

LEGAL REGULATION OF RESORT TO INTERNATIONAL  
COERCION: AGGRESSION AND SELF-DEFENSE IN  
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THE maintenance of public order—when public order is conceived in its minimal sense as community control and prevention of private violence—is commonly and appropriately regarded as the first indispensable function of any system of law.<sup>1</sup> The securing of a public order—understood in a broader sense as embracing the totality of a community's legally protected goal values and implementing institutions<sup>2</sup>—which seeks, beyond an effective community

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This article is the third in a series upon the law of war. The first article, *International Coercion and World Public Order: The General Principles of the Law of War*, appeared in 67 YALE L.J. 771 (1958), and the second, *The Initiation of Coercion: A Multi-Temporal Analysis*, in 52 AM. J. INT'L L. 241 (1958). The present article is concerned with the first of the major problems of the law of war.

1. Recognition of the primacy of this function in the international as in municipal arenas is widely reflected in the literature. See, e.g., Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS [hereinafter cited as HAGUE RECUEIL] 455 (1952); BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 230 (1958); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 17-18 (1943); STONE, *THE PROVINCE AND FUNCTION OF LAW* 454-55, 555, 559-60 (1950); Kelsen, *GENERAL THEORY OF LAW AND STATE* 21-22 (1954); cf. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 99 (Corbett transl. 1957). Studies on primitive and ancient systems indicate that such communities accorded similar priority to control of disruptive violence. See, e.g., HOEBEL, *THE LAW OF PRIMITIVE MAN* (1954); LLEWELLYN & HOEBEL, *THE CHEYENNE WAY* chs. 10-12 (1941); MAINE, *ANCIENT LAW* ch. 10 (Everyman's ed. 1954); 1 SIMPSON & STONE, *LAW AND SOCIETY* 66-89, 284-97 (1948). See also Aberle *et al.*, *The Functional Prerequisites of a Society*, 60 ETHICS 100, 103, 110 (1950).

2. For development of the reference assigned to a "system of public order," see McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959). See also Dession & Lasswell, *Public Order Under*

monopolization of force, the richest production and widest sharing of all values, is today also commonly projected as appropriate aspiration by most mature territorial polities. The intimate interdependence of these two conceptions of public order is obvious. Effective prevention and repression of private violence are necessary prerequisites to establishing appropriate institutions for the most rewarding pursuit of other values. Conversely, a full opportunity to pursue individual and community values through peaceful procedures, by lessening predispositions to coercion and violence, may be expected to further the continued maintenance of minimal order.

Conspicuous features of the world social process today include the increasing unity of demand among most of the peoples of the world for achievement in the international arena of public order, in its widest as well as in its narrowest sense, and the increasing awareness that efficient world institutions for the optimum creation and distribution of values depend upon the securing of minimum order. Subjecting the processes of coercion and violence among nation-states to effective community controls is thus the most fundamental contemporary problem for all who seek a world public order honoring, in deed as in rhetoric, human freedom. This problem is not of course peculiar to our age, although the implications of continued failure, given the existing weapons of catastrophic destruction, are now perhaps unique. It had its origin with the first conception of a community of states under a common law.<sup>3</sup> When emerging territorially-based polities first began to constitute an international arena, the problem became, as it remains, the central one in international law.

This basic problem of legal regulation of resort to international coercion may perhaps be most economically outlined by recalling in briefest summary the related, but analytically separable, processes of coercion and legal decision.<sup>4</sup> In an earlier article, we described the process of international coercion in terms of nation-states seeking the fulfillment of their value goals and applying to each other for that end coercion of fluctuating degree of intensity, by all available instruments of policy, under all the constantly changing conditions in the world arena. We sought to indicate that some degree of coercion is almost continuously observable in the ordinary processes of state interaction for values,<sup>5</sup> and perhaps in all human interaction, whether the processes

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*Law: The Role of the Advisor-Draftsman in the Formation of Code or Constitution*, 65 YALE L.J. 174, 185 (1955); Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFFALO L. REV. 22, 23-24 (1955).

3. See SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* ch. 2 (1954); VAN VOLLENHOVEN, *THE LAW OF PEACE* chs. 1-3 (1936); VAN VOLLENHOVEN, *THE THREE STAGES IN THE EVOLUTION OF THE LAW OF NATIONS* (1919); Van Vollenhoven, *Grotius and Geneva*, in 6 BIBLIOTHECA VISSERIANA 5 (1926); SMITH, *THE CRISIS IN THE LAW OF NATIONS* 8 (1947).

4. A recommended mode of inquiry into these processes is spelled out in some detail in the first article of this series. McDougal & Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771-817 (1958) [hereinafter cited as McDougal & Feliciano, *General Principles*].

5. Cf. ARON, *ON WAR* 8 (Anchor ed. 1959): "Relations between sovereign states may be more or less bellicose; they are never *essentially* or *ultimately* peaceful."

be confined within the boundaries of a single state or transcend state boundaries. In the course of this continuous process of coercion among states, as we also noted, contending participants make certain characteristic types of opposing claims about the lawfulness and unlawfulness of their respective exercises of coercion. The contraposed claims with which we are here more particularly concerned relate to the initiation of coercion. Generally, one participant asserts that it is lawful to employ highly intense coercion, or to accelerate the intensity of coercion previously exercised, against the opposing participant; and the opposing participant then maintains that such is unlawful initiation or acceleration of coercion and justifies defensive coercion. To these facts of initiative and response in coercion and these claims and counterclaims of lawfulness and unlawfulness, certain decision-makers, established by community perspectives as authoritative, respond by determining both the requirements or limits of authority in respect of the coercion and the appropriate community or unilateral measures. In fulfilling their community responsibility decision-makers commonly find it necessary to appraise particular exercises of coercion in terms of conformity to public-order goals, and when appropriate to characterize such exercises as permissible or impermissible. In the making of such appraisals and characterizations, the decision-makers seek to give effect to certain shared policy objectives. To this end they formulate and apply authoritative community prescriptions.

*Complementary Prescriptions on Permissible and Nonpermissible Coercion*

The contemporary world prescriptions about the application of coercion across state boundaries project in general terms a set of complementary policies designed, in ultimate effect, to secure and maintain an overriding policy of peaceful change and of minimizing destruction of values. A principal purpose of modern efforts at comprehensive organization of the community of states has been to clarify a distinction between permissible and nonpermissible coercion and to establish the institutions and procedures thought indispensable and appropriate for sustaining that distinction. The Charter of the United Nations indicates, in broad strokes, the level of coercion that is sought to be prohibited: members are required—and this is declared a basic principle—to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the [organization].”<sup>6</sup> The positive aspect of this prohibition lies in the obligation of members to resolve their disputes “by peaceful means” that do not endanger “international peace and security, and justice.”<sup>7</sup> The commitment of members to “refrain from the use or threat of force” is sometimes assumed by commentators to refer to the use or threat of armed or military force.<sup>8</sup> The apparent implication, however, that

6. U.N. CHARTER art. 2, para. 4.

7. U.N. CHARTER art. 2, para. 3.

8. See, e.g., 2 OPPENHEIM, INTERNATIONAL LAW 153 (7th ed. Lauterpacht 1952) [hereinafter cited as OPPENHEIM-LAUTERPACHT]; BENTWICH & MARTIN, A COMMEN-

employment of nonmilitary types of coercion was never meant to be prohibited, is subject to serious reservations. The authority of the Security Council to characterize particular coercion as a "threat to the peace," "breach of the peace," or "act of aggression," and to call for appropriate sanctioning measures, is not restricted, by the Charter at least, as to the modality of coercion that may be so characterized.<sup>9</sup> Beyond cavil, political and economic pressures may, in some particular contexts, endanger "international peace and security and justice"<sup>10</sup> when they assume such proportions and intensity as to generate a substantial likelihood of or need for a military response. In contrast with the differences of opinion about nonmilitary instruments, there is no question that the applications of armed force prohibited by the Charter include both the comprehensive and highly intense uses commonly associated with "war" and the less comprehensive and relatively milder exercises often described in the past as "measures short of war."<sup>11</sup> These affirmative obligations, subsequently and frequently reiterated in charters of regional governmental organizations,<sup>12</sup>

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TARY ON THE CHARTER OF THE UNITED NATIONS 13 (1950); GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 104 (2d rev. ed. 1949); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 455, 492 (1952); BOWETT, SELF DEFENSE IN INTERNATIONAL LAW 148 (1958).

The discussions and preparatory work at San Francisco appear somewhat confused and equivocal on this point and hardly yield conclusive indication of the correctness of the commentators' assumptions. For instance, while it is true that a Brazilian amendment to article 2(4), one that would have added the words "and from the threat or use of economic measures," was rejected by the Drafting Subcommittee of Committee I/1, 6 DOCUMENTS OF THE U.N. CONFERENCE ON INTERNATIONAL ORGANIZATION 334, 559 (1945) [hereinafter cited as U.N.C.I.O.], the Report of Committee I to Commission I stated that "The unilateral use of force or *similar coercive measures* is not authorized or admitted," *id.* at 400. (Emphasis added.) The commentators cited above commonly invoke the "ordinary connotation" and the "plain, common-sense meaning" of "force"—a criterion of interpretation which in other contexts is seldom regarded as conclusive.

See, further, Kelsen, *General International Law and the Law of the United Nations*, in THE UNITED NATIONS: TEN YEARS LEGAL PROGRESS 4-5 (1956). He suggests that "force" in article 2(4) may be construed to refer to both "armed force" and "non-armed force."

9. U.N. CHARTER art. 39; see text accompanying note 103 *infra*. See, in this connection, the argument made by Professor Kelsen, *supra* note 8, at 11, that "Member states are not only under the obligations stipulated expressly in Article 2, paragraphs 3, 4, and 5, but also under the obligations to refrain from a threat to or breach of the peace stipulated in Article 39; . . ."

10. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 286-87 (1954) suggests that in such cases, "forcible or coercive" measures may be regarded as violative of article 2(3), if not article 2(4), of the U.N. Charter.

11. See, *e.g.*, Waldock, *supra* note 8, at 489; 2 OPPENHEIM-LAUTERPACHT 152, 184; GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 104 (2d rev. ed. 1949); JESSUP, A MODERN LAW OF NATIONS 169-77 (1948).

12. Citations to these regional treaties are collected in McDougal & Feliciano, *General Principles* 802 n.100. See also Security Treaty Between Australia, New Zealand, and United States, art. 1 (1951) (text in 46 AM. J. INT'L L. SUPP. 93 (1952)); Mutual Assistance Pact Between Greece, Turkey, and Yugoslavia, art. 1 (1954) (text in 49 *id.*

are supplemented by the "Nuremberg principles" which were unanimously affirmed by the United Nations General Assembly as "principles of international law"<sup>13</sup> and which authorize the imposition of negative (criminal) sanctions on individual persons judicially ascertained to be responsible for the "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances."<sup>14</sup>

The conception of permissible coercion, complementary to that of nonpermissible, is characterized by multiplicity of reference. One reference is to all coercion which is implicit in and concomitant to the ordinary interaction of states, and which does not rise to the level and degree of prohibited coercion.<sup>15</sup> Another and more common reference is to coercion of a high degree of intensity, including the most comprehensive and violent uses of military instruments, when employed in individual or group defense against unlawful coercion. States traditionally have claimed and reciprocally acknowledged a large competence to protect themselves by countering coercion with coercion. The United Nations Charter explicitly mentions and preserves this permission to resort to force in response to unauthorized coercion, describes it as an "inherent right," and recognizes that permissible coercion may be exercised by the target state individually, or by a collectivity of states, without prior authorization from the organized community (although, of course, subject to its subsequent appraisal).<sup>16</sup> A third reference is to coercion exercised in fulfillment of or in accordance with certain commitments and permissions of members to participate in police measures required or authorized by the general security organization to prevent or repress impermissible coercion. These measures of collective peace enforcement are designed to supplement the efforts of the participant or group of participants determined by the community to have been exercising lawful defense.

The most elementary distinction that any system of law must make in attempting to secure minimal public order is thus today established by the world community in its fundamental prescriptions.<sup>17</sup> By contraposing the prohibition

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Supp. 47 (1955)); Mutual Defense Treaty Between the United States and the Philippines, art. 1 (1951) (text in SUBCOMMITTEE ON DISARMAMENT, SENATE COMMITTEE ON FOREIGN RELATIONS, DISARMAMENT AND SECURITY: A COLLECTION OF DOCUMENTS 1919-1955, 84th Cong., 2d Sess. 598 (1956)); Mutual Defense Treaty Between United States and Republic of Korea, art. 1 (1953) (text in *id.* at 607); Mutual Defense Treaty Between United States and Republic of China, art. 1 (1954) (text in *id.* at 608).

13. U.N. Gen. Ass. Res. No. 95 (I), GEN. ASS. OFF. REC. 1st Sess., Plenary 55 (1946).

14. Principle VI, Formulation of the Nuremberg Principles, Report of the International Law Commission covering its second session, June 5-July 29, 1950, in 2 YEAR-BOOK OF THE INT'L LAW COMM'N 1950, at 376.

15. This and the other references of permissible coercion are explored in relative detail in the second part of this article.

16. U.N. CHARTER art. 51.

17. In the language of Professor Kelsen's system, the effect of establishing this distinction is to permit "war" to be characterized as either a "delict" or a "reaction against a delict [sanction]." See KELSEN, LAW AND PEACE 34-55 (1942); KELSEN, THE LAW

of unlawful coercion and the permission of lawful coercion, we seek to emphasize the complementarity and polarity of these prescriptions.<sup>18</sup> Contrary to the suggestion sometimes made,<sup>19</sup> to couple the prohibition with the permission is not to neutralize and nullify the prohibition. The world community's prescriptions about coercion, like other world prescriptions, march and must march in pairs of complementary opposites. An absolute interdiction of all coercion is scarcely conceivable, or if conceivable, is hardly within the limits of the achievable. A certain degree of coercion is almost always exhibited in all the value-institutional processes that take place in the world arena. Certainly the world social processes, characterized in terms of the dominant value at stake as power processes, pervasively and continuously manifest many aspects of coercion.<sup>20</sup> Further, not even the most highly centralized and effectively organized municipal public order attempts to prohibit private coercion absolutely; some provision for self-defense in residual, exceptional cases always remains.<sup>21</sup> In a decentralized world arena, in which the general community of

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OF THE UNITED NATIONS 707-08 (1950); Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 33-35 (1952). See also Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11 (1951).

18. There is some recognition of this complementarity in, e.g., Stone, *AGGRESSION AND WORLD ORDER* 75 & n.182 (1958); Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 TRANSACT. GROU. SOC'Y 178, 199 (1935); Williams, *SOME ASPECTS OF THE COVENANT OF THE LEAGUE OF NATIONS* 237 (1934). See also the American Note of June 23, 1928, issued during the drafting of the Briand-Kellogg Pact: "Express recognition by treaty of this inalienable right [of self-defence], however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side . . ." (Text in Miller, *THE PEACE PACT OF PARIS* 214 (1928).) In contrast, see Kelsen, *COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 27-28 (1957), and Pompe, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 55-60 (1953).

19. See, e.g., Stone, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 243 (1954), who lists article 51 of the U.N. Charter among "clauses of escape and evasion from peaceful settlement and peace enforcement." Similarly, Professor Stone writes that "if these provisions [e.g., articles 2(3), 2(4), 39-50] were not qualified by other provisions [e.g., article 51] of the Charter, and by the difficulties of operating them, they would virtually have established legal control over the resort of states to war, analogous to that of municipal law over the resort of citizens to private violence." *Id.* at 303.

20. Lasswell & Kaplan, *POWER AND SOCIETY* 98 (1950), point out that power can be described in terms of, *inter alia*, its degree of coerciveness which

depends on which values serve as the influence base (and function as positive or negative sanctions), and on the amounts of those values promised or threatened. . . . The exercise of power is simply the exercise of a high degree of coerciveness. When the values promised or threatened are sufficiently important to those over whom the influence is being exercised, the latter are being coerced: they are subjected to a power relationship.

See also *id.* at 250-61.

21. Cf. Kelsen, *COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 27 (1957). It is made clear in Jenks, *THE COMMON LAW OF MANKIND* 139-43 (1958) not only that all major legal systems recognize self-defense, but also that such systems exhibit an impressive uniformity with regard to the appropriate limiting principles. Dr. Jenks made

states still lacks effective capacity to protect constituent states from unlawful coercion, it would seem a fortiori even less practicable to eliminate permissive self-defense and achieve a truly complete prohibition of coercion. Inasmuch as an absolute prohibition of coercion has not been feasible, the historical alternatives of the general community have been either to permit complete disorder or to aspire to minimal public order. Complete disorder, failure to forbid even the most intense and comprehensive destruction of values, is not only possible, but has in fact long characterized the perspectives of traditional international law. If, on the other hand, the deliberate choice is made to pursue at least a minimum of order in the world arena, the coercion that is to be prohibited clearly must be distinguished from that which is to be permitted.<sup>22</sup> The conceptions both of impermissible and of permissible coercion are thus necessary in the theoretical formulation of authoritative policy as well as in the practical application of that policy to interacting human groups.

### *The Basic Postulate of Peaceful Change*

The fundamental policies embodied and projected in these prescriptions are, as indicated, complementary. In formulating, interpreting and applying the prohibition of impermissible coercion, authoritative decision-makers of the world community attempt to regulate conflicting claims by states, on the one hand, to *effect* changes, and, on the other, to *avoid* changes in the patterns of power and other value allocation among the various nation-states.<sup>23</sup> The decision-makers seek to prevent coercive and violent unilateral modification and reconstruction of value patterns and, simultaneously, to encourage recourse to nonviolent, noncoercive methods of change and adjustment. This policy is instinct with a community recognition that coercion of provocative intensity and violence are not appropriate instruments for asserting and implementing

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reference to the common law, Canadian, French, German, Italian, Islamic, Hindu, Jewish, Chinese, Japanese, African, and Soviet systems.

22. Contrast the suggestions made in Cohn, *The System of Sanctions of Article 16 of the Covenant and the Future Role of Neutrality*, in *COLLECTIVE SECURITY* 402 (Bourquin ed. 1936):

The system of sanctions should be directed against war as such, as a fact, without regard to its psychological basis. . . . [D]efensive war must be included as well as offensive war, so that the States not involved in the conflict may not be obligated to make a choice which would at the same time necessitate the moral condemnation of one of the Powers, but may simply be confronted with the state of war as a fact which must be prevented and combated [*sic*], in the common interest of all the nations. It is of little importance to determine who, from a purely formal standpoint, is playing the part of the aggressor. War is forbidden in all cases and for all parties . . . .

The singular want of realism in these suggestions is all the more conspicuous when it is recalled that they were addressed to the problem of making the League of Nations "more and more effective and universal."

23. As to this mode of generalizing the opposing claims, cf. DUNN, *PEACEFUL CHANGE* 1-4 (1937).

claims to a reallocation of values; the most intense coercive and violent unilateral redistribution of values in the world arena not only wastefully entails the expenditure of values for the destruction of values but also generates further value expenditure and destruction in the shape of a countering response.<sup>24</sup> The basic community policy might, therefore, simply be generalized in terms of a demand for elemental public order and for the preservation of basic human values in the course of international change. In permitting, on the other hand, certain coercion as lawful, authoritative decision-makers seek to utilize coercion, under appropriate conditions, for the more effective securing of such minimum public order by authorizing community enforcement action and, in deference to the still poor degree of organization obtaining in the world arena, by conceding individual and group defense against breaches of public order. The assumption which underlies the permission of lawful coercion is, like that which underlies the prohibition of unlawful coercion, not that the value distribution map and the particular configuration of the international arena existent at any given time should be immunized from change but that the common interest in minimizing the destruction of values dictates that they should not be reconstructed through intense coercion or violence.

In an arena as decentralized, primitively organized and afflicted with competing conceptions of preferred world public order as the existing world is, and absent effective, specialized institutions for prescribing and applying community policy about coercion, the essential distinction between permissible and nonpermissible resort to coercion is, of course, difficult to apply in varying specific contexts of coercion. At a later stage in this Article, we propose to canvass these difficulties and to indicate in some detail the range of contextual factors bearing upon application of the permissible-nonpermissible distinction. The point of present emphasis is that neither difficulty of application nor the continuing high expectations of violence should obscure the indispensability of

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24. Indeed no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it. The probable result of such a conspiracy, and the inevitable result of its execution is that death and suffering will be inflicted on countless human beings.

JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 1142 (1948). The comparable, and more frequently quoted, passage from the judgment of the Nuremberg Tribunal appears in OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT 16 (1947).

The character and capabilities of modern weapons have, of course, imparted new and sharper point to this humanitarian recognition. As Professor Dunn observes in *Peaceful Change Today*, 11 WORLD POLITICS 278-79 (1959) :

The recent spectacular developments in military weapons have sharply restricted the utility of coercion as a means of changing the *status quo*. The destructiveness of nuclear weapons is out of all proportion to any political gains that might be achieved by war. There is no certainty that even mild forms of coercion would not eventually lead to their use. Hence, whereas change by voluntary agreement is very difficult to achieve, change through the resort to forceful measures has in most cases become entirely too dangerous to contemplate.



the distinction for securing both minimum order and the necessary conditions for a world public order of freedom and abundance. Withal the authoritative establishment of that distinction represents a substantial achievement.<sup>25</sup> The long perspective of history precludes casual deprecation of prescriptions which epitomize what has for centuries been a major aspiration of much of mankind—the institution of processes of authority, encompassing both prescriptions and procedures, that permit and encourage the production and sharing of values without the disruption of coercion and violence from across national boundaries.<sup>26</sup>

*Emergence of the Fundamental Distinction: Bellum Iustum*

These contemporary prescriptions have roots that reach far back into the Middle Ages when comparable efforts to distinguish between legitimate and nonlegitimate (*iustum* and *iniustum*) violence were made.<sup>27</sup> The gist of the conception of *bellum iustum*, as formulated and systematized by the medieval theologians and jurists, was that resort to violence could be regarded as a legitimate procedure of self-help only if certain requirements relating to a belligerent's authority to make war (*auctoritas principis*), and to the objectives (*iusta causa*) and intent (*recta intentio*) of the belligerent, were met.<sup>28</sup>

25. Cf. Jessup, *The Crime of Aggression and the Future of International Law*, 62 POL. SCI. Q. 1 (1947).

26. For surveys of the numerous peace plans, in which this ancient and continuing aspiration found expression, conceived and put forward from the days of Dubois at the beginning of the fourteenth century down to the establishment of the United Nations, see, e.g., BEALES, *THE HISTORY OF PEACE* (1931); HEMLEBEN, *PLANS FOR WORLD PEACE THROUGH SIX CENTURIES* (1943); TRUEBLOOD, *THE DEVELOPMENT OF THE PEACE IDEA* (1932); WYNNER & LLOYD, *SEARCHLIGHT ON PEACE PLANS* (1944). See also *THE EVOLUTION OF WORLD-PEACE* (Marvir ed. 1921); PHELPS, *THE ANGLO-AMERICAN PEACE MOVEMENT IN THE MID-NINETEENTH CENTURY* (1930); SOULEYMAN, *THE VISION OF WORLD PEACE IN SEVENTEENTH AND EIGHTEENTH-CENTURY FRANCE* (1941). A brief summary is offered in SCHWARZENBERGER, *THE LEAGUE OF NATIONS AND WORLD ORDER* 7-18 (1936), and Possony, *Peace Enforcement*, 55 YALE L.J. 910 (1946).

27. See, e.g., BALLIS, *THE LEGAL POSITION OF WAR: CHANGES IN ITS THEORY AND PRACTICE FROM PLATO TO VATTTEL* (1937); BUTLER & MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 107-21. (1928); EPPSTEIN, *THE CATHOLIC TRADITION OF THE LAW OF NATIONS* chs. 4-5 (1935); NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* chs. 3-4 (rev. ed. 1954); POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 116-38 (1953); SCOTT, *THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW* (1934); WEHBERG, *THE OUTLAWRY OF WAR* (Zeydel transl. 1931); Von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665 (1939). References to continental literature are compiled in STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 298-99 nn.6 & 9 (1954).

28. Systematization of the conception of *bellum iustum* in terms of these three general requisites was the work of St. Thomas Aquinas. The requirement of *auctoritas principis* was designed to exclude private violence. *Iusta causa* required the showing of fault on the part of the adverse party. *Recta intentio* was absent where the belligerent's motive was aggrandizement rather than "securing peace," "punishing evil-doers," and "uplifting the good." See SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW* pt. 1,

In this conception, the legitimate objectives of violence were limited to the redressing of "a wrong received,"<sup>29</sup> a "wrong" "serious and commensurate with the losses the war would occasion" and "which cannot be repaired or avenged in any other way."<sup>30</sup> "*Iusta causa*" thus anticipated the requirements of consequentiality and necessity which seem implicit in present conceptions of permissible coercion.

The classical doctrine of *bellum iustum* may be seen to be comparable in policy with contemporary prescriptions. The doctrine incorporated a policy of limiting the incidence of violent change among the multitude of kingdoms and principalities that comprised the medieval European world.<sup>31</sup> In the context of the arena that existed at least in the later middle ages, *bellum iustum* and the policy it embodied seemed much more practicable of application than might be supposed from the epithets with which the doctrine has been described by some modern writers.<sup>32</sup> The Western world in the later middle ages exhibited a basic unity characterized, in its fundamental aspect, by one widely and deeply shared body of spiritual perspectives, a centralized ecclesiastical organization that transcended political boundaries, and a common overriding respect for the supreme ecclesiastical authority, the Papacy. The degree of unity and centralized organization of authority achieved by the Church was such that medieval Christendom has been described by scholars as an "international state."<sup>33</sup> The Papacy, whose authority was conceived as derived from

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at 192 (1934). Suarez much later modified the Thomist doctrine by substituting for *recta intentio, debitus modus*, a proper mode of conducting a war. Suarez, *De Triplici Virtute Theologica*, in 2 CLASSICS OF INTERNATIONAL LAW, SELECTIONS FROM THREE WORKS 805 (1944). Grotius, beyond stating the just causes of war as defense, recovery of property, and punishment, added little to the scholastics' analysis. DE IURE BELLI AC PACIS bk. II, ch. 1, § II, 2 in 2 CLASSICS OF INTERNATIONAL LAW 171 (1925).

29. Vitoria, *De Indis et De Iure Belli Relectiones*, in SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW at LIV (1934). Vitoria expressly rejected extension of empire, differences of religion, and personal glory or advantage of the belligerent prince as just causes of war. *Id.* at LIII-LIV.

30. Suarez, *supra* note 28, at 816; *cf.* Vitoria, *supra* note 29, at LIV-LV:

Not every kind and degree of wrong can suffice for commencing a war. . . . As, then, the evils inflicted in war are all of a severe and atrocious character, such as slaughter and fire and devastation, it is not lawful for slight wrongs to pursue the authors of the wrongs with war, seeing that the degree of the punishment ought to correspond to the measure of the offence.

31. See Vitoria, *supra* note 29, at LXX.

32. Nussbaum, *Just War—A Legal Concept?*, 42 MICH. L. REV. 453 (1943); Kunz, *Bellum Iustum and Bellum Legale*, 45 AM. J. INT'L L. 528 (1951); KUNZ, LA PROBLEMATICA ACTUAL DE LAS LEYES DE LA GUERRA 85 (1955).

33. See Krey, *The International State of the Middle Ages: Some Reasons for Its Failure*, 28 AM. HIST. REV. 7 (1927); *cf.* FIGGIS, STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS 1414-1625, at 4 (2d ed. 1923): "In the Middle Ages the Church was not a State, it was the State; the State or rather the civil authority (for a separate society was not recognized) was merely the police department of the Church." See also HOFFNER, LA ETICA COLONIAL ESPANOLA DEL SIGLO DE ORO 3-44 (Caballero transl. 1957).

a source independent of and higher than human volition, was regarded as competent to formulate and interpret general standards for the ordering of relations among temporal rulers, to intervene in disputes between them for the maintenance of peace and, in case of war, to pass judgment on the justness of a belligerent's cause.<sup>34</sup> Sanctioning procedures available for enforcing papal judgments included the pronouncement of excommunication and interdict which, in that age, entailed extensive material deprivations and, at times, even the deposition of an offending prince.<sup>35</sup>

Profound changes in the conditions of the medieval world—brought about by the Reformation with its disintegrating impact on the unity and authority of the Church, and by the consolidation of the effective power of territorial polities<sup>36</sup>—deeply affected the viability of *bellum iustum*. With the authority of the Papacy repudiated by many temporal rulers, there was no longer any supranational organ commonly acknowledged as competent to give judgment on the legitimacy of the cause asserted by a sovereign prince who resorted to violence. The absence of an effective central authority enabled each belligerent to be, in effect, his own and final judge; a prince's recourse to war was in fact likened by commentators to a decree of a law court against a defendant.<sup>37</sup> Thus, the question of the "subjective," as distinguished from the "objective," justice of a resort to violence, and the possibility and implications of an armed conflict being "subjectively" just on both sides, were much discussed. Neither Vittoria's conception of "invincible ignorance" as sufficient justification nor Suarez' notion of "probabilism"<sup>38</sup> could infuse much vitality into the doctrine

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34. SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* ch. 1 (1954); GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 9-21 (Maitland transl. 1900) (especially at 14-15); WRIGHT, *MEDIAEVAL INTERNATIONALISM* 18-50 (1930). See also 4 CARLYLE & CARLYLE, *A HISTORY OF MEDIAEVAL POLITICAL THEORY IN THE WEST* 362 (1922); 5 *id.* 165-71 (1928); EPPSTEIN, *THE CATHOLIC TRADITION OF THE LAW OF NATIONS* ch. 8 and app. I (1935); NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 17-21 (rev. ed. 1954); 1 PERENYA VICENTE, *TEORIA DE LA GUERRA EN FRANCISCO SUAREZ* 271-82 (1954).

35. 2 CARLYLE & CARLYLE, *op. cit. supra* note 34, at 200-06. For instances of excommunication and deposition of kings and princes by papal decree for breaking the peace, see 1 WALKER, *A HISTORY OF THE LAW OF NATIONS* 92-93 (1899).

36. FIGGIS, *op. cit. supra* note 33, at 55, summed up the changes as "a change from a world-empire to a territorial State, and from ecclesiastical to civil predominance." See also LAWRENCE, *INTERNATIONAL LAW* 20-21 (7th ed. Winfield 1928); SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* 27 (1954); STURZO, *THE INTERNATIONAL COMMUNITY AND THE RIGHT OF WAR* ch. 1 (Carter transl. 1929); NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* ch. 4 (rev. ed. 1954).

37. The judicial analogy is especially discernible in the writings of Vitoria, *supra* note 29, at LV-LVI (1532), and Suarez, *supra* note 28, at 806 (1612). See also SCOTT, *THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW* 39-41, 441-43 (1934); Husserl, *The Conception of War as a Legal Remedy*, 12 U. CHI. L. REV. 115, 258 (1945); Von Elbe, *supra* note 27, at 679.

38. See SCOTT, *THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW* 48-49, 459-65 (1934); BUTLER & MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 110-14 (1928); 1 PERENYA VICENTE, *TEORIA DE LA GUERRA EN FRANCISCO SUAREZ* 214-70 (1954).

of *bellum iustum* in an arena where no effective decision-maker was generally accepted as authorized to apply it.<sup>39</sup> By the eighteenth century, Vattel could write that the rectitude of international violence was a question pertaining to the "necessary law of nations" addressed to the "conscience of sovereigns," and that the "voluntary" or "positive law of nations" derived from the practice of states drew no distinction between wars on the basis of the "intrinsic justice" of the respective belligerents' causes.<sup>40</sup>

*Regression From Order: Decision by Relative Strength*

In the theory and practice of international law during the nineteenth and early twentieth centuries, *bellum iustum* had for all practical purposes been brought to unobtrusive demise. Resort to coercion was, in the view of most publicists and state officials of that century, the exercise of an attribute or prerogative of sovereignty the legitimacy of which nonparticipating states were not competent to judge.<sup>41</sup> Traditional international law included no prescription for controlling a resort to coercion or for characterizing coercion as permissible or nonpermissible; it attempted only the regulation and humanization of violence once violence had in fact been initiated. In theory, the contending belligerents stood on a plane of "juridical equality," and third states which chose not to participate were said to be under a "duty of impartiality" and nondiscrimination in their relations with both belligerents.<sup>42</sup> Consequently, as some scholars have observed,<sup>43</sup> a deep internal contradiction in the structure of world prescriptions developed: the right to independent existence, though classed as a fundamental right of states, did not include a prohibition against states waging war and destroying one another.

The international law of the nineteenth century may thus be seen to repre-

39. It is in the light of Grotius' historic task of supplying secular principles to fill the void left by the shattering of medieval religious and ecclesiastical unity and of giving definitive form to the conception of a community of territorial states without centralized organs, but under a common law, that his use of the *bellum iustum* doctrine is to be considered. For a brief but excellent exposition of the function Grotius assigned to permissible coercion in his system, see SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* ch. 2 (1954). Schiffer points out that Grotius himself was quite aware of the difficulties presented by the then existing arena conditions. *Id.* at 40-41, 46.

40. VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, in 3 *CLASSICS OF INTERNATIONAL LAW* 247, 305, 308 (Fenwick transl. 1916).

41. See, e.g., HALL, *INTERNATIONAL LAW* 51-52 (1st ed. 1880); HERSHEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW* 349, 351-52 (1912); LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 292 (2d ed. 1897); 2 OPPENHEIM, *INTERNATIONAL LAW* 55-57 (1st ed. 1906); RISLEY, *THE LAW OF WAR* 68-69 (1897). See also POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 138-52 (1953); Wright, *Changes in the Conception of War*, 18 *AM. J. INT'L L.* 755 (1924).

42. HALL, *INTERNATIONAL LAW* 52 (1st ed. 1880); WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 697 (2d ed. Lawrence 1863) (quoting Bynkershoek).

43. See BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 21 (1944); 2 OPPENHEIM-LAUTERPACHT 178-79; Tucker, *The Interpretation of War Under Present International Law*, 4 *INT'L L.Q.* 11, 13-14 (1951); 2 WRIGHT, *A STUDY OF WAR* 950 (1942).

sent a policy of indifference,<sup>44</sup> as it were, to the common interest in restraining violence, and hence of permitting the speedy resolution of controversies between states simply on the basis of their relative strength. Its principal effort appeared to be to limit the spatial extension of violence through application of its "neutrality" rules, designed in theory to isolate the contending belligerents and practically tending to make superior indigenous strength decisive. Obviously, this policy manifests an acceptance of private coercion and violence as permissive methods not only of self-help and self-vindication for conserving values but also of effecting changes in the international distribution of values.<sup>45</sup> In this way, the doctrine and policy of traditional international law reflected the decentralized and unorganized character of the world arena of the eighteenth and nineteenth centuries, the multi-polar structure of that arena which permitted the operation of a system of power-balancing among the stronger states, the great movements of Western nationalism and the expansion of colonial empires, and the limitations of the contemporary technology of violence.<sup>46</sup>

There were, it is true, a few prescriptions that purported to govern non-comprehensive uses of coercion—coercion of limited dimensions for limited objectives—technically denominated as "reprisal," "intervention," "pacific blockade," and so forth, and generically classed as "measures short of war." Without attempting any detailed exposition of the traditional theory about the coercive exercises deemed not to bring about the "legal consequences" compendiously, if confusingly, termed a "legal state of war," we may observe that the rules on "measures short of war" restricted the lawful application of

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44. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 138-39 (1953) speaks of a "period of indifference," existing "from the seventeenth to the twentieth centuries." On the main point in the text, see 2 WESTLAKE, *INTERNATIONAL LAW* 4 (1907): "The truth is that when war enters on the scene all law that was previously concerned with the dispute retires, and a new law steps in, directed only to secure fair and not too inhuman fighting."

45. Judge Lauterpacht made this clear:

Prior to that treaty [the 1928 General Treaty for the Renunciation of War] the system of international law, glaringly inconsistent in many matters, was symmetrical in one respect: while it made no provision for institutional peaceful change, it permitted war as an instrument for changing the existing legal position. Every State had the right, by formally going to war and thus risking its own existence, to alter the *status quo* either by annihilating the defeated opponent or by dictating to him the conditions of peace.

Lauterpacht, *The Legal Aspect*, in *PEACEFUL CHANGE—AN INTERNATIONAL PROBLEM* 139 (Manning ed. 1937).

46. See, e.g., CLAUDE, *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 19-34 (1956); LISKA, *INTERNATIONAL EQUILIBRIUM* ch. 1 (1957); Wright, *International Law and the Balance of Power*, 37 *AM. J. INT'L L.* 97 (1943); Wright, *Accomplishments and Expectations of World Organization*, 55 *YALE L.J.* 870 (1946). See particularly 1 OPPENHEIM, *INTERNATIONAL LAW* 73-74, 185-86 (1st ed. 1905), in which the author conceived of the "existence of international law" as dependent upon "an equilibrium between the members of the Family of Nations."

limited coercion to cases in which a prior unlawful act, or a culpable failure to perform international obligations, was attributable to the state against which coercion was applied.<sup>47</sup> The limitations which these prescriptions sought to impose seem less real than ostensible: the initiating state could at any time designate its operations as "war" and avoid the thrust of the limitations. There is appropriate sarcasm in the analogy drawn by one scholar to a municipal enactment that punished petty thieving while condoning armed robbery.<sup>48</sup> "Measures short of war" were generally utilized only by participants with a very substantial power differential over their opponents.<sup>49</sup> The doctrines on "measures short of war," like other nineteenth-century international law doctrines, in fact constituted but one expression of the general policy which would localize the area of coercion and violence by permitting, in an unorganized world arena, a quick settlement through superior strength.<sup>50</sup> The tacit assumptions were that the weaker participant would readily perceive the futility of

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47. Thus, for instance, the German-Portuguese Arbitration Tribunal in the *Naulilaa* case (1928) defined "reprisals" as "acts of self-help of the injured State, acts in retaliation for an unredressed act of the offending state contrary to international law" and stressed that "they will be illegal unless a previous act in violation of international law has furnished the justification." BRIGGS, *THE LAW OF NATIONS* 951 (2d ed. 1952). The Tribunal specified two other requirements for the lawfulness of "reprisals": they must "have been preceded by a request for redress which has been unavailing" and must not be "out of all proportion to the act which has motivated them." *Id.* at 953. See also COLBERT, *RETALIATION IN INTERNATIONAL LAW* (1948); HALL, *INTERNATIONAL LAW* 433-43 (8th ed. Pearce Higgins 1924); HINDMARSH, *FORCE IN PEACE* (1933); 2 OPPENHEIM-LAUTERFACHT 136-51.

48. KELSEN, *LAW AND PEACE* 53 (1942). Compare JESSUP, *A MODERN LAW OF NATIONS* 157 (1948).

49. Maccoby, *Reprisals as a Measure of Redress Short of War*, 2 *CAMB. L.J.* 60, 69 (1924); Giraud, *Memorandum on Pacific Blockade up to the Time of the Foundation of the League of Nations*, *LEAGUE OF NATIONS OFF. J.*, 7th Ass. 841, 842 (1927); HINDMARSH, *FORCE IN PEACE* 73-74, 87-88, 92-94 (1933); Westlake, *Reprisals and War*, 25 *L.Q. REV.* 127, 133 (1909).

It seems an interesting commentary upon the change of perspectives exhibited in contemporary prohibitions of coercion that in 1897 Professor Holland could ask plaintively:

Why, again, is it made a matter of reproach that a pacific blockade has almost always been employed, as a matter of fact, by strong against weak states? Unless weak states are to be allowed to shelter their wrong doing, or their persistence in a policy detrimental to the peace of the world, behind their weakness, they must be brought to reason either by forcible pressure in time of peace, or by war. There can be little doubt which of these two methods is better adapted to oblige and enable a weak state to make concessions, which in any case are inevitable, with the least injury to itself and the least disturbance of the peace of the world.

HOLLAND, *STUDIES IN INTERNATIONAL LAW* 141 (1898). See also HOLLAND, *LETTERS TO THE TIMES UPON WAR AND NEUTRALITY, 1881-1920*, at 14 (3d ed. 1921).

50. As Professor Briggs points out, justifications were found in allegations that such hostile measures were, in reality, "pacific" in character, since States, instead of exercising their legally unfettered right to resort to war, prevented the rise of general hostilities by confining their measures to a restricted *locale*, a particular bombardment, blockade or occupation

widening or prolonging the conflict and make haste to comply with the demands of its more powerful opponent, and that such demands would be kept so relatively modest as neither to create furious resistance on the part of the weaker state nor to excite the alarm of nonparticipants fearful of a serious imbalance of power in the arena.

*The Fundamental Distinction Revived: From the Covenant to the Charter*

The Covenant of the League of Nations represented the first significant break with the theory of traditional international law.<sup>51</sup> The Covenant set forth a broad undertaking of members to "respect . . . the territorial integrity and existing political independence" of each other.<sup>52</sup> The specific obligations it imposed upon its members were, however, less comprehensive. "Resort to war" was, under the terms of the Covenant, unlawful in four cases: when made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League; when begun before the expiration of three months after the arbitral award or judicial decision or Council report; when commenced against a member which had complied with such award or decision or recommendation of a unanimously adopted Council report; and, under certain circumstances, when initiated by a nonmember state against a member state.<sup>53</sup>

It was of course no mere historical accident that the break with traditional theory and the re-establishment of a distinction between permissible and non-permissible resort to coercion coincided with the first attempt at a permanent, institutionalized organization of the community of states. The necessity for such organization was underscored by the collapse of the nineteenth-century

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of territory. That such measures of armed coercion did not always lead to war was due only to the preponderance of force on one side . . .

BRIGGS, *THE LAW OF NATIONS* 958 (2d ed. 1952); cf. HALL, *INTERNATIONAL LAW* 434 (8th ed. Pearce Higgins 1924).

51. There had been prior but minor and fragmentary efforts to establish some limitation on the "*jus ad bellum*" of traditional law. The Hague Convention II of 1907 prohibited the use of force for recovery of contract debts, save in case of refusal of the debtor state to arbitrate. The Bryan arbitration treaties imposed the duty not to begin hostilities before the report of the conciliation commissions provided for in such treaties. See generally White, *Limitation Upon the Initiation of War*, 19 *PROC. AM. SOC'Y INT'L L.* 102-08 (1925). For a listing of the Bryan treaties, as well as of bilateral agreements between Latin-American countries providing for recourse to arbitration or other peaceful modes of settlement before resorting to violence, see Harvard Research in International Law, *Rights and Duties of States in Case of Aggression*, 33 *AM. J. INT'L L. SUPP.* 858-61 (1939).

52. LEAGUE OF NATIONS COVENANT art. 10.

53. LEAGUE OF NATIONS COVENANT art. 12, paras. 1, 2, arts. 13, 15, paras. 6, 7, art. 17, paras. 1, 3; see MARTIN, *COLLECTIVE SECURITY* 90-93 (1952). To Professor Brierly, war under the circumstances listed above was "of a particularly heinous kind." 17 *TRANSACT. GROT. SOC'Y* 77 (1931). The Eighth Assembly of the League unanimously approved a resolution declaring that "*all wars of aggression are, and always shall be, prohibited.*" LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 54, at 155-56 (1927). The effect of this resolution upon the scope of the prohibitions of the Covenant was much debated.

system of power-balancing in Europe, a system that had become increasingly unstable and precarious as the number of effective territorial units of power gradually diminished. The blood-letting of World War I, the first conflict since the Napoleonic Wars to assume the proportions of "total war," generated widespread revulsion over the use of violence to secure national goals. Thus, promoting recourse to nonviolent procedures of change was a principal purpose infusing the prescriptions of the Covenant. In fact, prior recourse to nonviolent procedures was made a test of permissible coercion. The prevention of resort to violence was also sought in the Covenant by incorporating a "principle of delay," upon the hopeful assumption that the effect of time on contending participants would be a tranquilizing one.<sup>54</sup> The Covenant prescribed what was in substance a three-month moratorium on violence after the chosen peaceful procedure had resulted in a decision; and it allowed a participant, upon the expiration of such moratorium, to implement by force of arms a decision in its favor against a noncomplying party.

The League's rudimental degree of organization, reflected in the modest scope of the Covenant's specific prohibitions of coercion, was most clearly exhibited in the decentralized character of the decision-making required for the application of those prohibitions. Each member of the League retained authority to characterize a particular exercise of coercion as one in breach of or consistent with the requirements of the Covenant and hence to render operative or inoperative its own commitments to participate in sanctioning procedures against an offending state. The authority of the League Council did not extend beyond that of formulating recommendations to the individual members.<sup>55</sup> The difficulties of application inherent in such decentralized decision-making were not relieved by the phraseology of the Covenant's prohibitions. "Resort to war" aroused confused contention as to the continuing legitimacy of force and violence if participants used some verbal symbol other than "war," such as "reprisal" or "intervention" or other "measure short of war," in designating their exercises of coercion, and if they disclaimed any intention to institute a "legal state of war."<sup>56</sup>

The formally modest limitations which the Covenant of the League placed on the *jus ad bellum* of traditional international law were sought to be extended, and the so-called "gaps" in the Covenant closed,<sup>57</sup> by the General

54. WILLIAMS, SOME ASPECTS OF THE COVENANT OF THE LEAGUE OF NATIONS 137-38 (1934).

55. See Resolutions 4 and 6 of the Resolutions on the Economic Weapon adopted by the Assembly of the League on October 4, 1921. LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 6, at 25. See also WILLIAMS, ASPECTS OF MODERN INTERNATIONAL LAW 91 (1939); WILLIAMS, *Sanctions Under the Covenant*, 17 BRIT. YB. INT'L L. 130 (1936).

56. For a recent canvassing of the polemical literature on this point, see KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 154-71 (1956). This debate related to the so-called "subjective" or "intention" and "objective" theories of "war"; a possible mode of clarification is sketched in McDougal & Feliciano, *The Initiation of Coercion: A Multi-Temporal Analysis*, 52 AM. J. INT'L L. 241 (1958).

57. These "gaps" referred to cases in which unilateral resort to "war" (other than in self-defense) was not prohibited by the explicit language of the Covenant. See the list



Treaty for the Renunciation of War of 1928. This Pact of Paris (Kellogg-Briand Pact) condemned "recourse to war for the solution of international controversies" and set out comprehensive undertakings to renounce "war as an instrument of national policy" and to seek the resolution of "all disputes or conflicts, of whatever nature or whatever origin they may be" exclusively by "peaceful means." The policy objectives of preventing violence and promoting noncoercive methods of adjustment were thus much more ambitiously formulated than in the League Covenant. That the Pact of Paris left intact the freedom of states to exercise violence in self-defense has at times been noted with some aspersion,<sup>58</sup> as though that in some way impaired the Pact's prohibition of "recourse to war." The fact is, of course, that self-defense is recognized in even the most advanced municipal public orders, and is indispensable in an arena as ineffectively organized as that of the present world, so long, at least, as the assumption prevails that an arena of plural participants should be maintained.<sup>59</sup> Some scholars have observed that the Pact of Paris did not

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of "licit wars" conceivable under the Covenant set out in EAGLETON, *INTERNATIONAL GOVERNMENT* 480 (3d ed. 1957). See also MARTIN, *COLLECTIVE SECURITY* 92-93 (1952). There had been, prior to the Pact of Paris, considerable efforts devoted to closing these "fissures" in the structure of authoritative prescription, the most notable effort being the drafting of the 1924 Geneva Protocol. Apropos of these efforts, Professor Brierly wrote in 1943 (and hence with the benefit of hindsight) that they

implied that if war came, there was a real danger that the aggressor would first carefully observe his Covenant obligations, and then take advantage of one of the gaps to enter on a war not expressly prohibited; this was formally possible, but it was always politically most improbable, and in fact none of the wars that have broken out since the Covenant came into force has begun that way.

BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 283 (1958).

58. See, e.g., POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 157, 159 (1953); Borchard, *The Multilateral Treaty for the Renunciation of War*, 23 *AM. J. INT'L L.* 116 (1929). See also FERRELL, *PEACE IN THEIR TIME* 170-200 (1952). What could properly be objected to was not the "reservation" of self-defense but the excessively broad statement in the United States Note of June 23, 1928, that a state claiming self-defense "alone is competent to decide whether circumstances require recourse to war in self defense." (Text in MILLER, *THE PEACE PACT OF PARIS* 213, 214 (1928).) Justice Pal in his dissenting judgment in the Tokyo Trial took that statement in a literal and absolute sense as making "the question whether a particular war is or is not in self defense . . . unjustifiable." PAL, *INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST* 35-48 (1953); see note 216 *infra*.

59. In laying stress upon self-defense here as elsewhere in this essay, we have no intent to make a fetish of the nation-state as it is known today. It should be obvious that the only rational hope is the common one that a much higher degree of effective organization may be secured in the world arena. We do, however, assume the desirability of some deconcentration and dispersal of power, both authoritative and effective, in the world. The contemporary nation-state is, of course, not the only possible organizational form that plural units of participation in world processes of power may take. The configuration of the world arena and the interrelations of global and subglobal (the more comprehensive and the less comprehensive) power processes are susceptible of nearly infinite detailed variation and the number of possible organizational patterns for allocating authoritative power between a center and balanced regions is indefinite.

inhibit the "customary liberty [of states] to resort to war" to the extent that it prohibited "recourse to war" only as an instrument of "national" policy and only as between its signatories.<sup>60</sup> The importance of these observations need not be exaggerated. First, "recourse to war," as an instrument of "international" as distinguished from "national" policy, referred simply to the use of coercion in accordance with the mandates or authorization of the League Covenant to participate in sanctions against a Covenant-breaking state, in a word, to community-enforcement action.<sup>61</sup> Second, practically every nation-state in the world, certainly every state of any consequence in world-power processes, became a party to the Pact.

It is true, however, that the Pact, by retaining "war" as a term of art, failed to quiet the continued debate as to the permissibility of force that participants might verbally describe as a "measure short of war."<sup>62</sup> It was left to the Charter of the United Nations to resolve and make moot that debate by discarding the term "war" and employing in its stead the multiple references to "threat or use of force," "threat to the peace," "breach of the peace," and "act of aggression." Taken collectively, these phrases refer to a whole spectrum of degrees of intensity of coercion, including (so far as *force* is concerned) not only "war," understood as extensive armed hostilities or the highest degree of destructive use of the military instrument, but also all those applications of force of a lesser intensity or magnitude that in the past had been characterized as "short of war." The Charter sought also to centralize the process of characterizing, for purposes of requiring or authorizing enforcement action, a particular exercise of coercion as permissible or nonpermissible, and to vest that function in the organized community itself.

## THE CONCEPTIONS OF PERMISSIBLE AND IMPERMISSIBLE RESORT TO COERCION: MULTIFACTOR ANALYSIS FOR POLICY CLARIFICATION

### PART I: THE CONCEPTION OF IMPERMISSIBLE RESORT TO COERCION

#### *The Debate About Definitions*

The decision of the framers of the United Nations Charter to leave such terms as "threat to the peace," "breach of the peace," and "act of aggression"

60. See, e.g., STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 300 (1954).

61. 2 OPPENHEIM-LAUTERPACHT 182-83; Kelsen, *LAW AND PEACE* 39 (1942) (*semble*). See also POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 158 (1953), who writes that "war as an instrument of international policy is a *contradictio in terminis*. The international action against a lawbreaker, to enforce exactly those rules the Kellogg Pact preconised has . . . nothing but the laws of warfare in common with 'normal' interstate war, 'war as an instrument of national policy.'"

62. See WEHBERG, *THE OUTLAWRY OF WAR* 98-100 (Zeydel transl. 1931); Briefly, *International Law and Resort to Armed Force*, 4 *CAMB. L.J.* 308 (1932); McNair, *Collective Security*, 17 *BRIT. YB. INT'L L.* 150, 157 (1936); Williams, *The Covenant of the League of Nations and War*, 5 *CAMB. L.J.* 1 (1933).

ambiguous and comprehensive was a deliberate one.<sup>63</sup> In recent years, however, the failure of the optimistic hopes for great power cooperation and intensifying expectations of violence have caused renewed agitation for the clarification and elaboration of basic concepts. The continuing debates today, like those within the League of Nations, have centered principally on the question of "defining aggression."<sup>64</sup> Unfortunately, the efforts of the First and Sixth Committees, the political and legal committees, of the General Assembly, the International Law Commission, and the 1953 and 1956 Special Committees on Defining Aggression to formulate a generally acceptable "definition of aggression" have not been blessed with conspicuous success.<sup>65</sup> Representatives of nation-states engaged in the enterprise of defining aggression conceive of too many implications, real and unreal, for national security to permit much consensus either on any particular proposed verbalization of the conception of aggression or even on the utility of attempts at definition.

The principal formulations proposed have generally assumed one or the other, or a combination, of two main forms. The first consists of a more or less lengthy catalogue of stereotypes of aggressive acts. The formulation vigorously propounded by the Soviet Union—a formulation which grew from the five-item closed list of overt military acts incorporated in the 1933 London Conventions for the Definition of Aggression<sup>66</sup> to an open-ended

63. See the Report [on Chapter VIII, section B] of the Rapporteur of Committee 3 to Commission III. 12 U.N.C.I.O. 502, 505. The Committee, after rejecting the Bolivian and Philippine proposals for inserting an enumerative definition of aggression in the Charter (texts of the proposals in 3 U.N.C.I.O. 584, 538), decided "to leave to the Council the entire decision as to what constitutes a threat to peace, a breach of the peace, or an act of aggression." 12 U.N.C.I.O. 505. See also RUSSELL & MATHER, *A HISTORY OF THE UNITED NATIONS CHARTER* 669-72 (1958).

64. The term "aggression" has been in very common use both in international agreements and in official statements of governments, at least since 1919. See Harvard Research in International Law, *Rights and Duties of States in Cases of Aggression*, 33 AM. J. INT'L L. SUPP. 819, 848-55, 861-70 (1939).

65. See STONE, *AGGRESSION AND WORLD ORDER* 27-77 (1958) for the most recent brief and spirited survey of these labors, including those in the League period, at definition up to the consideration of the Report of the 1956 Special Committee by the Sixth Committee of the General Assembly at its Twelfth Session (1957). See Report of the Sixth Committee, U.N. GEN. ASS. OFF. REC. 12th Sess., Annexes, Agenda Item 54, at 2 (1957). By Resolution No. 1181 (XII), the General Assembly established a committee to determine "when it would be appropriate for the General Assembly to consider again the question of defining aggression" which time would be "not earlier than the fourteenth session." *Id.* at 5-6. This committee decided to defer, "until April 1962," determination of an appropriate time for considering again the definition question, unless an "absolute majority" of its members subsequently call for an earlier meeting. N.Y. Times, April 18, 1959, p. 2, col. 7.

66. Signed by the Soviet Union, the Baltic states, some of the Balkan states, and Turkey and Persia. 147 L.N.T.S. 66, 69 n.2 (1933); 148 L.N.T.S. 211 (1933); 27 AM. J. INT'L L. SUPP. 192-94 (1933). This was the same list that had been incorporated, upon a Soviet proposal, into the Draft Act Relating to the Definition of Aggression prepared by the 1933 Geneva Disarmament Conference, Committee on Security Questions, Conference for the Reduction and Limitation of Armaments (1933), *Politis Report*, Conf.

fifteen-item inventory of acts of military, "indirect," "economic," and "ideological" aggression in 1956<sup>67</sup>—is perhaps the best-known species of this genus of definitions. The point of such an inventory is that the state "which first commits" one of the listed acts is to be declared the aggressor. More distinctively, the Soviet formulation includes a list of negative criteria, of acts which are not to be characterized as aggression and internal conditions which do not justify the commission of any act catalogued as aggressive. The most basic defect of the Soviet and other comparable definitions is an over-emphasis on material acts of coercion and on a mechanistic conception of priority; concomitantly, they fail to take into account other factors which rationally are equally relevant, factors such as the nature of the objectives of the initiating and responding participants and the character or intensity of the coercion applied.<sup>68</sup>

The second major type of definition exhibits a different approach which rejects the technique of specific enumeration and seeks instead the construction of a broad and general formula that would comprehend all possible instances of aggression. Perhaps the broadest of these formulas was that submitted by M. Alfaro to the International Law Commission:

Aggression is the threat or use of force by a State or Government against another State, in any manner, whatever the weapons employed and whether openly or otherwise for any reason or for any purpose other than individual or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations.<sup>69</sup>

This formulation emphasizes the complementarity of aggression on the one hand and self-defense and collective peace enforcement on the other. It is,

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D/C-G 108 (1935.IX.4 League of Nations Publications) 679-90 (1935). Subsequent treaties adopting this listing, verbatim or substantially, are enumerated in the Report by the Secretary General, Question of Defining Aggression, A/2211, U.N. GEN. ASS. OFF. REC. 7th Sess., Annexes, Agenda Item 54, p. 50 A/2211 (1952) [hereinafter cited as Report of the Secretary General].

The interesting fact may be noted that, at the 1945 London Conference on war crimes, the United States proposed the inclusion of the Litvinov-Politis definition in the Charter of the International Military Tribunal. There the Soviet representative resolutely opposed such inclusion, stating that "when people speak about 'aggression,' they know what that means, but, when they come to define it, they come up against difficulties which it has not been possible to overcome up to the present time." See Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, U.S. DEP'T OF STATE, PUB. No. 3080, at 328 (1949).

67. U.N. Doc. No. A/AC.77/L.4 (1956); also in Report of the 1956 Special Committee on the Question of Defining Aggression, U.N. GEN. ASS. OFF. REC. 12th Sess., Supp. No. 16 (A/3574), at 30-31 (1957) [hereinafter cited as Report of the 1956 Special Committee].

68. See text accompanying notes 131-49, 170-82 *infra*.

69. U.N. Doc. No. A/CN.4/L.31, at 27 (1951). See also Alfaro, *La Cuestión de la Definición de la Agresión*, 59 REVISTA DE DERECHO INTERNACIONAL 361 (Cuba 1951). Comparable drafts were submitted to the Commission by Mr. Amado, U.N. Doc. No. A/CN.4/L.6 (1951); Mr. Cordova, U.N. Doc. No. A/CN.4/L.10 (1951); Mr. Hsu, U.N. Doc. No. A/CN.4/L.11 and Corr. 1 (1951); and Mr. Yepes, U.N. Doc. No.

however, little more than a posing, in highest level abstraction, of the general problem involved, and offers no index for the guidance of decision-makers who must apply it in specific cases.<sup>70</sup> Only slightly less abstract is the definition achieved by Professor Scelle:

Aggression is an offense against the peace and security of mankind. This offense consists in any resort to force contrary to the provisions of the Charter of the United Nations, for the purpose of modifying the state of positive international law in force or resulting in the disturbance of public order.<sup>71</sup>

Thus, Professor Scelle appropriately stresses the relevance of the character of the objective or purpose of the state resorting to force; but he fails to specify any operational index of the nonpermissible objective of modifying "the state of positive international law in force." In further illustration of this second major type of definitions, the formulation incorporated in the Act of Chapultepec signed by all the American republics on March 8, 1945, may be noted. The act provides that

[A]ny attempt on the part of a non-American state against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered an act of aggression against all the American States.<sup>72</sup>

In contrast with Professor Scelle's definition, this act offers some indication of the character of the perspectives that make coercion and violence unlawful. It exhibits, however, little effort to clarify what operations, "attempts," when moved by these perspectives, may be characterized as aggression.

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A/CN.4/L.12 (1951). A very similar draft was proposed by the Netherlands representative in the 1953 Special Committee. See Report of the Special Committee on the Question of Defining Aggression, U.N. Doc. No. A/AC.66/L.11, at 35 (1953) [hereinafter cited as Report of the 1953 Special Committee].

70. Cf. Fitzmaurice, *The Definition of Aggression*, 1 INT'L COMP. L.Q. 137, 142-43 (1952).

71. U.N. Doc. No. A/CN.4/L.19 and Corr. 1 (1951).

72. 9 HUDSON, INTERNATIONAL LEGISLATION 286 (1950). A comparable treaty provision is found in the Finnish-Soviet peace treaty of 1939: "Any act of violence attacking the integrity and inviolability of the territory or the political independence of the other High Contracting Party shall be regarded as an act of aggression, even if it is committed without declaration of war and avoids warlike manifestations." 157 L.N.T.S. 397.

If still another illustration of this general approach to definition were desired, the Harvard Research formulation may be adduced. The Harvard draft reads: "Aggression is a resort to armed force by a State when such a resort has been duly determined, by a means which that State is bound to accept, to constitute a violation of an obligation." Harvard Research in International Law, *Draft Convention on the Rights and Duties of States in Case of Aggression*, art. 1(c), 33 AM. J. INT'L L. SUPP. 827 (1939). The draft emphasizes the need for authoritative third-party determination but does not seek at all to indicate the factors that rationally may enter into a "due determination" of the lawfulness of a particular resort to armed force. From this perspective, the formulation amounts to little more than the tautologous statement that aggression is a prohibited resort to coercion.

A third type of definition, the so-called "mixed" definition, seeks to combine both the enumerative and "broad-formula" approaches by appending an illustrative but nonexhaustive list of specific examples of aggression to a relatively abstract statement of general policy. Although the facile objection has been raised that such "mixed" definitions would only tend to cumulate the difficulties that the catalogue and abstract types of definition have individually presented,<sup>73</sup> the great majority of states that support the formulation of *some* definition have favored the "mixed" kind as a possible *via media*.<sup>74</sup> The draft definition submitted by Iran and Panama at the ninth session of the General Assembly is representative:

1. Aggression is the use of armed force by a State against another State for any purpose other than the exercise of the inherent right of individual or collective self-defense or in pursuance of a decision or recommendation of a competent organ of the United Nations.
2. In accordance with the foregoing definition, in addition to any other acts which such international bodies as may be called upon to determine the aggressor may declare to constitute aggression, the following are acts of aggression in all cases:
  - (a) Invasion by the armed forces of a State of territory belonging to another State or under the effective jurisdiction of another State;
  - (b) Armed attack against the territory, population or land, sea or air forces of a State by the land, sea or air forces of another State;
  - (c) Blockade of the coast or ports or any other part of the territory of a State by the land, sea or air forces of another State;
  - (d) The organization, or the encouragement of the organization, by a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.<sup>75</sup>

#### *The Demand for Ad Hoc Decision*

Throughout the course of this contention in the United Nations and even in the debates during the League period, one view consistently and energetically put forward is that all definitions of whatever type are undesirable restrictions on the discretion of the appropriate decision-making organ. "[All]

73. See, *e.g.*, the statement of the Belgian representative, U.N. GEN. ASS. OFF. REC. 6th Comm., 6th Sess., 287th mtg., para. 34 (1952); Report of the 1953 Special Committee 14; Report of the Sixth Committee, U.N. GEN. ASS. OFF. REC. 9th Sess., Annexes, Agenda Item No. 51, at 10 (1954); Report of the 1956 Special Committee 8-9.

74. Report of the Sixth Committee, U.N. GEN. ASS. OFF. REC. 12th Sess., Annexes, Agenda Item 54, para. 21 (1957).

75. This draft was resubmitted by Peru to the 1956 Special Committee. See Report of the 1956 Special Committee 31. See also the draft definition proposed by the Dominican Republic, Mexico, Paraguay, and Peru to the 1956 Special Committee, *id.* at 9-10, and the drafts submitted by China, Mexico, and Bolivia to the 1953 Special Committee, Report of the 1953 Special Committee, Annex 4-8.

definition[s] delimit," it is said, and make certain factors decisive while passing over other elements and circumstances that may be equally relevant.<sup>76</sup> The primary desideratum, in this view, is that the decision-maker should be unfettered by a priori rules and tests, and completely free to make *ad hoc* determinations upon appreciation of the peculiar elements of each specific situation of coercion.<sup>77</sup>

Recently, a distinguished scholar has undertaken to restate at detailed length, to document, and to build upon this view. Professor Stone inveighs mightily against those who, in his opinion, seek to find a "mechanical test of aggression, insulated from the merits of the situation in which States act," a test that would be "clear and precise enough for certain and automatic applications to all future situations," in short, a "juristic push-button device."<sup>78</sup> The purpose behind the continuing search for "precise definition" has been, as Professor Stone sees it, "to control determinations to be made when passions are aflame by advance criteria agreed upon before national passions were embroiled . . .,"<sup>79</sup> "to make it clear in advance of the particular crisis what the judgment will be and remove the agony and the conflict of national interests

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76. See POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 80 (1953), summing up this view.

77. Such is the official view of the United States and United Kingdom governments as of now. See McDougal & Feliciano, *General Principles* 819 & n.151. For a collection of statements of these and other governments urging this view in its many detailed forms, see Report of the Secretary General 54-59. These arguments, which, as will be developed below, rest on a singular conception of the processes of decision making, have been repeated uncritically ever since Sir Austen Chamberlain dropped his mot in the House of Commons about any definition of aggression being "a trap for the innocent and a signpost for the guilty." Observations of His Majesty's Government in Great Britain on the Programme of Work of the Committee on Arbitration and Security, Minutes of the Second Sess. of the Committee on Arbitration and Security, LEAGUE DOC. No. C.165.-M.50.1928.IX, p. 176 (1928).

In the discussions of the 1956 Special Committee, the U.S. representative added a mildly astonishing ground: the limitations of the human mind. He said:

It would be no remedy to say that any definition must, of course, be interpreted and applied in the light of circumstances. That would, in his opinion, be another way of saying that it was impossible to avoid appraising a threat or act of aggression in the light of the circumstances as a whole. Since each threat of aggression varied in its history and its facts in an infinite number of ways, it taxed human ingenuity and wisdom beyond reasonable limits to evolve a formula which would anticipate events and provide useful guidance.

Report of the 1956 Special Committee 12. The suggestion may not be inappropriate that the principal deficiency lies, not in the human intellect as such but in the character of the intellectual tools of analysis which thus far have been applied to the problem of clarification. The infinitude of the number of possible combinations of specific circumstances is scarcely unique to aggression and defense; it has not deterred other decision-makers, including both the Congress and the courts of the United States, from prescribing and applying policy with respect to any number of municipal problems.

78. STONE, *AGGRESSION AND WORLD ORDER* 10-11 (1958).

79. *Id.* at 25.

from the moment of decision."<sup>80</sup> The referent of the notion of aggression includes, he emphasizes, "a judgment of value, and in particular of justice";<sup>81</sup> and if the application of a criterion of aggression is not to "outrage minimal levels of justice as between the contending Parties," that criterion "must allow consideration of the full socio-political context of the conduct under judgment."<sup>82</sup> But for it "to be *precise enough* to control the future judgment of aggression," the criterion must be "a violent abstraction from that full context of the crisis which consideration of the merits of the dispute would require to be taken into account."<sup>83</sup> Thus, the failure of states and scholars to achieve agreement on a definition is ascribed by Professor Stone, "at least in part," to "the impossibility of containing the unceasing struggle for a minimal justice in international relations within the straitjacket of precise formulae . . ."<sup>84</sup> Professor Stone makes explicit his conviction that a satisfactorily precise and certain definition is unattainable. Even if advance criteria were agreed upon, there will still be, he states, "additional elements of uncertainty of interpretation of the criteria themselves":<sup>85</sup> the "verbal formulation . . . still has to be interpreted and applied by the very organs whose unreliability is the reason for the formulation. . . ."<sup>86</sup>

*Goal Clarification by Configurative Analysis: An Alternative Conception*

The mechanistically conceived function of a "definition of aggression" which Professor Stone appropriately castigates is, in the light of what is known today about the processes of decision-making, a curious one indeed. To seek to construct a set of words that will automatically determine all future decisions and relieve human decision-makers of the anguish of choice and judgment in responding to events of coercion and opposed claims about coercion is, of course, a futile enterprise; to recognize its futility is, however, only the beginning of wisdom.<sup>87</sup> It is no more feasible or desirable to attempt to define

80. *Id.* at 151-52.

81. *Id.* at 81.

82. *Id.* at 18.

83. *Id.* at 156.

84. *Id.* at 12.

85. *Id.* at 24.

86. *Id.* at 25.

87. Today it is commonly recognized that the process of applying authoritative words in concrete instances requires creative choice. The late Judge Jerome Frank some three decades ago made classic disposition of the illusion of verbal absolutism. FRANK, *LAW AND THE MODERN MIND* (1930). It is not the collocation of letters or concatenations of noises in verbal signs but rather the fundamental perspectives of decision-makers, seldom adequately expressed in brief technical definitions, which importantly affect decision (save, perhaps, for an occasional judicial robot). See, *e.g.*, RAPAPORT, *OPERATIONAL PHILOSOPHY* (1953); Probert, *Law, Logic and Communication*, 9 W. RES. L. REV. 129 (1958); Williams, *Language and the Law*, 61 L.Q. REV. 71 (1945).

It is not our brief that a short technical definition of aggression, if agreement on one were secured, would adequately serve community policy purposes. As Judge Lauterpacht has, however, suggested, because "no definition acts automatically," the objection that



aggression "once and for all" than it is so to define any other legal term or concept of international or municipal law. For observers with full awareness of the factors realistically affecting decision, the task of "defining aggression" is not appropriately conceived as one of searching for a precise, certain, and final verbal formula that would abolish the discretion of decision-makers and dictate specific decisions. It is rather, in broad outline, that of presenting to the focus of attention of the various officials who must reach a decision about the lawfulness or unlawfulness of coercion, the different variable factors and policies that, in differing contexts and under community perspectives, rationally bear upon their decisions; of indicating the interrelations of these factors and policies in context; and, perhaps, of making some lower-order generalizations about the relative weighting of pertinent factors and policies in different contexts.<sup>88</sup> The task, again, is not so much to abolish, with quasi-magical ar-

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adoption of a definition of aggression would necessarily deprive governments and tribunals of "the freedom of appreciation of the merits of a particular situation" lacks thrust. 2 OPPENHEIM-LAUTERPACHT 189 n.2.

88. The task of clarifying general community objectives in the process of authoritative decision about the coercive relations of states is entirely comparable to that with respect to the consensual relations of states. For assistance and guidance in the application of agreements between states to specific instances of interaction, authoritative decision-makers over the centuries have developed a comprehensive set of principles of interpretation, including both content principles and principles of orderly inquiry. The content principles guide decision-makers to all the relevant features of the process of agreement (parties, objectives, situations, base values, preliminary negotiations, modes of expression, immediately indicated shared expectations of commitment, subsequent conduct, etc.) and of context (the embracing conditions of more general community processes) and offer certain tentative weightings to such features both in terms of the presumptive meanings that parties of the specified characteristics would attach to their expressions when affected by such features and in terms of certain relevant community policies. The principles of orderly inquiry prescribe the modalities of analysis by which an interpreter can get the most rational results in applying the content principles. Thus, in most general summation, the two sets of principles, taken together, require an interpreter to proceed as follows: first, to seek a preliminary orientation among possible inferences of shared expectation in community-wide ("plain" and "natural") meanings; next, to test these possible, preliminary inferences by logical (syntactical) principles for contradictions, ambiguities, and omissions; and, finally, to seek the closest possible approximation of the actual active expectations of the particular parties by a pragmatic and systematic examination of all of the relevant features of the process of agreement and its context, as such process and context might have been viewed by parties of the ascertained characteristics. Introduction to the literature may be had from materials referred to in note 255 *infra*.

Similarly, decision-makers who are asked to pass judgment upon the lawfulness or unlawfulness of acts of coercion have their attention directed to a series of *specialized events* that are provisionally designated by the parties (claimants) as "acts of aggression" or "acts of self-defense" (or otherwise). The problem confronting such decision-makers is to discover and assess the perspectives (conservatory or expansionist) of the parties who formulated and executed the coercive policies whose designation and lawfulness are in dispute. Whether the coercive policies in question are permissible or impermissible coercion depends in significant measure upon the *demands and expectations of the claimant parties* at the times of formulation and execution; and these expectations must be

rangements of words, conflicts of national interests (more or less myopically perceived) as it is to clarify common, long-term interests in the maintenance of minimal public order. To dissolve the problem into one of determining "jus-

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established and assessed both according to their "manifest" content and according to other features of the context which may be more indicative of actual demands and expectations.

What we urge here is the need for principles of interpretation of coercive policies, as for persuasive policies, to provide guidance for decision-makers. Such guidance might again take the form both of principles of content (pointing to and weighting the relevance of the important features of the process of coercion and its context) and of principles of orderly inquiry (outlining the sequence in which the components of process and context may most rationally be brought to the focus of attention of decision-makers). See Lasswell, *Clarifying Value Judgment: Principles of Content and Procedure*, 1 INQUIRY 87 (1958), for some amplification of these principles. Emphasizing the contextual basis of inference, such principles would systematically explore the way in which the specialized events of formation and execution of coercive policies are interrelated with the manifold events relevant to their characterization. Thus, beginning with the manifest content of the parties' demands and expectations as indicated by community-wide intelligence, such principles might provide for the orderly examination of the alleged demands and expectations on both sides of the controversy for contradictions, ambiguities, and omissions, and then outline a pragmatic appraisal of the actual, active perspectives of each set of parties in terms both of their special characteristics and of the intelligence in fact known to have been available to them.

In this Article, we attempt both to outline some of the more important features of processes of coercion which may affect the actual perspectives of participants charged with "impermissible" and claiming "permissible" coercion and to relate these features by tentative general weightings to fundamental community policy. Any claimed perspectives may be appraised according to the typicality of the predispositions affecting them and their rational plausibility in context, and may be explored at many different levels of intelligence. The range of possibilities may be indicated by such questions as these:

- a. Were the expectations of the claimants based upon the overwhelming concord of *public* and *secret* intelligence content?
- b. If *public* intelligence was divided, were the bases of inference relied upon by the claimants more plausible at the time than the contradictions? (*E.g.*, statements by elite "enemy" figures? Deeds of elite "enemy" figures? Statements and deeds of elite figures of third powers? Of our body politic? *E.g.*, reputable commentators, investors?)
- c. Were the *public* bases of inference overwhelmingly confirmed by the *secret* channels of intelligence?
- d. If *public* bases were tenuous and the *secret* sources were contradictory, were the *secret* bases of inference more plausible at the time than the contradictions? (*E.g.*, were the sources relied upon plausibly regarded as relatively trustworthy?)
- e. If the *public* and *secret* bases of inference at the time were both tenuous, does subsequently available knowledge show that the inferences made by the claimants were actually correct?

It may be added that intellectual procedures of sufficient refinement are today available to permit increasingly relevant estimates at the different levels of intelligence of the actual perspectives of participants resorting to coercion. See, *e.g.*, HILLSMAN, STRATEGIC INTELLIGENCE AND NATIONAL DECISIONS (1956); PLATT, STRATEGIC INTELLIGENCE PRODUCTION (1957); RANSOM, CENTRAL INTELLIGENCE AND NATIONAL SECURITY (1958). See also the literature referred to in note 129 *infra*.

tice" as between contending participants makes conscious efforts at more detailed clarification for policy guidance neither impossible nor dispensable. It can scarcely be assumed that no policies of a lower level of abstraction than "justice" can be articulated and described. Nothing inherent in nature prevents the objective scholar from describing past applications of a distinction between permissible and nonpermissible coercion (it seems salutary to recall that there have been some), from identifying the variables that have conditioned and affected these applications, from making estimates of probable future applications, and from appraising both past and projected future applications in terms of their probable consequences upon the goal values of the kind of world public order the scholar prefers.<sup>89</sup>

Of course, every definition of aggression, as of any other legal term, is an abstraction; indeed, one of the principal lessons which contemporary studies on semantics and linguistics offer is that every verbalization, whether definitional or not, is an abstraction from the "un-speakable level of objective events."<sup>90</sup> It does not follow from this, however, that all verbalization about aggression, of whatever order of generalization, is futile and undesirable or creates any unique risk that decision-makers may be misled in particular cases and fail to take some relevant element of the "full context" into appropriate account. Such a risk seems inherent in the application of any general concept or standard of any legal system, if not all processes of human decision-making, authoritative or otherwise. That risk is more likely to be reduced to tolerable levels, and the incidence of rational decisions (in the sense of closer approximation of community-approved value goals) is more apt to be increased, by explicit, sustained and systematic efforts at clarifying relevant variables and policies affecting decisions about coercion. Certainly it cannot be reduced by an approach that assumes a completely futilitarian attitude towards words, views each specific case of coercion in microcosm with no more than a few terms of highest level of abstraction, and relies upon calculation of momentary expediencies and, as it were, on visceral sensitivity.

#### *Semantic Equivalents or Roses as Sweet*

The suggestion has also been made that the notion of aggression is unimportant since the legal powers of the organized world community can be activated as well by any "threat to the peace" and "breach of the peace" as by any "act of aggression," and hence that any "supposed 'aggression'" can be "more easily brought home as a breach of the peace."<sup>91</sup> The addition, it is also said, of the "factual" terms "breach of peace" and "threat to the peace" makes it unnecessary to locate responsibility for aggression or to weigh equities before

89. These intellectual tasks, see references in McDougal & Feliciano, *General Principles* 778 n.23, relate to indispensable component operations in problem-solving processes.

90. KORZYBSKI, *SCIENCE AND SANITY* chs. 24-27 (2d ed. 1941). See also HAYAKAWA, *LANGUAGE IN THOUGHT AND ACTION* (1949); MORRIS, *SIGNS, LANGUAGE AND BEHAVIOR* (1946); OGDEN & RICHARDS, *THE MEANING OF MEANING* (10th ed. 1949).

91. STONE, *AGGRESSION AND WORLD ORDER* 22-23, 152 (1958).

police action is undertaken by the organized community; the Security Council, indeed, is neither required nor authorized to wait until the "guilty party" has been identified beyond a reasonable doubt. The Council, the argument runs, has only to resolve a "simple question of fact"—whether or not an actual or imminent "threat to the peace" or "breach of peace" exists.<sup>92</sup> While some verbal symbol less emotionally charged than "aggression" may well be preferred, and while the scope of authority of United Nations organs is not dependent upon the use of one rather than another symbol, the point bears emphasis that the intellectual complexities that attend characterizing impermissible coercion are not successfully evaded simply by the substitution of less invidious labels. Even initial, noncoercive, community intervention for conciliation and settlement requires guidance by an understanding of fundamental long-term goals, guidance not likely to be secured by verbal legerdemain.<sup>93</sup> With respect to the security organs of the United Nations, the problem of characterizing coercion in particular cases as permissible or nonpermissible is principally one of determining the appropriate direction or target of the collective repressive action that is decided upon for the organization or recommended to the several states;<sup>94</sup> it arises when noncoercive community intervention has failed,

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92. EAGLETON, *INTERNATIONAL GOVERNMENT* 525 (3d ed. 1957); MARTIN, *COLLECTIVE SECURITY* 118 (1952). See also the statement of Dr. Pasvolsky, *Hearings before the Senate Committee on Foreign Relations, Charter of the United Nations*, 79th Cong., 1st Sess. 282 (1945).

93. We recognize that different types of decisions reflecting different degrees of community involvement may be taken in the application and implementation of fundamental community policy about recourse to coercion, from traditional exercises of diplomacy in "good offices," through collective conciliation and political pressure, to collective military enforcement action. Differing emphases upon different specific factors and policies may be appropriate in varying types of decision.

The kind of process of clarification that is suggested in this essay is intended to be of assistance in the making of any type of decision. The assumption made is that consideration of goals is relevant to any kind of decision-making which purports to affect the future. Whatever the specific type of decision and whatever the degree of involvement of the general community, continuous and purposeful focus upon long-term goals and policies may help in promoting rationality in decision. Certainly, orderly intellectual procedures for examining contextual factors and policies need not interfere with or impede the negotiation of a compromise or settlement. All we urge is that such compromise or settlement should be as rational, in terms of basic community goal and policy, as particular circumstances may permit.

When the general community of states is most deeply involved, as when collective military action is required or authorized, the need for systematic reference to and appraisal of relevant factors and policies in context is most obvious. In insisting that the most serious decision the general community may make be explicitly related to fundamental goals, we are not recommending the making of facile judgments about guilt or blameworthiness for their own sake. Any decision to engage in collective enforcement that does not impose a plague upon both houses must rest upon some assumption about an appropriate allocation of responsibility. Rational decision requires conscious, ordered, and goal-oriented examination of such assumptions.

94. Cf. Professor Bourquin in *COLLECTIVE SECURITY* 329 (Bourquin ed. 1936):

Why is the need felt of determining the guilty party? It is not for the pleasure of attributing blame or praise; it is because the point of departure is the idea

and it persists as long as one or both of the contending participants refuses to cease acts of coercion. Thus, although characterization for coercive intervention may in some measure be forestalled through successful collective conciliation and compliance by both participants with injunctions to cease and desist, the replacement of "aggression" with some other nonemotive words of the same level of abstraction offers little guidance toward rational decision, even in the diplomacy of conciliation, once the problem has arisen. In fact, commonly implicit in arguments such as those noted above is a facile analogy drawn from municipal law situations: a municipal peace officer separates two individuals who are in violent conflict and brings them before a court for a determination of their rights and liabilities.<sup>95</sup> The appropriateness of this analogy in an arena such as that of the contemporary world is, obviously, highly questionable. While, in point of theory, the United Nations as keeper of the international peace may have competence to coerce both contending participants into stopping hostilities, with the exception of peripheral situations involving only small powers of negligible military capability, the dispatch of international armed forces to do battle with both participants does not presently seem a significant possibility.

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that the aggression must be repressed, that sanctions must be applied to the guilty and aid brought to the victim or victims.

The problem of the determination of the aggressor is of capital importance; it is a problem leading to a practical consequence, tending to set in motion a social reaction against one of the States in conflict, and to secure to the other the advantage of the protection of the society. . . . [T]he determination of the aggressor . . . is an act of reprobation, tending to designate, among the States in conflict, the one against which sanctions are to be applied.

See also ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, *INTERNATIONAL SANCTIONS* 13 (1938): "The international community, if it would apply coercion for the restoration of order, must reach some conclusion as to guilt before using either economic pressure or military action as in either case it would be necessary to inflict material loss, possibly on large populations, in order to restore peace." See also Braatöy, *The Quest for Treaty Definitions of Aggression*, 5 *ACTA SCANDINAVICA JURIS GENTIUM* 29, 35 (1934).

The point we seek to underscore—the irrelevance of the particular term employed in making the characterization—may be illustrated by the Security Council resolutions of June 25 and 27, 1950, (S/1501 and S/1511) in the Korean case. The Council there used the term "breach of the peace" which neither prevented nor dispensed with the Council's discriminating between the North Korean authorities and the Republic of Korea and recommending assistance to the latter as against the former. It should be obvious that "threat to the peace" and "breach of the peace" are, in this sense, little more than functional equivalents of "act of aggression" and call for the same act of judgment if coercive enforcement measures are at all to be taken.

95. The analogy is explicitly developed in Kopelmanas, *The Problem of Aggression and the Prevention of War*, 31 *AM. J. INT'L L.* 244, 253-56 (1937).

JESSUP, *A MODERN LAW OF NATIONS* 196-97 (1948) envisaged the aerial bombardment of the "positions" of both belligerents who refuse to heed a U.N. call for cease-fire and withdrawal of troops, but conceded that where the fighting continues despite such bombardment, the U.N. would have to decide against whom sanctions are to be applied. The suggestion of a preliminary air bombardment by "international air contingents" must today seem quaint.

From this perspective, the basic intellectual task is one of categorizing the variable contextual factors and policies which relate to the distinction between permissible and impermissible coercion for the guidance of differing particular decision-makers.<sup>96</sup> The burden of this task is not so much the distillation of brief, black-letter definitions for authoritative projection in treaty or other form as it is the clarification of a process of intellectual analysis by which responsible decision-makers may discipline themselves for the consideration of relevant factors and policies.

We are hopeful enough to believe that to attempt to clarify the community policies at stake in this most fundamental of all problems is not entirely futile, and that these policies can be clarified and refined in sufficient operational detail to give significant guidance to the various officials who must respond to varying specific controversies.<sup>97</sup> We are acutely aware that the formulation and assignment of operational meaning to policies which, while inherent in the structure of authoritative myth, are there expressed only in the highest order of abstraction, may be most difficult in some particular contexts. There is no way of escaping these intellectual difficulties, just as there is no avoiding the uniquely human problem of choice which all decision-makers ultimately must face. We do not purport to have any magic means of coercing the raw living flow of events into imaginary absolutes of word-categories. We

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96. See the insightful suggestion made by the United States representative (Maktos) in the 1953 Special Committee that "instead of trying to establish a general formula which would probably be incomplete, it would be better to offer the competent organs of the United Nations, and in the first place the Security Council, a list of factors to be taken into account in deciding a given case." Unfortunately, although some other members of the Committee "thought this idea constructive and worth examining," the suggestion apparently was not followed up in subsequent discussions in later Committees by either the U.S. representative or other delegates. The objection raised by the Polish delegate in the 1953 Special Committee that "such a list of factors could only circumvent the important problem of clearly defining aggression and would serve no useful purpose" indicates less than adequate grasp of the character of the task involved. See Report of the 1953 Special Committee 14.

97. The suggestion is sometimes made that for decision-makers to discipline their judgment by a comprehensive "check list" of factors would mean protracted debate and delay when prompt action may be of the utmost importance. It is not, however, our contention that decision-makers must consider each and every factor in minutest detail in every single case. The specific factors upon which inquiry, in a given case, should center and the degree of detail to which such inquiry should be carried, are a function of the particular context to which the decision-maker is responding, including the type of decision to be made. An appropriate metaphor is that of the telescope: the inquiry may be compressed or drawn out as particular contexts may require. But however insistent may be the demand for prompt action, some reference to relevant factors and policies in context must be made if the decision is to make any pretense towards being a rational one, that is, related to the securing of both long-term and short-term community goals. The reluctance to become explicit about such factors and policies may occasionally be only a reflection in actual operation of the destructive skepticism that minimizes or denies the role of authority, and its efforts to achieve policy clarification, in power processes.

do not seek an impossible perfectionism of complete and permanent precision. Our belief is that here, as in other problems of international law, both approximations of policy clarification and rough practical judgments to promote clarified policies are possible, and that perfection is as unnecessary as it is unattainable.

It may be useful to anticipate in summary manner the mode of inquiry that we recommend for detailed clarification of community policies about both non-permissible coercion and permissible coercion. We propose, as a step preliminary but indispensable to clarity, to identify the different types of decision-makers from whom a judgment as to the lawfulness of particular applications of coercion may come to be demanded, to locate their differing positions in the structure of authority, and to note differences in function, in purpose, and in the conditions under which they operate. Next, we shall consider the method of analysis which is relevant when decision-makers are confronted with claims that a certain act or series of acts of coercion is impermissible, and which may enable them to identify and focus upon the more important factors that in various specific contexts may rationally condition or affect a characterization of coercion as nonpermissible. Finally we will suggest a rough and tentative categorization which includes such interrelated items as: the factor of priority in exercise of substantial coercion; the relative size and strength of the contending parties; the nature of their objectives; the conditions under which coercion is applied; the methods employed; the effects achieved; their relative willingness to accept community intervention; and expectations about the effectiveness and costs of decision.

It is well to stress in advance that the significance of any particular factor or set of factors is relative and may be expected to vary from particular context to context. The significance of any factor is in principal measure a function of its location in the whole constellation of variables in a specific context, and of the interrelations of these variables.

Typically, the set of events with which a decision-maker is confronted includes not only a claim of impermissible coercion but also a countering claim by the participant charged with unlawful resort to coercion that it was in fact acting in lawful defense. It is thus necessary to examine in systematic detail the coercion applied by each party upon the other. Claims of lawful defense involve factors which are comparable to, and just as complex as, those raised by charges of unlawful coercion. Parallel analysis is called for and this we propose also to outline.

#### *The Differing Functions of Different Decision-Makers*

The first indispensable requirement is to identify the types of decision-makers who may, on different occasions, be confronted with conflicting claims about the lawfulness of particular coercive acts and to whom differing configurations of factors may make a difference. A general categorization must include officials of international governmental organizations; judges of courts

or tribunals, national or international, permanent or specially constituted; and officials of nation-states.<sup>98</sup>

Officials of the United Nations offer the most convenient illustration of the first type. The principal function of the United Nations, and the relevant one for present purposes, is expressed thus in the Charter: "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . ."<sup>99</sup> In practice, responsibility for the exercise of this security or peace-enforcement function is shared by the Security Council and the General Assembly. Although the Charter assigns "primary responsibility" to the Council,<sup>100</sup> the Assembly has formally and effectively claimed authority to exercise that function when the Council is veto-bound.<sup>101</sup> The competence of the United Nations to deal with situations of coercion is comprehensive. The exercises of coercion which the Security Council may determine to be impermissible and whose prevention or suppression may be sought through measures of community coercion are characterized only in such broad formal terms as "threat to the peace,"

98. See the related categorization achieved in the 1956 Special Committee of the various functions which a definition (or definitions) of aggression may perform and which differ as the decision-makers utilizing such definition (or definitions) differ: (a) guidance for U.N. organs in carrying out the task of safeguarding international peace; (b) guidance for members claiming self-defense; (c) guidance for an international tribunal punishing individuals under the Draft Code of Offences against the Peace and Security of Mankind; (d) possible functions in relation to disarmament arrangements and regulation of atomic weapons. Report of the 1956 Special Committee 5-7. It should be noted that (d) was raised in the form of a call for postponement of discussions on aggression until "the results of disarmament negotiations were known." See also STONE, *AGGRESSION AND WORLD ORDER* 23, 137-39 (1958), who focuses only upon functions (a) and (c). Compare POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 66-71 (1953) and Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, 520 (1956). Earlier and somewhat fragmentary recognition of this variation in function is found in the Report of the 1953 Special Committee 32-35; U.N. Gen. Ass. Res. No. 599 (VI), U.N. GEN. ASS. OFF. REC. 6th Sess., Plenary 368 (1952); U.N. Gen. Ass. Res. No. 688 (VII), U.N. GEN. ASS. OFF. REC. 7th Sess., Plenary 408 (1952).

99. U.N. CHARTER art. 1, para. 1.

100. U.N. CHARTER art. 24.

101. Under the "Uniting For Peace" Resolution, U.N. Gen. Ass. Res. No. 377 (V), U.N. GEN. ASS. OFF. REC. 5th Sess., Plenary 302 (1950). In the light of the effective structural modifications which the organization has undergone, the debates about the "legality" and "constitutionality" of the "Uniting For Peace" Resolution appear remarkably detached from reality. The effects of the "process of structural evolution" have been summed up in the following terms:

[T]he principle of differentiation of function, as between the Security Council and the General Assembly, has been cast into the discard. The scheme of division of labor, involving the supervisory Assembly and the specialized Councils, has tended to break down. The concept of decentralization has given way to a situation in which the General Assembly is the dominant organ within the United Nations.

TENTH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, STRENGTHENING THE UNITED NATIONS 26 (1957).



"breach of the peace," and "act of aggression." Neither the authority of the Council to require or recommend in a particular case collective enforcement action, nor the type, military or political and economic, of enforcement measures that may be required or recommended, is made contingent upon the particular technical nomenclature invoked. Except, perhaps, to the extent that "threat to the peace" may be thought implicitly to convey the notion of a lower degree of coercion than "breach of the peace,"<sup>102</sup> the possible references of these phrases (and of "act of aggression")—in terms of the kinds and intensities of coercion that may be determined to be nonpermissible—are deliberately left indeterminate. Distinguished authorities have accordingly emphasized that the Council's authority to order or call for enforcement action is not conditioned upon a finding of a use or threat of *armed* force in violation of article 2(4) of the Charter.<sup>103</sup> It would then seem a clear inference that the Council may designate as unlawful coercion that which is applied by other than military instrumentalities and which has not reached the level of open military violence.

The conditions under which the United Nations has exercised or attempted to exercise its peace enforcement functions have usually been characterized either by overt military hostilities or by high or rising expectations of violence. The corresponding objectives of community intervention in these situations may be expressed, in most general description, as to prevent accelerating coercion from reaching the intensity of overt violence, and, where that stage has already been reached, to effect the termination of unlawful violence. Beyond these objectives, the organized community may also seek to bring about conditions calculated to prevent the recurrence of violence. The measures adopted to this end may be partial and provisional arrangements. Thus, in the Suez affair, for example, a United Nations Emergency Force<sup>104</sup> was stationed in the Gaza area to preclude further incursions of guerrilla forces across belligerent lines. In some instances the measures may extend to complete and final settlement of the original dispute as in the 1932 Peruvian-Colombian conflict over the Leticia trapezium.<sup>105</sup>

Both the objectives sought in efforts at peace enforcement and the conditions that commonly attend such efforts place a considerable premium upon expeditious action by the organized community, a premium which tends to increase as capabilities of modern weaponry and techniques of coercion mature. Despite modern means of communication, and sometimes because of their character, difficulties of objectively ascertaining facts and of verifying pro-

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102. See Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, 524-26 (1956).

103. See 2 OPPENHEIM-LAUTERPACHT 163-64; Kelsen, *The Law of the United Nations* 726-31 (1950). See also BOWETT, *Self-Defence in International Law* 147, 176 (1958); Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 25 (1951).

104. U.N. Gen. Ass. Res. Nos. 1000 (ES-1), 1001 (ES-1), U.N. GEN. ASS. OFF. REC. 1st Emer. Spec. Sess. Supp. No. 1 (A/3354) (1956).

105. See 2 WALTERS, *A History of the League of Nations* 536-40 (1952).

claimed purposes may be compounded. If the exercise of authority and the application of community enforcement measures are not to be prejudiced, or conceivably entirely nullified, the United Nations must obviously be authorized to act quickly and upon less rigorous standards of evidence than those appropriately demanded of other decision-making bodies, such as judicial tribunals, or of scholarly historians writing a hundred years *post facto*. To put the point most comprehensively, shifting concatenations of relevant factors may be appraised by the security organization differently from other decision-makers who have different functions and purposes and who speak under different conditions.<sup>106</sup>

Judges of tribunals may also have occasion to pass upon the permissibility of resort to coercion in particular cases. The tribunals may be municipal in character, that is, unilaterally established, as were the Chinese War Crimes Military Tribunal<sup>107</sup> and the Polish Supreme National Tribunal for trial of war criminals,<sup>108</sup> or international, that is, established by multilateral agreement, as were the International Military Tribunal (the Nuremberg court) and the International Military Tribunal for the Far East.<sup>109</sup> They may be temporary *ad hoc* creations or, as a higher degree of organization is achieved in the world arena, permanent institutions.<sup>110</sup> The function of these judicial

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106. It might, for more specific instance, be suggested that the organized community may appropriately consider itself as authorized to intervene with measures of varying scope and severity in contexts of intense and accelerating coercion, even before the stage of critical intensity is reached, when the target state may itself be authorized to react militarily.

107. See *Trial of Takashi Sakai*, 14 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1949).

108. See *Trial of Greiser*, 13 *id.* 70. Mention may also be made of the military tribunals and courts established by each of the occupying powers in Germany in its respective zone, pursuant to Control Council Law No. 10. These tribunals and courts had jurisdiction to try, *inter alia*, alleged crimes against peace. See 15 *id.* 39-43.

109. The aptness of the adjective "international" as applied to the Nuremberg and Tokyo Tribunals has been impugned by some scholars. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 238 (1952) contends that the Nuremberg Tribunal was not an "international" tribunal but a "common tribunal" of the Allied Powers on the ground that the Axis Powers were not parties to the London Agreement. Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329, 338 (1947), wrote that it was "more akin to a joint tribunal under municipal law than to an international tribunal in the normal sense of the word." Anent this preoccupation with word-labels, what is important, it may be suggested, is that those tribunals were established by multilateral agreement and that they invoked and sought to apply inclusive policies. It is hardly practical to stipulate an absolute "universality" as the only possible reference of "international."

110. Such as the proposed international criminal court. See Report of the Committee on International Criminal Jurisdiction, U.N. GEN. ASS. OFF. REC. 7th Sess., Supp. No. 11 (A/2136) (1952); Report of the 1953 Committee on International Criminal Jurisdiction, U.N. GEN. ASS. OFF. REC. 9th Sess., Supp. No. 12 (A/2645) (1954). The problems that confront contemporary efforts to establish such an institution are of course vast and complex, and a high probability of realization in the near or foreseeable future is difficult to posit. See STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 378-79

bodies is not the enforcement of peace among nations but rather the determination of the criminal responsibility of individual persons for unlawful resort to coercion. The individuals brought before these tribunals would commonly be political, military, or economic elites, in other words, the top effective decision-makers of the state which breached the prohibition of unlawful coercion.<sup>111</sup> The objectives embodied in the imposition of criminal punishment upon these types of individuals may, but need not, differ from, and may include, all the ordinary purposes for which criminal justice is administered in municipal public orders.<sup>112</sup>

The Judgment of the Nuremberg Tribunal, it may be recalled, evoked much learned, if at times confused, contention about the "criminality" as distinguished from the "illegality" of aggressive war under international law. This contention has, today, been largely muted. Perhaps few will doubt that the present corpus of authoritative myth permits the punishment of individual persons responsible for impermissible recourse to violence, and that the real problem is creating appropriate international institutions and sustaining perspectives and dispositions of effective power for the implementation of authority. It may be observed in this connection that the charters and judgments of the Nuremberg and Tokyo Tribunals as well as the International Law Commission's formulation of the "Nuremberg principles" refer to individual criminal responsibility in the context of a "war of aggression,"<sup>113</sup> that is, impermissible coercion that has reached the dimensions and intensity of overt and extensive military violence. The Draft Code of Offenses Against the Peace and Security of Mankind would extend the policy involved to "any act of aggression"<sup>114</sup> and thereby include unlawful coercion falling short of naked, armed violence. The realism of this projection obviously depends in considerable degree upon the extent to which an effective community monopoly of force is secured in the international arena.

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(1954); Report by Sandstrom on the Question of International Criminal Jurisdiction, 2 YEARBOOK OF INT'L LAW COMM'N 1950, at 18. But approval may be given to the continuation of efforts to clarify the conditions under which such probability may be increased.

111. See *High Command Trial*, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 69-70 (1949); *Krupp Trial*, 10 *id.* at 127-28; *I. G. Farben Trial*, *id.* at 37-38.

112. For an excellent, recent inquiry into these purposes, see Lasswell & Donnelly, *The Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 YALE L.J. 869 (1959).

113. See *Charter of the International Military Tribunal*, art. 6(a), in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS at XI (1949); *Charter of the International Military Tribunal For the Far East*, art. 5(a), in JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, ANNEXES 21 (1948); *Formulation of the Nuremberg Principles*, principles I & VI, 2 YEARBOOK OF INT'L LAW COMM'N 1950, at 374, 376.

114. Article 2(1); Report of the International Law Commission Covering the Work of its Sixth Session, June 3-July 28, 1954, U.N. GEN. ASS. OFF. REC. SUPP. No. 9 (A/2693), at 11 (1954). For brief general comment, see Johnson, *The Draft Code of Offenses Against the Peace and Security of Mankind*, 4 INT'L COMP. L.Q. 445 (1955).

Realistically, the judicial attribution of criminal responsibility can, of course, be carried out only after the termination of violence, and only upon the assumption that the State identified as having unlawfully exercised coercion has been so far forcefully subdued as to permit the arrest and seizure of its leaders and top policymakers. With respect to coercion that has not matured into open military violence, it is conceivable—though history as yet offers no precedent—that a revolutionary elite may emerge in the offending State, capture power and surrender the ousted elite for trial or try them in its own courts. The point of emphasis, however, is that, with either the termination of violence or the subsidence of expectations of violence, judges inquiring into individual guilt would not experience the same insistent need for quick decision that presses upon the security organs of the organized community. The judges may and appropriately do require more exacting degrees and procedures of proof.<sup>115</sup> Difficulties of fact-finding may be substantially relieved by access which the judges presumably would have to the secret files and archives of the accused leaders of the subdued state, and by other evidence not available to the preceding decision-makers. The judicial organs would have full opportunity for more extended inquiry into the relevant factors in context; the relevant context might indeed be defined, and the significant segment of time delimited, somewhat differently for purposes of individual punishment than for purposes of peace enforcement. In particular, in the weighing of equities and apportionment of blame, close consideration can be given to the subjectivities of the individuals accused—in terms of the degree of voluntary and purposeful participation in the making of decisions unlawfully to engage in coercion—<sup>116</sup> which may be pleaded in mitigation or exculpation of responsibility.

The third group of authorized decision-makers is composed of the officials of nation-states who make judgments about the lawfulness of coercion for a number of differing purposes. First, state officials must be continually appraising that degree of constraint, usually minimal, exercised in the ordinary course of interaction with other states. These officials must also assess and

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115. A wide-ranging survey and evaluation, encompassing the procedures utilized in both trials for crimes against peace and trials for "conventional" war crimes, is presented in Tsai, *Judicial Administration of the Law of War: Procedures in War Crimes Trials*, 1957 (unpublished thesis in Yale Law Library).

116. Cf. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 252 (1953). In the Krupp trial, Judge Anderson stressed that for conviction there

must be knowledge of facts and circumstances which would enable the particular individual to determine not only that there was a concrete plan to initiate and wage war, but that the contemplated conflict would be a war of aggression and hence criminal. Such knowledge being shown, it must be further established that the accused participated in the plan with the felonious intent to aid in the accomplishment of the criminal objective. In the individual crime of aggressive war or conspiracy to that end as contra-distinguished to the international delinquency of a state in resorting to hostilities, the individual intention is of major importance.

10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 123 (1949).

decide upon an appropriate response to any drastically accelerated coercion that may be applied against their states. Third, in the event that one or both security organs of the organized community, the Security Council and the General Assembly, are unable to arrive at a characterization of coercion exercised by two contending participants, individual third states may need to decide about permissive discrimination and participation on the basis of such residuary authority as the Pact of Paris.<sup>117</sup> States, finally, who are parties to collective defense arrangements must make determinations as to the occurrence of a *casus foederis*, and must appraise a party's claim for assistance in collective self-defense.

We focus here upon officials of a state against which highly intense coercion has been exercised. Such officials, in responding to coercion with coercion and in asserting a claim to act in self-defense, in fact make a determination that the coercion to which they respond constitutes an unlawful breach of world public order. A determination of this sort is and must be provisional. It is a *claim* to self-redress without prior authorization from the organized community, and is subject to review and appraisal by that community.<sup>118</sup> In the uncertain interval, however, between initiation of substantial coercion and subsequent determination by the organized community, the individual state must be conceded competence to respond quickly if response is to serve the purpose of protection. The need for celerity in decision may be even more pressing, the perils of delay more portentous, for the target state than for the general security organization. Thus, the target state may appropriately be regarded as authorized to act upon a *prima facie* evaluation of the coercion exercised against it, and on standards of proof at least no more demanding than those upon which decision-makers responsible for the enforcement of peace may find it necessary to act.

#### *The Analysis of Alleged Initiating Coercion*

We turn now to the mode of analysis which we suggest as relevant for inquiring into contextual factors that influence decisions about the lawfulness of coercion. The order in which we proceed to analysis of these factors reflects requirements of convenience in exposition rather than a posited hierarchy of intrinsic importance.

#### *Priority in the Exercise of Substantial Coercion*

There has been much discussion in the United Nations committees that have sought to define aggression of a purported "principle of priority" or, as it is sometimes called, a "principle of the initial act."<sup>119</sup> This discussion has, how-

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117. On residual bases of permissive discrimination and participation, see the references cited in McDougal & Feliciano, *General Principles* 826 n.170.

118. See text accompanying notes 213-17 *infra*.

119. See, *e.g.*, Report of the Sixth Committee, U.N. GEN. ASS. OFF. REC. 9th Sess., Annexes, Agenda Item 51, at 11-12 (1954); Report of the 1956 Special Committee 9-10; Report of the Sixth Committee, U.N. GEN. ASS. OFF. REC. 12th Sess., Annexes, Agenda Item 54, at 4 (1957).

ever, been characterized in large degree by misdirection; it has focused too much upon a reference to the chronological priority of some single, "precisely defined," physical act, divorced from the subjectivities of attack or defense accompanying the act. Much of the argument has centered about the "principle of priority" incorporated in the enumerative Soviet draft definition: the stipulation that of two contending participants, that party is the aggressor which first commits any of the acts specifically catalogued as aggressive acts. Some have urged that this particular "priority principle" furnishes the only available criterion for distinguishing a prohibited act of aggression from permissible self-defense. "None of the acts mentioned in the USSR draft resolution," the Ukrainian SSR delegate explained, "amounted to aggression *per se*. Two acts might be the same in the military sense yet from the legal point of view, one would be an act of aggression and the second legitimate retaliation [*sic*]. Aggression would inevitably be the first act, which induced or provoked the second."<sup>120</sup> From an antithetical perspective, the representative of the United Kingdom asserted with equal confidence that "the question of which State was 'first' to commit a certain act was basically irrelevant and that everything depended essentially upon the circumstances."<sup>121</sup> More recently, it has been appropriately emphasized that the "tasks of evaluation" involved in a determination of aggression "simply cannot be performed by limiting consideration to the occurrence of a precisely defined act, at a particular moment, in insulation from the broader context of the relations of the States concerned."<sup>122</sup>

The factor of priority cannot lightly be dismissed as wholly irrelevant to judgments about permissibility or impermissibility of coercion. A conception of priority is implicit in the very notion of impermissible coercion;<sup>123</sup> what community policy seeks to prohibit is resort to certain coercion, not responding coercion in necessary protection of values. Completely to reject the relevance

120. U.N. Doc. No. A/C.6/SR.408, at 13 (1954); *cf. Report of the [Politis] Committee on Security Questions, Conference for the Reduction and Limitation of Armaments*, [1933] 2 CONF. DOCS. (1935.IX.4) 680 (1935) ("The chronological order of the facts is decisive here."). See also the statements of Politis in the Records of the Conference for the Reduction and Limitation of Armaments, 2 MINUTES OF THE GENERAL COMMISSION 500 (League of Nations, Ser. B 1933).

121. U.N. Doc. No. A/C.6/SR.406, at 8 (1954). The United Kingdom delegate, curiously enough, went on to echo the argument made by the Soviet Union in the 1945 London Conference and stated that "Everyone could recognize aggression when it occurred and the matter should be left at that . . ." *Id.* at 9. As to the argument referred to in the text, see also Report of the 1956 Special Committee 9.

122. STONE, *AGGRESSION AND WORLD ORDER* 70-71 (1958).

123. *Cf. Spiropoulos, Second Report on the Draft Code of Offences Against the Peace and Security of Mankind*, 2 YEARBOOK OF INT'L LAW COMM'N 1951, at 43, 67. The same point was stressed by the Netherlands representative to the 1956 Special Committee: "[T]he priority principle was inherent in every definition dealing with armed attack and self-defense. The only problem was to what kind of acts the priority principle was related." Report of the 1956 Special Committee 19. Even the United Kingdom delegate conceded that "it was self-evident that for a legitimate exercise of the right of self-defence something must have first happened to call it into play." *Ibid.*

of priority is thus, in substance, to reject the fundamental community policy of limiting permissible change to change by peaceful procedures only.<sup>124</sup> It is, on the other hand, equally obvious that to assign exclusive relevance to a "principle of priority" whose reference is limited to the timing of a particular "precisely defined" operation indexed, as in the Soviet list, as aggressive, is hardly more rationally designed to secure the fundamental community policies at stake; such a unifactor test ignores the significance of subjectivities or objectives of coercion which must be considered when ascertaining responsibility for breaches of basic policy.

Any conception of priority takes on meaning and must be appraised in terms of the fundamental policies to be served, policies which in considerable measure determine the categories of phenomena to be observed and considered in terms of their sequential relationships of anteriority, simultaneity, and posteriority. Priority, in other words, can here as in other types of problems be ascertained only within a temporal sequence which the decision-maker deems relevant. To delimit the relevant sequence in time necessarily involves specifying the kind of behavior (subjectivities and operations) that may be characterized as unlawful. This specification obviously depends upon the policies the decision-maker seeks to realize. Determination of priority can lapse into an infinitely regressive historical excursion only when the decision-maker is unclear about basic policy or in fact secretly rejects the minimum policy which demands that no change shall be effected through intense coercion and violence.

The diverging views in the United Nations about priority have been inspired by deep discontent with the attempt to utilize, for purposes of fixing responsibility for breach of the public order, a much too mechanistic rule relating single "precisely defined" operations in abstract chronological sequence. The

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124. STONE, *AGGRESSION AND WORLD ORDER* 71 (1958) appears to come perilously close to such a position. Professor Stone writes:

This difficulty was increased to the point of caricature by the express provision in the Soviet draft that virtually no considerations whatsoever "political, strategic or economic", nor in particular any of a rather exhaustive list of provocative invasions by the "victim" of the "attacker's" legal rights and legitimate interests, could justify the attack. In a state of the world in which there is usually no other possible means of vindicating rights and interests, this is rather like proposing a municipal legal order in which the only law which is enforced is a law forbidding physical trespass against the realty or person of another.

See also *id.* at 43, 95, 100. The list of nonjustifying circumstances incorporated in the Soviet definition is, of course, in some of its items, open to serious objection. But Professor Stone himself failed to indicate what "legal rights and legitimate interests," other than the right and interest in defending against "physical trespass against [one's] realty or person," may or should be permitted to be "vindicated" by unilateral force. It may be well to recall that that prohibition is the first indispensable law of any public order. And it is travesty of customary international law to analogize the general community of states to a "municipal society [where] no means whatever existed for changing the law except with the consent of every individual member of the society." *Id.* at 71 n.164. (Emphasis added.)

conception of priority that would determine community policy simply by the chronology of individual physical acts without reference to any other contextual factor was appropriately rejected. The rejection of this notion, however, at times came too close to denying any relevance to conceptions of priority. For proper clarification, neither priority in conducting a specified operation alone nor priority in certain subjectivities unattended by operations is crucial. What is crucial is, rather, priority in the exercise by certain operations and with certain perspectives, of destructive coercion which reasonably creates in the target state—as reasonableness can be tested by third parties—expectations that it must react with violence to conserve its own values.<sup>125</sup> A physical operation alone, considered simply as an act of coercion, is deaf, dumb, and blind to policy and yields no necessary indication of its impact on demanded policies. The question of priority is, we submit, appropriately posed not in terms of marking the exact date or hour of some one physical act, such as the landing of a battalion or the firing of a cannon, but in terms of ascertaining initiative in creating, by certain operations impelled by certain perspectives, the stipulated realistic expectations as to the requirements for protecting values. Subjectivities about coercion are, of course, no more open to direct observation than are subjectivities about persuasion and agreement, and must often be inferred from operations; but inference is no more impossible with respect to coercion than with respect to agreement. Inference about subjectivities, in processes of coercion as of agreement, may and must be drawn from many different particular operations, not merely from one, and from the varying configurations of the specific operations performed by each participant in detailed contexts, including the relative chronological sequence of individual operations.<sup>126</sup> A judgment as to priority thus requires, if chronology is to serve fundamental community policy, appraising and relating to a calendar or clock whole constellations of factors, encompassing both acts and qualifying perspectives, exhibited in the coercion exercised by the respective participants.

### *The Characteristics of Participants*

In considering the relevance of the character and constitution of participants for determining the lawfulness or unlawfulness of coercion, it is necessary to recall that the nation-state is still the major type of participant in

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125. We are here anticipating inquiries made below; see text accompanying notes 170-79 *infra*.

This conception of priority does not compel an infinite regress in historical search for responsibility. The thrust is upon initiative in creating expectations in a contemporary context of a need for military reaction. Difficulty in finding a "time of beginning" for determining responsibility—that is, selecting the appropriate target of community intervention—only arises where one does not accept the basic postulate of no change through too intense coercion or assumes the impossibility of clarifying standards for identifying too intense coercion for expansionist purposes.

126. See note 88 *supra*. With respect to processes of agreement, see also notes 254-55 *infra*.



world processes of coercion and ordinarily commands control of armed forces, the power base which permits the application of the most intense degree of coercion. The relative size and power of a state which is alleged to have unlawfully initiated coercion, that is, its size and power in relation to that of its opponent, may serve as indices of the real, as distinguished from the proclaimed, objectives of each participant, of the intensity of coercion exercised by each (particularly before the stage of open military violence is reached), of the realism of asserted expectations that violence is necessary for protection, and hence of the probable situs of responsibility. The more conspicuous the disparity in relative fighting capability, appraised in terms of both forces-in-being and potential for war, the more easily inferences of responsibility may be drawn. Both common sense and the history of such wars as the Italo-Abyssinian war, the Sino-Japanese conflicts of 1931 and 1937, and the Soviet-Finnish war of 1939 suggest that, in the ordinary course of events, a state with a low level of fighting capability is not likely to initiate highly intense coercion against a much more powerful state. A plea of self-defense has a characteristically implausible ring when uttered by a great power against a weak or disorganized or primitive state.<sup>127</sup>

In weighing relative power and strength, account must be taken of the capabilities not only of the immediately contending participants but also of those defined by each participant as its allies or potential allies. The external structure of identifications that each participant projects, indeed the very configuration of the world arena, may thus be relevant. In the current world, however, the significance of an appraisal of relative capability may depend upon the extent to which the patterns of power move toward diversification rather than toward a simple, rigid bipolarity. Inquiry into such identification structures may yield a more direct indication of the character of the objectives or purposes of the respective participants by revealing the kind of world public order each demands, whether it be one which requires the subordination or destruction of independent power centers or one which seeks peaceful coordination and cooperation in a pluralistic arena.

The nature of the internal structures of authority and control in each of the contending states may also suggest relevant probabilities. A distinguished scholar has submitted that "among factors which appear to influence the warlikeness of a state are the degrees of constitutionalism, federalism, division of powers and democracy established in its political constitution."<sup>128</sup> The

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127. There may, however, be cases of small and weak states deliberately engaging in attacks of a minor and diminutive scale, largely of nuisance value, against a more powerful state. This may be illustrated by the recent incidents at the ill-defined Yemen-Aden border where, it was reported, Yemeni troops with a few field guns and machine guns fired at British forces in the Aden protectorate. British forces reacted by bombing and strafing Yemeni gun positions. The United Kingdom, in a letter to the U.N. Secretary General, stated that the British air action was taken under article 51 of the U.N. Charter. N.Y. Times, May 8, 1958, p. 13, col. 5, p. 34, col. 5.

128. 2 WRIGHT, A STUDY OF WAR 833-48 (1942). See also *id.* at 1164, 1168, 1172, where some generalizations about possible interrelations of economic structure and war-

degree to which both authoritative and effective power are shared by several organs of government and the extent to which a system of power-balancing is maintained within a state, as well as the character and composition of the ruling elite and of predominating symbols,<sup>120</sup> appear in the present world to have some impact on the capacity and likelihood of a state undertaking arbitrarily to resort to force and violence. It is significant that the States which have been explicitly determined by an international organization or tribunal

likeness are attempted. More than half a century before Professor Wright wrote, a comparable insight into the relation between internal value systems and external policies of states was offered by F. de Martens:

I have tried to show the existence of a connection between the internal system and external relations of each country in successive historical periods from antiquity to our times and I have reached the conclusion that when civil and political rights in a State are based on respect for human personality and its inalienable prerogatives, the foreign policy of the government seeks as a natural result to protect the legitimate interests of the nation in its external affairs in upholding order and right abroad and in encouraging every attempt to spread the benefits of civilisation throughout the world. Such a foreign policy should generally produce firmly established peaceful relations and respect for the acquired rights of others. On the other hand, relations with states where human personality enjoys no rights but is oppressed, surrendered to arbitrary caprice, and subject to brutal force cannot be established on a firm basis or develop.

1 TRAITÉ DE DROIT INTERNATIONAL at ii-iii (Leo transl. 1883), as translated and quoted in JENKS, *THE COMMON LAW OF MANKIND* 73 (1958).

More recent studies sustain these insights. *E.g.*, LOEWENSTEIN, *POLITICAL RECONSTRUCTION* 86 (1946):

The distinction [between a political democracy and an autocracy] acquires point when applied to the system of international relations. There is an interrelationship or, it may be said, a causality between form of government and world peace or world organization; and the two are identical, as we have learned the hard way. In the simplest and least controversial terms, a nation organized as a political democracy is more inclined to cooperate peacefully with other nations, and is less prone to resort to violence and war, than one organized as an autocracy.

*Id.* at 90: "But the causality between autocracy and war does not end here. A government which has come to power and must maintain itself by internal violence cannot be expected to behave peacefully towards other countries." See also NEUMANN, *PERMANENT REVOLUTION* (1942); ARENDT, *THE ORIGINS OF TOTALITARIANISM* 394-96, 427-28 (1951); FRIEDRICH & BRZEZINSKI, *TOTALITARIAN DICTATORSHIP AND AUTOCRACY* 57-68 (1956); MOSKOWITZ, *HUMAN RIGHTS AND WORLD ORDER* 87-88 (1958).

129. The significance for war and peace of the character and composition of elites and of dominant symbols are explored in, *e.g.*, ABRAHAMSEN, *MEN, MIND AND POWER* (1945); BLUEMEL, *WAR, POLITICS, AND INSANITY* (1948); LASSWELL, LERNER & DE SOLA POOL, *THE COMPARATIVE STUDY OF SYMBOLS* (1952); LASSWELL, LERNER & ROTHWELL, *THE COMPARATIVE STUDY OF ELITES* (1952); LASSWELL, *POWER AND PERSONALTY* (1948). Contemporary techniques of content analysis appear promising and may provide operational indices for elite and symbol factors and trends bearing on the use (or non-use) of coercion and violence. Recent suggestive studies include DE SOLA POOL, *SYMBOLS OF DEMOCRACY* (1952); DE SOLA POOL, *SYMBOLS OF INTERNATIONALISM* (1951); LASSWELL, LEITES & ASSOCIATES, *LANGUAGE OF POLITICS: STUDIES IN QUANTITATIVE SEMANTICS* (1949).

to have unlawfully resorted to force and violence were commonly totalitarian in internal structure: Fascist Italy, prewar Japan, Soviet Russia, Nazi Germany, North Korea, and the People's Republic of China. Again, it does not seem unreasonable to suppose that the internal characteristics of a state, like its external identifications, reflect in certain measure the kind of public order it projects in the international arena and hence the nature of the objectives that motivate it.<sup>130</sup>

### *The Nature of Participants' Objectives*

In the United Nations committees that sought to define aggression, certain delegations contended that the objectives or purposes or "subjective motives"<sup>131</sup> of a participant charged with having unlawfully initiated coercion were not to be considered in determining the lawfulness of coercion. This view was urged principally in connection with the supposed merits of the enumerative Soviet definition. "The Soviet draft," the representative of Roumania stated, "rightly excluded the subjective element, *animo aggressionis*. The aggressor would, of course, always maintain that whatever his actions, his intention had not been to attack but merely to defend himself or to forestall aggression. Hence no opportunity should be given to the aggressor to plead alleged good intentions."<sup>132</sup> A comparable view was submitted by the Iranian delegate who objected to the inclusion of a reference to "territorial integrity and political independence" in a joint Iran-Panama draft. He argued that this

130. We are not, it might be made explicit, suggesting that nontotalitarian states can never be guilty of prohibited coercion and violence. See also note 156 *infra*. The suggestion made is simply that in examining a participant's publicly asserted perspectives for their realism or spuriousness, inquiry may appropriately extend to the authority and control arrangements, the system of public order, maintained within such participant and projected in the world arena.

131. We speak of "objectives" or "purposes" as referring to preferred and actively sought configurations of events. For purposes of clarity, this reference should be distinguished from that frequently given to "aggressive intention" or "*animus aggressionis*"—the deliberate, rather than merely inadvertent or accidental, initiation of violence. The latter reference is made explicit in, *e.g.*, the Report of the Secretary General 68. Inadvertent or accidental initiation may, for instance, occur where a state, mistaking weather or freakish electronic disturbances on radar screens for approaching hostile missiles, reacts by launching its own missiles. The Secretary General's report pointed to a historical example: during the Second World War, Allied bombs meant for enemy territory fell on Swiss towns.

Purpose can of course be projected only by human beings. It is not easy to appreciate the fine subtleties about "*State mens rea*" spun in STONE, AGGRESSION AND WORLD ORDER 141 (1958). An appropriate conception of top formal and effective decision-makers may go far in clearing such alleged difficulties. The Tribunal in the High Command Trial explained that "war whether it be lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose it is so because the individuals at the policy making level had a criminal intent and purpose in determining the policy." *The German High Command Trial*, 12. LAW REPORTS OF TRIALS OF WAR CRIMINALS 67 (1949).

132. U.N. Doc. No. A/C.6/SR.520, at 11 (1957).

language introduced a "subjective element" and that "the effect of the act, rather than the intention of the aggressor should be the decisive factor in determining aggression . . . ."<sup>133</sup>

The objectives or subjectivities of participants (or, more precisely, of the top effective decision-makers in participating states) cannot, as suggested earlier, be wholly disregarded in characterizing coercion as impermissible. Fundamental community policy does not seek to prohibit all coercion, nor even all highly intense coercion; it explicitly permits coercion for certain purposes, such as that necessary to protect certain indispensable values and to enforce certain community decisions. A participant should not, of course, be allowed to escape responsibility by simply asserting some secret legitimate intention that is belied by any reasonable construction of its acts. This is only to say that proclaimed objectives must be distinguished from objectives sought in fact, and that verbal proclamations alone do not offer conclusive indications of the purposes actually pursued. In the exercise of coercion, as in the making of agreements, the purposes or subjectivities of a participant must be "objectively" ascertained; they are, it may again be emphasized, appropriately inferred from acts and the effects of acts, the totality of a participant's operations, verbal and nonverbal, considered in detailed context. From this perspective, the dichotomy posed by the representative of Iran between the "effect of the act" and the "intention of the [actor]" or, as formulated by Dr. Pompe, between the "purport of the act" and the "purpose of the actor,"<sup>134</sup> appears unreal. To speak of the "purport of the act" apart from the purpose of flesh-and-blood actors is like, in Professor Williams' figure, "speaking of the grin without the Cheshire cat."<sup>135</sup> The available quanta and kinds of evidence from which inference as to purposes is to be drawn may obviously differ as decision-makers differ in function, objective, and operating condition. The point which we would emphasize, however, is that the purposes that impel an exercise of coercion must be relevant to policy, whatever the specific controversy and who over the decision-maker purporting to apply community prescription.<sup>136</sup>

In authoritative myth and doctrine, the nature of objectives or purposes that may not lawfully be sought through destructive coercion is characterized only in terms of a very high level of generality. Article 2(4) of the United Nations Charter prohibits the threat or use of force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." "Territorial integrity" and "political independence," phrases which, it is well known, were inserted in the

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133. U.N. Doc. No. A/C.6/SR.416, at 9 (1954).

134. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 103-04 (1953).

135. Williams, *Language and the Law*, 61 L.Q. REV. 71, 83 (1945).

136. "Whether," the Tribunal in the High Command Case said, "a war be lawful, or aggressive and therefore unlawful under International Law, is and can be determined only from a consideration of the factors that entered into its initiation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found its lawfulness or unlawfulness." *Trial of Von Leeb*, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 67 (1949).

original Dumbarton Oaks draft at San Francisco upon the insistent behest of small states,<sup>137</sup> are classical, technical terms embracing in summary reference the most important bases of state power, the values or interests whose impairment and destruction are sought to be prohibited and, correlatively, whose necessary protection by coercion is permitted. "Political independence" is commonly taken most comprehensively to refer to the freedom of decision-making or self-direction customarily demanded by state officials.<sup>138</sup> Impairment of "political independence," as an attack upon the institutional arrangements of authority and control in the target state, thus involves substantial curtailment of the freedom of decision-making through the effective and drastic reduction of the number of alternative policies open at tolerable costs to the officials of that state. It may further consist of an attempt to reconstruct the process of decision in the target state, to modify the composition or membership of the ruling elite group, and, perhaps, to dislodge that group completely and to substitute another more acceptable to the attacking state. The reference commonly assigned to "territorial integrity," on the other hand, is that control which state officials hold over a certain geographic resource base and the peoples there located. Impairment of "territorial integrity" as an objective of coercion thus implies that control over all or part of a state's physical and demographic resources will be reduced or eliminated. The appropriate emphasis is upon effective control or possession rather than upon formal recognized title,<sup>139</sup> for community policy seeks change only by peaceful modalities, a policy whose applicability is not contingent upon lack of disputation about the formal "legal status" of the area involved or upon the recognition of an opponent's technical "statehood." Initiating coercion intended to accomplish factual modification in resource distribution is prohibited.

The phrase "or in any other manner inconsistent with the Purposes of the United Nations" was designed to emphasize the inclusiveness of the basic policy and to "insure that there should be no loophole."<sup>140</sup> Since the purposes

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137. GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 103 (2d rev. ed. 1949); see 6 U.N.C.I.O. 557, 720.

138. Cf. POMPE, *op. cit. supra* note 134, at 106: "Political independence opposes the other classic aim of war: the imposition of one's will upon the attacked State." See also GOODRICH & HAMBRO, *op. cit. supra* note 137, at 105.

139. See BOWETT, SELF DEFENCE IN INTERNATIONAL LAW 34-36 (1958). The reference to effective control or possession is made not only in the Draft Act prepared by the 1933 Geneva Disarmament Conference and the 1947 Rio Treaty cited by Bowett, but also in, *e.g.*, the definition of aggression proposed by Bolivia to the 1953 Special Committee, which included "the invasion by one State of the territory of another State across the frontiers established by treaties or judicial or arbitral decisions and demarcated in accordance therewith, or, in the absence of marked frontiers, an invasion affecting territories under the effective jurisdiction of a State . . ." U.N. Doc. No. A/AC.66/L.9 (1953); Draft Submitted by Iran and Panama, Report of the 1956 Special Committee 31; Draft Proposed by Mexico, *id.* at 32-33; Joint Draft Proposal of the Dominican Republic, Mexico, Paraguay, and Peru, *id.* at 33.

140. 6 U.N.C.I.O. 335. Contrast the singular reading of article 2(4) by Professor

of the United Nations are formulated in such broad terms as "to maintain international peace and security," "to develop friendly relations among nations," and "to achieve international cooperation in solving international problems,"<sup>141</sup> the omnibus phrase may be seen to include in its reference an indeterminate number of possible objectives which are, on the one hand, less ambitious in scope than the total destruction of the "territorial integrity" or "political independence" of the target state and which are, on the other hand,

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Stone: "Article 2(4) does *not* forbid 'the threat or use of force' *simpliciter*; it forbids it only when directed 'against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.'" He goes on to suggest, in effect, that "the use of force for the vindication of rights" (*i.e.*, other than in self defense) "where no other means exist," is not inconsistent with either article 2(4) or 2(3), and that a "blanket prohibition" is difficult "to reconcile" with the words "and justice" found in article 2(3). STONE, *AGGRESSION AND WORLD ORDER* 95 (1958). It may be noted that what Professor Stone seeks to demolish by this argument is "the extreme view of Article 2(4) prohibiting resort to force by States for the vindication of their rights, save in reaction to armed attack or pursuant to collective decisions . . ." *Id.* at 98.

A partial and preliminary answer is that the "extreme view" with which Professor Stone grapples is, to the extent that it purports to limit the reference of permissible self-defense to defense against overt military violence, largely a straw man. Such a limitation of reference represents a highly selective reading of the drafting history of article 51 and other relevant articles of the U.N. Charter, as well as a projection of doubtful realism. Further, appropriate application of the requirements of necessity and proportionality of response should provide adequate answers to alleged difficulties of having "to submit in default of collective action, to all kinds of illegality, injustice and inhumanity as long as these do not take the specific form of an 'armed attack' under Article 51." *Id.* at 99.

One principal difficulty with Professor Stone's view is that it misconceives the purpose and scope of articles 2(3), 2(4), and 1(1) and treats too casually the preparatory work on these articles. Thus, for instance, he assumes that the inclusion of "territorial integrity" and "political independence" in article 2(4) somehow had a limiting effect upon the prohibition there projected. Contrast the observation made in BOWETT, *SELF DEFENCE IN INTERNATIONAL LAW* 151 (1958) that the "origin [of those words] is found in the desire of the smaller powers to secure some express guarantee of their territorial integrity and political independence; the introduction of this phrase at San Francisco had not, as its purpose, the qualifying of the obligation . . ." See also 2 OPPENHEIM-LAUTERPACHT 154; 6 U.N.C.I.O. 334-35, 400, 564. Again, Professor Stone makes too much of the insertion of "and justice" in article 2(3). "[A]nd justice" was meant to refer to the terms of the disposition and settlement of a dispute—in other words, the settlement should not only not threaten the peace and security of others but should also be just; it was not intended to qualify "by peaceful means." 6 U.N.C.I.O. 399. The location of the phrase "in conformity with the principles of justice and international law" in article 1(1) was carefully chosen precisely with such a purpose in mind. See 6 U.N.C.I.O. 203, 245-46, 318, 394-95, 422. There is absolutely nothing to suggest that the unilateral use of force for vindication of rights (other than in self-defense) in the name of "justice" was intended to be permitted. But the cumulative effect of Professor Stone's view is to place an enormous premium upon the unilateral determination and vindication of "justice" by resort to force. See STONE, *AGGRESSION AND WORLD ORDER* 100 (1958).

141. U.N. CHARTER art. 1.

different from the objectives embodied in "legitimate self-defense" and enforcement of decisions of the organization.<sup>142</sup>

The appraisal of the objectives of a participant alleged to have resorted to unlawful coercion would, of course, present no difficulties if the participant explicitly and publicly declared its intention to destroy the "territorial integrity" or "political independence" of its opponent. Such open explicit declarations, however, are bound to be rare.<sup>143</sup> The more usual case has been, and in all probability will remain, that in which actual objectives are not so candidly expressed. For characterizing actual as distinguished from publicly declared purposes, and for considering the concordance of actual purposes with the fundamental policies outlined in the Charter, certain general factors relating to such purposes may, we submit, be usefully examined. A number of tentative categorizations are suggested below.

*Consequentiality.* The comprehensiveness or consequentiality of the objectives, considered in terms of the nature, scope and relative importance (to each participant) of the values a given state seeks to affect, is of obvious, if preliminary, significance. The spectrum of possible objectives ranges from the most modest to the most comprehensive. The degree of consequentiality of particular objectives is commonly related in roughly direct proportion to the intensity of the coercion applied to secure an objective;<sup>144</sup> and both these factors taken together bear upon the degree of realism attributable to the target state's expectation that it must react with violence. Objectives of relative inconsequentiality may be expected to involve no more than a low degree of coercion and may thus be but an incident of the ordinary intercourse of states arousing no appreciable expectations of a need for countering violence. Although, in principle, the authority of the security organs of the general community may be said to extend to these cases, they would not ordinarily be expected to seize upon such minimal coercion as conduct appropriately calling for community intervention. A certain degree of consequentiality is, as a practical matter, an implicit condition for an exercise of the policing functions of the organized community. On the other hand, objectives that approach the upper extremes of consequentiality, such as the total destruction of the "terri-

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142. The comprehensive reference of this omnibus phrase makes it, we submit, all the more clear that article 2(4) is—notwithstanding Professor Stone's valiant exegetics—appropriately interpreted to exclude the unilateral use of force other than in permissible self-defense, in particular, the recourse to force for the protection or vindication of lesser rights and interests than those involved in "territorial integrity" and "political independence." Detailed, multiple-factor or configurative analysis such as is recommended in this Article remains, however, as necessary for distinguishing the lawful use of force in self-defense from its unlawful use for lesser purposes as it is for discriminating between lawful self-defense and prohibited aggression.

143. In the Suez case, the Israeli representative to the U.N. argued that the Egyptian government had made unequivocal and public statements of a purpose to destroy and eliminate Israel. See U.N. GEN. ASS. OFF. REC. 1st Emer. Spec. Sess. 21-23 (1956).

144. See McDougal & Feliciano, *General Principles* 796-97.

torial integrity" and "political independence" of the target state, require for their achievement the application of highly intense coercion. An objective of this sort arouses strong expectations of a necessity for violence in response. The more comprehensive the objective and the more intense the coercion initiated, the easier it may be to arrive at a rational determination of impermissibility.

*Extension or Conservation.* A major category clearly discernible in the prescriptions of the Charter is that of extension or conservation; a participant charged with unlawfully initiating coercion may be seeking to expand its value resources by attacking and acquiring values held by its opponent or to conserve and maintain its own values against acquisition by its opponent. Characterizing objectives in these terms is obviously required by the fundamental policy of the community respecting permissible modes of change. International change in an arena exhibiting in high degree "position scarcity" and "resource scarcity"<sup>145</sup> realistically involves a reallocation of values among the participants concerned, and reallocation commonly means expansion for the one and diminution for the other.<sup>146</sup> It is perhaps just as obvious that this distinction, to be meaningful in determinations of lawfulness, must be considered in conjunction with both the relative consequentiality of the values involved and the degree of coercion employed to acquire or conserve those same values.<sup>147</sup>

In partial reiteration, for the overriding purpose of securing public order in its most elementary sense, basic community policy seeks to protect from destructive unilateral reconstruction those patterns of value allocation that actually exist and manifest at least a minimal degree of stability. Such patterns need not entirely coincide with those which other, less critical policies and prescriptions, or perspectives of "justice and equity," may require. It is not a theme of an international law of human dignity that our inherited distribution of values among peoples accords completely with humanity's noblest conceptions of justice, nor is it an expectation of such an international law that no future wrongs against peoples will be done. The dominant theme is only that both a more just distribution of values and the revindication of future wrongs must be effected by less primitive methods than the destruction of

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145. See *id.* at 785 n.50.

146. See generally BLOOMFIELD, *EVOLUTION OR REVOLUTION? THE UNITED NATIONS AND THE PROBLEM OF PEACEFUL TERRITORIAL CHANGE* (1957); DUNN, *PEACEFUL CHANGE* (1937); *PEACEFUL CHANGE* (Manning ed. 1937).

147. This posing of complementary categories need not imply any rigid dichotomy nor any assumption about the existence of an absolute "zero-line" between conservation and extension, with one party invariably and wholly located on one side of the line and its opponent always and entirely on the other side. "Pure" cases are bound to be few. What matters is the relative position of each party with respect to the other in the particular context considered; differentiation of degrees—with one party so much more conservationist and the other so much more expansionist—is sufficient for the making of practical judgments of policy.



peoples and resources. While in particular cases it may be difficult to draw lines between conservation and revindication, between defense and redress, it is necessary to continue at attempt to make a practical judgment because there is in their impact upon policy a crucial difference, a difference arising from the interposition of the community's elemental interest in minimal order.

*Inclusiveness or Exclusiveness.* The relative inclusiveness or exclusiveness of the objectives that move a participant may also be relevant in appraising the lawfulness of coercion. Objectives manifest inclusivity to the extent that they admit of widespread participation in the sharing of the values involved, that is, to the extent the values are sought on behalf of other states, or possibly of the entire community of states, as well. Exclusivity, on the other hand, marks objectives which preclude a sharing of the demanded values, with the acting participant seeking unilateral control thereof. Inquiry into the degree of inclusiveness or exclusiveness of belligerent purposes thus entails inquiry into the degree of comprehensiveness of a participant's "self-system" or external structure of identification. But much more than a mechanical counting of heads on each side is involved, for members of a coalition may quite possibly have as little in common as a collective enemy. Objectives of coercion may range from the most exclusive, such as conquest and annexation of the target state, to the most inclusive, such as participation in community peace-enforcement action.<sup>148</sup> The more exclusive a participant's objectives are, that is, the closer their approximation to a program of self-aggrandizement, the less difficult it may be to assess their impact on that fundamental policy which seeks to ensure "that armed force shall not be used, save in the common interest."<sup>149</sup> Consideration of relative inclusiveness or exclusiveness may find particular application in appraising the objectives of subsequent participants—participants other than the states originally involved in the conflict situation—who intervene under a claim of collective defense. The legitimate objectives envisaged in the permission of collective defense are inclusive in nature; they comprise a demand for common safety. Appraisal of the objectives of subsequent participants would of course present little difficulty when the organized community had previously achieved, through either of its security organs, a characterization of the original coercion. The aims of later participants may then be measured against the previous characterization for concordance or contrariety, for sustainment or defiance.

### *The Context of Conditions*

We have previously generalized the relevant conditions under which an allegedly unlawful resort to coercion takes place so as to embrace all the vari-

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148. Some illustrations are suggested in McDougal & Feliciano, *General Principles* 784.

149. U.N. CHARTER preamble. In the apt words of Lord McNair, force is sought to be "collectivized, denationalized." McNair, *Collective Security*, 17 BRIT. YB. INT'L L. 150, 161 (1936).

able interacting components of a world power process.<sup>150</sup> The more important factors of fairly obvious significance to our present problem of appraising lawfulness include expectations about the nature of the available technology of violence, and about the relative probabilities of effective community intervention, and the kind of public order demanded by the respective participants.

The expectations of the participant accused of unlawful coercion as to the character of the technology of violence available to, and the relative vulnerability of, itself, its allies, opponents, and potential opponents may partially explain both the participant's perspectives and its expectations concerning the necessity and costs of recourse to violence. We have adverted to the capability of some contemporary weapons systems for quick and comprehensive destruction. Possessors of these weapons enjoy an overwhelming advantage over those without them. This disparity makes it difficult to give credence to a claim that violence is necessary to protect the stronger against the weaker participant. In the event of an armed conflict between powers possessing them, these weapons may conceivably make, under certain present circumstances, surprise and the first strikes "decisive"; they may thus place a considerable premium on an effective capacity to counter an expected blow by an anticipatory thrust.<sup>151</sup> In these and analogous circumstances, to the extent that an imminently impending attack is realistically expected, seizing the initiative in the actual exercise of violence need not be incompatible with perspectives of lawful defense. The same velocity and destructiveness of contemporary weapons, by reducing to a few minutes the time available for accurate ascertainment of an approaching attack and of the identity of the attacker and by correspondingly increasing the need for instant reaction,<sup>152</sup> may further make so-called "accidental war" a significant possibility,<sup>153</sup> a possibility not likely to

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150. See McDougal & Feliciano, *General Principles* 786-91.

151. The conference convened at Geneva last November 10, 1958, between Western and Communist Powers, for exploring technical means of preventing or detecting surprise attacks, strongly suggests continuing concern over such a possibility. Proposals and counterproposals have been made for specific detection systems against specific weapons that can be used in massive surprise attacks. N.Y. Times, Nov. 25, 1958, p. 1, col. 5; *id.*, Nov. 29, 1958, p. 1, cols. 7-8. The factors that contribute to this possibility, that is, that make the effectiveness of both offensive and defensive capabilities sensitive to who strikes first, are ably discussed in Rathjens, *Deterrence and Defense*, 14 BULL. OF ATOMIC SCIENTISTS 225 (1958) and Schelling, *Surprise Attack and Disarmament* (P-1574, Rand Corp., Dec. 10, 1958) (discussion paper). See also Brodie, *The Anatomy of Deterrence*, 11 WORLD POLITICS 173 (1959); Phillips, *The Growing Missile Gap*, The Reporter, Jan. 1959, p. 10; Puleston, *Should the United States Ever Strike the First Blow?*, U.S. News & World Report, Dec. 13, 1957, pp. 64-66. It does not seem impossible that technological factors of weapons development may overtake cultural perspectives which predispose a nation to accept the "first blow."

152. See Shelton, *Impact of the Ballistic Missile on Defense*, in U.S. AIR FORCE REPORT ON THE BALLISTIC MISSILE 127 (Gatz. ed. 1958); Sheridan, *Impact of the Ballistic Missile on Warfare*, *id.* at 139.

153. See Leghorn, *The Problem of Accidental War*, 14 BULL. OF ATOMIC SCIENTISTS 205 (1958); Rabinowitz, *Accidental War, Missiles and World Community*, *id.* at 202. The very necessity for maintaining deterrence capabilities tends to increase the possibility

be reduced by the continuing development of new weapons systems.<sup>154</sup> "Accidental war," understood as violent action impelled by a misapprehension that an attack has been launched, raises problems that may be inescapable in a primitively organized world which lives under the shadow of ever more fearful instruments of destruction.

Common estimations of participants as to the dependability of timely and effective intervention by the organized community, estimates which obviously reflect the degree of organization and integration achieved in the world arena, may have a significant bearing upon the reasonableness of asserted expectations that violence was necessary for self-protection. When the prevailing estimations of the possibility of such intervention are low, there are evident difficulties in requiring a participant to wait very long, in a context of rapidly accelerating coercion, before responding with violence. These expectations also have particular relevance for officials and members of regional security organizations, established precisely because those expectations were low, who must respond to demands for assistance made in the name of collective defense. Furthermore, to tribunals determining the criminal responsibility of particular members of an accused elite, these expectations may present themselves as possible mitigating circumstances.

In a world marked by deep, continuing conflict among differing conceptions or systems of world public order, it is no longer revolutionary to suggest that the kind of public order demanded by a participant charged with unlawful coercion is a factor relevant to a decision on permissibility. The suggestion amounts to this: that decision-makers rationally should take account of the probable effects of various alternative decisions upon the values of the system of world order to which they are committed. There is growing recognition that conflict between competing conceptions or demanded systems in fact deeply affects both the prescription and application of policy on recourse to coercion, as on other problems.<sup>155</sup> Clarification of fundamental policy about per-

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of accidents. Wohlstetter, *The Delicate Balance of Terror*, 37 FOREIGN AFFAIRS 211, 231 (1959):

A deterrent strategy is aimed at a rational enemy. Without a deterrent, general war is likely. With it, however, war might still occur.

In order to reduce the risk of a rational act of aggression, we are being forced to undertake measures (increased alertness, dispersal, mobility) which, to a significant extent, increase the risk of an irrational or unintentional act of war.

154. Such as the submarine-ballistic-missile complex, as to which see Brinckloe, *Missile Navy*, 84 U.S. NAVAL INST. PROC. No. 2, at 23 (1958); Garthoff, *Sea Power in Soviet Strategy*, *id.* at 85; and the report by Witkin on ballistic missiles capable of being launched from sea and air, N.Y. Times, Jan. 14, 1959, p. 12.

155. Citations to the growing body of relevant literature are collected in McDougal & Feliciano, *General Principles*, 805 n.108, and McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 n.1 (1959). See also, Pinto, *International Law and Coexistence*, 82 JOURNAL DU DROIT INTERNATIONAL 307 (1955); Schwarzenberger, *Scope and Limits of International Legislation*, in GEGENWARTSPROBLEME DES INTERNATIONALEN RECHTES UND DER RECHTSPHILOSOPHIE, FEST-

missible and impermissible coercion requires clarification of the permissible and impermissible objectives of coercion. Differing conceptions of world order which incorporate different perspectives about law, human nature, and human society, and appropriate patterns for the production and sharing of values, define differently the objectives or occasions that, in terms of each system, legitimate the use of coercion and violence. The Soviet doctrine of "just" and "unjust" war offers an important illustration:

(a) *Just* wars, wars that are not wars of conquest but wars of liberation, waged to defend the people from foreign attack and from attempts to enslave them, or to liberate the people from capitalist slavery, or, lastly, to liberate colonies and dependent countries from the yoke of imperialism; and

(b) *Unjust* wars, wars of conquest, waged to conquer and enslave foreign countries and foreign nations.<sup>156</sup>

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SCHRIFT FÜR RUDOLF LAUN 65 (1953); Berlia, *International Law and Russo-American Coexistence*, 79 JOURNAL DU DROIT INTERNATIONAL 27 (1952); International Law Ass'n, American Branch, *Report of the Committee on Peaceful Co-existence*, in PROCEEDINGS AND COMMITTEE REPORTS 85 (1957-1958); INTERNATIONAL LAW ASS'N, N.Y.U. CONFERENCE, REPORT OF THE RAPPORTEUR (RADOJKOVIC) OF THE COMMITTEE OF CO-EXISTENCE (1958).

The suggestion made above that probable impact upon values should be considered appears implicit in Professor Goodrich's eloquent warning:

[T]he United Nations cannot be satisfied with a role which is basically neutral as to values. It must seek to preserve the peace by harmonizing the policies and actions of states, but always on terms which will represent progress toward the achievement of those values for which the United Nations stands. These constitute the life blood of the Organization and unless it is loyal to them, and continually seeks to bring their fulfillment nearer by its actions, it loses its vital force and becomes a piece of lifeless machinery that can easily and properly be dispensed with once it has served or failed to serve its utilitarian purpose.

GOODRICH, THE UNITED NATIONS 330 (1959). Three pages earlier, Professor Goodrich had observed that "Unlike nationalism, Communism offers as part of its basic ideology the promise of an integrated world community, but the goal to be achieved and the path to it are not those of the Charter." *Id.* at 327.

156. HISTORY OF THE COMMUNIST PARTY OF THE SOVIET UNION (BOLSHEVIKS), SHORT COURSE 167-68 (ed. Commission of the Central Committee of the C.P.S.U. [B], 1939). In the 1950 sessions of the U.N. General Assembly's Sixth Committee, the Netherlands representative observed that under the above Soviet doctrine, "there would be two fundamentally different concepts of aggression. On the one hand, the [U.N.] Charter forbade a change in the *status quo* brought about by armed force. On the other hand, there was the view that wars could be fought to achieve an ideological purpose." The reply of the Soviet representative was characteristic: "[F]rom the actual description given by the great Lenin and the great Stalin of just, non-aggressive wars, it followed that they were not aggressive wars but wars of liberation, whereas unjust wars were always wars of aggression." U.N. GEN. ASS. OFF. REC. 5th Sess., 6th Comm. 135, 157 (1950).

For a more recent statement, note the speech delivered by Premier Khrushchev at Leipzig on March 7, 1959, where he is reported to have said, after stressing that "the military power of the Communist bloc is greater than that of the 'imperialists'": "We recognize the right of using strength in dealing with the imperialists. When you talk

With such differences as to the legitimate purposes of coercion and violence existing,<sup>157</sup> universal consensus on any clarification of policy must seem unlikely except, perhaps, on the level of rhetoric of a sufficiently high order of generality. Furthermore, whatever the consensus achieved on an abstract verbal formulation, differences in specific interpretation and application are to be expected. In point of fact, even a cursory review of the records of the General Assembly and Security Council and of the United Nations committees on defining aggression reveals that both the draft definitions of aggression—in particular, the types of specific indices of aggression and of nonexculpating circumstances—and the specific interpretations of broad prescription in particular cases that have been urged by states projecting totalitarian systems of world order, are constantly designed to enhance the strategies, and promote movement towards the goal values, of their systems. In these circumstances, for decision-makers committed to a system of world order that seeks to honor human dignity either to dismiss as totally irrelevant the probable impact of possible alternative resolutions upon the values embodied in such system, or else to assume a nonexistent universality, may be only to engage in traumatic self-delusion. Even in today's extreme crisis, however, we do not recommend

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with the imperialists, morals are not enough. You must be supported by strength." N.Y. Herald Tribune, March 8, 1959, p. 14, col. 4.

Lest the contrary impression arise by default, it may be made clear that, in contrast with the quoted Soviet doctrine, we make no proposal for incorporation of a double or multiple standard in the conception of permissible coercion. The policy we recommend is, on the contrary, that of demand for effective universality, for the uniform application to all participants of a basic policy that excludes the acquisition or expansion of values by coercion and violence. In urging the explicit examination of the fundamental public order perspectives of participants, in particular their definitions of the legitimate purposes of coercion, the hope is precisely that decision-makers may thereby escape the double standard which in specific interpretations may be created against those who do not accept as permissible the use of coercion for expansion. We think of the interest to be clarified, the demand for change by noncoercive and nonviolent procedures only, as a general community interest, as the long-term interest of all individual states, and recognize that there must be a promise of reciprocity from states who reject totalitarian conceptions of world order. It does not need elaborate demonstration that this interest has special significance for the newly emergent, the small, or the weak territorial communities who comprise the bulk of the peoples of the world and who cannot even hope by their individual resources to maintain their identities as distinct and self-directed participants in the contemporary arena as against powerful states which may seek self-expansion.

157. In further illustration of such differences, the doctrine of *jihad*, so important in traditional Islamic law, may be noted. Islamic law theory divided the world into the *dār al-Islam* (abode or territory of Islam) and the *dār al-harb* (abode or territory of war). *Jihad* imported an obligation upon the Moslem state to transform the latter into the former by war as well as by other means. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 51-73 (1955); Khadduri, *International Law*, in 1 *LAW IN THE MIDDLE EAST* 353-54, 359 (Khadduri & Liebesny ed. 1955).

For an authoritative statement of the dynamic contemporary purposes and aspirations projected for the Islamic world, see NASSER, *EGYPT'S LIBERATION: THE PHILOSOPHY OF THE REVOLUTION* 81-114 (1955).

that expansion by violence be held permissible for the half-world or regions or states adhering to nontotalitarian systems of public order. Any violent expansion involves a destruction of values that is, we submit, incompatible with the overriding conception of human dignity.

Any clarification of permissible and impermissible purposes of coercion must obviously be sustained by a certain minimum community of interest and sharing of values. In last resort, all law must depend for its efficacy upon the common interest and shared values of the participants in the arena to be regulated. From the perspective of proclaimed doctrine—postulating an implacable hostility and irreconcilable conflict between the Communist world and the Western “bourgeois, capitalist” world, and explicitly envisaging the eventual liquidation of the latter at the most economic speed—a serious question arises whether the necessary community of values remains between leaders and peoples committed to such a doctrine and other peoples.<sup>158</sup> From the more realistic perspective of the conditions that must eventually affect specific demand, however, there may be discernible at least an immediate mutual interest in continued survival. The fundamental import of the conditions of power which, in the contemporary global arena, manifest themselves in a precarious equilibrium of capacity for inflicting fearful destruction, is that the proponents of one system cannot destroy by violence the proponents of the other without bringing their own world to enduring radioactive ruin.<sup>159</sup> As peoples dedi-

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158. See, e.g., POSSONY, *A CENTURY OF CONFLICT* (1953); Aaron & Reynolds, *Peaceful Coexistence and Peaceful Cooperation*, 4 *POLITICAL STUDIES* 283 (1956); Cottrell & Dougherty, *Hungary and the Soviet Idea of War*, 16 *RUSSIAN REV.* No. 4, at 17 (1957); Lissitzyn, *Soviet Interpretation and Application of International Law*, 8 *NAVAL WAR COLLEGE REV.* No. 5, at 33 (1956); Strausz-Hupe, *Protracted Conflict: A New Look at Communist Strategy*, 2 *ORBIS* 13 (1958); Triska, *A Model for Study for Soviet Foreign Policy*, 52 *AM. POL. SCI. REV.* 64 (1958). Compare Hula, *The Question of Russian Objectives*, in *EAST-WEST NEGOTIATIONS* 52 (Wash. Center of Foreign Policy Research, 1958).

In his Leipzig speech, as reported in the *N.Y. Times*, March 8, 1959, p. 3, col. 4, Premier Khrushchev affirmed that “if there is a new war—one could start in a small way—it will end with the downfall of capitalism,” and that “even the blind will see what is white and what is black and they will see that for the world there are not two ways but only one way—the way of communism.” Premier Khrushchev is here reiterating the theme of systemic revolution which he, Adlai Stevenson reported, had previously expressed:

You must understand, Mr. Stevenson, that we live in an epoch when one system is giving way to another. When you established your republican system in the eighteenth century, the English did not like it. Now, too, a process is taking place in which the peoples want to live under a new system of society; and it is necessary that one agree and reconcile himself with this fact. The process should take place without interference.

*N.Y. Times*, Aug. 28, 1959, p. 6, col. 1.

159. The type of situation that may be referred to here has been characterized in terms of “determinate,” meaning calculable, but “unlimited” risks associated with the prosecution of “unlimited objectives,” that is, objectives “related to survival.” See King, *The Rationale of Agreement Between Nuclear Powers—A Method of Analysis*, in *EAST-WEST NEGOTIATIONS* 38, 42 (Wash. Center of Foreign Policy Research, 1958). King

cated to freedom maintain this last and narrow common ground, they may cherish the hope that others will recognize such common ground and that it may slowly be widened to include sharing of other values sufficient to sustain a common policy against coercion.

### *The Modalities of Coercion*

In considering the relevance of the methods used by a participant who allegedly has initiated unlawful coercion, it may be recalled that, while armed force has for centuries been the classical instrumentality of coercion between states and still remains the ultimate means of applying the most intense coercion, it is today a commonplace that all instruments of policy—military, economic, and political—can be and are being used to achieve varying degrees of coercive effect. The burden of the experience of recent decades is that many objectives for which armed force was used in an earlier day may now frequently be realized, or at least substantially facilitated, by highly developed nonmilitary techniques of coercion without open violence. Of principal importance in this connection are the exercises of coercion emphasizing political or ideological instruments, with military instruments in a muted and background role, commonly referred to as “indirect aggression” and frequently described as more dangerous than the “direct” or military type of aggression. A chief characteristic of “indirect aggression” appears to be the vicarious commission of hostile acts by the aggressor state through the medium of third-party groups located within the target state and composed either of foreigners or nationals of the target ostensibly acting on their own initiative.<sup>160</sup> The hostile acts may include the giving of aid and support and, frequently, strategic and tactical direction to rebellious internal groups. The classic postwar case is that of the Greek Communist guerrillas to whom Albania, Bulgaria, Yugoslavia and Roumania furnished both open military aid and the use of their territory as a base for military operations against the constitutional Greek government and also as a safe refuge in tactical defeat.<sup>161</sup> The assistance given

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suggests that in this situation, negotiations “indicating mutual recognition of the stand off and a mutual resolve not to challenge the *status quo*” might be useful. *Id.* at 47. The sensitivity and precariousness of the equilibrium is underscored by, *e.g.*, Wohlstetter, *The Delicate Balance of Terror*, 37 FOREIGN AFFAIRS 211 (1959).

160. Report of the Secretary General, 72.

161. In Resolution No. 193 (III), the General Assembly declared that “the continued aid given by Albania, Bulgaria and Yugoslavia to the Greek guerrillas endangers peace in the Balkans, and is inconsistent with the purposes and principles of the Charter of the United Nations.” U.N. GEN. ASS. OFF. REC. 3d Sess., Part I, Resolutions 18, 19 (1948). The Assembly later recommended that all U.N. members and “all other States” “take into account, in their relations with Albania and Bulgaria, the extent to which those two countries henceforth abide by the recommendations of the General Assembly in their relations with Greece”. U.N. Gen. Ass. Res. no. 288 (IV), U.N. GEN. ASS. OFF. REC. 4th Sess., Resolutions 9 (1949). Detailed findings of fact are contained in the Reports of the U.N. Special Committee on the Balkans; U.N. GEN. ASS. OFF. REC. 3d Sess., Supp. No. 8 (A/574) (1948); U.N. GEN. ASS. OFF. REC. 4th Sess., Supp. No. 8 (A/935) (1949).

to internal groups may frequently assume more covert and subtle forms including the training, exportation, and financing of leaders and specialists in subversion, sabotage, infiltration, fomentation of civil violence, and *coups d'etat*. "Indirect aggression," disguised as a purely domestic change,<sup>162</sup> presents peculiar difficulties for external decision-makers. The organized community may suddenly be confronted with a *fait accompli*, as in the case of Czechoslovakia in 1948, which may leave as an alternative to passive acquiescence only the improbable prospect of collective coercion against the victim state in an effort to dislodge the new revolutionary elite. Persuasive evidence of common fear and expectations of the effectiveness of "indirect aggression" may be found not only in the repeated proposals specifically to include condemnation of its use in a definition of aggression but also in declarations of the United Nations General Assembly. In the "Peace through Deeds" Resolution, the General Assembly did "solemnly reaffirm" that "whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interests of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world."<sup>163</sup> In a world exhibiting in ever increasing numbers military weapons of awesome capability for destruction and in which the possibility of avoiding or limiting the use of such weapons once violence breaks out remains problematical, there is growing awareness that recourse to military force even of the "conventional" type may impose unacceptable risks of grievously exorbitant costs. Consequently, increasingly frequent resort to methods of "indirect aggression" may be anticipated since they provide more economical means of achieving unlawful objectives. The most serious problem confronting adherents to systems of world order which seek to honor freedom may thus be to devise appropriate procedures for identifying and countering unlawful attack disguised as internal change.<sup>164</sup>

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162. See, *e.g.*, with respect to capture of Czechoslovakia in 1948, the statements of the Soviet representative in the Security Council invoking article 2 (7) of the U.N. Charter on "domestic jurisdiction" on behalf of the Czech Communist government. U.N. SEC. COUNCIL, OFF. REC. 3d Year, No. 56, at 2-21 (1948). For exposition of the circumstances surrounding the seizure of power and the techniques employed by the Communists in Czechoslovakia, see the statements of the U.S. representative, *id.* at 25-33. See also POSSONY, *A CENTURY OF CONFLICT* 292-95 (1953) and, more generally, SETON-WATSON, *THE EASTERN EUROPEAN REVOLUTION* (1951).

163. Resolution No. 380 (V), U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20 (A/1775), at 13 (1950). See also Resolution No. 381 (V), *id.* at 14. *Cf.* The "Essentials of Peace" Resolution where the Assembly condemned "any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State." Resolution No. 290 (IV), U.N. GEN. ASS. OFF. REC. 4th Sess., Resolutions 13 (1949). See also the formulations achieved by the International Law Commission in the DRAFT CODE OF OFFENSES AGAINST THE PEACE AND SECURITY OF MANKIND arts. 2(4), 2(5), and 2(6); Report of the International Law Commission, 6th Sess., U.N. GEN. ASS. OFF. REC. 9th Sess., Supp. No. 9 (A/2693), at 11 (1954).

164. This problem of coping with "indirect aggression" presents the difficult task of distinguishing between (a) situations in which there is significant intervention in a



In connection with efforts to clarify the meaning of "indirect" or nonmilitary types of aggression, particular proposals have been made for formulating a definition of "economic aggression." Concern for this form of coercion is revealed by a number of proposals; however, they have tended to be idiosyn-

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factual sense, whatever the precise modalities, by external elites, and (b) rebellion situations which are wholly or primarily of genuinely indigenous initiation and management. This distinction must be attempted because of the differences in the relevant fundamental community policies.

The type of situation in which an external elite attacks a body politic by use of internal agents poses no new policy problem. Highly intense attacks through such instrumentalities, of such impact as to create in the target state a reasonable expectation that it must resort to the military instrument (and, for instance, strike at the bases of operations maintained in the external elite's border zones) to preserve its independence and territorial integrity, are just as inimical to minimum world public order as any other mode of attack. The fact that attacking external principals utilize and receive aid from internal agents merely adds a new dimension to the threat, and neither the target state nor the general community should be required to make too nice discriminations of the degrees of threat from the "outside" and from the "inside." For dealing with this type of situation, all the provisions of the U.N. Charter and other documents referred to above are entirely relevant.

Situations where rebellion is of indigenous stimulation and genuine internal direction pose more difficulty. One of the basic premises of a world arena composed of states is that territorial communities of peoples whose interactions most directly and immediately affect each other may establish their own internal public order, with whatever specific goal values and implementing institutions they choose. The presumption in favor of "self-determination" by appropriately responsible communities is in substance a presumption in favor of the human rights—the private choice—of individuals. In the increasingly interdependent contemporary world, however, no community lives entirely alone. When the balance of global power teeters precariously between two poles, or a few major centers of concentration, what begins as honest home-grown violence may easily become a spreading conflagration affected with the deepest international interest. In such situations, initial preference for self-direction of lesser communities should of course yield to the necessities of the larger community interest in securing even a minimum of public order. Fortunately, the U.N. Charter affords adequate authority for the continued surveillance of coercion which begins as internal rebellion and for general community intervention when such appears necessary. Note the very broad language of articles 14 and 34 of the U.N. Charter.

In particular instances, it may not, of course, be at all easy to determine whether internal violence is merely disguised external attack or genuine indigenous revolt. Rebellions may be of many different kinds and occur in many differing contexts under varying conditions. The recourse of the responsible decision-makers must again be to systematic and careful examination of all the factors that make up the coercion in its context, at all possible levels of intelligence. The more obvious observation of lines of communication and movements of persons and material may again be supplemented by inquiry into more subtle and covert factors, such as: the relation, if any, of the internal disturbance to claimed world revolutionary movements; the differential allegiance of various internal groups to varying competing systems of world public order; the degree of sharing of power admitted in internal structures of public order; the degree to which internal practices, institutionalized or not, constitute "provocative conditions" by denial of human rights to minorities or even whole populations; and so on. The presumption against general community regulation of indigenous violence is, it must always be recalled, a presumption in favor of human rights. When the factual bases for such presumption are

cratic and are frequently characterized by formidable abstraction and ambiguity. For instance, the draft definition formulated by Bolivia provides in part that:

3. . . . unilateral action whereby a state is deprived of economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is unable to act in its own defense or to cooperate in the collective defense of peace shall likewise be deemed to constitute an act of aggression.<sup>165</sup>

Other proposals include the suggestion of the Afghan representative that closing the "historical trade route of a land-locked country or creating difficulty in the way of free and normal trade and commerce" should be condemned

nonexistent or fail, the presumption may, much as in the traditional doctrines of humanitarian intervention, be required to give way to more inclusive policies.

Confusion in discussions of these problems may further arise from failure to distinguish attack by external aggrandizing elites upon a target state, through the medium of internal groups, from assistance to a state, upon request of its constitutional government, in maintaining internal order. In respect of the latter, it is sometimes necessary to recall that traditional international law imposed no prohibition upon the rendering of aid to an independent and duly constituted government, inside its own territory, for quelling internal disturbances and it seems difficult, save perhaps where such government has consistently and ruthlessly denied the most basic human rights to its own people, to find such a prohibition in the U.N. Charter. It was only where rebel groups had been able to maintain prolonged civil strife, waging general hostilities and occupying substantial territory, that some modification of the liberties of the constitutional government was sought under the somewhat elusive customary law doctrines on "belligerency" and "insurgency." The suggestion has on occasion been made that when the stage of substantial success is reached by rebels, provisions of the U.N. Charter (*e.g.*, article 2(4)) may be supplied to impose comparable limitation upon requests by the *de jure* government for external aid. In this connection, see Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 119-25 (1959). The basic policy at stake is, as indicated above, the preservation of the genuine self-direction of territorial communities and not the restraining of peoples from changing their governments. The long experience under the older "belligerency" and "insurgency" doctrines, however elusive those technical formulations may have been, may possibly afford relevant guidance to contemporary decision-makers who must cope with this problem in appraising the genuineness and degree of internal changes in authority and effective control.

165. U.N. Doc. No. A/AC.66/L.9 (1953). Compare article 16 of the Charter of the Organization of American States which prohibits "the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." (Text in 46 AM. J. INT'L L. SUPP. 43, 47 (1952).) Clearly similar to article 16 of the O.A.S. Charter is article 2(9) of the DRAFT CODE OF OFFENSES AGAINST THE PEACE AND SECURITY OF MANKIND, *supra* note 163, at 11.

Bolivia's concern over "economic aggression" has not been wholly academic. Dumping of cheap tin on the world markets by the Soviet Union resulting first in the downward revision of export quotas under the International Tin Agreement and later in the collapse of price levels, led Bolivia to raise a charge of "economic aggression" against the Soviet Union. Bolivia's economy depends in very considerable measure upon her production of tin. N.Y. Times, May 6, 1958, p. 17, col. 3; *id.*, Oct. 2, 1958, p. 29. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 106 n.3 (1958) cites examples of cases where complaints were made to the Security Council of various forms of "economic aggression."

as "economic aggression."<sup>166</sup> The delegate of Pakistan urged that to deprive riparian states of their rights with respect to international rivers was an act of "economic aggression."<sup>167</sup> The most extravagant formulation is that in the Soviet draft which includes "measures of economic pressure violating [another state's] sovereignty and economic independence and threatening the base of its economic life."<sup>168</sup> None of these proposals have met with much enthusiasm, partly because of the fear that their inclusion in a definition of aggression "might suggest the right to go to war in self defense" against "economic aggression."<sup>169</sup> An appropriate application of the principle of proportionality would commonly rule out "war" or extensive violence as a legitimate response to economic coercion which, in many contexts, may be merely of the kind and level inescapable in the ordinary relations of states. Yet, however tendentious and destructive of initiative and freedom in ordinary intercourse these proposals may be, their very submission reflects a recognition that, with the development and refinement of methods of economic warfare, the flow of goods and services in the international arena can be so managed as to inflict a substantial measure of coercion upon a target state and that, with increasingly tight economic interdependences, the vulnerability of most states to economic coercion tends to increase.

Awareness of the potentialities of all instruments of coercion may indicate that what is of particular importance for decision-makers is not the specific modality or even combinations of modalities employed, considered in typological abstraction, but rather the level and scope of intensity achieved by the employment of any one or more modalities in whatever combination or sequence. The relevance of the kind of instruments utilized by a participant is rather limited: it lies primarily in the rough and ready indication—precise quantification not presently being practicable—which it affords, first, of the level of coercion being applied, second (in equally gross terms), of the relative proportionality of the response in coercion, and, third (though indirectly), of the nature and comprehensiveness of the participant's subjectivities.

### *The Effects Secured*

*Dimensions of Coercion.* That the effects achieved by the employment of coercion constitute a factor of the highest relevance for a determination of

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166. U.N. GEN. ASS. OFF. REC. 12th Sess., 6th Comm. 50 (1957).

167. *Id.* at 62.

168. Report of the 1956 Special Committee 30. The items listed in the Soviet draft as constituting "economic aggression" and "ideological aggression," as well as most of the nonexculpating circumstances specified are, of course, designed to serve the purposes of political warfare.

Still another illustration of the type of proposals that have been made, formally or informally, in respect of "economic aggression," is the suggestion of the Syrian representative in the 1953 Special Committee that: "If a great Power made exorbitant demands in return for the assistance it gave to a weak nation, it was acting contrary to the spirit of the Charter. When those demands threatened the independence of the country concerned, they amounted to aggression." Report of the 1953 Special Committee 25.

169. Report of the 1956 Special Committee 8; See also Report of the 1953 Special Committee 27.

lawfulness requires only brief demonstration. Community policy addresses itself not to objectives and intentions as psychological phenomena alone but rather to such objectives and intentions in action, to their materialization in concrete relations between peoples, to the impact of the coercive pursuit of such purposes upon value processes in the world of time and space. We principally refer to the intensity and magnitude of the coercion—its consequences upon the values of the target state—actually achieved in the process alleged to have been initiated unlawfully. Just as in the appraisal of the consequentiality of objectives, the most comprehensive and detailed appraisal of the consequentiality of the achieved coercion involves consideration of factors like the number and kind of values of which the target state is deprived, the relative importance of these values to the target state, and the scope of value deprivations, including both the geographical range and temporal dimension of the damage. The spectrum of possible degrees of consequentiality is obviously a very wide one.

From perspectives either of realistic descriptions of the past or of projections into the probable future, it will be seen that not every intensity and magnitude of coercion may be characterized as impermissible, whether the purpose be to specify the appropriate precipitating event for lawful recourse to the military instrument in self-defense, or to initiate coercive repression by the organized community, or to impose criminal punishment upon particular individuals. As has been suggested before, a certain degree of coercion is inevitable in states' day-to-day interactions for values. Fundamental community policy does not seek to reach and prohibit this coercion, as indeed it cannot without attempting to impose moral perfection, not to mention social stagnation, on humanity.

There remains the problem of clarifying the intensity and magnitude of coercion that, for varying purposes, may appropriately be characterized as impermissible. The discussions in the United Nations committees on aggression show increasing awareness of the need for clarification. "To constitute aggression," the delegate from Iran stated, "the use of force must be sufficiently serious; otherwise the door would be open to dangerous abuses by States claiming to be acting in self-defense."<sup>170</sup> The Iraqi representative was

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170. U.N. Doc. No. A/C.6/SR.405, at 3 (1954). The Iranian representative was here echoing what the de Brouckere Report of 1926 had observed:

Every act of violence does not necessarily justify its victim in resorting to war. If a detachment of soldiers goes a few yards over the frontier in a colony remote from any vital centre . . . then it cannot be maintained that . . . the invaded country has *reasonable grounds* for mobilising its army and marching upon the enemy capital. . . . [The invaded country] could not be so released [from its obligations under the League Covenant] unless it were the victim of a *flagrant aggression of such a serious character that it would obviously be dangerous not to retaliate at once*.

*Documents of the Preparatory Commission For the Disarmament Conference*, LEAGUE OF NATIONS, SERIES III, at 101 (1927). (Emphasis added.)

Cf. the effort to clarify a distinction between a "frontier incident" listed as a non-

even more explicit in explaining that, under his country's draft definition, which took account of "both the purpose and the effect of the act in question," "the material factor was the gravity of the act, judged by its scale and intensity."<sup>171</sup> Similarly, in the 1956 Special Committee, the Netherlands proposed that the Committee dedicate itself to clarifying "armed attack" as used in article 51 of the Charter. The Netherlands representative stressed that "the place of Article 51 in Chapter VII indicated clearly that small-scale hostilities connected with border incidents fell outside the scope of that Article," and that the "crucial problem" was "to find the criterion distinguishing armed attack from any other use of force, which did not entitle the [target] State to take the action provided for in Article 51."<sup>172</sup>

*The Critical Intensities of Coercion—The Test of Impact Upon Expectations.* In indicating the resulting levels of coercion that are of crucial importance for the application of community policy, it is necessary to refer to a continuum of degrees of coercion, extending from the mildest through an ascending scale of intensity and scope to the most intense. Coercion located at the upper ranges of this hypothetical scale of scope and intensity presents little difficulty. Open and extensive military violence inflicting substantial destruction upon both peoples and resources, the principal constituent bases of state power, clearly represents a prohibited intensity of coercion. The sudden unilateral intensification to such high intensities of a process in which coercion had been at the ordinary minimal level justifies, almost by definition, a reaction on the part of the target state with war in self-defense. The handful of cases in which the League of Nations achieved an explicit determination of impermissibility involved highly destructive uses of the military instrument: the Chaco War,<sup>173</sup> the Sino-Japanese (Manchurian) War,<sup>174</sup> the Italo-Abysinian War,<sup>175</sup> and the Soviet-Finnish War.<sup>176</sup> Similarly, most of the cases

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exculpating circumstance in the Litvinov-Politis definitions and an "act of aggression," made in the Report of the Secretary General 62: "[T]he first salient feature to note is that [a frontier incident] is on a small physical scale, the forces involved being too slight to enable an invasion or attack to be carried out. This criterion, however, would not be a very strict one: What amount of force would have to be used to constitute something which was no longer an incident but an aggression?"

171. Report of the 1956 Special Committee 22.

172. *Id.* at 24.

173. Upon the acceptance by Bolivia and rejection by Paraguay of the formal recommendations of the League Assembly for the settlement of the Chaco dispute, the Assembly recommended that the arms embargo, which had previously been imposed as against both parties, be lifted for the benefit of Bolivia and maintained against Paraguay. See LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 133, at 49 (1935); *id.*, Spec. Supp. No. 134, at 56-57; *id.*, Spec. Supp. No. 135, at 22, 26.

174. See *id.*, Spec. Supp. No. 112, at 22 (1933), where the Assembly adopted unanimously (Japan's negative vote was not counted; there was one abstention) the Lytton Report finding Japan responsible for resorting to war in violation of the League Covenant. The text of the Report is found in *id.* at 56-76.

175. See LEAGUE OF NATIONS OFF. J., 16th year, 1223-25 (1935).

176. See LEAGUE OF NATIONS OFF. J., 20th year, 505-08, 531-41 (1939).

arising after 1945 in which either article 2(4) or 39 of the Charter was explicitly or implicitly invoked, whether in their submission or in the proposals and decisions concerning them, involved overt and substantial uses of armed force: the Indonesian (II), the Palestinian, the Korean, the Guatemalan, the Suez, and Hungarian cases.<sup>177</sup> Of course, the cases of coercion dealt with and penalized by both the Nuremberg and Tokyo International Military Tribunals were principally cases of the most severe and extensive armed hostilities. The reference of such descriptive words as "substantial" and "extensive," in terms of particular quanta of military force, may of course be variable,<sup>178</sup> inasmuch as they are a function of, among other things, the fighting capability of both the attacking and the target states.

As the level of coercion under consideration moves away from the upper extreme toward the lower end of the putative scale of intensity and scope,<sup>179</sup> when, in other words, a process of accelerating coercion has not reached the stage of open and extensive violence, the problem assumes some complexity. Despite the focus upon applications of armed force in article 2(4) of the Charter, severe destructive uses of the military instrument do not exhaust the competence of the community to intervene with appropriate police measures. A sufficiently flexible test of the crucial intensity and scope may be reached, we suggest, by considering the impact of the coercion exercised upon the expectation structure of the target state. In these terms, the key effect is creation in the target state of reasonable expectations, as third-party observers may determine reasonableness, that it must forthwith respond with exercises

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177. See 2 REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS 334-38 (1955).

178. At Tokyo, in reply to the indictment charging aggression by Japan against the Soviet Union in the Lake Khassan (1938) and Khalkin Gol (1939) areas, the defense contended that the operations in both these areas were mere "border incidents caused by uncertainty as to the boundaries." In the Lake Khassan area, the Japanese attacked first with "a small number of troops probably not exceeding one company," and later with "the main forces of one division." The fighting continued for about two weeks and resulted in the Japanese troops being "practically wiped out." The Tribunal stated that "the attack having been planned and undertaken with *substantial forces* cannot be regarded as a mere clash between border patrols." JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 833-34 (1948). (Emphasis added.) The fighting at the Khalkin Gol area was described by the Tribunal as being on an "extensive scale," with aircraft, artillery, and tanks being committed, and resulting in more than 50,000 casualties for the Japanese and 9,000 for the Soviet Union. The Tribunal again rejected the defense that the fighting was no more than a "border incident." *Id.* at 840. In both cases, the objective of the Japanese forces was shown to be seizure of strategically important territory.

179. Contexts located at the lower extreme of the hypothetical scale may perhaps be illustrated by the Spanish Question. In that case, the subcommittee created by the U.N. Security Council reported that, since no "threat to peace," no "breach of the peace," and no "act of aggression" had been established, the Council had no jurisdiction to require or authorize enforcement measures against the Franco regime, but that a "potential threat to the peace" might be found. See U.N. SEC. COUNCIL OFF. REC. 1st year, 1st series, Spec. Supp. 1-12 (1946). Whatever coercion existed was largely of the order of a "moral affront" arising from the disreputable origin and activities of the Franco government.

of military force if it is to maintain its primary values, customarily described as "territorial integrity and political independence." If the coercion brought to bear by whatever modality or combination of modalities (falling short of open and extensive violence) is of such order and proportions as reasonably to bring about expectations in the target state of the insufficiency of nonmilitary countermeasures and of an immediate necessity for a military response, our submission is that a characterization of such coercion as impermissible may appropriately be made.<sup>180</sup> When this stage is reached in a developing process of coercion, to require the target state to delay its reaction further may be to compel it to forego effective defense and submit to its own destruction. At this stage, conditions of fact, high expectations of impending violence, will have been generated, requiring immediate intervention by the organized community to prevent the consummation of the attacking state's objectives. Before this stage is reached, the destructive use of armed force would, by application of the proportionality principle, be precluded *per definitionem* as a legitimate response. In such anterior stages, collective coercive measures, as distinguished from collective conciliation, by the organized community may be both improbable and impolitic. The location of the crucial stage in any particular process of coercion or the determination of the reasonableness of the target state's expectations as to the need for reacting with military force must clearly depend in large measure upon an appraisal of the other factors detailed above. With specific reference to contexts of "indirect aggression," the capabilities of the target state appraised in such terms as the strength of its internal authority and control structures, the stability or vulnerability of its economic basis, its military power resources, and the ideological cohesiveness or homogeneity of its people, may be of special importance.

The clearest and most common illustration of impermissible intensities is that involving a serious direct threat of an imminent, large scale, military attack, such as that employed by Nazi Germany against Austria, Czechoslovakia, and Denmark in 1938-1940.<sup>181</sup> The possible scope of application of the recommended test of intensity need not, however, be limited to contexts in which the target state is put under the apprehension that intensifying coercion is about to culminate in hostile armed violence. The thrust of contemporary concern about "indirect aggression," "economic aggression," and so on, is that the skillful management and combination of economic, ideological and diplomatic strategies, against a background and implicit threat of military violence,

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180. Cf. the specification, proposed by the Netherlands representative, of the intensity of military coercion that would warrant determination of an "armed attack" for purposes of article 51 of the U.N. Charter, in Report of the 1956 Special Committee 24-25. See also the statements of the same representative in Report of the 1953 Special Committee 20; POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 111 (1953). Both Dr. Pompe and the Netherlands representative, however, limited the reference of aggression to coercion by *military* instruments; obviously, we make no such postulation about the types of instruments by which coercion may be accelerated to such an intensity.

181. See the judgment of the International Military Tribunal at Nuremberg, *NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT* 21-27, 38 (1947).

may achieve degrees of coercion that leave no effective alternative to the target state but a military strike (alone or with its allies). The cumulative intensity or value consequences of the coercion applied rather than the particular modality or modalities of application is of primary significance for legal policy; the modality need not be a conclusive index to the degree of intensity actually secured. In many and perhaps most contexts, economic, political, and ideological measures may result only in relatively low-level coercion calling for denial of reciprocities or for impositions of retaliation other than the application of extensive military force. In some contexts, however, they may in fact be so intense and swiftly effective as to preclude successful resistance on the part of the target state.<sup>182</sup>

### *Acceptance or Rejection of Community Procedures*

Still another factor of some relevance to judgments about the lawfulness of coercion is the relative willingness of the contending participants to accept

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182. A conception of aggression limited to aggression by overt military means assumes that coercion emphasizing other instruments of policy may not in any context present the same danger to territorial integrity and independence that armed violence may. This assumption is as unnecessary as it may be hazardous. Cf. the point well stressed in BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 24 (1958):

[W]hen the delict does not involve force or the threat of force, it would similarly seem arbitrary to deny to the defending state the right to use force in defence of its rights as a matter of fixed principle. . . . [T]here is something to be said for the view that economic or ideological aggression can be as detrimental to a state's security and, if illegal, as dangerous a violation of the state's essential rights as the use or threat of force. The relevance of any distinction between delicts involving force and those not so doing lies, in our submission, in the requirement of proportionality. The use of force as a reaction to a delict not involving force will scarcely ever be "proportionate," but there is no rule of law to say it can never be so . . . .

To accept Dr. Bowett's position is not to open a Pandora's box of real as distinguished from supposed evils. The tests of "necessity" and "proportionality" are not in any greater degree susceptible of abuse here than in other contexts, if the reviewing decision-makers desire to safeguard them from subverting misuse. Susceptibility to abuse is a common property of all legal standards and rules.

To the above suggestion that a response with armed force to coercion which has not assumed the form of overt military violence may, in certain contexts exhibiting the crucial intensity, be reasonable and appropriate, objection is occasionally raised also upon the ground that, the conditions of the contemporary arena being what they are, especially with the growing diffusion of the techniques of nuclear destruction, global or general war may result from such defensive armed action. One difficulty with this argument is that it may prove too much. A military response to coercion which has in fact taken the shape of open violence presents the same possibility of a spreading conflagration and expanding destruction, but it has never been seriously contended that, in such case, armed responding coercion may not lawfully be exercised. It would seem very difficult to suppose that that possibility is overwhelmingly greater in the first than in the second type of situation.

In final comment, the alternative to the suggestion made above--that is, to reject a right of self-defense in any and all contexts not exhibiting overt violence and even against



community procedures for the cessation of hostilities already begun and for the nonviolent settlement of the underlying dispute. That this factor *is* relevant has long been recognized. It was in fact adopted as a test of aggression in a number of conventions drafted under the auspices of the League of Nations, all of which conventions, however, failed of ratification. The Geneva Protocol of 1924, for instance, required the League Council to enjoin an armistice upon the belligerents and prescribed that any belligerent refusing to accept the armistice or violating its terms "shall be deemed an aggressor" against whom sanctions were to be applied.<sup>183</sup> Similarly, the 1931 General Convention for Improving the Means of Preventing War raised a *prima facie* presumption of responsibility for aggression—"resort to war" within the meaning of article 16 of the League Covenant—against the party failing to comply with provisional measures ordered by the Council.<sup>184</sup> The United Nations Charter, while also expressly recognizing the relevancy of this factor, is less mechanical in its terms. The Security Council is authorized, for the purpose of preventing "an aggravation of the situation," to call upon the parties concerned to comply with provisional measures, including not only "cease fires," truces, and armistices but also arrangements for the withdrawal of armed forces from particular areas and the establishment of demilitarized zones, and to "take account of failure to comply with such provisional measures."<sup>185</sup> The 1950 General Assembly resolution on the "Duties of States in the event of the Outbreak of Hostilities"<sup>186</sup> offers still further acknowledgment that attitudes toward community intervention may be of help in determinations of responsibility. The resolution recommended that each participant promptly and publicly declare its readiness, upon assurances of reciprocity, to "discontinue all military operations and withdraw all its military forces" that have entered the territory of another; and provided that such a declaration, or a failure to make one, may

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the most intense uses of nonmilitary instruments—may, under the same conditions of the present world, amount to requiring a target state to be the sedentary fowl in an international turkey-shoot.

183. Art. 10; LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 24, at 136, 138-39 (1924). It may be noted that in the summary of "factors [which] may provide the elements of a just decision" about aggression drawn by a Special Committee of the Temporary Mixed Commission For the Reduction of Armaments, there was included: "(e) Refusal of either of the parties to withdraw their armed forces behind a line or lines indicated by the Council." Commentary on the Definition of a Case of Aggression, LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 16, at 184-85 (1923). The formulation proffered by Professor Wright in 1935 turned wholly upon this factor of refusal to accept an armistice. Wright, *The Concept of Aggression in International Law*, 29 AM. J. INT'L L. 373, 395 (1935). In 1957, he spoke of a "strong presumption" of lawfulness arising when a state "has indicated willingness to accept a cease-fire order of a United Nations organ . . ." Wright, *The Legality of Intervention Under the United Nations Charter*, 51 PROC. AM. SOC'Y INT'L L. 79, 87 (1957).

184. Art. 5; LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 93, at 242 (1931).

185. U.N. CHARTER art. 40.

186. Resolution No. 378 (V), U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20 (A/1775), at 12-13 (1950).

"be taken into account in any determination of responsibility for the breach of the peace or act of aggression in the case under consideration and in all relevant proceedings before the appropriate organs of the United Nations." The practices of both the Security Council and the General Assembly offer at least a few instances in which failure to comply with provisional measures appears to have been weighed in characterizing coercion as impermissible. These include the condemnation of the attack by North Korea against the Republic of Korea,<sup>187</sup> the designation of the Peoples Republic of China as an aggressor in Korea,<sup>188</sup> and the determination of the existence of a "threat to the peace" in Palestine.<sup>189</sup>

The significance of relative willingness to accept community intervention is principally derived from the indication it gives of the real as distinguished from the ostensible objectives sought by a participant. Just as conduct subsequent to agreement is commonly honored in principles of treaty interpretation, conduct subsequent to the initiation of coercion is relevant in gauging the realistic subjectivities of the contending states. The special application of this principle here is that a refusal to observe an order addressed to both parties to cease using violence is inconsistent with a professed purpose merely to maintain and defend one's own values. Conversely, a willingness to cease hostilities is evidence of good faith and negates an imputed objective to expand values by violent means. When a participant charged with unlawfully initiating coercion accepts and implements arrangements for cessation of hostilities, it removes the necessity for defense expressly or tacitly pleaded by the opposing participant. Accordingly, if the latter rejects these arrangements, it tends to show that the asserted necessity was unreal in the first place. Disregard of provisional measures, however, does not offer conclusive indication of the unlawful character of a participant's objectives. The initial attacks may, in a par-

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187. In its Resolution of June 25, 1950, the Security Council called "for the immediate cessation of hostilities" and called "upon the authorities of North Korea to withdraw forthwith their armed forces to the 38th parallel." U.N. SEC. COUNCIL, OFF. REC. 5th year, No. 15, at 13-14 (1950). In its June 27, 1950, Resolution, the Council "noted . . . that the authorities in North Korea have neither ceased hostilities nor withdrawn their armed forces to the 38th parallel . . ." *Id.* No. 16, at 4.

188. Resolution No. 498 (V), U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20A (A/1775/Add. 1) (1951). In this resolution, the Assembly noted "that the Central People's Government of the People's Republic of China has not accepted United Nations proposals to bring about a cessation of hostilities in Korea with a view to peaceful settlement . . ."

189. Resolution of July 15, 1948; U.N. SEC. COUNCIL OFF. REC. 3d year, Supp. for July at 76 (1948). The Council, in this resolution, "[took] into consideration that the Provisional Government of Israel has indicated its acceptance in principle of a prolongation of the truce in Palestine; that the states members of the Arab League have rejected successive appeals of the United Nations Mediator and of the Security Council . . . for the prolongation of the truce in Palestine . . .," ordered a cease-fire, and declared that "failure by any of the Governments or authorities concerned to comply . . . would demonstrate the existence of a breach of the peace within the meaning of Article 39 . . ."

ticular situation, have created a serious imbalance of power or placed the target state in a specially vulnerable strategic position with respect to the attacking state, a position or imbalance which may be frozen by the imposition of a "cease fire" or truce. Absent international armed forces able effectively and decisively to aid the complying party in redressing such a disadvantage in the event that hostilities are resumed, failure to comply promptly with provisional measures called for by the organized community need not always be incompatible with perspectives of defense.<sup>190</sup> Response to provisional measures must, like all other factors, be appraised in conjunction with every other factor.

#### *Expectations about Effectiveness of Decision*

The final item in the constellation of relevant factors of which explicit mention may be made is the state of expectations of decision-makers as to the degree of conformity that probably can be secured to a particular demanded decision. This factor, of special significance to officials of international security organizations, is frequently a function of the officials' calculations of the degree of common responsibility and the amount of effective power that realistically can and will be organized to sustain a characterization of impermissibility if one is made, as well as of their expectations about the probable costs of an application, or nonapplication, of policy.<sup>191</sup> That this factor does in fact bear upon decisions to characterize or to refrain from characterizing impermissible coercion<sup>192</sup> obviously reflects the still rudimentary degree of effective organization which the general community of states has achieved and the dependence of the organized community upon the bases of power made available to it by member states.

## PART II: THE CONCEPTION OF PERMISSIBLE COERCION

As indicated above, the conception of permissible coercion may usefully be assigned a three-fold reference. First, there is a relatively low-level coercion which is "normal" and perhaps ineradicable in the ordinary value processes taking place across state boundaries and which includes all coercion not accelerated to the levels of intensity and magnitude that signal impermissible

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190. Cf. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 96-97 (1953). See the discussions preceding the adoption by the General Assembly of the Resolution on "Duties of States Upon the Outbreak of Hostilities" (note 186 *supra*). U.N. GEN. ASS. OFF. REC. 5th Sess., 1st Comm., 249-81 *et passim* (1950).

191. Some illustration is offered in McDougal & Feliciano, *General Principles* 807-08 nn.113-115. See also GOODRICH, *THE UNITED NATIONS* 164-68, 176-88 (1959).

192. It also bears upon the prospects of securing substantial consensus upon any particular formulation of prohibited coercion. Among the arguments presented against "defining aggression" was that "the international situation had placed greater emphasis on the functions of conciliation and mediation of the United Nations rather than on the coercive function. Member states were reluctant to undertake collective military action for fear of provoking a third world war." Report of the Sixth Committee, U.N. GEN. ASS. OFF. REC. 12th Sess., Annexes, Agenda Item 54, at 3 (1957).

coercion. Secondly, there is the coercion of relatively great scope and intensity, including the most intense and extensive violence, that is exercised in necessary response to and defense against impermissible coercion by others. Lastly, there are police measures of varying degrees of comprehensiveness and intensity applied by or under the authorization of the organized community of states.

Admittedly, various specific acts encompassed in the first type of coercion, "ordinary coercion," may constitute international wrongs other than aggression which legitimize responses in the form of denying reciprocities and imposing retaliations other than destructive uses of the military instrument. Such acts may contravene community prescriptions and policies other and less fundamental than those concerned with the securing of minimal public order and the promotion of peaceful modalities of international change, and entail "legal consequences" differing from those we have detailed above.<sup>193</sup>

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193. In referring to such coercive acts as "permissible," we do so only in the sense that they do not assume the intensity and dimensions requiring application of international prescriptions about aggression and self-defence. We do not intend to suggest that such coercive acts may not appropriately be characterized by an arbitral tribunal, for instance, as unlawful, "tortious," or "internationally delinquent" acts in requiring, for instance, financial indemnification, as to which, see, *e.g.*, 1 SCHWARZENBERGER, *INTERNATIONAL LAW* chs. 31-36 (3rd ed. 1957). *Cf.* the distinction well expressed in Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 *MODERN L. REV.* 1, 5 (1956):

It is not against law-breaking as such that [U.N. Charter provisions] . . . are directed, but against that particular type of law-breaking that takes the form of an act of aggression or of committing a breach of the peace. Now it is possible to violate a large part of international law in all sorts of different ways, and to commit breaches of treaties right and left, without ever having recourse to aggression or breaking the peace or even threatening a breach of the peace.

It is also a source of confusion in relevant community policy that lesser deprivations or minor interferences are sometimes assimilated to greater deprivations or major interferences under labels as encompassing as "intervention." The literature frequently fails to make indispensable distinctions. *E.g.*: the facts of state interaction are not distinguished from the responses of established decision-makers in application of authority to such interaction; among facts, beneficial interdetermination is not differentiated from detrimental interference (as benefit or detriment may be assessed by a third-party observer or decision-maker); among detrimental interferences, major assaults upon indispensable bases of power are not distinguished from minor injury to local pride and sensibility; and among claimed lawful responses to injurious interference, unilateral reprisal for primarily exclusive purposes is not differentiated from general community measures in support of inclusive policies. See, *e.g.*, GOULD, *AN INTRODUCTION TO INTERNATIONAL LAW*, 596-97, ch. 19 *passim* (1957); THOMAS & THOMAS, *NON-INTERVENTION* (1956); Lador-Lederer, *General Report on "Zenith and Decay of the Doctrine of Non-Intervention of States in the Internal Affairs of Other States,"* 59TH INT'L CONG. COMP. LAW (Brussels, 1958).

The principles we consider in this essay are those designed to assist in identifying the major deprivations and in clarifying the conditions under which coercive responses, of differing institutional modality, may be appropriate with regard to community policy for securing basic order. Comprehensive consideration and identification of all possible types of lesser deprivation and of the remedies appropriate for them would take us beyond reasonable compass. It may suffice to register that we share the common view that

We focus in subsequent discussion upon the second and third references of permissible coercion.

The specific contexts of interstate conflict which may confront authoritative decision-makers commonly include both measures of coercion and measures of counter or opposing coercion. These processes of coercion and counter coercion give rise to opposed claims that, on the one hand, the coercion applied is unlawful, initiating coercion and that, on the other, the coercion is lawful self-defense. When the respective contending participants are viewed in turn, each may be seen commonly to assert both claims simultaneously: that its opponent has unlawfully initiated coercion and that it is itself responding with coercion in self-defense. Obviously, an external decision-maker must make coordinated inquiry into and assessment of both the coercion claimed to be prohibited aggression and the coercion claimed to be permissible defense. The theme of complementarity is thus a dominant one manifesting itself both in the contraposition of claims asserted in practice and in the necessities of rational analysis by decision-makers.

#### *Self-Defense Distinguishable From Other Exercises of Coercion*

For clarity in thought, that coercion which is claimed to be in defense against unlawful attack or threat against independence or territorial integrity must be distinguished sharply from certain other types of asserted coercion which differ greatly in modality, purpose, specific context, and relevant community policy but which also are frequently put forward under the name of self-defense. The claims with which we are primarily concerned in this Article are claims to exercise highly intense coercion in response to what is alleged to be unlawfully initiated coercion. The other distinguishable types of assertions include claims by one belligerent that it is lawful to apply coercion against a nonparticipant state in response to or anticipation of some operation by the opposing belligerent in the nonparticipant's territory. They also include claims to exercise, for varying purposes, limited and occasional jurisdiction over portions of the oceans and the superincumbent airspace.

#### *Claims of Self-Defense*

The first type—claims to employ highly intense coercion in defense against allegedly impermissible coercion—may be conveniently subcategorized accord-

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the prescriptions and policies embodied in the U.N. Charter forbid the unilateral use of force and violence by way of reprisal for lesser wrongs or "tortious" conduct. See, e.g., BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 13-14 (1958); BRIERLY, *THE LAW OF NATIONS* 324-26 (5th ed. 1955); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *HAGUE RECUEIL* 455, 493 (1952). The overwhelming common interest in basic order, and the exorbitant potential costs of exercises of force by contemporary weapons, would appear to counterbalance losses states may occasionally incur from lesser wrongs left inadequately redressed because of deficiencies in available remedial procedures or the limited ability of a poorly organized community to create effective remedies for all wrongs.

ing to the imminence and intensity of the coercion to which response is to be made. Most conspicuous perhaps are claims to respond with force to intense coercion that is immediate and current and that may be of varying degrees of comprehensiveness and continuity. Such is the claim which a target state makes when reacting violently to military blows initiated and delivered against it; the United States' declaration of war following the attack by Japanese air forces on Pearl Harbor is a familiar example.<sup>194</sup> Claims to resort to force in anticipation and prevention of intense coercion are only slightly less prominent. The coercion anticipated may, in the expectations of the claimant, be of varying degrees of imminence or remoteness. Claims have been made, for instance, to initiate pre-emptive violence under allegedly high expectations of imminent or impending military attack. Israel's claim that its invasion of Egyptian territory in 1956 was defensive in character being, among other things, in anticipation of an "all-out attempt to eliminate Israel by force"<sup>195</sup> presents one contemporary illustration. The notion of anticipatory defense has at times been given extravagant unilateral interpretation by claimant states. In the past, states have asserted claims to pre-empt and counter by armed force not only imminently expected eruptions of military violence but also more or less remote possibilities of attack. They have asserted, in other words, the need to preclude a context of "conditions which, if allowed to develop, might become in time a source of danger."<sup>196</sup> What states have in effect claimed in these assertions, sometimes under an invocation of "self-preservation," is a competence forcibly to protect their values by forestalling processes

194. The U.S. declaration referred to "the Imperial Government of Japan [having] committed unprovoked acts of war against the Government and the people of the United States of America." 55 Stat. 795 (1941).

195. See the statements of the Israeli representative in the General Assembly, U.N. GEN. ASS. OFF. REC. 1st Emer. Spec. Sess. 61 (1956). The "inherent right of self-defense" was explicitly invoked by the same representative. *Id.* at 22-23.

196. FENWICK, *INTERNATIONAL LAW* 231 (3d ed. 1948). Claims of this type were most prominent in the eighteenth and nineteenth centuries and are of course to be viewed in the context of the system of power balancing that prevailed in the Europe of those eras. Such claims were frequently justified by the claimants in terms of maintenance of equilibrium. The assumption was basic in such system of power balancing that conditions which resulted in marked preponderance of power of one participant were conditions of potential danger to all the other participants in the arena. See LISKA, *INTERNATIONAL EQUILIBRIUM* ch. 1 (1957); Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, 516-17 (1956). Secretary of State Elihu Root spoke of the struggle to preserve the balance of power in Europe as depending upon the principle that affirms "the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself." ROOT, *The Real Monroe Doctrine*, in ADDRESSES ON INTERNATIONAL SUBJECTS 105, 111 (Bacon & Scott ed. 1916).

It need not be supposed, however, that such claims, or analogous ones, have entirely departed from the international arena. See, for instance, the Soviet attempt to justify its invasion of eastern Poland in 1939 on the basis, among others, of self-defense. Ginsburgs, *A Case Study in the Soviet Use of International Law: Eastern Poland in 1939*, 52 AM. J. INT'L L. 69, 75-76 (1958). See also the claims made by Pakistan in connection with the entry of Pakistani troops into Kashmir in 1948. U.N. SEC. COUNCIL OFF. REC. 5th year, 464th meeting 1-40 *passim* (1950).

which, they argue, may in the future develop into highly intense coercion or violence. Hence they seek to strike while these processes still embody only a low level of coercion.

#### *Assertions of Coercion Against Third States*

Claims by a belligerent to use force against a third state—a nonparticipant in the original conflict—in order to prevent or counter some anticipated hostile operation by the opposing belligerent in the territory of the third state, have been made under differing words: “self-defense,” “self-preservation,” “right of necessity,” “necessity in self-preservation” and so on. The force employed against the third state under these assertions has varied widely in intensity, scope and continuity, from isolated acts to full-scale invasion and occupation of the third state’s territory. The classic illustration of a single limited application of force was the seizure of the Danish fleet in 1807 by British naval forces, following a severe bombardment of Copenhagen, to prevent acquisition of the fleet by Napoleon.<sup>197</sup> A comparable instance arose in 1940 when the British destroyed the French fleet at Mers-el-Kebir and Oran to preclude capture of the fleet by German forces.<sup>198</sup> Assertion of more comprehensive claims of this type may be documented by reference to the German invasions of Belgium in World War I and of Norway in World War II. In 1914, in its ultimatum demanding permission for German troops to march through Belgium, Germany declared that it was “essential for [her] self-defense that she should anticipate” what was alleged to be a French intention to mount an attack through Belgian territory.<sup>199</sup> In 1946, it was contended by the defense at Nuremberg that “Germany was compelled to attack Norway to forestall an Allied invasion and [that] her action was therefore preventive.”<sup>200</sup> Another comprehensive (though less extravagant) claim was the Anglo-Soviet occupation of Iran in 1941 to prevent further German infiltration and “fifth column” activities.<sup>201</sup>

#### *Assertions of Temporary and Limited Authority on the High Seas*

Claims of the third type, frequently asserted with an invocation of “self-defense,” or “self-protection,” or “security,” or “general security,” compre-

197. HALL, *INTERNATIONAL LAW* 326-28 (8th ed. Higgins 1924); Karlsrud, *The Seizure of the Danish Fleet, 1807*, 32 *AM. J. INT'L L.* 280 (1938).

198. 1 OPPENHEIM-LAUTERPACHT 270-71; *THE INITIAL TRIUMPH OF THE AXIS, SURVEY OF INTERNATIONAL AFFAIRS 1939-1946*, at 209-211 (Royal Institute of Int'l Affairs 1958).

199. 2 GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 188-89 (1920).

200. OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, *NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT* 36 (1947). The same claim was made with respect to the German invasion of Belgium, the Netherlands, and Luxembourg in 1940, both at Nuremberg, *id.* at 40, and at the commencement of the invasion, *THE INITIAL TRIUMPH OF THE AXIS, SURVEY OF INTERNATIONAL AFFAIRS 1939-1946*, at 159 (Royal Institute of Int'l Affairs 1958).

201. See KIRK, *THE MIDDLE EAST IN THE WAR, SURVEY OF INTERNATIONAL AFFAIRS 1939-1946*, at 129-41 (Royal Institute of Int'l Affairs 1952).

hend a rich variety of particular claims to exercise limited or temporary and episodic authority over certain events on the high seas and in the airspace above the high seas. Of the specific claims of this type, some relate to the maintenance and protection of the military security interests of the claimant state: unilateral establishment of "Air Defense Identification Zones" extending hundreds of miles seaward; placement of radar warning platforms in contiguous areas of the high seas; surveillance, visitation and search of vessels in contiguous zone areas; establishment beyond territorial waters of "defensive areas" in which navigation is limited or temporarily excluded; and temporary exclusive use of high-seas areas for weapons testing and maneuvers.<sup>202</sup> Other specific claims that relate to the protection of coastal interests other than military security—claims for customs inspection, antismuggling controls, conservation and exclusive exploitation of mineral and organic marine resources—have also been frequently couched in the language of "self-defense" or "self-protection" or "security."<sup>203</sup> These claims are of course supported by threats of deprivation, as are all claims to state authority. But they constitute exercises of coercion of such a relatively low level of intensity and magnitude as frequently to be indistinguishable from the ordinary coercion inescapable in a world of states interacting and competing for values. Further, they are general in character in that they are commonly directed not against a particular target state defined as an enemy but rather against all other states.

#### *Differences in Policy Issues*

While the three broad types of claims are often made under the same or similar verbal designations and while there may be some overlap between the first and second types, the specific demands made commonly refer to different activities moved by varying purposes, arising in varied contexts, and posing greatly different issues of community policy. Indiscriminately to group the several types of claims together and to subsume them under some single verbal rubric such as "self-defense" or "necessity" or "self-preservation" may tend only to conceal their disparity in activity, purpose, context and policy and possibly to induce confusion.<sup>204</sup>

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202. For detailed documentation and analysis of these claims, see McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 666-82 (1955); McDougal & Burke, *Crisis in the Law of the Sea: Community Perspectives Versus National Egoism*, 67 YALE L.J. 539, 553-54, 563-64, 581-88 (1958). See also the convenient listing of claims in Boggs, *National Claims in Adjacent Seas*, 41 GEOGRAPHICAL REV. 185 (1951).

203. See BOWETT, *SELF DEFENCE IN INTERNATIONAL LAW* ch. 4 (1958); JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* ch. 2 (1927); Memorandum on the Regime of the High Seas (Gidel), U.N. DOC. NO. A/CN.4/32, at 45 (1950).

204. Subsumption of disparate things under a common rubric is observable not only in the rhetoric of claims but also in some of the learned literature. See, e.g., CHENG, *GENERAL PRINCIPLES OF LAW* 29-102 (1953); HALL, *INTERNATIONAL LAW* 322-26 (8th



In respect of claims to exercise highly intense coercion in response to prohibited aggression, the fundamental community policy at stake is the common interest of all the world's peoples in securing a minimum of public order. This most basic policy seeks to preserve an existing distribution of values among states against modification by destructive coercion and to that end permits the unilateral use of force and other intense coercion only in necessary reaction to coercive reconstruction. In the contemporary world, low expectations as to the effective competence of the general organization of states to protect individual members, among many other factors, make indispensable the permission of some self-defense. Even in an arena with a much higher degree of effective organization than the present world exhibits, self-defense must, if experience in municipal arenas can be projected,<sup>205</sup> still be regarded as an emergency, interim authorization subsisting until the public force of the organized community is effectively brought to bear.

In contrast, the distinctive characteristic of the claims to apply coercion against a third state is that coercion is claimed as permissible against a state which has not attacked the claimant. Such claims, when they are something more than veils for aggrandizement, are moved by the claimant's expectations that certain hostile operations will imminently be carried on by its opponent in the territory of the third state and that the third state will be unable or unwilling to prevent those hostile operations. In short, the claimant seeks to anticipate or counter such hostile conduct. The relevant context is not simply one of the claimant-belligerent initiating coercion against the third state but rather the broader one of continuing coercion between the claimant-belligerent and the opposing belligerent. The claims against the third party are made in the course of and as an incident in an on-going process of highly intense coercion. The community policy most immediately involved is not merely that emphasizing peaceful change; it extends to the limitation of the area of involvement and limitation of the aggregate destruction of values. The problem is that of accommodating the contraposed policies of securing military effectiveness and of minimizing the disruption of the value processes of nonparticipating states. The relevant prescriptions applicable to implement these policies include not merely the prohibition of aggression and the permission of self-defense, but also the rules on the rights and duties of belligerents and neutrals.<sup>206</sup> In view of these differences, we suggest that these claims—to the

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ed. Pearce Higgins 1924); RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* (1928); Weiden, *Necessity in International Law*, 24 *TRANSACT. GROT. SOC'Y* 105 (1938). Bowett attempts to establish a distinction, *intra* the third broad group of claims, between "defense of [a state's] security" by exercise of "the right of self-defence upon the high seas adjacent to its territory" on the one hand, and, on the other, "protection of certain essential interests of the state" with respect to which "customary rights of a jurisdictional character" may have developed; when the latter "customary rights" "exist," there is, in his view, no need to invoke the former. BOWETT, *op. cit. supra* note 203, at 86.

205. See note 21 *supra*.

206. The specific rules directly relevant include those on the belligerents' duty to respect and the neutral's duty to preserve the "inviolability" of neutral territory, waters,

extent that the supporting expectations relating to imminent enemy operations in the third state's territory and such third state's inability or unwillingness to prevent those operations are determined to be genuine and reasonable—are more appropriately considered under the second major problem of the international law of coercion, that is, the regulation of participation in coercion. If, of course, the claimant's expectations prove fictitious, the assertion of force against the third state may, when the other detailed variables noted earlier are considered, be characterized as a new, unlawful initiation of coercion. Such is implicit in the Nuremberg Tribunal's rejection of the defense's claim respecting Germany's invasion of Norway, as well as of Belgium, the Netherlands and Luxembourg.<sup>207</sup>

The problems raised by claims to exercise limited or occasional jurisdiction on the high seas and superjacent airspace are completely distinct from those raised by the claims to respond to unlawful initiating coercion and to employ coercion against a third state. Although often urged in the rhetoric of "self-defense" or "self-protection," these claims to prescribe and apply authority

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and airspace and those relating to the conversion of such territory, waters, and airspace into permissible areas of hostile operations by the neutral's tolerance of or inability to prevent their violation by one of the belligerents. See, *e.g.*, CASTREN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 442-43, 462-63 (1953); HALL, *op. cit. supra* note 204, at 721-24; 2 OPPENHEIM-LAUTERPACHT 678-80; 3 HYDE, *INTERNATIONAL LAW* 2337-39, 2340-41 (2d rev. ed. 1945); *The Anna Maria*, Case No. 174, *ANNUAL DIGEST* (1946); *Coenca Brothers v. German State*, Case No. 389, *ANNUAL DIGEST* (1928-29).

It may be noted that after the German invasion of Belgium in World War I, Germany sought to justify her actions in terms other than those of "self-defense," "self-preservation" and "necessity." Charges were made that, before the delivery of the German ultimatum, France had already violated Belgian neutrality with the consent of the Belgian government. 2 GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 203-06 (1920). Similarly, the Allied occupation of Saloniki and other measures taken against Greece when it was still a neutral in the same war were sought to be justified upon the ground that Greek territory was long used as a source of supplies and a base of operations by Germany with the approval of the Greek government. *Id.* at 254-55.

207. Although the evidence submitted at Nuremberg indicated that there had in fact been an Allied plan to occupy harbors and airports in western Norway, it also appeared that at the time of the German invasion of Norway, Germany did not know of this Allied plan and in fact ruled it out as a serious possibility. As the Tribunal pointed out, anticipation and preemption of an Allied landing was not, in point of fact, the precipitating purpose of the invasion of Norway which Germany had projected and prepared long before the Allied Powers found it necessary to plan a landing. OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, *NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT* 35-38 (1947).

Similarly, with respect to the German invasion of Belgium, Holland, and Luxembourg, the Allied Powers agreed, one month before such invasion, to "press for a preventive entry of their troops into Belgium." Belgium, however, rejected their demand and publicly reiterated its determination to maintain its neutrality. The German decision to attack the Low Countries had been taken, again, long before the Allies sought permission for "preventive entry." *Id.* at 39-40; *THE INITIAL TRIUMPH OF THE AXIS, SURVEY OF INTERNATIONAL AFFAIRS 1939-1946*, at 125-26, 155-58 (Royal Institute of Int'l Affairs 1958).

to certain events for many differing purposes, are commonly made not in contexts of high level interstate coercion but in those phases of the persuasion-coercion continuum in which persuasion is still relatively dominant. The general community policy here most directly at stake is not the maintenance of world public order, in its minimal sense; it is, rather, the promotion of the fullest, conserving, peaceful use of such great common resources as the oceans by achieving the most economic balance possible between the special exclusive demands of coastal states and other special claimants and the general inclusive demands of the other members of the community of states.<sup>208</sup> Authorized decision-makers seek to secure this common interest by formulating and applying the bodies of authoritative myth commonly referred to as the "law of the sea" and the "law of the air." These domains of doctrine and practice are obviously distinct from, for instance, the prohibitions and permissions about coercion established in the United Nations Charter. The type and range of conditioning variables of which account must be taken in determining the reasonableness (in detailed context) of, for example, a claim to a contiguous zone, are very different from the kinds of variable factors that bear upon the necessity and proportionality of an assertion of extensive violence in self-defense. In fine, claims of jurisdiction and those of defensive violence have too little in common to warrant their continued subsumption under a single label.<sup>209</sup>

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208. Amplification is offered in McDougal & Burke, *supra* note 202; McDougal & Schlei, *supra* note 202. Cf. the formulation expressed in Memorandum (Gidel), *supra* note 203, at 10. Compare Sorensen, *Law of the Sea*, INT'L CONC. No. 520, at 198-99 (1958), the force of whose criticism is impaired by failure to distinguish between differing levels of abstraction.

209. In McDougal & Schlei, *supra* note 202, at 674-88, 686, it was suggested that the nuclear weapons tests by the United States off the Pacific atolls could be justified both as reasonable measures in the interests of "security" and as "in substance a claim to prepare for self-defense." (Emphasis added.) In so far as this suggestion depends upon the traditional technical conception of "self-defense," it may be regarded as an "over-kill." In conducting these tests, the United States was not employing the military instrument against any opponent state. The United States was rather seeking to assert merely a temporary, exclusive control or jurisdiction over a portion of a common, shared resource, the Pacific Ocean. To establish the lawfulness of the United States' claim, it is necessary only to establish its reasonableness by traditional criteria of the law of the sea. This necessary "reasonableness," it was suggested, is primarily indicated by the deeply vital importance of the tests to the security of the United States, and indeed of all free peoples, as contrasted with the minimal and temporary interference with shared interests in navigation and fishing. The same essential community policy of maintaining a basic public order in which peoples are free from attack and threats of attack, underlies of course both the broader concession of jurisdiction for "security" purposes, authorizing lesser interferences with less fundamental interests of others and the narrower permission of "self-defense" authorizing the application of military force in response to major and grievous threats; and comparable tests of necessity and proportionality, in sum of "reasonableness," are relevant in applications of both concepts. The latter concept, that of "self-defense," simply is not necessary, by Occam's razor, to sustain lesser interferences.

## SELF-DEFENSE

*The Requirements of Self-Defense: Necessity and Proportionality*

These preliminary distinctions make it possible now to focus more sharply upon the class of claims with which we are immediately concerned—claims to use highly intense coercion in defense against what is claimed to be impermissible initiating coercion. The principal requirements which the “customary law” of self-defense makes prerequisite to the lawful assertion of these claims are commonly summarized in terms of necessity and proportionality. For the protection of the general community against extravagant claims, the standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. Such is the clear import of the classical peroration of Secretary of State Webster in the *Caroline* case—that there must be shown a “necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.”<sup>210</sup> The requirement of proportionality which, as we shall develop below, is but another application of the principle of economy in coercion, is frequently expressed in equally abstract terms. One example is M. de Brouckere’s formulation: “Legitimate defense implies the adoption of measures proportionate to the seriousness of the attack and justified by the imminence of the danger.”<sup>211</sup> There is, however, increasing recognition that the requirements of necessity and proportionality as ancillary prescriptions (in slightly lower-order generalization) of the basic community policy prohibiting change by violence, can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context.<sup>212</sup> What remains to be stressed is that reasonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion.

*The Decision-Makers: Provisional Characterization and Subsequent Review*

The authoritative decision-makers whom community expectation establishes to pass upon coercion claimed to be in response to prior coercion from others are of course the same decision-makers who assess the coercion which

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210. Mr. Webster to Mr. Fox, April 24, 1841, in 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1840-1841). See generally Jennings, *The Caroline and McLcod Cases*, 32 AM. J. INT’L L. 82 (1938). Cf. Professor Wright’s formulation: “[T]he plea of defense will justify otherwise illegal action only if the action was taken to *prevent* an *immediately impending, irreparable injury* and for that purpose alone.” Wright, *The Meaning of the Pact of Paris*, 27 AM. J. INT’L L. 39, 54 (1933).

211. Report of de Brouckère, *supra* note 170.

212. Cf. SCHWARZENBERGER, REPORT ON SOME ASPECTS OF THE PRINCIPLE OF SELF-DEFENCE IN THE CHARTER OF THE UNITED NATIONS AND THE TOPICS COVERED BY THE DUBROVNIK RESOLUTION 23 (Int’l Law Ass’n 1958).

is alleged to be prohibited aggression. But the determination of whether the coercion directed against a target state constitutes unlawful initiating coercion and therefore justifies an assertion of responding coercion in self-defense is, in the first instance, made by the target-state claimant itself. Competence to make an initial and provisional determination without previous authorization from the organized community must be conceded to the claimant pending the completion of a much more viable world public order. "To wait," Professor Brierly explained, "for authority to act from any outside body may mean disaster."<sup>213</sup> The recommendation of a distinguished scholar that even "a true war of defense" should be permitted only as a "war of sanctions" by delegation from and with the prior permission of the organized community<sup>214</sup> must, despite the modern technology of communications, seem unreal and utopian. The inevitable time-lag between initiation of highly intense coercion and appropriate determination and authorization by the general security organization, and the ever present possibility of the organization's failure to reach any determination at all, make such a recommendation potentially disastrous for defending states. The provisional characterization of the target state—its assertion of a claim of self-defense—must, however, be subject to subsequent appraisal by other, external, decision-makers, both international and national. The statement that the acting state "alone is competent to decide whether the circumstances require recourse to war in self defense"<sup>215</sup> cannot be taken literally without in effect repudiating fundamental community policy.<sup>216</sup> Thus, the general competence of both the Security Council and the General Assembly to characterize impermissible coercion necessarily implies that the par-

213. BRIERLY, *THE LAW OF NATIONS* 320 (5th ed. 1955).

214. WEHBERG, *THE OUTLAWRY OF WAR* 100-03 (Zeydel transl. 1931).

215. Identic Note of the Government of the United States, June 23, 1928. (Text in MILLER, *THE PEACE PACT OF PARIS* 213-14 (1928).)

216. At the Tokyo Trial (as at Nuremberg) the defense relied on Secretary Kellogg's note in contending that, under the Pact of Paris: "(4) the nation resorting to measures of self-defense was to be the sole judge on the question of self-defense, (5) that the question of self-defense was not to be submitted to any tribunal, (6) that no nation should have anything to do with deciding the question of self-defense regarding the action of any other nation unless such action constituted an attack on itself." TAKAYANAGI, *THE TOKIO TRIALS AND INTERNATIONAL LAW* 36-37 (1948). The Tribunal rejected this argument, saying: "Under the most liberal interpretation of the Kellogg-Briand Pact, the right of self-defence does not confer upon the State resorting to war the authority to make a final determination upon the justification for its action. Any other interpretation would nullify the Pact; and this Tribunal does not believe that the Powers in concluding the Pact intended to make an empty gesture." *JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST* 68 (1948). See also 2 OPPENHEIM-LAUTERPACHT 187-88; LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 179-82 (1933); Wright, *supra* note 210, at 41-50. Professor Brierly stressed that "the practice of states decisively rejects the view that a state need only declare its own action to be defensive for that action to become defensive as a matter of law . . . . [I]t is clear that the defensive or non-defensive character of any state's action is universally regarded as a question capable of determination by an objective examination of the relevant facts." BRIERLY, *THE LAW OF NATIONS* 320-21 (5th ed. 1955).

ticipant claiming to exercise coercion in self-defense does so at its peril. The same implication flows from article 51 of the United Nations Charter, which requires that measures taken under claim of self-defense be immediately reported to the Council and which explicitly reserves the "authority and responsibility" of the Council "to take at any time such action as it deems necessary in order to maintain or restore international peace and security."<sup>217</sup>

### *The Appraisal of Alleged Defending Coercion*

Inquiry into the factors that are relevant to an appraisal of coercion claimed to be permissible self-defense parallels our earlier inquiry into factors that rationally bear upon judgments about impermissible initiating coercion. Accordingly the same categories of variables, that is, *participants, objectives, methods, conditions and effects*, are equally useful in this examination. Likewise, all the factors elicited in our analysis of initiating coercion are equally relevant to the appraisal of coercion alleged to be lawful defense. The principal emphasis here, however, must be upon the need of relating particular factors to the requirements of necessity and proportionality.

### *The Characteristics of Participants*

At the outset, there may arise the problem of identifying participant groups, to whose mutual applications of coercion and violence the community policy and prescriptions distinguishing between permissible and impermissible coercion may appropriately be applicable. Allegations of impermissible coercion and accompanying claims to use intense coercion in self-defense have been made not only by officials of bodies politic universally recognized as nation-states but also by officials of territorial communities and governmental organizations not formally recognized as states by their opponents and, at times, by some members of the community of states as well. The Arab-Israeli conflict in Palestine in 1948 and the Korean war of 1950 afford familiar illustrations. The Jewish Agency for Palestine, even before issuing the proclamation on establishing an independent state of Israel, raised a charge of aggression against Trans-Jordan and Egypt before the United Nations Security Council and, at least inferentially, claimed a right to self-defense.<sup>218</sup> The Arab states refused to recognize Israel as a state and indeed asserted that, with the termination of the British Mandate, Palestine had become an independent nation in which the Jews constituted a rebellious minority.<sup>219</sup> In the Korean conflict, neither of the initial participants—the Republic of Korea and the

217. See JESSUP, *A MODERN LAW OF NATIONS* 165 (1948).

218. See the letter of the Jewish Agency for Palestine to the President of the Security Council, May 14, 1948, and the statements of the representative of the Jewish Agency, U.N. SEC. COUNCIL OFF. REC. 3d year, No. 66, 292d meeting 2, 4-7 (1948).

219. See, *e.g.*, the statements of the representative of the Arab Higher Committee, *id.* at 7-9, and the statements of the Egyptian delegate, U.N. SEC. COUNCIL OFF. REC. 3d year, No. 68, 294-295th meetings 5, 8-9 (1948).

North Korean Peoples' Republic—recognized the other as a state. The Soviet Union argued to the United Nations that the exercise of violence in Korea could not be characterized as unlawful coercion since the conflict was an internal or civil one and the Charter prescriptions are not applicable to coercion between two groups within a single state.<sup>220</sup> The decisions reached by the United Nations in the Palestine and Korean cases<sup>221</sup> suggest that conflicts involving a newly organized territorial body politic, or conflicts between two distinct territorial units which the community expects to be relatively permanent, are, for purposes of policy about coercion, to be treated as conflicts between established states. Thus, the applicability of basic community policy about minimal public order in the world arena and competence to defend against unlawful violence are not dependent upon formal recognition of the technical statehood of the claimant-group by the opposing participant.<sup>222</sup> This conclusion is but an obvious corollary of effective community policy; a contrary view would permit the thrust of fundamental policy to be avoided by the simple device of refusing to perform a ceremonial ritual. It is not the ceremony of recognition by others that constitutes a group an effective, self-directed, territorially organized community, but the facts of the world power process.

#### *The Nature of Claimants' Objectives*

The objectives of the participant claiming self-defense may best be examined in terms of the same factors found useful for inquiry into the objectives of the participant claimed to have unlawfully initiated coercion: extension or conservation, degree of consequentiality, and the degree of inclusivity or exclusivity. The first two factors may require some additional discussion.

#### *Limitation of Permissible Conservation*

Characterization of the real objectives of the claimant in terms of extension or conservation is most directly related to the requirements of permissible self-defense. The very conception of self-defense implies that the purpose

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220. U.N. SEC. COUNCIL OFF. REC. 5th year, No. 24, 482d meeting 6-10 (1950). See the answering arguments made by the United Kingdom representative, *id.* No. 28, 486th meeting 4-6 (1950).

221. As to the Palestine case, see the Resolutions of May 22, 1948, U.N. SEC. COUNCIL OFF. REC. 3d year, Supp. for May 97 (1948), and of July 15, 1948, *id.* Supp. for July 76 (1948). As to the Korean case, see note 187 *supra*.

222. For indication of the complexities of policy relating to internal strife within bodies politic, see note 164 *supra*.

Our emphasis here is merely that rational community policy must be directed to the coercive interactions of territorially organized communities of consequential size, whatever the "lawfulness" of their origin and whatever the prior niceties in the presence or absence of the ceremony of recognition. This necessity appears acknowledged in measure even in the older doctrines of "belligerence" and "insurgency." See, *e.g.*, LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947).

of the defender is to conserve its values rather than to extend them through acquiring or destroying values held by the opposing participant. Conservation, as the legitimate objective of self-defense, is commonly referred to by commentators in such terms as "stopping or preventing"<sup>223</sup> or repelling "any imminent or present invasion of the rights [of the defender]."<sup>224</sup> Such confining language is doubtless intended to induce restraint in the assertion of claims to self-defense.<sup>225</sup> Nonetheless, a rational appraisal of particular purposes must depend upon a consideration of all relevant conditioning factors in particular detailed contexts, including especially the condition of necessity which impelled the response in coercion. Permissible objectives of self-defense against massive military attack and invasion, for instance, need not necessarily be limited to stopping and repelling or pushing back invading enemy troops to their own side of the frontier; realistically, the necessity to which the target-claimant is responding may not, in the circumstances of a particular case, be wholly terminated merely by repulsion of the enemy invasion, and may reasonably require counter-invasion of the enemy's own territory.<sup>226</sup>

The problem of clarifying the permissible limits of conservation as the only legitimate objective of self-defense may perhaps be put in sharper focus by referring to the objectives of the Allied (United Nations) Powers in World War II. Allied objectives, as formulated and developed in the course of the prolonged struggle, were not limited to physically stopping or repelling the aggressive violence exercised by the Axis Powers.<sup>227</sup> Prominent among these purposes was the comprehensive, long-term aim of preventing any recurrence of aggression by Germany and Japan. This aim was sought by imposing upon the entire territory of the enemy states what might be called "therapeutic" occupation—occupation designed to permit the modification and reconstruction of certain basic enemy political, economic, social and legal institutions, the reorientation of mass and elite perspectives, the removal or limitation of

223. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 455, 464 (1952).

224. Schwarzenberger, *The Fundamental Principles of International Law*, 87 HAGUE RECUEIL 195, 335 (1955).

225. "[T]here is a natural temptation, when force has been resorted to, to continue its use after the needs of defence have been fairly met." BRIERLY, *THE LAW OF NATIONS* 316 (5th ed. 1955).

226. Cf. Schwarzenberger, *The Fundamental Principles of International Law*, 87 HAGUE RECUEIL 195, 334 (1955). The factual question, from the perspective of an independent observer, is whether the repulsion of the enemy invasion, together with calculations as to the probable costs of mounting another attack, have effectively modified the expectation and demand structure of the enemy elite. The question would in measure depend upon the comprehensiveness of and the value assigned by such elite to their original objectives.

227. See generally 1 *WAR AND PEACE AIMS OF THE UNITED NATIONS—SEPTEMBER 1, 1939-DECEMBER 31, 1942* (Holborn ed. 1943); 2 *id.*—*JANUARY 1, 1943-SEPTEMBER 1, 1945* (1948).



enemy potential for war, and so forth.<sup>228</sup> From the perspective of prediction, perhaps this and other objectives of comparable degrees of comprehensiveness will not present a serious problem of legal policy if certain conditions of power are secured in the future. Such conditions include at the minimum, first, the achievement and maintenance of a rough equilibrium between the polar powers in capacity for delivering as well as in vulnerability to annihilating thermonuclear destruction; second, the recognition by both powers of their common interest in keeping coercion below a ruinous level of destruction; and third, the constant awareness by the powers of the close relation that prospects of limiting violence bear to limitation of the moving purposes of violence.<sup>229</sup> To the extent, in other words, that the hope that only limited war may take place is realism, the deliberate postulation and prosecution, by defending as well as by attacking states, of objectives as comprehensive as those of the Allied powers may become unlikely. From perspectives of preference, competence to pursue and implement an objective of ensuring against recurrence of aggression in the more or less remote future by "therapeutic" reconstruction of the institutions and fundamental demand and identification patterns of the defeated aggressor more appropriately belongs to the organized community of states. Such measures should be exercisable only by, or under an unambiguous authorization from, the entire community, rather than impliedly included in the permission of self-defense.<sup>230</sup> A restrictive definition of the scope of permissible conservation that excludes this and similar "pedagogic"<sup>231</sup> objectives accords both with the Charter's conception of self-defense as an interim and emergency authorization, and with the imperatives of limiting the dimensions of violence. The viability of such definition, we are aware, depends upon the degree of effective, centralized organization secured in the arena,

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228. See, e.g., FRIEDRICH & ASSOCIATES, *AMERICAN EXPERIENCES IN MILITARY GOVERNMENT IN WORLD WAR II* chs. 1-2, 12 (1948); Loewenstein, *Law and the Legislative Process in Occupied Germany*, 57 *YALE L.J.* 724 (1948); Loewenstein, *Reconstruction of the Administration of Justice in American-Occupied Germany*, 61 *HARV. L. REV.* 419 (1948); Plischke, *Denazification Law and Procedure*, 41 *AM. J. INT'L L.* 807 (1947); U.S. DEP'T OF STATE, PUB. NO. 2671, *FAR EASTERN SERIES, OCCUPATION OF JAPAN: POLICY AND PROGRESS* 17 (1946).

229. The principal reference here is to the conditions of so-called "mutual deterrence" and "limited war." See McDougal & Feliciano, *General Principles* 797, 813-14. See also APPADORAI, *THE USE OF FORCE IN INTERNATIONAL RELATIONS* 19-20 (1958).

230. In respect of the comprehensive Allied objectives of reconstruction in the last world war, it is relevant to point to the observation made by Dr. Yokota: "[T]he very fact that the 51 allied nations opposing the Axis in the last war, represented the overwhelming majority of all the nations of the world, may be considered as the imposition of an ultimate sanction by the international community." Yokota, *War as an International Crime*, in *FOUNDAMENTAL [sic] PROBLEMS OF INTERNATIONAL LAW, FESTSCHRIFT FÜR JEAN SPIROPOULOS* 453, 458 (1957).

231. The term is borrowed from KECSKEMETI, *STRATEGIC SURRENDER: THE POLITICS OF VICTORY AND DEFEAT* 239 (1958). Mr. Kecskemeti makes able inquiry into some aspects of the problem of limitation of objectives.

and upon the degree of success achieved in establishing and maintaining the supporting arrangements of power.

*Consequentiality of Values Conserved*

Characterization of the particular objectives of a claimant as conservation rather than extension need not be conclusive as to the lawfulness of the coercion exercised; such objectives must also, among other relevant considerations, be appraised for the degree of consequentiality of the values sought to be protected and conserved. The values which states have on occasion sought to conserve and protect present a wide spectrum in degree of consequentiality; they range from the most trifling to the most fundamental. In this connection, certain propositions, derived by distinguished scholars as inferences from the judgment of the International Court of Justice in the *Corfu Channel (Merits)* case,<sup>232</sup> appear to confuse the milder coercion unavoidable in the relation of states with intense attacks upon independence and territorial integrity. In the view of Professor Waldock, the court held, among other things, that:

[A] threat and, indeed, use of force—the demonstration of naval force in Albania's territorial waters—is not contrary to Article 2(4) *when it is in affirmation of rights which have been illegally and forcibly denied.*<sup>233</sup>

More recently, Dr. Schwarzenberger has written:

[The] case appears to suggest three propositions regarding the interpretation of Paragraph 4 of Article 2 and Article 51 of the Charter of the United Nations:

(1) The exercise of a right for the purpose of testing whether it is threatened by armed attack, and in such strength as to discourage the repetition of such an attack or its prompt repulsion is not an illegal threat under Paragraph 4 of Article 2 of the Charter of the United Nations. More specifically, it does not deprive a passage through an international strait of its innocent character.

(3) If it is legal to take precautionary measures of the kind discussed, it must be compatible with the international quasi-order of the United Nations to take *armed action in self defense against any actual armed interference with the enjoyment of rights under international law.*<sup>234</sup>

These generalizations, as Dr. Schwarzenberger concedes, rest on the assumption that articles 2(4) and 51 of the Charter were applicable to the situation presented by the passage of British warships through the channel on October 22, 1946, and are derived wholly from the failure of the court to characterize their passage as violative of article 2(4). It is difficult to find much basis in the judgment for this assumption and derivation, since neither article

232. [1949] I.C.J. Rep. 5.

233. Waldock, *supra* note 223, at 500.

234. SCHWARZENBERGER, REPORT ON SOME ASPECTS OF THE PRINCIPLE OF SELF-DEFENCE IN THE CHARTER OF THE UNITED NATIONS AND THE TOPICS COVERED BY THE DUBROVNIK RESOLUTION 24 (Int'l Law Ass'n 1958). (Emphasis added.)

2(4) nor article 51 was mentioned by the court, and the plea of self-defense was never raised by the United Kingdom as a justification for the passage of its warships on October 22, 1946.<sup>235</sup> The complete silence of the court on this matter is, at the very least, ambiguous. It is equally explainable by the contrary assumption—that the court did not regard article 2(4) and the permission of self-defense as bearing upon the particular case. The issues raised and conclusions reached by the court in the *Corfu* case seem too narrowly drawn to support, by process of necessary implication, the inferences urged.

The extrapolations under discussion appear open to yet more fundamental objections. To the extent that they seem to suggest, for failure of appropriate qualification, that the enjoyment of *any* "right under international law," without regard for any other factor such as the consequentiality of the "right" involved, may be "affirmed" or defended by the employment of force, the formulations submitted by Dr. Schwarzenberger<sup>236</sup> and Professor Waldock come perilously close to emasculating the basic community policy on minimum public order. The need for imposing limits on the kind and character of "rights" or values that may legitimately be defended by highly intense coercion must seem obvious. The denial, even by "actual armed interference," of inconsequential or trivial "rights" or value claims warrants proper reciprocities, retaliations and remedies other than high-level coercion. It is not necessary to invoke self-defense to sustain ordinary reciprocities and retaliations against such tortious conduct of another state, in other words, in contexts in which the level of coercion falls far short of highly intense and destructive attack upon fundamental and indispensable values. If, as we suggest, the permission of self-defense is most appropriately conceived as a permission to exercise destructive coercion, a requirement of a certain degree of consequentiality in the values sought to be conserved by such coercion is a substantial, if implied, effect of the combined principles of necessity and proportionality.

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235. The pleas of "self-defence and self-redress" and of "self-help" were made by the United Kingdom agent with respect to the sweeping of the Channel on November 12-13, 1946 ("Operation Retail"). See 2 CORFU CHANNEL CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 280-84 (I.C.J. 1950); 3 *id.* at 293-97; 4 *id.* at 572-92. The pleas were rejected by the Court. The passage of October 22, 1946, was sought to be justified by the U.K. agent not in terms of "self-defence" or "self-help" but as being "fully within the right of innocent passage." 3 *id.* at 293. See also 2 *id.* at 301. It may also be noted that the specific right involved was the right of innocent passage by warships and that such a right can neither be exercised in the first instance nor subsequently "affirmed" without instrumentalities of force, *i.e.*, warships, being used.

236. Dr. Schwarzenberger had previously written that: "This prerequisite [that the need must be overwhelming] limits self defence to action in protection of *vital, or at least important, rights or interests* and precludes such action in cases of merely formal or trivial breaches of international law." Schwarzenberger, *The Fundamental Principles of International Law*, 87 HAGUE RECUEIL 195, 333 (1955). (Emphasis added.) Barely five pages later, however, he also wrote that "The [Corfu] Judgment clarifies beyond doubt that the prohibition of the use of force in Paragraph 4 of Article 2 of the Charter does not preclude action in self defence, as distinct from self help at large, against the forcible denial of *any* right." *Id.* at 339. (Emphasis added.)

The conception of requisite consequentiality can be assigned functional references only in particular contexts. On one level of abstraction, there would generally be no necessity for highly intense coercion—nor could such coercion be characterized as proportionate—except in response to an unambiguous and imminent threat or present imposition of severe deprivations of values so important that their loss or destruction will substantially impair the functioning of the territorially organized community or preclude its continued existence as a distinct polity. On another level of abstraction, a finding that appropriate standards of consequentiality have been met may be most easily reached when the claimant shows the particular “rights” or values or interests threatened or attacked to be indispensable components of its “territorial integrity” or “political independence.” As our discussion of impermissible coercion indicated, the primary reference of the words “territorial integrity” and “political independence” is to the more important bases of community power. These bases are comprised of a community’s continuing, comprehensive control over its geographical base and physical resources, over its people, and over its institutions. This control over institutions extends to both the integrity and continuity of the community’s internal arrangements of authority and effective power and its freedom of self-direction and self-commitment in customary interaction with other communities. In considering the reasonableness of asserted expectations about the serious impact of a threat or deprivation of particular values upon a claimant’s “territorial integrity” or “political independence,” the territorial location of the values affected may have an obvious relevance. If a threat or an actual deprivation is directed, for instance, against the person or property of a stray national or two in some distant land, it would seem most unlikely, even if carried out by violence, to have any appreciable effect upon the fundamental bases of power of the home state.<sup>237</sup> But if, on the other hand, the values threatened or attacked are located within the community’s territorial base, a strong presumption that fundamental power bases are significantly affected may be appropriate. There seems, in gross illustration, an evident distinction between the sinking of a small boat in some internal river of China<sup>238</sup> and the destruction of eight battleships in Pearl Harbor. We do not, of course, mean to suggest that geographical situs has anything like conclusive significance.<sup>239</sup> What we suggest is that the relation of the particular value or interest affected to the essential bases of community power is a capital aspect of consequentiality, and physical location of the value or interest may be one index to that relationship.

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237. Cf. BOWETT, *SELF DEFENCE IN INTERNATIONAL LAW* 93 (1958).

238. *E.g.*, the sinking of the U.S.S. *Panay* on the Yangtze River by Japanese aircraft. See 15 BULL. OF INT’L NEWS 9 (1938).

239. Thus the relevance of geographical location may be relatively minimal in cases of attack upon a state’s strategic military bases situated in third countries. For an exploration of the importance of overseas bases for the military security of the United States under present power conditions and current strategic doctrines, see Hoopes, *Overseas Bases in American Strategy*, 37 FOREIGN AFFAIRS 69 (1958).

*The Modalities of Response*

The methods the claimant of self-defense employs in exercising coercion may, like those employed by the participant charged with having initiated unlawful aggression, comprise any one or all—in combinations and sequences of varying emphases—of the policy instrumentalities familiarly categorized as diplomacy, mass communication, control over goods and services, and armed force. Here again the relevance of modality lies principally in its utility as a crude and prima facie indicator of the general level of intensity reached by the coercion claimed to be in self-defense and, in equally rough evaluation, of the proportionality or disproportionality of the allegedly responsive coercion when measured against the necessity created by the initial coercion.<sup>240</sup> Military violence is of course easily distinguishable from nonmilitary coercion; the distinction is, in terms of susceptibility to direct or optical observation, similar to the popular sub-distinction between “conventional” arms and “nuclear” weapons. But, in the regulation of resort to coercion just as in regulation of the conduct of combat, rational policy is and must be primarily concerned not with modality as such but with the effects of coercion, the level of intensity and scope, actually obtained in particular contexts. Appraisal of the level of coercion exercised in specific contexts and of the degree of proportionality exhibited is not rationally limited to application of a single-factor test of modality.

*Conditions and the Expectation of Necessity*

Inquiry may next be directed to the conditions under which coercion claimed to be in self-defense is exercised. The conditions we noted as relevant for scrutinizing allegedly unlawful coercion, conditions including both the general elements pervasive in power processes in the world arena and certain particular conditions of more direct significance, are, again, of equal relevance for reviewing assertions of self-defense. The most important condition that must be investigated is the degree of necessity—as that necessity is perceived

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240. As to the possible function of modality as a quick index of intensity, cf. NITZE, SYMMETRY AND INTENSITY OF GREAT POWER INVOLVEMENT IN LIMITED WARS, MILITARY POLICY PAPERS 55 (Wash. Center of Foreign Policy Research 1958):

[T]he means actually employed can be roughly graded as to intensity. One can start with normal diplomatic and political support; go on to more intense advice and propaganda support; to the furnishing of economic and military supplies and the active training of personnel; to manpower support in gradations from volunteers to participation by satellites or allies on to direct and open military participation by the great power itself; and the military participation by the major power can be graded from air and sea support to direct participation by all services; the weapons used by the supporting forces can be conventional, tactical atomic, or without restriction; the geographic area subject to hostilities can be expanded by gradations to any given approximation to a global conflict. The possible gradations and combinations of gradations do not fall neatly on a linear scale of intensity. It is, however, generally meaningful to say that one set of means involves a greater intensity of major power intervention than some other set of means.

and evaluated by the target-claimant and incorporated in the pattern of its expectations—which, in the particular instance, impels the claim to use intense responding coercion.<sup>241</sup> All other conditions must be assessed for their bearing upon this fundamental condition of necessity. Since necessity is generated by and represents the total impact of the opposing participant's application of coercion upon the claimant's expectations about the costs of conserving and protecting its values, an appraisal of the condition of necessity must involve an estimate of the entire coercion applied by the opposing participant. The most comprehensive specification of functional indices of necessity must logically include all the factors we have detailed for considering coercion alleged to be prohibited aggression. The relative size and power of the participant charged, the nature and consequentiality of its objectives, the character of its internal institutional structures, the kind of world public order it demands, the intensity and magnitude of the coercion applied, its expectations about effective community intervention, all are relevant. The tight complementarity of the conceptions of permissible and impermissible coercion and the interdependence of the factors comprising a detailed context may once again be underscored.

*The Exacting Standard of Customary Law.* The structure of traditional prescription has established a standard of justifying necessity commonly referred to in exacting terms. A high degree of necessity—a “great and immediate” necessity,<sup>242</sup> “direct and immediate,”<sup>243</sup> “compelling and instant”<sup>244</sup>—was prerequisite to a characterization of coercion as “legitimate self-defense.” Necessity that assumed the shape of an actual and current application of violence presented little difficulty. It was of course the purpose of high requirements of necessity to contain and restrict the assertion of claims to apply pre-emptive violence, that is when the necessity pleaded consisted of alleged expectations of an attack which had yet actually to erupt. In the *Caroline*

241. What must, in other words, be ascertained and appraised by a third-party decision-maker are the claimant's perceptions and evaluations that culminated in assertion of the claim. It has been emphasized in Sprout & Sprout, *Environmental Factors in the Study of International Politics*, 1 J. OF CONFLICT RESOLUTION 309, 319 (1957) that “what matters in policy-making is how the milieu appears to the policy-maker, not how it appears to some sideline analyst or how it might appear to a hypothetical omniscient observer.” *Id.* at 324: “If the problem is to explain or to predict a policy decision, the analyst has to answer such questions as: What environmental factors (or aspects of the situation) did the decision-maker [claimant] recognize and consider to be significant? What *use* did he make of his environmental *knowledge* in defining what was to be attempted and the means to be employed?”

For an antithetical perspective, see Schwarzenberger, *The Principle of Self-Defence in International Judicial Practice*, in ESTUDIOS DE DERECHO INTERNACIONAL 213, 216 (Universidad de Santiago de Compostela 1958), referring to “putative self-defence.”

242. 1 WESTLAKE, INTERNATIONAL LAW 300 (1904).

243. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 118 (2d ed. 1897).

244. Schwarzenberger, *The Fundamental Principles of International Law*, 87 HAGUE RECUEIL 195, 334 (1955).

case, it will be recalled, the British claim with which Secretary of State Webster was confronted was an assertion of anticipatory defense.<sup>245</sup> There is a whole continuum of degrees of imminence or remoteness in future time, from the most imminent to the most remote, which, in the expectations of the claimant of self-defense, may characterize an expected attack. Decision-makers sought to limit lawful anticipatory defense by projecting a customary requirement that the expected attack exhibit so high a degree of imminence as to preclude effective resort by the intended victim to nonviolent modalities of response.

One illustration of the application of the customary-law standard of necessity for anticipatory defense is offered in the judgment of the International Military Tribunal for the Far East in respect of the war waged by Japan against the Netherlands. Japan contended that "inasmuch as the Netherlands took the initiative in declaring war on Japan, the war which followed [could] not be described as a war of aggression by Japan."<sup>246</sup> The Netherlands declared war on Japan on December 8, 1941, before the actual invasion of the Netherlands East Indies by Japanese troops and before the issuance of the Japanese declaration of war against the Netherlands, both of which took place on January 11, 1942. The evidence showed, however, that as early as November 5, 1941, the Imperial General Headquarters had issued to the Japanese Navy operational orders for the attacks upon the Netherlands East Indies, as well as the Philippines and British Malaya,<sup>247</sup> and that on December 1, 1941, an Imperial Conference had formally decided that Japan would "open hostilities against the United States, Great Britain and the Netherlands."<sup>248</sup> The Tribunal held that the Netherlands, "being fully apprised of the *imminence* of the attack," had declared war against Japan "in self defense."<sup>249</sup> Similarly, the International Military Tribunal at Nuremberg, in rejecting a defense argument that the German invasion of Norway was "preventive" in character and designed to anticipate an Allied landing in Norway, pointed out that the German plans for invasion were not in fact made to forestall an "*imminent*" Allied landing, and that, at best, such plans could only prevent an Allied occupation "at some future time."<sup>250</sup> The documentary evidence submitted to the Tribunal did indicate that there was a "definite" Allied plan to occupy harbors and airports in Norway. The Tribunal found, however, that the expectations of Germany at the time of launching the invasion did not as a matter of fact include a belief that Britain was about to land troops in Norway.<sup>251</sup>

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245. Note 210 *supra*.

246. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 994 (1948).

247. *Id.* at 964-66.

248. *Id.* at 976-78.

249. *Id.* at 995.

250. OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT 37 (1947).

251. See note 207 *supra*.

*Maintenance of Customary-Law Standard in the U.N. Charter.* It is against the background of the high degree of necessity required in traditional prescription that article 51 of the United Nations Charter should be considered. Article 51 states in full:

Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

There has been considerable contention about the impact of this article upon the standard of required necessity projected in the customary law of self-defense. Some scholars have taken the view that article 51 demands an even higher degree of necessity than customary law for the characterization of coercion as permissible defense, that it limits justifying necessity to an "armed attack" as distinguished both from an expected attack of whatever degree of imminence and from applications of nonmilitary types of intense coercion, and that it absolutely forbids any anticipatory self-defense. For instance, Professor Kunz, insisting that article 51 provides a "clear and unambiguous text," wrote, in characteristic exegesis:

[F]or this right [of self-defense under article 51] does not exist against any form of aggression which does not constitute "armed attack." Secondly, this term means something that has taken place. Article 51 prohibits "preventive war." The "threat of aggression" does not justify self-defense under Article 51. Now in municipal law self-defense is justified against an actual danger, but it is sufficient that the danger is *imminent*. The "imminent" armed attack does not suffice under Article 51.<sup>252</sup>

Most recently, Dr. Ninčić has argued from the canon *exceptiones sunt strictissimae interpretationis* that:

[T]his means that nothing less than an armed attack shall constitute an *act-condition* for the exercise of the right of self-defense within the meaning of Article 51 (i.e. "subversion" and . . . "ideological" or "economic aggression" does not warrant armed action on the basis of Article 51). It further stipulates that *the armed attack must precede the exercise of the right of self-defense*, that only an armed attack which has actually materialized, which has "occurred" shall warrant a resort to self-defense. This clearly and explicitly rules out the permissibility of any "anticipatory" exercise of the right of self-defense, i.e. resort to armed force "in anticipation of an armed attack."<sup>253</sup>

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252. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947).

253. Reply from Dr. Ninčić, in SCHWARZENBERGER, REPORT ON SOME ASPECTS OF THE PRINCIPLE OF SELF-DEFENCE IN THE CHARTER OF THE UNITED NATIONS AND THE



The major difficulties with this reading of what appears to be an inept piece of draftsmanship are two-fold. In the first place, neither article 51 nor any other word formula can have, apart from context, any single "clear and unambiguous" or "popular, natural and ordinary" meaning that predetermines decision in infinitely varying particular controversies.<sup>254</sup> The task of treaty interpretation, especially the interpretation of constitutional documents devised, as was the United Nations Charter, for the developing future, is not one of discovering and extracting from isolated words some mystical pre-existent, reified meaning but rather one of giving that meaning to both words and acts, in total context, which is required by the principal, general purposes and demands projected by the parties to the agreement.<sup>255</sup> For determining these major purposes and demands, a rational process of interpretation permits recourse to all available indices of shared expectation, including, in particular, that which Professor Kunz casually de-emphasized,<sup>256</sup> the preparatory work on the agreement. Such a process of interpretation would, moreover, seek to bring within the attention frame of the interpreter and applier not just one element of a context suggested by one rule or principle of interpretation, such as that upon which Dr. Ninčić relied, but all the relevant variable factors of a particular context. It is of common record in the preparatory work on the Charter that article 51 was not drafted for the purpose of deliberately narrowing the customary-law permission of self-defense against a current or imminent unlawful attack by raising the required degree of necessity. The

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TOPICS COVERED BY THE DUBROVNIK RESOLUTION 69 (Int'l Law Ass'n 1958). (Emphasis in the original.) Professor Kunz and Dr. Ninčić have not been alone in their position on this matter. See KELSEN, *THE LAW OF THE UNITED NATIONS* 797-98 (1950); MARTIN, *COLLECTIVE SECURITY* 169 (1952); 2 OPPENHEIM-LAUTERPACHT 156; Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29-30 (1951).

254. Of the numerous eloquent exposures of the fundamental flaw of such a view, it suffices to quote Pollux, *The Interpretation of the Charter*, 23 BRIT. YB. INT'L L. 54, 67 (1946):

It does not seem very helpful to state that "the ordinary methods of interpretation" shall be used in order to determine the "clear" meaning, "the plain terms," the "natural," "grammatical," "logical," "categorical," or "ordinary" meaning of one or more words. These terms beg the question for two reasons. In the first place, there may be words which have no such fixed meaning, and secondly, words may be used in a sense quite different from the usual one. Moreover, the foregoing expressions are not really at all informative. In practice they usually veil the process whereby a person, a court, or another body reaches a certain conclusion which inclines them to regard a particular meaning as the natural and plain meaning of a given word.

255. Some development of this general point is offered in McDougal & Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258 (1951). See also HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, at 641-45 (1943); 2 HYDE, *INTERNATIONAL LAW* 1468-72 (2d rev. ed. 1945); Harvard Research in International Law, *The Law of Treaties*, 29 AM. J. INT'L L. SUPP. 937-71 (1935); Stone, *Fictional Elements in Treaty Interpretation—A Study in the International Judicial Process*, 1 SYDNEY L. REV. 344 (1955).

256. *Supra* note 252, at 873.

moving purpose was, rather, to accommodate regional security organizations (most specifically the Inter-American system envisioned by the Act of Chapultepec) within the Charter's scheme of centralized, global collective security, and to preserve the functioning of these regional systems from the frustration of vetoes cast in the Security Council.<sup>257</sup> Further, in the process of formulating the prohibition of unilateral coercion contained in article 2(4), it was made quite clear at San Francisco that the traditional permission of self-defense was not intended to be abridged and attenuated but, on the contrary, to be reserved and maintained. Committee 1/I stressed in its report,<sup>258</sup> which was approved by both Commission I and the Plenary Conference,<sup>259</sup> that "The unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self defense remains admitted and unimpaired."

More comprehensively considered, the principle of restrictive interpretation, of which *exceptiones sunt strictissimae interpretationis* is but one variant, may, with at least equal cogency, be invoked against the position Dr. Ninčić has taken. "Legitimate self-defense," encompassing anticipatory defense, has long been honored in traditional authoritative myth as one of the fundamental "rights of sovereign states." In accordance with one variant of the principle of restrictive interpretation, limitations or derogations from sovereign competence are not lightly to be assumed.<sup>260</sup> The view urged by Ninčić pro-

257. See 12 U.N.C.I.O. 680-82; 11 *id.* 52-59. See also, *e.g.*, BOWETT, SELF DEFENCE IN INTERNATIONAL LAW 182-84 (1958); GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 297-99 (2d rev. ed. 1949); RUSSELL & MATHER, A HISTORY OF THE UNITED NATIONS CHARTER 688-704 (1958); Bebr, *Regional Organizations: A United Nations Problem*, 49 AM. J. INT'L L. 166 (1955); Lleras Camargo, *El Sistema Regional Americano*, 1 REVISTA COLOMBIANO DE DERECHO INTERNACIONAL NO. 2, at 5 (1947). Professor Kunz himself was quite familiar with the purpose that lay behind article 51. See Kunz, *supra* note 252, at 872-73; Kunz, *The Inter-American System and the United Nations Organization*, 39 AM. J. INT'L L. 758 (1945).

The Dumbarton Oaks Proposals, it may also be recalled, contained no provision at all on self-defense. At Dumbarton Oaks, in connection with a question raised by China as to who was to determine whether a state claiming self-defense was using force consistently with the purpose and principles of the projected organization, "it was agreed that the Charter could not deny the inherent right of self-defense against aggression . . ." RUSSELL & MATHER, *op. cit. supra* at 465-66. See also *id.* at 599.

258. *Report of Rapporteur of Committee 1 to Commission I*, as adopted by Committee 1/I, 6 U.N.C.I.O. 446, 459.

259. See *Verbatim Minutes of Fifth Meeting of Commission I*, 6 U.N.C.I.O. 202, 204; *Report of Rapporteur of Commission I to Plenary Session*, *id.* at 245, 247. For the approval of this Report by the Plenary Conference, see *Verbatim Minutes of the Ninth Plenary Session*, 1 *id.* at 612, 620.

260. On the principles of restrictive interpretation, see, *e.g.*, the North Atlantic Coast Fisheries Case, in BRIGGS, THE LAW OF NATIONS 313, 315 (2d ed. 1952); FIORE, INTERNATIONAL LAW CODIFIED 345 (Borchard transl. 1918); HALL, INTERNATIONAL LAW 394-95 (8th ed. Pearce Higgins 1924); 2 PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 110, 111-13 (3d ed. 1882); Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT.

ceeds from the hypothesis that self-defense is an "exception" whose recognition tends to nullify the "general rule" of prohibition of coercion and which must therefore be confined within the narrowest of limits. Even apart from the essential complementarity of prohibited and permissible coercion to which we have so very often adverted, the permission of self-defense embodied in customary prescription cannot of itself, if appropriately applied, render ineffective or illusive either the fundamental community policy against change by destructive coercion projected in the Charter, or the peace-maintaining functions of the United Nations. As noted above, customary prescription has always required a high degree of necessity—specifically, in the case of an anticipated attack, a high degree of imminence—to support the lawfulness of intense responding coercion. One index of the required condition of necessity is precisely the degree of opportunity for effective recourse to nonviolent modes of response and adjustment, including invocation of the collective conciliation functions of the United Nations. Furthermore, permitting defense against an imminently expected attack does not, any more than permitting defense against an actual current attack, impair or dilute the "authority and responsibility" of the organized community "to maintain or restore international peace and security."<sup>261</sup> Whether the events that precipitate the claim

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YB. INT'L L. 1, 22 (1956). Sir Gerald attaches a curious label on this principle—"subsidiary interpretative finding."

In most comprehensive and accurate formulation, the principle of restrictive interpretation is a full complement of the principle of effectiveness, or interpretation by major purposes. Each principle serves merely to weight certain features of the process of agreement, as bases of inference of the shared expectations of the parties, for the guidance of decision-makers, and both principles are designed to preserve the integrity of the agreement-making process as an instrument by which states may securely project policies as to their future interrelations. The principle of effectiveness is a positive formulation that, when unfolding events inevitably lay bare contradictions, gaps, and omissions in the reference of an agreement, such deficiencies must be remedied by an interpretation best designed to promote the more general, essential purposes of the parties. The principle of restrictive interpretation is a negative formulation that the clarification of contradictions, completion of gaps, and resolution of ambiguities should not be carried beyond what is absolutely necessary to implementation of major purposes and should not be extended to imposing new purposes and unnecessary detailed obligations upon the parties.

For determining the shared expectations of the parties with respect to article 51 of the United Nations Charter, the two principles, or formulations, fortunately reinforce each other in indicating a single conclusion. It is scarcely conceivable, as developed in our text, that the major "security" purposes of the parties to the Charter could in contemporary conditions be adequately, if at all, served by an interpretation which would reduce "self-defense" to assumption of the posture of the sitting duck. Similarly, to require the parties to the Charter to give up their traditional right of self-defense for so illusory a return would certainly be to impose upon them deprivations nowhere clearly stipulated by the records of the Charter, and, in conformity with a policy of protecting the integrity of agreements, should not be done.

261. U.N. CHARTER art. 51. Professor Kunz and Dr. Ninčić are in effect purporting to discover in article 51 words not written there in printer's ink. They interpret the phrase "if an armed attack occurs" as if it read "if, and only if, an armed attack occurs." A proposition that "if A, then B" is *not* equivalent to, and does *not* necessarily imply,

of self-defense constitute an actual, current attack or an imminently impending attack, the claim remains subject to the reviewing authority of the organized community. Finally, the continuing refusal of most of the members of the United Nations to accept the Soviet or Litvinov-Politis type of definition of aggression appears significant. If the members did concur in the narrow construction of article 51, if their demands and expectations were that the justifying conditions of necessity for self-defense should be and have been limited to an "armed attack" and that responding coercion must in all circumstances be postponed until unlawful coercion has exploded into destructive violence, then the Soviet first-shot test of aggression would have been embraced, it might be supposed, as a matter of course.<sup>262</sup>

The second major difficulty with a narrow reading of article 51 is that it requires a serious underestimation of the potentialities both of the newer military weapons system and of the contemporary techniques of nonmilitary coercion. If, in scholarly interpretation of authoritative myth, any operational reference is seriously intended to be made to realistically expected practice and decision, an attempt to limit permissible defense to that against an actual "armed attack," when increases in the capacity of modern weapons systems for velocity and destruction are reported almost daily in the front pages of newspapers, reflects a surpassing optimism. In these circumstances, "to cut down," Professor Waldock suggests forcefully, "the customary right of self defense beyond even the *Caroline* doctrine does not make sense. . . ."<sup>263</sup>

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the proposition that "if, and only if, A, then B." To read one proposition for the other, or to imply the latter from the former, may be the result of a policy choice, conscious or otherwise, or of innocent reliance upon the question-begging latinism *inclusio unius est exclusio alterius*; such identification or implication is assuredly not a compulsion of logic. If a policy choice is in fact made, it should be so articulated as to permit its assessment.

262. That acceptance of the construction of article 51 objected to above would logically require adoption of the Soviet first-shot definition of aggression was made clear by the Soviet representatives to the U.N. committees in defining aggression. See, *e.g.*, the statement of the Ukrainian SSR delegate that "the negative reference to the right of self-defense in operative paragraph 1 [of the draft definition submitted by Iran and Panama] did not stress the point that defensive measures were only permitted after an act armed attack [*sic*] had been committed by the opposing party. The draft resolution of Iran and Panama thus obscured the essence of Article 51 of the Charter, while the Soviet proposal was the perfect complement of that Article." U.N. GEN. ASS. OFF. REC. 12th Sess., 6th Comm. 59 (1957).

263. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 455, 498 (1952).

This indicates a major difficulty in the position taken in Tucker, *Force and Foreign Policy*, 47 YALE REV. 374 (1958). Professor Tucker would compel policy makers to choose between deference to "standards set by the United Nations Charter" and the achievement of "American security" and "preservation of Western interests." *Id.* at 379. He assumes the wholly unnecessary view that what the U.N. Charter prescribes is the excessively narrow construction of article 51, *id.* at 375, and proceeds to describe such a "doctrine" as "divorced from political reality," *id.* at 380. There are other dichotomies drawn by Professor Tucker—such as "national interests" and "international standards,"

For illustration of the tergiversations and curious distinctions that become necessary in any attempt to accommodate the position insisted upon by, *inter alia*, Professor Kunz and Dr. Ninčić, with the actualities and potentialities of the contemporary technology of violence, reference may be made to the recommendations of M. Singh.<sup>264</sup> While vigorously stressing that "the sole condition on which the right [of self-defense] can be exercised is restricted to an armed attack,"<sup>265</sup> M. Singh, recognizing at the same time that "in nuclear warfare time is of the very essence,"<sup>266</sup> proposes a conception of "armed attack" that would permit the target state to respond with violence at some time before an attack is actually delivered or physically felt in its territorial domain. He writes:

[I]f the provisions of Article 51 are carefully examined, it would appear that what is necessary to invoke the right of self defense is an *armed attack* and not the actual, physical violation of the territories of the State. . . . [A]s long as it can be proved that the aggressor State with the definite intention of launching an armed attack on a victim member-State has pulled the trigger and thereby taken the last proximate act on its side which is necessary for the commission of the offense of an armed attack, the requirements of Article 51 may be said to have been fulfilled even though physical violation of the territories by the armed forces may as yet have not taken place.<sup>267</sup>

Thus, M. Singh illustrates, submarines known to the target state "as a result of secret intelligence" to be about to undertake a nuclear attack may be attacked and destroyed "as soon as," but not before, they leave the territorial waters of the aggressor state. Similarly, the moment an initiating state has allowed its aircraft "to take off" and its guided missiles "to be shot," such instrumentalities of attack may be "repelled" by the target state. The justification offered is in terms of a *locus poenitentiae* admitted by "the general principles of law":

. . . before the submarine fleet had left territorial waters, there was the possibility of the aggressor state changing its mind and hence it may be premature to attack the fleet while still within the territorial limits of the aggressor state.<sup>268</sup>

It is not difficult to achieve the impression that these lines between "attack" and "actual preparation for the mounting of the attack" are largely unreal and arbitrary. On the one hand, imaginary boundaries on the sea and in the

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"renunciation of force" and "international order," "security" and "survival," "justice" and "order"—which others may find difficult to make with the same confidence. For a presentation somewhat more concerned with community perspectives of authority, see his earlier article, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11 (1951).

264. Singh, *The Right of Self-Defence in Relation to the Use of Nuclear Weapons*, 5 INDIAN YB. OF INT'L AFFAIRS 3 (1956).

265. *Id.* at 24.

266. *Id.* at 24-25. See also *id.* at 18.

267. *Id.* at 25.

268. *Id.* at 26.

air have no necessary realistic relation to the limits of a hypothetical *locus poenitentiae*. On the other hand, considering the state and potentialities of modern telecommunications and guidance systems, there may in fact be no "last irrevocable act"—in respect of the instrumentalities M. Singh referred to: submarines, aircraft and guided missiles—short of dropping or exploding a nuclear weapon. Thus, the whole tenor and effect of consistently requiring a "last irrevocable act" would seem to be to compel the target state to defer its reaction until it would no longer be possible to repel an attack and avoid damage to itself. In case of delivery by ballistic (as distinguished from guided) missiles, whose trajectory is traversed in a matter of minutes and against which effective repulsion measures have yet to be devised, it should be even clearer that to require postponement of response until after the "last irrevocable act" is in effect to reduce self-defense to the possible infliction, if enough defenders survive, of retaliatory damage upon the enemy. It is precisely this probable effect that gives to the narrowly restrictive construction of article 51, when appraised for future application, a strong air of romanticism.

In particular connection with exercises emphasizing nonmilitary forms of attack, we have suggested that, in many contexts, the use of political, economic and ideological instrumentalities may indeed result in no more than a modest degree of coercion, a degree which may constitute part of the ordinary coercion implicit in the power and other value processes in the world arena. To say, however, that article 51 limits the appropriate precipitating event for lawful self-defense to an "armed attack" is in effect to suppose that in no possible context can applications of nonmilitary types of coercion (where armed force is kept to a background role) take on efficacy, intensity and proportions comparable to those of an "armed attack" and thus present an analogous condition of necessity. Apart from the extreme difficulty of establishing realistic factual bases for that supposition, the conclusion places too great a strain upon the single secondary factor of modality—military violence. A rational appraisal of necessity demands much more than simple ascertainment of the modality of the initiating coercion. The expectations which the contending participants create in each other are a function not only of the simple fact that the military instrument has or has not been overtly used but also of the degree and kind of use to which all other instrumentalities of policy are being put. What must be assessed is the cumulative impact of all the means of coercion utilized; policy-oriented analysis must be *configurative* analysis. The kind, intensity and dimension of political, economic or ideological pressure applied may, through this analysis, serve in some contexts as relevant indices of the imminence or remoteness of an allegedly expected armed attack.

#### *Effects and the Proportionality of Responding Coercion*

We turn, finally, to appraisal of the effects of coercion claimed to be in self-defense. The principal reference here is to the degree of intensity and

scope exhibited in this coercion—factors long-recognized to be of special relevance in judgments about the lawfulness of particular claims to self-defense. It is primarily in terms of its magnitude and intensity—the consequentiality of its effects—that alleged responding coercion must be examined for its “proportionality.” “Proportionality” which, like “necessity,” is customarily established as a prerequisite for characterizing coercion as lawful defense, is sometimes described in terms of a required relation between the alleged initiating coercion and the supposed responding coercion: the (quantum of) responding coercion must, in rough approximation, be reasonably related or comparable to the (quantum of) initiating coercion.<sup>269</sup> It is useful to make completely explicit that concealed in this shorthand formulation of the requirement of proportionality are references to both the permissible objectives of self-defense and the condition of necessity that evoked the response in coercion. Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense.<sup>270</sup> For present

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269. See, e.g., the formulation in the report of de Brouckere quoted in text accompanying note 211 *supra*. Weightman, *Self-Defense in International Law*, 37 VA. L. REV. 1095, 1097 (1951), summarizing the conclusions of Giraud, *La Theorie de la Legitime Defense*, 49 HAGUE RECUEIL 691 (1934), and JENKS, *THE COMMON LAW OF MANKIND* 141-43 (1958), observe that proportionality is a common requirement of self-defense in municipal systems. See also Sancho Izquierdo, *La Guerra Defensiva y la Doctrina de la Legitima Defensa*, in 3 LA GUERRA MODERNA 29, 41, 51-53 (Universidad de Zaragoza 1956).

Kunz, *Individual and Collective Self Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947), made the astonishing statement that “If ‘armed attack’ means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident; necessity or proportionality are no conditions for the exercise of self-defense under Art. 51.” This of course reduces fundamental community policy to nonexistence. To say, further, that even a few shots across a border gives rise to a right of self-defense, while maintaining that the most imminent threat of massive violence does not, is to make an absolutistic fetish of certain irrelevant aspects of modality.

270. This mode of formulating the proportionality principle, which would relate the response directly to legitimate objectives of defense rather than mediately to the stimulus of initiating coercion, may acquire new significance should contemporary possibilities of achieving instrumentalities of coercion that would incapacitate without killing, maiming, or otherwise producing permanent incapacity, be realized. The possibility of securing such instruments in the form, for instance, of a “P-bomb” (paralysis bomb) or a “P-beam” (paralyzing beam), as one approach to the “problem of harmonizing considerations of humanity with the use of whatever coercion cannot be avoided,” was referred to in Lasswell, *The Political Science of Science: An Inquiry into the Possible Reconciliation of Mastery and Freedom*, 50 AM. POL. SCI. REV. 961, 968 (1956). More recently, the U.S. Army is reported to have “held out the hope” that chemical and biological agents with such capabilities “could prevent small wars or help win nearly bloodless victories in a big conflict.” Among the items specifically mentioned are means of producing temporary blindness, a “debilitating disease” “that would not kill but would leave enemies listless,” and “psycho-chemicals” that would induce temporary “irrational behaviour” (such as trying to “fly across a room”). N.Y. Times, May 10, 1958, p. 10, col. 3.

purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion. Put a little differently, the objective is to cause the initiating participant to diminish its coercion to the more tolerable levels of "ordinary coercion." This is the import of Secretary of State Webster's somewhat cryptic statement that "nothing unreasonable or excessive [must be done], since the act, justified by the necessity of self defense, must be limited by that necessity and kept clearly within it."<sup>271</sup> Thus articulated, the principle of proportionality is seen as but one specific form of the more general principle of economy in coercion<sup>272</sup> and as a logical corollary of the fundamental community policy against change by destructive modes. Coercion that is grossly in excess of what, in a particular context, may be reasonably required for conservation of values against a particular attack, or that is obviously irrelevant or unrelated to this purpose, itself constitutes an unlawful initiation of coercive or violent change.

From this perspective, it should be evident that an appropriate appraisal of the magnitude and intensity of an exercise of self-defense for its proportionality—a determination, in other words, of the amount of coercion reasonably necessary in a particular instance for achieving the lawful purpose of self-defense—requires functional reference to all the various factors relating to the opponent's allegedly aggressive coercion as well as to all the other factors relating to the claimant's coercion, which together comprise a detailed context. More particularly, the determination of proportionality is not, as is sometimes suggested, necessarily exhausted by ascertaining the qualitative similarity or dissimilarity of the weapons employed by one and the other contending participant. It has been urged, for instance, that a lawful defense against an attack executed with "conventional" weapons may not utilize "unconventional" or nuclear weapons; the use of nuclear arms, the argument

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271. Note 210 *supra*.

272. Some amplification of this principle may be found in McDougal & Feliciano, *General Principles* 796-98. As a reading of the literature there referred to will indicate, the conception of proportionality or economy in coercion has acquired increased significance as recognition of the difficulties of keeping violence limited has grown. The conception, put in one form or another, appears to underlie many of the current theories of "graduated deterrence" and "limited war" strategies. It is perhaps most conspicuous in proposals on "proportional" or "measured deterrence" which envisage almost mechanical equilibration of response and attack, for example, response by delivering the same number of bombs on the attacker's cities as that detonated by the attacker on the replier's cities. See Amster, *Design for Deterrence*, 12 BULL. OF ATOMIC SCIENTISTS 164 (1956); Sherwin, *Securing Peace Through Military Technology*, *id.* at 159. The soundness of exclusive reliance upon a theory of "massive deterrence," *i.e.*, where deterrence from *any* initial act is sought to be effected by the very disproportion of the promised reaction, under present power conditions, has been insistently questioned. See, *e.g.*, Nitze, *Symmetry and Intensity of Great Power Involvement in Limited Wars*, in MILITARY POLICY PAPERS 55 (Wash. Center for Foreign Policy Research 1958). Compare Kaplan, *The Calculus of Nuclear Deterrence*, 1 WORLD POLITICS 20 (1958).



runs, would be a disproportionate and excessive reaction.<sup>273</sup> We have repeatedly indicated that modality may be useful as quick index to intensity and scope. But, as we have just as frequently suggested, modality is no more than a *prima facie* rule of thumb which cannot dispense with more detailed inquiry into the consequentiality of coercion, and which must be taken in conjunction with all other relevant variable factors. Thus, in particular respect of the "conventional-nuclear" dichotomy, it would, we suggest, be an extremely hazardous prediction to say (as M. Singh appears in effect to be saying) that in no possible set of events will an authorized decision-maker regard the use of nuclear weapons—the "yield" of which, it should be recalled, is subject to control and may vary enormously—as reasonably necessary to stop and turn back an attack initiated with "conventional" weapons. It is perhaps symptomatic that M. Singh himself would concede one "possible exception": when the target state, "facing certain defeat, with a view to upholding the law and to prevent the aggressor from becoming victorious, after giving full trial to permissible weapons, uses prohibited nuclear weapons as a last resort against the law-breaker."<sup>274</sup>

#### COLLECTIVE SELF-DEFENSE

The permission of collective self-defense recognized in article 51 of the United Nations Charter has, in the context of continuing conflict between the major demanded systems of world public order and of consequently low expectations about the reliability of effective intervention by the organized community, acquired special prominence and importance. That importance, of course, flows from the faculty afforded by article 51 of taking collective action in defense against initiating coercion without need of securing prior authorization from the general security organization. The last decade or so has seen the proliferation of regional defense arrangements or organizations which has culminated in the emergence of two principal sets of opposing, mutually exclusive, agreements that impart, in substantial effect, formal expression to the contemporary phenomena of systemic conflict and of polarizing power in the world arena. There are, on the one hand, the agreements among Western and Western-oriented states, such as the Inter-American Treaty of Reciprocal Assistance of 1947, the Brussels Treaty of 1948, the North Atlantic Treaty of 1949, the Pacific Security (ANZUS) Treaty of 1951, and the Southeast Asia Collective Defense Treaty of 1954.<sup>275</sup> On the other hand, there are the

273. Singh, *The Right of Self-Defence in Relation to the Use of Nuclear Weapons*, 5 INDIAN YB. OF INT'L AFFAIRS 3, 32-34 (1956). Cf. the statement of the Indian representative in U.N. GEN. ASS. OFF. REC. 12th Sess., 6th Comm. 54 (1957): "If the use of atomic weapons was declared illegal, even in self-defence, any state which used them to defend itself against an attack using conventional weapons would become an aggressor. It was a general principle that self-defence must be legitimate and must be proportionate to the attack."

274. Singh, *supra* note 273, at 33.

275. See note 12 *supra*. The text of the Brussels Treaty may be found in 43 AM. J. INT'L L. SUPP. 59 (1949). See generally ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS,

Warsaw Treaty of 1955 between the Soviet Union and her protected states,<sup>276</sup> the Treaty of Friendship, Alliance and Mutual Assistance of 1950 between the Soviet Union and the Peoples' Republic of China,<sup>277</sup> and the network of bilateral treaties of the Soviet Union with Bulgaria,<sup>278</sup> Roumania,<sup>279</sup> Hungary<sup>280</sup> and Finland,<sup>281</sup> and of the protected Eastern European states *inter se*.<sup>282</sup> In addition to these major groupings, there is the Joint Defense and Economic Cooperation Treaty of 1950 between the members of the Arab League.<sup>283</sup> These regional arrangements or organizations together embrace a very substantial number of the countries of the world that have any power capability. Some scholars have eloquently deplored that "the right to collective self defense has been used to emasculate the world organization in favor of regional organization"<sup>284</sup> and that "collective self defense" and "collective security" are poles apart, "as distant from each other as order is from chaos."<sup>285</sup> These lamentations appear to assume that only that security is collective which is also universal and to ignore that not the permission of collective self-defense but the rising power and the dynamics of totalitarian world orders have imperiled the aspiration for universal security. The real point of the development of regional defense arrangements and organization is the increased recognition that, the facts of contemporary international life being what they are, defense must be collective if it is not to be an exercise in individual suicide.

Establishment of a collective defense organization represents a claim to prepare for collective defense. Objection to treaties establishing such organi-

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ATLANTIC ALLIANCE: NATO'S ROLE IN THE FREE WORLD (1952); ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, COLLECTIVE DEFENSE IN SOUTHEAST ASIA: THE MANILA TREATY AND ITS IMPLICATIONS (1956).

276. 49 AM. J. INT'L L. SUPP. 194 (1955).

277. 44 AM. J. INT'L L. SUPP. 84 (1950).

278. 48 U.N.T.S. 142 (1950).

279. 48 U.N.T.S. 196 (1950).

280. 48 U.N.T.S. 170 (1950).

281. 48 U.N.T.S. 156 (1950).

282. 1 U.S. DEPT. OF STATE, DOCUMENTS AND STATE PAPERS 238-49 (1948); *id.* at 681 (1949). On the Soviet network of treaties generally, see Kulski, *The Soviet System of Collective Security Compared with the Western System*, 44 AM. J. INT'L L. 453 (1950); Schapiro, *The Post War Treaties of the Soviet Union*, 4 YB. OF WORLD AFFAIRS 130 (1950); Yakobson, *World Security and Regional Arrangements—Soviet Position*, 44 PROC. AM. SOC'Y INT'L L. 15 (1950).

283. 49 AM. J. INT'L L. SUPP. 51 (1955).

284. LEVI, FUNDAMENTALS OF WORLD ORGANIZATION 84 (1950).

285. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 264 (1954). See also Wolfers, *Collective Security and the War in Korea*, 43 YALE REV. 481 (1954), where the assertion is made that the action taken in Korea was "collective self-defense" rather than "collective security," at least on the part of the United States, upon the theory that the United States had vital "national interests" in taking the action it did. For Dr. Wolfers, no concerted action may appropriately be described as "collective security" unless the members participating "actually chose the long run advantage at the expense of immediate security." *Id.* at 485.

zations has, in the past, been made upon the ground that the permission of self-defense, whether individual or collective, is available only at the precise moment of "armed attack," and that apprehension of attack does not justify military preparations.<sup>286</sup> It is not necessary to take this objection seriously; the permission of self-defense, particularly under the conditions posed by the present technology and techniques of coercion, must be quite meaningless if read to exclude "peacetime" preparatory arrangements to meet coercion. Claims to the actual exercise of coercion in collective self-defense are of more important concern to the present inquiry. Review and appraisal of the lawfulness of these claims present no special or unique intellectual difficulties. Exactly the same kind of multiple-factor analysis we have recommended for passing upon coercion claimed to be in individual self-defense seems necessary for making judgments about coercion avowed to be in group self-defense, and all the categories of detailed factors relevant for the one are in general relevant for the other. It remains necessary, however, to deal with a few objections to the entire concept of collective self-defense and, in so doing, to examine certain factors that relate peculiarly to claims of group defense.

The deprecatory attitude toward collective self-defense begins with a strong preoccupation with a dogmatic conception limited to the defense of single, territorially-organized polities like those which broke away from feudalism several centuries ago. This preoccupation is evident in Professor Kelsen's analysis:

[Self-defense] is a right of the attacked or threatened individual or state, and of no other individual or state. Article 51 confers the right to use force not only upon the attacked state but also upon other states which unite with the attacked state in order to assist it in its defense. This is probably the meaning of the term "collective self defense." If so, the term "collective self defense" is not quite correct. It is certainly collective "defense," but not collective "self"-defense. . . . [T]he action on the part of the states which are not attacked, but only assist the attacked state against its aggressor, is not exactly self-defense.<sup>287</sup>

The strictures of Professor Stone are comparable:

[U]nder general international law, a State has no right of "self-defense" in respect of an armed attack upon a third state. The very notion of *collective* self-defense seems contradictory, except as resorted to by two or more victims simultaneously attacked by the same Power.<sup>288</sup>

The most recent detailed statement on collective self-defense is built upon the same limited conception. The "essence" of collective self-defense "properly termed," Dr. Bowett writes, is "that the participants base their action on a

286. See the statement issued by the Soviet Ministry of Foreign Affairs on January 29, 1949, asserting the nonconformity of the North Atlantic Treaty with the U.N. Charter. 3 INTERNATIONAL ORGANIZATION 400-06 (1949). See also Schick, *The North Atlantic Treaty and the Problem of Peace*, 62 JURIDICAL REV. 26, 49 (1950).

287. KELSEN, *THE LAW OF THE UNITED NATIONS* 792 (1950).

288. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 245 (1954).

violation of their own legally protected rights or interests."<sup>289</sup> Upon this premise, Dr. Bowett submits that:

[T]he situation which the Charter envisages by the term is . . . a situation in which each participating state bases its participation in collective action on its own right of self-defense. It does not, therefore, generally extend the right of self-defense to any state which desires to associate itself in the defense of a state acting in self-defense.<sup>290</sup>

The intervening state which has no legal right in the security of the actual victim, which has not itself the right of self-defense, must justify its action as being in the nature of a sanction; it is not self-defense, individual or collective.<sup>291</sup>

The most fundamental difficulties in these formulations are two-fold. The first lies in the implicit or explicit assumption that only single nation-states are authorized to claim self-defense, that, in other words, the "self" which may be defended is simply, as indicated, that of the particular form of body-politic inherited from the decay of feudalism. That assumption leads almost inevitably to a misconception of the core problem—identification of the "self" which may lawfully claim to exercise defending coercion. A claim of collective self-defense arises whenever a number of traditional bodies-politic asserting certain common demands for security as well as common expectations that such security can be achieved only by larger cooperative efforts, and purporting to define their respective identification structures so as to create a common overlap and interlock, confront an opponent and present themselves to the rest of the general community as one unified group or collectivity for purposes of security and defense.<sup>292</sup> Each member of the group in effect asserts, singly and in combination, defense of the new and more comprehensive "self." The question is whether the comprehensive group or collective "self" projected for purposes of security should be accepted by authorized decision-makers and be entitled to lawful defense. In view of the power processes existing in the world arena, a group "self" that comprehends several traditional territorial polities need no more be dismissed as a "legal fiction" than a "self" consisting of only one such polity. It can indeed be dismissed as a "legal fiction" only if the prior, question-begging assumption is made that the individual "self" of a particular nation-state is a constant for all purposes and may alone be protected and maintained by lawful coercion. The identifications which human beings make, the "self" systems which they establish for many different purposes, may be of many differing degrees of geographical

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289. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 206 (1958).

290. *Id.* at 216.

291. *Id.* at 217.

292. *Cf.* the formulation of the "general rationale behind collective defense" in King, *Collective Defense: The Military Commitment*, in *MILITARY POLICY PAPERS* 25, 28 (Wash. Center of Foreign Policy Research 1958). See also Haas, *Regional Integration and National Policy*, INT'L CONC. No. 513 (1957).

range and scope;<sup>293</sup> the territorial state, as we know it today, is only one such system for certain particular purposes. Groupings of states, regional or functional, constituted in many varied degrees of organization and integration, are familiarly recognized as authorized participants for equally varied purposes in many authority processes.<sup>294</sup> There is no compelling reason why they may not or should not be recognized as authorized units of claim and participation for the most important purpose of all, defense and security. If the provision for collective self-defense in the United Nations Charter has any point, it is the recognition that, in particular contexts, an unlawful attack upon one component of a group may, in its objectives, dimensions and probable effects, so involve and endanger the whole as to make prompt response by the group necessary, meet and reasonable. Community authority joins, we submit, with realistic observation in recognizing that the "self" systems by and on behalf of which claims to exercise defending coercion may be reasonably asserted may exhibit differing measures of comprehensiveness. These systems range from the primary "self" of a single state, through a more comprehensive group "self" established by two or a few states, to the most inclusive "self" that may be organized in a particular situation and which may include the bulk of the community of states.

The second principal difficulty is the apparent failure to perceive that the same fundamental community policy runs through all the varying specific forms that permissible coercion may assume. "Individual-self defense," "collective self-defense," "regional enforcement action," and "collective security action" or "police action" are indeed but differing remedial techniques and institutional modalities designed to secure the first and most basic policy of any legal system: the prevention and suppression of unilateral change by

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293. Introduction to "self" or identification systems is provided in LASSWELL & KAPLAN, *POWER AND SOCIETY* 11-13, 30-31 (1950). On the state considered as one (among many) system of interlocking identifications, see LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* ch. 13 (1930). For the social psychological bases and processes of "self" formation, see the influential accounts in COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* (1902) and *SOCIAL ORGANIZATION* (1909) (both reprinted *sub nom.* *THE TWO MAJOR WORKS OF CHARLES H. COOLEY* (1956)); MEAD, *MIND, SELF AND SOCIETY* (1934). See also KRECH & CRUTCHFIELD, *THEORY AND PROBLEMS OF SOCIAL PSYCHOLOGY* (1948); SHERIF & CANTRIL, *THE PSYCHOLOGY OF EGO-INVOLVEMENTS* (1947). A recent discussion of the processes and conditions of community formation, the construction and integration of a larger "self," among several states in a particular geographical region, is found in DEUTSCH & ASSOCIATES, *POLITICAL COMMUNITY AND THE NORTH ATLANTIC AREA* (1957). See further DEUTSCH, *POLITICAL COMMUNITY AT THE INTERNATIONAL LEVEL: PROBLEMS OF DEFINITION AND MEASUREMENT* (1954).

294. For indication of the range of relevant organizations, see, *e.g.*, EAGLETON, *INTERNATIONAL GOVERNMENT* (3d ed. 1957); HILL, *INTERNATIONAL ORGANIZATION* (1952); LEONARD, *INTERNATIONAL ORGANIZATION* (1951); MANGONE, *A SHORT HISTORY OF INTERNATIONAL ORGANIZATION* (1954); Jenks, *Co-ordination in International Organization: An Introductory Survey*, 28 *BRIT. YB. INT'L L.* 29 (1951); Potter, *World Institutions*, in *THE WORLD COMMUNITY* 259 (Wright ed. 1948); Bebr, *Regional Organizations: Their Functions and Potentialities in the World Community, 1951* (unpublished thesis in Yale Law Library).

destructive coercion and thereby the maintenance of those conditions of minimal order indispensable for the continued and fruitful functioning of all human value processes. In these terms, "individual self-defense" and "police action" represent the opposed ends of a spectrum of degrees of community involvement and participation in the forcible redress of breaches of world public order. "Collective self-defense" and "regional enforcement action" refer to the degrees of involvement in the middle ranges of the spectrum where more than one nation state but less than the whole or the bulk of the community is engaged in the task of securing public order. Thus a wide variation may exist, first, in the range and comprehensiveness of the "self" on behalf of which the exercise of lawful coercion may be claimed, and, second, in the specific institutional techniques by which primary community policy may be implemented.

We do not mean to suggest that, in terms of the more particular requirements of common, unifying, fundamental policy, differences may not exist between "individual self-defense," "collective self-defense" and "collective security action" (the last including both "regional enforcement action" and more general "community police action"). Broad, basic policy must be adapted to the varying specific types of contexts in which it is to be secured by the varying institutional modes of implementation. Thus, the differences in the structure and comprehensiveness of the "participant" or "self" may rationally require differences in appraisal of the other constituent factors of a particular context. For instance, in assessing the conditions under which collective self-defense is asserted, it may be appropriate to require a higher degree of imminence of attack and more exacting evidence of compelling necessity for coercive response by the group as such than would be reasonably demanded if the responding participant were a single state. The larger "self" of a group-participant ordinarily means greater bases of power at its disposal and, vis-à-vis a single opponent state, a substantial preponderance of force. Indeed a major, if somewhat obvious, premise of the multiplication in recent decades of collective defense arrangements and organizations is that a consolidated and coordinated group is less easily threatened than a lone and isolated state. Again, the limitations on the scope of permissible objectives of self-defense, individual or group, in which force is asserted without previous specific authorization from the organized general community, need not necessarily be regarded as restricting the competence of the organization itself inclusively to determine upon more comprehensive objectives for police action.

From this perspective, Dr. Bowett's focus upon the "individual right" of self-defense of each single participating state would seem essentially misdirected. It is not, we submit, an atomistic inquiry into the existence of an "individual right" to self-defense in each component member of a group-claimant, but rather a determination of the reasonableness of coercion by the group considered as a unified whole, as a collective "self," that is demanded by basic policy and prescription. Reasonableness here, as in individual self-defense, refers to the total configuration of relevant variables in context, and

depends, in broadest statement, upon the character of the objectives sought by the group and the necessity for and proportionality of the group response. Appraisal of the real as distinguished from the proclaimed goals of the group-claimant involves appraisal of the genuineness of the asserted common identifications for defense and security. It also necessitates an evaluation of the realism of the avowed expectation that the defense and security interdependences of the members are such that an attack upon any member seriously prejudices the security of every other member.<sup>295</sup> A first step in the determination of reasonableness (that is, lawfulness) is thus an inquiry into the substantiality of the collective "self" alleged for security and defense, and into whether a purported grouping for common protection is in reality a facade for other unlawfully expansive, purposes.

For similar reasons, the dilemma Dr. Bowett constructs between, on the one hand, the necessity of showing an "individual right" of self-defense in each element of a group-participant and, on the other hand, the imposition of inaction, however dire the emergency, until previous authorization for "collective security" or "police action" is obtained from the organized community,<sup>296</sup> appears specious. Dr. Bowett himself recognizes the probable "serious disadvantages" which acceptance of his analysis would entail "once we assume the impotency of the competent organs of the United Nations": "piece-meal aggression" whereby "each victim would fall in turn with no hope of assistance from friendly nations."<sup>297</sup> Dr. Bowett insists, however, that these consequences are reasons for "questioning the political wisdom" of the Charter scheme, *not* for "extending and distorting the legal concept of self defence."<sup>298</sup> He adds that neither the "political conditions of post war" nor the numerous collective defense treaties adverted to earlier "can alter the concept of self defence."<sup>299</sup> Moreover, under the Uniting For Peace Resolution, the argument continues, the inability of the United Nations to authorize "collective [security] action" can no longer be assumed.<sup>300</sup> It is difficult to ascribe much force to this plea for maintaining the purity of a particular past conception of self-defense. Outside the celestial abode of juristic concepts, in the world of time and space where the global processes of power are located, it must seem a curious conviction that this concept of self-defense must remain unaltered despite profound changes in the conditions and features of those processes. A "legal concept" of self-defense, like any other legal concept, can be given empirical reference only in terms of who, for what purposes and under what conditions, uses and applies the concept. The expectations both of the

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295. Dr. Bowett approaches this view in stating that "the important question is always, in final analysis, whether an attack upon one state in fact threatens the security of the other." BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 238 (1958).

296. *Id.* at 239-43.

297. *Id.* at 245.

298. *Id.* at 246.

299. *Id.* at 241.

300. *Id.* at 246.

general community and of particular authorized decision-makers about lawfulness (that is, reasonableness) do and must change through time as the conditions of use and application change. Fortunately, with the Uniting For Peace Resolution, a somewhat higher exponent can be placed on the probability of obtaining an authorization—a characterization of the permissibility of particular coercion—by the organized community. This very expectation, however, makes it all the more difficult to concede point to Dr. Bowett's version of collective self-defense. A group claim of self-defense, no less than an individual claim, remains subject to review by the organized community. It is to the necessities arising in the interim between initiation of the unlawful coercion and subsequent authorization or characterization that the permission of self-defense, individual or group, addresses itself. A final indication of the extent to which Dr. Bowett's analysis escapes contact with reality lies in the character of the alternatives that he offers for meeting those necessities: disarmament and world federation.<sup>301</sup>

#### COMMUNITY POLICE ACTION

The third and final reference of permissible coercion is to police or enforcement action. It is sometimes suggested with undertones of cynicism that "police action" in fact means going to "war."<sup>302</sup> In the sense that police action undertaken by or on behalf of the organized general community may be as immediately destructive of values as an unauthorized application of violence, this is true. But the inclusive policy at stake in police action is the exact opposite of the exclusive purpose projected in unauthorized violence. The one is the overriding community policy of establishing and maintaining that minimum order in which all value processes may peacefully go forward; the other is unilateral expansion by force that directly repudiates and attacks minimum order. Whatever the similarity in the physical destruction wrought or in the instrumentalities of policy employed, significant differentiation is to be found in the identifications of the participants and the nature of their objectives.

The agreements envisaged in article 43 of the United Nations Charter, agreements for the supply of "armed forces, assistance and facilities" to the Security Council, have never been concluded, and in all likelihood will not be concluded in the foreseeable future. Furthermore, the probability of unanimity among the permanent members of the Council—except, perhaps, in a conflict between small powers not involving any appreciable interest of the polar powers—seems apt to remain negligible. As a result, the participants in a

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301. *Id.* at 247. We do not, it may be added, seek to disparage these alternatives as long-term goals. What is open to grave doubt is the probability of their realization in the (now) discernible future and the wisdom of rejecting group defense while those goals as yet remain out of reach.

302. The suggestion appears, with varying nuances in reference, in, *e.g.*, APPADORAI, *THE USE OF FORCE IN INTERNATIONAL RELATIONS* 98-99 (1958); Wolfers, *Collective Security and The War in Korea*, 43 *YALE REV.* 481, 484 (1954). See also Borchard, *The Impracticability of "Enforcing" Peace*, 55 *YALE L.J.* 966 (1946).



police action probably will consist of individual members or groups of members acting as agents of the organized community upon the basis of a permissive authorization or delegation from the General Assembly. The operative assumption behind any police action is thus that the organization has succeeded in characterizing coercion in a particular case as impermissible.

The appropriate objectives of a particular police action are to be determined by the security organization itself. The ample range of U.N. authority in this regard is indicated by the high level of generality with which the grant of competence is formulated in the Charter: "to maintain or restore international peace and security."<sup>303</sup> On the one hand, police action cannot, without making nonsense of fundamental community policy, seek the destruction of the political independence and the disposition of the territory and other values of the aggressor state for the exclusive aggrandizement of the participating members. On the other hand, the restrictions in respect of permissible conservation customarily established for unilateral self-defense need not be regarded as necessarily applicable to police action authorized by the organized community. The significant policy difference would seem to lie in the inclusive character both of the identifications of the participants and of the decision process by which the appropriate objectives of a specific police action are formulated and established.<sup>304</sup> More specifically, neither the Charter of the United Nations nor other basic authoritative policy would preclude the organization from setting, in a particular case, objectives for police action more comprehensive than the mere "repelling" or "halting" of the unlawful attack. Authority, for instance, may well be conceded to the organized community to reconstruct those basic institutions of the target aggressor-state which outrage all conceptions of human dignity, or otherwise to modify conditions which, in reasonable expectation, may give rise to future violations of public order.<sup>305</sup> For a public order committed to human dignity, however, a fundamental constitutional principle is that individuals must not be coerced beyond a level reasonably necessary to maintain the order itself. In addition, objectives may be limited by the differential operation in differing cases, or even in differing

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303. U.N. CHARTER art. 39. See also article 1(1). In article 24(2), it is stipulated that "in discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations."

304. From this viewpoint, the related controversy, aroused by the very broadness and generality of the authority granted by the Charter, as to whether the organization is "bound" by "principles of justice and international law" in the characterization of prohibited coercion and the application of sanctions, appears largely unreal. The details of this contention may be found in Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783 (1948); Kelsen, *Sanctions in International Law Under the Charter of the United Nations*, 31 IOWA L. REV. 499 (1946); Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 25-27 (1951). See also Schick, *Peace on Trial—A Study of Defence in International Organization*, 2 WEST. POL. Q. 1, 13-15 (1949).

305. Cf. the argument on desirability of such authority made in LOEWENSTEIN, *POLITICAL RECONSTRUCTION* (1946).

stages of the same case, of the cost factor—the expectations of the general community about the tolerable or unbearable character of the probable costs of achieving a particular objective.

The experience in Korea affords documentation of the effect of this cost factor upon the definition of objectives. The Security Council resolution of June 27, 1950,<sup>306</sup> after noting that the North Korean authorities had “neither ceased hostilities nor withdrawn their armed forces to the 38th parallel,” recommended assistance to the Republic of Korea “to repel the armed attack and to restore international peace and security in the area.” Later, on October 7, 1950, with the military position of the United Nations forces dramatically improved and the North Korean armies being pushed back toward the 38th parallel, the General Assembly asserted authority to determine upon a general objective that went beyond the mere repulsion of the unlawful North Korean attack. The Assembly authorized the United Nations forces to take “all appropriate steps . . . to ensure conditions of stability *throughout Korea*”, as well as “all constituent acts . . . including the holding of elections, under the auspices of the United Nations, for the *establishment of a unified, independent and democratic government in the sovereign State of Korea.*”<sup>307</sup> Upon the initiation of massive unlawful intervention by the “Peoples’ Republic of China,” however, and the change in the prevailing expectations, realistic or otherwise, of the members about the costs and risks of pursuing the objective of unification, the General Assembly redefined and re-interpreted that objective in the following more modest terms: “to bring about a cessation of hostilities in Korea and the achievement of United Nations objectives in Korea by peaceful means. . . .”<sup>308</sup>

Police action may be carried out, like any other coercion, by all the familiar instrumentalities of policy, and may present a considerable variety in the kind and extent of participation and assistance undertaken by various members. For clarity, police action in this sense—the application of coercive sanctions against a participant inclusively determined to have initiated prohibited coercion—must be distinguished from the operations of an international “police force” like the “United Nations Emergency Force” created during the Suez crisis of 1956.<sup>309</sup> While the mere presence of the UNEF in the conflict area may have induced restraint in the contending belligerents, it was neither de-

306. U.N. SEC. COUNCIL OFF. REC. 5th year, No. 16, at 4 (1950).

307. Res. No. 376 (V), U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20 (A/1775) at 9 (1950). (Emphasis supplied.)

308. Res. No. 498 (V), U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20A (A/1775/Add. 1) at 1 (1951). See also Res. No. 500 (V), *id.* at 2; No. 711 (VII) A, *id.* 7th Sess., Supp. No. 20B (A/2361/Add.2) at 1 (1953); GOODRICH, KOREA, A STUDY OF U.S. POLICY IN THE UNITED NATIONS chs. 5-8 (1956); Goodrich, *Korea: Collective Measures Against Aggression*, INT’L CONC. No. 494 (1953); Wright, *Collective Security in the Light of the Korean Experience*, 45 PROC. AM. SOC’Y INT’L L. 165, 171-75 (1951).

309. Res. No. 1000 (ES-1), U.N. GEN. ASS. OFF. REC. 1st Emer. Spec. Sess., Supp. No. 1 (A/3354) at 2 (1956). See generally Goodrich & Rosner, *The United Nations Emergency Force*, 11 INTERNATIONAL ORGANIZATION 413 (1957).

signed nor equipped actually to exercise force and to "influence the military balance" against an identified violator.<sup>310</sup> Its functions were limited to supervising and policing the cease-fire and withdrawal of forces called for by the General Assembly. The modest character of these functions is perhaps most clearly indicated by the fact that the consent of the country in whose territory they were to be performed was regarded by the organization as indispensable.<sup>311</sup> In making this distinction between "police action" and a UNEF-type of "police force," we do not mean to minimize the latter. There are, on the contrary, a number of conceivable situations in which such a "police force" can be a valuable device for the localization of conflict.<sup>312</sup>

In contrast with the customary-law permission of unilateral self-defense, the competence of the organized community to order or authorize police action is not circumscribed by Charter specification of a required degree or condition of necessity. No specific standard has been accepted as authoritative for the organization in "determining the existence of" the appropriate precipitating events—"a threat of the peace," "breach of the peace," "act of aggression"—for requiring or authorizing coercive action to "maintain or restore international peace and security." It is precisely for rationality in such determinations, for maintenance of the most delicate adjustment of specific decision to fundamental community policy, that configurative analysis of changing contexts of coercion, by appropriate standards like those recommended above, is most essential. The conditions under which, in a particular instance, police action is authorized by the organization may exhibit a very high and even an extreme necessity for arresting an unlawful attack and for aiding the victim. As a practical matter, participation in police action carries with it burdens and risks which states do not lightly assume. There are, as a result, built-in safeguards against premature or officious initiation of police action. Indeed, the constant danger to world public order is not that police action may be precipitously taken in circumstances of actually inadequate necessity, but that it may not be taken at all.

#### POLICY CLARIFICATION A FIRST STEP TOWARD MINIMAL PUBLIC ORDER

The main purpose of this study has been to establish that, even in the contemporary cloven and disjointed world, it is both intellectually possible and

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310. *Second and Final Report of the Secretary General on the Plan for an Emergency International United Nations Force*, U.N. GEN. ASS. OFF. REC. 1st Emer. Spec. Sess., Annexes, Agenda Item 5, at 19, 20 (1956).

311. The Secretary General stated, *id.* para. 9, that "While the General Assembly is enabled to *establish* the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be *stationed* or *operate* on the territory of a given country without the consent of the Government of that country." This was approved by the General Assembly. Res. No. 1001 (ES-1), U.N. GEN. ASS. OFF. REC. 1st Emer. Spec. Sess., Supp. No. 1 (A/3354) at 3 (1956).

312. See FRYE, *A UNITED NATIONS PEACE FORCE* chs. 7-9 (1957); Nitze, *Where and Under What Circumstances Might a United Nations Police Force be Useful in the Future?*, in FRYE, *op. cit. supra* at 111.

practically indispensable for peoples genuinely dedicated to the values of human dignity to clarify in some detail a rational community policy concerning resort to international coercion. The principal emphases comprising our theme have been:

that in a world of accelerating interdependences with respect to all values, minimal order—in the sense of freedom from expectations of unauthorized violence and coercion—is as indispensable in the general community of states as it is in single states to an order of freedom and abundance in the production and sharing of values;

that existing world prescriptions, expressed in the United Nations Charter and other authoritative pronouncements and judgments, and accepted, formally at least, with near universality, make the necessary distinction between permissible and nonpermissible coercion and project a basic policy which seeks to prohibit the use of intense coercion as an instrument of international change, that is, for purposes of extension rather than defense of values;

that by orderly examination of processes of coercion in context, with appropriate significance being accorded to principal features such as *participants*, *objectives*, *methods*, *conditions* and *effects*, an observer or decision-maker may, in particular instances, make the specific interpretations of basic community policy best designed to promote the values of human dignity and progress toward a more complete international order in which these values are more secure;

that from perspectives seeking movement toward a world order of human dignity, the coercion characterized as “nonpermissible”—and prohibited in general community prescription as “acts of aggression,” “breaches of the peace,” “threats to the peace,” and so on—is most rationally conceived as extending to all coercion, by whatever instrument or combination of instruments, military and other, which is directed with requisite intensity against such substantial bases of power as the “territorial integrity” and “political independence” of the target state;

that, from similar perspectives, the coercion characterized as “permissible” and authorized by the general community in the cause of “self-defense,” should be limited to responses to initiating coercion that is so intense as to have created in the target state reasonable expectations, as those expectations may be reviewed by others, that a military reaction was indispensably necessary to protect such consequential bases of power as “territorial integrity” and “political independence”;

that general community measures—from gestures of conciliation to armed police action—as well as individual self-defense, collective self-defense and

regional enforcement are all appropriately regarded as modes of securing, and as being limited by, the same basic policy of minimum change by coercion, and that explicit focus upon basic policies, with constant relation to the principal features of processes of coercion in context, is as helpful to appropriate decision by one authoritative decision-maker as by another, whatever the degree of community involvement and action;

and, finally, that the explicit examination and weighting of major features in processes of coercion in terms of relation to values of human dignity, and the explicit appraisal of alternatives in decision for their relative impact upon a projected public order of these values are, far from being an abnegation of law, in fact of the very essence of a reasoned decision grounded, without dependence upon a transcendent metaphysic, in the most persuasive authority our world today offers—the most deeply held demands and expectations of peoples about the kind of public order in which they wish to live.

It has not been our purpose, by all this emphasis upon the importance of clarifying basic community policies, to underestimate the importance of such other tasks as the evaluation and invention of structures of authority and sanctioning procedures for the more effective application of basic policies. The assumption upon which we have proceeded is, rather, that clarity about fundamental goals and policies, about principal premises and the type of public order demanded, so insistently and continuously affects choices about authority structures and sanctioning procedures that it affords an economic first focus of attention. The primacy of basic policies over institutional modalities is the primacy of ends over means: the possible models for improving structures of authority and implementing procedures that could be projected, absent systematic clarification of fundamental policies, are countless; further, very different structures and procedures may in some contexts serve the same policies; and comparable structures and procedures may in other contexts serve very different policies. Conversely, however, it must be recognized that available means and knowledge of means affect the rational choice of ends and, hence, that the potentialities and limitations of achievable and known structures of authority and sanctioning techniques affect the realism with which basic policies can be projected and maintained. The most fateful challenge to lawyers and scholars in our time may, accordingly, be seen to embrace the dual tasks of inventing the structures of authority and sanctioning procedures designed most economically to move the peoples of the world from our immediate, precarious balance of terror toward minimal security and a more complete world public order of human dignity, and after investigating controlling conditions, of recommending the measures in communication and other action most effectively calculated to affect the predispositions of leaders and peoples to accept these structures and procedures and to put them into practice. In a subsequent study, we propose to examine some of the more important contributions presently being offered to meet this challenge.

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