the customary law is extant.

In the XXth Century the codification process has proceeded concurrently with conduct which would have been anathema in the past millennium. An increasing involvement of civilian populations in active military operations in the first World War led to renewed demands for the protection of civil populations by international agreements. The excesses of occupying forces and genocidal policies of some belligerent States in the second World War and since promoted increased interest in the situation of civilians in war. This was in tune with concern for the material position of peoples generally in peace as well as war. From this concern, expressed in Art 1 of the UN Charter, evolved the common definition of what should govern human relationships now set out in the Universal Declaration of Human Rights (UN General Assembly Res 217/A (III)).

It was obvious that war conditions would restrict the full operation of such a code, and its adoption is still a matter of concern. Agreement to place the onus on States to afford, in war conditions, at least minimum standards is contained in the 1949 Geneva Conventions ((1949) 78 UNTS 31: 135: and 287).

The post war situation, whether in 'peace or war conditions', of Palestinians, Cambodians, Vietnamese, Kurds and others led to the amplification of regulations relating to the victims of international armed conflicts contained in the Geneva Protocol I of 1977 (UK Misc 19 (1977) Cmnd 6927). Since then the continuing lot of Palestinians, South East Asians, Afghans, Kurds, Ethiopians and Sudanese, shows that standards of conduct still fall below what international law prescribes.

The humanitarian law of war also deals with the conduct of combatants and the treatment to be afforded them when wounded and when prisoners of war. Treatment of wounded and prisoners is governed by the

1949 Conventions, and conduct in war, including conduct by combatants towards prisoners of war and wounded, may be the subject of prosecution for 'war crimes'. What constitutes 'war crimes', whether committed by civilian or soldier, is referred to in the Charter of the Nuremberg International Tribunal.

In these operations and pre-occupations there is the unspoken acknowledgement that even if the killing of other humans as a judicial and criminal punishment is no longer inevitable - at least in some legal systems - war and its slaughter is likely to continue. This assumption stems in part from a long history, and a large literature extolling the virtues of war and forceful justice in systems of law and order. It stems also from a long experience of rationalization by interested parties. Yet since the second World War many governments have abolished capital punishment for crimes and, in the West, there is outspoken opposition to capital punishment still inflicted for 'crimes against the political State'. If this has a humanitarian basis it may go some way towards facilitating the enforcement of humanitarian laws of war especially if Rules of Engagement are drawn more tightly as to some practices to which governments have closed their eyes in the past.

In summary, the humanitarian law of war is concerned with three separate elements:

- (i) the justness of war:
- (ii) conduct of war;
- (iii) the treatment of civilians, the wounded, and prisoners of war.

(i) Justness of war imports a humanitarian character to a concept which would limit wars to those that are just by all the moralists' standards of cause, intention, and lawful authority. Right intention relates not only to cause but also to the means to be used and the ends to be fought for. Means necessarily involve questions of proportionality and of minimum force, both humanitarian characteristics, and involve

consideration for civilians exposed to military operations and to the effects arising from such actions. The requirements of justness and intention must lead to consideration of strategy and armament for each can have qualities inimical to justness of, and in, war.

The justness of peace should not be disregarded. There are situations involving inter-State dispute and violence less than war as usually defined, and in legal terms the transition from peace to war should only be initiated after formal declaration, making surprise attack less likely. Justness of peace may be jeopardized by the retention of conquered territory.

(ii) Conduct in war is not now solely in the hands of the actual combatant forces. Most weapons have intrinsic qualities liable to make any use disproportionate. Thus, there is implicit in the humanitarian law of war an examination of the weapons which may be used lawfully, and how they may be used. As regards the weapons themselves there are not only specific prohibitions, but legal implications also arise from their use. These implications and prohibitions cast doubt as to the possible legality of any war waged with certain modern weapons. But even in war which may be lawful by existing standards there are explicit rules as to the conduct of governments and their armed forces.

(iii) Humanitarian law regulates the treatment to be afforded civilians, prisoners of war and the wounded. It provides not only for situations in which States are at war, but also for those circumstances in which conflict short of war is concerned.

#### Practical Application of Humanitarian Law.

The roots of the humanitarian law of war lie deep in history and the practices of many races. Chivalrous conduct has no territorial boundaries. Much groundwork for the present law was laid in the Middle Ages although real, formal development has taken place following the 1868 St Petersburg Declaration ((1868) IAJIL Supp 95) and the 1907 Hague Conference ((1907) 205CTS 233).<sup>3</sup>

Historically there was a fundamental relationship of the spiritual and the temporal in the Muslim, Jewish and Christian nations and Churches, and their military proclivities were as often promoted by the spiritual as by the temporal leadership. It is likely that strict religious laws played a major part in the development of the laws of war, for this development,

"has been determined by three principles: first, the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realization of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources, and money: second, the principle of humanity, according to which kinds and degrees of violence which are not necessary for the purpose of war are not permitted to a belligerent; and, thirdly, the principles of chivalry, which demands a certain amount of fairness in offence and defence, and a certain mutual respect between the opposing forces".<sup>4</sup>

The principles were held in respect to some extent prior to the second World War, but it is doubtful if all belligerents today are inspired by the principles, or reflect in their practices, (at least as a conscious law of behaviour), the following moral precepts, which are enjoined on the British Army:

"The law of war is inspired by the desires of all civilized nations to reduce the evils of war by:

- (a) protecting both combatants and non-combatants from unnecessary suffering:
- (b) safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians, and
- (c) facilitating the restoration of peace."<sup>4</sup>

But, whatever the views of individuals whether in authority or under orders, the laws represent the standard to be aspired to and enforced. In the words of the Martens Clause, they antedate the formal laws as representing what had been customarily followed: namely,

"the principles of international law as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience".<sup>5</sup>

Thus, the law of war is composed in part of customary international law, and in part of conventional rules by which parties to a convention

are bound. It follows that:

- (a) All laws of war are not subscribed to by all States or in the same way.
- (b) The relevant Conventions, even when agreed by States will remain unobserved in practice unless practical measures are taken in domestic law within national systems to guarantee their application.<sup>6</sup>
- (c) The laws of war (jus in bello) do not refer solely to belligerents. The four 1949 Geneva Conventions and the 1977 Geneva Protocols all deal with the victims of war.
- (d) Both belligerents and neutrals are bound to comply with the laws of war for these are binding on States and their peoples, especially their armed forces.

Whatever a State's position as to the adoption of the Conventions within domestic law, subject to reservations duly notified, both State and individuals are bound by the customary law of which the Conventions are codifications.

#### Humanitarian Law and Jus in Bello.

Humanitarian concepts in war take account of the legality of wars in both legal and moral terms: that is to say, in terms of the provisions of the UN Charter as well as the classical requirements for a war to be just.

Assuming that there were genuinely just wars in the past it can be barely possible that any future war, even one limited in scope and objective, can be just in the light of modern weapons and fire power and the extravagant attitudes to these sometimes shown by modern military logistics. If, on the other hand, strict observance of the legal provisions were to prevail the use of certain weapons would be in breach of concepts of humanity as well as of law and custom. Nuclear, chemical and biological, and flamethrowing weapons are examples which, even if disputed on legal grounds, would be excluded by jus in bello principles of proportionality.

Apart from doubts about the legality of war in which such weapons are used, justification for killing in war now generally rests on the sovereign right of States to order their affairs as they will or are

able. Even then killing is justified only within the proper conduct of military operations. In such operations military commanders and individual members of armed forces authorised by the political authority are faced with situations in which decisions have to be taken as to the methods to be used to gain the objectives ordered by the authority. It is then assumed as a matter of course that the reason for taking a particular decision is what is demanded by military necessity. Concepts of military necessity, however, need examination in the light of circumstances for they must not be excuses for unbridled conduct. This raises questions as to the military necessity for the conflict itself as well as to conduct during it.

Without paying undue regard to the spirit in which the Geneva Conventions and Protocols and the Judgments of the Nuremberg Military Tribunal were discussed and drawn, it seems clear that if the rules and prohibitions were all strictly observed in war they would so affect the practice of modern warfare as to make it doubtful whether military decision would be feasible by such warfare. At the least, there would need to be such circumspection in utilizing all the possibilities of modern weapons that commanders would be inhibited in conducting the inter-service and all-arms operations which are fundamental to modern military practice. Further, a need to deal strictly with the provisions of the Conventions and Protocols regarding civilian populations would impose such restrictions on a commander's freedom of action, both geographically and operationally, that offensive operations, at least, would become more or less impossible in any built-up and industrial environment.

Given the provisions of Art 51 of the UN Charter, war for defence and survival is still a lawful option for States. War, however, is not without restrictions imposed by morality as well as by custom and law. On the other hand, defensive war is just only if the concepts of military necessity and proportionality are still accepted whether in nuclear or

conventional war. Unless proportionality is to be dictated by the technological limits of weapons, the question which now needs to be resolved is not what legal limitations may be placed by a State on its forces as to the limits of necessity and proportionality, but how the concepts can be applied in practice. The principle of "applying compulsion and force of any kind, to the extent necessary for the realisation of the purpose of war"<sup>8</sup>, will always appear to leave open whether the concept of military necessity is justification before or excuse after the event. Naturally, States will not tie themselves beyond Art 51 to voting for limitations on their ability to make war in present circumstances. Nor would they forego the right to stock their arsenals with the latest weaponry they can obtain no matter what detailed restrictions by way of arms control of existing weapons they might agree to.<sup>9</sup> They are unlikely, therefore, to embrace the idea that the doctrine of military necessity may itself be morally inexcusable.

Steady progress has been made, however, in the promulgation of codes of conduct. These codes and the precedent of the Nuremberg trials might inhibit some commanders seeking to justify strict proportionality and military necessity, and their political superiors in ordering any use of military forces and the weapons the State has provided for them. So long as victory is taken as justifying the operations undertaken, it is not likely that Humanitarian Laws of War will have such an effect in the foreseeable future despite civilian and political attitudes to nuclear weapons. Even the provisions of the Geneva Protocols which require action by States in peacetime are not universally observed. In the light of the analogous Declaration of Human Rights as adopted by many States, which is prayed in aid by many in condemning breaches of such rights, the subject matter of the Conventions and Protocols merits more consideration than is usually accorded to it.



## Education.

The humanitarian law of war is addressed firstly to those in authority, and secondly to the peoples at large. Codification of the law and its extension to all armed conflicts has been the result of a similar philosophy to that which underlies the Universal Declaration of Human Rights. Both were influenced by the experience and effects of two World Wars. The sad fact, as Amnesty International has reported is that,

"in at least half of the countries of the world, people are locked away for speaking their minds, often after trials that are no more than a sham. In at least a third of the world's nations, men, women and children are tortured. In scores of countries, governments kidnap and murder their own citizens".<sup>10</sup>

The States and peoples which the Report refers to are also given the responsibility for the observance of the humanitarian law of war, but it can be expected that practices of peace will be carried into war.

If the Geneva Conventions and Protocols and other treaties were the subjects of purposeful instruction as a normal part of national educational curricula in peacetime - even if alongside instruction in national defence measures - some of the realities of war would be assimilated by generations which had no direct experience of it. This would affect the place of war in society.

The International Committee of the Red Cross, aware of the dilatoriness of States regarding action to be taken under the 1977 Geneva Protocols, has found it necessary in 1988 still to

"make considerable efforts to develop humanitarian law and to ensure that it is accepted by the States".<sup>11</sup>

One difficulty is that in normal educational systems peace is taken for granted in peacetime and war is a matter of history for those not involved in it. Acceptance of the need for law may be merely by assumption untried by real consideration and not extending, even philosophically, to war. In Britain this could be justified when war was a matter for a specialised section of the population but it has less rationality today. UNESCO could draw on so much evidence of the conflict between peace and war and the necessity for regulation that it would be

unnecessary for States to formulate their own curriculum merely adapting to their language and cultural approach a universal doctrine.

Unfortunately the standing of UNESCO which should be the natural fount of such doctrine as well as being its administrative progenitor and educational system has not yet recovered from excesses of the past few years.

It is not the mere propagation of the codes which is desirable. Discussion of the international system and its apparent acceptance of war as an institution merits continuing questioning if the place of war is to vacated in favour of the place of peace.

### The Weapons.

The place of war runs pari passu with demand for technological improvement in weapons and with an urge for moderation in the scope and conduct of military operations. As long ago as 1868 in the Declaration of St Petersburg it was said that,

"The necessities of war ought to yield to the demands of Humanity",  
But in 1968,

"Military considerations were still proving too strong for the humanitarian argument to prevail".<sup>12</sup>

In the face of elementary human rights it is otiose to classify some weapons as inhumane as though there are any others. Such taxonomy demonstrates the ease with which a classifier can relate the human to the animal species to which the use of the 'humane killer' was necessary to still fears of inhumane slaughter. Initially the term related only to the killing of domestic animals: less 'humane' killing reserved for sport is now increasingly being questioned. Either way the dietary habits of Christian, if not other, meat eaters were safeguarded. The use of the terms 'humanely killed' and 'inhumane weapon' signifies a penchant of our species for killing, or ordering killing, and in some way disguising its finality.

However that may be, if war was a natural as well as a lawful activity, it was right to suppose that weapons could be classified as to

degrees of inhumanity and, if so, it was the duty of humane persons to seek to curb the more horrible (by contemporary standards) even if, by doing so, the use of the merely efficient might be excused on grounds of morale and economy. In retrospect it was recognized that the effects produced by the weapon and the ministrations of the medical, surgical and hygiene services available to the fighting man must be examined. This could not lead to numerical or qualitative control of weapons as in the SALT agreement, but to a humanitarian re-appraisal of the weapons of war. Such an examination must relate to the user as well as the victim and the moral nature of the weapon would suggest whether it should be prohibited totally in war. But, if the argument has always affected the use as well as the weapon in general terms the user in war is rarely in a position to decide on limitations on the use to which the weapon is to be put, or, indeed, how he is to be armed.

The discussion was not new in 1868. Moral questions were raised regarding the permissibility in war among Christians of the crossbow.<sup>13</sup> When the tools of war were provided by the soldier-user a standard of discretion relating to economy rather than humanity was self applied. When the state assumed responsibility for his arms and accoutrement (and, sometimes, pay) the era of indiscrimination coincided with a consequential lowered status for the soldier. As his relative status declined his indifference increased and colonial wars did nothing to prevent it.

Similarly the civilian populations were increasingly bound by conscription, militia ballots, or by pressing, and campaigns eventuated for civilian and soldier in disease which inflicted more casualties than the medical services and the battles.

As the area of operations and weapon effectiveness increased, the logistical support for armies became more reliant on civilian provision and the concept of the innocent civilian became more elusive. For war the industrial revolution was a technological success promoting the

supply of warlike equipment and weapons. The inventive capability of peaceful civilians (encouraged by warlike soldiers) effected the improvements in projectile and propellant which confused military targets and civilian property and person. Wars became more important than war aims in the inability of politicians to clearly delineate those aims to generals who could understand and agree with them and carry them out. Communication failures resulted on one side or the other in the total wars of the Century as culmination of the savagery of the American and Spanish Civil Wars which were the proving grounds of modern European inhumanity to man in weapons, war aims, and conduct.

Emphasis on humanity in war has encouraged attempts at Geneva and elsewhere since 1945 to ban or restrict the use of certain weapons. Discussions from 1971 led to restrictions incorporated in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons ((1981) 19ILM1523) (which relates to conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects).<sup>14</sup> That Convention clarified vagueness in Art 35.2 of the Geneva Protocol I of 1977. Coincidentally but, perhaps, inevitably, the Iran-Iraq war<sup>15</sup> and the Afghanistan conflict showed again that it is not enough to reach agreements on texts, Resolutions, or the self-enforcement by States of international obligations to ensure observance of even the basic principles of agreements which they believe in any specific matter are not in support of national interests.

The humanitarian law in war is less concerned with weapons as such than their effects for arms limitation is mainly effected through arms control agreements. It is the conduct and treatment of individuals in war and conflict, and the actions of States in the enforcement of the humanitarian conditions prescribed by international law, that most concerns this aspect of the Laws of War. As a preliminary it should be noted that the Laws of War "are binding not only upon states as such but also upon individuals, and in particular, the individual members of armed forces".<sup>16</sup>

### Individuals and Moderation in War.

That States have duties towards their citizens has been recognized in legal systems and has been acknowledged by the Universal Declaration of Human Rights which incorporated "all peoples and all nations" into the context. The extent of the duties, however, was (and is) not necessarily extended to aliens especially by States at war. Sixty years ago the Commissioners in their findings in the Noor Claim said,

"...the propriety of governmental acts should be put to the test of international standards, and that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".<sup>17</sup>

That decision postulated the treatment to which aliens are entitled when interned in a foreign country at war. A similar standard is to be expected from an occupying military force and the deliberate ignoring of such standards during and after the second World War encouraged the formulation of the Geneva Protocols of 1977 as a code of treatment for civilian populations and military personnel in certain situations.

The humanitarian laws of war prescribe for armed forces in war situations, but the place of war depends on the co-operation of a State's armed forces and how their treatment is affected by law. It is to that (domestic) law that a State's armed forces must look for rights and obligations. But members of armed forces as citizens as well as members of the State's forces should have reasonable treatment whilst at duty; they should not have to wait until hors de combat, or be taken prisoner of war, to become entitled to it. The soldier thus retains rights in peace, war and captivity, although rights are necessarily curtailed by domestic legislation and circumscribed by, for example, Art 29.2 of the Universal Declaration of Human Rights.<sup>18</sup> To be placed under some disability vis-a-vis other citizens is not exclusive to armed forces: police and many professions also have statutory rules governing their conduct and discipline.

### The Military and Humanitarian Law.

There is a tendency today - due in some degree to the plethora of law and regulation which impinges on almost every aspect of daily life - to question some laws and to disregard some regulations as a matter of habit. Children daily observe their parents and others not only disregard traffic laws and regulations, but also listen to expressions regarding such legislation. An attitude is created and develops from then until the children, later, become aware of the question as to whether laws with which an individual has fundamental political, moral, or conscientious, objection should be obeyed. In this the individual's attitude will be influenced by opinion-formers of every kind. Most young people will find the question difficult, not less junior officers of the armed forces being instructed in their responsibility to the laws of war.

"It is now accepted that in time of war members of the armed forces are in general bound to comply with the customary and conventional rules of international law or, if none exist, that such members must at least conform to a certain minimum standard of conduct dictated by the laws of humanity and the public conscience".<sup>19</sup>

The latter part of that statement might have already offered difficulty, but

"It cannot be asserted that the latter requirement would be contrary to the doctrine of nullum crimen sine lege"<sup>19</sup>

It is, of course, fully acceptable instruction where actions would, in any case, constitute crimes by established law, but it is an area of military discipline where greater instruction is needed for clarification of the position as regards the junior officer, and where reference to the Manual of Military Law<sup>20</sup> and to the Judgment of the Nuremberg International Tribunal<sup>21</sup>, are imperative.

The military student will be aware that by Art 228 of the Treaty of Versailles the German government recognized a right of the Allied Powers "to try by military tribunals persons accused of violation of the laws and customs of war". In the 1930's, that might have been warning enough until the whole treaty was progressively rejected by the German

government between 1933 and 1939 unopposed by the former allied powers. Through a similar kind of disinterest the Nuremberg precedents have not served to prevent breaches of humanitarian law in wars since the Judgments were promulgated.

In an age of increasing violence and armed opposition to authority the individual's attitude to humanitarian principles and laws in the heat of battle and the realities of planning for survival, and, it may be, within permissive orders and Rules of Engagement, is affected by his civilian and military environment as well as his education and training. The attitude of States to humanitarian measures when planning the armament of their forces, in their own obedience to international law, in the Rules of Engagement they furnish their forces, as well as in the objectivity of their approach to the development of international law, is relevant. So also is the State's attitude to the observance of international law by its subjects.

Those who enter into agreements on behalf of their States may have in mind, even if subconsciously, domestic legal rules to which there may be exceptions or exclusions. They will not find surprising exceptions such as Denmark's and Norway's opposition to NATO nuclear deployment. Nor would they raise definitive objections to the frequent reservations expressed by Spain and Greece to otherwise agreed NATO policies. This follows naturally from the practice of making reservations to treaties. Again, provisions of treaties which offer the possibility of exceptions to principle also offer scope for future disagreements. Art 51 of the UN Charter, for instance, offers exceptions to the rule against war.

In their national interests States reserve their positions, but individuals can realistically only approach each problem in war as it presents itself. There, all violent behaviour is regulated by rules, custom and definition. Conduct regarded as falling outwith the humanitarian rules and now, more particularly, the definitions contained in the Charter of the Nuremberg Tribunal, (following the statement of the

4th Hague Convention of 1907 that "the right of belligerents to adopt means of injuring the enemy are not unlimited") is regarded as criminal and is subject to the penalties of law.

In practice it has proved relatively easy only once to bring before international tribunals individuals of States defeated in a modern conflict and to apply the sanctions of law to those adjudged there to be guilty of war crimes. It is less easy to ensure that individuals accused of war crimes will be tried in the courts of their own States. War crimes, however, are not committed solely by one side only. It has not proved so relatively easy or desirable to arraign before tribunals persons of the victorious side who may be suspected of war crimes.

After World War I, even if Holland was expected to hand over William II for trial, it did not do so. After World War II, Hirohito was exculpated, as some believe on somewhat specious grounds. Other leaders, however, bearing great, if not supreme, authority in the defeated States were tried for war crimes. Even if it is not possible to say that justice was even-handed between the belligerents the warnings were clear.

This one-sided attitude continued after World War II - perhaps more spectacularly in civil rather than in inter-State war. Both Korea and Vietnam provide examples of unpunished war crimes, and the cases of Amin and Pol Pot again demonstrated that leaders may escape punishment. The selectivity of action against the perpetrators of war crimes strengthens a philosophy that some individuals will prove to be above the law. The situation of Russia and Katyn is in point, emphasising that national governments will not always admit excesses committed on their side whatever their attitude to the other side.

The hope that television as an educational as well as an entertainment medium would provide a means of moral example has been diluted by what some might regard as a dedicated programme of the denigration of authority, police and public order embarked on in the imagined interests of entertainment and viewing statistics. There is



continued ridicule of earlier moral standards, at least as far as Britain and the US are concerned. Members of the armed forces have to adjust their attitudes between this exposure, the requirements of military law and discipline, and their organizational role in society which may include the preservation of:

"the physical security of the society, with the promotion of the State's interests in the international arena, and with the preservation of the socio-economic and political system".<sup>22</sup>

In this role both 'promotion' and 'preservation' in the context may indicate a use of military force. Such a use of force would acknowledge that in some circumstances, and as far as the armed services are concerned, the Universal Declaration of Human Rights may suffer setback on its way to the attainment of the universal ideal of Art 30. In this some divergence of practice between peace and war however obvious in principle has not had an effect on the place of war.

The purposes for which armed forces are mustered can be secured only so long as the forces survive. Instinct for survival in combat with any enemy is inimical to humanitarian principles even if not always in breach of law or Declaration. But both principles and law are often displaced deliberately, as by the German Orders of 13 May, and the so-called 'Commissar Order' of 6 June 1941.<sup>23</sup> These German High Command Orders were in breach of Hague and Geneva Conventions to which Germany had adhered. If Japan ordered treatment of a similar kind to be meted out by its forces during the second World War, the fact that it had not adhered to the Conventions did not exculpate it for breaches of customary international law or the jus cogens.

Obedience to orders, whether legal or otherwise, is a matter of training. In spite of the difficulties of strict compliance with the terms of international law during conflict, whether as a result of instilled unquestioning obedience to orders, or in the heat of battle and out of an underlying desire for survival, some attention to law is paid in some armed forces. A recognition of the need for ethical standards

may be illustrated by the case of special 'intervention' forces, such as the SAS, the US Rapid Deployment Force, the Soviet Operational Manoeuvre Groups and the Spetnez troops, and France's Force d'Action Rapide, whose operations particularly bring them into contact with enemy civilians. A NATO commander, who had commanded Britain's Out of Area Force, said,

"We must also, of course, consider the special training necessary for the soldiers, sailors and airmen themselves. Besides having to handle evacuees with tact and sympathy, they must continually be aware of the Rules of Engagement which are unlikely to be straightforward on the ground, at sea or in the air. Hostages may have been taken, and the enemy probably will be difficult to distinguish from friendly civilians. Cunning, patience and diplomacy will be called for at all levels, which is unlike conventional training where direct confrontation is more obvious".<sup>24</sup>

Unfortunately, to such a view of hoped-for conduct the voice of experience may be opposed,

"The enemy was bullets and shells, grenades, dugouts and bunkers...and the struggle against these was too all-consuming to allow for irrelevant 'flannel' about just wars or the good of humanity. These were irrelevancies in the fullest sense of the word, for they simply had no place on the battlefield".<sup>25</sup>

Despite the importance of the individual, it is the attitude and actions of the States which really dictate how the humanitarian laws will be observed, and it is unlikely that States that do not themselves adhere to the Conventions will train their troops to do so. In the second World War,

"the refusal of Germany to recognize Soviet Russia as entitled to the benefits of international law as accepted by the States of Western civilization - an attitude which manifested itself in particular in the treatment of Russian prisoners of war in utter disregard of the accepted laws and customs of war",<sup>26</sup>

was not entirely unreciprocated. But even if a State is conscientious about Art 127 of the 1949 Geneva Convention III enjoining humanitarian training, if some enemies are to be treated differently from others there is always liable to be a lowest common denominator applied by the troops.

As a result of education in the humanitarian provision of the Conventions breaches may become less atrocious and less frequent than might be the case if training is not forced on the armed forces.

Commanders faced with situations of survival or breach will decide that it is their troops who must be considered first and ideal humanitarian standards second, unless the interests of one can be fostered by the other. After all, the margins are wide, for actions in breach of international law are culpable only if without military excuse or justification. But the question of military excuse or justification in the use of indiscriminate weapons where civilian populations will be affected is not primarily a matter for the individual serviceman's attitude to humanitarian law but rather for arms controllers although other questions as to the lawfulness of superior orders may arise.

Nevertheless, the individual's attitude and conduct is what affects military conduct in war, and if international law is to affect the place of war the attitudes of military forces will be decisive. Whatever difficulties the US experienced through domestic civilian opposition to the Vietnam conflict military forces could have been maintained in the field. In any case, German post-World War I 'stab-in-the-back' type propoganda will be promoted usually to justify military surrender.

It should be added, nevertheless, that usually there is respect between fighting forces. Excesses committed are often by support troops. Respect between frontline troops may not extend to civilians and it is here that discipline breaks down (or limited licence is extended by commanders and custom). All that is indicated is that international law standards have to be enforced to be fully observed and tradition and culture are usually deciding influences.

Despite humanitarian expositions of human rights and legal enactments on the treatment of prisoners of war, and on the intervention of the "protecting power", it is the underlying moral and ideological tenets which dictate the treatment meted out in practice. This can be seen from the Korean War, and the IndoChina conflicts, which followed patterns discernable in German treatment of Russian prisoners and vice

versa, and of Japanese treatment of Allied prisoners, in the second World War.

All too often, however, legislation and institutions to 'protect' human rights are in reality designed to create rights which formerly either did not exist or were unrecognized as rights. Further, such rights are often sectional and selective and their creation diminishes existing rights of others. Examples can be found not only in race relations, equal opportunities and tenants' rights, but also in 'rights' formerly exercised in war by mercenaries and in the ransoming of knights. That is not to denigrate such legislation, but to point to changing moral attitudes which, so far, have not in practice impinged on basic conduct in war.

In drawing comparisons or parallels between national and international law, and in seeking to internationalize the law of all nations apart from the basic conduct which war tends to bring out, the differences between traditions and cultures are liable to prevent total integration. In that event, equality of individuals as between one nation and another in the treatment and regimentation of own troops as well as of prisoners of war is unlikely. For instance, the increasing Muslim population of Europe, especially of the United Kingdom, will raise questions there of the validity of Quranic law. In the United Kingdom the Union of Muslim Organizations argues that Muslims in Britain should be subject not to British Law in respect of marriage, divorce, death and inheritance, but to the Quranic law<sup>27</sup>, (of which, of course, there are several Schools of interpretation). Such differentiation is not impossible: British India was administered under different systems of private law based on religion (ie, Muslim, Hindu, Christian ((English) law in Indian adaptations). But, as in India, it does not encourage integration.

In spite of the violent nature of contemporary human relationships there is a danger that the humanitarian law of war may be affected by

emotion on the part of liberal proponents, and cynicism by the military actually engaged in operations of war. The former seek wider safeguards in the face of advancing military technology: the latter may question motivation and how far restrictions are dictated by ideas regarding defence of property, both human and real, similar to those which Church and feudal superiority promoted in the Middle Ages, and which may place the fighting unit at a military disadvantage.<sup>28</sup>

Instances of chivalry today are influenced by conduct in any or all military ranks, and the plea of military necessity is not limited to higher commanders. Both in regard to what is considered military necessity and to obedience to superior orders the facts as often expose initiative from below as orders from above. Tactical requirements, now as always, dictate the preservation of vulnerable points for they may be needed later. Bridges were formerly located in centres of population and that was a reason for limiting damage to towns by advancing armies. It was in retreat that such limitations were removed. Troops in the field will often suspect intention and motive where limitations are imposed in actual operations, and commanders will consult what is vital to their planned operations.

There is substance in the soldier's point of view for experience of the humanitarian law of war is that it is applied selectively in the punishment of breaches; it is, and has, no sanction for the States which fail to initiate in peacetime what the Conventions and Protocols obligate them to do.<sup>29</sup> Controversy regarding Hirohito of Japan and failure to indict Field Marshal von Weichs illustrate a problem which all prosecutors face.<sup>30</sup> If the Military Tribunals of Nuremberg and Tokyo are to be precedents, who is brought to trial for breaches of humanitarian law will remain a matter for victorious States and how they may be influenced in their selections of the panels to be arraigned.

What requires renewed consideration is the problem of safeguarding civilian populations. This becomes increasingly less feasible as weapons

become more powerful, of longer range, but remain subject to the vagaries which must be expected in war of electronic command, control and countermeasures, irrespective of whether weapons are aimed, as in the Iraq/Iran conflict, at civilian targets, or not.<sup>31</sup>

Different attitudes to the humanitarian codes will be adopted until and if the States police the law through the establishment of permanent UN central machinery to ensure prosecution for breaches. This goes beyond the provision for International Fact Finding Commissions in Art 89 of Geneva Protocol I of 1977. The codes otherwise will be treated as effective only depending on the circumstances of each incident and the national views taken about them. But, unless fairness to all is apparent, military people will treat the law with some suspicion. Training for war necessarily concentrates on training for battle, not on how not to fight. Adjustment of basic military practice to take account of humanitarian aspects can be made only in actual operations. In peacetime, training time is allocated to instruction in the disciplinary codes of the forces and, for officers, some instruction in military law, with the refresher courses which experience of courts martial provides. For wartime intakes of recruits, time available is a matter of circumstances rather than of a planned curriculum, and instruction in military law could be an early casualty. The education of guards and prisoners in the provisions of the Geneva Conventions referring to prisoners of war is likely to be in a prisoner of war camp except for security injunctions designed to limit the effectiveness of interrogation procedures.

Duties in occupation forces, or in aid of the civil power, make for greater problems for military units trained for instant retaliation. This is exacerbated if such forces are expected to produce political answers not military results. The situation in occupied territory of the Israeli Army in dealing the the Intifada has underlined the difficulties

no less than civil enforcement duties for British forces in Northern Ireland.

Responsibilities of States and Individuals.

Attention has been focussed in this thesis on the place of war of the State for any acceptable definition defines war as a matter for States. But the privileges and responsibilities of the individual citizen (now referred to as 'human rights'), increasingly affect the State's position in relation to its ability to wage war. Concentration on the position of States should not leave the individual out of consideration, for he, too, has a place of war. That place is now less muted than formerly even where conscription to armed forces is a common legal obligation as it is in many countries.

In one sense, therefore, the Humanitarian Law of War is law for and about individuals. Whilst States by adherence to the law have undertaken certain action preparatory to, or in calling into being, a state of war, are held responsible for certain actings of their nationals, it is the conduct of individuals and treatment of their property which is, to a large extent, the subject of the Conventions and Protocols. But the Nuremberg Tribunal Charter shows that while the State may be accountable for individuals' actions, the individual is not thereby relieved of responsibility.

The matter, however, is not simple, for despite the rights formulated in humanitarian law, and in the doctrine of Human Rights, individuals remain means and not ends in war. Their rights are curtailed to ensure this whether as a result of their participation in parliamentary elections and proceedings, or as a result of the will of arbitrary government. In NATO,

"...the provision of money and people is not an end in itself. What counts is how these inputs are translated into defence capabilities..."<sup>32</sup>

Violence and crime flourish today equally in 'wealthy' and less favoured States. Certain types of violent crime are met in a reciprocal

manner without recourse to formal legal process and they may be less evident than actual in less wealthy societies which may also have greater incidence of both civil unrest and terrorism. Violence in the heart of man is still an attribute of humanity, and is a considerable component of terrorism, although recruitment to terrorist organizations may to some extent be dictated by fear or fashion. Attention to humanitarian law is less likely where violence flourishes as a norm of life. This is reflected also in mercenary service which still obtains although discouraged in some States, (for example, by the British Foreign Enlistments Act of 1870).

Major progress towards harmonizing the attitude of people and State to war and to the State's anti-war measures needs to go further than a mere acquiescence in - or failure to oppose - defence budgets. It is easy to wear a pessimistic air about progress in arms control, disarmament, and war prevention globally whilst expenditures on armaments continue relatively unabated (except in situations of increasing fiscal and trade weakness), and whilst threats of continuing violence pervade most societies. What may be less obvious is the attention and diplomatic effort given by governments to these issues. Diplomatic negotiation is not all overt, and the medium of the UN and its Committees is not the only channel used.

Consensus is a slow process, and the problem of knowing the desired destination but not how to get there is not unusual in international relations. Convincing all the parties that the stated destination is the correct one and that it can be reached by the means proposed is often difficult. In the meantime, the place of war remains nationalistic and relatively unchanged. But a federated decision-making administration at a distance from the individual would not be improved in that respect by a world military authority. The right to bear arms is likely to become the duty to bear arms under such an authority in its major peacekeeping preoccupations.



A similar depersonalizing philosophy, fuelled by modern weapon power designed for distance killing rather than face-to-face combat, necessarily actuates some military planning. In such plans it is possible to see only 'the enemy' and not the individuals, military or civilian, at risk, and it is a continuation of the attitude which resulted in area bombing, naval bombardment by large units, and submarine warfare. It became a factor in the realities of the Iraq-Iran missile exchanges, and extends to nuclear pre-targeting (although planners will point out that plans are conditional and may never be put into operation).

It is possible in such circumstances to become blind to the many and separate effects of war. Refugee problems are not made by the armed forces although they are likely to be the immediate cause of them. The same will be said of the diseases and other evils which will result from any use of nuclear weapons. Much of humanitarian law of war relates cause and effect in a direct way which is not pursued by other interests in war, for States at war will justify their actions as being essential and in any case as being directed against other States. The consequences to individuals will be said to be unplanned and incidental to the military necessities.

#### Punishment for Breach of Humanitarian Law.

Principles are a source of law in the Scots, as in other, legal systems. Principles as sources are assumed to be moral, although neither party politics nor the politico-economic ideology from which much legislation emanates is necessarily moral. When lawyers and social scientists contemplate long established constitutional and common law provisions they do not consciously and invariable relate them to the reasons and circumstances obtaining when the provisions were founded or imposed. Only when change is desired, whether for convenience. moral interpretation and adjustment, or evolving political or social attitudes,

is there consideration of the origins of the provisions, as may be observed as regards many British constitutional practices. Reports of the English and Scottish Law Commissions contain examples of such investigation.

In the formulation of international law, national interest is brought to the debate just as party politics are brought into debate in domestic law-making. This becomes evident in post facto discussion about the meaning of many treaties which ought to be clear statements of objective and intentions. Humanitarian law is not different.

In international relations, however, disputes about formulation or interpretation are not always genuine disagreements. Sometimes they cloak pre-meditated policies of aggression or intimidation. Even whole-hearted and universal acceptance of adjudication by the ICJ would not purify this, for the idea of voluntary jurisdiction - risible in a domestic concept of law if not in voluntary codes - when taken up by leading powers such as the US and the USSR has militated against the effectiveness of such institutions as the ICJ. For this reason humanitarian law has been enforced rarely by domestic tribunals not under foreign military administration to some degree. The major exceptions were the Tribunals of Nuremberg and Tokyo imposed by the victorious Allies after the second World War and reflecting Art 228 of the Treaty of Versailles.

The Charter governing those Tribunals was based on selected principles regarded by the Allied Powers as moral for the purposes of the Tribunals, and the indictments dealt with a variety of offences in breach of the Laws of War. It may be assumed, nevertheless, that it was not an intention of the Allies to attribute guilt solely in respect of courses of conduct which only one side had adopted and to avoid issues of conduct in which both sides in the conflict had participated. That, however, was the effect of the selection made, and it detracted from a clear legal declaration of principles which should have become precedents.<sup>33</sup>

Vagts, expressing the difficulty of accurately apportioning blame for a war, raised similar issues in respect of Art 231 of the Versailles Treaty:

"The future of the rights and considerations to be granted to enemies in war is at best obscure. Judging by experience, enemies are to be deemed criminals in advance, guilty of starting the war; the business of locating the aggressor is to begin before or shortly after the outbreak of war; the methods of the enemy in conducting the war are to be branded as criminal, the victory is not to be a triumph of honor and bravery over honor and bravery but the climax of a police hunt for bloodthirsty wretches who have violated law, order, and everything else esteemed good and holy. If civilians are extensively responsible for this new war code, the military have not been negligent in adopting and enforcing it. In any form, however applied, it does not make for the reconciliation of nations or for a firmer belief in the possibility of harmonising international interests, permanently or temporarily, before or after war".<sup>34</sup>

In the event, certainly as far as the Allies were concerned, occupation after the second World War was administered differently by each of the Allied Commissions. The circumstances of the Cold War affected the situation initially rather than any considerations arising from humanitarian law. It is clear, however, that the need for what eventuated as the 1949 Conventions was recognized, and in the immediate post-war period consensus was encouraged by the events not only fresh in memory but whose effects were still obvious rather than by such contemporary views as those expressed by Sir Robert Vansittart in his pamphlet 'Black Record'<sup>35</sup> or by such views as that expressed by Vagts. The formulation and acceptance of international humanitarian law comes about not by pamphleteering but rather because of the intolerable situations, political and economic, which impinge eventually on the consciousness of determined people.

If a clear picture of belligerent conduct in war is to be seen it is necessary to differentiate between war and the means by which it is waged. Apart from the causes of war, and the crimes of those who cause war to break out, it is necessary to examine the actions of those who for administrative convenience wear military uniform in order incidentally to take advantage of the Conventions although not really members of the

fighting forces. The occupation forces of Germany in the second World War included many such individuals whose war crimes followed inevitably from the Nuremberg Decrees.<sup>36</sup>

Politically directed crimes by occupying forces may escape condemnation in the wider world as the later history of Pol Pot has shown. Worse, perhaps, are the many instances of States which fail to bring to justice their nationals known to have committed war crimes.

Unlawful conduct in war is not limited to conduct during battle but is within the responsibility of the armed forces in a theatre of operations irrespective of any directions of government to other government forces. German armed forces co-operated with the 'special measures' in occupied Europe for the reason that the nature of such measures was not a military responsibility - a plea rightly rejected at the Nuremberg trials. Russian armed forces similarly co-operated with other government departments as regards the Stalin special measures, and looting, rape and murder were never far from the victorious troops as they advanced westward. Because of what had been suffered under the occupation by Germany and its allies there was sympathy with crude actions of immediate revenge. But there was also policy, and not merely individual savagery in the revenge taking.<sup>37</sup>

The Geneva Conventions and Protocols place the responsibility for all acts committed by those forming part of the armed forces on the State.<sup>38</sup> The responsibility of States to compensate victims of war crimes does not exculpate offending individuals. But it is not clear how crimes committed by victorious armies are to be punished if offenders' own States take no action to do so. The responsibility of individuals for initiating war and for inhumane conduct in it, however, will not necessarily go unpunished for, unlike much formal international law which leaves procedures and enforcement to States, a precedent for sanctions directed at least against the defeated has been set by the Nuremberg

International Tribunal which itself had origins in Art 225 of the Treaty of Versailles.

Today, it is the judgments of the Nuremberg and Tokyo Tribunals which are principally discussed not the controversy as to whether the Tribunal and its Charter were in accordance with international law. Yet the controversy is not without importance for not all the subjects of the Allied Governments took the Charter and Tribunal as legal<sup>39</sup>, and, no doubt, such disagreement would recur but for the subsequent Resolution 95(I) of the General Assembly.<sup>40</sup>

Lord Hankey had many objections to the Tribunal and Charter: for example, he said

"They (the Nuremberg Tribunal and its Charter) were not in accordance with international law, nor with the law of Great Britain, the USA, or Germany where the trials took place". The Charter "violated the Universal Resolution of Human Rights...for example, Article 10".

Lord Hankey saw it as a

"victor tribunal, consisting only of victor nations, with no neutral or unbiased outsider, with a Charter drawn up by the prosecutors to suit the prosecution".<sup>41</sup>

In addition, he referred to trials other than those at Nuremberg, but which were governed by the application of the Charter, and cited breaches of Geneva Conventions in respect of some of the accused,

"they were deprived of their uniforms, decorations, badges of rank, and at court-martials they were not tried by their equals, eg, in the case of Field-Marshal von Manstein".

In referring to Article 11(2) of the Universal Declaration he said,

"some of the acts with which the prisoners were to be accused were definitely not crimes at the times when they were committed. As to 'aggression', he said, "I was myself up to the neck in the Kellogg Pact, right at the heart, and never on one single occasion in all the discussions about the Kellogg Pact did I hear one single word to suggest that it was a criminal act. And never in all the 26 years in which I was secretary of the Committee of Imperial Defence, did I hear any suggestion that planning and preparing a war of aggression was a crime. Planners do not know whether their plans will be put in operation as aggression or as counter measures".

If after the first World War Germans were quick to condemn the Treaty of Versailles including the war guilt Articles (227-230), after

the second World War there has been less continuous opposition to the judgments of the Nuremberg and Tokyo Tribunals' decisions on that subject. Such disassociation on the part of the Germans may be attributed to diversion of blame to the Nazi party instead of to the German people as such, rather than to an unequivocal acceptance of the principles and terms of humanitarian law and the reinforcement of them by the General Assembly in the Resolution referred to above.

Particularly from the military point of view, but also the civilian, the precedent of the Tribunals as to obedience to superior orders and to the doctrine of military necessity has great importance. There is often a direct connection between pleas of military necessity and of superior orders, but Art 5 of the Charter of the Tribunal "expressly rejected the plea of superior orders as an absolute defence"<sup>42</sup>, and commanders have a responsibility for the acts of their subordinates<sup>43</sup>.

It may be that in practice there is as much danger for senior officers of defeated forces from a change in Government from the political party they obeyed to one which opposed the policies they supported.<sup>44</sup>

Crimes against peace and war crimes committed during the course of war are clearly defined in the Nuremberg Charter and Judgments.<sup>45</sup> Little effective effort has been made to apply the definitions in respect of war-making since 1945. The continuing activities of Idi Amin, Pol Pot, and others show that different standards are applied to different situations, and that decisions to enforce the Laws of War are likely to be political.

It may be true, nevertheless, that the Geneva Conventions, and the precedents of Nuremberg and Tokyo do good by setting objective standards by which action can be judged, even if the precedents are rather for victors in bringing to trial persons who might not be tried if the matter were left to the processes of their domestic law. But if the UN Charter and the Nuremberg and Tokyo Judgments define what war crimes and crimes

against humanity may comprise, they do not offer precedents for investigation of the actions of the successful in war.<sup>46</sup>

The area of possible violation of the laws of war is continually widening. Wars have always been likely to affect neutrals and third party States if only in disruption of communications. Now the effects of radiation from the fallout of nuclear explosions not only in the theatre of operations but at great distances from it, together with the increasing lethality of conventional weapons has put civilian populations at greater risk than ever. If the timing of the 1949 Conventions soon after the Nagasaki and Hiroshima atomic attack was apposite it was also likely that there was more than a sub-conscious thought in the minds of the initiators of the Conventions that a more embracing regulation of conduct in war, especially as regards civilians and children, had become imperative. Perhaps also the thought lingered that,

"The successful nation State ultimately perhaps by definition, is a war fighting organism".<sup>47</sup>

If so, the conduct of such a State could be restrained in its action only by the force of law universally agreed. To that end the Geneva Protocol I of 1977 included the Basic Rule at Art 48.<sup>48</sup>

That is one reason why States have sought to differentiate between the nuclear weapon as deterrent and the weapon in actual use. There is an analogy between the indiscriminating effects of the weapon (on combatant and civilian alike) and the 'hostage' component of nuclear deterrent theories. It might be said that there is a difference between the 'nuclear hostage' and the physical act of taking a person hostage, but the principles of the attempt to safeguard civilians, by the prohibition of taking and killing hostages in war and armed conflict<sup>49</sup>, is rejected in nuclear deterrence planning. The Basic Rule above really says all that is necessary to indicate the potential unlawfulness of the weapon in use.

In any case, in the observance of the Conventions and Protocols it is duty not rights which is relevant. For the individual, there is also the dilemma of the weapons he is required by his lawful authority to handle and use. The dilemma is especially apparent in situations where conscientious objection to service in combatant units is not recognized. In the armed forces it will be thought generally that weapons provided by the State are legitimate weapons of war although the thought might not exculpate an individual using what he has been issued with if it was in breach of the law. Further, an individual would be unlikely to know if the missile to which he was assigned was in excess of the number permitted under an arms control agreement.

#### War and the Civilian.

The laws of war, arms control agreements between States, and confidence building measures, have direct or indirect humanitarian aspects or effects. This is also true of instruments of alliance for if such instruments lessen the probability of war or defeat if war does eventuate, they may mitigate some of war's ill effects but escalation in the areas of dispute implicit in military alliances is to be noted.

In general, the humanitarian law of war relates to conduct between belligerents, and between belligerents and third party non-combatants, and what Hartigan called "The Forgotten Victim" - the civilian.<sup>50</sup> The law also itemises the duties which are imposed on States in relation to both combatants and non combatants under circumstances of capture, surrender, and occupation.

Discussion of the position of the civilian in war is more than ever relevant today when the basis of conduct in war has often reverted to an earlier barbarism euphemistically, or pragmatically, called 'total war'. Now, with Hartigan, the question needs to be asked:

"Is the idea of the civilian an anachronism? Have nuclear weapons and guerrilla warfare for ever obliterated the distinction between combatant and non combatant?"



Hartigan answered for himself,

"In what should be called the Age of Animosity the correct answer would seem to be a reluctant but none the less affirmative".<sup>51</sup>

That answer is debatable from both legal and operational viewpoints. This thesis is not the place for a sophisticated analysis of the part played by civilians in war, but that part has importance in every aspect of the promotion, maintenance, and the logistics of modern warfare. Discussion is necessary, therefore, as to whether humanitarian law specifically aimed at excluding civilians from war and its immediate operational effects, is desirable, necessary, or possible.

In many senses the humanitarian law of war is retrogressive, for it observes the indiscriminatory effect of the products of modern technology, which are the products of the workers in industry, it seeks to provide for the safety of non-combatants engaged in prolonging - even making possible - war, and weighs the scales against the combatant, leaving him to fall back on his plea of military necessity.

In any case, it cannot safely be asserted now that experience of non-nuclear war in the past is completely relevant to a nuclear future since modern weapons technologists have largely removed moral usage from the engines of war. As regards strategy, the advent of highly sophisticated technology which is sometimes an end in itself rather than a possible means whereby political decisions might be reached, has introduced a factor by which the consequences of the use, or non-use, remain unknown.<sup>52</sup> Non-use of technological, especially nuclear and chemical, weapons does not remove fears of possible contamination, or even accidents in storage. Human conduct, on the other hand, has been relatively uniform through the centuries mitigated only by the force of moral standards even if promise and performance were generally at variance.

The safeguarding of the life of civilian non-combatants is nevertheless a foundation of humanitarian law. Hartigan, however, puts a

realistic, if jaundiced, view and Iraqi use of chemical weapons against civilians does not refute it:

"The principle of non-combatant and civilian immunity is a theory made concrete in law and practice. It demonstrates how mankind, seemingly driven to lethal intra-species aggression, had come to control that aggression's worst impact, the unintentional slaughter of persons not directly involved in fighting. Now, after nearly eighteen hundred centuries of forging, the societal tool seems shattered and abandoned.<sup>53</sup>

But, even if the weapons technology has got out of hand to the extent that it controls the strategy, has the principle really been abandoned? More and more States have excised the death penalty from the sanctions of their criminal law code.<sup>54</sup> Even where this has been done for diverse reasons not solely moral, including fear of the fallibility which sometimes arises in criminal judgments, the morality of the reasoning has been based broadly on dislike for the calculated taking of human life. Efforts at the prevention of war have a comparable ethos. The evolution of the Declaration of Human Rights was advanced by identical care for human life and well being. A reciprocal is that in some systems of law 'self defence' is hedged around with conflicting definitions of justifiable force and a welcome reversion to the Augustinian view that "no pleasure should be taken in regard to killing even so as not to be killed".<sup>55</sup>

It is sensible, therefore, to observe a difference between execution by judicial sentence, which some States reject totally whilst at the same time arming their police who may, acting in the defence of the community, kill a suspected offender resisting apprehension. Such killing, if legal and unpremeditated in principle, is not the result of a judicial pronouncement. (St Thomas put it, 'as directed to the welfare of the whole community'). This merely says that shooting by properly authorised police, under certain conditions, is justified as in the 'common good' and is similarly justification for the killing necessitated in war. Even if this begs the question of the justification of war itself, it is held to apply to killing innocent persons by 'mistake' in

the case of armed police shootings, and of civilians in war, and theories of military necessity and of double effect are involved.

The attitude towards arming civilian police and the orders under which they operate reflect the State's attitude toward individual lives, and the State's attitude in turn reflects the normal societal behaviour of the citizens. It is outwith the purposes of this thesis to seek a correlation between such attitudes and actual battle conduct as, for example, at Oradour or My Lie. In both cases civilians were the victims.

It is, however, the link between reservations regarding justifications for killing and killing necessary in war which ensures that humanitarian laws must have regard for some differences between combatant and non-combatant. In some circumstances the position is not straightforward for it is dependent not only on law, but also on:

- (a) the attitudes and actions of individual members of the armed forces, as well as their commanders both as individuals and commanders, in active operations of war,
- (b) the effects of being subject to their own and enemy propaganda, and
- (c) their own rights under human rights concepts to listen to broadcasting, and freedom to read a free press from whatever source that press may emanate.

If it is apparent that civilians are entitled to freedom of information - a freedom which may be diluted by domestic law especially in war - it is also to be remembered that it is from the civilian population that the information medias' workers are drawn. Apart from service newspapers and broadcasts the armed forces, like members of the civilian population, are subject to what the civilian media propagates. If this has an objective of supporting the morale of soldier and civilian alike it can be a positive factor in military operations if only indirectly. The reverse is also true.

Armed forces are employed to achieve political ends and purposes of war. Such purposes cannot be pursued today without the active co-operation of civilians, Paret had it that strategy,

"is also based on, and may include, the development, intellectual mastery, the utilization of all of the State's resources for the purpose of implementing its policy in war".<sup>56</sup>

The legal differentiation between civilian and combatant set out in the Conventions and Protocols will be obscured very often through the effects of indiscriminate weapons and by the very nature of war and its incidents.<sup>57</sup> That is no reason to neglect agreed machinery for the investigation of violations as, for example, by the International Fact-Finding Commission under Art 90 of Geneva Protocol I of 1977. Neither does it mean that efforts by any military obliteration methods to break the morale of a civilian population and its will to continue a war can necessarily be justified as military necessity.

The portrayal of modern war, and the motivations of those who portray it, should not be overlooked. The picture is drawn as ideological on the one hand, emotional on the other, by East and West. This portrayal forms part of the contemporary history, drama, theatre and television designed to index life in retrospect but also to encourage it for the future.

Establishment religion plays some part, conjectural often even in fundamentalism. That is the religion as enunciated by its proponents does not always prevent war against co-religionists - Iraq-iran amongst the Muslims; Cambodia and Vietnam amongst the Buddhists; World Wars I and II amongst the Christians. Like judges, the ability to distinguish cases may be seen as in the dissident Afghans against the Afghan government forces, for the latter are thought by the former to be agents not for the Faith but for communist ideology.

For the Anglican Synod, war is a peripheral subject, for procedures and recruitment have primary importance there. Adjustment of doctrine to conform to contemporary mores, leading to support for violent political opposition, transposing theories of just war to acts of revolution, fail to recognize the real - and double - question of security and survival.

Yet out of this has come a real concern for mitigating the inhumanities of war, and a continuing determination to promote

universally a humanitarian law of war. Much has been codified, and much of the concern has been with the victims of war, so that codes provide not only for the combatant forces and their conduct, but for the civilian populations who are the victims. Conditions for these two categories must necessarily differ, so that some definition is required.

In very simple terms there are:

- (a) Members of the armed forces and certain authorised non-military persons accompanying the armed forces eg, war correspondents and all others falling under the definitions of Art 4 of Convention III. If captured, these are to be treated as prisoners of war and their treatment is prescribed in Convention III.<sup>58</sup>
- (b) The whole of the populations of the countries in conflict fall under the provisions of Convention IV, and the treatment to be accorded to them is contained in that Convention at Part II.<sup>59</sup>

It will be noted that the 1949 Geneva Conventions III and IV did not differentiate as regards "Persons taking no active part in the hostilities" (Art 3), as to whether they had been engaged in making armaments and other essential war material, or in maintaining equipment of the armed forces, although this was being debated at the time. In part the omission was due to the unrestricted bombing policies adopted by both sides during the second World War, when the morale of the civilian population was considered to be an important target.

The position of armed forces and their subsequent treatment if taken as prisoners of war is fairly clear as regards States which are contracting parties to the Conventions. The personnel of an acceding State may, however, be at a disadvantage for that State remains bound by the Conventions whether or not the enemy "accepts and applies the provisions" (Art 2).

The dangers and privations which affect the civilian population of the States in conflict are now to be feared as an inescapable part of modern war technology even if not accompanied by inhumane occupation practices. Thus, it is not the effect of war on armed forces as much as on the civilian population which may encourage change. Because of deliberate attacks on civilians, and the incidental effects of battle on

them even when military operations have endeavoured to confine dangers to the fighting forces, humanitarian law has emerged to mitigate the effects of military necessity and political decision in the conduct of war. Even in the most favourable circumstances, however, modern war will not avoid problems for refugees and war orphans.

#### Civilians, Refugees and War-Orphans.

In war as in peace humanitarian law does not flourish in the climate of the hunger and poverty that are the camp followers of both war and civil dissent. Liberal attitudes towards crime and punishment, even if based on ethical concepts, tend to facilitate crime and disobedience. This is seen in prisoner of war and refugee camps no less than in civil prisons. Nor can humanitarian law affect that aspect of war which results in the brutalizing of emotion and compassion arising not only from the war itself, but also as incidental to the doctrine of military necessity if loosely applied. Whether applied with due regard for moral standards or not the doctrine, like other incidents of war with the consequential uncertainties and dangers which attend them, makes wars the great begetters of orphans and refugee children and this is recognized by humanitarian law.<sup>60</sup>

In the practical realities of war law's remedies can only be palliative, but the 1949 Conventions envisaged and sought to provide for those realities. Prior to the Conventions - especially Convention IV - the earlier agreements provided for "relatively few positions - basic in character", but

"The experience of the first World War showed the inadequacy of these provisions: the technological development of weapons, and the enlarged field of military action introduced thereby, demonstrated that civilians could no longer be regarded as being outside hostilities, and indeed, were exposed to the same (or worse) dangers as combatants".<sup>61</sup>

The very high casualty rates of civilians indicated need for the realistic regulations introduced by Convention IV, and the need for a detailed system for the treatment to be accorded to civilians,

particularly to orphans and refugee children. That such regulations were necessary reflects the unbridled nature of modern war and the depravities which become evident under its stresses. The Convention, therefore, not only sets out rights and treatment but also terms of operation and supervision. Unfortunately as it may seem from post-war history generally and in the Middle East and South East Asia in particular, the experience of those orphaned by war do not necessarily induce strong anti-war attitudes preventing repetition of their own experiences generation after generation.

Prior to the second World War problems of re-settlement or return to former domicile tended to be 'solved' before the next similar problem arose. After the substantial evacuation of the post-1945 displaced persons camps the problem was still considered to be temporary arising from war to war. The United Nations Relief and Rehabilitation Agency (UNRRA) was established on that basis as an ad hoc arrangement by voluntary contributions. It was only in 1971, in the face of continuing problems, that the Agency was institutionalized as though acknowledging that no end of the problem could be foreseen.

It now seems likely that it is impossible to obviate the inevitability of the coincidence of refugee problems and modern war. Famine has been a cause of large-scale and enforced population movement and war another. The genesis of famine often lies in war, or is exacerbated by war, in a way in which the reverse situation is not common today.

Refugee problems arising from conflict in Korea, Palestine, South East Asia, Afghanistan, Ethiopia and the Sudan are examples which show that the post 1939-45 lessons are disregarded as being an unchanging element of war. Palestinian refugees alone total over two million and their displacement stemmed from institutional policies resulting in the recognition of the State of Israel and after failure to enforce UN Resolution 131 (II). Afghan refugee problems stemmed directly from

foreign intervention in a domestic political situation. For Pakistan which has received some three million people from Afghanistan the real problem has yet to be realized.

In States unaffected by physical problems of incoming refugees consciences remain relatively undisturbed: such problems are accepted as incidental to war. Even the delayed consequences of war which prolong refugee problems as in the case of the Vietnamese 'boat people' the problem attracts mixed attitudes. But refugees are no longer mere incidentals of war. They can be used as a political weapon, as in Vietnam, or as an economic factor as in compensatory payments in respect of the movement of individuals from East to West Germany. Dangers for the future may be seen in agitation for a Tamil State in Sri Lanka, for indigenous rule by Fijians, by Basque ambition in Spain and Sikh in India. Desires for the creation of sovereign States backed by violence inevitably lead to refugee problems and demands for political asylum with cross-border movement and counter-movement. Such activities influenced Israel in Lebanon and South Africa in Angola and Botswana. In times of relative peace such actions are deprecated, but they are the line of least resistance when peace is violated as Pakistan experienced during the Russian occupation of Afghanistan.

It is a feature of modern war that it has become necessary to prescribe the treatment to be accorded to war orphans, but it is equally a criticism of public law that whereas it provides remedies for States, either through the ICJ or by way of reparations, individual anomalies must be adjusted by domestic law and procedure. There is no redress if States decline to pursue the individual's plea unless, as in the EEC, some appellate system is in force. The question would arise as to whether any system of law could cope with deprivation of rights on the scale of the refugee problem.

There is on one hand the humanitarian concept for both peace and war which has been re-furbished since the second World War in the



Universal Declaration of Human Rights and the Geneva Agreements. The Declaration and the Agreements should be considered together for the objective standards of the former are curtailed in war, whereas the treatment prescribed by the latter should become effective in war. On the other hand those who initiate wars are not inhibited by the inevitability of refugee problems stemming immediately from the abrogation of human rights, and the tactic of encumbering an enemy by driving the civilian population towards him, are equally in direct contradiction of the Declaration and Agreements.

The continuous nature of the problem was acknowledged in the UN Convention Relating to the Status of Refugees ((1951) 189UNTS150) (and the Protocol adopted on 16 December 1966). The problem's magnitude can be seen from statistics including:<sup>62</sup>

- (a) 60 million people had been displaced in the second World War up to 1943.
- (b) 2 million Palestinians have been dispersed throughout the Eastern Mediterranean area since 1946.
- (c) 3 million Afghans are refugees in Pakistan and half-a-million in Iran.<sup>63</sup>

Numbers of refugees from South East Asian States, and from Tibet, are large but unknown, and this by no means exhausts the refugee flood, or describes the conditions under which they try to survive. Not all refugees from war zones are refugees from the war itself. Those from Vietnam who are referred to as 'the boat people' are more likely to be ethnic Chinese whose departure, sufficiently funded, is desired by the Vietnamese.<sup>64</sup>

The necessity for regulation of State conduct with regard to refugees would seem more than obvious from the experiences of this Century, but the economic situation of receiving States should be borne in mind in criticising standards actually afforded. What has transpired since 1949, despite the endeavours of UNRRA and various voluntary organizations, has failed to solve the post-war problems upon which have

been piled more problems as time has elapsed. Nor are war and national catastrophe the sole creators of refugee problems, but some such problems are disguised under categories of immigration and emigration as in the case of East African Muslims expelled by Amin. They, too, require humanitarian treatment as prescribed by the Conventions, even if they are not the victims of inter-State war.

As the Universal Declaration stands it is individuals not States who are affected by the conflicting ideas of Art 3 ('everyone has the right to life, liberty and security of person'), and Art 29 ('in the exercise of his rights and freedom, everyone shall be subject only to such limitations as are determined by law'). This seems to imply that the Declaration deals only with rights in a State as peace, for Arts 3 and 30 are plainly irrelevant in time of war.<sup>65</sup> Where it is convenient for a State to carry that argument further into times of crisis no doubt Art 29.2 might be cited in aid.<sup>66</sup> This is a reason for the coming into force of the Geneva Agreements and especially Protocol II of 1977. It seems clear that if there was any intention in the Declaration to affect the place of war such intention has been frustrated: but the words of the Preamble refer to both the foundation of peace and to recourse to rebellion.

The Declaration would be a blueprint for all seasons only if it made war an infringement of rights. As adopted by States the Declaration has not yet become universally accepted but the adoption of an even stricter instrument is more unlikely.

In the long term it is the treatment which all categories of refugees, other civilian populations, (and immigrants for that matter), receive that determines their attitudes to war, revenge, or integration. Experience in Kampuchea is not encouraging.

#### Humanitarian Law and Human Rights.

Freedom of expression - a concept underpinned by the Helsinki Accords as well as the Universal Declaration of Human Rights - is

differently regarded in different States, and particularly in how free expression may be followed by action. Opposition to war, or to defence expenditure, or to certain weapons may promote political reaction.

States usually rely on forms of conscription to raise armed forces for war although some favour voluntary recruitment in peace. There would seem to be little difference between the two in what a State allows its forces by way of the Universal Declaration's catalogue of rights, and the place of war seems to be unaffected by the method used to induct citizens into the State forces. It follows that interpretation of the justness of war may lead to a regulated procedure to establish conscientious objection in some States but will not obviate conscription in others.

What seemed certain was that the political complexion of a national or federal State government in practice was a matter for the State or Federation. That seemed to fall within international legal concepts and custom and was unlikely to be altered by general consensus. Yet it remains doubtful if the Baltic States, and some East European States now under the tutelage of Russia are satisfied with their present position notwithstanding any national parliament they may be permitted. Thus concepts of empire remain despite much adverse international opinion. It is an open question whether Russia has yet modified

"its world-wide political and ideological ambitions, and its often-demonstrated willingness to promote these ambitions without scruple when the opportunity offers and the risks are not too great".<sup>67</sup>

Given also Russia's past experience of invasion it seems probable that the Western States and the USSR will retain some mutual antagonism however muted. This will not be dissolved completely by recognition and exchange of diplomatic missions if the distrust lingers and co-operation in the UN is only spasmodic. In that case, it is likely that neither the USSR nor the US and Western Europe can yet "see any alternative way of safeguarding its own security and minimum foreign objectives" short of devoting "huge slices of their national incomes to maintaining the means of obliterating each other".<sup>67</sup>

In these circumstances differences of interpretation of human rights may well be carried into the training of the armed forces where the first and primary object will be to orientate the soldier to the difference between his right as citizen and as soldier. Interpretations of 'freedom' will similarly enter the training programme. Of course, as the Universal Declaration of Human Rights,

"derives (also) from the more enduring elements in the traditions both of natural law and natural rights and of most of the world's great religions and philosophies",<sup>8</sup>

it is not surprising that some of its provisions were already in force in some military codes. For instance, the British Army Act and the Manual of Military Law prescribed punishment only after due process. Such attention, however, did not stem solely, if at all, from the motives which led to the promulgation of the Universal Declaration. The maintenance of discipline in organized forces, both on and off the battlefield, has been long established. The means for ensuring discipline may alter with time but the need for discipline does not. As well as the need for an additional legal code for armed forces, the relationship of those forces to the government must be scrutinized constantly. Whatever the standing of the Universal Declaration attitudes by the armed forces to politics and government do differ between one State and another, and from time to time with consequences for the place of war.

War remains a brutal instrument of State policy no matter how the laws of war may be regarded and how people are recruited to armed forces. But the instrument is operated under a system of compulsion comparable to systems of taxation in that the citizen must pay taxes for the protection that the State affords him and must fight to defend the State at the will of lawful authority. That voluntary forces persist in some States shows that the theory is accepted more cheerfully by some than by others. That a war can be offensive in spirit, and expansionist in design; or may be unjust in concept and policy and may afford a citizen a moral right to call in aid theories of just war, will not alone allow him to escape

conscription.<sup>69</sup> The fact that weapons may be regarded as offensive, or morally indefensible in the citizen's judgment, will not allow him to contract out of taxation to be raised by the State with which to furnish its armed forces with such weapons.<sup>70</sup> These are national, not international, issues but they affect citizens of all States, and although treatment under national law affecting human rights varies from one State to another, all citizens of all States will be entitled to equal treatment under the humanitarian international laws of war. In practice, however, such equal treatment may depend on signature and ratification or adoption in domestic law of the relevant international conventions. It is necessary to note that in such matters of humanitarian law it is the "High Contracting Parties" which undertake to respect and ensure respect for the Conventions of 1949 and the Geneva Protocol I of 1977, but not all States are High Contracting Parties.

That some States have not found it judicious to adopt the Conventions and Protocols may in part result from differences in societal factors and experience, and may reflect a disbelief in the efficacy - as whip or carrot - of injunctions about conduct in war. On the other hand, the Helsinki Accords, and the current negotiations in Vienna of the 35-nation Conference on Confidence and Security-Building Measures (CCBM) are aimed at a more stable relationship in Europe. They are very much concerned with promoting a common European acceptance of concepts of human rights and of the Universal Declaration.

#### Humanitarian Considerations in Peace and War.

In a wider view of humanitarian attitudes towards war the question of the justness of war has had considerable discussion. The justness of peace has been less canvassed. Yet it is a continuing fallacy that 'peace' is the reciprocal of 'war', as though relationships in the international system are mathematical or necessarily reactive. It is also fallacious to assume that an objective of international law is the assurance of peace. As usually considered, peace is a state of

non-violence; international law seeks to perpetuate a system offering alternatives to violence between States in the settlement of disputes, and disputes are as endemic in 'peace' as in 'war'. Thomas Aquinas aptly described peace in a kingdom as comparable to what life is in a man.

Peace in international relations is likely to be only an equiparation between dispute and resolution without war, and not an utopian ideal of the elimination of conflicts of interest. It introduces generally, but not essentially, non-violent methods of dispute resolution and control, but there are various situations involving violence between and within States which are not within the legal definition of war.<sup>71</sup>

The difference between international and municipal law in concern with disputes is that the latter imposes control, but the former requires consensus both as to substance and procedure. Because certain international institutions, the International Atomic Energy Agency under the Non-Proliferation Treaty for example, exercise specific powers it is possible that expansion of such international control by an international institution may become the ultimate arbiter in disputes. The attitude of the generality of States toward the ICJ shows that this may be far off in practice.

If much has been written generally and specifically about just war, discussion of just peace has been promoted only by those concerned with specific cases. But there are differences of interpretation illustrated, (for example, by discussion of the Treaty of Versailles as it affected Germany in the inter-war years). For one school a just peace and peaceful co-existence could only be a peace in which communist policies could be realised worldwide, that is to say, a continuation of the struggle against capitalism by all means other than war. Even if there have been changes in practice as well as in attitudes, this supposed alternative to nuclear war, (the socialist objective of world domination), may not finally have been abandoned. In either case all or any form of interim co-operation with capitalist States may be utilized

or exploited. If capitalist States are unwilling to entertain unrestricted co-operation, especially in the fields of technology, ghosts of cold war will not have been exorcized. This is because peaceful co-existence and active co-operation require at least a public agreement with ideas of political freedom and religious tolerance, and human and property rights, enshrined in international social instruments including the UN Charter.

The Chinese realistically call 'peace' "unarmed truce unable to prevent local war".<sup>72</sup> But 'peace' has institutionalized camps of super-power influence. In multi-national, multi-racial, and multi-tribal States such as some ex-colonial countries, as well as currently in Yugoslavia, a peaceful co-existence requires co-existence within the country as well as between blocs of States.

Peace and War, and the state of peace and war between one country and others, have to be viewed with causation in mind. Adherence to blocs, or to voluntary alliances, enlarge areas of causation and, in practice, even the so-called non-aligned States are not able always and in full to conform to the ideals of peaceful co-existence even within the State.

Apart from factors arising solely out of associations of States there is a wide classification of causes, lawful or otherwise, from which situations of peace or war can develop. Linder itemizes:

Deterministic causes, such as laws and regularities.  
 Indeterministic causes, such as free will.  
 Teleological causes, such as nature, history, or God's will or plan.<sup>73</sup>

Rapaport classified causes of peace and war as:

Political - rational  
 Eschatological, attempts to establish a world without injustice.<sup>74</sup>  
 Cataclysmic - a catastrophe for humanists.

There are other classifications of these causes, for example:

Ethical, as in the exaltation of war for noble ends; scorn for stagnation by a peace which has bred moral decay and downfall of nations.  
 Social, or religious, or ideological.

Most of such classifications are unscientific, and some overlook social factors and totalitarian instincts: they cannot all be valid. The nature of man and the nature of society, and the international system with its differences in economic standing and ideology affect attitudes to, and prescription for, the abolition of war or the maintenance of a state of peace. In the context of humanitarian law conduct in war may be affected by the causation of the war, but causation tends to be a retrospective study.

The causation of peace - the sequence of war: peace terms imposed or accepted: the consequences of peace terms - immediate - are factors in just peace - continuing. If not better understood after the second than the first World War events rather than the legal instruments imposed their consequences for both Germany and Japan affecting their place of war over the past 40 years.

Many factors account for varied ideas about the sustaining of peace by collective and legal enforcement. There have been movements towards the resolution of disputes by negotiation and diplomacy, and legal concepts have been among the actuating influences for enquiry into causation as a basis of legal investigation and judgment.<sup>75</sup> However, decisions as to the causes of any particular war are rarely possible until after a considerable lapse of time. The official papers have to make public appearance and historians have to interpret them.. By contrast inquiry into the causes for a State being at peace has seemed in the past to be a work of supererogation, and it is not clear what part desire for law and order rather than war weariness influences peace movements during war.

The high costs of military technology, weapons systems and the electronic adjuncts of armed forces, and of their destruction rate even in peace time, as well as fear of nuclear war, contribute to public attitudes. But these may not be decisive in competition with immediate



or overt reasons particular to a specific situation. If war is a 'multidimensional phenomenon', so is peace, and both have mainly political causation. But law may also be so described and also has a mainly political causation.

Social welfare developments to improve human living standards demand the continuing attention of politicians, and comparisons of national standards are promoted as causes of domestic unrest. Whether social development can be separated from mere 'bread and circuses' has yet to be proved, but high standards of living have not prevented military adventures nor, necessarily, evoked any greater patriotism in defence of country. Even if there are ceilings to expenditures social development is generally evolutionary and may produce revolution in standards. Socialism is revolutionary and intended to change a system quickly. Between the two political realism has regard for survival. Justice in peace, therefore, may not be the desired objective, or the immediate object. It would be a mistake nonetheless to consider that fixed and fairly immoveable foreign policy goals are no longer aimed for, even if variable economic factors dent and delay the fruition of such policies.

How far different governmental systems influence different attitudes or how far governments reflect national views is not in point here, but political discussion in some States is generally non-violent, while violence arising from political disagreements is common in others.<sup>76</sup> In both it is taken for granted, however, that the country is at peace when not engaged in major war. Thus European States were at peace during their individual colonial wars in the late 19th and early 20th Centuries. Similarly, the US was at peace when engaged in the Vietnam conflict; as was the United Kingdom during the Falkland Islands dispute; and Russia during the occupation of Afghanistan. The national place of war was not changed by these conflicts, perhaps illustrating the truth of the Chinese definition.<sup>77</sup>

The humanitarian law of war effectively covers periods of 'war in peace' by legal definition (that is, periods of International Armed, and non-International Armed, Conflicts)<sup>78</sup> as well as war. Whilst this is a necessary course of legal development it accepts that, by the nature of political thought and the utility of modern weapons, declaration of war is less likely in the future.

Jessup had the idea of a State co-existing with a peace and war intermediacy which he called 'imperfect war'.

"...if the mind is wedded to the idea that there is no alternative between war and peace and the actualities seem to deny that there is 'peace', the argument for war seems to command the support of a certain logic".<sup>79</sup>

But the vagueness of the interpretation and observation of 'the mind being wedded' could hardly lead to concrete and consistent law. If, however, there were support for a definition of war as being merely a situation in which the killing by individuals of one State of individuals of other States is sanctioned, encouraged, or ordered by a State, the consequences would be to discourage negotiations and make real war more likely. This is the situation where terrorism is planned and accoutred in one State and carried out in another. But there should be a scale of commitment in a definition: large, organized groups engaged in more or less systematic killing at the behest of their political authority still might not qualify if incidents could be isolated, as localised conflicts on the River Amur between Russia and China were during the 1960s. There is a difference between such incidents and the consistent actings of the 'terrorist' state, which seems to offer justification for reprisals. But reprisals are today in a disrepute which has stemmed from aerial and naval bombardment which is often indiscriminate.

The real point, perhaps, is that no matter how far the humanitarian law of war is taken, or how wide arms control agreements may be drawn, the essential planning of peace cannot be left safely to what is

available after planning and providing for war and the continuing charges arising from previous wars. Security at a lower cost in agreement with like-minded States must still depend in the longer run on the policies of peace.

In contemporary circumstances there is a need for the policies of peace to have regard for jus ad bellum and jus in bello in a continuing educational campaign regarding the laws of war. Greater awareness of the necessity for these laws may in the long-run lead to an increased repugnance (and healthy fear) for violent solutions with their inevitable indiscriminate in weaponry and tactics.

Humanitarian principles and the positive law to give effect to them, if universally accepted, would make modern war impossible. Experience indicates that such an eventuality is unlikely at least in the short-run, but that the best instincts of some national leaders have been sufficiently aroused to agree a code of conduct even for the business of war is a step forward. Unfortunately altruism and international efforts to control armaments have not extended effectively to those means of war-making by which the code will be broken. In reality, the view of humanitarian law in the context of national survival is to be seen in the equipping of a State's armed forces and in its military operational plans. Acquisition of indiscriminate weapons (nuclear, chemical, biological or conventional) and plans for their use show that policies are subordinated to the perceived realities of the international system.

Similarly, the cultural background of individuals may be subordinated in battle to the necessities of the moment when survival tactics may override humanitarian instinct and habit. It follows that humanitarian practices and law may affect the conduct of war and the consequences that arise from it, but they are not yet primary factors in the place of war.

## THE MITIGATION OF WAR - THE MODERATION OF THE EFFECTS

## (B) By Arms Control and Disarmament

## Arms Control: Definition.

A belief that proliferation of armaments is a cause of war, and continuing hopes for the abolition of war have prompted discussion of disarmament, arms control and arms limitation. The terms are often applied indiscriminately but they may be more specifically defined. Disarmament is a major issue discussed separately below<sup>1</sup>, Arms limitation is loosely used to indicate any measure designed to effect a control of armaments short of a complete prohibition by way of General and Complete Disarmament (GCD).

## Arms control embraces:

- (i) Reduction or abolition of specific items agreed in formal international treaties.
- (ii) Demilitarization agreements between States regarding defined geographical areas or 'free zones', (eg, the Rush-Bagot Agreement between the US and Great Britain (1817) as to the Great Lakes and the US-Canada border).
- (iii) Mutual agreement to set qualitative standards or upper and lower limits in numbers in any kind of arms and materials including:
  - (a) Zones of Peace (a concept not yet proved in practice).
  - (b) Nuclear free zones (only one of which (in Latin America by the Treaty of Tlatolco) is successful. The success was due to the nature of the territory which was nuclear free when the treaty was signed).
  - (c) Confidence-building measures (more developed between NATO and the WPO than elsewhere).
- (iv) Regulation of the arms trade, including transfers between States by way of military aid and assistance and sales whether by governments or entrepreneurs. This area of control is relatively undeveloped.
- (v) Aid from one State to another in cash, kind or credit (which may make available funds for purchasing arms which otherwise might not have been possible).

Arms control and disarmament have different objectives: the former to reduce the risk of war and the dangers of surprise attack; the latter to eliminate war and maintain peace. Arms control by the restricting of numbers may lead to lower levels of armaments, but may nevertheless leave

State arsenals sufficiently stocked, and replacement facilities sufficiently organized, to support the national policies, but arms control does not maintain peace. The abolition of war depends not only on the elimination of weapons of war but also research for 'new' weapons and control of weapons production capabilities. It is ability to effectively prevent replacement of weapons and material in war that most affects the place of war at any time.

Military formations and units and their locations as well as armaments may be referred to in arms control or confidence-building measures. Agreement on upper limits of weapons may result in increasing, not decreasing, a State's arsenal in order to effect balance between parties. What happens to the weapons which become surplus as a result of arms control agreements should be regulated in the agreement in order to avoid recreating imbalance elsewhere. In reviewing arms control agreements and their effect on balance between States the state of the weapons remaining should not escape scrutiny.

It may be apposite here to refer to nuclear testing. A complete, universal and verifiable prohibition of nuclear testing would be a serious even if not definitive arms control measure. Attempted controls on nuclear testing are not otherwise referred to herein because they have neither been ratified by the US nor has an acceptable system of verification yet been finalised. In any case only the US, the USSR and the UK of the acknowledged powers have been involved in negotiations on all of the agreements reached such as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, Outer Space or Under Water ((1963) 480 UNTS 43), and the Treaty on the Limitation of Underground Nuclear Weapon Tests ((1974) 13 ILM 906). But talks on a comprehensive test ban and verification procedures are proceeding.

One further point of definition as regards arms control is necessary. The prohibition of the use of a weapon as was the case of chemical weapons by the Geneva Convention ((1925) UKTS 24 (1930) Cmd

3604) is not enough: manufacture must also be outlawed if the weapon is to be eliminated.

Arms Control: Purpose.

Arms control and confidence building measures are mainly of a restrictive nature promoted for political and economic motives rather than by military considerations. In so far as their ultimate purpose is to reduce the risk of war between the parties they have moral and humanitarian incentives of:

- (1) Increasing stability.
- (2) Reducing economic burdens of defence expenditure.
- (3) Lessening the risk of surprise attack.
- (4) Reducing damage in the event of war.

Between States a balance of armaments and forces at agreed levels - mainly mathematical but sometimes qualitative - makes for military stability. Arms control negotiators, however, do not all start from identical positions. This makes stability a concept difficult to rescue from the abstract when considering the conflicting factors presented by the array of modern armaments. The concept is necessarily bound by asymmetrical tracts of time, technical knowledge, skills and manufacturing capabilities.

Universal arms control measures are usually negotiated in a step by step process, each being complete in itself. This normally applies also to bi-lateral agreements for even between two States negotiations do not have in mind the ultimate goal of disarmament. Difficulties, such as are being experienced with the control of chemical weapons, can arise from this piecemeal process in negotiation where,

"the forbearance of the United States over the past 19 years has only met with continued production, stockpiling and deployment by the Soviet Union",

which has led to an attitude of not being in favour

"of giving up or halting the maintenance of a minimum retaliatory capacity which is allowed by the Geneva Convention..."<sup>2</sup>

Economic savings are not an invariable result of arms control measures for all too often sacrifice of one item is counter-balanced by the increasing costs of others. Neither is reduction of damage always to be expected from reduced numbers: improved performance is a fundamental reason for technical advance which may also affect the danger of surprise attack.<sup>3</sup>

The purpose of arms control might be explained in another way as a reduction in the combinations which make up military forces and their equipment with a view to:

- (a) lessening risks to security,
- (b) reducing the danger of escalation in the event of war, and perhaps
- (c) advancing in some manner, even if only 'climatically', towards complete disarmament.

Arms control on a global, regional or national basis is relatively unco-ordinated in its effect on the place of war in society. Control is muddled in practice falling between national initiative and universal reluctance; at any given time falling between a reduction in some items for some States and uncontrolled expansion for others. Generally it is without reference to the future introduction of improved and new weapons or to manufacturing capacity and trade potential. The term used by politicians and strategic analysts is often inaccurate in what they intend it to convey for it has become a euphemism (disguising its often barren nature) for transactions involving merely an adjustment of arms inventories. The control then lies only in verification procedures, but fear of loss of advantage will always be present in arms control negotiations so long as the international system remains one in which "the ultimate arbiter is the relative power of the competing states".<sup>4</sup>

In their attitudes to arms control measures all States are not equal, and difficulties start from the two or three separate channels for the promotion of measures of control and the instruments which give legal interpretation of them (as, indeed, is common to much of international

law). In arms control this makes for unevenness. Balancing controls between NATO and the WFO for example may allow the place of war for either to be adjusted in another area and vis a vis a different potential enemy. That result might have been obviated had a universal control instead been possible. On the other hand, control of a weapon will affect the burden of defence budget more for some states than others in the replacement, by some other (and inevitably more expensive) weapon systems, of the effective military value relinquished if the place of war and stability is to be maintained. The place of war may as easily be aligned to offensive as to defensive policy and symmetrical balancing of weapons between States is not always what a State requires to support its foreign policies. Such policies will have regard not only to the forces and their equipment but also to the industrial base and raw materials. For this reason arms control measures rarely include restrictions on research toward the improvement of existing weapons (including those which are the instant subject of control); research toward new weapon systems; and the subsequent development, production and deployment or sale of the improved and new weapons. At the time of negotiating an arms control measure the stage which research and development of improved and new weapons may have reached already may be such that a weapon controlled by an agreement may be almost obsolescent already.

As arms agreements can refer to a multiplicity of aspects including armaments generally, specific weapons, advisers, technicians and users, research and development, complete or partial controls, qualitative, quantitative or geographical limitations, agreement on what is material is necessary at every stage of negotiations. Whether self-application is dictated by morals, conscience or financial stringency it is not always subordinated to the military value of the proposals.<sup>5</sup>

Although the subject of disarmament is addressed elsewhere herein it is appropriate here to point out that GCD was a quid pro quo offered to non-nuclear States to eschew nuclear proliferation in the meantime by



adhering to the Non-Proliferation Treaty of 1968 (an arms control universal agreement). GCD might be the logical goal of arms control measures if they were co-ordinated to that end, but although there is a periodical review of the steps which have been taken by the nuclear states towards disarmament, progress (and positive international law) is minimal despite Art 11.1 of the UN Charter.

Arms control measures may be promoted by the UN (under Art 26 of the UN Charter), by individual States, or on a regional basis, but relative importance can depend more on which States adhere than on whether the convention is universal and open to all States. Apart from self-imposed unilateral controls some arms regulation may be determined exceptionally by a third party,<sup>6</sup>. A self-denying ordinance affecting the place of war is sometimes represented by a provision in the Constitution of a State. Although the UN Charter ought to constitute a major multi-national constraint on war States may go further. The Japanese for example are forbidden by their Constitution,

"from resorting to war to solve international disputes, stationing SDF (Self-Defence Force) troops overseas, engaging in arms trading or possessing offensive weapons...Japan will not manufacture, possess or allow any nuclear weapons onto her territory. She is also prohibited from taking part in 'collective defence', that is, alliances such as NATO".

If some of the provisions are vague the instrument may constitute "a barrier to the return of militaristic imperialism"<sup>7</sup>, but the duty imposed under Art 43 of the UN Charter appears to be treated cavalierly.

Self-denying ordinances, like Constitutions, can be abandoned, amended or re-interpreted. Japan is no exception, for

"if the balance of power were to rapidly alter in the region- a US withdrawal from its Philippines and South Korean bases for example - Japan, unable to take part in collective defence, might choose to rely on her own increasing military power to protect her interests in the region".

But such an ability to change should not be regarded as nullifying unilateral decision for most arms control agreements, whether bi- or

multi-lateral, have provision for terminating or amending their substance.

The place of war is affected by national economics which provide for the availability of weapons and other means of making war. Few attempts have been made in international and domestic law to place restraints on arms manufacture, production and transfers, and purchases are restricted usually only by finance although they may be given by way of military aid as recompense for some political consideration. This is an area in which the effect of international law on the place of war is lightly felt although serious arms trading is of immediate international concern.

The size of the 'open' arms transfers problem is illustrated in the following example,

"Six developing countries - including Syria, Iraq and Libya - each have more tanks than the US Army has in its units in Europe. In all, a dozen or more developing countries have more than 1,000 main battle tanks, and a similar number has access to ballistic or cruise missile technologies. When the prospect of chemical or nuclear proliferation is added, future conflict in the developing world may be complex and deadly".

Several other areas in the distribution of armaments also affect the place of war not only through an absence of effective restriction but as the result of determined commercial effort on the part of the producing States. They include (a) The illegal export of small quantities of apparently harmless materials from multiple sources which can be built up to allow the establishment of nuclear and chemical manufacturing plant (such as at Kabuta in Pakistan, Tarapur in India and Rabta in Libya), (b) Large scale missile proliferation which is causing regional anxieties.

Legislative weakness under which transfer of arms may be illegal if arranged in the supplying State but which is lawful if arranged in the receiving State is aggravated because the policing of laws affecting commercial arms transactions falls to be carried out by the individual States concerned.

### Arms Control: Developments.

Approaches to arms limitation, (inconceivable in earlier centuries to a laity under feudal obligations when philosophical as well as moral, legal, and military principles were based on the right of States to make war<sup>9</sup>), emerged in the late 19th Century but were rejected at the Hague Peace Councils of 1899 and 1907. There military views prevailed and were accepted as the States' views, for as feudalism retreated the State appropriated the privileges of the sovereign as feudal lord and merely transferred to itself the personal obligations of the people. This it did by means of taxation and the obligation to attend for military service in the State's quarrels, in the Militia for training and for home defence, and the soldier could and did participate in the political debate.

Thus if States came to arms control still conditioned to believe in an unlimited right to use military power in their disputes with other States, they could contemplate arms limitation only when they could also contemplate limitation both of sovereignty and the use of military forces to obtain what they desired. Partial and unilateral disarming was common after the conclusion of hostilities. It was not regarded as disarmament but rather a rationalization of forces and expenditures to a peacetime level following an apparent lessening of the imminence of the next war. In reality there was probably a difference in time scale between the acceptance of limitation in the practical applications of sovereignty on one hand and attitudes favourable towards lessening the use of force in pursuit of national objectives on the other. Reluctance to vote funds to support active military operations was a continuing factor but one which did not affect the concept of sovereign right in war-making, which was the main reason for the development of legal restrictions such as the Covenant of the League of Nations and the Kellogg-Briand Pact.

It is now recognized that political will to uphold them is the essential if legal instruments like the Kellogg-Briand Pact are to lead

to the elimination of war. That political will must be supported by effective reduction of armaments and in openness about national arsenals, and control of the arms trade, all of which the League failed to effect.<sup>10</sup> But the League's failure induced a less utopian attitude in the UN which initially limited such proposals to the formulation of a plan for the regulation of armaments whilst outlawing aggressive war.<sup>11</sup>

Even so, the danger of direct confrontation between them led the US and the USSR by about 1960 to place greater emphasis on bi-lateral arms arrangements, especially as regards Europe, than on the likelihood of co-ordinated and universal arms control through the UN. Deterrence rather than war policies began to emerge.<sup>12</sup> Now experience has shown that if the control of armaments is to have a material effect on the place of war disarmament rather than limitation may be necessary for deterrent policies do not eliminate the possibility of war. Wars can be fought with what arms are available so that what is decisive is not the arms controlled but what are retained for use backed by an industrial base for replenishment.

Generally limitations to national defence forces have not taken into account potential manufacturing capabilities or the repercussions of trading in arms. The arms trade is an element of national strategy and foreign policy. For a manufacturing State it is both a matter of sovereignty and security and is often fundamental to securing a favourable balance of trade. Thus the exporting of arms is a conscious political and economic policy which directly affects employment and social policies. Its contribution to the national exchequer through taxation or direct profits is important. On the other hand, disarmament would reduce defence expenditure and allow re-deployment of labour, materials and capital in the longer term, but unless universal, disarmament would not eliminate the arms trade.

Control of arms and arms manufacture remains the subject of importance which the founders of the League of Nations appreciated as

directly related to any effort to relegate the place of war in society. Even in a world of disarmed and free societies entirely without violent entanglements, and subject to a world authority, there could be no guarantee of unbroken peace. The reality of this absence of guarantee in present circumstances in which a disarmed world is not yet contemplated, is acknowledged in Art 43.1 of the UN Charter. The circumstances are dictated by the realities of sovereignty, national interest, and the international system in which the effects of polarization of the Yalta spheres of influence are still apparent. This state of affairs is exacerbated by the schools of thought within a society which argue as to the means by which law and order should be enforced.

Measures of voluntary or enforced disarmament, arms limitation and control altogether separate from jus in bello, just war, or simple economics have proved to be of variable effectiveness although concepts of arms control are proposed as affecting inter-State stability and, thus, the probability of war.

It may be thought that there is clearer evidence of the effect of international law on actions in war than on its effect on the place of war. This is so in relation to the Law of the Sea and its influence on strategy. O'Connell called the attitudes and postures adopted regarding the Second Law of the Sea Conference an,

"intellectual morass where opinions and views are a substitute for law, the occasions for controversy; dispute and violence become ever more numerous and frequent. The law of the sea has become the stimulus to sea power and not its restraint".<sup>13</sup>

He pointed out that the changing law of the sea earlier represented the interests of the European States especially in relation to freedom as opposed to sovereignty related to neutrality, blockade and contraband.

"...the pliable character (of the law) has meant that it has been made to serve the purposes of sea power, and has become a weapon in the naval armoury".<sup>14</sup>

This attitude is reflected in 'linkage' theories applied to arms control negotiating and is an integral constituent affecting limitation

in any aspect of land and air as well as sea power. There is danger that refined and sophisticated arms limitation theories may have a similar effect, especially as they are pursued as individual topics without reference to humanitarian policies as such, and without the planned objective of general and complete disarmament prescribed by the Non-Proliferation Treaty.

Humanitarian measures and arms control agreements, however, often have much in common; if their overt considerations differ their objectives are often similar. The Intermediate Nuclear Force Treaty (INF) of 1988 seeks to eliminate a type of weapon just as the 1925 Protocol sought to eliminate chemical weapons. If effective both would reduce dangers to civilians as well as combatants. The vital difference is between a species of weapon (like the chemical) and a class (like the INF). If the object of any arms control measure is to reduce quantities from an overabundance to sufficiency, a balancing rather than elimination, it might be a step in the right direction even if it merits no fanfare of trumpets. Terminology if descriptive of means is not of itself necessarily descriptive of ends.

As a development of the League of Nations it was hoped that the Kellogg-Briand Pact of 1928 would effectively outlaw war. That assumption influenced the agenda for a Disarmament Conference in 1932<sup>15</sup>, but the agenda was principally a repetition of obligations under the Covenant which members had already disregarded. The discussion raised interesting points: France submitted detailed proposals one of which was that weapons exceeding a certain size should be internationalized, and the US proposed that tanks and heavy mobile guns should be abolished. It was also proposed that a Disarmament Commission on verification and sanctions be established by the League. Indeed, the measure of success was such that with the inclusion of nuclear weapons the same agenda would stand today for the same issues remain unresolved, and, like the Anti-War Pact, they have not sufficiently influenced national policies.

The creation of the UN, and at least nominal adherence to the Charter, represented progress in attitudes if not in fact. Falk said,

"...the willingness of nations to subscribe, even in principle, to the renunciation of their rights to use (except in self defence) force, is a significant step, an expression of willingness to move in the one direction rather than another...".<sup>16</sup>

The willingness should still not be over-stated for (as Dr Kissinger said of detente), it

"is an instrument of mitigation of conflict among adversaries, not the cultivation of friendships".<sup>17</sup>

### Arms Control and Strategy.

A State may accept restriction on its right to make war but perpetual peace is not yet automatically a consistent and unvarying strategy of any State even if various 'paths to peace' have been identified by strategic and other analysts.

"Strategy is not getting what one wants, but knowing what one wants, and what it takes to get it",<sup>18</sup>

and in the context the paths it takes include deterrence, non-violent resistance and arms control. But whereas arms control in itself is not obviously a path to peace in a world in which war remains possible, even if not inevitable, it may be a manageable concept of deterrence on a path designed to lead to peace. The potentially catastrophic effect of nuclear war ensures that arms control is all too often synonymous in the public mind with nuclear arms control and nuclear deterrence disregarding the lethal nature of modern explosives.

At best, arms control is a limiting rather than a preventive factor: at worst it may be regarded as a policy which accepts the continuation of war as an arbitrator in international dispute. Even justificatory expenditure on armed forces in civil power establishments ostensibly for prevention of civil strife leads to a classification of weapons as defensive and thus sustains a tactical illusion as to the potentiality of weapons.

If arms control is a derivative of deterrence theory (ie, security at a lower level of armament), it follows that it must have regard to a

State's ability to respond to aggression not only on its own behalf but also on behalf of the UN under Cap VII of the Charter. Whilst deterrent measures organized against hostile military threat remain potent elements of inter-State relations, arms control must also remain as an essential balancing factor. It is anomalous that, at the same time, arms manufacture and distribution as a form of inter-State trade and aid will remain and continue to effect an energetic cycle of threat, deterrence and arms race. Arms control policies, therefore, must go beyond own defence planning for control policies ought to include destruction of proscribed weapons and forbid stockpiling and future sales of what becomes obsolescent as a result of arms agreements.<sup>19</sup> Much of third world armament consists of weapons which became surplus to the requirements of other States and in certain circumstances in war military forces will utilize all available armament not necessarily with real regard for discrimination or proportionality.<sup>20</sup> UN concern with instances of the operational use of chemical weapons since 1945 emphasises this attitude.<sup>21</sup> Further, any notion that if deterrence fails nuclear weapons will remain unused is unrealistic in the face of NATO's flexible response doctrine and the size of nuclear arsenals known and suspected.

Under present conditions weapons will continue to be developed and manufactured without general restriction. Some will be sold as items of a State's export trade with more regard for political policy than real regard in any particular context to long term peaceful purpose. These trade-off effects of arms control measures are one aspect, but the measures themselves are not lightly undertaken for,

"we (the US) do not rely on trust in international agreements just as we do not in domestic commercial agreements. For arms control this means that whenever the limitations involved would affect our military strength, we must be able to satisfy ourselves that other parties are living up to their reciprocal commitments: we do not rely on trust but on verification".<sup>22</sup>

But, as Nitze pointed out,



"It would be nice if we could attain perfect verification, that is, if we could be sure of detecting any violation of a treaty provision. But such standard is unreachable, even with the most intrusive verification regime we could devise".<sup>23</sup>

An important aspect of an enlarged verification process included in the INF Treaty is that it is detailed in a formal legal instrument as opposed to the sometimes surreptitious surveillance methods which formerly had to be employed. There are political advantages too,

"For Soviet acceptance of on-site inspection marked a fundamental change in their attitude towards the West".<sup>24</sup>

The detail to be included will make agreements increasingly complex not only as to the inspections but also, where applicable, as to the destruction of weapons if the nuclear example is to be followed in agreements concerning conventional weapons. But because they deal with means rather than principles arms control agreements continue to be overtaken by technological progress and the 'economics of futility' implicit in the cancellation of research and contracts, after heavy expenditure but before fruition, due to the subject becoming a victim of 'catching-up and leap-frogging' in weapon design and production. This futility is not only a drain on taxpayers but it shows how weak the connection between the present arms control balance concept is and the preservation of peace. The history of the American SDI (and the ABM Treaty) may later constitute a principal example. For example, if Carver is correct that the Soviet principle of 'correlation of forces' means 'superior in quality and quantity'.

"It bodes ill for those who place their hope on persuading them to accept measures of arms control that do not preserve their superiority, whether the approach preferred is that of 'negotiation from strength' or unilateral disarmament".<sup>25</sup>

As between NATO (and the neutral Scandinavians) and the WFO, however, the probabilities for the use of force appear to be lessening with the improving atmosphere for agreement on arms control measures including conventional as well as nuclear weapons.<sup>26</sup>

The changing influence of military power is related to the limitations placed on the use of military force by political decisions including arms control and confidence-building measures, and in attitudes about means to be adopted in the resolution of political disagreement. The potential to use military force, especially in Europe, reflects the limitations and the attitudes. Because of such politically imposed restriction on the use of force it is sometimes claimed that the purpose of armed forces' planning is defensive and designed on a view that,

"Offensives produce war and/or empire: defences support independence and peace".<sup>27</sup>

Such simple propositions might reflect military experience if they relate solely to the use of military force, but the reality is more complicated. Economics are the geneses of arms and armies. If some States pursue the propositions in terms of arms control they disregard them in their arms trade policies. By doing so they enhance the military power of the recipients and, perhaps, their own balance of trade. A hypothesis, therefore, might be that the use of force by a State or by its arms trade customers cannot be divorced from the political policies of the State.<sup>28</sup> Proxy forces, as Cubans in Angola, are examples and may also be a convenience for the export of obsolescent arms justified on economic grounds. But to maintain the place of war the up-dating of arms and equipment is vital and may have to be paid for from arms trading. By the nature of arms supply it follows that the States which are parties to the greatest number of arms control agreements are also the largest exporters of arms. The mechanics of arms production forces such States into long-term plans not only for the maintenance of their own arsenals but for their trade in arms as well. Accordingly, those responsible for the security of a State, including politicians, military, technologists or strategists, have to look into the future to plan ahead for a period of perhaps 25 years. Policies of 'no war before...' must envisage the lead

times involved in research and development, production and deployment, and training not only for weapon systems but also for the related technology in command, control and communications systems. National treasurers will take a shorter term view, but if the utility of military power is to remain relatively constant the progressive long-term replacement term must be accepted, at least in the absence of progressive arms control measures. Thus, the means for ensuring security will always be liable to short-term changes through day to day financial situations.

In arms acquisition and military technology there is a need for international law to be concerned with the political implications as well as with the weapons. The provisions of the law should be consulted not only regarding existing and potential weapons but on how desired objectives are to be met by them. For arms controllers a question is whether the legal provisions will be permitted to affect the scientific progress or the desired objectives. For politicians political desires ought not to dictate that an agreement and not its content is the vital factor. If agreement at any price is politically desirable future effects on ability and capability of the use of force will have been disregarded.

From some points of view the total control of a weapon for its military utility may not be desirable. For instance,

"Nuclear arms are not military instruments in the classical meaning of the term; their value lies much more in the effect they have as a political signal".<sup>29</sup>

The Non-Proliferation Treaty seems to support that view, for while it remains true that war is an extension of diplomacy

"by other means, in a nuclear age this is no longer a precept on which it is safe to base policy. Prevention of the use of nuclear weapons has itself become a major aim of policy".<sup>30</sup>

The Non-Proliferation Treaty alone will not ensure non-use of nuclear weapons even if their retention is justified on grounds of threat value and 'no use' philosophy. That would be ensured - if at all - by prohibition of retention, acquisition, and use.

Missing in contemporary questioning is the legality of the weapon rather than only the control of it. On the other hand it may be argued that rendering the weapon less immediately effective - the purpose of SDI - would alter the balance of argument as to its use. From a point of view of arms control and military power, not to use a weapon which is available represents a self-denial which most States could resist easily in most circumstances. Instances of such self-denial, however, have occurred which were not solely reactive to nuclear threat from opposing parties.<sup>31</sup> Nevertheless in a continuing relationship between arms control and military power the nuclear weapon cannot be excluded on 'threat no use' grounds.

Armament technology embraces many scientific, engineering and electronic elements including the consequential development of strategic and tactical doctrine to exploit the full possibilities of improving weapons systems. This continuing process dictates that arms control must also be a continuing and progressive effort. Progress is unlikely to be swift or certain: argument about nuclear policies and first use of tactical nuclear weapons today is reminiscent of earlier debate about the development of atomic strategy. Planning for massive retaliation may have given way to the doctrine of flexible response but arms control proposals are only now overtaking theatre nuclear weapons. The elimination of these short range weapons would delay escalation from conventional to nuclear war, but would bring longer range nuclear weapons into action earlier in a future war (if that war were conventional at its outset).

Proposals for arms control usually avoid the elimination of a class of weapon, and if the INF agreement did cover such a class it left untouched other classes as well as the permissible ceilings allowed by the SALT agreements. But the vista is widening: arms control is moving toward a more embracing discussion to include naval forces and nuclear propulsion. A starting point for such discussion must be the doctrine

that in land warfare an attacker has traditionally sought a three to one advantage in men and material, whereas in naval warfare the defender requires the stronger force. This concept - even tactically - may be difficult to promote in view of NATO's insistence that WPO superiority in numbers and location indicates an offensive policy for the Warsaw Pact, but that NATO naval superiority indicates no such policy, being dictated solely by defensive intention. Nevertheless, limitation of naval forces would be another step forward in nuclear restriction.

It would be wrong to be too optimistic about a system of continuous negotiations on arms control especially if effectively limited to the US and the USSR with the 40-Nation (UN) Conference playing only a hopeful role that any agreement reached in that forum will be accepted by member States. In any case if elimination is not feasible, a policy of retention of secure second strike ICBMs will merely promote nuclear war to an exclusively long range operation.

The effect on deterrent policies of limitation and class elimination must be taken into account militarily, whilst the climate in which negotiations take place must be noted politically. The US in Vietnam and the USSR in Afghanistan suffered political defeat through limiting their military effort, but that may not prove military force in use is no longer the arbiter it formerly was. What is indicated is that if a great power hopes to impose political solutions by force it must calculate the military requirements and aims more carefully, and its domestic support more critically.

At the same time inability to eliminate the nuclear weapon or unequivocally proscribe it by international law, whilst placing reliance on it for deterrence (especially in Europe but also as between Russia - China - the US), affords an index of the reluctant place war is accorded in that specific situation. But a place for limited war (China and Vietnam - Russia and Afghanistan, for example) remains unchanged.

It might follow that arms control negotiations will become institutionalized within political policies whilst concurrently arms development to affect adjustment of military policy will contribute to reactive developments even if only to ensure a continuing deterrent capability and credibility. Security at lower levels of expenditure and armament does not alter political or relative military positions any more than GCD would. But the unequivocal outlawing of nuclear weapons would impose increased financial burdens for funding conventional military policies leaving the surprise factor unchanged by the substitution of conventional for nuclear warheads.

In the arena of arms control international law has a part in specifying what is agreed, how it is to be carried out, and how verified. What has not been included in agreements so far negotiated is what sanctions shall be imposed for breaches of treaties other than a right to withdraw. There is need, too, for legal measures to fill the vacuum of relatively uncontrolled arms trading.

In the long view it is the attitude of mind against war which is the effective arms controller. Measures of arms control as foreseen remain fundamentally, if relatively, ineffective while technical research, development and testing continue, and while the industrial base of States is geared to incorporate armament production facilities. The continuation of progressive arms technology and arms manufacture in one State will ensure that all States continue to feel a need for arms for security. The levels at which arms stocks are held or fighting services are enrolled and furnished may be subject to increasing inter-State agreement but such agreement can eliminate only the probability of war - not its possibility.

These are reasons why the differing concepts of arms control would benefit from the establishment of a permanent institution under Art 26 of the UN Charter instead of the many ad hoc conferences and bi-lateral discussions which obtain outside the 40-Nation Conference at Geneva, and

which may have repercussions for many States. One example of the latter is that the ABM Treaty of 1972 (not ratified by the US) is between the US and the USSR with NATO indirectly involved as an extension of the US security policy.<sup>32</sup> But SDI is really a ballistic missile defence and it may prove to be a test for international law in the context of the bilateral negotiations.<sup>33</sup> It will not advance the cause of peace if one of the parties repudiates the ABM Treaty, but States other than the two signatories have no overt influence in the discussions. Breach of international law or withdrawal from treaty obligations may be expressions of realism, but some international co-ordination (perhaps under Art 102 of the Charter) designed to obviate such definite steps which may have effects on third party States seems desirable.

The value of international political and legal institutions may not always be obvious, but in a system with many dissensions always likely experience indicates that solutions are forthcoming eventually which would not materialize without debate in an institution open to all the States affected. So long as the institution functions for a community at peace improvement can reasonably be expected. Whether it would survive in a community at war is doubtful.

#### Arms Control: Economic Control.

The political objectives of arms control are not merely to ensure security at a lower level of armaments. The strategy has the control of defence expenditure also in mind.

Cobden forecast something of the kind in 1849.

"the progress of scientific knowledge will lead to a constant increase of expenditure. There is no limit but the limit of taxation".<sup>34</sup>

Scientific knowledge and its related technology continued to progress and were matched by larger armed forces and more equipment. At times in many States a limit of acceptable taxation has been in sight or has been reached as a result of events and political reactions. The progress,

"As mass armies arose and were developed...as the burdens of associated armament rivalries threatened the economies of the participating nations, a countermovement set in - a demand for the limitation of restriction of armaments by international agreement".<sup>35</sup>

Despite the numbers of men and women in armed forces it has been the increasing proportionate cost of equipment since 1945 which has encouraged the countermovement rather than the cost of the personnel. If technological progress demanded increasing proportions of defence budgets it also presupposed greater military effect with fewer people. It was incidental and largely overlooked that this was a prescription for nuclear, or perhaps chemical or biological, warfare rather than conventional war in spite of increased efficiency of conventional weapons.

When acknowledged, the prescription led to a further countermovement: to limit nuclear weapons and, at the same time, to seek a balance in conventional weapons hoping to be prepared for all contingencies. Renewed steps to eliminate chemical weapons were also pursued. The developing strategy can be seen in the NATO changes from the Lisbon Force Goals of 96 divisions, to all-out nuclear retaliation (MAD), and the the present policy of flexible response, all keeping the US extended deterrence and its high risk - low cost threat in mind. But the economic costs of being prepared for all contingencies are proving less acceptable and the NATO reactive nuclear threshold may actually be between peace and war and not between nuclear and conventional war although the costs of both systems of armament have to be accepted.

The problem for political decision is whether arms control is to become control of all weapons or merely the balancing of individual items as currently is the practice in the US-USSR agreements. The decision is likely to be determined by economic factors as much as preferred military strategy so long as universal controls are resisted and bilateral limitations are without comparative advantage. The economic aspects, however, are not limited to defence costs for they include the industrial base, employment, and in some States a lucrative arms trade. If defence



is a costly business for the industrial State there are set-offs to be taken into account.

In the promotion of arms in opposition to arms control the conflicts between the economist and the military are resolved by the politician by his decisions on the allocation of funds for defence votes and armament projects and his allotment of export licences for the arms trade. This is controlled by the purse, and this direct control is exacerbated by the effects of inflation.<sup>36</sup>

In any case allocations can be affected by outside influences, some directly as a result of international borrowing and the conditions attached to loans. In the case of newly independent States, political independence may not signify economic independence from former colonial powers. Such lack of independence may be seen in economic matters and in continued military associations with the ability and readiness of the former power to supply arms and aid.

Departmental control of defence expenditure as a form of arms limitation may be countered by the proclivity of administrators to put the onus of disbursement elsewhere.<sup>37</sup> For example, border police may be furnished from civil votes although they may essentially consist of soldiers organized in military formations. Time scales, too, are difficult: long term planning especially in view of production lead time permits changes of mind as well as of alliance commitment. Both can have a limiting effect.

Membership of international and regional institutions and organizations may define incidentally what funds are left for allocation by a State after satisfying the institutional demand. Similarly there may be some residual control as a result of a State's contribution to UN Peacekeeping forces and finance, for what is available to the UN in one place may not readily be available when required by the State in another. Arguments about burden-sharing in alliances reflect national allocations

to defence in personnel and equipment as well as in finance: they may result from unilateral arms limitation. Because of the disparities in the gross national product of States, however, there can be no balancing of defence expenditure on a purely percentage or per capita basis although such percentages can be the basis for balanced reductions.

Arms control measures in any case are calculated around some form of balancing of one side against the other. Lowes Dickinson pointed out that 'balance' has two meanings: equality between things, eg, a balance of forces; and another equality, eg, a credit balance at bank.<sup>38</sup> Balance of power professes the first whilst seeking the second, and military balance in arms control has similar attributes.

Arms control is a tool used to promote the vital interest of a State in survival. To this end only it would seem States endeavour to ensure their security not only by expenditure on defence forces but also by arms control agreement. In spirit this is a diplomatic method of trying to regulate the competition, whilst law records what has been agreed. The record in a formal treaty, however, may include time scales and cancellation clauses making arms control measures impermanent and subject to review.

#### Technological Development and War.

The means of modern war are products of technology the implications of which can be seen in the relationship between military requirements and technological progress. Much of all research and development expenditure is directed towards military ends and is funded by governments directly or indirectly. The relationship is sufficiently intimate for impetus towards new and improved materials and products to stem from the technologist or the military or both.

There is a military significance in improved social conditions leading to (a) an increasing percentage of young men and women physically fit for armed service (timely today in the absence of colonial manpower),

and (b) general standards of education sufficient on which to base the use and maintenance of sophisticated weapons and equipment.

These developments are relatively unaffected by public international law, but political implications have led to a changed strategy for nuclear weapon States from nuclear war fighting policies to nuclear war prevention. At the same time a conventional strategy of no restraint in weapon development, deployment and use has been maintained.

The logistical implications of technological advance in weapons systems has forced adaptation to extravagant rates of ammunition expenditure for an increasingly wide range of guns, and missiles, as well as mines and engineer equipment. It has also led to a constant updating of weapons and equipment of shorter obsolescence time span, and high wastage rates. This constant updating has released continuing stocks for arms traders.

Technological advance in military equipment is adapted to civilian applications, but no question is raised as to the pace of technological progress. It is not clear that technology is improving chances of survival in any case and circumstances, apart from the effects to be expected of all-out nuclear war. It is not clearly demonstrated either that scientists, technologists, engineers and politicians are now able to control all peaceful and warlike applications of their sciences. At the same time, if arms control follows rather than leading, the developing technologies may result in strategic imbalance, the costly maintenance of equivalents, or to retaliation in kind as a continuing military policy. Mines in space, particle beam weapons and SDI are referred to in the context, and although the effects to be expected of them are not fully understood political thought and policies follow the technological possibilities.

It is not clear that verification techniques can be expected to keep pace with advances in weapons technology. If not, a question is:

can nuclear war be managed? Earth surveillance and military command through satellites suffer from counter technology in any case.

It is clear that the military aspects of technological development cannot be treated in isolation and this has been recognized at 'Summit' discussions,

"The Reagan Administration insisted that the US-Soviet discussions not focus simply on arms control but rather cover a broad agenda including also human rights, regional conflicts and bilateral matters. This recognizes that relations between nations involves much more than the level of arms, which is, in fact, but one of a number of sources of tension and mistrust".<sup>39</sup>

Unrestricted advance in military technology could frustrate other agreements concurrently being negotiated, and emphasise the need for control of research, development, and manufacture as well as deployment. A realistic view would necessarily include the arms trade.

Such a view would consider strategy and the military means to support it. The economics of the arms trade is likely to be considered on economic terms rather than from a counter-strategic point of view. In the economic considerations the provision of military aid tends to be a short-term pragmatic matter, and even if some rolling index of military aid requirements was possible the industrial demands might continue to prove decisive.

#### Attitudes to Arms Control.

The different approaches by States to their defence problems at different times ensures that the processes of arms limitation are not dovetailed into an effective whole designed to eliminate war. They are designed rather to make war less likely. A result is thriving global arms industries and a general availability of arms for war (as shown by Iraq and Iran) and civil strife (as in Afghanistan).

The market, internal and external, allows a State to develop or obtain 'smart' weapons to maintain its military capabilities in the face of limitation of other arms. Longer-range and 'smart' weapons of greater accuracy and smaller expenditure per target allowing a wider choice of

target are not designed to render more effective humanitarian measures for the protection of civilians.

One effect of long range weapons and missiles is psychological in both tactical terms and humanitarian practice for

"when...the enemy and their hapless associates are not visible...Detachment may not breed contempt...it can limit our ability to care".<sup>40</sup>

The indiscriminate nature of the weapon is likely to be matched by indiscriminate behaviour when the killing is of victims unseen and it may be that attitudes towards distance killing result from a particular kind of training.

Changes in attitudes by States to measures of arms control are influenced by law only remotely for change is dictated more by the availability of arms and ability to obtain them. As they are developed arms control measures and technological possibilities affect strategic policy first and only thereafter a correlation of law and war. But arms control strategies are products of political attitude and may have a somewhat haphazard effect on strategic planning.

For instance,

"...for the first five years of the Reagan Administration, arms control was treated largely as a myth, and as a set of proposals the USSR would never accept. A combination of the events in Iceland, and the Reagan Administration's growing need for a major political achievement, then suddenly thrust all of these proposals to the fore. The resulting arms control negotiating process has been well managed...it has suddenly altered the entire US defence planning and programming equation in strategic and theatre nuclear forces, and conventional force for Europe, in ways for which the Department of Defense was largely unprepared".<sup>41</sup>

If what was being emphasised was the political nature of US initiative, the different and separate interests of arms control planning (as opposed to military defence, budgetary, and technological arms planning, and the research involved), was highlighted against a failure of consultation domestically.

It has been suggested that the Russian reaction has been affected more by the domestic economic considerations than by the military situation. But if economics forced the situation there was also the,

"succession of arms reduction proposals from Reykjavik onwards all framed and timed with such subtlety as to gain maximum propaganda advantage and give more cause for concern than comfort to the NATO allies".<sup>42</sup>

Influence of peace movements in the initiation of proposals is not apparent, and in the case of the USSR,

"concern about unhealthy trends in youth behaviour, (and)...the growing 'passivity' or apathy among youth" - passivnost - was mistranslated as 'pacifism' in the West".<sup>43</sup>  
Peace movements like political observers of foreign States are often misled by preconceptions. In discussing plans being made during the second World War for the Britain of the post-war years, Correlli Barnett said,

"Yet the wartime promoters of New Jerusalem had pursued their vision in the face of economic realities perfectly well known to them - on the best romantic principle that sense must bend to feeling and facts to faith".<sup>44</sup>

Facts and faith may express the different attitudes of those who believe war can be prevented but not abolished by arms control and humanitarian measures and those who see each measure as a step towards GCD.

Unilateral disarmament is not a solution for lack of reciprocal restraint is destabilizing, although each arms control agreement, even if not in a co-ordinated step by step process, can make for security between the parties. But if nuclear limitation satisfies public attitudes it will effect no financial savings if it is offset by increased conventional forces. Conventional balance at lower levels is necessary for that.

Lawrence Martin had a pessimistic approach in saying that among the practical priorities the strategic nuclear force should come first and should be fostered without unwarranted "expectation of what negotiated arms control can achieve".<sup>45</sup> Henry Kissinger, on the other hand, regarded arms control as linkage such as was pursued by the US prior to the invasion of Afghanistan and the civil disturbances of Poland. He said,

"It has to follow a military build-up and proceed on a broad front. High level meetings were to reflect careful preparation and reward restrained Soviet conduct".<sup>46</sup>

He added, however, that

"with highest level negotiations continuing all these premises are being cast overboard",<sup>47</sup>

and warned that if areas of negotiation, such as arms control, can be insulated by a State their other activities can more easily be pursued. Linkage, therefore, following military build-up, is essential, for arms control is merely an aspect of policy although an essential one.

In practice, the bogeyman may be a concept that 'negotiations' implies some equality between the parties and preparatory arms build-up may be intended to ensure this. But, so far, arms control negotiations have been a bargaining process aimed at limitation on a reciprocal basis. The elimination of a weapon system by both sides is another matter. The bargaining process embraced linkage not limited to direct arms control measures for national economics also played their part. President Nixon pointed out that when he was in office in the 1970s the Soviet leaders' eagerness for trade was

"one of our most powerful levers in winning concessions on political issues".

But he warned,

"linkage was only as strong as the Soviet leaders' desire for whatever it was that was being linked to their behaviour. It was only as strong as the West's own toughness and skill in bargaining".<sup>48</sup>

Such toughness has to be reflected in Alliance solidarity and, ultimately, in the military balance.

Whatever subjects are linked with arms control negotiations, a disarmed world is not yet envisaged for it is recognized that progress towards it must inevitably be on a step by step basis. This is dictated by the realities of the situations affecting international relations, arms races following technological 'advance', and is altogether separate from schools of thought within societies which argue as to intention and enforcement.<sup>49</sup> But disarmament and arms control have been regarded by some as being less effective than nuclear arsenals in keeping peace in Europe, always excepting the military incursions which have enforced Soviet domination in Eastern Europe.<sup>50</sup>

Peace in Europe is one matter, but in other parts of the world a ready supply of arms from European industrial States, the US, and the USSR has often provided the means of conflict. Now,

"It is incumbent on all governments who engage in arms expenditure - not just the major military powers - to examine the possibilities of arrangements that would result in reduced acquisition of arms, so allowing a greater proportion of their resources to be devoted to their own socio-economic development".<sup>51</sup>

But this admirable statement does not include the other necessary injunction, namely, that transfers of arms from the industrial States forms substantial economic substance for manufacturer and exchequer. Cutting off the sources is the most effective form of arms control in these circumstances.

#### Limitations on the Use of Weapons.

Public concern has been expressed in many countries regarding the indiscriminate and unnecessarily injurious nature of certain weapons. Popular movements have been initiated in some States to demand the control or elimination of nuclear weapons. This concern has been focussed mainly on 'new' weapons and there has been a failure to recognize that 'older' weapons have identical characteristics of indiscrimination and savagery. Indeed, most weapons have potentialities which bring them within a broad definition as indiscriminate for most can be used in an indiscriminate manner by bad aiming, bad timing, by deliberation or accident, irrespective of the quality and nature of their firepower and wounds they inflict.

In the public debate it is nuclear, biological, chemical and bacteriological weapons which are the subjects, but informed debate also about mines, booby traps and weapons the primary effect of which is to injure by fragments undetectable in the human body by X-rays, have led to conventional limitation measures.<sup>52</sup>

Some weapons platforms which have encouraged indiscrimination in the past, especially against civilian targets, have also been discussed. They include aircraft, naval bombardment vessels and submarines. Now



platforms in space must be included as well as the seabed, ocean floor and subsoil, the moon and other bodies in space, and Antarctica. Some of these are locations from which it has been agreed certain, or all, weapons should be barred permanently.<sup>53</sup>

Moral and practical reservations about certain weapons are not new, and if the use of some weapons is politically controlled it is primarily a measure of doubt about the moral, not the practical, qualities of the weapon although in the case of the nuclear weapon the doubt extends to the practical and the potential.

President Truman refused to use nuclear weapons in Korea in 1950 - 1953. In 1953 President Eisenhower,

"had told the United States Chiefs of Staff that they could plan to use nuclear armaments of all shapes and sizes in the future, wherever this would work to the advantage of the United States".<sup>54</sup>

In 1954, however, he refused to use nuclear weapons in support of the French at Dien Bien Phu. Nuclear weapons were not used in the British-French operations against Egypt in 1956.

No doubt the military plans of the nuclear powers include the identification of nuclear targets but considering that the US again refrained from using nuclear weapons in Vietnam (as did the British in the Falkland Islands conflict) the utility of nuclear force in use (and the possible advantage to the user) is being questioned. Thus, it is a paradox of arms control theory that nuclear deterrence is seen as something other than the threat of - and readiness to use - nuclear weapons: that by some emotional transference the most indiscriminate of weapons has become a symbol of peace in Europe. This somewhat Jesuitical situation may ensure the survival, and renewal from time to time, of the weapon even if its utility for actual armed combat there ceases to be seriously considered if or when conventional balance in Europe is secured.

War prevention or postponement has always been an objective of military deterrence, but if nuclear deterrence is to be regarded as a

proved preventative of war between nuclear States<sup>55</sup> a situation will emerge that unless nuclear weapons can be eliminated by agreement nuclear deterrence may prove an acceptable alternative to disarmament. The fact that there has been no serious war between China and Russia since China became a nuclear power, or between China and India since India acquired nuclear capability may not only support such a view, but also endorse political control of nuclear weapons. Too much emphasis on nuclear deterrence as what prevents war, however, obscures other reasons for states being at peace.

It is more relevant that domestic and international political concerns are affected by attitudes to legality as well as to desirability. But if the utility in use is problematic for whatever reasons, what is the utility of nuclear weapons in deterrence policy? The real argument for nuclear deterrence is that it prevents war (whether nuclear or conventional) between nuclear States, whereas deterrent measures limited to conventional forces do not prevent conventional war between either conventionally armed states or between a nuclear and a non-nuclear State. China, Britain, the US, the USSR and India have fought conventional wars since becoming nuclear States, and the many acts of aggression by other States have not been deterred by fears of hostile conventional weapons.

It is sometimes pointed out how close the US and the USSR came to nuclear war over Cuba in 1962, but the point is that there was no war: nor was war likely. The nuclear threat (as opposed to nuclear blackmail) was always sufficient to ensure the withdrawal of the weapons which were, or were to have been, installed in Cuba. The question was whether the threat would be made. Further, only vital interests of the US were involved, and there was no vital interest basis for war on the part of the USSR.

It seems likely that nuclear States may be reluctant to authorize initiation of nuclear exchanges by the tactical use of theatre nuclear

weapons despite the doctrine of flexible response. Fear of escalation, as well as the knowledge of inevitable effects of nuclear war, will inhibit politicians whatever the military recommendation. In this there is recognition that,

"The lessons of experience about the emotional experiences of men at war are much less comforting than the theory - the tactical theory which has led to the development of these (TW) weapons".<sup>56</sup>

But flexible response as deterrent, like limited war, requires the co-operation of the opponent. Korea, Vietnam, Iran/Iraq, the Middle East and Afghanistan, seem to show that limited wars may fail to gain objectives or teach relevant lessons, but it is not clear that it is solely because they are limited and not total.

Air Marshal Slessor wrote in 1954 that,

"...it seems to me that the very fact that the final arbitrament of total war is one to which no one will again resort as an act of policy may very well mean that our enemies will seek increasingly to achieve their aims by a series of limited aggression..."<sup>57</sup>,

but this has not proved to be profitable or to accomplish what aggressors have intended. Perhaps world opinion and the forum available in the UN mitigate against limited success in war being allowed to lead to territorial aggrandizement unless, as in the case of Tibet, a conquered State is abandoned by world opinion.

The greater danger today of the use of nuclear weapons by States that have not as yet acknowledged their nuclear capability if faced with imminent threat to survival cannot be excluded.

#### 'No first use' Declarations.

Public disquiet and moral reservations about certain weapons have encouraged some States to declare that they will not be the first to use nuclear and chemical weapons although the debate does not always develop beyond the 'no first use' morality to question why second or third use should be moral or less immoral.

'No first use' declarations, however, are unilateral and national having no particular international legal quality. They cannot bind successors in government either politically or militarily. The lack of

permanency in the declaration would remain even if a State became 'nuclear free' because the knowledge necessary for production would remain, although time might not permit the knowledge to be transformed into tangible stocks of the weapon. What the declarations really do is to emphasise ambiguities in the roles for which nuclear weapons are cast and the conflicting moralities of their use in war-fighting or as instruments of deterrence.

As unilateral declarations without any international legal content are unlikely to affect the place of war discussion would not be important but for the incompatibility of 'no first use' assertions and a 'flexible response' doctrine which includes escalation by means of nuclear weapons in their war-fighting role. A first principle of warfare, to make the enemy conform to one's own actions is especially important at the opening of hostilities. To this end the defence armouries of States will include a wide range of indiscriminate weapons with which, if necessary, to take and keep the initiative and leave the enemy only a reactive role.

In such situations debate about 'first use' of nuclear and chemical weapons must be viewed from a possibility that the side which opened hostilities would expect the other to commit smaller tactical nuclear weapons - possibly nuclear artillery - or chemical weapons anticipating that there will be pre-planned defensive situations or locations where 'first use' by the enemy was likely, justifying retaliation in kind. This seems to be implicit in the doctrine of 'flexible response'. At the same time the subject of SDI arouses fears and anxieties that it will lead to increasing weapons inventories and to arms races.

Other aspects of US-NATO planning, such as follow-on forces attack air/land battle, and counter-retaliatory strategy with more powerful (possibly more indiscriminate) conventional weapons, do not cause comparable public apprehension. Greater numbers and improved quality of conventional weapons could prove more likely to endanger peace than

nuclear deterrence has so far. This is one reason why added impetus to talks about conventional weapons is currently offering possibilities for further arms control measures at Vienna.

At first sight it is not clear whether declaration of 'no first use' of a weapon is intended as an arms control measure or as a humanitarian proposal, or whether such a declaration is made without regard to the role (defensive or offensive) which circumstances may impose on its use. Even if such declarations, (nuclear, chemical or biological), are credible as regards some situations it must be expected that blanket 'no first use' declarations covering any eventuality are not likely to be. Forceful pre-emption can never be ruled out entirely.

There is an element of doubt about the legality in use of nuclear weapons. In 1961 General Assembly Resolution 1653 (XVI) stated, inter alia, that the use would be a direct violation of the UN Charter. The Resolution was supported by 55, opposed by 20, member States and there were 26 abstentions. It is not clear either whether weapons are illegal in international law only when they have been declared specifically so to be (as in the case of some 'new weapons' if identified as falling under Art 36 of Geneva Protocol I of 1977). That Protocol, however, sidestepped the legality of nuclear weapons as the Reservations of the US and the UK seem to imply.<sup>58</sup>

In referring to nuclear weapons, basic principles and customary law, Best says,

"If by those criteria they were already unlawful before the seventies, they remain so after them. The essence of the argument that they were so rests chiefly on the indiscriminateness apparently inseparable from their employment".<sup>59</sup>

Massive bombardment affecting civilian populations such as were carried out in the second World War are now shown by Geneva Protocol I of 1977 to be illegal. Bombardment by nuclear weapons is different only in degree of indiscrimination for the total outcome of fallout remains unpredictable. The future of the nuclear weapon, perhaps doubt about its legality, and more particularly the effect of reciprocal reaction to a

first strike has led to categorical declarations of 'no first use' policy. But there remains an uncertainty of motivation. Such declarations purport to be political but they stem from strategic and tactical concepts, and, if not entirely rhetorical, may be a battle strategem. As they stand they have no legal validity even though they are in general conformation with the provisions of the UN Charter regarding aggression. But the idea of a 'no first use' doctrine if it supports anti-aggression policies is worth further consideration not least because it cannot be reconciled with the juxtaposition of conventional and nuclear weapons implicit in the NATO 'flexible response' policy. It is the highly indiscriminate nuclear, chemical and bacteriological weapons that raise humanitarian and moral questions of use (as in Resolution 1653), non-use, and first use, which are not always specific as to whether deterrence or battle is referred to. Expression of moral repugnance regarding the use of the weapons is reminiscent of similar discussion during the second World War (and since) about area bombardment.

Basic Rules 2 and 3 of Protocol I<sup>60</sup> might have seemed clear but for the Reservations of the UK and the US, and the NATO policy that so long as the weapons are not specifically abandoned through arms control agreements they remain vital to that policy.<sup>61</sup>

It is doubtful if 'no first-use' declarations have precluded the exhaustive pre-targeting for nuclear weapons as a deterrent action. Pre-targeting by the US is organized under the Single Integrated Operational Plan (SIOP) stemming from what was thought to be Soviet strategic vulnerability to air attack. The concept was described by the then US Air Force Chief of Staff, General Hoyt Vandenberg, in 1951:

"In the event of war, there will be concurrent requirements for the destruction of Soviet atomic delivery capability; direct atomic attack on Soviet ground and tactical air forces; and destruction of the critical components of the enemy's war sustaining resource".<sup>62</sup>

The realization of this policy would be impossible if demanded of second strike, following an enemy all-out nuclear first strike, or if pre-targeting is neglected. In the nature of the nuclear weapon and the likely circumstances destruction of targets must include civilian populations despite the greater accuracy and smaller circular error probable (CEP)<sup>63</sup> now than when SIOP was first envisaged. Pre-emption, however, is of doubtful legality if and until the enemy can be proved to have been immediately determined on aggressive military measures and committed to war. There is a considerable risk in waiting to find out that may over-ride the legal doubts, but the considerations differ as to whether missiles are available for use by one or both parties, (and, in the event, whether nuclear warheads are involved). A mistaken identification of a nuclear instead of a high explosive warhead could affect the honouring of a 'no first-use' declaration.

Such declarations have other weaknesses. Surprise remains a basic military objective but technology has brought additional problems for it. Surprise by high speed manoeuvre is made more difficult by electronic and other surveillance devices and early-warning systems.<sup>64</sup> Perennial problems of time and space have still to be solved for if distance has been annihilated by weapons platforms capable of fast movement, and by air, sea and land launched missiles, time is still an imponderable when related to an enemy's reactions.

Such is the possible efficiency of technological information-gathering that it is unlikely new weapon species, or new generations of older weapons, will take an enemy by surprise, or that the size of forces and size of contents of a State's arsenal will not reasonably be known to other States. But Egypt used Russian ground-to-air and ground-to-ground missiles in 1973 to the surprise of the Israelis; Argentine's Exocet missile armament was not public knowledge; and the Mujaheddin's more sophisticated arms surprised the Russians in Afghanistan. The use of chemical weapons in the Iraq-Iran war by Iraq was surprising in a State adhering to the 1925 Convention.<sup>65</sup>

Technology has made first use of indiscriminate weapons militarily attractive to an aggressor. Delivery of nuclear, high explosive, or chemical bombs or stand-off missiles at high speed over great distances to targets selected by the aggressor before hostilities have begun would outrage custom even if conforming to the principle of surprise. But whereas first use as an opening salvo in a war might be accompanied by attempted justification as a legitimate pre-emptive operation, pre-planned flexible response demanding escalation from conventional to nuclear warfare because of a stated conventional imbalance is another matter. Political decision will differentiate between first use and early use.

Justification for the use of nuclear or chemical weapons would have regard for actual situations but is likely always to presuppose a situation of imminent defeat unless use is agreed. Early use, which will be first use in some situations, need not be postulated only in a 'backs to the wall' scenario. It may be a tactical operation at a given time and location as a basis for counter-operations, pre-planned and pre-targeted.

The dilemma for NATO inherent in 'no first-use policy' is that,

"During the past five years, US strategic policies have tended to shift their emphasis from embracing nuclear deterrence to eliminating nuclear weapons. For the Europeans, the Reykjavik Summit proposals, the double zero agreement on INF weapons, and the population defence rationale for the Strategic Defence Initiative all contributed to the perception that Americans want to make nuclear weapons unusable. But since flexible response rests firmly on retaining the option to use nuclear weapons first if NATO is attacked, this perception has eroded European confidence in America's extended deterrence".<sup>66</sup>

There is also the obvious point that what is possible for NATO is also possible for the Warsaw Pact. A decision to put into operation a flexible response strategy, with its implications of escalation at a given point, may well be accepted by the USSR as according with the concept of 'nuclear sword and conventional shield' on their side.<sup>67</sup>

The matter may be complicated further by the idea of an agreement between the US and the USSR of 'no first-use' of nuclear weapons. This



idea has been variously advanced, by Edgar Boekar for example. He debated several factors which he thought might lead to,

"the adoption in Europe of a policy of no-first-use of nuclear weapons, perhaps codified in an agreement with the Soviet Union. This could result in reduction in the number of Soviet missiles targetted on Western Europe, and on the NATO side, it could eliminate costly first-use and nuclear warfighting options. It would also be acceptable to both super-powers since it would prevent the possibility of Western Europe developing as a major nuclear power in its own right ... the mere existence of a limited nuclear force at sea<sup>68</sup> would constitute a significant deterrent against first use".

Such a policy would constitute a measure of arms control for instead of unilateral declarations<sup>69</sup>, some in guarded terms, opposed States could develop a treaty agreeing on the policy. Verification would be impossible for the situation of use or non use fructifies only when hostilities commence, or as a conflict develops, when the treaty is either observed or disregarded. It would mean that short of denying itself the means with which to make a 'first use' policy - nuclear or chemical - a State's unilateral 'no first use' declaration is liable to be overtaken by circumstances. Formalizing an inter-State agreement would be a step forward, for it would underline the basic weakness of the double standards involved.

The inclusion of certain weapons in a State's arsenal is sometimes held to be morally justified as being solely for deterrent purposes. But such weapons are available for any purpose and the moral justification is flawed by a 'no first use' declaration for that indicates intention to use under certain circumstances. In any case the declarations are limited if applicable to non-nuclear states.

The conditional intention was explained by the then Secretary-General of NATO in 1984:

"There is indeed no alternative to "Flexible Response", and to opponents of that he could say, "He who propagates a purely conventional deterrent in full knowledge of the depressing lessons of history, accepts a very heavy responsibility".<sup>70</sup>

But the dichotomy between 'flexible response' and 'no first use' (as opposed to commencing a war without immediate nuclear use) is patent, but

that raises questions as to the effect in use compared to deterrence. Credible deterrence demands perceived will and intention to use: lack of will destroys credibility. There is a dangerous instability between 'having' and 'using' in the context for ultimately the decision to use might be out of the hands of the lawful authority.

Seeking to relate 'no first use' to a purely defensive role may be only an exercise of moral philosophy. 'No first use' as meaning not initiating a war by the use of nuclear weapons is only one aspect for,

"We can in a defensive war fight offensively: the defensive form in war is ~~no~~ mere shield but a shield formed of blows delivered with skill".<sup>71</sup>

In any case effect on morale of having 'not for use weapons' has to be considered.

There are other factors. Nuclear weapons will be subject to political control at a distance from the battle. It is one thing to contemplate decision-making difficulties for Heads of Government in ordering strategic nuclear warfare. It is another to decide whether a commander is to have authority to use TNW when he considers it vital or whether he must, in any circumstances, wait for political permission. Again, it may be more difficult to despatch manned nuclear sorties than to unleash missiles and remotely piloted vehicles (RPV), and there is always likely to be greater hesitation in sending manned aircraft.

The NATO concept of battlefield extension calls for early disruption and delay of enemy follow-on echelons. This is a time and space problem which logically may entail 'first use' (including nuclear mine-laying). It may not be politically possible in practice, but striking at targets at their most vulnerable, which may be at concentration or approach march (if such manoeuvres are still applicable), without waiting for actual invasion, may be sound military tactics in the circumstances. As these will be military targets often located within civilian environments, any such action is liable to foreclose on last minute negotiations between the parties.

Political necessity may make it impossible to disrupt a first attack before actual invasion and, if so, military necessity will demand deep battlefield extension if it remains an option. Reaction rather than pre-emption puts defence at a disadvantage although within the spirit of Art 51 of the Charter (which in any case envisages collective response). This is why a 'no first use' concept might not be a political or moral concept, but is likely to be a battlefield strategem to be regulated only by the military circumstances. Abolition or elimination of the concept will entail abolition of the weapon. Thus, the clear implication is that if nuclear deterrence is to be regarded as an intermediate stage between arms control and disarmament 'no first use' declarations must be avoided or be regarded as incredible, for the illegality of the weapon and its illegal potential indiscrimination make moral virtues in deterrence less likely than the virtues of guarding against the practical realities.

#### Technology and the Place of War.

Public opinion in matters of high technology may be influenced more by emotion than knowledge and that may be a reason why the actions of governments are sometimes shrouded in secrecy and public opinion is not consulted in decision-making. Not only is the place of war so decided but the developing means and capabilities involved may also be unattended by public discussion. The result is likely to be that public fears regarding the 'defence' situation may be disregarded as arising from ignorance of real facts and likely consequences or may be considered trivial or frivolous.

The history of nuclear energy, and especially of nuclear weapon development is an example, but it is not only in the field of arms technology that developing trends are to be feared, or the propensities of the scientist/politician complex to be questioned. Developing experimentation in human as well as plant and animal genetics has led to the view that,

"the entire creative process in higher forms of life including human life, is going to be re-directed or controlled to satisfy purely human ends".<sup>72</sup>

That military/political ends can be excluded is not certain, but if the process has been entirely uninhibited by international law domestic regulation is beginning to be effected in some States: international consensus may slowly follow. If, however, it is to be a question of which would be worse, the elimination of the human species through the effects of nuclear war; the changing mutations which radio-activity carelessly or accidentally disseminated might induce; what will follow the ultimate greenhouse effect of uncontrolled manmade atmospheric pollution; or what could be evolved as a result of human bio-technology and changed genetic characteristics in human beings, some people might choose war.

In an environment occasioned by technological uncertainties the problems of stockpiling and storage of radio-active waste material (including nuclear submarines) may seem petty. But it was typical that the politico-technocrats did not allow for the capital and continuing costs involved which the problem now presents, for in the early euphoria such costs were as overlooked as a problem involved when financing nuclear energy or the arms race which it generated.

Not everyone agrees that scientists were most at fault in the decisions to develop nuclear weapons systems and the resulting nuclear and missile arms races. For example,

"The civilian nuclear strategists...played a considerable and sometimes totally irresponsibel part in fuelling the arms race. They always knew more than their attentive audience - the politicians - and they always knew much more than the average citizen who had little access to the nuclear information being fed by the Pentagon into their 'consulting' firms. They were in a position to manipulate the politicians and the public...".<sup>73</sup>

Nor need it be supposed that the situation was very different in other nuclear weapon developing States especially in the period before the Non-Proliferation Treaty introduced some international elements of control.

Three components as follows inform the technological debate, and they, like the place of war, involve not merely science and defence but many government departments:

- 1 Provision of the scenarios and thereby the requirements in outline.
- 2 Development of the technology to meet the outline requirements.
- 3 Allocation of the necessary resources of men, money and materials.

This is not all: the deployed material has to be maintained, and a continuous process of improvement and 'modernisation' involves the scientist in counter-balancing progress made by other States and in keeping ahead of potential enemies. Reduction of cost per item leading to increased quantity is also an important factor which has been successful in the miniaturization important to missile technology. All this gave rise to a paradox.

Implicit in differing attitudes towards natural sciences and the economic aspects of 'social sciences' and fundamental to the opposed ideologies with which the post-war world has been inflicted and which has been a major factor in the arms race is a question. If value-neutral attitudes are taken towards scientific progress, and if there is a free choice in technology whether to pursue 'peaceful' or 'warlike' usage for such discoveries and developments, why do those who advocate a market economy as fundamental to economic science often also advocate State control as an essential in the field of economics and finance, and a socially-directed existence? If this were only a matter of budgetary priorities, and a fear that defence expenditures would overwhelm welfare and social expenditures, that fear could be obviated without great economic direction. Rather it is to be feared that much of the motivation arises from a paternalistic attitude toward 'how we should live'. On this, Kant warned that the paternalistic State is the greatest despotism imaginable.

In the long run, however, it seems to be assumed that Utopia is possible and the only question seems to be: to whose Utopia should we be directed? If a collective answer was possible it should settle the questions of 'how' and 'why' which the three components above pose. 'How and why' are vital: dissatisfaction with existing international systems and relationships, and fear of the possible results which may eventuate from an increasingly technologically directed future are not enough to effect change. This may be universally recognized: but eliminating causes of dissatisfaction in the control of systems affecting peace and war such as arms races, arms transfers and diversion of resources to armaments, is difficult. The difficulty is not lessened by the mixture of individual sovereignties and an as yet only partially accepted international control with which the international community struggles, and which the super-powers tend to by-pass in favour of bi-lateral discussion regarding mutual arms control.

Bi-lateral measures of arms control, or even global measures short of GCD, are unlikely to change the place of war permanently for a State, but such agreements are the most important measures currently being taken towards peace even if largely concentrating on the European situation. But there is a major - and planned - weakness. When a weapon in its present form is controlled by an agreement it may re-appear in another and uncontrolled but improved form as a result of technology available at the time to only one party.

#### The Gap between Arms Control and Disarmament.

Before leaving the subject of arms control to consider disarmament an intermediate position affecting the place of war may be noted.

If the abolition or elimination of war is possible a wide conceptual gap is evident as to the means by which it may be accomplished. Is it likely that piecemeal arms control measures can result in abolishing war (no matter what effect they may have on

individual cases), or is GCD possible at all in the present situation?

Attempts to provide a practical answer have not yet closed the conceptual gap beyond movement in favour of GCD which surfaced in the Non-Proliferation Treaty. The difficulties do not all arise out of strategic and foreign policies, or even economic factors, but because the system of international law seems more favourable (or easier to exploit) in the negotiation of bi-lateral than universal treaties. Arms control measures may take either form but GCD demands universal agreement. The difference and some of the effects arising from it may be seen in comparing the Geneva Protocol of 1925 on chemical weapons with the INF Treaty of 1987 on nuclear weapons between the US and the USSR.<sup>74</sup>

The Protocol prohibited the use of the chemical weapon but the Treaty provided not only for the elimination of a type of nuclear weapons but also for the destruction of the stocks and the weapons deployed. Both instruments were limited in application: the Treaty being bi-lateral directly affected only the two parties whereas the Protocol being universal affected only those who adhered to it. In effect, therefore, other nuclear States (acknowledged, unacknowledged and potential) remain free to deploy the specified nuclear weapons (but subject to the Non-Proliferation Treaty if they were subscribers to it). Those States not adhering to the Protocol remained free to use chemical weapons and there was no ban at all on manufacture and stockpiling.

It is true that chemical weapons are the subject of current arms control negotiations, but the point here is that despite its undoubted moral influence, the system of international legal restrictions on arms is limited to a voluntary acceptance of them, and of the detailed terms which will apply. It is in these circumstances that some unilateral and unenforceable decisions on the use of weapons have been made, and theories of deterrence have been evolved especially to avoid the use of nuclear weapons. Proposals for limiting conventional weapons at

the same time as nuclear deterrence continues to attract support and whilst the incidence of nuclear proliferation is increasing (in intent if not yet in practice), it might seem that a third concept is to be interposed between the concepts of arms control and disarmament. But it is by no means clear that the threat of nuclear weapons could resolve the conceptual incompatibility between arms control and disarmament which represents the probability of the continuance of war as an instrument in any circumstances. Law alone cannot resolve the incompatibility for its enforcement might entail armed conflict bringing into question the means of enforcement in a multi-national or multi-regional society.

Further, the proliferation of nuclear States will always raise a spectre of nuclear blackmail and the use of sophisticated weapons against elementary weapons has never been inhibited by ideas of Queensberry Rules in warfare. In any case the nuclear weapon is an inflexible weapon in use and requires a flexible security system in deployment and stock-holding.

Declaration of 'no first use' or of limited conditions and circumstances under which the nuclear (or for that matter, any) weapon would be used is also an interpolation between arms control and disarmament but may have little meaning in practice. Yet if a coherent policy of war is possible and it is seen as either (a) essential in national interests without an alternative, or (b) a means not to some other end, but as an end in itself - a kind of 'superman' thesis - it may discourage steps toward disarmament even if it does not foreclose arms control measures, neutrality, or perhaps the renunciation of offensive war.

Coherent or not the position accorded to war in the reality of the present system of international relations prompts the question,

"Can and should international theory be focused upon the abjuration of the right to go to war at all...or should it rather be aimed at the elimination of certain evidently intolerable ends, styles, and methods of warfare".<sup>75</sup>



The question needs refinement for there seems no technical reason today for assuming that the elimination of some weapons or methods, even if possible, would lead some States to adjure total war as a modern heresy. It is weapon supply which allows States to contemplate war: how they are used in battle will not be circumscribed except by events. In any case the example of neutral States is not helpful for abjuration of war does not necessarily imply disarmament, and the defence budgets of neutral States are considerable.

It is to be anticipated that the current focus - elimination or limitation of certain weapons rather than abjuration of war is likely to continue. This course is dictated because any form of renunciation accompanied by disarmament is possible only if accompanied by a whole-hearted belief in a collective security system. Cap VII of the UN Charter has yet to promote such a belief and the lack of real impetus towards implementation as regards collective security is too obvious to need emphasis.

In the result exercises stated to be of collective security as in Grenada, Afghanistan, Sri Lanka, Chad, and the Maldives, only leave the inviting States to wonder when their invitees and their influence will leave whatever they may have accomplished for the benefit of their hosts.

In the balance of abjuration or control too much should not now be made of the Kellogg-Briand Pact and its history,<sup>76</sup> or of the failures of post-1945 proposals by both sides during the period of the Cold War including the joint 1961 US-USSR proposals<sup>77</sup>. Since then, some agreement as to the desired ends has emerged in Art VI of the NPT but only disappointment prevails as to the means to be adopted.

There are two principal differences to be overcome as to means:

- (i) Whether the implementation of GCD is possible in the present system of international relations, or
- (ii) If it is possible, how it can be carried out and peacekeeping be assured.

As to (i), a control system and plan under which GCD could be effected is clearly unlikely as long as the Security Council is unable to function to the extent of its Charter powers and so long as member-States will not implement Art VI of the NPT.

As to (ii), if an international institution to effect (i) did become universally possible the verification procedures included in the INF Treaty might solve the earlier problem of an acceptable method. There may be a wide gulf, however, between specific 'on site' site inspection and a general disarmament commission's necessary freedom.

US Attorney-General Jackson pointed out in 1941 (when post-war reconstruction could be treated somewhat idealistically in North America),

"The principle that war is an instrument of national policy is outlawed must be the starting point in any plan of international reconstruction".<sup>78</sup>

In the event this did not take the argument into practical channels and the UN draftsmen left the door ajar by Art 51 of the Charter. Perhaps they might have agreed with Roling's view that,

"Jurists have always been aware of the inadequacy of positive law to achieve the aims it has set itself"<sup>79</sup>,

for the inclusion of Cap VII in the Charter was intended to provide the sanction: the draftsmen cannot be blamed for the politicians' inclusion of Art 27.

Disarmament might be easier to envisage if there was a basic agreement with Geneva that war is

"a parasitic activity because it makes use of materials, results, techniques, and knowledge of any other activity in order to accomplish its purpose without making any rational contribution to the realisation of any other practically possible ends".<sup>80</sup>

But the statement might be thought untrue if only the example of Russian retention of conquered territory and Yalta agreements are considered.

Such anomalies made laying a foundation for disarmament more difficult than a victorious alliance might have been entitled to expect.

Situations have to be taken as they are and with two opposed super powers

unable to agree on any system of disarmament proposed by the other (or even jointly) little progress was possible. Indeed, instead of disarmament massive re-armament has been universal in spite of efforts which have been made to secure some international consensus on measures of arms control rather than on the more contentious concept of universal GCD.

### Theories of Disarmament.

Four main concepts of disarmament have been suggested:

- (1) The reduction or penal destruction of the armament of a State defeated in war. Germany by the Treaty of Versailles and Italy by necessary implication of para 11 of the Terms of Armistice (3 February 1945) and the subsequent Instrument of Surrender, are examples.<sup>81</sup>
- (2) Unilateral disarmament arrangements relating to specific geographical areas: the Rush-Bagot Agreement (1817) between Canada and the US is an example.
- (3) The complete abolition of all armaments - the 'Utopia' theory.
- (4) The reduction and limitation of national armaments by international and general agreement.

(1) and (2) need not be discussed here.

(3) is multilateral and formal and generally referred to as General and Complete Disarmament. It has many defects among which are the unnatural separation of arms from the political causes of war and the lawyer's nightmare of defining 'arms'. It has been supported in Britain as elsewhere in the formulation of Art VI of the NPT<sup>82</sup>, and its virtues are self evident.

(4) describes the processes of arms control which are currently undertaken through the 40-Nation Disarmament Committee of the UN.

In present conditions GCD would entail a complete change in the international system and that cannot be foreseen. What more aptly describes disarmament today is Tate's term 'illusion'<sup>83</sup>. This is reminiscent of Moltke's report to the Reichstag; for GCD would require an effective judiciary:

"A tribunal of international law, if it should exist, would still be without executory power and its judgments would finally be submitted to decision on the battlefield. Small states can rely on neutrality and international guarantees: a large state exists only by itself and its own strength".<sup>84</sup>

Small states and neutrality are one matter, but a stockpile of nuclear weapons held centrally might be another.

Arms control and disarmament are rarely dealt with as one co-ordinated process<sup>85</sup>. In practice the two are separate concepts<sup>86</sup>, so that in discussing arms control reference to disarmament is, perhaps, inevitable for disarmament ought to be a logical progression from individual measures to universal abolition rather than a cataclysmic awakening. Such progress is not possible yet and GCD is not really a serious topic in current arms control negotiations. Some arguments for arms control, however, are arguments directly in favour of disarmament in some contexts. In consequence repetitive discussion is sometimes unavoidable as between one concept and the other. What seems incontrovertible is that arms control practice is founded on pragmatism not logic, whilst GCD theory is based on a specific application of logic even if not yet generally accepted. Arms control measures as presently envisaged will not lead to GCD by any logical process as the British position shows:

"The Government support balanced and verifiable arms control agreements, which are consistent with maintaining our security. We must beware of proposals for wholesale disarmament, which see the reduction of weapons as an end in itself. That is not the end. The end is greater security, and that is an important distinction".<sup>86</sup>

It may be important to observe that the reference to disarmament was not to GCD the object of which is complete security so far as that is attainable.

Limitation by numbers or deployment is included in both concepts. In one sense Michael Howard's description of arms control, as follows, is a prescription for disarmament for the lowest feasible level of armaments is GCD:

"Only the very naive would assume that the reduction of armaments is in itself a good thing; that the lower level of armaments the nearer one automatically comes to 'peace'. The object of arms control agreements is to ensure international stability at the lowest feasible levels of armaments, and reductions which do not maintain or enhance such stability do more harm than good, however much money they may save".<sup>87</sup>

Serious disarmers do not think that military stability is an end, or that the elimination of war will come about without political consensus which is the real objective. The point of departure for disarmers in Howard's description is 'the lowest feasible levels', for that limits the definition in three ways. First, to a calculation as to the levels, or perhaps to a succession of levels but short of GCD. Second, that peace is only determinable by military stability. Third, the definition seems to indicate a universal agreement affecting all States. Bi-lateral agreements (between two States or alliances), which are what is often being considered in such circumstances, take no account of the effect on the stability of third party States<sup>88</sup>. In any case, a general table of levels is unlikely, for each State requires a different and changing level of armaments to ensure its security at any time. Any kind of universal comparative scale would appear to be doomed to failure as were the Treaty of London of 1936 and its predecessor the Treaty of Washington of 1922/23, both of which foundered on comparative calculations. Disarmament on the other hand would be a universal prescription.

It has been weakness of practical arms limitation that it has been regional or geographical (eg, between the US and the USSR) with some exceptions discussed at the UN and its Committees. Levels of armaments in the Middle and Far East, and the Pacific Ocean States, have had less attention. China especially has not featured in nuclear or conventional weapons agreements.

That GCD will grow, if at all, from progressive but disconnected arms control agreements between individual, or groups of, States following the present pattern is doubtful. Even if the expressed hopes of President Reagan and Mr Gorbachov for the abolition of nuclear weapons come to some concrete and universal reality, and Conventional Stability Talks effect reductions and balance in Europe, capability for war will remain. Second World war conventional weapons were not without indiscrimination: they have been 'improved' since 1945. If

nuclear war implies holocaust, total conventional war will not be observably different for millions of victims.

General and Complete Disarmament: Concept and Development.

The Non-Proliferation Treaty which stemmed from a US-USSR draft to the Geneva Disarmament Conference includes the obligation that,

"Each of the Parties...undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control". (ArtVII)<sup>89</sup>

The Treaty was signed in July 1968 and just how much Art VII was merely a continuing quid pro quo offered to non-nuclear States to ratify the Treaty is problematic. As Frank Barnaby put it,

"perhaps the greatest weakness of the Treaty is the imbalance between the obligations of, and benefits for, the non-nuclear weapon parties - the "have nots" - and those of, and for, the nuclear-weapon parties - the "haves". Moreover, the nuclear-weapon parties have failed to fulfil the few obligations under the Treaty which they do have".<sup>90</sup>

The INF Treaty has been concluded since that statement was made, but it generally remains correct as regards disarmament for GCD is not universally regarded as practicable or even desirable today. Hedley Bull, for example, saw the sovereign States, even without a common government, as a society; albeit

"an imperfect one: its justice is crude and uncertain, as each state is judge in its own cause; and gives rise to recurrent tragedy in the form of war; but it produces order, regularity, predictability and long periods of peace, without involving the tyranny of a universal state".<sup>91</sup>

He pointed out that more thought had gone into preserving this society than abolishing it, and one of its institutions has been national armaments of which he said,

"if armaments are an integral part of the whole system of international relations, and stand or fall with it, there are serious objections to the notions both of the possibility and the desirability of disarmament".<sup>92</sup>

His objections really stem from his belief that world government, even if possible at all either by consensus or conquest, would result in a universal tyranny. At the same time, he has no belief in the probability

of a change in the nature of the disposition of the State to forego altogether aggression and expansion. If collective security is impossible without a change in the nature and system of international relations, therefore, States must continue to attend to their own security<sup>93</sup>. Both these pessimistic, if realistic, views seem to be reflected in the lack of progress to which Barnaby referred.

It is not necessary here to labour the point that the two schools of thought - controllers and disarmers - exist, and that States, in their views of the future, are unlikely to adopt one by dismissing the other. If one school reads lessons from history whilst the other is concerned with a normative view, both may subscribe in some degree to the notion that, still today,

"Peace is artificial: war is natural"<sup>94</sup>, and "the power to destroy cannot be literally obliterated as long as human beings and their productive capacity exist"<sup>95</sup>.

Even if there are now few Hegelians who would suggest that the interdependence of States "reduces disputes between them to terms of mutual violence", or that "war is not only a practical necessity, it is also a theoretical necessity, an exigency of logic", Kolnai, who stood for "rational and civilised views of government", agreed that although "war in itself is an evil", it might become "under certain circumstances a necessary evil"<sup>96</sup>. This merely leads to the view that the truth of Philip Noel Baker's,

"comprehensive disarmament would produce a world in which states do not have a predatory nature"<sup>97</sup>,

has yet to be tested in practice. But if "peace is rationally the goal to which societies tend", as argued by Aron,<sup>98</sup> and if "survival is the primary goal of all states", it may follow that,

"in the most adverse situation force is ultimately necessary to guarantee survival, hence military force is always a component of national strategy"<sup>99</sup>.

Where the argument seems to lead is that whilst all States appear to agree that war is undesirable, all will continue to reserve the right to engage in it. That is, when it is not possible to justify war in

terms of 'Just War' theory, the reality of a situation, however arrived at in the system of international relations as it is, may demand the use of force. An 'inherent right' to that is recognized by Art 51 of the UN Charter. The real question is,

"whether international society can survive if states continue to pursue autarchic policies of security and defence".<sup>100</sup>

The question will remain until it is resolved whether,

"armaments cause wars or are (they) the product of international tensions arising from other causes".<sup>101</sup>

For the disarmers it seem clear that,

"Rapid advance in military technology, the continued deployment of new weapon systems, and the worldwide dissemination of the most modern weapons brought about by governmental arms traders, are having the most serious consequences for world security".<sup>102</sup>

They may feel that perhaps Madriaga was correct in his assessment that,

"The problem of disarmament is not the problem of disarmament. It really is the problem of the organization of the world community".<sup>103</sup>

#### Availability of Arms in the Causes of War.

It is unrealistic to divorce sources of supply from possession of armaments in a question of the causes of war. Such sources fuel tensions just as they may be thought to underpin the activation of a will to fight, especially where the arms trade is political and not solely commercial. Iraq, of course, was aware of Iran's military build-up during the years of Mohd Raza's reign, but judged that the political situation favoured Iraq in a short and limited war. But the war was not quick, and its duration and outcome then depended on sources of supply of arms. What does seem possible is that the long-standing tensions gave rise to demand for armaments, and the resort to arms was less an appreciation of the arms situation than an effort to harness the circumstances obtaining in Iran: arms versus disruption, as it were.

As an example, therefore, the Iraq-Iran war does not provide an answer to Buchan's question\*\*. What does seem likely is that the conflicting hypotheses for and against disarmament seem to indicate some

\*\* (see fn 100)



general agreement on some of the terms, not least on the proposition that,

"force is an ineluctable element in international relations, not because of any inherent tendency on the part of men to use it, but because the possibility of its use exists". "It thus has to be deterred and controlled...and if all else fails, used with discretion and restraint".<sup>104</sup>

That seems to suggest that if people are in principle 'against war', they none the less expect to see it continue as an instrument in international relations because the alternative seen is unattainable. At the same time they may feel that the possibility of the initiation of war rests on availability of weapons with which to fight it, even if that consisted only of an exchange of missiles discharged from great distances with no face to face combat.

If the situation is that,

"...in today's world, policies and strategies are usually developed after new weapon systems have been acquired", for "in very few cases have weapons been developed to fulfil a national military requirement or even as an answer to a perceived threat to national security",<sup>105</sup>

belief in the availability hypothesis may be well grounded. This view of consequential development of policies and strategy has been supported in all regional theatres of operations when sophisticated missile systems have been introduced into belligerents' arsenals, whether in Vietnam or in the Middle East conflicts.

The need for arms control measures follows such a hypothesis, as is well known to supplying States, for as regards their own national interests if not that of their customers they take note of the injunction that,

"What we need to ensure now is that our arms control strategy is in line with our security and defence requirements...the aim of arms control is to enhance, or at least maintain, our security at lower levels of armaments".<sup>106</sup>

In relation to this equation of security requirements, arms control and limitation, the objective of GCD is unrealistic at the moment, as is the attainment of perfect defence whether through SDI or a new system of

international relations. The situation is bedevilled by the momentum of technological weapon development which continues to energize a cycle of arms improvement - strategic policy catching up - arms control - arms development. The cycle will continue in the absence of effective arms development control. In reality this leaves little room for hypotheses short of planned progress toward the realisation of the presumed intentions of Art VI of the Non-Proliferation Treaty.

Accepting that war is not primarily the fact of arms and armies, and whatever view of control or disarmament is favoured, war remains a political instrument and cannot abolish itself except, perhaps, by the obliteration which all-out nuclear war would effect. In any case, human agency remains an essential and it must continue to be asked whether the use of force can be eliminated, or if not, how it can be controlled if the UN as currently organized and operated is not an effective answer.

Political Initiative.

Irrespective of differences of views on means to be adopted, it is generally realised that arms control and disarmament on one hand, and defence on the other, are inter-related with both having the aim of promoting and enhancing national and, thus, international security. Both, however, demand universal and not merely unilateral agreements for implicit in the danger of war is the danger of involving other States as happened in 1914/1919.

That there is recognition of the inseparability of arms control and defence policies is progress, and the recognition that they are "integral parts of foreign policy" is vital.<sup>107</sup> This recognition is obvious from the establishment of governmental bodies such as the British Arms Control and Disarmament Research Unit of the Foreign and Commonwealth Office, and the US Arms Control and Disarmament Agency. A negative restraint on at least the export of technology is hoped for in the NATO States and Japan, and this has the blessing of the governments concerned.<sup>108</sup>

Restrictions through direct trade channels might retard development of weapons giving the West some temporary advantage within a limited time scale. But restraint is increasingly being questioned as a result of the Gorbachov approaches. Attitudes may not so quickly change. The Tsar's Rescript regarding the Hague Conference of 1896 was for discussion on 'maintenance of general peace and possible reductions of excessive armaments which weighed upon all nations'. Two schools of thought emerged, but

"even within the Russian government, suspicion existed regarding the desirability of arms limitation discussion".<sup>109</sup>

The attitude persists with argument as to desirability against feasibility: could there be general peace without reduction of excessive armaments - and what constitutes excessive?

The Special Session of the UN Conference on Disarmament of 1978 adopted by consensus,

"the most comprehensive statement on disarmament ever accepted by the world community"<sup>110</sup>,

but later sessions were less unanimous.

The 40-Nation Conference on Disarmament meets at Geneva for six months each year. Amongst other subjects it has been pursuing an agreement on chemical weapons since 1982.

States enter negotiations with reservations and this is true of those of the Special Session kind, which, for technical reasons, cannot result in effective action. States with no direct - or likely interest in a subject approach the subject from different angles than those directly interested. Nuclear states differ from non-nuclear States as regards the Treaty on Outer Space of 1967 as well as the Non-Proliferation Treaty of 1968. Yet there is some possible argument for nuclear weapons in space in that the technology might hinder or prevent the outbreak of war. Whilst the argument would lapse with abolition of nuclear weapons, the Russian desire for technology has the argument in mind in viewing the US plans for SDI.

The SDI question is only one aspect of an urge for technological advance, and States generally now recognize the part to be played in future prosperity by technology.<sup>111</sup> Nevertheless in foreseeing SDI Bull warned that,

"...if the deterrent situation is brought to an end by a technological breakthrough, for example the invention of an effective defence..." the function of nuclear armaments at the present time of limiting the incidence of war..."may cease to be so even for nuclear armaments; the deliberate choice of nuclear war will become a rational alternative for the superior nuclear power...".<sup>112</sup>

On balance it is probable that Churchill was more perspicacious,

"It is to the universality of potential destruction that we may look with hope and even confidence".<sup>113</sup>

That was said in favour of nuclear deterrence, and so long as it proves successful arms control will be limited to numbers of warheads and missiles, or even of individual classes: disarmament will remain only a possibility for the future.

In the drive for limiting numbers whilst maintaining a deterrent capability, it must be remembered that if arms races are de-stablizing so too would be 'disarmament races', especially if the underlying individual foundation of capability is weakened at a disproportionate rate. But not all limitation is planned limitation. Some is,

"What might be called passive disarmament, which is what Defence Ministers are finding it increasingly difficult to avoid under pressure on the the one hand from Finance Ministers and Cabinet colleagues and Star Chambers and on the other, from a seemingly inexorable rise in the real costs of defence equipment".<sup>114</sup>

It may be too early to believe that disarmament is more likely to come about because of shrinking defence budgets than because of moral urging to limit or eliminate war. The concept of armaments at a lower level is as descriptive of cost factors as of numbers. It does not change the position of war for when a decision is taken to start a conflict forces must go to war equipped as they are - not as they might like to be. This has always been so.

### The United Nations and GCD.

Perhaps it is implicit in the terms of Art 11.1 of the UN Charter that the founders regarded 'disarmament and the regulation of armaments' as somewhat academic. This approach seems to have been followed, for in Art 26 where the Security Council was empowered to formulate plans 'for the establishment of a system for the regulation of armaments', only recommendations to the Member States was possible. However, as the entire enforcement basis of the UN was to rest upon Arts 43 and 44 there was a necessary recognition of the reality of the standing armed forces of the Member States, and general disarmament was not likely to be of immediate moment or priority. The situation may have changed somewhat with the years, but international law, as yet, has had little part to play in it despite any hopes which may have been founded on Art VI of the Non-Proliferation Treaty.

### Disarmament: The Future?

Several factors prevent fulfilment of visions of GCD. First, the concept was rejected as fundamentally unrealistic by some analysts. Second, fears for survival in the existing international system ensure the maintenance of national arsenals. Third, the importance of the armament industries in national economies.<sup>115</sup> Fourth, the technological aspects of weapons research and development and their effect on arms balance and stability.<sup>116</sup> Fifth, a lack of faith in the ability of the Security Council effectively to carry out the duties imposed by the UN Charter (which may, alternately, be said to be a lack of faith in the willingness of the members to ensure the success of the Charter's regimen).

In reality it seems only possible to envisage the concept of GCD in circumstances in which -

- (a) law, custom and contemporary views of morality support attitudes in favour of GCD,
- (b) the weight of conscientious objection to defence policies, as well as to service in armed forces, makes any form of conscripted military force unlikely<sup>117</sup>, and

- (c) economic necessities, including environmental protection, leave insufficient funds for the provision of military equipment and advancing military technology. (In the meantime if this is a factor in support of the elimination of armaments it also supports defence at a lower cost).

If law is to have an influence toward disarmament, political action, as always, must make progress in the elimination of areas of disagreement and apprehension. It is in the nature of human relationships and institutions that as one dispute is being settled others arise in a continuing process. This has been the case with approaches to arms control and disarmament. Now a major concern in the West is with agreed measures of nuclear arms control - perhaps nuclear disarmament - on one hand and SDI on another. If nuclear disarmament was effected it should obviate the need for SDI (and the as yet unforeseen problems which SDI might pose). The elimination of a weapon by the development of countervailing systems has not been unknown. Its likelihood in the case of SDI cannot be predicated merely on US-USSR negotiations, even if both subscribed to the hypothesis that,

"When the security of a state is based only on mutual deterrence with the aid of powerful nuclear weapons missiles, it is directly dependent on the good will and designs of the other side, which is a highly subjective and indefinite factor....The creation of an effective anti-missile system enables the state to make its defence dependent chiefly on its own possibilities and not only on mutual deterrence".<sup>118</sup>

Yet the case for having national nuclear arsenals is weakened if deterrence would rest on those 'own possibilities' rather than on the nuclear weapons themselves. But, of course, effective SDI measurement is likely only to be credible in action and not merely theoretically if SDI is to influence nuclear disarmament. Thus the discussion remains highly political as yet, and

"We know that unilateral security can no longer be achieved either by unilateral withdrawal from the world or by unilateral attempts to achieve impregnability"<sup>119</sup>,

according to the Head of the Delegation of the US in the nuclear negotiations with the USSR, casting doubt on the 'disarming' qualities to be expected of SDI and putting the argument back to 1972 and the ABM Treaty. Adding weapons to an arsenal is unlikely to lead to disarmament

and SDI in any case might lead to an arms race in space and to the abrogation of the Outer Space Treaty of 1967.

Throughout, the argument is an acceptance of belief that GCD is impossible without some kind of world government with power to shape its own institutions, enforcement methods and means. The deficiencies of the League of Nations and the UN illustrate the hurdles to be jumped. If disagreement was of detail the difficulty might be overcome. But it is disagreement in principle which is involved, and the time for systemic change apparently is not yet. Vagaries of interpretation and uncertainties of intention in the EEC, and burden-sharing calculation in NATO, illustrate difficulties always liable to arise in international organizations. Long-standing differences between Greece and Turkey remain unresolved despite common membership of NATO which in practice has not proved to divert or direct all their attention from perceived national to international interests.

The periodical reviews of the Non-Proliferation Treaty already undertaken offer advocates of disarmament small encouragement, nor will they be encouraged by the proliferation of ballistic missile armed States for that exposes some regional instabilities as well as increasing sophisticated arms production capacity.

Technological advance in nuclear weapons and missiles attracts little disfavour even though their end results may be unforeseen and unforeseeable. After 30 years of the 'peaceful' use of nuclear energy, problems attendant on closing down nuclear power stations are only now being examined and costed. Technological and engineering progress in weapons systems is to be feared as well as favoured for it is the creation and availability of weapons not their destruction that prevent disarmament. The seesaw effect cycle produced by the availability of obsolescent weapons following arms control agreements or modernisation and their re-distribution to other States is also to be feared.

Arms control is not disarmament and measures effective in Europe do not solve universal problems: global conventional stability talks remain vital. Advice such as,

"Forget spurious morality, foreign policy that is based on anything other than self-interest, is as unlikely to survive as it is impossible to conceive".<sup>120</sup>

is generated by contemporary realities but it is as applicable to the production, proliferation and global distribution of armaments and the means of making war as to defence because national self-interest is concerned with national economics as well as with national security.

It would be wrong in this thesis, therefore, to leave the subject of arms control and disarmament without considering the national and international trade in arms.

#### Arms Sales and Transfers.

The 'regulation of armaments' has to comprehend the two separate connotations of defence and the arms trade, but the defence aspect tends to receive more attention as it is this which forms the basis for the bi-lateral treaties which are seen as urgent steps towards the elimination of particular inter-State wars.

The consequential but theoretical background of a strategy of arms control measures is clear from Arts II and 24 of the UN Charter. Reviewing the US-USSR bi-lateral agreements at one extreme and lack of progress towards the realization of Art VI of the Non-Proliferation Treaty at the other, the practice discloses that enthusiasm for the subject is muted by industrial and commercial considerations.

In the long run it may have been a mistake in Art II to limit the General Assembly to making recommendations to the Security Council for such recommendations could result only in a plan for submission to the member-States the most powerful of which have shown little desire to institute a universal regulatory system. But if the regulation of armaments ought properly to include decision on the legality of a weapon judicial opinion should have been provided for. However, if regulation



is not of inventories but of sources (ie, of arms sales and transfers) powers beyond mere recommendation are essential to a regulatory process.

In the weak position of the UN, in the paradoxical situation that arms producing States will seek to finance some of their own defence spending from profits and taxation of an export arms trade, and in the motivating factors generating the giving of military aid and assistance, it would seem inevitable that movement toward universal regulation would be a frustrating business. That frustration is exacerbated in practice by the economics of the arms trade which is dictated by the politics of States both as suppliers and customers. Where amour propre is not the villain (as in the similar case of state airlines) a perceived need for tools to assist in self-help is.

It is necessary to question the purpose for purchase and the relationship of arms purchases and defence commitment. Multi-lateral forms of arms control which set ceiling figures have little relative effect on the strengths of forces. What is important is the transfer of types of arms which would offer marked advantage for one State over another and missile technology has been a recent example repeated many times. Setting up facilities for domestic manufacture has vital implications for regional balance. Both Libya and Iraq have been assisted in their ambitions in the nuclear and chemical warfare fields by Western technology however acquired and despite any illegality of weapon or weapon proliferation. For the industrial States factoring construction, and providing the machinery and knowledge, forms part of their export trade whether legitimate or otherwise.

In all the circumstances the omission of any direct reference to the arms trade from NATO's Comprehensive Concept of Arms Control and Disarmament is not surprising<sup>121</sup>. The Declaration of the Heads of State and Government which accompanied the Comprehensive Concept stated that,

"31. We will seek to contain the newly emerging security threats and destabilising consequences resulting from the uncontrolled spread and application of modern military technologies".<sup>1,2,2</sup>

In reality any question of direct limitation of the arms trade whether in NATO or the UN will remain for decision by the individual member States.

States have different levels of military, economic and industrial capability and ambition. Concentrating almost exclusively on the US-USSR (NATO-WPO) negotiations, or on the eventual attainment of GCD, takes little account of the smaller States and their propensities for war. Equally, concentrating on bilateral nuclear agreements between the two super powers takes no cognizance of their client States, how they are armed, and by whom.<sup>123</sup>

Arms sales and transfers are not limited to providing for client States, nor are they exclusively between an industrial and a non-industrial State. The search for a main battle tank to replace the Challenger in the British army prompted competition between West Germany (Leopard 2), the US (Abrams M1), and the British Challenger II. If a non-British vehicle had been chosen it would not have raised any principle, moral or otherwise, about the arms trade by those who opposed the purchase, but only a debate on the merits of not buying home-produced products.<sup>124</sup> This is a matter of the normal competitive nature of the arms trade.

In arms trading there is some governmental interference which tends to be muted by the deep-seated theology of free trade on the part of those powerful States that share most of the international arms trade.<sup>125</sup> These States also decide what restraints they will apply to the trade as it directly affects themselves and how they will police their own legislation.

Determination to use force if necessary to assure the national interests of a State can be maintained, and the determination sustained, only by capability for armed conflict. States which do not - or cannot - equip their armed and police forces from indigenous manufacture must import from States that are willing to supply armaments. For obvious reasons of capital investment and because of differing technological

standards, specialisation skills, and economic abilities to spend lavishly on armament research and development, even some industrial States today have to rely on others such as the US, the USSR, France, Britain and, increasingly Japan.<sup>126</sup> The arms trade is a continuous process, It does not operate on any 'once only' basis for armed forces demand a constant up-dating of equipment to keep pace with the modernisation to be seen in the equipment of other forces.

### Justifying Arms Sales.

When weapons of war were hand held and unsophisticated there was some balance of forces and technology. Each centre of population had its armourer, fletcher, smith and bowyer, and the engine of war - the horse - was bred locally. War was then endemic but limited to the extent of the availability of weapon numbers and the weapon-making capacity and capability. The North-West frontier tribesmen of India (Pakistan) had long been examples of operators of limited war restrained by local weapon-making and stealing effort. The Russian invasion of Afghanistan has changed the situation and now underlines how vital external arms supply is for factions with no modern industrial infrastructure. It has also introduced modern warfare and weaponry on a sophisticated scale which will bedevil Afghanistan in the future and make Pakistan's policy to deny Pakhtunistan more difficult to maintain. Terrorism is largely a matter of the availability of weapons supply supporting the dogmatism which collectivities, interest groups, and 'religious' organizations can command. The Mujahideen are 'freedom fighters' to Pakistan but terrorists (dushmani) to the Russians.

The arms industries of the world, state-owned or encouraged, have equal ability to make possible armed conflict or to buttress deterrence. In the proliferation of arms manufacturing states there seems little chance that such cause for concern will be aroused as to lead to prohibition and dismantling. Instead, only 'terrorist' arms 'factories' are destroyed when discovered. This is an opportunistic policy of States

in the interest of the State as a manufacturer, as well as being in the public interest. A difficulty occurs when terrorist forces develop into armed opposition and civil war.

The apparent concern of the 1925 Geneva Conference is now largely forgotten: instead encouragement of arms production is said to be essential on the grounds that it is not only sound domestic economic policy but also necessary for national autonomy in defence matters.<sup>127</sup> Western industrial States as well as Taiwan, South Korea, and increasingly North Korea, Israel and South Africa advance these views. Such a policy for South Africa necessarily followed UN imposition of an arms embargo. The Brazilian government encouraged domestic arms manufacture as a factor of national export and economic policy, but the development stemmed rather from "the armed forces organization culture" consequent on Brazil's successive military governments.<sup>128</sup> It is a story repeated in many States with military regimes composing, or sustaining, governments. Liberal domestic commercial policies lead to the development of arms industries, and subsequently to collaboration by the machinery manufacturing and transportation industries. In Brazil many Western automobile manufacturers had local subsidiary companies that also collaborated.

As the range of sophisticated weapons arsenals grows a matter for concern is that 22 developing countries have active ballistic missile programmes; 17 Third World States have deployed such weapons; and they have been used in operations in Syria, Egypt, Libya and the Afghanistan army as well as by both sides in the Iraq-Iran war. More worrying is that these missiles are capable of carrying nuclear weapons.<sup>129</sup>

There is no international legal inhibition on the development by a State of its own arms industry. Instead, the total effect of indigenous arms production, and the consequential reduction in imports by Third World manufacturing States, may ensure that there will be less restraint or influence on importing States than was formerly exercised by the super

and medium exporting countries. But lack of the technical knowledge necessary for the production of more sophisticated systems is an initial restraint. Some local control is exercised especially in the case of weapons produced under licence, but, as in Brazil, support by multi-national companies is likely to be forthcoming as opportunities offer. What may be required is a Non-Proliferation of Technological Information and Equipment Treaty in respect of sophisticated and 'smart' conventional weapons to displace or supplement such organizations as COCOM (Co-ordinating Committee for Multilateral Export Controls).<sup>130</sup> Such a treaty, however, is unlikely to reach even a draft proposal.

Development of indigenous arms manufacture does not result only from external pressures from exporters or even from economic considerations. UN embargoes result from the very conduct which necessitates access to sources of arms supply (as in the cases of South Africa and Iraq-Iran). External dangers are also potent factors even when, as in Israel, a 'sponsor' could be relied upon for arms and financial support. Experience shows that when indigenous arms industries are set up with the purpose of making States self-sufficient at least to some degree in arms supply, it is not long before export outlets are sought. But all is not plain sailing for such industries. Political and economic difficulties may lead to reduced military budgets with resulting difficulties in financing arms procurement. In the face of foreign competition a home producer must reduce unit costs, or seek longer production runs resulting in surpluses to domestic requirements.

A substantial source of supply also arises from surpluses thrown up when forces are re-equipped and their equipment modernised with the latest weapons. The older weapons may still be desirable and regionally advantageous to another State.

In an alliance such as NATO reduction in defence allocations affect the quantities of locally produced equipment which each member will purchase for its forces. Current 'zero growth' formulae adopted by NATO

States in place of the annual 3% growth policy which recently obtained resulted from the improved atmosphere for arms control in Europe about which Mr Gorbachov said that,

"Our principle is simple: all armaments should be limited and reduced...if there is any imbalance, we must restore the balance not by letting the one short of some elements build them up, but by having the one with more of them scale them down."<sup>131</sup>

Thus, both scaling down and budgetary limitations may increase the availability of arms for trade purposes. With competition between arms manufacturers and between arms manufacturing States, and an availability of surplus arms through controls mentioned, falling prices will result. This will allow purchases by States that could not previously have afforded such purchases, and is a reason for universal agreement on budget limitation as well as arms limitation, as was proposed at the 1899 Hague Peace Conference. Compensatory transfer from manufacture of armaments to manufacture of other goods to maintain economic equilibrium will be essential.

#### State Support for Arms Manufacture.

Trade in arms as in other commodities can be a weapon of foreign policy. Brazil provides an example of the privileged position of arms manufacture in industrial States. It can often offer employment when other industry is in recession, help the balance of payment equation, and present electoral advantages - the American 'pork barrel' for some politicians. The slow progress of rationalization and standardization within NATO is indicative of the importance of their arms industries to the member States. Price per item comparisons favourable to American-produced arms do not always alter the preference by West European member States for their home productions.

Government support for arms industries is not limited to defence purchases and finance. Even when defence requirements and commercial sales are predominantly concerned political influence or pressure may still be applied, especially in export trade licensing. Political

direction may be indicated to firms whether state-owned or private, or to local units of multi-national companies particularly when foreign investment in domestic enterprises is concerned. In Britain there have been anxieties regarding many arms manufacturing firms including GEC, English Electric, Westland and Ferranti.

It may be true, however, that a need for overall commercial viability in multi-national companies makes a national policy more difficult to apply without threat of interference from the State where the company is incorporated. How the firm of Krupp (a portion of which has been owned by Iran since 1974) has been affected in sales to Iraq and Iran may be less public, but any attempt by the Federal German government to nationalize or compulsorily purchase the Iranian holding could have been viewed in the context of oil embargo countermeasures. The position of COCOM is also relevant.<sup>132</sup>

Another aspect of governmental interest is demonstrated by the German and Russian arms industries which used the Spanish Civil War as a proving ground under battle conditions of equipment designed for their own forces. Such a valuable laboratory is not always available, but the US is said to have access to Israeli first hand experience of American equipment used in the Middle East:

"A recent survey in the Washington Post showed that Israel now buys \$500 million worth of parts a year from 15,000 different American companies...the Pentagon receives detailed information from Israel on the performance of American-made weapons, some of which have never been used in combat by the US".<sup>133</sup>

There is a real danger of weapons looking for a war in which to be tested under battle conditions, and such a war need not be between States. In civil war, weapon availability may make the difference between domestic protest and violent insurgency.

#### Control of Arms Sales and Transfers.

Major transactions in arms are not made in the open market, but are the results of political and commercial negotiations. Transfers by way

of military aid, or under the terms of an alliance agreement, are dictated primarily by political and economic policies.

Arms control if extending to arms sales and transfers lies in embargo on physical transfer or in restrictions imposed by a supplying State on its exporting agencies. But such control is difficult to exercise for systems of supply are often either indirect or deliberately obscured. Restrictions on use may be imposed, for instance in limiting weapons to police or defensive purposes, but difficulty of verification and control is obvious.

Transfers of arms from one State to another, if controlled, are generally regulated by domestic legislation,<sup>134</sup> which may be in conformity with a UN Resolution or Recommendation<sup>135</sup>, by inter-State agreement, or unilaterally by observance of contractual conditions of sale or transfer. There is also a possibility of total prohibition of a State from exporting arms such as is prescribed by the Japanese Constitution, but interpretation of 'arms' may prove contentious.

On the other hand proliferation may be encouraged by extra-commercial considerations such as subsidies, interest-free loans and other inducements to purchase like payment by raw materials or other barter arrangements. Such considerations are not matters for international public law unless weapons prohibited by international convention are concerned: rather they fall within the law of contract.

Political administration and efforts to improve standards of living may offer some priority to moral values, but commercial transactions in the arms industry have no regard for such values except in so far as they may be applied by legislation.<sup>136</sup> The world is a commercial and industrial place and international relations are more and more concerned with 'oiling the wheels of commerce'.<sup>137</sup> The economies of States, often geared to welfare-state subvention which demands an increasing industrial output to satisfy welfare ideals, tend to accept whatever is fiscally rewarding. Commodities which can be produced, marketed and exported



encourage a national commercial outlook especially in newly industrial States. Even bureaucrats and educationalists who may wish to avoid direct contact with mercantilism must nevertheless support an industrial basis of society whether as administrators and executives of the industrially conscious State, or in preparing the younger generations for entry into the industrial society. It is little wonder, therefore, that the industrial society incorporates the armaments industry as a commercially orientated and necessary element.

Recurrent balance of payments deficits in many States encourage government support for exporting. As adverse balances become serious or habitual a more relaxed view of the activities of their exporting manufacturers than rhetoric on arms control may imply may be taken by governments. This is serious enough when conventional weapons are concerned, but the arms trade has not refrained from selling chemical weapons and related materials as the recent case of the RABTA plant in Libya 'designed to produce chemical weapons' shows. Even if not on a government to government basis instances of assistance in setting-up nuclear plant and processes for military purposes has been suspected in contravention of the NPT for example in Iraq and Palestine.

It has not been unusual for both the US and the USSR to place restrictions of some kind on some arms supplied although transfers by way of military aid may have been unconditional. Subsequent transfer to a third party has been restricted except in cases where it was the real intention of the transactions. France on the other hand made no secret of the fact that it was selling 'independence' by way of arms for Third World States. Since the law of 1987 (Loi Progamation Militaire) the necessity to co-operate with other States in arms development programmes may place some restriction on an unlimited policy of arms sales, as well as on a policy of offering such a means of independence.

Co-ordinating Committee for Multi-lateral Export Controls (COCOM).

It is not only international agreements and how they are observed that make for collective action. Reciprocity and fears of reprisal have

similar effect. This is a basis of the operation of COCOM which is an organization composed of the NATO members (except Iceland) and Japan, and is administered under an informal understanding arrived at in 1949. There is no treaty or inter-State agreement and the secretariat has no international status.

The principle of COCOM is that commercial instincts and interests have to be subordinated to alliance solidarity in the matter of the sale or transfer of technology and some of its products from Western States to the Russian bloc. It has been described as follows:

"Cocom's task is to restrict Western exports to the Communist World. The Germans, ever anxious to increase their own trade with the Eastern bloc, are increasingly critical of the whole system: the Greeks reportedly turn a blind eye to it: the British fear that US export laws may impinge on UK export rights, and the Americans are quick to accuse their partners of selling computer secrets to the East".

Fisk described the Organization's method of dealing with offenders:

"We don't put pressure on them (citing "such diverse organizations as the Irish Government's 'Export Control Delegation', the Swedish 'Industrialists' Group', the Swiss Ministry of Defence, and South Korean business groups" which regularly attend meetings with Pentagon officials) "and they know we are not their enemy. But if they sell the wrong stuff to the Russians, they know they won't be getting any more technology from us".<sup>138</sup>

Fisk did not report whether the members of COCOM received treatment identical to that received by the 'diverse organizations'. In any case it is doubtful if on basic issues COCOM is able to effect the controls for which it is intended. Aggressive industrial and technological espionage makes control difficult. The breach in April 1987 which resulted in the sale of machine tool equipment to the USSR allowing it to produce almost silent propellers for submarines in a case in point.<sup>139</sup> Further, the importance attached by States to their arms sales trade is illustrated by the euphoric manner in which news of arms sales agreements are publicised.<sup>140</sup>

### The UN and Constraints on Arms Transfers.

The practical application of restrictions on arms transfers adopted by the UN is likely to vary from State to State. All forms of sanction against a State agreed in the UN are effective only to the extent that they are imposed and policed by individual States.<sup>141</sup>

Unevenness in application of controls follows from the economic importance of arms sales to manufacturing States which makes universal co-operation in embargoes under UN Resolutions unlikely. Weaknesses in enforcing sanctions were exposed in Rhodesia and South Africa, and no doubt would have continued in Iraq and Iran but for the ceasefire agreed between them. Embargoed States will naturally seek to circumvent restrictions and as arms transactions are viewed commercially there are always interstices to be found in sanctions walls as the result of political pragmatism as well as commercial enterprise.

Where terrorists in a State receive arms supplied by another State - as the IRA is reported to have done from Libya - there may be appeal to the UN under Art 39 of the Charter as being likely to lead to breach of international peace. The offended State, however, must still apply its own remedies.

Arms supply to 'independence fighters' raises many issues as sides are taken in the UN as US governments have found regarding both Nicaragua and Afghanistan. But support for a faction such as the Contras in Nicaragua shows which side in the conflict the supplying government favours. Commercial priorities rather than disinterest in the result of a conflict may induce a State even to supply arms to both sides (China in the Iraq-Iran war, for example)<sup>142</sup>.

Wars begin and are sustained by armaments and suggestions (by Alva Myrdal for instance) have been made that the UN should collect and distribute information regarding national armaments by means of a UN international disarmament control agency. The proposal has not been promoted enthusiastically, and not only because commercial interests have

been lukewarm. Arms sales and transfers are influential counters in international relations affecting voting in the UN. In any case, it is when demand for arms is lightest and weakest that agreement on restriction is more difficult to obtain from the manufacturing countries because of the competitive commercial pressures being applied.

The purpose of arms embargoes by the UN, however, is not solely of arms limitation but to bring about cessation of hostilities as in relation to the Iraq/Iran conflict. Security Council Res 598 may yet prevail to transform cease fire to peace treaty, but both States are replenishing their arsenals. Generally, it is the circumstances seen by the belligerents rather than UN recommended sanctions, (that is, where the force of circumstances begin and the circumstances of force end), which will dictate, for if only arms supply is in point some State will be found willing to meet demand.

It is unnecessary to look beyond casualty lists for the effects of the arms trade, and in this context it is not necessary to take account of the causation of war and the will to fight to underline the truism that,

"The history of warfare is inseparable from the history of weapons and weapons designed for the fight have a central place in the military dimension",<sup>143</sup>

and now increasingly in the political and economic dimensions. Thus with the help of other governments,

"Iraq has been able to keep Iran from winning decisive victories because it has dominated the race for new arms imports".<sup>144</sup>

In Afghanistan the supply of arms via Pakistan to the Mujahideen may well have been a deciding factor in a Russian decision to withdraw her troops.

Experience shows that it is not enough for States to acknowledge the need for control and limitation of the arms trade; they must constitute the means to ensure these ends. International law as a means can perhaps be effective if it is backed by positive law but arms traffic in this Century has demonstrated how relatively easy it is to avoid unsupported legal prohibitions and registers.

Proposals for a register of arms transfers were made at the League of Nations,<sup>145</sup> at the UN by various members including Malta (1965) and Denmark (1967): the idea was rejected at the 1970 Geneva Conference on Disarmament. Obvious reasons for rejecting a register and other initiatives to restrict arms transfers are the conflicting interests of vendor and purchaser and traditional, innate secrecy on the part of some States as to their defences and equipment. This applied to the aborted Conventional Arms Talks initiated by President Carter (1974-1978) which envisaged a combination of legal/political and military/technical restraints. A compromise is included in the Final Document of the 1978 UN Special Session on Disarmament,

"consultation should be carried out among major arms supplier and recipient countries on the limitation of all types of conventional weapons, based in particular on the principle of undiminished security of the parties with a view to promoting or enhancing stability at a lower military level".<sup>146</sup>

Stability in the first instance is a regional problem in the present international system, but becomes a universal problem in the long term. Arms control and disarmament, however, require universal application and President D'Estaing's view at the 1978 Session,

"that to seek universal principles would be inefficient and contrary to political realities"<sup>147</sup>

in the present world diversity would itself prove accurate as the arms trade would operate where it could. It is a weakness of regional as opposed to universal decision-seeking that States, especially Third World States, wish to see all being treated equally and subject to identical restrictions. It is those States that need economic assistance which find restrictions most crippling as regards arms supply, but who feel most vulnerable to regional inequalities. In any case, how is a region to be defined and where does overlap and interdependence end?

Investigation of the inventory of arms available at the beginning of the Iraq/Iran war would have disclosed build-up based on Arab-Israeli, as well as on the Gulf and oil, situations and, in respect of the latter,

the Saudi-Arabian build-up. Oil in itself might have become a cause for war: what regional limitation could then have applied?

States have to police strictly to preserve domestic arms restraints in company with customs and treasury enforcement. There are difficulties to be envisaged in setting up and enforcing international legal restraints which would fall to be controlled by those same domestic organs.<sup>148</sup> Only changed political outlook will affect a rationalization and coercion of the arms trade, but whilst there are no universal curbs on arms manufacture there is little likelihood of a manufacturing State mounting a major campaign to restrict arms transfers universally.

The reality today, therefore, is that international arms trading is not illegal per se and a blanket prohibition is unlikely to be placed on the trade for lack of consensus among industrial States. In any case enforcement and verification in present circumstances would prove impossible.

It is fairly certain, however, that influential States will continue to have little real difficulty in buying even the latest weapons, aircraft, naval vessels and other armaments whether the interest and influence is oil (as Iran and Iraq); geographical situation (as Vietnam); regional leadership (as India)<sup>149</sup>; and some States may combine more than one source of influence (Saudi Arabia and India).

In their legal manifestations arms control measures and unco-ordinated limitations on arms sales indicate a continuing place for war rather than for its abolition for, in practical terms, they protect the place of war.

PART IV  
CONCLUSIONS

In the existing international system of interdependent States enforceable world policies are the results of consensus formulated in international law and adopted in municipal law by the exercise of national sovereignty. The enforcement of policies so adopted is also a duty of states as a matter of national sovereignty.

War is regulated under international law both as to its legitimacy and its conduct in operations and termination.

Where a State considers international law to be incomplete in any particular affecting itself and another State it may seek to fill the vacuum by means of inter-State treaties. Treaties such as these may include the mutual limitation of armaments and other steps to reduce the possibility of war between the parties.

That these principles do not always command obedience in a system which depends upon a diversity of national choices is to be expected. For that reason the UN was embodied in 1945 as the international control organization over the customary sovereign right of States to make war. From the UN the law could be developed, disobedience called into question, and the danger of war mitigated or prevented through open debate and collective action by civil or military means. Ad hoc peacekeeping forces, and truce observer forces, could be established designed to alleviate situations which might lead to conflict. In its operation, however, the UN must always rely on the individual member States for action and for finances.

It will be clear that in principle the place of war in society should now be subject to regulation by international law and its institutions especially in matters of:

- (a) National sovereignty and international law.
- (b) Arms control and disarmament.
- (c) Collective security.

## (d) Conduct in war.

The conclusions which follow attempt to summarize some effects which both the law and the practice have had on the place of war in society.

International Law, National Sovereignty and the Place of War.

The place of war - the lowest common denominator of international society - is now the result of conflict between the interests of the international community and the claims of sovereignty and nationalism of States (and Federations), that is, between the observance or non-observance of international law. So far armed conflict has been mitigated when the exercise of sovereign power has been controlled by economic necessities because international conflict is also a conflict between economic powers and standards of living. The conflict of interests between the international and the State societies is evidenced by the frequent non-observance in practice of concessions reluctantly made to demands to limit State sovereignty.

This conflict has remained continuous in its incidents notwithstanding that there is an international mechanism for the control of war and the place of war, the United Nations. The views of governments are presented in this international organisation by unelected representatives. In consequence, the UN organization is remote from the peoples of the international community, and the views expressed in it may well be unsupported by national vote as changes in national governments have demonstrated.

The UN organization is founded in international law and a cursory examination of post-war history shows that whilst the effect of international law in this Century has been to outlaw aggressive war, (as well as the use of certain weapons and means of war), the behaviour of States and international institutions has often been to deny such an effect. Nevertheless, it is also clear that the place of war in



international society has been circumscribed by international law and the influence of that law on public opinion.

It is for each State to determine whether war is to continue as an instrument of international politics, and each State's view of the place of war is affected by that adopted by other States. The reality is that although the illegality of aggressive war is explicit in the UN Charter, and although certain methods and means of warfare have been prohibited by the Geneva Protocol I of 1977, observance of these limitations on sovereignty has been frustrated on many occasions by failure of foresight and of enforcement. That is only to say international society has moved from the vague "desire to diminish the evils of war, so far as the military requirements permit" (of Hague Convention IV of 1907) to the prohibitions of the UN Charter and the 1977 Protocol. But unlike the UN Charter which is generally binding on States as regards the settlement of disputes, the Convention and Protocol are subject to the procedural requirements of treaty making. These limit the binding nature of the Convention and Protocol to the States adhering to them and subject their content to the declarations, reservations and objections of the adhering States (notwithstanding the Vienna Convention on the Law of Treaties of 1969).

As Art 1 of the UN Charter makes clear by implication the effect on the place of war brought about by international law may be greater in the fields of economics, commerce and industry since military budgets and strategic policy are dictated by economic circumstances (of which Spanish silver, African gold and Middle Eastern oil are historical examples). Economic declarations in the UN may often be of more relevance to the place of war than overtly military Resolutions.

It may not be clear, however, if economic stability is now a pre-requisite for military stability or whether wars are still fought with an underlying purpose of attaining economic stability. What seems clear from contemporary events is that military stability on an imperial

scale may undermine economic stability, and if this is not to be redressed by expansionist military adventure it will have to be sought by peaceful means as the UN Charter prescribes. A continuously changing place for war affected chiefly by economic forces may stem from respect for and a calling in aid of international law when a State is weak, albeit disregarding it when the State is strong.

Although the laws of war remain applicable whether a war is lawful or unlawful, and whether or not it is in breach of conventional agreements, the place of war as an expression of sovereignty has not as yet been directly affected by the possibility that other States will exercise the powers provided by the Charter.

Involved in a State's place for war are standing forces and operational plans whether for aggression or defence, and a belief that self-help may still be required in international relations and in intractable disputes. For the State the major difference between peace and war may be that the violence of its sanctions is normally directed against the persons and property of its citizens when they fall into dispute with domestic law, but the concept of international war directs the State's violence against the citizens of other States in defiance of the legal concept of sovereignty. But if one State's sovereign power includes the right to wage war it is potentially at the expense of another State's sovereignty and territory. Traditions of sovereignty may have supported the notion: international law forbids it. The precaution implicit in a place for defensive war is not illegal, and for offensive war illegality arises only when war become a fact.

One purpose of international law and custom is intended to ensure that international relations are conducted within an internationally agreed framework. The civilized formalities are contained in the Vienna Conventions on Diplomatic Relations of 1961, on Consular Relations of 1963, and on the Law of Treaties of 1969.<sup>1</sup> Other customs and ways of organizing international relations have also arisen in the past, basing

their detail on different premises. These can sometimes produce results contrary to those produced by other concepts. Religion, for example, can produce divergent views of proper conduct in the same circumstances. However, in this Century codes derived mainly from the customs of the European nations (which had sought to determine when war was just and how it should be justly conducted) have provided a common approach for all States. These codes expressed what can be regarded as eternal verities of human conduct translated from individual to State in jus ad bellum, and back to the individual in jus in bello. Thus the practice of genocide is condemned as adhorrent in war and peace just as the St. Bartholomew's Day slaughter of 1572 is now condemned.<sup>2</sup>

The eternal verities today are said increasingly to be subject to contemporary circumstances and interpretation. Similarly, in particular cases common law interpretation is said to be affected by modern thought and conditions, although no subsequent statutory provisions have been passed to affect earlier precedents. It is an easy transition from a doctrine of desuetude to repeal by statute as has happened in Scots Law.<sup>3</sup> But there is no analogy between repeal in domestic and agreed parliamentary procedure and a concept such as rebus sic stantibus which may apply in inter-State treaties but not in actual law.

It is reasonable to claim that the laws of war are immutable and affect equally warlike practice and means.<sup>4</sup> But eternal verities are not identical for all civilizations and religions, and evolutionary progress at variable rates of change affect attitudes to morals and to particular laws - a position made more difficult by variable responses by individual States to limitations on their sovereignty.

Change in international relations usually implies more authority for central organizations, but elements of sovereignty are not given up lightly. When sovereignty is surrendered voluntarily it is in return for some quid pro quo: when the result of compulsion it is rarely finally accepted but remains a cause for future dispute (e.g. the Baltic States).

Since 1945 there has been an incidental movement to limit sovereignty through interdependence and internationalization (for instance in communications and in atomic development). But at the same time the expansionist counter-movement of decolonization and consequential proliferation of new States has created problems for any role the UN might have in Dickenson's hypothesis.\* Even if some of the new States have been created without bloodshed others were encouraged by foreign aid and arms to freedom through conflict (for example Vietnam, Malaysia, Aden, Angola, though decolonization might have resulted without the bloodshed in some cases).

In consequence the international system has progressed from a more limited individual sovereignty to a greatly increased number of units exercising that sovereignty. As the evolutionary position of these sovereign powers varies from ex-Imperial to newly created, an 'adequate procedure' for consensus-making from such different points of view (and material national interests) has been made progressively more difficult. The UN, like newly created States, has needed the benefit of experience.

Apart from those different starting points from which States argue, war is the more difficult to eliminate because of the recurrent threat implicit in the advance by one State in the technological means of combat. Technology could be harnessed to an 'adequate procedure' especially by more effective surveillance and redistribution of resources but this is not in evidence. Rather the utilization of technical resources and resourcefulness continues to encourage arms races. On the other hand efforts to deny the victorious in war the fruits of territorial conquest, even if a further limitation of national sovereignty, would eliminate one cause of war. In the absence of the 'adequate procedure' it would be myopic to think that calculations of possible gains from war are no longer possible. The Middle East, Iraq/Iran, and the Falklands Islands conflicts all had some form of territorial gain as a war aim.

\* See page 339

The concept of sovereignty with its integral concomitant of armed acquisition as well as voluntary relinquishment also includes an ability to retain as well as to surrender territory. By custom the concept may include an ability to regain what had been surrendered voluntarily even if it has been written into a treaty. Such retrogression may form incidentally a basis for the doctrine of the clausula rebus sic stantibus.<sup>5</sup>

There is an exception specific to general and imposed instruments such as the UN Charter where even non-adherence will not form a ground for non-observance in some circumstances.<sup>6</sup> But provision is made in the Charter for amendment,<sup>7</sup> and a similar procedure is available in normal treaty making so that possible grounds for invoking the clausula would be obviated. Territorial conquest has been frequently the reason for war, however, and if international law did not clearly endorse the fruits of war and conquest, reality did. But is territorial conquest still a rational war aim? Custom at least seems to be moving against it now that humanitarian demands, nationalism, and general opinion have virtually effected the demise of colonialism and the military support of trade adventurism, and Art 2.4 of the UN Charter forbids conquest. Even in Great Power policies the exercise of a concept of uti possidetis seems now to be inhibited by global opinion if the withdrawal of the USSR from Afghanistan is to be regarded as reflecting contemporary standards. But the possibility has not been eliminated: Israel, Iraq and Argentina have maintained it since 1945 and no doubt included it in calculations of their military capability.

The transition in this Century from Great Power politics (which were inhibited, if at all, only by balance of power policies) to the imperfect influence of majorities in the UN has been masked by fundamental disagreements among the most powerful members of the organization.

In its practical operation the system of international relations depends on political co-operation between States, but politics is founded on pragmatism and the exercise of national sovereignty is affected by the demands of party politics. Development of international law, which is usually a limitation on sovereignty even if voluntarily accepted, also requires political co-operation, but the pragmatic operation of international politics makes such development difficult. This need for international co-operation is not always satisfied thus making continuity in international matters uncertain.

As it is now conducted, the international relations system in principle remains subject to voluntary acceptance and enforcement of international agreements. Enforcement of international law also requires political co-operation, but pragmatism militates against universal effectiveness. Even if legal principles and customary law are accepted in general the practice may not always live up to the model. Terrorism and environmental pollution reflect the practicalities and the uncertainties. This is a situation of reality, and it has to be accepted if equal status for States is to continue even if that equality is political and not economic or military. The alternative, conquest and occupation in a rule of might would be reversion and not progress.

Just as condemnation of anti-Semitism and racism, although accepted in principle, has yet to become universally effective, so fears of national security and survival have delayed the acceptance in practice of dispute resolution solely by peaceful means. Fears for survival present psychological as well as factual and doctrinal barriers to the elimination of armaments and have also been the causes of delay in law-making. Statesmen need to acquire the ability to ensure that situations do not become so intractable that use of force is the only method open to one side or the other in inter-State dispute. It follows that if the purposes of the UN are to be effected the powers and procedures of the Security Council must be enforced as they could be

under Art 33(2) and Cap VII of the UN Charter. In present circumstances that depends on consensus, and it is wishful thinking to believe that it will soon become the invariable practice. It may be that if war is inevitable in any system of inter-State relations, some inhibiting factor like the threat of nuclear devastation to contain or limit conflict may be essential however dangerous and undesirable. This kind of dichotomy can be seen in attitudes to nuclear and chemical weapons. For example, the official attitude of Britain is that retention of nuclear weapons is an essential element of deterrence, and, in any case, the weapon cannot be disinvented. At the same time, Britain presses in arms control discussions for the elimination of chemical weapons - sometimes described as the 'small State's A-bomb' - but that weapon cannot be disinvented either. Even further, the danger of nuclear proliferation in the present reality of only mild discouragement may render it impossible for the USSR, the US, France and Britain to dispense with nuclear weapons although verification techniques may now be sufficiently advanced to police such a dispensation. Verification of any agreement on the elimination of chemical weapons poses greater difficulties. Such weapons can be hidden at production and deployment more easily than nuclear weapons in similar verification situations.

Technology, however, produces tools which are the means towards solutions of problems, but only when in the right hands. What seems obvious in theory but difficult in practice is that there can be no absolute national security without international security. Yet it is often believed that international security in practice would be only the sum of individual national security. But national security is not merely a military matter. It is also a defence of the way of life of a society and of the expectations and welfare of the people. Some societies are prepared to adopt policies which accept military risks in order to retain or attain the economic and welfare goals they seek. Such policies depend on the nature of the threats against a society. If nuclear deterrence

has been instrumental in preserving peace in Europe nevertheless in the global economic interdependence of today's international system nuclear deterrence alone may be too simple a concept and insufficient to ensure survival of the national way of life, attainment of national goals, or even maintenance of the standard of living. Just as technology may help to effect economic changes, so dissent and opposition may effect political change.

Now the possibility has to be considered that some change in relationships between the US and the USSR will affect seriously the distribution of world power reducing the bi-polar nature of international relations and increasing multi-polarity and the influence of the UN.<sup>8</sup> Such a development might arise from a combination of economic weakness of both super powers at a time when regional economic alliances (such as the EEC) and national economic strength (as of Japan) increasingly make themselves felt.

Desire for change is endemic in 'have not' societies, whereas 'have' societies want to maintain the status quo. Between the two superficial examination notes the changes in power relationships without seeing changes in the international system which have been effected incidentally during this Century. Those who long for a changed but still ordered system of world government see an unchanged world system dominated by State sovereignty and the threat or use of force. Those who resist encroachment on national sovereignty see defence expenditure as a first priority and the use of force as final arbiter. The reality is that so long as either school exists the other must be prepared to deal with it.

Attempts to write contemporary history are doomed to fail for the picture is never complete. Whatever lessons seem to be emerging they are liable to be falsified by events. Whatever objectives are delineated and sought they are overtaken and merged and weakened or fade before a continuous rising up of others now assuming greater importance and



urgency. Of itself the process induces change based on retrospective values. Comprehension of, and movement toward, ideal situations are always accompanied by contemporary difficulties which inhibit bold political decisions (or inhibit the carrying through of them).

Change is nonetheless apparent. To acknowledge the State of Israel quick recognition by the US and the USSR pushed the UN to adopt it as accomplished fact: it will take longer to transform the PLO into the government of an Arab Palestine State. But the change which the UN effected of a general recognition of the State of Israel (notwithstanding Arab dissent), instead of the previously normal state by state process of recognition, has also brought into recognition the PLO as an entity in the international system. The limits have to be seen also for the conflicting actions which arise from majority decisions in the UN and national sovereignty sew discord as can be seen in Lebanon. Recognition of an Arab Palestine State will further destabilize the Middle East. Change, therefore, must remain in the curtailment of national sovereignty and its actions inimical to the UN objective. How will the acceptance and furtherance of the UN objective be secured? The case of Israel offers scant precedent so far in its relations with the UN, or with UN peacekeeping forces.

International law will be affected by change in the system, and international law retrospectively will effect it. Regional arrangements will have their treaty constitutions, and bi-lateral treaties will underpin economic understandings with the World Bank and IMF and with other States. Debtor States that have difficulty in increasing their national indebtedness because they cannot, or will not, conform to limiting conditions postulated by lenders will increasingly seek help on a state-to-state basis either by regional combinations or by joining the camps of greater powers.

Economic weakness is relative: current Russian activity in the Middle East and Egypt is evidence that it does not entirely inhibit

search for global power. American policies have similar attributes and purposes. This points to a direct connection between economic means to political influence and trade promotion, for in the long run one fuels the other.

It might be premature, however, to take it for granted that the strategy of promoting both political influence and trade by display of military might has been abandoned finally.

#### Disarmament and Arms Control

The effect of international law on the place of war is diffused by the demands of national sovereignty. Assuming the potential effectiveness of the UN, in theory States have restricted their former customary right to make war except as directed by the Security Council or in accordance with the limitations imposed by Art 51. of the UN Charter. But many States have engaged in warfare since 1945 apparently without regard for the procedures of the UN or of Art 51. Such actions might be taken to demonstrate a disregard for the UN Charter and its underlying philosophies. There are objections to that hypothesis:

- (a) The majority of member States have not felt their vital interests to be so endangered that they have had to consider the matter of the Charter in these terms, at least on their own behalf.
- (b) A series of failures of the Security Council to take effective action was coupled with doubts about collective security possibilities and (more urgent at the vital time) fears of the timing by which collective security measures could be mounted by the UN. This led to conflict without reference to the provisions of the Charter beyond reliance on Art 51.

There have been instances of aggressive war since 1945 but it would be foolish to believe that the UN has been entirely discredited even though its reputation has fluctuated. Contributing to the UN failures in some of the instances avoidance of a war has been due to action by one, or sometimes both, of the super powers whose efforts have been directed to avoiding direct confrontation as a result of other States' wars or their own disagreements (if, indeed, they had wanted war at all).

Where there have been armed conflicts between States they have not been because of interpretations of Art 51 or of international law however expressed. They have been expressions of national sovereignty. Whatever the legal situation if permanent peace between States as the basis of international relations is what is sought (as resolved in the UN Charter) the peoples of the United Nations and their leaders have to be convinced of it.<sup>9</sup>

What would the motivation for a shift to permanent peace be? It must be political rather than moral for, if the change could not be imposed but must be the result of a political consensus, moral values would be subordinated to an amalgam of national interest values, and survival is not a moral issue whatever moral duty a government owes for its peoples' survival. Realities rather than idealism would dictate and Morgenthau's now dated and no longer universal statement still has relevance

"It is one of the great paradoxes of the 20th Century that as the preservation of peace has become a matter of survival for Western civilisation the traditional instruments for preserving it have become less effective; and more effective ones have not yet been devised".<sup>10</sup>

The change would involve consequential disarmament and relocation of labour and a substantial re-shaping of the economies of the industrial States. It would probably release substantial arsenals of surplus weapons for international trading. If only for these reasons it would be unlikely to be either a swift, or a universally welcomed development. Progress towards the peaceful resolution of disputes through the UN was unlikely while the opposed positions of the US and the USSR and their followings dominated that scene. What now seems to be incontrovertible is that a change in the priority which the threat or use of force has in the present system represents the minimum position from which to approach the issue.<sup>11</sup>

Inis Claude viewed disarmament with some suspicion,

"...the power to destroy cannot be literally obliterated so long as human beings and their productive capacity exist; deindustrialization

and perhaps even depopulation of the globe are the ultimate requirements for making war impossible".<sup>12</sup>

His emphasis on the desirable qualities which the change could bring,

"pacific settlement proposes to leave states with nothing to fight about, and collective security proposes to confront aggressors with too much to fight against, disarmament proposes to deprive nations of anything to fight with".<sup>13</sup>

reflected his belief in the unlikely acceptance of them. That is not to say that any progress towards permanent peace is possible if disarmament measures are ignored. Causation remains a principal element in the practice of peace and is as much a matter of 'hearts and minds' in international relations as it was in low intensity situations in Malaysia (even if forgotten in Vietnam). But if causes of war cannot be eliminated, and if deterrent measures do not deter, is disarmament possible while acceptance of some form of peaceful arbitration, and the findings of the arbitrator, remain matters for voluntary agreement by States exercising their sovereign powers?

Arms control measures seem desirable to a growing section of populations,<sup>14</sup> but evidence that a consequence is that the resolve for war of those who see armed conflict as an acceptable method of dispute resolution is weakened is not permanently reliable if only for the reason that circumstances alter cases. It is improbable that 'peace movements' have, as yet, influenced changes in a State's view of the place of war. Similarly, the success of NATO's deterrent policy over 40 years has probably influenced some calculation of the costs and means of the policy in relation to the likelihood of war. Such calculations will be made increasingly in the contemporary circumstances, but unless the material capability to make war is removed questions of the use of force remain hypothetical for people until their interests are directly involved. But if "international politics is of itself necessarily power politics"<sup>15</sup> people will continue to see solutions in terms of power as they do in domestic situations where the application of class or economic power is normal.

The factors which make up national interest are not without opposed elements, but the concept of national interest may disguise internal conflicts such as the, perhaps, inexorable animosities which arise from ethnic differences such as Slav, Croat, Serb and Albanian from the Austro-Hungarian Empire in the artificial 'nation' of Yugo-Slavia. Tribal differences as in Zimbabwe and Nigeria; religious differences as in India, Lebanon and Ireland; and long-standing colour and economic differences as in the US have similar effects. Even in emergent and ex-colonial States the need to secure and maintain defined, agreed and safe boundaries both external and internal (as between India and China; Israel and the Arab States; or internal as in Cyprus), leads to use of power in spite of a long and respectable history of arbitral boundary awards.

The opportunism which exists in international politics cannot be ignored. It may be

"more conspicuous when nations go to war: it is still strong in peace. The most popular vision of peace is of nations living independently each respecting the rights and territories of others, and each belonging to a kind of brotherhood. The brotherhood of nations, however, tends to be hierarchical and opportunist. Peace still depends directly or indirectly on military power. While we observe the role of military power when it dramatically breaks the peace, we tend to ignore its role when it ends a war or preserves the peace".<sup>16</sup>

It may be that such a philosophy or historical interpretation gives less credit to any change of peoples' attitudes, or change in the system of international relations, which the existence and experience of the UN may have effected and is effecting. Or it may be that the philosophy ignores or rejects any peacekeeping capability of the UN which, endeavouring to avoid any semblance of enforcement by means of military power, has operated on the sufferance of the belligerent parties. Philosophies seeking to delineate causes of war often pay insufficient attention to the antithetic question of the causes of peace, except to say that it is enforced and artificial. Yet both war and peace, like law, are expressions of the will of States with the

difference that whilst war may be imposed on a State as the alternative of surrender and occupation, peace cannot be so imposed - only occupation and cease fire which remains conflict not peace. The State of Israel in its early if partial recognition and subsequent history is an example and it may yet have to consider an alternative of joint sovereignty if conflict is to be ended and the place of war adjusted to economic reality.

Given a general acceptance of the provisions of the UN Charter the UN may be capable of substantiating what Dickenson believed. He said that war

"will be eliminated eventually not by the strategy of prevention, but by the development of an adequate procedure for controlling and digesting change in international relations".<sup>17</sup>

#### Humanitarian Concepts and Arms Control.

Humanitarian restrictions in war are designed in part to mitigate the technically possible effects which can arise from the nature and quantities of weapons available to the combatants. Arms control measures agreed and verified in peacetime will effect this also, but new weapons which have not been subject to arms control discussion will additionally be available.

Too much humanitarian content should not be read into those arsenals that have escaped restraint since the established humanitarian principle of minimum force is wholly compromised by certain weapons of mass destruction which, in any case, make minimum force a relative term. This has led to agitation for the control of such mass destruction weapons although until recently the demand has been focussed more on nuclear, chemical and biological weapons.

Opposition to nuclear, chemical and biological weapons does not spring primarily from any foundation of international law, or consciously perhaps from knowledgeable humanitarian feelings,<sup>18</sup> notwithstanding current discussions regarding chemical weapons and the 1972 Convention on Bacteriological (biological) and Toxin Weapons. The concern is rather

dictated by fears for the survival of our species.

In differentiating between the morality of one weapon as compared with others opposition to war itself is neglected. In respect of a particular war the differentiating is liable to be between conventional war taken as concerning combatant forces and nuclear and chemical war in which entire civilian populations will be at risk. This is not only a matter of the weapons' effects but nuclear, biological and chemical weapons are weapons of surprise as well as of indiscrimination and are likely to affect civilian and military alike without regard for minimum force in its customary meaning.

Limitation of conventional weapons has been less hardly pressed universally as the Reviews regarding the Non-Proliferation Treaty show. Progress in the Vienna Conventional Stability Talks can be expected but unless surplus weapons resulting from any agreement are destroyed that surplus may find its way to other States outside Europe. It is inescapable that the combination of aircraft or missile and high explosive aimed at civilian targets and populations is as much in breach of international law as if the bombs and warheads were nuclear or chemical.

It is understandable that attention should be directed to nuclear weapons even if that has the indirect effect of making conventional war seem more acceptable and general and complete disarmament more difficult to envisage. Fear and abhorrence of nuclear weapons have grown not only from the weapon and the complex and still unresolved total nature of its effects but also from reiteration of the continuing effects of the Hiroshima and Nagasaki bombings of 1945. Such abhorrence and fear is greatly worsened by accidents to nuclear plants such as Three Mile Island and Chernobyl. In perspective but not justification, the actual casualty figures of the two Japanese cities are dwarfed by those of even the revolutionary and guerrilla conflicts of the Century some of which - the Karens in Burma and guerrillas in Central and South America, and the PLO

and others in the Middle East - still continue their fighting. However, it is the potential of nuclear power which frightens.

The place of war is affected by the revulsion felt towards nuclear weapons, and the instantaneous capability of missiles with nuclear warheads plays a part because it induces a feeling of defencelessness against the inhumanity of the weapon and its means of delivery.

In the past humanitarian conduct was not vital to the concept of war as a measure of State power either in the settlement of disputes or in colonial conquest. The introduction of new weapons did not affect humanitarian aspects decisively even if some applications such as 'dumdum' bullets were deplored. Now there may be considerable differences in attitudes between States which can use force without fear of escalation to nuclear warfare and those whose resort to armed force may, or is likely to, initiate nuclear war. Neither the elimination nor non-proliferation of nuclear weapons is a foregone conclusion, and the view that chemical weapons are the small States' equivalent of the nuclear weapon is being resisted, not merely in the nuclear States.

No doubt each nuclear State has studied the attitudes to the role and the interpretation of humanitarian law within it of those upon whom nuclear weapon would depend. Such information is not available here.

Collective Security.

The concept of collective security formerly implied co-operation between a limited number of States bound by treaty relationships, and it was subject to change through circumstances including defeat in war. That system was theoretically altered by the Covenant of the League (Arts 8 to 12 and 16) and now by the extensive provisions of the UN Charter making the organization and administration of international collective action a matter for the UN. But since the Korean War States have not given up their sovereignty in the matter of intervention in the war of other States to the ad hoc arrangements which are implied by the UN Charter (except in the limited way of peacekeeping and observation



forces which have been mounted from time to time by the UN).

In the circumstances little need be said here beyond;

- (a) There is no proof that the provisions of Cap VII of the UN Charter will operate so long as the armed forces remain national in every sense.
- (b) A collective security policy which relies on national forces, arsenals and state of readiness for war (even though a place for war does not necessarily indicate a readiness for war - or vice versa), postulates such a time lag between commencement of war and the UN intervention as to be ineffective in preventing war.

Peace is an objective not a policy (as President Reagan said), but without a peace policy the objective of peace will not be attained. A policy for peace is explicit in the UN Charter but its weapons of deterrence, arms control and collective action in the present situation of the UN are related directly only to the postponement of war not to its elimination. Collective security measures are not so much a test of the UN as of the member States. Experience of the 1973 Middle East War, the Iraq-Iran war, and the Israeli invasion of Lebanon shows that if reliance on UN diplomacy and public opinion proves unavailing the member States are unlikely to support an interventionary military role for the UN.

To that extent it is doubtful if the collective security provisions of the UN Charter have affected the place of war in society. But it has not been possible (or thought desirable) to put Cap VIII provisions into effective collective military action.

In many of the instances of armed conflict since the Korean War, and despite UN Resolutions calling for cease fires, the latent threat of collective action by the UN has failed to prevent the outbreak and continuation of inter-State hostilities.

Individual ready forces are maintained for instance by the US, the USSR, France and NATO, but their immediate services are available for

national or alliance purposes. They are not permanently allocated to the UN under Art 43 of the Charter.

It has no doubt been considered whether a more immediate threat from a standing (UN) force would inhibit the escalation to armed conflict of inter-State disputes, and whether States would make permanent allocations of armed units to the UN. This has to be weighed against the probability that the benefit of immediate availability would be lost in debate as to whether the force should be used in any particular incident.

Perhaps the calculation by aggressive States is really whether effective collective action is likely at all in the absence of a standing UN military force.

#### Justice and Conduct in War.

An enquiry into the application of international law germane to war would be incomplete without reference to common standards pertinent to justness of cause and conduct which international law either specifies or seeks to endorse in its efforts to offer assurance of law and order, for it is in concepts of justness that international law is brought to bear on the realities of war. Other matters illustrating the nature of international law in regulating the conduct of States is provided for in inter-State conventions. Justness is not only understandable to the citizen from his domestic experience, but in and as regards war it is something which affects him in a direct, immediate and personal way which the texts of treaties do not. It is by the concepts of justness that the international law of war places direct responsibilities on individuals as the Charter of the Nuremberg and Tokyo Tribunals made clear.

In the matter of war prohibition by law can become effective only with the force of public opinion which would be strengthened if the responsibilities of the individual were more widely known. This is the case especially in the matter of obedience to orders where the position of subordinates in a disciplined service in active operations is difficult. That difficulty is only one example of the impossibility of equating even a just cause with justness to every individual in promoting

the cause. Justness of both means and ends diverge more in war than in other operations of states.

Efforts by humanitarian codes to mitigate the worst possibilities of war obscure the essential unjustness of the operations of war. Experience has shown that whilst war is tolerated, limitations must be placed on its practices. How difficult this may be is shown by the fact that in the major spheres of political judgment nuclear weapons are proposed as the strategical and tactical foundations of future operations. Any war fought with such weapons must be unjust by traditional standards however laudable the cause. It may be true that if the place of war has remained little changed by international law in this Century, (though public opinion, as yet unorganized, may be in advance of lawmaking), the means of war have retrogressed far behind the traditional ideas of justness and humanitarian law, and some indiscriminate weapons are without clear and unequivocal prohibition. Such an example underlines the difficulty in international relations of matching legal prohibition with moral injunction.

War will rarely work justice for the people as individuals however just a State's cause may be and this is a reason why international law is promoted if possible to eliminate war, and otherwise to mitigate its effects. But history has generally demonstrated that 'might' is 'right' and is the stronger party in peace and victor in war,<sup>19</sup> affording a reason for the pessimistic outlook of some analysts. Few wars could be categorized absolutely as 'just' wars for neither might nor victory can of themselves indicate justness or rightness. In practice justness follows judicial decision no matter how unjust that may be.<sup>20</sup> Military decision is another matter and in international relations the absoluteness of justice and right give way to the expediency and practicality of reality. Just war, therefore, remains a relative concept, but even if the cause for which a war is fought is just - for

example, a war against a real aggressor - the actual operations of war will work injustices of one kind or another. The haphazard and selective drafting of individuals for armed service will ensure this.

If as a justification for the abolition of capital punishment a State declares that it has no right to take human life, it could only justify a contrary view in war to defend itself from aggression or when acting under the lawful authority of the UN. In the latter case a State would have to accept the burden of deciding on the justness of the UN position. But there can be no virtue in a concept of the sanctity of human life of the adjudged criminal whilst exposing conscripted forces to a State's war of aggression.

In the absence of an absolute system of collective security by voluntary forces the effect of international law on the place of justice arising in and of war is likely to be restricted and retrospective. The objectives of international law promote the legality of resistance to aggressive war. Thus law creates a reason for war in the same way that the medieval moralists' definition created "just cause" as a reason for war. Initiating collective help at the behest of the Security Council must be taken to be in pursuit of the justice of international law's attempt to substitute other methods of arbitration instead of war. It follows that 'just war' is not a legal concept even though the expression might be endorsed by the UN in any specific case. Just war fails to discourage wars for most could be justified by one side, or by both, by contemporary standards and the definitions applied. For international law war is a fact not a morality, and with an absolute system of collective security aggressive war would be unprofitable as well as impractical. Collective security requires reliance on a majority of States adhering to a definition of aggression and opposition to those in breach of it.

Prior to the Covenant of the League, the Kellogg-Briand Pact and the UN Charter, it was thought that war was a lawful exercise of sovereignty or, if not, then

"an institution recognized by international law as a condition or fact found and regulated by it".<sup>21</sup>  
 Now even the idea that a legal right of self-defence exists under the Charter is sometimes disputed. It is said that "it is flatly denied by the Charter itself", for

"Art 51 comes at the very end of Chapter VII which is entirely devoted to the duties and functions of the United Nations Security Council". Thus, "the Charter does not confer any right, but if an inherent right exists outside the Charter (and some international lawyers have questioned what 'inherent' means) then the inherent right is subject to the rules of the Security Council and only...until the Security Council has taken measures."<sup>22</sup>

In any case, the history of the actions of the Security Council may continue to encourage the view of independent decision.<sup>23</sup> Beyond the argument lies method. President Wilson's ideal of collective security for the League of Nations was a projection of the balance of power policy which had kept Europe more or less from substantial war between the Great Powers during this Century to 1914. Attainment of the ideal was not accomplished, not because it was intrinsically impossible but because it was never attempted, and half-hearted imposition of sanctions - as in the Italy-Abyssinia dispute - was no substitute. Similarly, what were intended to be the military or coercive provisions of the UN Charter were abandoned or rarely or substantially invoked (with the exception of Korea and the Congo conflicts). In the Iraq-Iran war, States, and not the UN, took some steps in the Gulf to protect neutral interests but mounting a UN peacemaking and election overseeing force is delayed by disagreement.

Failures in the Security Council can reflect disagreement in the General Assembly where, given the situation of political disagreements since 1947, the provisions of international law have not been applied to encourage balance of power or to prevent stabilisation of it.

In spite of fundamental weaknesses caused by super power 'confrontation', the task of identifying bases of equilibrium and preventing the erosion of them still falls on the UN. In reality the organization can intervene only with active assistance from the super

powers. But between American concepts of global freedom for the Western political system, and Russian desire for the global domination of communism there does stand a kind of collective security. Without debating whether the USSR wants to continue to expand westward, or intends to do so, or whether the NATO States would ever fight except in self-defence, the fact is that direct war between them has been avoided so far by their actions and not by any idealistic views or deference to each other's beliefs.<sup>24</sup> That avoidance of war has been due to respect for international law would be to give undue weight to the institutions in which the States argue such issues and cases. To say that no respect at all is due to international law - and justice of cause - would be to misunderstand the progress which is being made.

The situation is not free from anomalies. Arms races and arms research competition continue, and proxy wars have not been eliminated even if Cuba is withdrawing troops from Africa. Whatever effect international law has had in the prevention of wars, its effect on the place of war is different. Defence expenditures by States make it obvious that most believe they must be prepared for war as though war will continue as the final arbiter in their policies for offence or defence, or that military strength will enable them to avoid war. War may cost too much, but even without a war policy, results may still depend on forces in being. But any theory that if ends are not attainable without war they would be attainable by war, has less acceptability today.

It would be easy to draw conclusions from an assumption that arms planning and acquisition is re-active, and that mirror-image reactions are what fashions arms inventories. Discussion of military balance may reinforce such an assumption. If that is really the position it must dispose of the idea that weapons are procured with only defensive use in mind, for the intention is to match what is seen by one side as aggressive intention by the other. But counter-measures are in themselves

forms of offensive tactics and require offensive weapons. Further, in the context of the US and the USSR, the defence of one ideology in the long term supposes the elimination of the other conflicting ideology where the basis of one is world domination. The weapons, however, may not be exclusively military.

If military domination cannot be attained without economic sacrifice, as experience indicates, it is not clear whether economic domination must accompany military domination or is the result of it.<sup>25</sup> Japan is now an example of one situation having formerly been an example of the other. Now it is clear that war and military domination are subject to international legal prohibitions, restraints and limitations, but it is not clear that economic domination is also so constrained. Beyond matters of expropriation and compensation, and the General Agreement on Tariffs and Trade (GATT), the actions of multi-national commercial activities are controlled, if at all, by domestic law.<sup>26</sup>

Questions of separate or interlocking military and economic domination will increasingly arise as the Russian economy prospers (if, with the help of Western technology, it does) as is happening in Japan. If private international law has application to inter-State trading economic conflict as opposed to economic co-operation between States will require an application of public law as in the EEC.

It has been thought that war is the price to be paid for stability, but it becomes increasingly obvious that peace is the investment essential for economic stability. Just as uninhibited sovereignty is no longer possible in matters of peace and war, so untrammelled economic sovereignty can be exercised no longer. A difficulty is that the real difference between war and peace has been emasculated by 'cold war' the effects of which can be seen in comparing the economic circumstances of the US and USSR with that of Japan. Peace can only be a state in which war is not envisaged, planned or financially provided for. But the comparison is not simple for Japan's military

expenditure is considerable even if representing only 1% of GNP.<sup>27</sup> There is the implication that the percentage of GNP which is allocated for warlike purposes however described may be a State's own index of its situation of real peace or cold war. To eliminate cold war as well as armed conflict by promoting real peace is the fundamental purpose of the UN.

To be prepared for war or defence requires one kind of analysis, but in any analysis of justness rather than expediency before war is initiated no aggressor's calculations are unbiased. This has always been so, but the UN Charter (Art 34) should afford a more unprejudiced examination if Art 33 has not already resolved the dispute. That is not to say just war theories are wholly discredited even if now largely theoretical. Although States may be committed by economic or political alignment to one side in a dispute there is increasing interest displayed by their peoples in the justness of causes as presented to viewers and readers.

Except when circumscribed by strict censorship, independent reporting, however, is likely to concentrate on the evils rather than on official justifications for war and its supposed necessities (and blessings), even if examples of heroism and chivalry will not be entirely unremarked. If there is truth in such a proposition, what should be obvious to all (rather than as formerly only to those in the battle area) are the costs of war, for modern communications systems provide many opportunities for considering conflicts world wide. People, as well as States, can now consider the advantages, disadvantages and the costs of war. Today it is no longer the fact of war or its operations which remain unscrutinized, and administrations may no longer be able to take their people into war with acclaim or resignation and without reference to the costs. Vietnam rather than Suez or Korea may be the precedent. Would nationalism and patriotism repeat the Falklands Islands scenario



for Gibraltar? But any hypothesis might fail through the introduction of religious fervour into the dispute.

Perhaps greater separation of the military from the social costs of government is apparent. Spiralling costs to maintain military credibility are matched by equally spiralling health, welfare and education costs. Any theory that expenditure on social services is pointless if the State does not maintain effective defences can have little account of time scale - other than some arbitrary guess - for wars are not usually scheduled in a State's short or long term outlook (although 'no war before...' may be). Whether a war is planned or is forced upon a State it is only during the course of the operations that the economics of defence become apparent in,

- (a) the ever increasing cost of the minimum technology believed to be required to mount an operation or present a credible defence tested against performance (including failed deterrence),
- (b) the costs involved in utilizing what has been provided through earlier defence budgets, the continuing costs for provision of more munitions, the other opportunity costs of war, and personal involvement affect the people more directly and obviously, and
- (c) the costs of rehabilitation to be seen in the progressive destruction and in what will be required to return a State to a peace footing including the war's addition to the national debt.<sup>78</sup>

Realisation that the most effective deterrent lies in collective security (and preferably in a regime of general and complete disarmament) may be awakened in time under necessities that demand greater control of expenditure, material and people than war affords. If such an awakening occurs it is likely to have been influenced more by international economic pressures than the exercise of national sovereignty in defending its customary embrace. Demography is also important if only in comparing India and China's fecundity with European and North American population projections. Even if war's military operations demand proportionately fewer hands its logistics may be starved for lack of production and maintenance effort.

Realisation of the improbability of obtaining advantage even from victory in war ought to lead to lack of support for it, at least whilst the international system offers hope for economic and physical survival. Experience points to the danger that if a collective economic and security system does not evolve to prevent war some limited and non-nuclear wars may continue. One possible belligerent might calculate a war would prove rewarding in the short term thus upsetting any hypothesis of the unrewarding nature of modern war. The fact that at the end of the Iraq-Iran war Iran was without any sizeable external debt and was earning £6 billions a year in oil revenue has to be put alongside the loss of life and treasure and the costs of reconstruction.

The role of international law and international institutions to document and enforce measures for restricting the ability of States to make war is clear, but in practical terms national sovereignty still inhibits definitive universal steps to the relegation of the place of war in the priorities of society. Evidence for this is clear. In a violent age the ability of States to maintain law and order is continuously under pressure but it is a measure of the degree of international co-operation that the UN has had relatively few successes in actually preventing wars. Successes in negotiating cease-fire agreements, truces and armistices have not removed the underlying causes of disputes (for example, Kashmir, Cyprus and Lebanon). In any case, the peaceful settlement of some disputes, or the post-war settlement of others, should not be taken for the acceptance of a principle or as evidence of a lower priority for war as a consequence in the face of the contrary evidence of post-1945 history of over 100 armed conflicts of varying degrees of intensity and carnage.

Illegitimate conduct in war seems to be an inevitable corollary of war and may arise directly from the place given to the violent resolution of breaches of domestic law and order. The treatment of prisoners of war in the Korean and Vietnam conflicts, the genocidal policies of Pol Pot,

the use of chemical weapons by Iraq against both Iraqi Kurds and in the war against Iran, the use of long-range missiles against cities and merchant shipping by both Iraq and Iran, and the 'death squads' of Nicaragua are examples of the obstinate nature of the problem of matching performance to the ideals of the Geneva Conventions.

From the evidence it would seem that even if the thought of war is more difficult to entertain the practical possibilities for it are unchanged, and the consequential conduct continues to reflect the nature of war for which a place in society continues to be accorded.

#### Summary.

The place of war in society is neither constant nor typical. It is not constant because at any time it depends on national resolve and ambition and on fluctuating attitudes within the UN. Resolve and ambition are also reflected in the capability and readiness of armed and economic forces. A belief in the use of force to attain foreign policy objectives, or in defence of sovereignty, is essential for war to have a high place in society. On the other hand the place of war is inconsistent depending as it does on the condition of stability in the international system which may offer no likelihood or necessity for the use of force in a foreseeable future. All these conditions are subject to frequent change and re-assessment.

The place of war is not typical because the requirements for the use of force differ as between States. More particularly today the requirements differ as between nuclear States, between a nuclear as opposed to a non-nuclear State, or between non-nuclear States.

Much of the formal international agreement on arms control since the second World War has related to nuclear weapons and nuclear testing. This has affected the place of nuclear war only slightly if at all, because the remaining nuclear arsenals only refer to deterrence at lower levels of armament not to the elimination of nuclear war. Nevertheless, both the WPO and NATO appear to hold the view that nuclear war would

result in some kind of stalemate without military decision. At the same time the Non-Proliferation Treaty is intended to make it more difficult for the non-nuclear States to acquire nuclear weapons. But the Non-Proliferation Treaty may be less than completely effective.

Means of communication related to geophysical factors have widened the areas of interdependence for many States, and modern weapon systems have increased the danger of global war for States with global interests.

Although events are stirring after years of unproductive effort in Mutual Balanced Force Reduction negotiations, little actual progress has yet been made in conventional arms control beyond some agreement relative in biological and certain inhumane weapons. Progress in arms technology has provided weapons of increasing killing-power and range. Expanding facilities for armament production on a worldwide scale has increased the availability of sophisticated weapons to all States that can pay for them in whatever manner is acceptable to suppliers, or that can form a relationship with a supplying State which facilitates military aid and assistance. That commercial and political situation has made it easier for States to contemplate the use of force either alone (eg. Iraq) or with the aid of proxy or mercenary forces provided by 'sponsor' States (eg. Angola and Ethiopia).

Changes in the place of war which might have resulted from stricter adherence to the UN Charter have, therefore, been discouraged by the increased incidence of weapons producing industries and availability of weapons.

In particular cases adherence to the Charter might have been regarded as limitation of sovereign right, whereas a general attitude evident since 1945 (or perhaps since the Korean War) that on occasion a limited war if desirable might also be possible has sometimes been seen as a demonstration of sovereign right (eg. the Falklands Islands, Chad and Afghanistan).

Thus if as seems probable the place of war is dictated by:

- (i) Intention,
- (ii) availability of means and favourability of time and circumstances,  
and
- (iii) national and global public opinion,

international law has not been a direct inhibiting factor on it, although the climate of opinion affecting intention at any time may be influenced by provisions of international law or by their absence. The correlative place of peace is also dictated by such reasons, as well as by international law since a balance in favour of negotiated settlements may be influenced by these means as well as being strengthened or counterbalanced by the availability of arms.

The ideals and influence of the UN and its international legal standing may direct leaders towards negotiation. At the same time, contemporary movement toward increased interference in the internal affairs of States - inevitable in the context of the UN - may prove counterproductive. General agreements such as the 1986 Stockholm Document are factors in international relations where the parties agree on the objectives of the agreement. Direct interference (as with South Africa), not necessarily military, is another factor especially dangerous where such interference is orchestrated outside the UN and with, perhaps, special reasons.

Indirectly influenced by a climate of law and order and of economic necessity the strategic aims of military forces in Europe have been changed from war-making to deterrence. Although related specifically to NATO/WPO this change has a global effect not limited to the US and the USSR.<sup>29</sup> Except in an atmosphere of desire for law and order, and the effect of such desire on public opinion, international law itself cannot be said to have been the real and direct reason for the changed strategy; that resulted from fear of nuclear war.

The future of international peace is now balanced between agreements as to how States should conduct their affairs and the direct

limits of national sovereignty in an international system with modern conditions and communications. There are lessons to be learned from current affairs in the USSR and East Europe. (I write in 1989).

Problems of control emphasize both the interdependence and the mutual oppositions of States in an international system without central direction or enforcement efficiency. Universal history is one of the ebb and flow of State power. This is unlikely to abate in the present international system. It is important that a climate of law and order should not be utilized to enable States to build-up power for regional or global domination.<sup>30</sup> This can be prevented by building-up a contrary power such as the UN not only as a source of law but also as an instrument of assurance. To be effective the steps toward such a conclusion are matters for international consensus not military power, but questions remain as to whether national, religious and racial interests can be subjugated to international interests.

International law will continue to have little regulatory effect on the place of war, however, until arms control embraces not only the elimination of weapon systems but also controls the research and development of weapons both existing and new, and the strict regulation of the trade in arms. Any wish to effect change by less draconian measures of nuclear and conventional arms control even were they formalized in international law and supervised by international institutions, is subject to objection that what is inferred is relative and not definitive, and, in consequence, will not fundamentally affect the place of war.

Just how General and Complete Disarmament is to come about is still problematic, but if a place for war in the international system is to be denied it seems likely that only the inability to wage war will prevent war. It is not certain that such an outcome is possible. In the interim, greater efforts to promote measures of collective security are indicated.

The dominance of science and engineering on the means of war will increasingly affect the place of war in the future. To offset the dangers inherent in unregulated scientific development collective political action has become important. There is a general trend now for technology, relatively uninhibited by law, to take the place of territory in the adversarial aims of States. As the same time, whilst satellite technology continues to progress and space satellites serve growing military and other purposes, anti-satellite weapons will continue to develop. Despite international law such weapons are likely to be stationed in space sooner or later unless collective action can persuade the super powers to oppose such a possibility. The effect of international law on developing technology is weak and it is as yet unclear how it will relate to future operations in space.

This thesis might be brought aptly to its conclusion by a quotation from a recent advertisement:

"The law exists to protect you, but can you afford to use it?".

The question is relevant: it expresses what is fundamental to the international system at present, where an ideal effect of international law would be the elimination of war. But States have consistently shown by their actions they do not rely exclusively on the provisions of international law in issues of peace and war. It is not an absence of international legal aid which is the culprit: it is a congenital belief that other States believe they cannot afford to rely on law and order alone to survive. The UN is a 'legal protection group' in which States are already subscribers, but they are not willing or able to make the organization reliable and in consequence they do not rely on it. Whether to make it reliable is impossible, or whether non-reliance is a result of deliberate choice or a symbol of independence is not entirely clear.

The upshot is that the social effort undermines the intended effect of international law on the place of war which continues to depend on the maintenance of a correct and worldwide balance between economic

and socio-political requirements. The task of nationalism and national sovereignty is to will the global means. The task of the member States of the UN in the absence of a political centre of power is to guide society to effect that worldwide balance.



Footnotes; Part I. Law and War.

1. Rapaport, A (1968): V.vi (b): pp 402,403.
2. The Lotus (PCIJ Series A No. 10). Briggs, HW (Ed) (1952):p 3 at 6. This principle is constantly breached in economic policies as well as in military policies.
3. "...the law of war must continue to be a legitimate object of the science of International Law. While a legal system can prohibit recourse to unlawful force, it cannot always prevent it; neither can it renounce physical compulsion for the purpose of enforcing the law". (Oppenheim,L (1965) : Note 4 on p 183).
4. Oppenheim, L. (1967)) : Note 2 on p 5.
5. Draft Declaration on Rights and Duties of States proposed by the UN International Law Commission. (UN doc.A1251: p 67 - Annex to UN General Assembly Res. 375(IV) of 6 Dec 1949).
6. In reality even Oppenheim's phrase 'Family of Nations' is rather too intimate. (Oppenheim L.(1967) : p 18).
7. See Neuchterlein, DE.(1979) : p 73 at 76.
8. Collins, JM (1983) : p 14.
9. Martin, L.(1982) : p 32.
10. Report on the Conference on contemporary problems of the law of armed conflicts (1971) : Preface by JM.Johnson p iv.
11. Shorter Oxford English Dictionary (3rd Ed. revised 1959).
12. This is a problem with regard to Declarations and Resolutions of the UN General Assembly.
13. Examples are: "The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilised States in their relations with one another". (Brierly, JL. (1963) : pl.  
"Law of Nations or International Law is the name for the body of customary rules which are considered legally binding by States in their intercourse with each other."  
(Oppenheim, L (1967) : pp 4,5).  
"International Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims". (The Lotus : PCIJ Series A No. 10).
14. Starke, JG. (1967) : p 3.
15. Dicey, AV. (1962) : p 1.

16. Jas Hatfield (1800) 27 St Trials, Pl281 at 1309, 1310 : "It is agreed by all jurists, and is established by the law of this and every other country, that it is the reason of man which makes him accountable for his actions".
17. Hart, HLA : (1961) : p 210.
18. Ibid : p 211.
19. Vitoria:De Indis III: Prof III.
20. Delon, JT and de Solages,B. cited by Midgley, EBF. (1975): pp 220, 221.
21. Vitoria, ibid.
22. Briggs, HW. (1952) : p 17.
23. Ibid : p 18.
24. Morgenthau, H: (Politics Among Nations: Knopf, 1948 pp 211, 230), quoted by Briggs, HW. (1952) : p 21.
25. Brierly, JL. (1942) : pp 4,5.
26. Briggs, HW (1952) : p 18.
27. Hirst, C. Quoted by Wright, Q (1966) : p 3.
28. For example, the Final Declaration of the Review Conference of 1985 of the Non-Proliferation Treaty of 1968 included as regards Art VI, "B(i). The Conference concluded that, since no agreements had been reached in the period under review on effective measures relating to... a Treaty on general and complete disarmament under strict and effective international control...the aspirations...still had not been met." (Survival XXVIII.1 (Jan/Feb 1986) : p 69 at 74, 75).
29. This is illustrated by the absence from the Non-Proliferation Treaty of 1968 of France, China, India, Pakistan, South Africa, Argentina, Brazil and Israel - all potential or actual nuclear States.
30. For example the Strategic Arms Limitation Treaty (SALT II) of 1979 remains an operating agreement between the US and the USSR but is not ratified by the US. ((1979) 18 ILM 1112).
31. Novello v Toogood (1823) 1 Barn & Cres 554.
32. Atkin. LJ in Chung Chi Cheung v The King (1939) AC 160.
33. West Rand Central Mining Co v The King (1905) 2KB391 (CA).
34. Municipality of St. John v Fraser-Bruce Overseas Corporation (1958) SCR 263.
35. Mortensen v Peters (1906) 14 SLT 227.
36. Post Office v Estuary Radio (1967) 1WLR 1396 (CA).
37. Mortensen v Peters (1906) 14 SLT 227.

On the subject generally see Fawcett, JES. (1963) : pp 35-74.

38. Chongwhi, K : (1987) : p 14 at 15.
39. Grotius (trans. Campbell, AC.) (1901) : p 417.
40. Brownlie, I (1967) : p 2.
41. Montgomery, Lord (1972) : pp 11 and 15.
42. Rapaport, A (1968) : I.1.2 : p 101.
43. Best, G. (1983) : pp 144, 145.
44. Fuller, JFC. (1972) ; pp 16-20.
45. (1980) UKTS 58; (1969) 8ILM 679.
46. For example, Geneva Convention I of 1949 : "Art 2...all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". This was extended in Protocol I of 1977 to include, "Art 1.4... armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes".
47. Verdross's definition - cited by de Lupis (1987) : fn 20 on p 6.
48. Geneva Protocol II of 1977, Art 1. (Roberts, A & Guelff, R (1982): p 449.
49. There is discussion on the declaration of 'war' in de Lupis (1987): pp 1-24, especially at 23 and 24. The effects referred to generally are related to international public law. Contract and other civil law matters are affected differently.
50. Brierly, JL. (1930) : p 311 at 314, 315 ; and (1942) : pp 263,264. But the 6th (Waldock 1963) edition in the light of the opinion of the League's Special Committee of Jurists on the 1923 Corfu Incident was not so definitely expressed. See also Briggs, HW (1952) : pp 961, 962.
51. Oppenheim, L. (1965) : pp 184, 185.
52. Brownlie, I. (1963) : p 88.
53. In this thesis 'war' and 'resort to war' and forceful measures such as occupation following threat of war are included in 'the use of force' and 'the place of war'.
54. Kelsen, H. (1949) : p 334.
55. Kawasaki Kisen Kabushiki : Kaisha of Kobe v Bentham Steamship Co. Ltd. (1939) 2KB 544 (CA).
56. Briggs, HW (1952) : p 976.
57. International Military Tribunal : Nuremberg Trial of Major War Criminals, Official Documents I. 208, 209.

58. Not only do interpretations differ as between the Roman and the Common Law systems in the West, but also between the Common Law as applied in various countries in which it has been adopted. Following the separation of the American States from Britain, and termination of the Appellate jurisdiction of the Privy Council in many of the former colonial States, the Common Law system is no longer homogenously applied.
59. Oppenheim, L : (1965) : p 26 fn 19.
60. UN Res 610 (VII) of 3 Dec 1952.
61. Taylor, T. (1971) : p 149.
62. Fundamental Rules of International Humanitarian Law Applicable to Armed Conflicts : Geneva 1978. The only purpose of this was 'to facilitate the dissemination of knowledge of international humanitarian law". (Roberts, A & Guelff, R (1982) : pp 465, 466).
63. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, concluded on 8 Aug 1945 between the US, the UK, France and Soviet Russia.
64. Report of the International Law Commission, 2nd Session, 1950 : UN. GAOR 5th Session, Supp. No. 12 (A/1316) : p 11.  
Nuremberg Tribunal Charter : Art 6(a). "Crimes against peace; planning, preparation, initiation, or waging a war of aggression, in violation of international treaties, agreements, or assurances, or  
  
participating in a common plan or conspiracy for the accomplishment of the foregoing.  
(Text in Oppenheim, L (1965) : p 578).
65. Treaty Providing for the Renunciation of War as an Instrument of National Policy of 1928. (UKTS 29/1929). Entered into force July 1929. Also known as the Kellogg-Briand Pact.
66. See Brownlie, I (1966) : p 454.
67. Non-Proliferation Treaty Review Conference 1985 : Final Declaration: (Survival XXXIII. 1 (Jan/Feb 1986): p 69 at 74 and 75)
68. Oppenheim, L. (1965): p 291.
69. Hague Convention III of 1907 (UKTS 9 (1910) Cd 5030) Art 1. "The Contracting Parties recognize that hostilities between them must not commence without a previous and unequivocal warning which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war". (Oppenheim, L. (1965) : p 293).
70. Draper, GIAD. in Tolstoy, N.(1986): p 545 at 563.
71. UN General Assembly Doc. A/Conf.95/19 of 27 Oct 1980.
72. Following the signing of the INF Treaty (Treaty between USA and USSR on Elimination of their Intermediate-range and Shorter-range

missiles) on 8 Dec 1987 negotiations are still pending between the Parties on nuclear limitation - not disarmament.

73. For Example, the London Allied Declaration of 1942 stated punishment for war crimes was a war aim of the Allies.
74. Art 6(b) of the Tribunal Charter refers to war crimes being violations of the laws of war and customs of war. The crimes included murder, ill-treatment or deportation of slave labour of civilians, murder or ill-treatment of prisoners of war, killing of hostages, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
75. Art 6(c) refers to crimes against humanity including murder, extermination, enslavement, deportation or other inhuman acts against any civilian population before or during the war. Persecution on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated. (Oppenheim, L.(1965): pp 578, 579).
76. The use of chemical weapons during the Iraq-Iran war was raised in the General Assembly without positive action following.
77. Enc. Brit. Year Book 1986 : p 291.
78. Oppenheim, L. (1965): p 136.
79. Ibid, fn 1 on p 144.
80. UN General Assembly Res. 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States which would impose a duty on States to refrain from acts of reprisal involving the use of force.
81. Oppenheim, L. (1965) : p 141.
82. Tribunal of the Permanent Court of Arbitration 1904. (JB.Scott: Hague Ct Rep 56).
83. Briggs, HW. (1952) : p 958 (citing Jessup,PC: A Modern Law of Nations: p 157 ff).
84. Taylor, T. (1971) : p 186.
85. Kissinger, H: (1982): p 730.
86. The Treaties of the EEC viz. European Coal and Steel Community of 1951 (261 UNTS 140); European Atomic Energy Community of 1957 (UKTS 15 (1979) Cmnd 7480); and European Economic Community of 1957 (UKTS 15 (1979) Cmnd 7480) may be strictly and legalistically interpreted for that is provided for in Art 164 of the EEC Treaty. The North Atlantic Treaty of 1949, on the other hand, may rest on a mutual co-operation basis.
87. Report of the Committee of Three on non-Military Co-operation in NATO, adopted by the North Atlantic Council, December 1956. (Text in NATO Facts and Figures, 11th Ed. 1989: para 9, p 384 at 385).
88. The UN General Assembly has criticised the US and the USSR for 'increasing reliance on bilateral arms control negotiations to the

detriment of the Conference on Disarmament's efforts', and "the often narrow nature of bilateral negotiations and their scant resemblance to genuine disarmament efforts". (ADIU Fact Sheet 1 April 1984).

89. Provision of forces for a national conflict (eg. the Falklands Islands) could weaken commitment to an alliance (eg. NATO).
90. The Report, which included also instances of alleged non-compliance with the Anti-Ballistic Missile Treaty of 1972 (11 ILM 784), is printed in Survival XXVIII.3 (May/June 1986): p 252 ff.
91. Binyon, M. (Times 5 June 1986): p 7.
92. Official Records of the Security Council, 3rd Year No 62: p 2. (See Oppenheim, L.(1965): p 166 note 4).
93. UN Year Book 1977: p 6.
94. Even if the doctrine of rebus sic stantibus is generally relevant there is a move toward making reservation on signature or ratification more difficult. See also the Vienna Convention on the Law of Treaties of 1969, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. (8 ILM 679 and 25 ILM 543).
95. Details of these Constitutional interdictions on war are in McMahon, MM. (1975): fn 24 on pp 131, 132.
96. Rapaport, A. (Ed):(1968) 1.1.27, p 121.
97. Ibid. V.VI(b), p 405.
98. Ibid. 1.1.21, p 117.
99. Kissinger, H. (1957) : p 176.
100. The UN General Assembly frequently worried about nuclear weapons. For example, Res 3479(XXX) 1975; 31/74(1976); 32/84A(1977); 33/68B(1978); 34/79(1979); 35/149(1980); 37/77(1982), and particularly 32/84B(1977) which urged States to stop developing mass destruction weapons. GA Res 2936(XXVII)(1972) expressly referred to use of nuclear weapons as under "permanent prohibition".
101. Manual of Military Law, Part III (1958):para.113.
102. Oppenheim, L. (1967) : p 299.
103. Hudson, MJH. (1986): p 37 at 40.
104. As to the technical term 'State of War' the Hague Convention III of 1907 prescribed that hostilities would commence only after "a reasoned declaration of war, or of an ultimatum with a conditional declaration of war". There is nothing to impose any specific period of delay between the issue of notification and the beginning of hostilities. (See Manual of Military Law, Part III (1958): p 7). Thereafter, or at a stated time and date, a State of War would exist between the relevant States. The Hague Convention of 1907 was not binding on non-signatories, but today in relation to either

a formal Declaration or the commencement of hostilities without notification Art 2 of the UN Charter would apply. Formal Declaration has been omitted on many occasions since 1907.

105. Report of the Conference on Contemporary problems of the Law of Armed Conflicts (1971); p 11.
106. Fuller, JFC. (1972): p 13.
107. Brierly, JL: (1963): p 172.
108. Fuller, JFC: (1972): p 313.
109. Ibid: p 314.
110. 'Cold war' for example - cloaking breaches of the UN Charter.
111. Although some modus vivendi seems to have been arrived at as regards Iraq-Iran (whether fortuitously or deliberately).
112. Morali, T (1985): p 20.
113. Point 8, Atlantic Charter, 13 Aug 1941.
114. Dickinson, GL. (1926): p 135.
115. Siebert, B de: Entente Diplomacy and the World: trans. by Siebert: London, Geo Allan & Unwim 1924: quoted by Dickinson, GL: (1926): pp 230-231.
116. Atlantic Charter.
117. Nussbaum, A: (1954): p 15.
118. Erickson, J. (1985): pp 647-656.
119. Ibid.
120. Nussbaum, A (1954): p 286.
121. De Visscher, C.(1968): pp 16, 17.
122. Enc. Brit. Year Book 1983: p 688.
123. Schwarzenberger, G. (1964):p 492.
124. Schwarzenberger points out that field diplomacy has weakened and Foreign Office bureaucracy at home has strengthened in the light of technical advance. (op cit p 129). This implies greater political participation in negotiations, and even in routine procedures, than formerly was the case. This is no guarantee of quality in negotiation. Coral Bell was of the opinion that "crisis diplomacy of the society of states is determined almost exclusively by the chief decision-makers of the powers", and that, "the 19th Century function of the career diplomat in this role has vanished". (Bell, C. (1979): p 157) at 166. The question arises: has this given greater emphasis on international law as an aspect - in crises?
125. "Power politics signifies a type of relation between states in which certain patterns of behaviour are predominant; armaments,

isolationism, power diplomacy, power economics, hegemony, imperialism, alliances, balance of power, and war".

(Swarzenberger, G. (1964): p 13.

126. Hart, HLA : (1961): p 212.
127. Today's realities are not perpetual realities. Midgley pointed out that "even if there were specific and unsurmountable hindrances to the political organization of the world as a whole in Old Testament terms, we cannot immediately conclude that the same difficulties will necessarily prevail at all times". (Midgley, EBF: (1981): p 241.
128. Russell, B. (1979): p 14.
129. Wright, Q. (1961): p 50.
130. The finances of the UN may afford an analogy. In 1988 the UN was owed £489 millions on regular account, and £440 millions on peacekeeping budget account. Equality of States as principle cannot imply equality of effort or burden sharing.
131. UN General Assembly Res. A9690 (XXIX) 6 Dec 1974.
132. Paskins, B. & Dockrill, M (1979): p 216.
133. Burchard, EM. (1936): p 91 at 94.
134. Such innovations include autonomous homing inventions; energy laser weapons; and there are duplex rounds for the 'simple' rifle as well as caseless rounds and flechettes.
135. General Treaty for the Renunciation of War as an Instrument of National Policy of 1928 (UKTS 29 (1929) Cmd 3410). (see also Brownlie, I(1983): p 114).
136. Oppenheim, L (1965): p 197.
137. Grosser, A (1980): p 329.
138. UN Charter, Art 1.6
139. UN Charter, Art 24.
140. UN Charter, Art 99.
141. Kissinger, H: (1982): p 672.
142. The Permanent Members are the USSR, the US, the UK, France and China. The duties and responsibilities are at Ch V, VI and VII of the UN Charter. (See Brownlie, I.(1967): p 32.
143. See p 77.
144. Urquhart, B. (1986): p 387 at 392.
145. Heiberg R. and Holst, JJ. (1986): p 399 at 405.
146. The question regarding China was as to which China should be a member of the UN: at the time some states recognized mainland China



others Formosa as representing the legitimate Chinese Government. For Israel recognition and admission to the UN established the legitimacy of the new State. The realities of the concept of State recognition may be illustrated by the situation of Taiwan (Formosa) which is not generally recognized by major States as the Chinese Government. Taiwan does not have membership of international institutions such as the UN and the International Monetary Fund (IMF). But States have to attach importance to Taiwan's position as the world's 14th largest trading nation. Now the Palestine Liberation Organization (PLO) has raised its claim to a State of Palestine and some 100 governments had recognized the claim by November 1988.

147. Or European-American, capitalist or colonial; socialist; and a middle course between them. But the position of the Soviet Union is regarded with some scepticism.
148. It is probable, however, that if such a policy is still followed by some it does not embrace support for the policy as a general proposition.
149. No international institution could exist for long without realistic acknowledgement of vital national interests. In the European Economic Community (EEC) the point will emerge again after experience of the Single European Act of 1986 (25 ILM 506).
150. At San Francisco it was decided that the UN should not be subject to a higher tribunal capable of reviewing its acts. (Doc.933 (English) IV/2/42(2) of 12 June 1945 - 13 UNICO 703-709 (1945).
151. In 1970 the US was a member of four Regional Defence Alliances and participated in a fifth; it had mutual defence treaties with 42 nations, and was a member of 53 international organizations. (Steele, R: Pax Americana:New York, 1977, quoted by Craig, GL (1988): p 37 at 42.43).
152. Arangio-Ruiz, G. (1979): p 155.
153. For example, in the Conditions of Admission of a State to Membership in the United Nations Case (1948) ICJ Rep.
154. Arangio-Ruiz, G: (1979); Gross,L.(1965); McWhinney, E (1967); Parry, C.(1965); Friedmann, W. (1964), and Sorensen, M. (1960).
155. Oppenheim, L: (1967): p 424.
156. Goldblat, J: (1983), pp 290, 291.
157. McDougal, MS et al. (1980):p 334. It was the authors' assumption that in some circumstances at least the resolutions could be considered as law.
158. Parry, C.(1965):p 113. (see also Arangio-Ruiz, op cit; p 6 note 10).
159. Kissinger, H.(1982): p 1170.
160. Antarctic Treaty of 1959 (402 UNTS 71). Opinions are mixed as to the continuing effectiveness of the Treaty.

161. Outer Space Treaty of 1967 (610 UNTS 205).
162. UN Doc. E/CN.4/L610 of 2 April 1962 notes that in the language of the documentation of the UN a Declaration is a formal and solemn instrument whilst a recommendation is less formal.
163. UN General Assembly Res. 2625 (XXV): General Part 3.
164. Heiberg, R. & Holst, JJ: (1986): p 416.
165. Arangio-Ruiz, G. (1979): p 32.
166. Ibid: fn 37 on p 32.
167. UN Conference on International Organization, Doc.873, Vol 13, pp 653, 654. (IV/2/37 of 9 June 1945).
168. Nicaragua v US (Jurisdiction) (1984) 24 ILM 59; and Nicaragua v US (Merits) (1986) 25 ILM 1023.
169. Comd 2901: Statement on the Defence Estimates 1966, Part 1, The Defence Review 1966. (See also Greenwood, D: (1973)).
170. Leventin, AV. (1957): p 51.
171. Hall, WE. (1917): sec. 31.
172. Hershey, AS. (1930): p 276. (See also McMahon, M: (1975): p 4).
173. Bonfils, H (J.F-Z) 1835-1897: Manuel de Droit Internationale Public in 1894 dealing with rules governing relations between sovereign and independent States.  
Fiore, P. (1837-1914): International Law Codified 1890 - English trans. 1914.
174. Fiore, P (1918): No. 1086. McMahon, M: (1975): p 87.
175. Phillipson, C. (1916): p 49, p 29. McMahon, M (1975) : pp 81, 82.
176. The Argentine Anti-War Pact. (Treaty of Non-Aggression and Conciliation of 1933).
177. Moller, A:(1931): pp 114-119 quoted by McMahon, M (1975): pp 85, 86.
178. Hershey, AS. (1930): p 278. McMahon, M. (1975): p 71.
179. Brierly, JL. (1936): p 124.
180. Brierly, JL. (1963): p 172.
181. Ibid: p 172.
182. Fenwick, CE. (1934): p 269. McMahon, M. (1975): p 73.
183. US Secretary of State, H.L. Stimson, in a 1932 Note to China and Japan stated that the US Government did not intend to recognize any treaty or agreement entered into between the governments of those States, or agents thereof, which might impair the treaty rights of the US or its citizens in China. This was followed by the League of

Nations Res. of 11 March 1932 on similar principles. (League of Nations Official Journal, SP Supp. No.101: pp 87, 88). The UK recognized Italy as in control of Ethiopia and the King of Italy as Emperor of Ethiopia (Haille Selassia v Cable & Wireless Ltd. (No.2) (1939) Ch82 (CA).

184. "Soviet and other Warsaw Pact Countries claimed the right to intervene in any country in Western Europe in which the socialist system was threatened". (See Northedge, FS. (1981): p 217).
185. Brownlie, I. (1963): p 108 fn 1.
186. Ibid: p 108.
187. Wright, Q. (1970): pp 270, 271. (See also Halberstam, M: (1984): p 502 fn 30.)
188. It may have been coincidental that Philip C. Jessup, Representative of the US at the UN, in advocating the admission of Israel to the UN suggested that a territory need not 'be exactly fixed by definite frontiers'. Israel seems to have continued to take that view. (Briggs, HW: (1952): p 71
189. Jones, JW. (1956): pp 149, 150.
190. Starke, JG. (1967): p 373.
191. Ibid: p 374. See also the Report of the International Law Commission, 15th Session, and Draft Act 44(2) in ILC Year Book (1963) ii.207.
192. Briggs, HW (1952): p 918.
193. (1974) ICJ Reps 3.
194. Ott, DH. (1987): p 202.

Footnotes: Part II. War: Justification or Abolition.

1. Brussels Convention on Conventional Arms Control approved by Ministers at North Atlantic Council Session, Dec 1986: para 7 of Communique: (NATO Review 34.6 (Dec 1986): pp 26 and 28.
2. The essential foodstuffs referred to are meat, fish, dairy products, cereals, fruit and vegetables. The total population referred to - two thousand millions. (Ferguson, J: (1982): pp 3,4.
3. Ibid: p 6.
4. Crowe Admiral WJ: (1986): pp 9,10.
5. Stalin, J: Marxism and the National Question: Moscow, 1913: p 56, quoted by Stewart Smith, DG. (1964): p 43.
6. Resolution of the 24th Congress of the Communist Party of the Soviet Union: Information Bulletin (Prague) 1971 No 7 - 8: p 215 - quoted by Greig, I.(1981): p 38.

7. Yepishev, General AA: The Powerful Weapon of the Party: Moscow, Voenizdat, 1973: p 14 - quoted by Greig, I.(1981): p 74.
8. Role and Organization of the Soviet Armed Forces: Command, Political and Engineering-Technical Personnel - quoted by Greig, I.(1981): pp 91,92.
9. Sidel'nikov: Peaceful Co-operation and the Security of the People: Red Star, 14 Aug 1973 - quoted by Greig, I (1981):p 61.
10. eg. Convention on the Prevention and Punishment of the Crime of Genocide ((1948) 78 UNTS 277).
11. eg. Treaty Providing for the Renunciation of War as an Instrument of National Policy ((1928) UKTS 29 (1929) Cmd 3410).
12. eg. Agreement on Limitation of Strategic Weapons ((1972) 11 ILM 791).
13. eg. International Status of South West Africa ((1950) ICJ Rep 128). Anglo Iranian Oil Case (1952) ICJ Rep 102. But Art 59 of the Statute of the ICJ ((1945) 1 UNTS xvi) limits the effects of its judgments to the parties to the case.
14. As regards international 'statutes' in a dissenting opinion Judge Tanaka stated, "... we are concerned ... with law-making multilateral treaties such as the Charter of the United Nations, the Constitution of the International Labour Organization ..." (South West Africa Cases (Second Phase) (1966) ICJ Rep 6). See Brownlie, I (Ed).(1971): p 457 at 461.
15. 'Disagreement' does not immediately signify an end to negotiations: 'failure to agree' might be more expressive assuming - even if without historical support - that peace rather than war is the norm for human society.
16. Argentina may have considered that geographical distance from Britain to the Falkland Islands was of overwhelming advantage. North Korea considered that the support of China and Russia at a time when the US seemed to have withdrawn interest from South Korea to be decisively advantageous.
17. UN Charter, Arts 3 and 4.
18. UN Charter, Art 2.4 and 2.7.
19. Of course, the powers afforded the judiciary are so afforded by an exercise of sovereignty.
20. UN Charter, Art 2.6
21. For example, the Financial Services Act 1986.
22. In his dissenting opinion on the South West Africa Cases, Judge Tanaka said, "In former days, practice, repetition and opinio juris sive necessitatis which are the ingredients of customary law might be combined together in a very long and slow process extending over centuries. In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organizations is greatly facilitated

and accelerated; the establishment of such a custom would require no more than one generation or even far less than that." (Brownlie, I.(1971):p 457 at 465). (see Note 14 supra).

23. The Effect of the Universal Declaration of Human Rights ((1948). UN General Assembly Res. 217A (III)), for example could mean rapid change, but that leads to its own dangers for change requires a gradual process if it is to be assimilated most advantageously.
24. Mexico for example.
25. Marwick, A.(1974): p 220.
26. Millman, R.(1965): p 20 fn 8 - quoted by Kennedy, P (1981): pp 75,75. Clarendon was Foreign Secretary.
27. Stewart Smith, DG.(1964): p 141.
28. Southern, RW. (1978): p 165.
29. Swinton, Lord:(1966): pp 244, 245.
30. One effect of the Second World War was the demise of the Caliphate the office of which was abolished by the Turkish Grand National Assembly in 1924. Since the Caliphate Conference of 1926 the Office has been in abeyance "until all the Islamic peoples could join in establishing a new Caliphate". With continuing and contemporary differences between Shia, Sunni and other sects there now remains no supreme authority to mediate between them. (See Enc. Brit. 1971 Ed. Vol IV: p 65d).
31. Erickson gives an example of failure in leadership, and perhaps, of intellectual honesty, in exchanges between Stalin and Roosevelt at Yalta in the negotiations regarding Russia's possible entry into the war against Japan. (Erickson, J.(1985): pp 672-674.)
32. This is not a matter of the ideological complexion of a state, but who in principle the 'beneficiaries' are to be.
33. Figueres, J: Some Economic Foundations of Human Rights: UN Doc. A/Conf.32/L.2 of 8 Feb 1968 - quoted by Brownlie, I.(1971): p 495 at 498.
34. The Argentine Courts in 1987 accepted 'superior orders' as exculpatory crimes of torture and murder during the 1970s and 1980s by government and military officials.
35. Criminal Justice (International Co-operation) Bill (1990).
36. James, RR. (Times, 27 Oct 1986: p 16).
37. Vallely, P: (Times, 29 Oct 1986): p 16).
38. MacCormick v L.A. (1953) SC 396. See Smith, TB. (1955): pp 622 ff.
39. Wade, HWR. (1980): p 11.
40. See Hamlyn, M.(Times, 16 Sep 1985) and leading article, 'The General's Dilemma: (Times, 14 Oct 1985: p 13.)  
The Suez conflict in 1956 illustrates secrecy in government and

difficulty in influencing governors. Levin reported that Lord Mountbatten said the Cabinet and Parliament were never kept informed of plans and decisions by Eden. Horne pointed out that there was an 'unnatural combination between Russia and America' against Britain and France, but James said that subsequently Dulles asked Selwyn Lloyd why the military action was not carried through to the downfall of Nasser. Later Nixon blamed the circumstances of a presidential campaign for a decision which would otherwise have been different, but, according to James, Eisenhower was consistent and 'did not believe the canal was worth a war and that Eden could not convince him that the British and French thought it was' (Levin, B. (Times 11 Nov 1980: p 12; Horne, A.:(1977): p 163; James,RR. (Times 27 Oct 1986: p 16: and Nixon, R. (1978; p 179.)

41. Kollek, T: (1978): p 173.
42. Long, EL. (1968) pp 22 - 33.
43. For instance the Roman procedural practice of issuing a repetito rerum and awaiting a reply.
44. They did not foresee that arms control measures would be treated rather as a curb to the arms race than in relation to the actual availability of weapons for war. The SALT Treaties are examples ((1972) 11 ILM 791 and (1979) 18 ILM 1112).
45. But no measure of arms control has been directed specifically at the safety of non-combatants.
46. Dr Kissinger pointed out that, "One man's limited war is another man's annihilation...from the European perspective the distinction was not as clear-cut as on the American side...a relatively few nuclear weapons could produce catastrophe and chaos difficult to distinguish from what only total war could do to America". (Kissinger, H.(1982): p 194 at 196).
47. Colonial wars did not figure in the later literature of just war theorists, or the expansionist wars of immigrants such as in the Americas. French and British wars in India followed earlier Muslim invasions. These and other examples in China, Mongolia, and South East Asia (and New Zealand) fell within what the incomer's domestic law allowed and was not necessarily then considered unjust.
48. "Just war tradition ... compares the evils of war with those of submission to oppressive governments". (Barton, JH. et al(1976): p 10.
49. So far, only the Nuremberg and Tokyo Tribunals have laboured in this field (sitting in judgment on the aggressors who had lost the war. But what if aggressors win?).
50. Katzenbach, N.(1966)
51. See Finnie, J.(1980): p 365, and the argument as to unjust laws at pp 362 ff.
52. Jenkins, I.(1980): p 204 and pp 202-206. Also Rawl, J.(1980): pp 350 ff on the duty to comply with an unjust law.
53. There is evidence of this in American experience in Vietnam.

54. Johnson, JF.(1981): p 166.
55. On 10 March 1987 the Times reported that "Despite repeated denials by Islamabad, the United States no longer has any doubt that Pakistan has reached the point where it could quickly make the bomb - if it has not done so already". (Times, 10 March 1987: p 7).
56. "...if....you sophisticate and poison the very sources of government, by urging subtle distinctions, and consequences odious to those who govern, from the unlimited and illimitable nature of supreme sovereignty, you will teach them by this means to call that sovereignty in question". (Emden, CS.(1939): p 221 at 222).
57. "In Christianity the conditions under which war might be justifiably undertaken were stringently laid down, and it is certain that war can never again take place within those conditions".  
(Ferguson, J.(1982): p 24).
58. Governments justify their actions even when flouting international - or just war - standards. Accordingly they maintain their right under Art 36 of the Statute of the ICJ ((1945) 1 UNTS xvi) to avoid the Court's jurisdiction.
59. Blix, H.(1978): p 32. Similarly, in counter-insurgency measures in Rhodesia where in 1973-1978 6,024 insurgents, 686 security forces, and 5,036 civilians were killed. (Marston, R, (1986): p 25 at 27 (Table 1) and fn 20 on p 31).
60. Pringle, P & Spigelman J.1981): p 18.
61. Hewlett, R & Duncan, F. (1972): p 183, quoted by Pringle, P & Spigelman, J.(1981): p 88.
62. Lilienthal, D: (1964): p 391.
63. Pringle & Spigelman (1981): p 95.
64. *Burmah Oils v Lord Advocate* (1965) AC 75.
65. *The Jesuits in the First World War*. According to French law as it was then all clerics were liable to military service, and the French Jesuits,...returned to the number of 855 and accepted combatant posts under the Colours. "It was customary, at any rate in Allied circles, to praise their patriotism, but in fact it was not altogether easy to see on what principles a dedicated religious should think it more important to fight in a war in which there was hardly a pretence that his side was more catholic than that of his opponents than it was to spread the gospel....534 exiled German Jesuits returned to fight on the German side..." (Hollis,C: (1968): p 247.)
66. See Tooke, JD.(1965): pp 6-10.
67. *Ibid*: p 8.
68. *Ibid*: p 10.
69. *Ibid*: p 91.

70. Ibid: p 11.
71. War is fought to impose a peace: peace is not sought to found a basis for war. Yet there is a continuing basis for ultimate victory in spite of temporary setbacks.
72. Non-intervention in the Iraq-Iran war was deliberate policy, but so was Russian and US intervention in 1956 over the Suez conflict.
73. Economic prognostication is notoriously fallible when undertaken by governments. Kissinger cited a US policy-making report of 1970 that, "Even at prevailing prices the US would be importing only 27% of its oil requirements by 1980 and that no substantial rise in the world price was foreseeable in the next decade". The reality by late 1970: "we were importing 50%...and the world price had increased more than tenfold". (Kissinger, H:(1982): p 856, quoting a US Cabinet Task Force on Import Control: The Oil Import Question, A Report on the Relationship of Oil Imports to the National Security: Feb 1970, pp 124, 125).
74. The International Law Commission's struggle over UN General Assembly Res. 177(II) illustrates this. (See Report of the ILC 37th Sess. GA Official Records 40th Sess. Supp.No.10 (A/40/10).
75. Gillick v West Norfolk Area Health Authority (1985) All ER 533 at 538, per Parker, LJ.
76. "We order that henceforth it is to have the force of law for the whole latin church". (The Code of Canon Law (1983): pxv.)
77. Computerization is the basis of modern weapons systems. It is neither offensive nor defensive, but it actuates either at the will of the user.
78. Goldblat, J.(1983): pp 2,3.
79. Convention on Prohibitions on the use of Certain Conventional Weapons which may be deemed Excessively Injurious or to have Indiscriminate Effects... ((1981) 19 ILM 1523).
80. Text in Goldblat, J. (1983): pp 242-248.
81. International Red Cross Report on its activities, Respect for International Humanitarian Law. (Delivered at Geneva by Mr. Alexander Hay, President of the International Committee of the Red Cross on 24 Oct 1986. (Document No. C 2, 1/2: pp 4,5).
82. Paul Ramsay for example.
83. Walzer, M.(1978): p 282.
84. Ibid: p 274.
85. Oudenaren, J van. (1986): p 24.
86. Ibid: p 26.
87. "...the war's logic is obscure, its huge cost and duration would appear to outweigh by far any tangible political gain for either party". (King, R. (1987): p 3.)



88. Halperin, MH. (1971): p 128.
89. Strategic Survey 1974: p 6, and Kissinger, H.(1979): p 1245.
90. Howard, M.(1983): p 17 at 18.
91. Kissinger, H.Address to a Seminar, Brussels, 13 Jan 1984 by the Centre of Strategic and International Studies of Georgetown University. (Times 18 Jan 1984: p 10).
92. The doctrine of rebus sic stantibus is now controversial. Vamvoukis thought that the Vienna Convention on the Law of Treaties "is of considerable evidential value as to the existence of a rule rebus sic stantibus, which has crystallised into law by an independent process". (Vamvoukis, A.(1985): p 150). The subject is discussed in Part I supra.
93. Leading Article, 'Debate on Deterrence' (Times 4 Dec 1986: p 17).
94. Yost, DS. (1984/5): p 14.
95. Hernu, C: La politique et la voluti de defense: in Politique Internationale No. 16 (Summer 1982) p 14 - quoted by Yost, DS. (1984/5): p 13.
96. Margine, I: L'avenir de la dissuasion: in Defense Nationale, (April 1978): p 28 - quoted by Yost, DS.(1984/5): p 15.
97. Martin, L:(1973): p 241.
98. International understandings regarding leakage of technological information and material from West to East are often honoured in the breach.
99. "Neutrality in a legal sense is the status evolved by international law and practice to regulate the rights and obligations of States which in time of war refrain from participating therein and maintain towards belligerents a legal attitude of impartiality". (Briggs, HW.(1952): p 1038. How far in practice the definition can include commerce has been debated for centuries.
100. Kemp, PE (Ed): Navy Records Society Vol 106, The Fisher Papers Vol II - quoted by Haggie.P.(1985): p 118 at 122.
101. Report of the European Security Study 1983: p 13.
102. Ibid: p 42.
103. Yost, DS. (1986): p 53 at 54.
104. There is a report that Egypt had deployed chemical warfare nerve gas weapons as a deterrent to an Israeli first use of nuclear weapons. (Beecher, W: Egypt Deploying Nerve Gas Weapons: (The Boston Globe, 6 June 1976: p1) - quoted by Vachon, GK.(1984): p 80.
105. Notley, CRS & Cohu, JJR.(1987): p 17.
106. Report of the European Security Study 1983, p 7.
107. Else, DH.(1986): p 51 at 52.

108. Owen R: (Times 21 April 1987: p 7.)
109. Kingston, Lt-Gen RC.(1984):p 14 at 17.
110. Memorandum of Understanding between the USA and the USSR regarding the Establishment of a Direct Communications Link, Geneva, 20 June 1963 (US Dept of State, Treaties and Other International Acts Series 5362).
111. See Hare, JE & Joynt, CB. (1982): Chapter 5.
112. US Catholic Bishops' Pastoral Letter (1983): para B2, p iii.
113. Church of England Working Party Report (1982): p 153.
114. Ibid: p 152.
115. Ibid: p 154.
116. Ibid: p 154.
117. Rogers, General BW.(1984): p 7.
118. Ibid: p 8.
119. Dahlitz, J.(1983): p 32.
120. Leading Article, 'The Francks Report', (Times 19 Jan 1983:p 13.)
121. Charter of the Nuremberg Military Tribunal, Art 6. (1945 Cmd 6668), Geneva Convention IV of 1949, Arts 34 and 147.(75 UNTS 32 (1931) Cmd 3930).  
Geneva Protocol I of 1977 (UK Misc 19 (1977) Cmd 6927).
122. Freedman, L. in Paret, P (Ed) (1986): p 773 - and referring to Ickle, F. (1973) and Panofsky, W (1974).
123. Reedman, L.(1986): p 774.
124. Roberts, A.(1983): pp 5,6.
125. Freedman, L.(1981): p 399.
126. Roberts, A.(1983): Col.1 on p 5.
127. Ibid: Col 1 on p 3.
128. Ibid: Col 1 on p 6.
129. For example, "Once India had exploded its first nuclear device, there could be no doubt - whatever international precautions were taken - that Pakistan would do its utmost to acquire at least an equivalent capability". (Times, (10 March 1987, leading article 'A proliferation of Rumour'.)
130. Roberts, A.(1983): pp 11 and 12.
131. Ibid: p 12, and Roberts, A & Guelff, R.(1982): p 462.
132. Is deterrence as a policy purely a matter of security, or can it be said to support the ideals of the UN? If international law of

itself does not deter States from armed conflict, making deterrent capability necessary, is deterrence then a manifestation of a desire to adhere to the provisions of the Charter?

133. Holst, JJ.(1983): p 32.
134. Chalfont, A.(Times, 21 Feb 1985) - quoting a report by General Scowcroft to President Reagan regarding the strategic defence initiative.
135. "The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations".
136. Cologero, F: (1982): p 19.
137. Cockett, R. (1982), where Neville Chamberlain's proclivities in that direction are discussed.
138. Roberts, A.(1987):p 7.
139. Ibid: p 9.
140. Ibid: p 12.
141. Strategic Survey 1986-1987: p 98.
142. Ibid: p 101.
143. Ibid: p 102.
144. Tooke, JD. (1965): p 140 - quoting Gilbey, T: From Between Community and Society: London, Longmans Green, 1953:p 13.
145. Lider, J.(1983): p 114.
146. Bajusc, W. (1986/7):p 4.
147. Renton, T. (Minister of State for Foreign & Commonwealth Affairs), (1986): p 6.
148. Thatcher, M.: Speech to the American Bar Association, (1985): p 2.
149. NATO Press Communique N-DPC-1(84)8 of 17 March 1984: Extract from para. 3.
150. Hockaday, A: (1985): p 6.
151. Leading Article, 'Debate on Deterrence': (Times 4 Dec 1986: p 17.)
152. Hague Rules of Aerial Warfare of 1923. (17 AJIL(1923).Supp245-250).
153. In the event what actually may happen may fall between weakness of military means due to weakness of political will to provide adequate means, or weakness in willingness to authorize use of adequate means. (See Kolko, G.(1986). Inability of the US to substitute military power for lack of political strength led to 'defeat' in Vietnam, (an example showing that possession of nuclear weapons has not of itself given a nuclear state any political dominance over a non-nuclear state).

Footnotes: Part III (A). Humanitarian Law.

1. The importance of confidence-building measures is generally recognized in current US-USSR negotiations.
2. General Assembly A/9690 (XXIX - 6 Dec 1974).
3. See for example Roberts, A & Guelff, R (1982).
4. Manual of Military Law, Pt III: (1958) para 3: pp 1,2.
5. The Clause is contained in the Preamble to the 1907 Hague Convention IV.
6. For example, reference is made in several Conventions to obligations on the part of States to take necessary steps as to implementation: Convention of 1949(I Arts 45 and 48); (II Arts 46 and 49); (III Art 128); (IV Art 145). Protocol of 1977 (I Art 80). De Lupis has a footnote "... it is argued by some writers that the Geneva Conventions of 1949 and the Protocols of 1977 are 'self-executing' and need only be ratified by some States". (De Lupis, ID: (1987): fn 215 p 163).
7. Judgment of the International Military Tribunal, Nuremberg 1946: Cmd 6964: pp 65 and 41 respectively.
8. Manual of Military Law (quoted in fn 4 above).
9. As, for example, Arts 35 and 36 of Geneva Protocol I of 1977.
10. Amnesty International Annual Report (1988). See also Beeston, N: Times, (5 Oct 1988: p 9.)
11. International Review of the Red Cross: 28.263 (Mch-Apr 1988):p 121.
12. SIPRI (Stockholm International Peace Research Institute) Year Book, 1981, p 450.
13. Several Popes interdicted the arbelist excluding its use against infidels, although the ground for interdiction was that the weapon was an atrocity. (Enc. Brit, 1971, Vol 6:p 815). The tenacity of weapons is such that a Lateran Council banned the arbelist in 1139 but it lived on and with the pike became the principal weapon of feudal armies,
14. UN General Assembly Document A/CONF.95/15 of 27 Oct 1980.
15. Iraq was not a signatory to the Geneva Protocol I of 1977.
16. Roberts, A & Guelff, R (1982): p 10.
17. US (Neer Claim) v Mexico: US-Mexico General Claims Commission 1926: Opinion of Commissioners (1927) 71. (Briggs, HW (1952): p 614).
18. For instance: Arts 12.2 and 17a of the German Federal Republic Basic Law of 1949; Art 27.1 of the American Convention on Human Rights of 1969; Arts 15.1 and 15.2 of the European Convention on Human Rights of 1953; and Art 31 of the European Social Charter of 1961.

19. Dunbar, NCH (1952): p 165.
20. Cap XIV, Appx. 22 - on liability to civil courts to justify actions.
21. Judgment: HMSO 1946 Cmd 6964: p 41 - on duties and liabilities placed on individuals - "only by punishing individuals who commit such crimes can the provisions of international law be enforced".
22. Lider, J: (1983): p 379.
23. There were several inhumane orders including the 1941 Barbarossa Jurisdiction Order relative to the occupation of captured territories by Germany in East Europe; the Dec 1941 Nacht und Nebel Order relating to occupied France; and the German refusal to recognize 'commandoes' although in uniform.
24. Howlett, Lt-Gen Sir G: (1985) :p 7 at pp 9,10.
25. Ellis, J: (1980): p 316.
26. Oppenheim, L(1965): p 576.
27. James, R: (Times 19 Aug 1977: p 9.)
28. The soldier is aware that such attitudes persist for he is directed in peacetime to the compensation clauses of the Manoeuvre Acts and the Wildlife and Countryside Acts in his training - but not necessarily to the Geneva Conventions.
29. Is bureaucratic inertia merely laissez aller or is it actual resistance?
30. The indiscriminate nature of the enforcement of international humanitarian law of war is illustrated by these cases where the adventitiousness of prosecution may not only depend on identification of crime as well as criminal but also on political expediency. In one case collective responsibility for Japanese war crimes was overlooked; in the other the execution of prisoners and hostages was similiary not prosecuted. Italians were not prosecuted for war crimes in Abyssinia. As to von Weichs see Mitcham, SE jr (1988): pp 219,220.
31. "Modern ground attack aircraft like the US-A16 can carry some 18,000 lbs of ordnance compared with the 2,000 lbs of their equivalents in the Second World War...some 700 sorties with freefall bombs did little damage to the Than Hoa bridge in North Vietnam, but one laser-guided bomb destroyed it". (Van der Veen, M.(1987): p 70 at 72). Again, "560 Lancaster bombers (3900 air crew) required for a raid on PEENEMUNDE with 1,800 tons of bombs in the Second World War should be compared with the 12 Tornado Aircraft (24 air crew) and 48 tons of explosive required today". (See Harding, P (1987): p 3 at 6). Military - not humanitarian - considerations dictate the technology.
32. Report of the NATO Defence Planning Committee, Dec 1988: Enhancing Alliance Collective Security.
33. American Justice Robert H.Jackson (speaking for the US opened the Nuremberg Trials) said, "While the law is first applied against

German aggressors, if it is to serve any useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment". (Taylor, T(1971): pp 11, 12). At the same time, each Allied State was expected to deal domestically with its own offenders.

34. Vagts, A(1959): p 397.
35. Vansittart, R.(1941).
36. The Nuremberg Tribunal judgments show the evidence.
37. See Erickson, J: (1985).
38. Art 91 of Geneva Protocol I of 1977.
39. Including Viscount Maughan, Lord Paget, Mr Justice Murphy, and Mr Justice Routledge as well as "three dissenting judges at the Tokyo Tribunal, a Dutchman, a Frenchman, and an Indian Judge". (Dunbar, NCH (1952): p 174.
40. General Assembly Res 95(I) of Dec 1946.
41. The quotations are from Dunbar (see Note. 39).
42. Oppenheim, L(1965): p 570.
43. The case of General Yamashita (War Crimes Trials 4 (1948) ppl-95) See Oppenheim, L(1965): p 572.
44. Some cases were pursued by the new Argentine government after the Falkland Islands conflict, including the court-martial of an admiral, a general, and a brigadier, but for their conduct of the military operations not for war crimes.
45. "Planning, preparation, initiation and waging a war of aggression". There is now a UN definition of aggression in place of the former retrospective interpretation - (GA Res A9690) - but it has attracted criticism.
46. The Fact-Finding Commissions referred to in Art 90 of Geneva Protocol I of 1977 lack the quality of urgency which a permanent organization could ensure.
47. Slip, J & Collier, TW in Paret, P (Ed) (1986): p 815 at 816.
48. Roberts, A & Guelff, R (1982): p 414. Observation of the Basic Rule, however, cannot now be separated from the effects of the weapons available for use, although by a sophisticated argument centres of population may be nuclear targets by reason of the military objectives deployed in them and despite reasonable views of lack of proportionality.
49. Art 6 of the Charter of the Nuremberg Military Tribunal, Arts 34 and 147 of Geneva Convention IV of 1949; and Art 75(2)(c) of Geneva Protocol I of 1977.
50. Hartigan, RS. (1982): Title.
51. Ibid: p 1.

52. "... the progress of science and technology has far outstripped the effectiveness of social contract through law". (Jenks, CW.(1969) p 92, quoting E.E.Paterson).
53. Hartigan, RS. (1982): p 5.
54. There is no international legal limitation on a State's right to keep or to abolish capital punishment. (See the International Covenant on Civil and Political Rights of 1966. (Brownlie, I (Ed) (1971): p 211 at 214.)
55. Augustine letter 47 ro Publica, in Fathers of the Church, trans Sister W.Parsons, SND: Vols 9-15: (Hartigan, RS (1982)p 27).
56. Paret, P (Ed) (1986): p 3.
57. Area and obliteration bombing methods used in the Second World War were not examined at the Nuremberg Tribunal despite the indiscriminate nature and the direct attack on civilian populations.
58. Geneva Convention Relative to the Treatment of Prisoners of War: 12 Aug 1949. (Convention III (75 UNTS 185).
59. Geneva Convention Relative to the Protection of Civilian Persons in Time of War: 12 Aug 1949. There are further provisions in Geneva Protocol I Additional to the Geneva Conventions of 12 Aug 1949, "Relating to the Protection of Victims of International Armed Conflicts" of 1977, and Protocol II, "Relating to etc. Victims of Non-International Armed Conflicts, of 1977.
60. For example, Art 24 of Geneva Convention IV of 1949.
61. Roberts, A & Guelff, R (Eds) (1982) : p 271.
62. The Indian sub-continent affords a particular view of the continuing refugee problem. The displacements of populations due to Partition were quickly followed by those from Kashmir, Tibet, large-scale movements of Biharis into East Pakistan and to India from Bangladesh.
63. See Rogers, T. (1987): p 416 and 418.
64. The list can be continued to include Sudanese, Ethiopians, Eritreans, Kurds, and ethnic Turks from Bulgaria amongst others.
65. Art 3. "Everyone has the right to life, liberty and security of person".
66. Art 29.2 adds"... solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.  
(See Brownlie, I. (ED) (1971): pp 105 at seq.)
67. Edwards, AJC (1979): p 31 at pp 32,33.
68. McDougal, MS. et al (Eds) (1980): p 3.
69. On 22 Aug 1988 the South African Government banned organized white opposition to military conscription on the ground that such

activity posed a threat to public safety. (See Hornsby, M: Times 23 Aug 1988: p 7).

70. C v UK (1984) 37 DR 142 (European Court of Human Rights).
71. The Geneva Protocols of 1977 expressly refer to 'armed conflicts' not war.
72. Lider, J: (1953): p 252.
73. Ibid: p 255.
74. Rapaport. A (1968): p 15, He also says, "...the nature of war is itself to a large extent determined by how men conceive of it" (p12).
75. For instance, the Permanent Court of Arbitration; The Hague Conventions for the Pacific Settlement of International Disputes (1899 and 1907); the ICJ. (See Brownlie, I (1966) Chapter XXVI).
76. For instance, Central and South American States.
77. See p 244 supra.
78. For example, the 1971 Zagreb Resolution of the Institute of International Law on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged. (See (1972)66AJIL 465-8). See also the Geneva Protocols I and II of 1977.
79. Jessup, P.(1954): p 99. Jessup preceded General Beaufre otherwise he might have contemplated the situation which the latter described: "Peace is far more stable than before the advent of the nuclear weapon. But peace has no longer the absolute character it had in the last century; today it is possible to hurl insults at a nation, burn down its embassy, arrest its ships, send hired assassins into its country or give almost open support to political parties without war breaking out; formerly this would have been unthinkable. Peace between contending nations has become 'war in peacetime' or cold war". (Beaufre, A: (1965): pp 29,30).

Footnotes: Part III (B) Arms Control.

1. Disarmament is a universally discussed issue acknowledged by Art VI of the Non-Proliferation Treaty of 1968. Progress is monitored by periodical reviews provided for in the Treaty.
2. Altenburg, Gen.W. (1989): p 9 at 11. Both NATO and the WPO are parties to negotiations for a ban on chemical weapons proceeding at Geneva.
3. The US air raid on Libya (1986) was by more than 100 combat and support aircraft. When the B2 comes into service only 3 or 4 will be sufficient for the same task. ("with greater tactical surprise and vastly less loss of life".) (Ropelowski, RR 1989 p 14).
4. Lider, J (1977): p 321.



5. Luttwak and Dougherty have exhaustive definitions of arms control. (Luttwak, E(1972): Dougherty, JE(1973). Bertram includes limitation of mission in his definition. (Bertram, C: (1978)).
6. A Communique issued simultaneously in Washington and Peking 17 August 1972 indicated that the US would limit and gradually reduce weapon deliveries to the Taipei Government. "The Taipei Government dismissed as null and void any agreement involving the rights and interests of the Government and People of the Republic of China reached between the US and the Chinese Communist regime". (Times 18 August 1982: p 22). But there is no bar in arms control concepts preventing two States agreeing on their actions regarding a third State.
7. RUSI News Brief 8.8 (August 1988): p 62.
8. Vuono, CE (1989): p 61.
9. It was an earlier rule of international law that in the absence of any express undertaking to the contrary no State was obliged to submit its disputes with other States to arbitration or judicial determination.
10. Covenant of the League of Nations, Art 8 and 8(6). (225 CTS 195).
11. UN Charter, Art 26.
12. Joint Statement by the US and the USSR of agreed principles for disarmament negotiations - Exchange of Letters 1961. (Goldblat J: (1983) :pp 139-141).
13. O'Connell. DP (1975): p 13.
14. Ibid: p 16.
15. League of Nations Conference for the Reduction and Elimination of Armaments, 1932.
16. Falk, RA: (1968): p 64.
17. Kissinger, H. (1979): p 753.
18. Pipes, R (1984): p 121.
19. In the INF Treaty (Treaty between US and USSR on Elimination of their intermediate-range and shorter-range missiles, 8 Dec 1987) 'elimination' means 'dismantling and destruction' of missiles and launchers.
20. The example of Greece is relevant. "The military like to acquire the latest state-of-the-art systems, but it seems that too many new systems are introduced at once while old equipment which is still operational is sold or left unused. Former high ranking officers argue that old equipment still has a role in the battlefield and quality is not a replacement for quantity". (RUSI News Brief 8.11 (Nov 1988): p 87).
21. Table 4.2 on p 100 of Goldblat, J(1983) lists instances from 1975 to 1981 since when established instances of use by Iraq have been reported. (see Cordesman, AH(1989): pp 54 ff and also UN Documents

- S/19823; S/20060; S/20063 and S/20134 (all of 1988) reporting on investigations into allegations of the use of chemical weapons in the Iraq-Iran war).
22. Farley, P. (formerly Deputy Director, US Arms Control and Disarmament Agency): (quoted in RUSI News Brief 7.11 (Nov 1987) p 5).
  23. Nitze, P. (1988): p 5.
  24. Evans, M: (Times 19 Nov 1987: p 14.)
  25. Carver, M: Conventional Warfare in the Nuclear Age: in Paret, P (Ed): (1986): p 813.
  26. In peace neutrality (as in Finland and Sweden) allays citizens' fears: in war it must be defended. Will the same apply to 'nuclear free zones'?
  27. Quester, C. (1977): p 208.
  28. Military power is discussed in Sherr, J(1987).
  29. Altenburg, Gen W (1987): p 1 at 2.
  30. Neville Jones, P (1987): p 1 at 3.
  31. The question of non-use of nuclear weapons cannot be argued from the Korean and Vietnam conflicts alone. The real question is of reaction when the conflict is directly between two nuclear States.
  32. The ABM Treaty has not been ratified by the US.
  33. As regards defence and space negotiations in progress between the US and the USSR Paul Nitze said that, "the primary difficulty derives from differing interpretations of the agreed but ambiguous phrase from the Washington Summit Statement that, during a specified period, the sides will 'observe the ABM Treaty, as signed in 1972, while conducting their research, development, and testing as required, which are permitted by the ABM Treaty . The Soviets, of course, interpret this phrase as placing much stricter limits on development and testing of space based ABM systems and components than we do". (Nitze, P (1988): p 1 at 3).
  34. Speeches Cobden 12 June 1849 quoted by Vagts, A (1959): p 160.
  35. Ibid: p 390.
  36. A Leander class frigate cost about £4m in the early 1960s: now it costs over £50m as a result of inflation, improved performance and complexity. The Falklands conflict demonstrated that relatively minor cost-cutting, eg aluminium instead of steel, and lack of attention to the covering of electric wiring, may as easily wreck the £50m as the £4m vessel.
  37. The UK Dept of Defence reduced "the number of our United Kingdom based civilian employees by 53,000...the money saved here... allowing us to increase our equipment spend". The dismissed employees could become charges on unemployment funds - a civil social vote of a different Department. (See Cooper, Sir F (1983);

p 3 at 6.) But this may be too simple unless there was a lasting obligation on the Defence Department to employ the staff to pensionable age.

38. Dickinson, A.Lowe (1926): p 5.
39. Nitze, P (1988) p 1 at 5.
40. Leading Article: Army Quarterly 118.2 (April 1988): p 216.
41. Cordesman, AH (1988): p 27 at 30.
42. Williams, ES (1988): p 35 at 43.
43. Ibid: p 41.
44. Barnett, C (1986): p 37.
45. Martin, L (1982): p 8 at 17.
46. Times, (23 Jan 1982: p 6.) It must be pointed out that all comment on linkage is not favourable. See Strategic Survey 1981-82, p 120, "after all, neither party is likely to conclude an agreement unfavourable to its military interests for the sake of outside bonuses". Another aspect, "Deliberate efforts to establish links between specific negotiations for the limitation and reduction of arms and the general international behaviour of one's opponents are inconsistent with our notion of common security", and the uncompromising verdict of the Independent Commission on Disarmament and Security Issues under the chairmanship of Olaf Palme was that, "The Commission considers the notion of political linkage an unsound principle which should be abandoned". (Common Security (1982: p 140). Lord Carrington, on the other hand, was of the opinion that, "The West will make a major mistake if it reduces East-West diplomacy to nothing but nuclear accountancy". (Carrington, Lord (1983): p 146.
47. As with Dr Kissinger's fears regarding conversations between Pres. Nixon and Secretary Brezhnev so during the Casablanca Conference in 1944 when the US and British Chiefs of Staff were finding agreement on the priority of operations as between Germany and Japan difficult. Dill pointed out to Brooke that "if the Combined Chiefs of Staff approached President and Prime Minister without agreement, the two political leaders would start resolving the strategic dilemma themselves, with what outcome none could foresee. It was a telling argument". (Fraser, D (1982): p 322).
48. Times, (20 Sep 1982: p 5.)
49. "...we cannot ignore the continued growth of Warsaw Pact...chemical capabilities...In the absence of an agreement on a verifiable global ban on chemical weapons, NATO must maintain a modern retaliatory capability: it would be foolish to do otherwise". Galvin, Gen. JR (1988): p 5 at 9.
50. In the event there was a coincidence in time between the announcement of the USSR withdrawal of forces from Afghanistan and the signing of the INF Treaty. Was this a US condition? On the other hand: "Moscow... continues to disparage the Western concept of 'linkage' whereby progress in arms control negotiations is

conditioned upon certain changes in Soviet international and domestic behaviour. Yet, the Soviet leadership appears to realize that, given Western domestic politics, at least some degree of linkage is a matter of objective reality, and cannot therefore be ignored. Moscow is also clearly interested in some linkage of its own, in so far as it has been voicing hopes that arms-control accords would lead to better political relations. In fact...the standard Soviet position is that, in general, East-west relations and arms-control are interrelated, and that progress in one area leads to progress in the other". (Rivkin, DB (1987): p 483 at 486).

51. Statement by the Deputy Permanent Representative of the UK Mission to the UN (John Birch) at the International Conference on the Relationship between Disarmament and Development, New York, 28 Aug 1987. (Arms Control and Disarmament Quarterly Review No. 7 (Oct 1987) p 23 at 29).
52. UN Convention of 1981.
53. Treaty on the Prohibition of emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof, 1971. (UKTS 13 (1973) Cmnd 5266). Treaty on the principles governing the activities of states in the exploration and use of Outer Space, including the moon and other Celestial Bodies, 1967. (6 ILM 386). Antarctic Treaty, 1961. (402 UNTS 71).
54. NSC 162/2 - Basic National Security Policy, 10 Oct 1953 (see Carver, M (1986): p 779 at 782).
55. A comment about the US in Vietnam: "... the American strategy was based on the philosophy of limited war, devised and imposed by civilian ideologists, who had intruded into the field of military strategy when the advent of nuclear weapons made war too dangerous in military hands alone". (Jackson, W (1989: p 36). (Tallyrand's ghost walking?).
56. Liddell Hart, B: quoted by Carver, M (1986): p 785.
57. Slessor, J: (1954): p 343 at 347.
58. At signature of Protocol I the US stated, "It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons". Similarly reservations by the UK include the understanding, "(i) the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons". (Roberts A & Guelff, R (eds) (1982): p 462.)
59. Best, G (1983): p 389.
60. Geneva Protocol I of 1977, Part III.
61. Sec-Gen Worner of NATO said, "The Alliance must equally maintain a strong defensive posture. That posture rests crucially on the role of nuclear weapons, and it is the role of nuclear weapons that lies at the heart of the strategic dilemma which has taxed the Alliance from almost its earliest days". (Worner, M (1989): p 3 at 8).

62. See Ball, D (1983): p 40 and fn 18 on p 46 (in which he quotes Rosenberg, DA: The Origins of Overkill, Nuclear Weapons and American Strategy: Manuscript for International Security VII.4 (1983): Note 30 p 21).
63. A list of Targeting Categories from the US Department of Defense in March 1980 is at p 14 of Green, O. et al (1985).
64. Concern about surprise is an important aspect of discussions between the US and the USSR (NATO and WPO), and the subject is included in Conventional Stability Talks.
65. It was surprising also in view of GA Res 2603 (XXIV) which interpreted the Protocol as prohibiting the use in international armed conflicts of any chemical agents of warfare even if some earlier interpretations had been of a 'no first use' nature.
66. Binnendijk, H. (Director of Studies IISS): (Times 15 Nov 1988: p 14.)
67. See Bluth, C (1988): p 149.
68. Boeker, E: (1987): p 1 at 3.
69. In 1987 at the UN General Assembly Special Session on Disarmament 'no first use' declarations were made by:  
 The USSR. The Soviet Union declared that it will never use nuclear weapons against those states which renounce the production and acquisition of nuclear weapons and have no nuclear weapons on their territories. "We are ready to conclude special agreements to that effect with any such non-nuclear state..."  
 The US. "The United States will not use nuclear weapons against any non-nuclear state party to the Non-Proliferation Treaty or to any comparable internationally binding commitment not to acquire nuclear explosive devices, except in the case of an attack on the United States, its territories or armed forces, or its allies, by such a state allied to a nuclear-weapon state in carrying out or sustaining the attack." (Stephenson, M & Hearn, R (1983): pp 113, 114).
70. Luns, JMAH (1984): p 1 at 5.
71. Clausewitz, C von: trans. Graham, JJ (1940) Vol II p 134.
72. Dr. Michael Fox, Scientific Director of the Humane Society of the US, quoted in the Times: Patenting a brave new world on animal farm: (18 April 1987: p 1.)
73. Pringle, P and Arkin, W (1983): p 86.
74. Treaty between the US and USSR on Elimination of their intermediate-range and shorter-range missiles, 8 Dec 1987. The missiles affected by the Treaty are described in Arts II and III of the Treaty.
75. Gallie, WB (1978): p 139.
76. It has been said of the Pact, "nobly, but impracticably renouncing war as an instrument of Policy". (Techman, B: (1982): P 5 at 10).

77. The McCloy-Zorin Agreement 1961.
78. Jackson, RH (1971): p 348.
79. Roling, BVA (1971): p 229.
80. Genova, AC (1959) p 198 at 216.
81. Manual of Military Law (1958): p 321.
82. See Stachey, J (1962) and Noel Baker, P (1958)
83. Tate, M (1942)
84. Vagts, A (1969): pp 392, 393. citing Fuller, JFC: War and Western Civilization.
85. For instance, that seems the implication of Art VI of the NPT and of Art 26 of the UN Charter. The UN Special Session on Disarmament discussed both disarmament and specific arms limitation measures, eg. the current discussion on chemical weapons.
86. The point was made by the Minister of State Foreign and Commonwealth Office in a Speech on 29 July 1988. (Arms Control and Disarmament Quarterly No. 11 (Oct 1988)).
87. Howard, M: One small, perilous step: (Times, 26 Nov 1987: p 2.)
88. Differences of opinion in NATO as to some US-USSR arms control proposals are evidence of third party fears.
89. Treaty on the Non-Proliferation of Nuclear Weapons of 1968. (Goldblat, J (1983): p 156.
90. Stockholm International Peace Research Institute (1975): p 27.
91. Bull, H (1970): p 136.
92. Ibid.
93. That there has been no occasion on which the effectiveness of Security Council Resolution on Security Assurances to Non-Nuclear Weapon States (UN/S/RES/255 (1968)) fell to be tested is a matter for relief on the score of the efficacy of the Security Council in practice, as well as the continuing non-use of nuclear weapons since Japan's surrender.
94. Wright, Q (1965): p 1517.
95. Claude, I (1970): p 123 at 135.
96. Kolnai, (1938): p 417.
97. Bull, H (1970): p 147, quoting Noel Baker.
98. Aron, R (1966): p 150.
99. Kerhane, RO & Nye, JS (1973): p 158.
100. Buchan, A (1968): p 176.

101. Ibid: p 178.
102. Stockholm International Peace Research Institute (1975 No. 2): p18 .
103. De Madriaga, S (1929): p48 .
104. Howard, M: (1970): p 10.
105. Stockholm International Peace Research Institute (1975 No. 2): p 19. An example of this was observed at the 1988 British Army Equipment Exhibition. "There was even one company which were showing an electronic device for which they had yet to discover a definite use". (Tillotson, Maj-Gen. HM (1988): p 266 at 267).
106. Hine, P (1987): p 8.
107. Lothian, Lord (1972): p 12 at 13.
108. See p 318 re COCOM.
109. Bettez, DJ (1988): p 57.
110. See Arms Control and Disarmament Unit Quarterly Review 9 ((April 1988) p 17. This Third Session failed to produce a Final Document. Britain believed, "as did our Allies, that the purpose of the Session should to give fresh emphasis to negotiations on arms control and disarmament... Other Countries, primarily the Non-Aligned, took a more narrow approach. They wanted to focus attention especially on nuclear weapons". (Speech by Mrs. Chalker, Minister of State for Foreign & Commonwealth Affairs, at Liverpool, 4 March 1988.(Ibid p-17).
111. "In the past nations have been great because they have had land, overseas possessions, railroads, oil... Today it's technology". (Dr. S. Bruan, COCOM: quoted in Fisk, R: Times 8 Oct 1988: p 8).
112. Bull, H: (1970): p 146.
113. Claude, I (1970) quoting Rovere, RM (1955): p 74.
114. Carrington, Lord (1987): p 3 at 4.
115. Paradoxically, a problem in the USSR would be solved by transferring some armaments production capacity to consumer goods, whereas reducing armament production entails problems for alternative employment and export trade for some States.
116. It is clear that technological research and development in the future might incidentally have military application whatever system of verification and surveillance of arms production is brought to bear.
117. Although public opinion and domestic opposition to war may be selective, as in the cases of Vietnam in the US and Algeria in France, they should not be disregarded. In both conflicts the 'querrillas' could have been defeated militarily but, nevertheless, they won politically. It is not possible to say whether public opposition to the Russian involvement in Afghanistan was an added factor to the economic burden on the USSR caused by the invasions, or if there is a parallel in Ireland.

118. Kampleman, M: (1988): p 17 at 18.
119. Ibid: p 21.
120. Heseltine, M: *Leading from strength*(Times, 13 Oct 1988: p 16.)
121. A Comprehensive Concept of Arms Control and Disarmament: Adopted by Heads of State and Governments at the meeting of the North Atlantic Council in Brussels on 29 and 30 May 1989. (NATO Review 37.3 (June 1989) pp 22 et seq).
122. Declaration of the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Brussels on 29 and 30 May 1989 (Ibid: p 30).
123. An idea of the proliferation of sources of arms supply can be gathered from the aggressive and competitive marketing conducted by governments as well as by manufacturers. One aspect, arms exhibitions, is demonstrated in many States (including some as unexpected as Gabon at Libreville in March 1989)), and a wide variety of items for sale from aircraft to small arms ammunition are displayed and as many as 700 manufacturers may exhibit (as at Ankara IDEA 89 Exhibition in June 1989). Already Iran's large armaments industry exhibits a range from rockets, mortars, landmines to communications gear. Air shows, like Farnborough and Paris are massive (over 600 French exhibitors at Paris in 1989). Britain in addition to Farnborough holds an Arms and Equipment Exhibition (in 1988 it covered 8<sup>1</sup>/<sub>2</sub> acres).  
 In a time of shrinking defence budgets such exhibitions present only a surface view of the armaments industries the efforts of which, when affected by arms control or defence limitation agreements, are redoubled to seek increased sales in export trade in compensation for declining home sales.
124. On the the other hand, a British "arms deal worth at least £7 billion" with Saudi Arabia received general approbation in the British Press (Evans, M:Times 9 July 1988: p 1.)
125. Embargoes placed on arms transfers by the UN are more by way of punishment for unacceptable behaviour on the part of the embargoed State than intended to restrain trade as such.
126. Although Japan manufactures just over 80% of the arms and equipment of its Self-Defence Forces (which is said to be defensive armament because it does not include amphibious forces or long-range bomber aircraft and missiles) it is limited as to exports by the Constitution. Exports contain certain specialized items rather than arms as such.
127. When the place of war has been paramount in a nation's policies and the supply of munitions vital "the law governing the manufacture of munitions served ultimately as a vehicle for extending state control over the economy as a whole". (Pearton, M (1982): p 158.) There is no international law to prevent this transformation and it follows that the economic place of war theoretically is not subject to international law.
128. Evans, C (1986): p 99 at 104. The importance of Brazil's arms industry is seen in the fact that the Engesa Company "is now the



largest manufacturer outside the Soviet bloc producing almost half of the world's (wheeled) armoured fighting vehicles".  
(Orgkiewicz, R (1979): p 259.

129. This proliferation is discussed in Strategic Survey 1988/89: pp 14-25.
130. The 1974 London Nuclear Suppliers Group and the Missile Technology Control Regime (1987) are other organizations of control or restraint.
131. Quoted by Blackwill, RD (1988): p 429.
132. See page 318.
133. Walker, C (Times 6 Sep 1982.)
134. Many States including the US, USSR, UK, FRG, Sweden and Italy have domestic arms trade legislation. For example, US: The International Security Assistance and Arms Control Act 1970; UK: Export of Goods (Control) Order 1987.
135. For example, Iran-Iraq by Security Council Res. 598.
136. Despite moral strictures, commercial claims seem to influence a growing import business in Britain in toxic waste disposal.
137. The amalgamation of the Foreign and Consular Services of the UK is an example of reality.
138. Fisk, R: (Times (15 Oct 1988): p 9.)
139. Evans, M: (Times (30 Jan 1988): p 5), and RUSI News Brief (April 1988): p 30.
140. See fn 124.
141. For example, Security Council Res. of 4 Nov 1978, on arms embargo on South Africa.
142. See Table 2, Cordesman. AH (1987): pp 24, 25.
143. Paskins, B and Dockrill, M (1979): p 106.
144. Cordesman, AH (1987): p 18 and Tables on pp 34 and 35.
145. Referred to in the League of Nations Statistical Year Books On Trade in Arms and Ammunition 1925-1938.
146. UN General Assembly Final Document of the Tenth Special Session (S.10/2 of 30 June 1978).
147. Pierre, AJ (1982): p 310.
148. It would be wrong to overlook the progress made regarding on-site inspection and the INF Treaty even if the problem, difficult as it may prove in that connection, is in respect of abolition - and non-manufacture - of an item, whereas there is, as yet, no suggestion of the abolition of a conventional weapon other than chemical. On-site counting at a factory where production is

continuing and production for sales and transfers remain in progress will offer difficulties which will not be met with in INF inspections. An agreed operational and stockpiling ceiling agreed for the national force will not ease the difficulty.

149. It may not be clear whether India seeks arms to maintain leadership or to acquire it in South East Asia.

Footnotes: Part IV. Conclusions.

1. Respectively 500 UNTS 95: 596 UNTS 261: and 8 ILM 679.
2. General Assembly Resolution 260 (III) (UN Document A/810 (1948)).
3. At least the doctrine seems to have been overtaken by the Statute Law Revision (Scotland) Acts 1906 and 1964. See Philip, R. (1931).
4. It is the laws affecting conduct in war that may be regarded as immutable, but customs related to uti possidetis, for example, do appear to have changed.
5. The Single European Act 1987 amending the Treaty of Rome makes a legal basis for foreign policy co-operation between member States of the EEC, and has eroded further the physical, technical and fiscal barriers within the Community including fiscal provisions imposing taxation. This was a voluntary surrender of sovereignty, but ideas of recovering the items of sovereignty thus surrendered will be dictated more by economics and politics than rebus sic stantibus.
6. UN Charter, Art 2.6.
7. Ibid, Art 103.
8. Not all analysts perceive Russian determination to forswear universal communism. (See Leading Article, "Beyond Containment": Times 2 Oct 1989:p 17).
9. Sovereignty is exercised on behalf of the nationals of a State whether with or without their knowledge or their consent. This may induce a laissez-faire attitude to the UN by individuals generally who forget, or do not realize, that the Charter is in their names and by their resolution (i.e. "We the peoples of the United Nations Determined...").
10. But it is necessary to look beyond a state of peace to attain order in international society. "Order implies a measure of predictability of cultural, social, economic and political relations making it possible for members of a society to plan their future". (Wright, Q (1961) p 7).
11. Enc. Brit (1971) 17.497.
12. Claude, Inis L: (1970) p 125 at 135.
13. Ibid: p 123.

14. The facts are unclear despite (or because of) the growing statistical evidence which opinion polls purport to show; but the reliability of statistical sampling depends not only on sampling techniques but also on the questions asked, in what circumstances, and when.
15. Morgenthau, H. (1950) pp 32-35.
16. Blainey, G: (1973) p 66.
17. Dickenson, EH. (1933) p 175.
18. Some humanitarian feelings have a place in restricting national arsenals and in the Conventions, but the place of war is determined by the total war fighting capability and its manufacturing base.
19. This may stem from a national and cultural philosophy, and national 'might' can be economic as well as military.
20. On one view, of course, concepts of the 'just' and the 'unjust' do not represent any objective fact of nature but are rather indicative of social convention. Protagoras, according to Plato, said, "whatever things are just and fine to each city, are just and fine for that city, so long as it thinks them so".
21. Oppenheim, L. (1965): p 179.
22. Joyce, JA: (1983) pp 81,82.
23. Of course, this is a continuing expression by member States of their sovereignty.
24. A question is whether NATO is solely a defensive military coalition accepting co-existence with an opposed political situation and intention. Or whether, as well as a defensive military effort an offensive political and propaganda effort should be expanded which might not contradict para.9 of the Harmel Report on the Future of the Alliance. Another question is whether the Alliance is concerned with a common enemy or with a common goal - denial or protection of universal communism. (For the Harmel Report see NATO Facts and Figures (1988) pp 402 et seq.)
25. The situation as between the USSR and the Eastern Bloc States is relevant if not easy to disentangle.
26. GATT is "An integrated set of bilateral trade agreements aimed at the abolition of quantitative trade restrictions and the reduction of tariff duties among the contracting parties". (Enc Brit (1971) 21. p 700.)
27. 1988 Expenditures were (in US dollars).  
     US. 260,268 million. (6.4% of GNP).  
     USSR. 320,800 million. (about 12 %of GNP).  
     Japan. 15,298 million. (1% of GNP).  
 (Military Balance 1989- 1990: pp 32, 208 and 210).
28. There might also be demands to be met for reparations, or on the other hand Marshall aid type of assistance might be offered.

29. "The sense that 1988 was a year in which the nations of the world may have set a new course was fed by the extraordinary change during the year from a world dominated by long-running conflicts to one in which settlement through negotiations became the norm...All around the globe belligerence gave way to compromise". (Strategic Survey 1988/1989: p 6).  
This should not be taken to mean all belligerence or that the norm is rigidly adhered to. Long-running disputes have their ebbs and flows and not only in India and Lebanon, and the 1988 settlement of Namibia was not the result of Res.435(1976) but of US and USSR co-operation.)
30. Global domination is costly and difficult in any case. As Paul Kennedy has pointed out, "...the sheer variety of military contingencies that a global superpower like the United States has to plan for - all of which, in their way, place differing demands upon the armed forces and the weaponry they are likely to employ". (Kennedy, P (1989) p 523).

## TABLE OF CASES

- Jas Hatfield (1800) 27 St Trials 1281
- Novello v Toogood (1823) 1 Barn & Cres 554
- West Rand Central Mining Co v The King (1905) 2KB 391 (CA)
- Mortensen v Peters (1906) 14 SLT 227
- British Coal Corporation v The King (1935) AC 500
- Chung Chi Cheong v The King (1939) AC 160
- Kawasaki Kisen Kabushiki of Kobe v Bangkok Steamship Co Ltd (1939) 2 KB 544 (CA)
- Haille Sellasie v Cable & Wireless Ltd (No 2) (1939) Ch 82 (CA)
- MacCormick v Lord Advocate (1953) SLT 235
- Municipality of St John v Fraser-Bruce Overseas Corporation (1958) SCR 263
- Burma Oils v Lord Advocate (1965) AC 75
- Post Office v Estuary Radio (1967) 1WLR 1396 (CA)
- Lynch v DPP for Northern Ireland (1975) AC 653
- Tudhope v Grubb (1983) SC CR 351
- Gillick v West Norfolk Area Health Authority (1985) ALLER 533
- Venezuelan Preference Case (1904) Tribunal of the Permanent Court of Arbitration
- The Lotus Case (1907) PCIJ Series A No 10
- US (Neer Claim) v Mexico (US-Mexico General Claims Commission 1926):  
Opinion of Commissioners 1927
- The Case of General Yamashita: War Crimes Trials (1948) 1
- International Status of South West Africa (1950) ICJ Rep 146
- Anglo Iranian Oil Co (1952) ICJ Rep 92
- Fisheries Jurisdiction Case (1974) ICJ Rep 3
- C v UK (1984) 37 DR 142 (European Court of Human Rights)
- Nicaragua v US (Jurisdiction) (1984) 24 ILM 59
- Nicaragua v US (Merits) (1986) 25 ILM 1023

## TABLE OF TREATIES, &amp;c.

- Treaty of Union (1707): (Halsbury's Statutes, 6.501).
- Rush-Bagot Treaty ((1817): 67 CTS 153).
- St Petersburg Declaration: ((1868) I AJIL Supp 95).
- Hague Convention on the Pacific Settlement of Disputes: ((1899) 187 CTS 410).
- Hague Declaration III concerning Expanding Bullets: ((1899) I AJIL Supp 155).
- Hague Conventions: ((1907) 2 AJIL (1908) Supp 90).
- Treaty of Versailles: ((1919) 225 CTS 188).
- Covenant of the League of Nations: ((1919) 225 CTS 195).
- Treaty of Washington: ((1922) 16 AJIL Supp 41).
- Hague Draft Rules of Aerial Warfare: ((1923) 17 AJIL (1923) Supp 12).
- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and Other Gases, and of Bacteriological Methods of Warfare: ((1925) UKTS 24 (1930) Cmd 3604).
- Geneva General Act for Pacific Settlement of Disputes: ((1928) UKTS 32 (1931) Cmd 3930).
- Treaty Providing for the Renunciation of War as an Instrument of National Policy: ((1928) UKTS 29 (1929) Cmd 3410). (Also referred to as the Pact of Paris, and as the Kellogg-Briand Pact).
- London Treaty for the Limitation and Reduction of Naval Armament: ((1930) 25 AJIL Supp 63).
- Montevideo Convention on the Rights and Duties of States: ((1933) USTS 881).
- United Nations Charter: ((1945) 1 UNTS xvi).
- Statute of the International Court of Justice: ((1945) 1 UNTS xvi).
- Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 Aug 1945: (39 AJIL (1945) Supp 258).
- Universal Declaration of Human Rights: ((1948) UN GA Res 217A (III)).
- Brussels Treaty: ((1948) 43 AJIL (1949) Supp 59).
- Charter of the Organization of American States: ((1948) 46 AJIL Supp 43). (Also called the Bogota Pact).
- Convention on the Prevention and Punishment of the Crime of Genocide: ((1948) 78 UNTS 277).

- North Atlantic Treaty: ((1949) 43 AJIL Supp 159).
- German Federal Republic Basic Law of 1949.
- Geneva Conventions: ((1949) 75 UNTS 31).
- European Convention on Human Rights: ((1950) UKTS 71 (1953) Cmd 8969).
- European Coal and Steel Community Treaty: ((1951) 261 UNTS 140).
- Convention Relating to the Status of Refugees: ((1951) 189 UNTS 150) (and subsequent Protocol: (1966)).
- US - Japan Security Treaty: ((1954) 48 AJIL (1954) 138).
- Treaty of Rome: ((1957) UKTS 15 (1959) Cmd 7480).
- Euratom Treaty: ((1957) UKTS 15 (1959) Cmd 7480).
- Antarctic Treaty: ((1959) 402 UNTS 71).
- European Social Charter: ((1961) UKTS 38 (1965) Cmd 2643).
- Vienna Convention on Diplomatic Relations: ((1961) 500 UNTS 95).
- Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water: ((1963) 480 UNTS 43).
- Vienna Convention on Consular Relations: ((1963) 596 UNTS 261).
- International Convention on Civil and Political Rights: ((1966) 6 ILM 368).
- Treaty for the Prohibition of Nuclear Weapons in Latin America: ((1967) 6 ILM 521).
- Outer Space Treaty: ((1967) 6 ILM 386).
- Treaty on the Non-Proliferation of Nuclear Weapons: ((1968) 7 ILM 809).
- Vienna Convention on the Law of Treaties: ((1969) 8 ILM 679).
- American Convention on Human Rights: ((1969) 9 ILM 673).
- Sea-Bed Treaty: ((1971) UKTS 13 (1973) Cmd 5266).
- Agreement between the USA and the USSR on Measures to Improve the Direct Communications Link: ((1971) Treaties and Other International Acts Series 7178 (1971)).
- Interim Agreement between the USA and the USSR regarding the Limitation of Strategic Offensive Arms (SALT I): ((1972) 11 ILM 791).
- Treaty between the USA and the USSR on the Limitation of Anti-Ballistic Missile Systems: ((1972) 11 ILM 784).
- Convention for the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons: ((1972) UKTS 11 (1976) Cmd 6397).

- Treaty between the USA and the USSR on the Limitation of Underground Nuclear Weapon Tests (Threshold Test Ban Treaty): ((1974) 13 ILM 906).
- Agreement amending the 1971 USA-USSR Agreement on Measures to Improve the US-Soviet Direct Communications Link: ((1975) Treaties and other International Acts Series 8059 US Dept. of State 1975).
- Helsinki Accords (Document on Confidence-Building Measures and Certain Aspects of Security and Disarmament, included in the Final Act of the Conference on Security and Co-operation in Europe: ((1975) 14 ILM 1292).
- Geneva Protocols to the Geneva Conventions of 1949: ((1977) US Misc 19 (1977) Cmd 6927).
- Red Cross Fundamental Rules 1978.
- Moon Treaty: ((1979) 18 ILM 1434).
- SALT II: ((1979) 18 ILM 1112).
- Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects: ((1981) 19 ILM 1523).
- Law of the Sea Convention: ((1982) 21 ILM 1261).
- Landa and Nkomati Accords between South Africa and Angola and Mozambique respectively: ((1984) 23 ILM 282 and 450).
- Anglo-Irish Agreement: ((1985) 24 ILM 1579).
- South Pacific Nuclear Free Zone Treaty: ((1985) 24 ILM 1442).
- Vienna Convention on the Law of Treaties Between States and International Organizations and Between International Organizations: ((1986) 25 ILM 543).
- Single European Act: ((1986) 25 ILM 506).
- Treaty between the USA and the USSR on Elimination of their Intermediate-range and Shorter-range Missiles: ((1987) 27 ILM 84).