

INTERNATIONAL COERCION AND WORLD PUBLIC ORDER:
THE GENERAL PRINCIPLES OF THE LAW OF WARMYRES S. McDOUGAL†
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THE importance today to every human being of community control of international coercion needs no pedant's footnotes to bestow upon it a sense of reality. The increasingly rapid multiplication and diffusion of weapons capable of shattering the globe, the most recent successful orbiting of artificial satellites and launching of guided and ballistic missiles of intercontinental reach,¹ the continued, if decelerated, hostile polarization of power in the world arena, the ever more precarious equilibrium between the polar opponents, the high and still rising levels in tension and expectations of comprehensive violence—all these and many other aspects of the contemporary world arena magnify with chilling insistence, even for the willful blind, the urgent need for rational inquiry into the potentialities and limitations of our inherited principles and procedures for controlling violence between peoples and for the invention and establishment of more effective alternatives in principles and

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This is the first in a series of articles upon the law of war. The second article, "The Initiation of Coercion: A Multi-Temporal Analysis," appears in the April 1958 issue of the *American Journal of International Law*. Subsequent articles will deal with the various major problems of the law of war from the resort to coercion, through the regulation of combat and noncombat situations, to the termination of coercion. The first portion of this Article, outlining in relative detail the processes of coercion and decision, is designed as an introduction to the whole series; the second portion offers a brief survey of some of the more important general policies relating to each of the major problems.

1. On the implications of artificial satellites and missiles for international security, see Berkner, *Earth Satellites and Foreign Policy*, 36 *FOREIGN AFF.* 221 (1958); Davidson, *The Modern Roman Circus*, 13 *BULL. ATOMIC SCIENTISTS* 331 (1957); Rabinowitch, *After Missiles and Satellites, What?*, 13 *id.* at 346. Preliminary inquiry into certain anticipated problems of community control is made in McDougal & Lipson, *Perspectives for a Law of Outer Space*, 52 *AM. J. INT'L L.* 407 (1958).

procedures.² This urgent need—not far removed, if at all, from that of simple survival—when considered in relation to the rising demands of people all over the world, whatever the perspectives of their rulers, for the securing of all their values by peaceful procedures, free from coercion and violence, confronts students of international law with unparalleled challenge and opportunity.

To meet this challenge, legal scholars unfortunately still much too often speak from one or the other of two contrasting attitudes, both destructive in high degree of efforts to clarify principles and procedures appropriate to a world public order honoring human dignity. The first of these attitudes, expressed in the accents of ultrasophistication and disenchantment, affirms that man's destructive impulses and instruments of violence have escaped all bounds and that little or nothing can be done by law either to control international coercion or to minimize the destruction of values once violence erupts. The contrasting attitude, manifested in continuing high deference to certain inherited terms of art, affirms an excess of faith in technical concepts and rules, divorced from contexts and procedures, as determinants of decision and exhibits much too little concern for the clarification of policies in detailed contexts and for the search for new principles and procedures. It will require but brief illustration to indicate the inadequacies of each of these attitudes and to emphasize the need for an alternative approach.

The first attitude, that of cynical disenchantment with law, may be illustrated by reference to certain writers who take what they describe as a "realistic" attitude toward the possibilities of legal regulation of coercion and violence among states. Emphasizing the "unlimited forces" that total war unleashes and pointing to the fearful potentialities of modern weapons, Judge de Visscher insists that "in its essence the problem of control [of such weapons] is wholly political" and adds:

"The new weapons of mass destruction have revolutionized all the data of war, and it is above all for this reason that the jurists will be well advised to waste no further time in what some of them still persist in calling the 'restatement' of the laws of war. To try to adapt these laws to the new conditions is not only labor absolutely lost; it is an enterprise that in certain of its aspects may be dangerous, as was demonstrated by the indefinite extension given in the second world war to the notion of the

2. This need has not gone unacknowledged in the more recent literature. See, e.g., STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT xxxi-lv (1954) (hereinafter cited as STONE, LEGAL CONTROLS); de Luna, *Fundamentación del Derecho Internacional*, 60 REVISTA DE DERECHO INTERNACIONAL 210 (Cuba 1952); Downey, *Revision of the Rules of Warfare*, 43 PROC. AM. SOC'Y INT'L L. 102 (1949); Kunz, *The Laws of War*, 50 AM. J. INT'L L. 313 (1956); Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 *id.* at 37 (1951); Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360 (1952); Phillips, *Air Warfare and Law*, 21 GEO. WASH. L. REV. 311, 395, 415 (1953). See also Pound, *Potentials for World Stability in the Field of Law*, in PROSPECTS FOR WORLD STABILITY 5 (PROC. INST. WORLD AFFAIRS, 26th Sess. 1949).

military objective. There is better work to be done today than picking up the fragments of an obsolete body of rules."³

The attitude here exhibited may be only a particular piece of the contemporary disillusionment which characteristically minimizes the actual and potential function of law in the world power process, exaggerates the role of naked power and deprecates continuing concern with legal principles and procedures as legalism—as an “intoxication with moral abstractions” and as one of the “great sources of weakness and failure” in foreign policy.⁴ Even so distinguished a humanitarian as Dr. Fenwick has given candid expression to such attitudes:

“The laws of war belong to a past age and except for a few minor matters of no consequence, it is futile to attempt to revive them. . . . Let’s face the facts. War has got beyond the control of law, other than the elementary law of humanity, if that can be discovered among the ruins of devastated cities.”⁵

“Gone, and it is to be hoped, gone forever is the naive belief that it is possible to draft new laws of war for new wars”⁶

The most obvious inadequacy in this attitude is that, because of its comprehensive deprecation of the role of authority, it offers no real alternative

3. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 293 (Corbett transl. 1957). For comparable pessimism expressed after the first World War, see *The League of Nations and the Laws of War*, 1 BRIT. Y.B. INT’L L. 109 (1920-21).

4. See MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 4, 101 (1951); cf. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, 95 (1951): “I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems. This approach was like a red skein through our foreign policy of the last fifty years. It has in it something of the old emphasis on arbitration treaties, something of the Hague Conferences and schemes for universal disarmament, something of the more ambitious American concepts of the role of international law, something of the League of Nations and the United Nations, something of the Kellogg Pact, something of the idea of a universal ‘Article 51’ pact, something of the belief in World Law and World Government. . . . It is the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints.”

For criticism of Professors Morgenthau and Kennan’s position, see McDougal, *Law and Power*, 46 AM. J. INT’L L. 102 (1952). See also CORBETT, *MORALS, LAW AND POWER IN INTERNATIONAL RELATIONS* 2-16 (1956); Oliver, *Reflections on Two Recent Developments Affecting the Function of Law in the International Community*, 30 TEXAS L. REV. 815 (1952).

For comparable underestimations of the function of legal principles and rules, see SCHWARZENBERGER, *POWER POLITICS* 203 (2d rev. ed. 1951): “In a society in which power is the overriding consideration, it is the primary function of laws to assist in maintaining the supremacy of force and the hierarchies established on the basis of power and to lend to such system the respectability and sanctity of law. In a variety of ways, international law serves these purposes.” For brief comment, see McDougal, *Dr. Schwarzenberger’s Power Politics*, 47 AM. J. INT’L L. 115 (1953).

5. 43 PROC. AM. SOC’Y INT’L L. 110 (1949) (Fenwick).

6. Fenwick, *The Progress of International Law*, 79 HAGUE ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS (hereinafter cited as HAGUE RECUEIL) 5, 63 (1951).

to naked force in an era in which the unrestrained exercise of such force against peoples threatens the very continuance of the human species. It is, of course, possible that the future may, as the world explodes in the holocaust of unlimited nuclear war, prove these writers to have been correct. Such pyrrhic vindication will, however, appeal to few, and for the scholar who cherishes both human life and human dignity, such a possibility can scarcely be permitted to deter renewed efforts to clarify the principles and procedures of a world public order in which human life and dignity may be made more secure. Fortunately, history does disclose a few examples of eras in which appropriate organizing principles and procedures were achieved, in contexts of sustaining effective power, for the restraint of generalized violence and for the minimization, in at least modest degree, of barbarism in conflict.⁷ There has yet to be demonstrated any inner necessity in either human nature or the nature of human society that makes it inherently impossible for men to discover and employ policies and institutions for harnessing the new instruments of destruction to the purposes of order rather than to their final mutual obliteration.⁸

The second attitude, that of overoptimistic faith in the efficacy of technical legal concepts and rules, is exemplified in the continued emphasis, evident in much of the contemporary literature of the law of war, on normative-ambiguous⁹ definitions and formulations and in the common underlying assumption

7. Europe during the greater part of the nineteenth century is the most frequently cited example, as to which see 1 WRIGHT, *A STUDY OF WAR* 361-62, 639, 653-55 (1942).

8. See MAY, *A SOCIAL PSYCHOLOGY OF WAR AND PEACE* chapters 1, 2, 9 (1943), whose main thesis is that "war and peace are basically and fundamentally the products of the types of social conditioning that have occurred in the large masses of people of the leading nations of the world." *Id.* at vii. Pear, *The Psychological Study of Tensions and Conflict*, in *THE NATURE OF CONFLICT* 118, 131 (1957), points out that the view which posits an "innate, independent, instinctual disposition of man" toward aggression is not supported by more recent studies on psychology, social psychology and comparative ethnology. 2 WRIGHT, *A STUDY OF WAR* 1224 (1942): "The attitude conducive to peace is neither that popularly attributed to the ostrich, which denies the possibility of war, nor that of the cynic, who considers war inevitable, but that of the rational man who appraises the opinions and conditions tending to war and the direction of human effort which at a given point in history might prevent it." Cf. TENSIONS THAT CAUSE WARS 17 (Cantril ed. 1950): "To the best of our knowledge, there is no evidence to indicate that wars are necessary and inevitable consequences of 'human nature' as such." See also KLINEBERG, TENSIONS AFFECTING INTERNATIONAL UNDERSTANDING c. 5 (1950); HUMAN NATURE AND ENDURING PEACE chapters 2-4, 26 (Murphy ed. 1945); WRIGHT, PROBLEMS OF STABILITY AND PROGRESS IN INTERNATIONAL RELATIONS 129, 146-47 (1954); Almond, *Anthropology, Political Behaviour, and International Relations*, 2 *WORLD POLITICS* 277 (1950); Cook, *Democratic Psychology and a Democratic World Order*, 1 *id.* at 553 (1949); de Luna, *Es La Guerra Inevitable?*, 8 *REVISTA ESPANOLA DE DERECHO INTERNACIONAL* 11 (1955); Malinowski, *War—Past, Present, and Future*, in *WAR AS A SOCIAL INSTITUTION* 21-31 (Clarkson & Cochran ed. 1941); Pear, *Peace, War and Culture Patterns*, in *PSYCHOLOGICAL FACTORS OF WAR AND PEACE* 21-45 (Pear ed. 1950).

9. A statement is "normative-ambiguous" when its terms make indiscriminate reference to the events to which decision-makers respond, to the policies which are assumed to guide

that certain predetermined "legal consequences" attach to and automatically follow—independently of policy objectives, factual conditions and value consequences as perceived by determinate decision-makers—from such definitions and formulations. This overemphasis on formal concepts and rules begins with the customary definition of war as a "legal state" or "condition" and extends through all ancillary concepts. The conception of war offered by Professor Hyde is representative:

"War may in a broad sense be fairly described as a condition of armed hostility between States. . . . A state of war is a legal condition of affairs dealt with as such, and so described both by participants and non-participants. It may exist prior to the use of force."¹⁰

The formulation by Lord McNair is even more explicit illustration:

"An important point . . . which, I think any good definition must bring out, is that war is a state or condition of affairs, not a mere series of acts of force. It is a state of affairs to which International Law attaches certain far-reaching consequences, and it is by reason of those consequences that it is necessary, as a matter of practice rather than of speculation, to define the state of affairs giving rise to them. . . . Moreover, Peace and War are mutually exclusive; there is no half-way house. . . . There are many measures of redress falling short of war, but the state of the relations between the State by whom and the State against whom such measures are taken continues to be peace until by one or both of them it is converted into war."¹¹

More recently, Professor Tucker has written:

"War—or the resort to armed force—is an action constituting a legal status defined by law. This status consists in bringing into operation certain rights and duties as between the belligerent states."¹²

The primary difficulty with all these definitions,¹³ and the comparable expressions of subsidiary concepts,¹⁴ consists in the fact that they not only

and justify decision and to the decisions ("legal consequences") themselves. Such statements commonly attempt in a single reference to describe past decisions, to predict future decisions and to state what future decisions ought to be. Further exposition of normative-ambiguity may be found in Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 266-67 (1943).

10. 3 HYDE, *INTERNATIONAL LAW* 1686 (2d rev. ed. 1945).

11. McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 *TRANSACT. GROT. SOC'Y* 29, 33 (1926).

12. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 9 (1957).

13. See the definitions collected in Eagleton, *The Attempt to Define War*, 291 *INT'L CONC.* 237, 258 (1933); Green, *Armed Conflict, War, and Self-Defense*, 6 *ARCHIV DES VÖLKERRECHTS* 387 (1957); McNair, *supra* note 11, at 31-32; Ronan, *English and American Courts and the Definition of War*, 31 *AM. J. INT'L L.* 642 (1937).

14. On "neutrality," see, e.g., ORVIK, *THE DECLINE OF NEUTRALITY 1914-1941*, 11 (1953): "Neutrality signifies primarily a nation's status of non-participation in hostilities when other countries are at war. Yet in international law a neutral state also undertakes certain duties and claims certain rights." See also TUCKER, *op. cit. supra* note 12, at 196.

attempt to refer at once to both "facts" and asserted "legal consequences," to both the time-space events of coercion and the responses of authoritative decision-makers to such events, but also purport to break each of the two distinguishable processes of factual coercion and of legal decision into the illusorily simple and dichotomous categories of "war" and "peace."

This conception of sharp discrimination between the "state of war" and the "state of peace," each with its distinctive and mutually exclusive sets of world prescriptions, is as ancient as Cicero's "*inter bellum et pacem nihil est medium*," upon which Grotius relied.¹⁵ It is, however, no new thought that this dichotomy is hardly a faithful reflection of the fluid and complex process of coercion in the contemporary world arena or of the equally complex process of legal authority. By resting on such an oversimplification, the legal scholar frequently compounds many particular confusions: he does violence to the great variety and differing intensities of the events in the coercion process,¹⁶ obscures the creative role of the authoritative decision-maker in responding to such events, removes from the focus of his attention many important variables which in fact affect decision, and confuses the fundamental policies, differing as the events of coercion differ, for the securing of which the public order of the world community establishes and maintains authoritative decision-makers.

Some recognition that the classical twofold categorization of the process of coercion has but minimal correspondence to contemporary realities in the interactions of states is apparent in the work of a number of modern scholars. This recognition is perhaps most explicit in Professor Jessup's recent recommendation that a new "legal state of intermediacy," a "third status" intermediate between war and peace, be recognized and elaborated in international law as a means of bridging the gap between traditional

15. 2 GROTIUS, *DE JURE BELLI AC PACIS* 832 (Kelsey transl. 1925). For more recent formulations of this dichotomy, see Lord Macnaghten, in *Janson v. Dreifontein Consol. Mines, Ltd.*, [1902] A.C. 484, 497-98; STOWELL, *INTERNATIONAL LAW* 491 (1931); 2 TWISS, *THE LAW OF NATIONS* 49 (2d rev. ed. 1875).

16. OSGOOD, *LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY* 20 (1957), offers lucid exposition of this point: "[I]t would be a mistake to regard war as a single, simple, uniform entity or as an independent thing in itself, to which one applies a wholly different set of rules and considerations than properly apply to other forms of international conflict. It is more realistic in the light of the complex and multifarious nature of international conflict to regard war as the upper extremity of a whole scale of international conflict of ascending intensity and scope. All along this scale one may think of sovereign nations asserting their wills in conflict with other nations by a variety of military and non-military means of coercion, but no definition can determine precisely at what point in the scale conflict becomes 'war.' In this sense, war is a matter of degree, which itself contains different degrees of intensity and scope." See HARTMANN, *THE RELATIONS OF NATIONS* 41-42 (1957); STRAUSZ-HUPÉ & POSSONY, *INTERNATIONAL RELATIONS* 41-45 (2d ed. 1954); WRIGHT, *A STUDY OF WAR* 10-12 (1942). Description of processes of conflict between social units or systems in terms of continua between polar extremes is almost commonplace in contemporary sociology. See, e.g., Bernard, *The Sociological Study of Conflict*, in *THE NATURE OF CONFLICT* 33, 44-45 (1957).

concept and contemporary practice and of avoiding confusion in policy.¹⁷ The set of events which Professor Jessup would designate as "intermediacy" would be characterized by a "basic condition of hostility and strain" or "tension" between the opposing participants, by issues of "so fundamental and deep-rooted a character that no solution of a single tangible issue could terminate [the hostility]" and by "reluctance" of both sides "to resort to war."¹⁸ Professor Jessup did not detail the legal consequences of intermediacy but did suggest that, in the third state, conduct "which would not be peaceful and yet would be short of . . . 'total war' " would be permissible.¹⁹

The proposal of Professor Jessup is not without precedent. A decade earlier, Dr. Schwarzenberger called attention to the fact that the "doctrine of the alternative character of war and peace" minimized or ignored the "reality of state practice."²⁰ States, he pointed out, have frequently applied against each other more or less limited amounts of coercion, military and nonmilitary, while continuing to maintain "peaceful relations" and denying that a "state of war" existed. Such noncomprehensive uses of force, commonly denominated "measures short of war," are incompatible, Dr. Schwarzenberger urged, with both the states of peace and war and have "created rules pertaining neither to those of peace or war, but constituting a *status mixtus*."²¹ Thus, he would, like Professor Jessup, recognize three instead of two "states of typical legal relations between states": a "state of peace" where states are limited in their mutual contentions to the use of economic and political power, a "*status mixtus*" where these forms of power are supplemented by the use of military power and a "state of war" where states use "all available forms of power."²²

17. Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AM. J. INT'L L. 98 (1954); Jessup, *Intermediacy*, 23 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 16 (1953).

18. *Id.* at 18-19.

19. *Id.* at 24.

20. Schwarzenberger, *Jus Pacis Ac Belli?*, 37 AM. J. INT'L L. 460 (1943); cf. STONE, LEGAL CONTROLS xxxiv, xxxvi-xxxvii, who speaks of a condition of " 'neither peace nor war' which dominates our actual world" and of the " 'normality' of this condition of 'no peace-no war.' " See also Schwarzenberger, *The Fundamental Principles of International Law*, 87 HAGUE RECUEIL 195, 327-28 (1955).

21. Schwarzenberger, *Jus Pacis Ac Belli?*, 37 AM. J. INT'L L. 460, 474 (1943). "Forcible measures short of war" have always been a source of annoyance to those concerned with tidy categorizations. For earlier suggestions about a "state of reprisals" intermediate between peace and war, see GROB, THE RELATIVITY OF WAR AND PEACE 124-40 (1949); HINDMARSH, FORCE IN PEACE 91 (1933). Expressions such as quasi-war, imperfect war, partial war and partial hostilities reflect the same difficulties of classification; they are roughly equivalent to state of reprisals. See 7 MOORE, A DIGEST OF INTERNATIONAL LAW §§ 1101-02 (1906); 3 WHARTON, DIGEST OF INTERNATIONAL LAW § 333 (2d ed. 1887).

22. Schwarzenberger, *Jus Pacis Ac Belli?*, 37 AM. J. INT'L L. 460, 474 (1943). Compare KORZSCHE, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 241 (1956), who apparently regards recognition of a "legal state of intermediacy" as

A major purpose of this essay is to suggest that the events of interstate coercion and the flow of decisions about coercion are even more complex than the modern literature has so far explicitly recognized and that a method of analysis more comprehensive and flexible than either dichotomy or trichotomy seems necessary if clarity in fundamental conceptions and rationality in decision-making are to be promoted. It would seem open to doubt whether a trichotomy which makes simultaneous and undifferentiated reference both to facts of the greatest variety and to responses which various decision-makers for varied purposes make to varying constellations of such facts is any more apt than a dichotomy of similar reference to lead to consequential insight and policy clarification.

An adequate theory for the analysis of practices and decisions must start with manageable conceptions of, and a careful distinguishing between, the factual process of international coercion and the process of authoritative decision by which the public order of the world community endeavors to regulate such process of coercion. Each of those two distinguishable processes has its own participants, seeking different objectives, acting by different methods and being affected by differing conditions. Appropriate analysis of the process of coercion may make possible intellectual isolation of the major, recurring types of problems which raise common identifiable issues of policy and which involve common patterns of conditioning factors. Such analysis may also enable avoidance of the preoccupation with exercises in derivation and legal syntactics in which scholars have unfortunately often engaged with minimum reference to the actualities of coercion and violence among states. An appropriate analysis of the process of authoritative decision may permit, with respect to recurring problems, the more careful observation and comparison through time of past trends in decisions, identification of the more important factors which have influenced and shaped decision, delineation and appraisal of the policies which have been sought in decisions, and projection of future probabilities of decision. And, finally, from such analysis may emerge alternatives in the formulation and application of policy²³ better designed to promote a world public order embodying the

undesirable on the ground that "legal thinking would degenerate into political arbitrariness without the confining walls of the firmly established distinction between war and peace." More accurately, "legal thinking" based on the distinction has been used to support political arbitrariness. See the statement of a North Korean representative at the Korean armistice talks at Panmunjom in connection with the North Korean proposal that the Soviet Union be included in the Neutral Nations Supervisory Commission: "Is your [the United Nations] side now in a state of war with the Soviet Union? If not, how can your side deny that the Soviet Union is a neutral nation apart from the two belligerents?" Quoted in Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AM. J. INT'L L. 98-99 (1954). See also JOY, *HOW COMMUNISTS NEGOTIATE* 90-101 (1955).

23. Some amplification of these intellectual tasks which the authors regard as indispensable to policy-oriented inquiry may be found in Lasswell, *The Political Science of Science*, 50 AM. POL. SCI. REV. 961, 977-78 (1956); Lasswell & McDougal, *supra* note 9,

values commonly characterized as those of human dignity in a society of freedom and abundance.²⁴

THE PROCESS OF COERCION

The factual process of coercion²⁵ across state boundaries may be usefully described, in broadest generalization, in terms of certain participants applying to each other coercion of alternately accelerating and decelerating intensity, for a whole spectrum of objectives, by methods which include the employment of all available instruments of policy, and under all the continually changing conditions of a world arena.²⁶ In the course of this seamless process of action and reaction, and as an integral part of it, participants also continu-

at 212-14; McDougal, *El Derecho Internacional Como Ciencia Política*, 3 REVISTA DE DERECHO Y CIENCIAS SOCIALES 142, 149-50 (1956-57); McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NATURAL LAW FORUM 53, 58-59 (1956); McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 HAGUE RECUEIL 137, 140-41 (1953).

24. For indication, in some detail, of the reference assigned to such values, see LASSWELL & McDOUGAL, *THE JURISPRUDENCE OF A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* pt. 3, pp. 1-39 (mimeographed materials, Yale Law School 1954); Bebr, *International Protection of Human Rights and Freedoms*, 29 PHIL. L.J. 307, 314-28 (1954); LASSWELL, *Democratic Character*, in *THE POLITICAL WRITINGS OF HAROLD D. LASSWELL* 465 (1951); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 217-26 (1943); McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 HAGUE RECUEIL 137, 188-91 (1953); McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60-72 (1949).

25. We think of "process" as a complex of interacting variable factors moving through time; its principal connotation is that of continual change in relationships over a time period. See EASTON, *THE POLITICAL SYSTEM* 172-75 (1953); SNYDER, BRUCK & SAPIN, *DECISION-MAKING AS AN APPROACH TO THE STUDY OF INTERNATIONAL POLITICS* 54 (1954). "Coercion" is used to refer to a high degree of constraint exercised by means of any or all of the various instruments of policy, see text at note 73 *infra*, and with respect to all values. Other terms used below are "force" and "violence." Unless otherwise indicated, the reference of "force" is to the infliction of severe deprivations of the value well-being through uses of the military instrument. "Violence" is used to refer to the most intense attacks on well-being by means of military weapons. In this connection, see LASSWELL & KAPLAN, *POWER AND SOCIETY* 76, 90, 97-102 (1950).

26. For fuller description of these categorizations, see McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 HAGUE RECUEIL 137, 165-79 (1953). Compare the categories which Talcott Parsons regards as necessary for the "minimum differentiation of structural elements" in an "action frame of reference": "ends, means, conditions and norms," PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 732 (1937), and those employed to describe processes of conflict by Professor Wright, *International Conflict and the United Nations*, 10 WORLD POLITICS 24 (1957). See also WRIGHT, *THE STUDY OF INTERNATIONAL RELATIONS* 531-67 (1955); Wright, *The Value for Conflict Resolution of a General Discipline of International Relations*, 1 J. CONFLICT RESOLUTION 3 (1957). For a brief survey of contemporary efforts to describe, in mathematical terms, social systems in processes of conflict and war, see Bernard, *supra* note 16, at 63-73. See also the notational matrix scheme adopted in STRAUSS-HUPÉ & POSSONY, *INTERNATIONAL RELATIONS* 45-49 (2d ed. 1954).

ously assert against each other many varying claims respecting the lawfulness or unlawfulness of the various coercive practices employed by and against them, invoking in support of their respective claims both world prescriptions and world public opinion.

Participants

The historic participants in this process are customarily and summarily described as the attacking and target states and their respective allies.²⁷ For purposes of precision in description, however, as well as for the application of certain sanctioning procedures such as those providing for criminal liability, one must frequently go behind the institutional abstraction "state" and refer to the effective decision-makers, the officials or representatives, political, military or otherwise, and members of the participating states.²⁸ Recently the officials of international governmental organizations have become formal and effective participants in this same process. The officials of third states, while seeking to avoid direct roles in the process of coercion, commonly take active part in the assertion of claims and counterclaims about the lawfulness or unlawfulness of various exercises of coercion; to this extent, they too should be listed as participants.

Nor does this list exhaust the groups and entities who in varying measure

27. For a typology, grounded on system analysis, of states as national actors in the international system, see KAPLAN, *SYSTEM AND PROCESS IN INTERNATIONAL POLITICS* 54-56 (1957). See also Wright, *International Conflict and the United Nations*, 10 *WORLD POLITICS* 24, 34-37 (1957); Wright, *Design for a Research Project on International Conflicts and the Factors Causing Their Aggravation or Amelioration*, 10 *WESTERN POL. Q.* 263, 267-69 (1957).

28. See SNYDER, BRUCK & SAPIN, *op. cit. supra* note 25, at 35-54, for a suggested framework for studies of states as decision-making units in the international arena. See also SNYDER & FURNISS, *AMERICAN FOREIGN POLICY: FORMULATION, PRINCIPLES, AND PROGRAMS* 89-134 (1954); Easton, *An Approach to the Analysis of Political Systems*, 9 *WORLD POLITICS* 383 (1957).

The concept of the elite, or top effective decision-makers, is of obvious relevance in the determination of individual criminal responsibility under international law. The tribunal in the *High Command Trial*, 12 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 69-70 (1949), said: "It is not a person's rank or status, but his power to shape or influence the policy of his state, which is the relevant issue for determining his criminality under the charge of Crimes against Peace. . . . Those who commit the crime are those who participate at the policy making level in planning, preparing, or in initiating war. After war is initiated, and is being waged, the policy question then involved becomes one of extending, continuing or discontinuing the war. The crime at this stage likewise must be committed at the policy making level." See also the *Krupp Trial*, 10 *id.* at 127-28 (1949); *I. G. Farben Trial*, 10 *id.* at 37-38; *THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL—HISTORY AND ANALYSIS* 58-61 (U.N. Doc. No. A/CN 4/5) (1949) (memorandum submitted by the Secretary-General). Recent elite studies include: DE SOLA POOL, *SATELLITE GENERALS: A STUDY OF MILITARY ELITES IN THE SOVIET SPHERE* (1955); LASSWELL, LERNER & ROTHWELL, *THE COMPARATIVE STUDY OF ELITES* (1952); LERNER, *THE NAZI ELITE* (1951); MILLS, *THE POWER ELITE* (1956); NORTH, *KUOMINTANG AND CHINESE COMMUNIST ELITES* (1952); SCHUELLER, *THE POLITBURO* (1951).

effectively participate in the world power process and hence in the process of coercion. A fuller listing would include those whom Dr. Schwarzenberger called "the minor members of the international cast"²⁹: transnational political parties, pressure groups, private associations and the individual person.³⁰ Since the inception of the modern state system, however, states have been, and in all probability will remain in the calculable future, the major and most significant participants in the international coercion process; they are ordinarily possessed of the greatest organized bases of power. Thus, states and organizations of states must remain as the principal focus of inquiry. The other participant groups and entities frequently either act through the state or function as instrumentalities of state policy.

Objectives

The objectives of states participating in this process of coercion may, like those of any actor in any system of action, be most broadly characterized in terms of a maximization postulate: any particular participant acts to maximize certain or all of its values in relation to the other participants in the world arena.³¹ Such objectives embrace, in most general statement, all the characteristic value demands of nation-states, including the demand to protect and expand their own bases of power and other values and to weaken or disintegrate the bases and values of those defined as enemies or potential enemies.³² On another level of abstraction, the objectives of any participant may be generalized as a demand that the enemy accept certain terms with respect to specified policies and accordingly alter its previous behavior³³—for instance, withdrawal or abstention from a hostile policy or projected policy, or affirmative adoption of some policy demanded by the acting participant.³⁴

29. SCHWARZENBERGER, *POWER POLITICS* 126-46 (2d rev. ed. 1951).

30. See McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 *HAGUE RECUEIL* 137, 174, 237-56 (1953). These groups and entities, as well as states and international organizations, are of course but specialized roles which the individual human being creates for himself in satisfying, or attempting to satisfy, his value demands. For comprehensive study of the extent to which the individual, through such groups and entities, effectively participates in the world power process, see JEFFERIES, *THE INDIVIDUAL AND INTERNATIONAL LAW* (unpublished thesis in Yale Law Library 1954).

31. See LASSWELL & KAPLAN, *POWER AND SOCIETY* 69-70 (1950).

32. See, generally, KAPLAN, *op. cit. supra* note 27, at 149-65; HARTMANN, *THE RELATIONS OF NATIONS* 68-82 (1957); MORGENTHAU, *POLITICS AMONG NATIONS* 35-79 (2d rev. ed. 1954); SCHWARZENBERGER, *POWER POLITICS* 126-46 (2d rev. ed. 1951); SPYKMAN, *AMERICA'S STRATEGY IN WORLD POLITICS* 17-19 (1942); STRAUZ-HUPÉ & POSSONY, *INTERNATIONAL RELATIONS* 1-21 (2d ed. 1954); Jessup, *Ends and Means of American Foreign Policy*, in *INTERNATIONAL STABILITY AND PROGRESS* 11-21 (1957); Nitze, *Aims and Methods of United States Foreign Policy*, 13 *BULL. ATOMIC SCIENTISTS* 292 (1957).

33. "The object on the part of each belligerent is to break down the resistance of the other to the terms which he requires for peace." 2 WESTLAKE, *INTERNATIONAL LAW* 53 (1907).

34. The descriptive categories abstention, withdrawal, co-operation, modification and reconstruction are suggested by Lasswell, *Political Factors in the Formulation of National*

A typology of the more particular demands of contending participants might perhaps be constructed on the basis of a number of possible criteria, such as the dominant value or values sought, the position assigned to particular demands in an order of priority established for the allocation of means and the time dimension of objectives as "long-term" or "short-term."³⁵ Such a typology, while useful for descriptive and historical study, does not seem essential for the purpose of clarifying fundamental legal policy. What is necessary is a mode of characterizing the specific objectives of participants which relates them more precisely to variables which do and should affect the prescription and application of authority—a set of categories which may and should be relevant in the making of community decisions about the permissible or nonpermissible character of the coercion exercised to secure such objectives. A few tentative categorizations may be suggested.

Consequentiality

At least three dimensions of consequentiality are relevant: the importance and number of values affected, the extent to which such values are affected and the number of participants whose values are so affected. A participant may demand from another many values or only one or a few and may seek to affect such values drastically and substantially or only to a modest degree. A participant's objectives may relate to and affect the power and other values of only one nation-state or of a number of nation-states. They may even include a demand for a monopoly of power or other values from the rest of the world community. The demands of participants may thus be of almost infinite variety in degree of consequentiality; in terms of polar opposites, the possible range is from the most limited to the most comprehensive. More concretely, the spectrum of particular demands asserted through coercion may range from such limited ones as the payment of a debt owed by the target state or its nationals³⁶ or the temporary passage of troops through its territory,³⁷ through the relinquishment of the target state's

Strategy, 6 NAVAL WAR COLLEGE REV. 19, 34-35 (1954). They are intended to describe the responses sought by strategists in nation-states. For elaboration and illustration of this mode of categorizing objectives, see McDUGAL & LASSWELL, *WORLD COMMUNITY AND LAW: A CONTEMPORARY INTERNATIONAL LAW* c. 3 (mimeographed materials, Yale Law School 1955).

35. SNYDER, BRUCK & SAPIN, *op. cit. supra* note 25, at 60.

36. The blockade of Venezuela by British, German and Italian warships in 1902-03, for example, was imposed as a result of the failure of the Venezuelan government to pay certain claims of nationals of the blockading powers. See *Venezuelan Preferential Case*, 1 SCOTT, HAGUE COURT REPORTS 55 (1916); 6 MOORE, *A DIGEST OF INTERNATIONAL LAW* § 967, at 586-94 (1906).

37. In 1914, in its ultimatum to the Belgian government, Germany demanded permission for German troops to march through Belgian territory, promising in return that "when peace was concluded . . . Belgium and all its possessions should be protected to the fullest extent, that its territory should be evacuated, and that if Belgium would preserve an attitude of friendly neutrality towards Germany, the German government would engage to pay

control over a specific portion of its territory³⁸ or acceptance of certain limitations on its freedom of decision-making,³⁹ to the complete absorption of the target state,⁴⁰ the annihilation of its people⁴¹ and the establishment of a universal empire.⁴²

Inclusiveness or Exclusiveness

The reference of the categorization suggested here is both to the degree of participation admitted in the sharing of the values demanded and to the degree of comprehensiveness of the identification system, the definition or interpretation of "self," in the name of which value demands are made.⁴³ The demands of a participant may be exclusive and made on its own behalf purely and simply; the "self" system may be restrictively defined to include only the demanding participant's "primary self." Demands may, on the other

cash for all supplies needed by the German troops and would indemnify her for all damage caused." 2 GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 188 (1920).

38. The Soviet-Finnish war in 1939 was preceded by a demand of the Soviet government for a thirty-year "lease" of certain islands in the Gulf of Finland and the cession of certain areas at the head of the Gulf, the islands and areas totaling 2761 sq. kms., in exchange for Soviet territory on the Finnish border with an area of 5529 sq. kms. These demands were apparently prompted by Soviet concern over the security of Leningrad. See *THE FINNISH BLUE BOOK: THE DEVELOPMENT OF FINNISH-SOVIET RELATIONS DURING THE AUTUMN OF 1939 INCLUDING THE OFFICIAL DOCUMENTS AND THE PEACE TREATY OF MARCH 12, 1940*, 13-19 (1940).

39. The Anglo-Soviet intervention in Iran in 1941 compelled the Shah's government to accept, among other things, the stationing of Allied forces in Iranian territory for the duration of the war and Allied control over means of communication and transportation in Iran, and to undertake "not to adopt in [its] relations with foreign countries an attitude . . . inconsistent with the alliance" forced on it by Britain and the Soviet Union. The Iranian government continued to exist and its functions, except in the particulars specified in the treaty of alliance, were not displaced. The text of the treaty is found in 6 DEP'T STATE BULL. 249-52 (1942). See, generally, KIRK, *THE MIDDLE EAST IN THE WAR, SURVEY OF INTERNATIONAL AFFAIRS 1939-1946*, 129-41 (1952); LENCZOWSKI, *RUSSIA AND THE WEST IN IRAN, 1918-1948: A STUDY IN BIG-POWER RIVALRY* 167-92 (1949).

40. The seizure and incorporation of Austria by Nazi Germany in 1938 is illustrative. For a brief recounting of the events leading up to the annexation of Austria, see *Judgment of the International Military Tribunal at Nuremberg*, in *NAZI CONSPIRACY AND AGGRESSION* 17-24 (1947).

41. This is exemplified by the Nazi German policies toward the civilian population in Poland and the Soviet Union. The International Military Tribunal at Nuremberg found that "the evidence shows that at any rate in the east, the mass murders and cruelties were not committed solely for the purpose of stamping out opposition or resistance to the German occupying forces. In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans." *Id.* at 66-67.

42. Among those who have attempted, after Rome, to re-establish a universal empire are the Hohenstaufen, the Hapsburgs, Louis XIV, Napoleon, the Kaiser, Mussolini and Hitler. 2 WRIGHT, *A STUDY OF WAR* 966 (1942).

43. On identification or "self" systems, see LASSWELL & KAPLAN, *POWER AND SOCIETY* 11-13, 30-31 (1950).

hand, be more inclusive and be asserted on behalf of a greater or lesser number of other participants—even on behalf of “humanity” in general or the entire world community; other participants are, for the time being at least, made components of the expanded structure of the claimant’s “self.” Whether the value demands pressed by any participant in any particular instance of coercion are in fact, and not merely in the propagandist’s word, inclusive and the extent to which they are so, are, of course, matters for empirical investigation. History exhibits no dearth of examples of states seeking exclusive values by coercion; wars of conquest and self-aggrandizement—in our own century, the Abyssinian adventure of Fascist Italy,⁴⁴ Japan’s wars in Manchuria,⁴⁵ China and southeast Asia,⁴⁶ and Nazi Germany’s wars in Europe⁴⁷—are only the most obvious ones. Perhaps the clearest recent instance of relatively inclusive demands asserted forcefully is the United Nations’ enforcement action in Korea. Comparable instances may be found in the last century in the collective action of the Great Powers in Europe to restore the balance of power that Napoleonic France had disturbed,⁴⁸ and in the “humanitarian interventions” designed to compel the Ottoman Sublime Porte to stop the persecution and massacre of its Christian subjects.⁴⁹

44. See 2 SURVEY OF INTERNATIONAL AFFAIRS 1935: ABYSSINIA AND ITALY (Royal Institute of Int’l Affairs 1936). The Committee of Six created by the Council of the League of Nations found that the “Italian Government . . . resorted to war in disregard of its covenants under Article 12 of the Covenant of the League of Nations.” LEAGUE OF NATIONS OFF. J., 16th yr. 1223-25 (1935).

45. See, generally, SURVEY OF INTERNATIONAL AFFAIRS 1931, 430-505 (Royal Institute of Int’l Affairs 1932); SURVEY OF INTERNATIONAL AFFAIRS 1932, 432-67, 515-86 (Royal Institute of Int’l Affairs 1933); SURVEY OF INTERNATIONAL AFFAIRS 1933, 478-518 (Royal Institute of Int’l Affairs 1934). See also the Lytton Report which found that there was “no question of Chinese responsibility” for “events since September 18, 1931.” This Report was adopted by the Assembly of the League of Nations on February 24, 1933. See *League of Nations Assembly Report on the Sino-Japanese Dispute*, 27 AM. J. INT’L L. 119, 147 (Supp. 1933).

46. See, generally, 1 SURVEY OF INTERNATIONAL AFFAIRS 1937, 154-305 (Royal Institute of Int’l Affairs 1938); *The Far East 1942-1946*, in SURVEY OF INTERNATIONAL AFFAIRS 1939-1946, 4-97 (Royal Institute of Int’l Affairs 1955); JONES, JAPAN’S NEW ORDER IN EAST ASIA: ITS RISE AND FALL 1937-45 (1954); Horwitz, *The Tokyo Trial*, 465 INT’L CONC. 475 (1950).

47. See *Judgment of the International Military Tribunal at Nuremberg*, in NAZI CONSPIRACY AND AGGRESSION 4-46 (1945).

48. See MORGENTHAU, POLITICS AMONG NATIONS 170-71 (2d rev. ed. 1954). 2 WRIGHT, A STUDY OF WAR 749 (1942), emphasizes the relatively inclusive character of balance of power policies. Cf. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 130-31 (7th ed., Winfield 1928).

49. See STOWELL, INTERVENTION IN INTERNATIONAL LAW 63-66 (1921). See also HODGES, THE DOCTRINE OF INTERVENTION 87-96 (1915); 1 OPPENHEIM, INTERNATIONAL LAW 312-13 (8th ed., Lauterpacht 1955) (hereinafter cited as OPPENHEIM-LAUTERPACHT); THOMAS & THOMAS, NON-INTERVENTION 372-74 (1956). Garcia-Arias, *La Intervención Internacional Por Causa de Humanidad*, in FUNDAMENTAL [sic] PROBLEMS OF INTERNATIONAL LAW: Festschrift für Jean Spiropoulos 163 (1957), stresses the inclusive nature of the purposes embodied in “humanitarian intervention.”

Extension or Conservation

A participant exercising coercion may be acting either to conserve and defend values already enjoyed or to attack and acquire values held by another.⁵⁰ Of course, in concrete situations of interstate coercion, it may be unusually hard to identify and distinguish demands of defense or "self-preservation" from demands of attack or "self-extension"; vehemently proclaimed objectives of "self-preservation" may in fact disguise the most ambitious projects of "self-extension"; and the characterization of demands in these terms is largely a function of the observer's definition of the material time sequence within which initiation and response are to be distinguished from each other. But difficult as it may be to draw a sharp line in theoretical construction between conservation and extension, and as susceptible to extravagant interpretation by partisan claimants as the distinction may be, the distinction which the world public order has long emphasized in past prescriptive formulation is important and will probably wisely continue to be emphasized until the world community is much more effectively organized.

Relation to the Public Order of the Organized Community

A participant may be observed to be exercising coercion in support of officials or organs of international governmental organizations or against them. Categorization of participants' objectives in these terms of course assumes that, in the particular instance of coercion considered, the decision-making process in such organization was successfully activated and has resulted in a decision, whether a formal "decision" or a "recommendation," with reference to which the objectives of specific participants may be examined for conformity or contrariety. So far as a participant other than those originally involved in the situation of coercion is concerned, conformity or contrariety to the decision would refer essentially to whether the new par-

50. Cf. the three-fold categorization adopted in HAAS & WHITING, *DYNAMICS OF INTERNATIONAL RELATIONS* 59-69 (1956): "self-preservation," "self-extension" and "self-abnegation"—a classification derived from Wolfers, *The Pole of Power and the Pole of Indifference*, 4 *WORLD POLITICS* 39, 50-63 (1951-52). See also MORGENTHAU, *POLITICS AMONG NATIONS* 35-79 (2d rev. ed. 1954): "policy of the status quo," "imperialism" and "policy of prestige"; he concedes that the third is rarely sought for its own sake and is much more frequently pursued in support of either the first or the second type of policy.

Characterization of objectives of contending participants in terms of extension or conservation of values is in line with contemporary sociological conceptualizations of conflict which regard mutually exclusive or incompatible values as inevitable characteristics of conflict. Incompatibility of values is conceived of as arising from "position scarcity" and "resource scarcity." See Bernard, *supra* note 16, at 38, 41-42; Bernard, *Parties and Issues in Conflict*, 1 *J. CONFLICT RESOLUTION* 111, 113 (1957); Mack & Snyder, *The Analysis of Social Conflict: Toward an Overview and Synthesis*, 1 *id.* at 212, 218-19. "Position scarcity" and "resource scarcity" are especially observable in the world arena where the entire land surface of the globe, except the Arctic and the Antarctic areas, have been so allocated among territorially based polities that extension of one polity must always be at the expense of another.

ticipant sided with the party determined, in the community decision, to be exercising lawful defense or "police action" or with the party identified as having impermissibly resorted to coercion. The action of the People's Republic of China, for instance, in joining the forces of the North Korean authorities against the Republic of Korea and other members of the United Nations, was an obvious contravention of the decision of the Security Council embodied in its resolution of June 27, 1950, urging assistance to the Republic of Korea.⁵¹ In such cases, to inquire into the concordance of a participant's objectives with the world public order is implicitly to refer to that participant's identification structure.

Conditions

The conditions under which participants resort to and exercise coercion include all the variable and interacting component factors of a global power process in a world arena.⁵² Such variables—or, more precisely, the participants' "images" or estimations of them⁵³—affect and influence both the expectations of the participants as to whether, in any given configuration of events, they can more economically secure their objectives and value goals by coercion than by persuasion, and their expectations of the level and techniques of coercion required. A few of the more important variables on which an inquirer should focus will be suggested.

The contemporary structure of the world arena, including the number, power and posture of the participants is clearly of prime importance. Until a few years ago, it was customary to present a picture of a world moving rapidly toward the pattern of bipolarity, of power being more and more rigidly structured around the hostile poles of two giant or "superpowers."⁵⁴

51. In resolution 498(V), Feb. 1, 1951, the General Assembly found "that the Central People's Government of the People's Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there has itself engaged in aggression in Korea." 1951 Y.B. OF THE UNITED NATIONS 224-25.

52. See Wright, *Design for a Research Project on International Conflicts and the Factors Causing Their Aggravation or Amelioration*, 10 WESTERN POL. Q. 263, 269-70 (1957).

53. Cf. SNYDER, BRUCK & SAPIN, *DECISION-MAKING AS AN APPROACH TO THE STUDY OF INTERNATIONAL POLITICS* 38 (1954).

54. See, e.g., GOODRICH & SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 23-44 (1955); LASSWELL, *WORLD POLITICS FACES ECONOMICS* 15 (1945); MORGENTHAU, *POLITICS AMONG NATIONS* 322-40 (2d rev. ed. 1954); SCHWARZENBERGER, *POWER POLITICS* 122-25 (2d rev. ed. 1951); SNYDER & FURNISS, *AMERICAN FOREIGN POLICY: FORMULATION, PRINCIPLES AND PROGRAMS* 579 (1954); WRIGHT, *PROBLEMS OF STABILITY AND PROGRESS IN INTERNATIONAL RELATIONS* 76, 115, 235, 268 (1954); Buehrig, *The United States, the United Nations and Bipolar Politics*, 4 INT'L ORGANIZATION 573 (1950); de Luna, *Fundamentación del Derecho Internacional*, 60 REVISTA DE DERECHO INTERNACIONAL 210, 230-34 (Cuba 1952); Fox, *The United Nations in the Era of Total Diplomacy*, 5 INT'L ORGANIZATION 265 (1951); Lasswell, *The Prospects of Cooperation in a Bipolar World*, 15 U. CHI. L. REV. 877 (1948);

In power and influence, all other nation-states were regarded as marginal or submarginal in relation to either of the two superpowers, and as orienting or tending to orient themselves firmly in policy and action toward one or the other pole of power. Recently, some observers have been able to speak of a "reversal," certainly at least of a deceleration, of the trend towards bipolarism.⁵⁵ Amorphous, fluctuating and unorganized groupings of "uncommitted" states have appeared, which, by resisting pressures toward definitive alignment and becoming objects of competitive attention and blandishment on the part of major powers mutually inhibited by approximately equivalent nuclear capabilities, have acquired some mobility and freedom of action.⁵⁶ Whether, or to what extent, a countertrend toward diversification of the patterns of polarity has actually emerged is still hidden from sight. The basic fact remains, however, that the two major powers continue to confront and engage each other in hostile opposition, each seeking to match and balance every increment of power achieved by the other. The arena of interaction is still a military one: high levels of tension and insecurity and expectations both of catastrophic and of limited violence continue to prevail and deeply affect the perspectives and policies of all participants.⁵⁷

Lasswell, *The Interrelations of World Organization and Society*, 55 YALE L.J. 889 (1946); Schwarzenberger, *The Impact of the East-West Rift on International Law*, 36 TRANSACT. GROU. SOC'Y 229, 231-32 (1950).

55. HAAS & WHITING, *op. cit. supra* note 50, at 530; REITZEL, KAPLAN & COBLENZ, UNITED STATES FOREIGN POLICY 1945-1955, 317-18, 324, 425-26, 453-54, 457, 462 (1956). See also Lippmann, *Breakup of the Two-Power World*, in FOUNDATIONS OF NATIONAL POWER 777 (2d ed., Sprout & Sprout 1951); Morgenthau, *Neutrality and Neutralism*, 11 Y.B. OF WORLD AFFAIRS 47, 67 (1957).

56. *Ibid.* Recently, simplification of the fluid political patterns or groupings in the "uncommitted" Arab world has appeared: the creation of the United Arab Republic by the union of Egypt and Syria under one president, one constitution and one flag, N.Y. Times, Feb. 6, 1958, p. 1, col. 4, p. 5, cols. 1, 5; and the formation of the Arab Federal State of Iraq and Jordan under one chief of state, *id.* Feb. 15, 1958, p. 2, col. 7, which has been regarded by some observers as a possible counterweight to the United Arab Republic, *id.* p. 2, col. 4. Each of the two new states has invited all other Arab states to join it. Yemen has signed an agreement of federation with the United Arab Republic, *id.* March 9, 1958, p. 19, col. 3. Earlier efforts to organize the Arab world centered around the establishment of the Arab League. See AHMED, REGIONALISM IN THE MIDDLE EAST: THE ARAB LEAGUE (unpublished thesis in Yale Law Library 1955). See also DIB, THE ARAB BLOC IN THE UNITED NATIONS chapters 4, 5 (1956).

On the Afro-Asian Bloc, particularly on the 1955 Bandung Conference, see KAHN, THE ASIAN-AFRICAN CONFERENCE, BANDUNG, INDONESIA, APRIL 1955 (1956); Parkinson, *Bandung and the Underdeveloped Countries*, 10 Y.B. OF WORLD AFFAIRS 65 (1956).

57. "Precisely because national communities expect further international violence, they seem to have resigned themselves to the recurrence of war. . . . Thus the expectation of future violence is part and parcel of political consciousness. As long as this fatalistic mode of thought continues, no demonstration of interdependence can be expected to change national loyalties to devotion to a global system of values. Anticipation of violence seems to breed continued acceptance of national values and interests and not a desire to transcend them." HAAS & WHITING, *op. cit. supra* note 50, at 18-19. See also WORLD TENSION—THE PSYCHOPATHOLOGY OF INTERNATIONAL RELATIONS (Kisker

The posture of each participant vis-a-vis every other participant is influenced, if not determined, by the relative inclusiveness or exclusiveness of their identifications—their definition and redefinition of each other as, in varying degree, an ally or enemy or an “uncommitted.” And the expectations of each as to the continuing relative fighting capabilities—described in terms of the combat “force-in-being,” economic capacity, administrative competence, motivation for war and defense and recuperative abilities⁵⁸—of itself, of its allies, enemies and potential enemies, and of international policing agencies, are written large in its formulation and execution of strategy. The range or inclusiveness of a participant’s identifications profoundly influence not only its decisions about resort to coercion but also about the conduct of coercion. Where a participant defines its opponent as an absolute enemy, one belonging to a different mankind whose gods are utterly false and as such completely excluded from its identification system, violence pitiless in its savagery may be expected unless reprisals are feared. An eminent publicist, who anticipated an insight furnished by contemporary studies on the sociology of war, wrote:

“It is almost a truism to say that the mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or states, a whole in which the enemy too is comprised, so that duties arising out of that larger citizenship are owed even to him.”⁵⁹

The expectations of participants as to the state of the technology and techniques of coercion and violence available to themselves, their enemies and potential enemies obviously weigh heavily in their estimation of the probable costs of resorting or responding to coercion. The contemporary technology of military violence has yielded basic-energy weapons and delivery systems that perhaps have raised the possible costs of coercion to the annihilation of entire nations and the conversion of large portions of their territories into uninhabitable wastelands. Such may be the result of the type and degree of destruction those weapon systems have made possible,⁶⁰ the general vulner-

ed. 1951); LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 52-74 (1935); Allport, *The Role of Expectancy*, in *TENSIONS THAT CAUSE WARS* 43-78 (Cantril ed. 1950). As to the possibilities of control of expectations of violence, see Lasswell, “*Inevitable War*”: *A Problem in the Control of Long-Range Expectations*, 2 *WORLD POLITICS* 1 (1949).

58. See KNORR, *THE WAR POTENTIAL OF NATIONS* (1956); STRAUZ-HUPÉ & POSSONY, *INTERNATIONAL RELATIONS* 157-74 (2d ed. 1954); Knorr, *Military Potential in the Nuclear Age*, in *MILITARY POLICY AND NATIONAL SECURITY* 137-61 (Kaufmann ed. 1956); Knorr, *The Concept of Economic Potential for War*, 10 *WORLD POLITICS* 49 (1957).

59. WESTLAKE, *COLLECTED PAPERS ON PUBLIC INTERNATIONAL LAW* 274 (Oppenheim ed. 1914). See also MORGENTHAU, *POLITICS AMONG NATIONS* 219 (2d rev. ed. 1954); RENN, *WARFARE: THE RELATION OF WAR TO SOCIETY* 20-21 (1939); SPEIER, *SOCIAL ORDER AND THE RISKS OF WAR* c. 18 (1952).

60. In an exercise conducted by the Federal Civil Defense Administration in which 250 “dirty” nuclear or thermonuclear weapons representing 2,500 megatons, with damage zones ranging from 3 to 5 miles, were “dropped” on cities, industrial targets and airfields

ability to their use, the attractive possibilities they seem to offer of swiftly overwhelming the enemy's will or ability to resist by shattering bombardment of industrial and population centers and the expressed willingness of the powers possessing them to carry out such massive nuclear bombardment.⁶¹ Modern weapons, particularly those capable of massive destruction, underscore the enormous power differential between the major states who possess them and the smaller ones who do not;⁶² the distribution of these weapons at once reflects and reinforces the structuring of power in the international arena. Future developments in weaponry, presaged by artificial satellites and rocket missiles, do not seem likely to reduce that differential.⁶³ On the other hand, should the possession of "space-weapons" become more widely diffused,

throughout the United States, "under a rather typical meteorological situation," the following estimations of effects on the population (based on 1950 population figures) were made:

	<i>Dead</i>	<i>Injured</i>	<i>Uninjured</i>
1st day	36,000,000	57,000,000	58,000,000
7th day	51,000,000	42,000,000	58,000,000
14th day	61,000,000	31,000,000	58,000,000
60th day	72,000,000	21,000,000	58,000,000

See *Hearings Before the Special Subcommittee on Radiation of the Joint Committee on Atomic Energy*, 85th Cong., 1st Sess., pt. 1, at 92-96, 117-18 (1957); *id.* pt. 2, at 1539, 1549-63.

On the radiological effects on individuals of nuclear explosions, see Brues, *Somatic Effects of Radiation*, 14 BULL. ATOMIC SCIENTISTS 12 (1958); Libby, *Distribution and Effects of Fall-Out*, 14 *id.* at 27; Neuman, *The Somatic Effects of Fission Products*, 14 *id.* at 15; Rotblat, *Nuclear Weapons in War*, 14 *id.* at 57.

On the genetic damage caused by atomic radiation, see *Hearings, supra* pt. 2, at 1564-87, 1827-52; Crow, *Genetic Effects of Radiation*, 14 BULL. ATOMIC SCIENTISTS 19 (1958); Muller, *How Radiation Changes the Genetic Constitution*, 11 *id.* at 329 (1955).

61. See, e.g., the British White Paper on Defense, Feb. 13, 1958, where the British government declared that in case the Western Powers are attacked by the Soviet Union, "even with conventional forces only," they would retaliate with strategic nuclear bombardment. N.Y. Times, Feb. 14, 1958, p. 1, cols. 2-3. See also the note sent by the Soviet Union to West Germany warning the latter that it would be a "veritable cemetery" in war if it uses nuclear arms or permits such arms to be stationed in its territory. *Id.* April 28, 1957, p. 1, col. 5, p. 27, cols. 1-2.

62. WRIGHT, PROBLEMS OF STABILITY AND PROGRESS IN INTERNATIONAL RELATIONS 74, 312-13 (1954); Wright, *Modern Technology and the World Order*, in TECHNOLOGY AND INTERNATIONAL RELATIONS 186 (Ogburn ed. 1949).

Surveys of the state of modern military weapon systems and techniques may be found in BUSH, MODERN ARMS AND FREE MEN 12-47 (1949); Baldwin, *The New Face of War*, 12 BULL. ATOMIC SCIENTISTS 153 (1956).

63. A recent possibility is that of employing techniques of weather control and modification as a weapon. Mr. H. T. Orville, Chairman, Advisory Committee on Weather Control, is reported to have said that weather control could have results more disastrous than atomic discoveries. N.Y. Times, Jan. 28, 1958, p. 19, cols. 5-6. Dr. H. G. Houghton of the Massachusetts Institute of Technology has stated that "international control of weather modification will be as essential to the safety of the world as control of nuclear energy is now." Houghton, *Other Aspects of Weather Modification: Present Position and Future Possibilities of Weather Control*, in 2 U.S. ADVISORY COMM. ON WEATHER CONTROL, FINAL REPORT 286, 288 (1957).

even the ascertainment of the identity of the initiator of an attack may become extremely difficult for the target-state.⁶⁴

Improvements in the means of applying coercion have not, of course, been limited to the field of military weapons. Refinements in the techniques of economic pressure, and of propaganda and subversion, as well as relative capability and vulnerability in respect of their use, form part of the complex of factors conditioning participants' expectations of the value costs of exercising coercion.

Attention may also be appropriately focused on the major trends observable in the world social process which affect, and are themselves affected by, the pursuit by nation-states of power and other values through coercion.⁶⁵ Among the more obvious of these trends is the increase in frequency and intensity of contact and interaction among peoples made possible by the modern inventions in communication and transportation, which have drastically shrunk physical, economic and strategic distances between states and fostered the rapid diffusion and unification of material culture.⁶⁶ This trend has in turn contributed to and probably accelerated the rising unity of demand among peoples everywhere for wider participation in the production and sharing of all values and for opportunity so to participate free from coercion and apprehensions of coercion.⁶⁷ A somewhat parallel trend is manifested in the growing interdependences of the same peoples in the attainment of their demanded values.⁶⁸

64. Such a situation would present obvious difficulties in the determination of responsibility for aggression. The Indian representative to the Sixth Committee pointed out that "one of the key questions which arose in any attempt to define aggression was to find out who had attacked first. In an atomic war, quick action gave a decisive advantage and it had become extremely difficult, if not impossible, to determine who had made the first move. New developments in science had a tendency to alter old established notions, and had raised new problems of great complexity." U.N. Doc. No. A/C.6/SR.520, at 13 (1957).

65. See Stone, *International Law and Contemporary Social Trends: Some Reflections*, 29 ROCKY MT. L. REV. 149 (1957).

66. *E.g.*, MENDE, *WORLD POWER IN THE BALANCE* c. 2 (1953); MITRANY, *PROGRESS OF INTERNATIONAL GOVERNMENT* 101, 115 (1933); STALEY, *WORLD ECONOMY IN TRANSITION* 3-20 (1939); WOYTINSKY & WOYTINSKY, *WORLD COMMERCE AND GOVERNMENTS* c. 7 (1955); 1 WRIGHT, *A STUDY OF WAR* 204-08 (1942); 2 *id.* at 1241-46; Angell, *International Communication and the World Society*, in *THE WORLD COMMUNITY* 145 (Wright ed. 1948); Brown, *Science, Technology and International Relations*, in *THE CHANGING ENVIRONMENT OF INTERNATIONAL RELATIONS* 19 (1956); Hart, *Technology and the Growth of Political Areas*, in *TECHNOLOGY AND INTERNATIONAL RELATIONS* 28 (Ogburn ed. 1949); Leigh, *The Mass-Communications Inventions and International Relations*, in *id.* at 126; Ogburn, *Aviation and International Relations*, in *id.* at 86; Wright, *Modern Technology and the World Order*, in *id.* at 174.

67. See, *e.g.*, 1 WRIGHT, *CONTEMPORARY INTERNATIONAL LAW: A BALANCE SHEET* 6 (1955); WRIGHT, *A STUDY OF WAR* 170-81 (1942); Kirk, *Mass Aspirations and International Relations*, in *THE CHANGING ENVIRONMENT OF INTERNATIONAL RELATIONS* 1 (1956); Berle, *The Peace of Peoples*, 77 *HAGUE RECUEIL* 1 (1950); Lasswell, *The Interrelations of World Organization and Society*, 55 *YALE L.J.* 889, 903-08 (1946).

68. See EAGLETON, *INTERNATIONAL GOVERNMENT* 7-12 (3d ed. 1957); EAGLETON, *THE FORCES THAT SHAPE OUR FUTURE* 9-29 (1945); HAAS & WHITING, *DYNAMICS OF INTER-*

The fact of interdependence is exhibited in every value-institutional process: power interacts with power throughout the world arena, with wealth, enlightenment, respect and every other value; wealth interacts with wealth, power and all other values, and so on.⁶⁹ The patterns and degrees of interdependences in the international system, and the resulting aggravated sensitivity of the entire structure of that system,⁷⁰ must affect the estimates of participants of the probable value costs of coercion and violence.

Increased interaction, expanding uniformity of material culture, rising common demands and interdependence might be supposed to be leading eventually toward a world of greater integration, freedom, peace and abundance. The fact is, however, that there are at least equally conspicuous trends, stimulated by chronic tensions, insecurity and expectations of violence, of ever greater centralization and concentration of power within the state apparatus, of increasingly comprehensive governmentalization and regimentation, of intensifying politicization of all internal value processes.⁷¹ These trends, which vitally affect many of the detailed policies of the law of war, may, by hardening national frontiers into walls of insulation and thereby establishing conditions which have been described as the "nationalization of truth" and the "breakdown of human communication,"⁷² effectively counter and nullify the forces moving toward integration and co-operation. The problem of regulating international coercion and violence may well be, in its most fundamental aspect, one of controlling, decelerating and reversing these fractionalizing trends.

NATIONAL RELATIONS 1-10 (1956); KALIJARVI, *MODERN WORLD POLITICS* c. 8 (3d ed. 1953); LEVI, *FUNDAMENTALS OF WORLD ORGANIZATION* c. 3 (1950); MUIR, *THE INTERDEPENDENT WORLD AND ITS PROBLEMS* (1933); Commission To Study the Organization of Peace, *Fourth Report*, 396 INT'L CONC. 97-101 (1944); Cole, *International Economic Interdependence*, 369 *id.* at 240 (1941).

69. For detailed exposition, see McDOUGAL & LASSWELL, *WORLD COMMUNITY AND LAW: A CONTEMPORARY INTERNATIONAL LAW* c. 9 (mimeographed materials, Yale Law School 1955).

70. "[T]he interdependence of all its parts makes the modern order much more sensitive than a simpler form of economic organization. Indeed, the more minutely the individual parts of a large mechanism fit into one another, and the more closely the single elements are bound up together, the more serious are the repercussions of even the slightest disturbance. . . . [I]n the world economy of the present day overproduction in one market becomes the misfortune of other markets. The political insanity of one country determines the fate of others . . . since the interdependence of the modern social organism transmits the effects of every maladjustment with increased intensity." MANNHEIM, *MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION* 50 (1950).

71. See LASSWELL, *THE WORLD REVOLUTION OF OUR TIME* 36-39 (1951); LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOUR* 146-57 (1948); WRIGHT, *PROBLEMS OF STABILITY AND PROGRESS IN INTERNATIONAL RELATIONS* 150, 273-74, 300-01 (1954). See also Ayala, *Liberty, Security and Modern Technology*, 2 INT'L SOC. SCI. BULL. 326 (1950).

72. STONE, *LEGAL CONTROLS* xli-xliii; Stone, *Of Sociological Inquiries Concerning International Law*, in *FOUNDAMENTAL [sic] PROBLEMS OF INTERNATIONAL LAW*, Festschrift für JEAN SPIROPOULOS 411, 414, 418-19 (1957); Stone, *International Law and International Society*, 30 CAN. B. REV. 164, 170-71 (1952).

Methods

The methods by which participants engage each other in coercion to effect the realization of their objectives include all the contemporary instruments of policy, employed in varying combination and sequence and with constantly changing—not simply dichotomous—degrees of intensity. These instruments or types of strategy may be conveniently categorized according to the distinctive means employed: negotiation, words, goods or arms; and the distinctive effects sought: the unity or disunity of elites or of masses, abundance or scarcity, protection or destruction.⁷³ The resulting categories permit distinction between the diplomatic, the ideological, the economic and the military instruments. Each of these instruments may obviously be used either singly or in combination with any or all of the others to achieve the desired level of coercion.

The diplomatic instrument has traditionally been concerned with the characteristic channels and rituals of interelite or interofficial communications and negotiations.⁷⁴ The coercive impact of a use of diplomacy may be the direct result of the content of the communication conveyed: the communication may contain a threat of grievous deprivations, exemplified by Nazi Germany's threat in 1939 to destroy Prague by bombardment from the air unless President Hacha accepted immediate German occupation of the Czech state.⁷⁵ It may, on the other hand, be the net effect of complex diplomatic strategy designed to isolate or encircle the target-state by securing from third states either agreements to support the initiator-state⁷⁶ or by inducing them to withdraw or withhold support from the target.⁷⁷ Some measure of coercion may perhaps also be achieved by the denial or withdrawal of access to internal arenas of authority through the refusal of recognition or the suspension or termination of diplomatic relations. Here, however, the coercion effectively exerted on the target-state may be so slight as to be largely "symbolic" and nominal.

73. McDUGAL & LASSWELL, *WORLD COMMUNITY AND LAW: A CONTEMPORARY INTERNATIONAL LAW* c. 9 (mimeographed materials, Yale Law School 1955).

74. See, generally, *THE DIPLOMATS 1919-1939* (Craig & Gilbert ed. 1953); HAAS & WHITING, *op. cit. supra* note 68, c. 7; MOWAT, *DIPLOMACY AND PEACE* (1935); NICOLSON, *THE EVOLUTION OF DIPLOMATIC METHOD* (1954); NICOLSON, *DIPLOMACY* (2d ed. 1950); SATOW, *A GUIDE TO DIPLOMATIC PRACTICE* (4th ed. 1957); STRAUZ-HUPÉ & POSSONY, *INTERNATIONAL RELATIONS* c. 10 (2d ed. 1954); WELLESLEY, *DIPLOMACY IN FETTERS* (1944). On communist techniques of diplomacy, see *NEGOTIATING WITH THE RUSSIANS* (Dennett & Johnson ed. 1951); JOY, *HOW COMMUNISTS NEGOTIATE* (1955).

75. 3 *SURVEY OF INTERNATIONAL AFFAIRS* 1938, 266-69 (Royal Institute of Int'l Affairs 1953), contains an account of Hacha's interview with Hitler.

76. *E.g.*, the efforts of the French ambassador to Moscow in 1936-38 to secure a tight military alliance between France and the Soviet Union to contain Nazi Germany. *THE DIPLOMATS 1919-1939*, c. 18 (Craig & Gilbert ed. 1953).

77. The efforts of Premier Bulganin to weaken the NATO alliance by sending diplomatic notes to each of the members containing pointed reminders of their vulnerability to nuclear retaliatory blows, which efforts apparently stimulated a "neutralist trend" among some members, afford recent illustration. *N.Y. Times*, Dec. 15, 1957, p. 34, cols. 1-2; *id.* Dec. 18, 1957, p. 1, col. 7.

The use of the ideological instrument commonly involves the selective manipulation and circulation of symbols, verbal or nonverbal, calculated to alter the patterns of identifications, demands and expectations of mass audiences in the target-state and thereby to induce or stimulate politically significant attitudes and behavior favorable to the initiator-state.⁷⁸ It includes, in combination with other instruments, all the techniques of propaganda, infiltration, subversion and *coup d'état* which have been refined and developed to such high efficiency as to have given rise to repeated proposals to condemn their use for certain objectives as a distinct form or mode of aggression.⁷⁹ The particular shape of ideological strategy will of course depend on the definition of the target as ally, enemy or "uncommitted." Specific strategies may include the creation and fomentation of attitudes oriented toward abstention or withdrawal from a hostile policy or toward co-operation with or incorporation in the initiator state. They may also include the incitation of the audience to the violent reconstruction of the elite structure or the decision-making process in the target-state.⁸⁰ The highly emotionalized appeals for the overthrow and assassination of the King of Jordan which the Egyptian radio and press directed to the Jordanian people are among the more recent instances of such a strategy.⁸¹ So-called "propaganda of the deed" may range from an offer and shipment of relief goods in case of disaster to the carefully timed announcement or demonstration of new weapons.⁸²

78. See MURTY, *THE INTERNATIONAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION* (unpublished thesis in Yale Law Library 1957); HAAS & WHITING, *op. cit. supra* note 68, c. 9; LASSWELL, *PROPAGANDA TECHNIQUE IN THE WORLD WAR* (1927); *PROPAGANDA IN WAR AND CRISIS* (Lerner ed. 1951); LERNER, *SYKEWAR: PSYCHOLOGICAL WARFARE AGAINST GERMANY, D-DAY TO V-E DAY* (1949); LINEBARGER, *PSYCHOLOGICAL WARFARE* (2d ed. 1954); SELZNICK, *THE ORGANIZATIONAL WEAPON: A STUDY OF BOLSHEVIK STRATEGY AND TACTICS* (1952); SPEIER, *SOCIAL ORDER AND THE RISKS OF WAR* chapters 26, 27, 29, 32 (1952); STRAUSS-HUPÉ & POSSONY, *INTERNATIONAL RELATIONS* chapters 17-19 (2d ed. 1954); FERREUS, *The Menace of Communist Psychological Warfare*, 1 *ORBIS* 97 (1957); Lasswell, *Propaganda*, 12 *ENCYCLOPAEDIA OF SOCIAL SCIENCES* 521 (1934); Speier, *International Political Communication: Elite v. Mass*, 4 *WORLD POLITICS* 305 (1952).

79. See, e.g., the draft definition of aggression by the Soviet Union submitted to the 1956 Special Committee on the Question of Defining Aggression, U.N. Doc. No. A/AC.77/L.13, annex II, at 1-3 (1957) (distinguishing between "indirect" and "ideological aggression"); the definition drafted by China, *id.* annex I, at 8-9; the definition submitted by Bolivia to the 1953 Special Committee, *id.* annex I, at 10; the definition proposed by the Philippines to Committee III of the Third Commission of the 1945 San Francisco Conference, Secretary-General, *Question of Defining Aggression*, U.N. Doc. No. A/2211, ¶ 115 (1952); and arts. 2(5), (6), Draft Code of Offenses Against the Peace and Security of Mankind, International Law Comm'n, 3d Sess., Report, U.N. GEN. ASS. OFF. REC., 6th Sess., Supp. No. 9, ¶ 9 (A/1858) (1951).

80. See MURTY, *op. cit. supra* note 78, chapters 2, 7.

81. See N.Y. Times, Nov. 9, 1957, p. 1, col. 4. The Egyptian appeals gave rise to demonstrations in Damascus, Syria, by Palestine refugees calling for the death of the King of Jordan. *Id.* Nov. 12, 1957, p. 1, col. 6.

82. See Brodie, *Military Demonstration and Disclosure of New Weapons*, 5 *WORLD POLITICS* 281 (1953).

The employment of economics as an instrument of coercive policy may, in broad statement, be described as the management of access to a flow of goods, services and money, as well as to markets, with the end of denying the target-state such access while maintaining it for oneself. All the familiar methods of economic warfare developed in the last two World Wars may be included, such as the blocking or "freezing" of the target's assets; the imposition of import and export embargoes, total or selective; "blacklisting" of foreign firms and individuals who deal with the target-state; drying up of foreign supplies by preclusive buying; control of re-exportation from a non-participant's territory; and control of shipping through selective admission to credit, insurance, stores, fuel, port and repair facilities.⁸³ These by no means exhaust the available economic techniques of exercising coercion. The monetary system of the target-state may be substantially impaired by skillful manipulation of foreign exchange markets, withdrawal or refusal of credits, dumping of large quantities of currency to compel the target-state to pay in gold, by psychological methods calculated to cast doubt on the target-state's ability or willingness to pay and by simple counterfeiting of its currency.⁸⁴ Other techniques include the creation of artificial scarcity and high prices and the retarding of technological development through cartelization schemes and the control of patents,⁸⁵ the refusal to grant loans or to pay for previous loans, and, of course, the taking, expropriation or confiscation of enterprises and property of nationals of the target country. In the last category, the most recent striking example is the taking over or "supervision" of banks, factories, plantations, commercial establishments and other properties of Dutch nationals by the government of Indonesia,⁸⁶ in apparent retaliation for the refusal of the Netherlands to transfer sovereignty over West New Guinea. One other variety of economic strategy that deserves particular mention is the granting or withholding of "foreign aid." Foreign aid programs may be provided with mechanisms of donor control: the initial grant of money, goods, technical assistance or military arms, and the subsequent continuation of the flow, may be made contingent upon the accommodation or co-ordination of the recipient's policies with those of the donor.⁸⁷ Foreign aid and foreign investment may also be

83. Detailed accounts of these techniques may be found in BAILEY, *THE POLICY OF THE UNITED STATES TOWARDS NEUTRALS, 1917-1918* (1942); BASCH, *THE NEW ECONOMIC WARFARE* (1941); EINZIG, *ECONOMIC WARFARE 1939-1940* (1941); GORDON & DANGERFIELD, *THE HIDDEN WEAPON: THE STORY OF ECONOMIC WARFARE* (1947); JACK, *STUDIES IN ECONOMIC WARFARE* (1941); 1 MEDLICOTT, *THE ECONOMIC BLOCKADE* (1952); RITCHIE, *THE NAVICERT SYSTEM DURING THE WORLD WAR* (1938); SINEY, *THE ALLIED BLOCKADE OF GERMANY 1914-1916* (1957); WU, *ECONOMIC WARFARE* (1952); Medlicott, *Economic Warfare*, in *THE WAR AND THE NEUTRALS, SURVEY OF INTERNATIONAL AFFAIRS 1939-1946*, 1-104 (Royal Institute of Int'l Affairs 1956).

84. STRAUZ-HUPÉ & POSSONY, *INTERNATIONAL RELATIONS* 509-16 (2d ed. 1954).

85. WU, *ECONOMIC WARFARE* 146-84 (1952).

86. N.Y. Times, Dec. 10, 1957, p. 1, col. 3.

87. See HAAS & WHITING, *DYNAMICS OF INTERNATIONAL RELATIONS* 233-42 (1956). See also the Mutual Defense Assistance Control Act, 65 STAT. 644 (1951), 22 U.S.C. §

managed to effect the penetration and perhaps the reorientation and eventual capture of the economic and political structure of the recipient.⁸⁸

While substantial degrees of coercion may be achieved by the skilled utilization of the diplomatic, ideological and economic instruments, the attainment of the maximum intensity of coercion normally requires the supplementation of such instruments with military force. Contemporary military weapons and weapon systems are unique in at least two aspects. They present a wide spectrum of degrees of destructive capability: in terms of the number of men one man can kill by a single operation, the range is from one-to-one weapons such as bayonets and pistols, to weapons of theoretically unlimited capability such as thermonuclear explosives and biological weapons.⁸⁹ The other aspect relates to the high degree of mechanization and automatism of modern weapons, presently exemplified par excellence in the long-range ballistic missile, and to the tendencies toward the "depersonalization" of the process of violence and the "dehumanizing" of armies that flow from the interposition of space and mechanical-automatic devices between the attacker and his target.⁹⁰ Both the

1611 (1952), which declares it to be the "policy of the United States that no military, economic, or financial assistance shall be supplied to any nation unless it applies an embargo on such shipments [of strategic materials] to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination." The act requires the termination of all military, economic or financial assistance to any nation that "knowingly permits" such shipment; however, the President may direct the continuation of aid, if the shipments are not of "arms, ammunition, implements of war, and atomic energy materials" and if he determines that "cessation of aid would clearly be detrimental to the security of the United States." Once terminated, aid can be resumed "only upon determination of the President that adequate measures have been taken by the nation concerned." No case has occurred where a recipient of United States aid intentionally exported arms, ammunitions or atomic materials to the Soviet Bloc. THE STRATEGIC TRADE CONTROL SYSTEM 1948-1956, 12 (Ninth Report to Congress on Operations Under the Mutual Defense Assistance Control Act of 1951, 1957).

On the difficulties of insulating "foreign aid" programs from the rest of the foreign policy of the donor or grantor country, see Schelling, *American Aid and Economic Development: Some Critical Issues*, in INTERNATIONAL STABILITY AND PROGRESS 121 (1957). On the objectives of United States foreign aid programs, see U.S. FOREIGN AID 11-56 (McClellan ed. 1957).

It hardly needs to be added that provision for donor or grantor control does not pre-empt the character of the objectives sought by the donor or grantor, which may be entirely legitimate legally and morally.

88. Cf. STRAUZ-HUPÉ & POSSONY, INTERNATIONAL RELATIONS 516-19 (2d ed. 1954). See also KNORR, RUBLE DIPLOMACY: CHALLENGE TO AMERICAN FOREIGN AID (Center of International Studies, Mem. No. 10, 1956).

89. Cf. MORGENTHAU, POLITICS AMONG NATIONS 351-52 (2d rev. ed. 1954).

90. STONE, LEGAL CONTROLS 339; cf. NEF, WAR AND HUMAN PROGRESS 371-74 (1950); LIDDELL HART, THE REVOLUTION IN WARFARE 32-37 (1947). "The multiplication of machinery has sterilized the romance of war, by diminishing the value of human qualities. Courage and skill are of little avail against a superiority of machinery." *Id.* at 117. The process of depersonalization of the means of war started with the discovery of gunpowder which marked the beginning of "the technological epoch of war, the hidden impulse of which is

vast destructiveness and the depersonalization of the process of military violence may be expected to affect significantly many of the fundamental policies of the law of war. For instance, the further diminution of face-to-face confrontation between contending troops may result in the reduction of the "principle of chivalry" to vestigial import for all save the historian of the law of war.⁹¹

From the foregoing brief and impressionistic references to the categories of means of policy, it should be evident that many varying intensities of coercion may be obtained, and that various types and degrees of destruction will result, from differing uses of different instruments or combinations of instruments. The possible range is from the mildest to the most intense coercion, from minor damage to the prestige of the opponent state, for instance, to its permanent physical liquidation. The intensity of the coercion which a participant applies and the level of destruction that it seeks or secures bear a close relation to the nature and scope of the objectives it sets for itself. The relationship is approximately one of direct proportionality: the more comprehensive and ambitious the objective is, the higher tend to be both the degree of intensity of coercion which must be applied and the level of destruction effected to achieve such objective, for the greater will be the target's resistance.⁹² Participants ordinarily tend to apply a degree of coercion and quantum of destruction roughly proportionate to the scope of their objective and the value they assign to it. The obvious implication for legal policy would seem to be that

the elimination of the human element both physically and morally, intellect alone remaining." FULLER, *ARMAMENT AND HISTORY* 77 (1945).

91. Cf. STONE, *LEGAL CONTROLS* 337.

92. This is one of the principal lessons to be derived from Clausewitz's thinking, which stressed that the political objective must dominate and delimit both the immediate military aim and the military effort. Clausewitz wrote: "The smaller the sacrifice we demand from our adversary, the slighter we may expect his efforts to be to refuse it to us. The slighter, however, his effort, the smaller need our own be. Furthermore, the less important our political object, the less will be the value we attach to it and the readier we shall be to abandon it. For this reason also our efforts will be the lighter. Thus the political object as the original motive of the war will be the standard alike for the aim to be attained by military action and for the efforts required for this purpose." VON CLAUSEWITZ, *ON WAR* 9 (Jolles transl. 1943).

Cf. MAURICE, *BRITISH STRATEGY: A STUDY OF THE APPLICATION OF THE PRINCIPLES OF WAR* 73 (1929): "War being a political act, the political object must govern the other objects of war. The political object may be such as to require the complete conquest of the enemy; or it may be obtained if the enemy is compelled to sue for peace on terms satisfactory to the Government; or the object may be to induce other powers to join as allies; or it may be to cause the enemy to abandon the purpose for which he went to war. Each of these objects influences variously the amount of force required to gain the object and the method of employing that force." Maurice offers historical examples of the operation of this principle. *Id.* at 73-76. See also CORBETT, *SOME PRINCIPLES OF MARITIME STRATEGY* chapters 3, 4 (1919); LIDDELL HART, *STRATEGY* chapters 21-22, especially at 369-70 (1954); NICKERSON, *CAN WE LIMIT WAR?* 32-33 (1934).

This lesson from Clausewitz on the predominance of the political objective has not been lost on Soviet political and military strategists. See GARTHOFF, *SOVIET MILITARY DOCTRINE* 12-13 (1953).

limitation of the degree of coercion and destruction depends in great measure upon limitation of objectives.⁹³

Apart from the corporal dissolution sought by Rome and inflicted by Scipio on Carthage, it is difficult to point to historical examples of totally unlimited belligerent objectives and applications of the absolute maximum of destruction. Some instances may be noted, however, where the objectives of participants and the degree of destruction they applied approached the upper extremes of theoretical ranges of comprehensiveness and intensity: the wars of Genghis Khan, the religious wars of the sixteenth and seventeenth centuries, the French Revolutionary and Napoleonic Wars, and the two World Wars furnish ready examples. Where the objective is more modestly defined and valued and where violent destruction is not specified as an end in itself, the coercive use of instruments of policy is commonly designed, not to destroy the enemy, but rather to modify the expectations entertained by the effective decision-makers in the enemy state and to create new expectations of net advantage in adopting the policies demanded by the acting participant.⁹⁴ Prominent among the motivations of participants is, of course, a desire not to provoke retaliatory destruction which necessarily raises the costs of achieving an objective. Coercion and destruction in excess of the amount necessary to reconstruct the expectation structure of the enemy elite represent inefficient and wasted expenditures of force and constitute an invitation to costly retaliation. Underlying the processes of coercion is a fundamental principle of economy. Concise exposition of this principle is offered by Professor Osgood:

"It [the principle of economy of force] prescribes that in the use of armed force as an instrument of national policy no greater force should be employed than is necessary to achieve the objectives toward which it is directed; or, stated in another way, the dimensions of military force should be proportionate to the value of the objectives at stake."⁹⁵

93. "The decisive limitation upon war is the limitation of the objectives of war." OSGOOD, *LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY* 4 (1957). See also FURNISS, *AMERICAN MILITARY POLICY* 114, 127-30 (1957); KISSINGER, *NUCLEAR WEAPONS AND FOREIGN POLICY* 87, 140-41 (1957); Kaufmann, *Limited Warfare*, in *MILITARY POLICY AND NATIONAL SECURITY* 102, 126-27 (Kaufmann ed. 1956); Brodie, *More About Limited War*, 10 *WORLD POLITICS* 112 (1957).

94. The Spanish-American War of 1898 and the Russo-Japanese War of 1904-05 have been suggested as examples of the limitation of war by restriction of political objectives. NICKERSON, *CAN WE LIMIT WAR?* 32 (1934). The Korean War of 1950 is another, more recent, illustration.

95. OSGOOD, *op. cit. supra* note 93, at 18. Compare the particularized application of "economy of force" as a principle of military strategy and tactics in GARTHOFF, *SOVIET MILITARY DOCTRINE* c. 7 (1953); MAURICE, *op. cit. supra* note 92, c. 6; Brown, *The Principles of War*, 75 *U.S. NAVAL INSTITUTE PROC.* 621, 630-31 (1949).

The specific limitations imposed upon conduct by application of a principle of economy in force must vary with both purpose and the segment of time into which purpose is projected. Force that is unnecessary for a limited objective may be necessary for a more comprehensive objective, and force that is economic in the short run may be most uneconomic in the long run.

The objection is sometimes made that a formulation in terms of economy in force lacks realism because it assumes that men act only from rational and conscious expecta-

To the student of history, the coincidence of "economy of force" as an underlying principle of the rational application of coercion with "military necessity" as a basic principle of the law of war will be apparent.

Claims

It is, of course, the claims and counterclaims which the contending participants make against each other about the lawfulness or unlawfulness of their various coercive practices which are of most immediate and detailed concern to an inquiry into law. For it is these opposing claims as to the requirements of authority which, in many differing particular contexts, constitute the specific controversies to which authoritative decision-makers must respond in search of resolution. A categorization of such claims must therefore be achieved

tions and do not err. The usefulness of a principle of economy in force is not, however, dependent upon any such assumption. It may be agreed that men act from unconscious as well as conscious motivation, that they often err, and indeed that all events are subject to an unknown degree of chance variation. The only assumption necessary to the usefulness of a formulation in terms of economy in force is the assumption that men may, by modification of their conscious attitudes, in some measure anticipate through time the probable effects of alternative courses of action and thus either maximize their gains or minimize their losses. See BROSS, *DESIGN FOR DECISION* (1953); KNIGHT, *RISK, UNCERTAINTY AND PROFIT* (1921); SPROUT & SPROUT, *MAN-MILIEU RELATIONSHIP HYPOTHESES IN THE CONTEXT OF INTERNATIONAL POLITICS* (1956).

The usefulness of formulations in terms of economy in force extends to various intellectual tasks. Past applications of coercion may be described in terms of the actors' objectives and calculations of proportionality, and comparison may be made of effects achieved. The hypothesis of economy in action for the maximization of gains and minimization of losses may also be applied to processes of coercion, as of persuasion, to stimulate comprehensive and detailed inquiry about variables in context which do in fact affect choices. Formulations in terms of economy in force, specifically related to community perspectives both of purpose and proportionality, may, further, be projected into the future as appropriate criteria for authoritative decision. Whatever successes the law of war has in the past achieved, and there have been some, are testimony to the efficacy of this effort.

It is sometimes suggested that men shape the proportion of their violence not so much from perspectives of economy, or of humanitarianism, as from fear of reprisals. The short answer is that minimizing risks of reprisal is precisely an aspect of economy in force. An application of force that results in the applier's sustaining retaliatory destruction can scarcely be described as economic. In terms of effects upon the humanitarian goals we recommend, moreover, it does not matter too much whether decision to limit destruction is based upon calculation of long-term self-interest, whether for preserving potential assets or minimizing risks of retaliation, or upon humanitarianism for fellow man. The contemporary world arena is so tight that none of the scorpions is likely to forget the danger from the others or entirely to ignore a practical humanitarianism which includes the self. To have the prescription and application of law dependent upon a nice interrelation of reciprocities and potential retaliations is no new found halliday. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926). The fact that the same participants in the world arena who on some occasions are belligerents are on other occasions authoritative decision-makers merely facilitates the transformation of the principle by which self-interest is calculated into the community expectations about common interest which are called international law.

which will enable an inquirer to identify both uniquely applicable policies and uniquely determining conditioning or explanatory factors in the recurring types of controversy. For tentative, working purposes, the following seven-fold set of broad groupings, which move from the initiation through the management to the termination of coercion, is suggested. The focus is primarily upon the military instrument, and claims are paired in terms of assertion and opposition.

Initiation of Coercion

In this type of problem,⁹⁶ the primary claim is that, to achieve objectives, coercion of high intensity, which ordinarily means the destructive use of the military instrument, may lawfully be initiated. Frequently, it may be more accurate to speak of a claim lawfully to intensify drastically the degree of coercion already being applied by and between the claimant and the target. The opposing claim is that such anterior coercion or intensification is not lawful and that unlawful violence gives a right to respond in self-defense with counterviolence.

Participation in Coercion

Here, two types of problems are posed by two distinguishable sets of opposing claims. In the first set, one claim is that states other than the initiator and the target, as members of international governmental organizations, are required to, or may lawfully, participate in community action organized to repress coercion and violence designated as unlawful. This is opposed by the claim that nonparticipation in community intervention, "neutrality," is permissible. In the second set, the claim that third states which escape involvement refrain from participation in augmenting the bases of the enemy's war-making power is paired against the claim that participants refrain from interfering with the nationals, resources and operations of nonparticipants.

Management of Combat Situations

The problems here are created by the opposing claims of the contending belligerents about the detailed modalities of the violence by which they seek forcibly to deprive each other, by capture or destruction, of bases of power and to secure compliance with terms. In more detail, the claim is to apply a certain quantum of violence through the employment of certain combatants and certain weapons in certain areas of operation against certain objects of attack. The countering claim is that such violence is unnecessary, disproportionate or pointless, and therefore inhuman and unlawful, or in cor-

96. Our reference here is to the fact of resort to coercion. In the second article in this series, appearing in the *American Journal of International Law* under the title "The Initiation of Coercion: A Multi-Temporal Analysis," we seek to show that there is really no separate general legal policy problem of initiation or commencement of war as that problem has been commonly conceived and dealt with by commentators in the past.

responding detail, that certain persons are illegitimate combatants, that certain weapons are impermissible, that combat operations may not be conducted in certain areas and that certain objects are legally immune from attack and capture or destruction.

Captured Enemy Territory

The set of contraposed claims here consists, on the one hand, of the claim to control and utilize enemy territory, captured through successful combat, as well as the peoples and resources there situated, and thereby to sustain and augment the captor's own means of carrying on combat in other still unoccupied areas; on the other hand is the claim that the loyalties, human dignity, private property, relationships and fundamental institutions of peoples in the captured territory be respected and maintained.

Captured Enemy Personnel

The captor state's claim is to control and utilize captured enemy personnel so as to secure their continued neutralization as elements of enemy power and to promote the captor's own war effort. The claim in opposition is for maintenance and protection of the lives, well-being and loyalties of such personnel.

Management of Noncombat Situations

The principal claim of participants is so to define, control and utilize "enemy" persons and property in their respective territory as to maximize their own capabilities for exercising violence and to insure against secret utilization by the enemy. The broad negating claim is that the loyalties, property and other human rights of the "enemy" persons in a belligerent's control be recognized and respected.

Termination of Coercion

On this concluding type of problem, the major contraposed claims include, on one side, claims that the process of coercion has been authoritatively terminated and the contending participants disengaged, that captured bases of power, personnel and resources must be restored, and that relations between participants be "normalized" by resumption of the process of persuasion and friendly intercourse. The claims on the other side may be generally to continue coercive practices, in varying degrees of deceleration, to retain control over captured enemy personnel, resources and other fruits of coercion, to establish controls on the defeated participant and to recoup the costs of coercion. The duration of the termination phase or the rate of deceleration of coercion, and the precise claims and counterclaims asserted in such phase, may be deeply affected not only by the nature of the objectives which the successful participants sought but also by their expectations as to the emerg-

ing configurations of power in the world arena. The years since 1945 have amply shown that the termination phase may coincide with the initial stages of a new cycle of coercion during which may take place a reinterpretation of identifications and objectives by the successful participants and a realignment and regrouping that may cut across the lines drawn in the preceding process.

THE PROCESS OF DECISION

The process of legal decision through which the world public order seeks to subject coercion to community controls may, like the factual process of coercion, be perhaps most conveniently and comprehensively described in terms of certain established decision-makers, seeking certain common objectives, under all the varying conditions of the world arena, by the employment of certain methods or procedures in the prescription and application of authoritative community policy.

Decision-Makers

The authoritative decision-makers established by the public order of the world community for resolving controversies about international coercion are substantially the same as those established for other—"peacetime"—problems. Reflecting the decentralized structure of decision-making in the international community, they include not only the officials of international governmental organizations and judges of international courts, military and arbitration tribunals but also the officials of nation-states, whether participant or non-participant in the coercion process. Such authorized nation-state officials who respond to claims to exercise coercion may of course be the same officials who, at other times and in another capacity, assert claims to apply coercion; they may alternately be claimants making claims on their own behalf and decision-makers assessing the claims of others. This dualism in role and function,⁹⁷ in a decentralized and primitively organized arena, permits reciprocity to operate as a sanctioning procedure and promotes recognition of the common interest

97. See George Scelle's conception of the dual capacity—*dédoublement fonctionnel*—of officials of states: as organs of their respective national communities and as organs of the international community. Scelle, *Le Phénomène Juridique du Dédoublement Fonctionnel*, in RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION: FESTSCHRIFT FÜR HANS WEHBERG 324 (1956). Cf. Kelsen's notion that "states as acting persons are organs of international law, or of the community constituted by it," a notion tied up with the "dynamic decentralization of the universal legal order," *i.e.*, the fact that "general international law does not establish any special organs working according to the principle of the division of labor" but instead "leaves it to the parties to a controversy to ascertain whether one of them is responsible for a delict, as the other claims, and to decide upon, and execute, the sanction." KELSEN, *GENERAL THEORY OF LAW AND STATE* 327, 351 (1945). See also KELSEN, *COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 12, 38 (1957); KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 21, 25 (1952); Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 59, 67, 70-74 (Lipsky ed. 1953).

in self-restraint. Conspicuous among decision-makers is, of course, the military commander who must on occasion, and at least in the first instance, pass upon the lawfulness both of his own proposed measures and of measures being taken against him.⁹⁸

Objectives

The policy objectives sought by such authoritative decision-makers in the resolution of conflicting claims respecting coercion are many and complex and of varying levels of generality. On one level of abstraction and realism, certain fundamental objectives may be noted.

First is the prevention of alterations in the existing distribution of values among the nation-states by processes of unilateral and unauthorized coercion and the promotion of value changes and adjustments by processes of persuasion or by community-sanctioned coercion. Contemporary expression and reiteration of these most fundamental policy purposes⁹⁹ are found in the constitutional documents of international governmental organizations, which commonly set forth both prohibitions of resort to force or the threat of force and commitments to settle disputes by pacific means,¹⁰⁰ in the decisions of the war crimes

98. See, *e.g.*, DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE ¶ 497(d) (FM 27-10, 1956), which requires commanding officers to assume responsibility for retaliative measures "when an unscrupulous enemy leaves no other recourse against the repetition of unlawful acts." The decision of the commander to resort to reprisals "may subsequently be found to have been wholly unjustified," in which case the responsible officer subjects himself to "punishment for a violation of the law of war." A similar provision is found in DEPARTMENT OF THE NAVY, THE LAW OF NAVAL WARFARE ¶ 301(a) (1955); see TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 372-73 (1957).

99. Earlier expression is to be found in LEAGUE OF NATIONS COVENANT arts. 10, 12, 13, 15, and in the Pact of Paris. In the Pact of Paris, the parties stated that they were "convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process." In the *High Command Trial*, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 70 (1949), the tribunal articulated the fundamental policy embodied in the Pact of Paris: "The nations that entered into the Kellogg-Briand Pact considered it imperative that existing international relationships should not be changed by force. In the preamble they state that they are 'persuaded that the time has come when . . . all changes in their relationships with one another should be sought only by pacific means.' This is a declaration that from that time forward each of the signatory nations should be deemed to possess and to have the right to exercise all the privileges and powers of a sovereign nation within the limitations of International Law, free from all interferences by force on the part of any nation. As a corollary to this, the changing or attempting to change the international relationships by force of arms is an act of aggression and if aggression results in war, the war is an aggressive war."

100. See U.N. CHARTER art. 2, paras. 3, 4; *id.* arts. 33, 37; ORGANIZATION OF AMERICAN STATES CHARTER arts. 5(e), 5(g), 15, 16, 18, 22 (text in SUBCOMMITTEE ON DISARMAMENT, SENATE COMMITTEE ON FOREIGN RELATIONS, DISARMAMENT AND SECURITY: A COLLECTION OF DOCUMENTS 1919-1955, 84th Cong., 2d Sess. 160-62 (1956)). See also the Inter-American Treaty of Reciprocal Assistance, arts. 1, 2 (1947) (text in *id.* at 650); American Treaty on Pacific Settlement, art. 1 (1948) (text in *id.* at 654); North Atlantic Treaty, art. 1 (1949) (text in *id.* at 530); Southeast Asia Collective Defense Treaty, art. 1 (1954) (text in *id.* at 612); Arab League Pact, art. 5 (1945) (text in *id.* at 618); War-

tribunals, and in the affirmation by the United Nations of the "Nuremberg Principles."¹⁰¹

A second major objective is the reduction to the minimum, when the procedures of persuasion break down and violence is in fact resorted to, of unnecessary destruction of values. This overriding policy has in the past consisted mainly of securing as much humanitarianism as is realistically possible in the mutual application of violence;¹⁰² it may in the future come to consist, in barest minimum, of the preservation of the earth as a habitable abode for man and the continuation of human social processes as we know them now. This basic common policy pervades all the detailed prescriptions of the *jus in bello* which seek to define, with varying degrees of specificity, the permissible maximum of violence and destruction in particular types of situations. It finds its most explicit and recent embodiment in the conventions for the protection of war victims which in effect are human rights conventions for contexts of violence.¹⁰³

The regulation of the conduct of coercion and violence in such manner as to permit and facilitate the restoration of the processes of persuasion is a third objective.¹⁰⁴ There is more than sarcasm in a comment of Mr. Dooley upon the Second Hague Conference of 1907: "This made th' way clear f'r th' dis-

saw Treaty of Friendship, Cooperation and Mutual Assistance, art. 1 (1955) (text in *id.* at 551).

The most explicit expression of the broad policy objectives is, of course, to be found in the preamble and statement of purposes of the United Nations Charter.

101. U.N. Gen. Ass. Res. No. 95(I), GEN. ASS. OFF. REC. 1st Sess., Plenary 55 (1946). See also the "Essentials of Peace" Resolution, U.N. Gen. Ass. Res. No. 290(IV), GEN. ASS. OFF. REC. 4th Sess., Plenary 261 (1949).

102. In the preamble of Hague Convention No. IV of 1907, *Respecting the Laws and Customs of War on Land*, the parties declared that they were "animated by the desire to serve, even in this extreme case [of an appeal to arms], the interests of humanity and the ever progressive needs of civilization," and that the provisions of the annexed regulations were "inspired by the desire to diminish the evils of war, so far as military requirements permit." The texts of the Convention and regulations are reprinted in DEPARTMENT OF THE ARMY, TREATIES GOVERNING LAND WARFARE 5-17 (Pamphlet 27-1, 1956).

In DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE ¶ 2 (FM 27-10, 1956), the purposes of the law of war are expressed as: "(a) Protecting both combatants and noncombatants from unnecessary suffering; (b) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy . . . (c) Facilitating the restoration of peace." These same purposes are put in slightly different phraseology in DEPARTMENT OF THE NAVY, THE LAW OF NAVAL WARFARE ¶ 200 (1955); see TUCKER, *op. cit. supra* note 98, at 363. The modest character of this policy objective is underscored by Professor Winfield: "War is . . . essentially a brutal and inhuman affair, however we view it. The remark is trite enough, but it must be emphasized in order to understand that the Laws of War can at best do no more than modify the brutality and inhumanity of it; they cannot eliminate those characteristics." WINFIELD, THE FOUNDATIONS AND THE FUTURE OF INTERNATIONAL LAW 59 (1941). See also 2 WESTLAKE, INTERNATIONAL LAW 3 (1907).

103. Cf. Kunz, *The Geneva Conventions of August 12, 1949*, in LAW AND POLITICS IN THE WORLD COMMUNITY 279, 283 (Lipsky ed. 1953).

104. See DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE ¶ 2 (FM 27-10, 1956); DEPARTMENT OF THE NAVY, THE LAW OF NAVAL WARFARE ¶ 200 (1955).

cussion iv th' larger question iv how future wars shud be conducted in th' best inthrests iv peace."¹⁰⁵ Underlying the formulation of detailed rules on the permissible limits of violence are at least two assumptions, one of which is that unrestrained, gratuitous destruction of values so tends permanently to acerbate and embitter the relations between the opposing participants as to make the return to peace—short of a Carthaginian peace—extremely difficult if not impossible. The other is that extermination, peace of the Carthaginian variety, is not a permissible objective of international violence; if it were, all legal limitations would be entirely pointless.

On another level of abstraction and realism, reference may be made to such objectives as the maintenance or furtherance of varying contending systems or conceptions of world public order, compatible, in theory or in specific interpretation, in greater or lesser degree with the values of a free society. The variation in systems or conceptions of world public order is observably both "vertical"—through time—and "horizontal"—through differing areas of the world at a given time. "Vertical" variation¹⁰⁶ is perhaps most dramatically illustrated in the changes, over the last century or so, in conceptions of the requirements of world public order exhibited in the formulation of the distinction between permissible and nonpermissible resort to coercion and of the corollary notion of permissible discrimination between belligerents by neutrals. The doctrines of the last century on "measures short of war," on war as a "prerogative right" of sovereign states, on the "juridical equality" of belligerents and on the neutral's "duty of impartiality," in substantial effect permitted the relative strength of participants to determine issues between them;¹⁰⁷ decision-makers, in other words, honored the assertion of exclusive rather than inclusive values. In

105. Quoted in Boggs, *National Claims in Adjacent Seas*, 41 GEOGRAPHICAL REV. 185, 208 n.29 (1951).

106. See, generally, Vinogradoff, *Historical Types of International Law*, 1 BIBLIOTHECA VISSERIANA 3 (1923).

107. Thus, with respect to reprisals as "measures short of war," it has been observed that "in modern times [after the eighteenth century] the effective use of reprisals is confined to the Greater Powers in their relations with the smaller. . . . Reprisal . . . is only practised against small or weak Powers by others which fear little harm from the utmost step they can take. So confident, indeed, are they of the superiority of the force they can bring to bear that they take it for granted that the State against which they have proceeded will quickly bow to the logic of facts, and, not making a difficulty of its wounded dignity, will hurry on to concessions in order to secure relief from the measures of coercion." Maccoby, *Reprisals as a Measure of Redress Short of War*, 2 CAMB. L.J. 60, 69 (1924). Some publicists have regarded the doctrine of reprisals, in permitting relative power to resolve issues, as embodying a policy of limiting the extent of, and involvement in, violence. See HALL, *INTERNATIONAL LAW* 434 (Higgins ed. 1924); HOLLAND, *LETTERS TO THE TIMES UPON WAR AND NEUTRALITY*, 1881-1920, 14 (3d ed. 1921). See also HINDMARSH, *FORCE IN PEACE* 73-74, 87-88, 93-94 (1933); 2 WESTLAKE, *INTERNATIONAL LAW* 52 (1907): "A war between civilised states is begun because one at least of the parties makes some demand with which the other does not comply, or some complaint of which the other gives no explanation regarded by the first as satisfactory. International law says its last word on that point when it pronounces the demand or the complaint to be legitimate or illegitimate, and, if possible, offers arbitration. If the

contrast, in contemporary prescriptions attempting to insure that force be employed only in response to unlawful force, emphasis is placed upon more inclusive values. "Horizontal" variation, or the simultaneous plurality of demanded systems or conceptions of world public order, is a candid fact of international life.¹⁰⁸ The antagonism and competition between the major systems or conceptions—frequently described in such broad terms as, on one hand, "western, Christian, liberal-democratic" and, on the other, "Marxist, totalitarian, popular-democratic"—reflect basic power conflicts in the world arena. It is no dark secret that decision-makers who are proponents of a totalitarian world public order constantly assert and promote their totalitarian goals by appropriate specific interpretations in concrete cases.

The more specific policy objectives of different authoritative decision-makers and the precise operational meanings they give to the more abstract goals of community policy can of course be determined only by the detailed study of particular decisions through time about major recurring problems. The range of specific objectives and interpretations will be indicated in some detail at a later point.¹⁰⁹

Conditions

The conditions under which authoritative decisions are taken obviously include all those same variables of the world power process that affect the process of coercion. Among the factors that bear immediately upon the pre-

parties are not content with this, the want of organisation in the world of states compels the law which was concerned with their dispute to stand aside while they fight the quarrel out." "The outbreak of war removes the controversy out of which it arose from the domain of law. It will be settled at the peace on such terms as the superiority of force decides . . ." *Id.* at 29.

108. Cf. STONE, *LEGAL CONTROLS* 57-64, who somewhat understates the point when he writes that "the hypothesis that there are at least two international communities and legal orders cannot yet, however, be regarded as proved." See also SMITH, *THE CRISIS IN THE LAW OF NATIONS* c. 2 (1947); Kunz, *Pluralismo de Sistemas Legales y de Valores y el Derecho Internacional*, 3 *REVISTA DE DERECHO Y CIENCIAS SOCIALES* 33 (Argentina 1956-57); Schwarzenberger, *The Impact of the East-West Rift on International Law*, 36 *TRANSACT. GROT. SOC'Y* 229 (1950); Wilk, *International Law and Global Ideological Conflict: Reflections on the Universality of International Law*, 45 *AM. J. INT'L L.* 648 (1951). Cf. also the related observations made by Lyon-Caen, *International Law and the Co-existence, in a State of Peace, of States With Opposing Political Systems*, 79 *JOURNAL DU DROIT INTERNATIONAL* 49, 55 (1952), who emphasizes that "the structure of the world is no longer homogeneous in character; there are now several types of States," and urges that "international law must adjust their co-existence." In this connection, see the important point made by de Luna in *Fundamentación del Derecho Internacional*, 60 *REVISTA DEL DERECHO INTERNACIONAL* 210, 248 (Cuba 1952): "Todo derecho, como fenómeno cultural que es, se afirma y cae con una determinada cultura. Y como el derecho internacional pretende regular la comunidad humana entera, presupone un mínimo de unidad cultural del mundo para poder subsistir. Ahora bien, esta unidad en nuestros días no existe, ha sido rota en mil pedazos, porque no hay cultura donde no hay principios comunes a que apelar, y es evidente que hoy el mundo, en lo cultural como en lo político, está por lo menos dividido en dos bloques."

109. See text at notes 141-237 *infra*.

scription and application of community policy are common expectations as to the character and efficiency of the technique and technology of violence.¹¹⁰ It may be recalled, for purposes of illustrating the impact of such expectations on the structure of prescription, that historically only weapons regarded as obsolete, marginal or indecisive, and militarily inefficient—weapons which did not or could not be expected to yield a substantial net military advantage after discounting the concomitant destruction of values, such as poisoned arms and expanding bullets—have successfully been proscribed.¹¹¹ The continuing failure, despite their awesome destructiveness, to achieve authoritative community prohibition of the use of basic energy weapons, the military ineffectiveness of which has still to be demonstrated, lends confirmation to historical experience.

Expectations of particular decision-makers as to the probable effectiveness of, or compliance with, projected regulation constitute another factor affecting the prescription and, more particularly, the application of policy in specific

110. "[The Hague Regulations] were written in a day when armies traveled on foot, in horse-drawn vehicles and on railroad trains; the automobile was in its Ford Model T stage. Use of the airplane as an instrument of war was merely a dream. The atomic bomb was beyond the realms of imagination. Concentration of industry into huge organizations transcending national boundaries had barely begun. Blockades were the principal means of 'economic warfare.' 'Total warfare' only became a reality in the recent conflict. These developments make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically or abstractly. Reasonable and practical standards must be considered." *The Flick Trial*, 9 LAW REPORTS OF TRIALS OF WAR CRIMINALS 23 (1949).

111. ROYSE, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE 141-46 (1928); STONE, LEGAL CONTROLS 551; Borchard, *The Atomic Bomb*, 40 AM. J. INT'L L. 161, 165 (1946). The experience of the Hague Peace Conferences of 1899 and 1907 is particularly significant in this regard. At the 1899 Conference, it was proposed that no propellant powders more powerful than those already in use be allowed. See Russian Circular of Jan. 11, 1899, in 2 THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, 3-5 (Scott ed. 1909). The proposal was unanimously rejected after Captain Crozier of the American delegation pointed out the possibility of invention of more powerful powders which, by causing less injury to the gun, would be more efficient and economical. See *Report of Captain Crozier to the U.S. Commission*, 2 *id.* at 29. A Russian proposal to outlaw submarine torpedo boats, submitted to the 1899 Conference, could not command unanimity, 2 *id.* at 367-68; some demonstration of its military effectiveness had been made in the Sino-French (1884) and Sino-Japanese (1895) wars, see HUIDOBRO TORO, EL SUBMARINO ANTE EL DERECHO INTERNACIONAL 16 (1936). The proposal was not repeated at the 1907 Conference, the Russo-Japanese (1904) war having shown conclusively its military efficiency. The only restriction approved was that torpedoes which had missed their targets and thus were militarily valueless must become harmless. Hague Convention No. VIII, art. 1[3] (1907).

As to expanding bullets, ROYSE, *op. cit. supra* at 141-42 n.53 observed that they were not only injurious to the rifle barrel, but were also inaccurate at the distance at which battles were fought and had been discarded for the much more accurate steel-nosed bullets. Expanding bullets flatten easily upon contact with the human body and tear great jagged wounds; they cause needless suffering without producing a compensating military advantage. As to poisoned arms, these had not been used since the bow and arrow and spear had become obsolete.

cases.¹¹² Such expectations in turn frequently depend on at least two other related factors. One factor is the decision-makers' estimate of the amount of effective power available to support an application of policy. This estimate is itself a function of their appraisal of the structural features of the world arena existing at a given time,¹¹³ in less abstract terms, the decision-makers seek to anticipate who will support, who will attack and who will ignore the decision if one is taken. The other is the estimation of decision-makers of the possible costs of making and enforcing a decision. Costs may take the shape of expanded involvement, measured in terms of both the number of opponents and the geographic locale of violence, and of grievously increased destruction of values. The operation of these factors has been demonstrated in the Korean,¹¹⁴ and in the Suez and Hungarian cases.¹¹⁵

112. The wide discretion given to the Security Council by art. 39 of the charter, and to the General Assembly by art. 11 and the "Uniting For Peace" resolution, leaves these organs ample opportunity to take this factor into account. A similar point was made by Judge Lauterpacht with respect to the Assembly of the League of Nations: "[T]he factors which may legitimately enter into the exercise of discretion are not only the scope and nature of the acts of force with which the League is confronted, but also the general political situation, including the actual prospects of the effectiveness of the League's action following upon the finding that resort to war has taken place." Lauterpacht, *Resort to War and the Interpretation of the Covenant During the Manchurian Dispute*, 28 AM. J. INT'L L. 43, 54 (1934).

113. Cf. Wright, *The Prevention of Aggression*, 50 *id.* at 514, 516 (1956). In 1937, the British Secretary of State for Foreign Affairs, explaining in the course of a debate in the House of Commons the failure of the League Assembly, the Brussels Conference and Britain to adopt definitive sanctions against Japan, then conducting large-scale military operations against China, stated: "We were told that in the Far East to-day we ought to be upholding the rule of law. . . . If Hon. Members opposite are advocating sanctions . . . I would remind them that there are two possible forms of sanctions—the ineffective, which are not worth putting on, and the effective, which means the risk, if not the certainty, of war. I say deliberately that nobody could contemplate any action of that kind in the Far East unless they are convinced that they have overwhelming force to back their policy.

"Do right Hon. Gentlemen opposite really think that the League of Nations to-day, with only two great naval Powers in it, ourselves and France, has got that overwhelming force? It must be perfectly clear to every one that that overwhelming force does not exist." Quoted in 1 SURVEY OF INTERNATIONAL AFFAIRS 1937, 292-93 (Royal Institute of Int'l Affairs 1938).

114. GOODRICH & SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 365 (1955). In the Assembly discussions on the draft of the resolution condemning the People's Republic of China as an aggressor, the Syrian representative argued that adoption of the draft resolution would not end the Korean War but would be more likely to extend it and that, should the war be extended, the United Nations would have to fight a population of about 800 million. The Indian delegate said that he would vote against the draft for the reason that it would prolong hostilities in Korea indefinitely and might expand the conflict into a global war. See 1951 Y.B. OF THE UNITED NATIONS 217-24. GOODRICH & SIMONS, *op. cit. supra*, point out that considerations such as these resulted in delaying the condemnation of the People's Republic of China.

115. In the Suez case, the resolutions of the General Assembly calling for a cease fire and withdrawal of Israeli, British and French forces from Egyptian Territory, U.N.

Still another factor influencing the prescription and application of policy is the state of expectations of various participants as to the possibilities of effective decision-making by the organized world community, the dependability, in other words, of reliance upon world community intervention. It is common knowledge that low estimates of such possibilities, induced by the adoption of the Yalta voting formula among other things, led to the insertion of article fifty-one in the charter of the United Nations, which recognized individual and collective self-defense, and since then, to the elaboration of the permission of the collective self-defense in numerous treaties establishing regional organizations.¹¹⁶ The realism of such estimates will continue, it may be

Gen. Ass. Res. Nos. 997, 999, 1002, U.N. GEN. ASS. OFF. REC. 1st Emer. Spec. Sess., Plenary Meeting and Annexes, Agenda Item No. 5, at 33-34 (1956), were supported by both the United States, the Soviet Union and most of the other member states. Together with other factors, such support resulted in compliance with the resolutions.

In the case of Hungary, the resolutions condemning the Soviet armed repression of the Hungarian people were much more strongly worded, U.N. Gen. Ass. Res. Nos. 1004, 1005, 1006, U.N. GEN. ASS. OFF. REC. 2d Emer. Spec. Sess., Annexes, Agenda Item No. 5, at 6-7 (1956); but the polar powers confronted each other in opposition, and realistic expectations of effectiveness were minimal. Doubts as to the probable effectiveness of the resolutions were expressed by Indonesia, among others, whose representative said: "Sentiments of sympathy, of anger and of condemnation of one another have been expressed. . . . We respect all those sentiments and feelings, many of which, indeed, we share. If, however, we ask the Assembly to take a decision, the prime consideration should be whether, after the adoption of [Res. 1004] . . . on 4 November, the adoption of another draft resolution would really contribute further to the solution of the situation, even though it might satisfy our sentiments and feelings. . . . With all respect to the sentiment and principles which are expressed in this draft resolution, in all fairness we do have honest doubts whether this draft resolution, if adopted, would have the effect it seeks to achieve." *Id.* at 67. See also the statements of the representatives of India, Ceylon and Burma, *id.* at 68, 71, 72.

The so-called "double-standard" of the United Nations is largely attributable to the differential operation of these factors in different situations. There is less than adequate appreciation of this fact in Green, *The Double Standard of the United Nations*, 11 Y.B. OF WORLD AFFAIRS 104 (1957). Compare Hoffman, *Sisyphus and the Avalanche: The United Nations, Egypt and Hungary*, 11 INT'L ORGANIZATION 446 (1957), which offers perceptive discussion of these factors.

It may be observed, in addition, that in the current debate on the question of "defining aggression," one of the arguments against definition is that under conditions of prevailing expectations of possibly excessive costs of enforcing a decision, a "definition of aggression" may be "more dangerous than useful" and that it may be sound, even essential policy to "refrain from branding as an aggressor one of the parties to the dispute." See the statements of the Netherlands representative, U.N. GEN. ASS. OFF. REC. 8th Sess., 6th Comm. 7-8 (1953).

116. See BECKETT, *THE NORTH ATLANTIC TREATY, THE BRUSSELS TREATY, AND THE CHARTER OF THE UNITED NATIONS* (1950); GOODRICH & HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 297-99 (2d rev. ed. 1949); Bebr, *Regional Organizations: A United Nations Problem*, 49 AM. J. INT'L L. 166 (1955); Kelsen, *The North Atlantic Defense Treaty and the Charter of the United Nations*, 19 ACTA SCANDINAVICA JURIS GENTIUM 41 (1949); Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783 (1948); Kunz,

expected, to be of intense relevance both for participants deciding on an appropriate response to coercion and for external decision-makers passing upon the lawfulness of a participant's claim to respond to coercion under the name of self-defense.¹¹⁷

Methods

The methods by which authoritative decision-makers attempt to regulate the process of coercion include certain special functions or procedures by which they continually formulate, reformulate and apply policy with respect to the various major types of claims to initiate and exercise or avoid coercion. In most comprehensive statement, such policy functions or procedures might be described to include those of intelligence, recommending, prescribing, invoking, applying, appraising and terminating.¹¹⁸ In the interests of brevity, and because of the lack of institutional specialization in the performance of each of these functions in the law of war, as in international law generally, emphasis here will be confined to prescription and application.

Prescription

The more obvious method by which the law of war is prescribed is by explicit agreement of the participants, as in great international conventions like those of the Hague and Geneva. It is commonly recognized, however, that the method of explicit agreement, particularly in the field of management of combat, has never been able to achieve much more in formulation than a

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

117. The operation of these expectations may be illustrated by the decision of the British government to resort to armed force in Suez. The discussions in the House of Commons afford some insight into the considerations involved in the issuance of the ultimatum to the Israeli and Egyptian governments. Mr. Maitland said: "We have heard the Leader of the Opposition . . . [propose] that nothing should be done until the Security Council had reached a decision.

"This proposition is put forward within a matter of days of another resort to the Security Council which produced no decision at all. It is put forward after some years of resort to the Security Council in many other matters that have produced no decision either. It is put forward in the light of the fact that on the one occasion when the Security Council did reach a decision nobody did anything about it." 558 H.C. DEB. (5th ser.) 1351-52 (1956).

The Foreign Secretary was even more explicit: "There is a fundamental point which this House and other countries will have to face. We have created a system of international law and order in which we have to face the fact that the Security Council is, first, frustrated by the veto and, secondly, that it cannot act immediately. In a sense, the policeman has his hands tied behind his back. He has to wait a long time before he is allowed to play his part. . . .

"We say that in the present international system, where the Security Council is subject to the veto, there must be the right for individual countries to intervene in an emergency to take action to defend their own nationals and their own interests." *Id.* at 1377.

118. See McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 HAGUE RECUEIL 137, 177-78 (1953).

general restatement of pre-existing consensus about relatively minor problems. Negotiators, seated about a conference table contemplating future wars and aware of the fluid nature of military technology and technique, imagine too many horrible contingencies, fantastic or realistic, about the security of their respective countries to permit much commitment.

Much more effective than explicit agreement in the prescription of the law of war has been the less easily observed, slow, customary shaping and development of general consensus or community expectation. Decision-makers confronted with difficult problems, frequently presented to them in terms of principles as vague and abstract as "the laws of humanity and the dictates of the public conscience"¹¹⁹ and in terms of concepts and rules admitting of multiple interpretations, quite naturally have had recourse both to the experience of prior decision-makers and to community expectation about required or desired future practice and decision. The myth is that when certain practices are repeated or mutually tolerated over a period of time by a substantial number of decision-makers, in the context of certain common perspectives of "oughtness" or "authority," a certain customary rule or principle of law emerges.¹²⁰ On a more realistic level, the function of this myth is to permit and authorize a decision-maker to achieve a more rational balancing of past experience, contemporary realities and future probabilities without appearing to create new policy. The process of customary development, considered as one of continual, creative readaption or reinterpretation of given prescription, whether conventional or customary, is particularly marked when it is in response to patterns of interaction, such as blockade and submarine and air warfare, which are themselves, because of altered conditions and fast-developing technology and technique, in a process of profound and rapid change.¹²¹ In such cases, the rate of attrition or obsolescence of particular inherited rules may be accelerated and the emergence of new ones hastened.¹²²

119. Preamble, *Respecting the Laws and Customs of War on Land*, Hague Convention No. IV (1907). The tribunal in the *Krupp Trial*, 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 133 (1949), declared that the preamble was "much more than a pious declaration," that it was a "legal yardstick" to be applied when specific conventional provisions did not cover specific cases.

120. For formulations of the myth with particular reference to the law of war, see *Trial of Altstotter*, 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35-38 (1948); *Trial of List*, 8 *id.* at 53 (1949); *Trial of Von Leeb*, 12 *id.* at 68, 69-70 (1949).

121. SMITH, *THE CRISIS IN THE LAW OF NATIONS* chapters 1-5 (1947). The technical device commonly used in the last two World Wars for bridging the gap between traditional prescription and contemporary practice was that of reprisals. The principal difficulty with this device is not so much its lack of complete ingenuousness as that it purported to leave the structures of formal doctrine intact, supposedly unaffected by the insistent pressure of changed conditions and the imperatives arising from these conditions. See STONE, *LEGAL CONTROLS* 355 n.39, on the "legislative function" of reprisals. The central problem, which need not be obscured by disingenuous labels or by the requirements of propaganda warfare, is one of determining realistic expectations of probable future practice and decision. Cf. Rowson, *British Prize Law, 1939-1944*, 61 L.Q. REV. 49, 57 (1945); SMITH, *op. cit. supra* at 16.

122. Cf. *Trial of Altstotter*, 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35 (1948).

From this perspective, if by "law" one means to make any operational reference to probable or realistically expected decision, the continued characterization by some commentators of certain pre-1914 prescriptions as law, despite their practically universal nonobservance in two World Wars,¹²³ may at best be harmless nostalgia. Such pre-1914 prescriptions may indeed possibly be regarded as "authority" in some cases in the future; but if they are, it will not be because they were once prescribed by certain earlier decision-makers for a bygone world, but because future decision-makers decide that they embody precisely the detailed limitations upon violence thought appropriate, in common interest, for future wars, total or limited, nuclear or nonnuclear.

Application and Sanction

The application of the prescriptions of the law of war to specific problems may be by any of the officials indicated above, international or national, and occurs in a variety of contexts—from general assemblies and international tribunals to foreign offices and battlefields. So great is the common interest of all participants in the observance of the law of war conceived to be that certain traditional principles on allocation of jurisdiction confer upon the courts of all belligerents—perhaps all states belligerent or nonbelligerent¹²⁴—and not merely those of the belligerent in whose territory the acts were committed or whose nationals are involved, power to try individuals held before them for violations of that law.¹²⁵ Reflecting the same unity of interest, the municipal codes, statutes, ordinances and regulations of many states embody into their national law, for administration as other national law is administered, prescriptions

123. See, e.g., TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 305, 315-17 (1957), discussing the lawfulness of the establishment of war zones by means of mine fields and of "long-distance" blockades.

124. See Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177 (1945); 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 26 (1949). See also *Trial of Altstotter*, 6 *id.* at 37-38 (1948).

125. TUCKER, *op. cit. supra* note 123, at 154-55; Baxter, *The Municipal and International Law Bases of Jurisdiction Over War Crimes*, 28 BRIT. Y.B. INT'L L. 390-92 (1951); Brand, *The War Crimes Trials and the Laws of War*, 26 BRIT. Y.B. INT'L L. 414-16 (1949). In *Trial of List*, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 54 (1949), the tribunal said: "An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen. . . . [War crimes] are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent."

See the 1949 Geneva Conventions which require each party to search for persons alleged to have committed "grave breaches" of the conventions and to "bring such persons, regardless of their nationality, before its own courts." Wounded and Sick Convention, art. 49; Wounded, Sick, and Shipwrecked Convention, art. 50; Prisoners of War Convention, art. 129; Civilians Convention, art. 146.

about the conduct of warfare and nonparticipation in warfare which, if not always identical, are at least comparable in policy with the prescriptions of the community of states.¹²⁶

Sanctions for enforcement raise perhaps the only issue, in application, which requires special elaboration. The opinion has been so often urged that the law of war is not law at all that it may be worthwhile to observe that the effective sanction which supports the law of war is the same sanction which supports all law: the common interest of the participants in an arena.¹²⁷ The common interest which sustains the law of war is the interest of all participants in economy in the use of force—in the minimization of the unnecessary destruction of values. Unnecessary destruction of values constitutes uneconomical use of force not only because it involves, by definition, a dissipation of base values which yields no military advantage;¹²⁸ it will also, by operation of the condition of reciprocity, result in the offending belligerent sustaining a positive disadvantage in the shape of at least an equal amount of destruction of its own values. By stimulating hatred in the enemy and strengthening his will to resist, it will in addition frequently compel the expenditure of much larger amounts of force than will otherwise have been necessary to secure the same objective.¹²⁹ Economy in the use of force is thus a matter of shared interest in self-restraint, and it is this general sanction which finds its detailed expression in all the varying procedural modalities of collective measures for redress by international organizations, including the employment of all instruments of coercion, of war crime trials during or after war by international or national courts and military commissions, of reprisal procedures in the course

126. See, *e.g.*, Uniform Code of Military Justice, 64 STAT. 108 (1950), 50 U.S.C. §§ 551-741 (1952); DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE (FM 27-10, 1956); DEPARTMENT OF THE NAVY, THE LAW OF NAVAL WARFARE (1957); UNITED KINGDOM, MANUAL OF MILITARY LAW (9th ed. 1956); CODES DE JUSTICE MILITAIRE: ARMÉES DE TERRE ET DE MER (Petits Codes, Dalloz ed. 1957).

National statutes and regulations on neutrality are collected in JESSUP & DEAK, NEUTRALITY LAWS, REGULATIONS AND TREATIES (1939).

127. Cf. CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES 13 (1951).

128. Indication of the kind of calculations in which economy of force manifests itself may be found in CAGLE & MANSON, THE SEA WAR IN KOREA 333-34, 352-53 (U.S. Naval Institute 1957). "The cost of a 5-inch shell at the end of the Korean pipeline was approximately \$200," Admiral Gingrich, commander of Task Force 95, is reported to have said, and "unless it did that much damage, we were hurting ourselves more than the enemy." *Id.* at 352.

129. The results of the policies of Nazi Germany in occupied areas of the Soviet Union during the second World War offer excellent illustration. The unbelievably savage and ruthless treatment of Soviet prisoners of war and the civilian population drove the inhabitants and stragglers from the Red Army to join the partisan movements, which correspondingly grew in effectiveness until they controlled large areas behind German lines. The German policies of absolute terror and extermination also resulted in the forfeiture of the opportunities offered by the nationalistic aspirations of the Ukrainians and Bylorussians and by their hopes for a better and freer life under Hitler's "New Order." A recent comprehensive study is DALLIN, GERMAN RULE IN RUSSIA 1941-1945: A STUDY OF OCCUPATION POLICIES (1957).

of hostilities and of diplomatic negotiations or interpositions with respect to claims for damages.

Compelling testimony to the effectiveness of the sanction of self-interest comes from the German archives made public at Nuremberg in the form of certain memoranda prepared by the "Operational Staff of the Armed Forces [Wehrmacht]."¹³⁰ These documents commented upon and assessed a proposal, made apparently at the last stages of the war, that Germany denounce its international obligations concerning the conduct of war. After listing the international conventions to which Germany was a party, the documents reviewed in minute detail the possible consequences of denunciation, methodically calculating expected advantages and disadvantages, and uniformly concluded that the disadvantages far outweighed possible advantages. In the course of its discussion, one of these remarkable documents stated:

"(1) Strictly formally, a denunciation of the agreements is not possible. The conventions concerning P.W. and wounded provide for no denunciation, the Hague Convention admits a denunciation only if one year's notice is given.

"(2) On the basis of the practice of states in the wars of the last centuries, there exists the 'International Law of Usage' which cannot be done away with unilaterally. It comprises the latest principles of a humane conduct of war; it is not laid down in writing. To respect it is however considered a prerequisite for membership [in] the community of states. (Prohibition on misusing the flag of truce, killing of defenseless women and children, etc.)

"Consequently Germany will by no means free herself from this essential obligation of the laws of war by a denunciation of the conventions on the laws of war."¹³¹

Recently, there has been much discussion of the existence of a "nuclear stalemate," comprised, it is said, of a relative parity between the two "super-powers" in capacity to inflict annihilating destructions on each other through "saturation" with nuclear explosives, and of a common military inability either completely to defend against contemporary delivery systems or completely to destroy the other's capabilities for retaliation. The implications of such a "stalemate" have also been considered in terms of the necessity, in view of the exorbitant costs of total war, of a strategy of "limited war."¹³² The

130. Memoranda Nos. 313/45, Feb. 20, 1945, 1859/45, Feb. 21, 1945, 1825/45, Feb. 20, 1945, in NAZI CONSPIRACY AND AGGRESSION 894-905 (Supp. A 1947).

131. Memorandum No. 313/45, Feb. 20, 1945, in *id.* at 895.

132. See, *e.g.*, MILITARY POLICY AND NATIONAL SECURITY (Kaufmann ed. 1956); KISSINGER, NUCLEAR WEAPONS AND FOREIGN POLICY (1957); OSGOOD, LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY (1957); ON LIMITING ATOMIC WAR (Royal Institute of Int'l Affairs 1956); Aron, *A Half-Century of Limited War?*, 12 BULL. ATOMIC SCIENTISTS 99 (1956); Buzzard, Slessor & Lowenthal, *The H-Bomb: Massive Retaliation or Graduated Deterrence*, 32 INTERNATIONAL AFF. 148 (1956); Hoag, *Nato: Deterrent or Shield?*, 36 FOREIGN AFF. 278 (1958); King, *Nuclear Plenty and Limited War*, 35 *id.* at 238 (1957); Kissinger, *Force and Diplomacy in the Nuclear Age*, 34 *id.* at 349 (1956);

reference commonly given to "limited war" has been that of exercises of military violence in which the participants mutually limit their objectives to determinate ones susceptible of negotiated settlement and in which the aggregate destruction of values is kept at a correspondingly low level by reciprocal limitations upon weapons, areas of operations or objects of attack. The point of present emphasis is that the possibilities of "limited war" appear to depend in large measure upon observance of the same principle which, as indicated before, traditionally has sustained a law of war, the principle of economy in the exercise of force. Thus, Professor Osgood states the point of theory involved succinctly:

"[A]s an examination of the interaction between military means and political ends will show, the proportionate use of force is a necessary condition for the limitation and effective control of war."¹³³

"In the light of this proportion between the dimensions of warfare and its susceptibility to political control, the importance of preserving an economy of force is apparent. For if modern warfare tends to exceed the bounds of political control as it increases in magnitude, then it is essential to limit force to a scale that is no greater than necessary to achieve the objectives at stake. By the same token, if war becomes more susceptible to political control in proportion as its dimensions are moderated, then the economy of force is an essential condition of the primacy of politics in war."¹³⁴

Similarly, Professor Kissinger makes explicit the application of this principle to the contemporary hope that, if there must be war, it be only limited war.

"The argument in favor of the possibility of limited war is that both sides have a common and overwhelming interest in preventing it from spreading. The fear that an all-out thermonuclear war might lead to the disintegration of the social structure offers an opportunity to set limits to both war and diplomacy."¹³⁵

If, then, the assumption of "nuclear stalemate" and the hope for limited war only are more than illusion, there will continue to be, in the principle which establishes their contact with reality, some sanction for a law of war.

The Role of Rules

With more general reference to the whole process of authoritative decision, one point already mentioned may perhaps bear further emphasis. Observers have too often assumed that it is the function of inherited legal rules to point definitively and precisely to certain preordained conclusions. The difficulty with this assumption is that it seeks to impose too great a burden upon man's

Slessor, *The Great Deterrent and Its Limitations*, 12 BULL. ATOMIC SCIENTISTS 140 (1956); Teller, *Alternatives for Security*, 36 FOREIGN AFF. 201 (1958). *But cf.* de Seversky, *A Forecast and a Warning: No More Little Wars*, This Week Magazine, March 23, 1958, p. 8.

133. OSGOOD, *op. cit. supra* note 132, at 18.

134. *Id.* at 26.

135. KISSINGER, NUCLEAR WEAPONS AND FOREIGN POLICY 144 (1957).

frail tools of thought and communication and an impossible rigidity upon both the processes of decision and social change. The fact is that the rules of the law of war, like other legal rules, are commonly formulated in pairs of complementary opposites and are composed of a relatively few basic terms of highly variable reference.¹³⁶ The complementarity in form and comprehensiveness of reference of such rules are indispensable to the rational search for and application of policy to a world of acts and events which presents itself to the decision-maker, not in terms of neat symmetrical dichotomies or trichotomies, but in terms of innumerable gradations and alternations from one end of a continuum to the other; the spectrum makes available to a decision-maker not one inevitable doom but multiple alternative choices. The realistic function of those rules, considered as a whole, is, accordingly, not mechanically to dictate specific decision but to guide the attention of decision-makers to significant variable factors in typical recurring contexts of decision, to serve as summary indices to relevant crystallized community expectations¹³⁷ and, hence, to permit creative and adaptive, instead of arbitrary and irrational, decisions.

The most comprehensive study of this process of decision, established by the public order of the world community for regulating international coercion and for minimizing the destruction of values in such coercion, would require the sustained systematic performance, with respect to each of the seven major types of controversies outlined earlier, of the several intellectual tasks we have noted as indispensable to policy-oriented inquiry. These may be briefly restated

136. The phenomenon of polarity in the syntax of prescriptions is by no means unique to the law of war, nor even to international law generally. See CARDOZO, *Paradoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 252 (Hall ed. 1947). The same phenomenon has been more recently observed in the field of constitutional law: "His [Thomas Reed Powell's] thinking was infused also, as I have suggested, by the principle of polarity, finding in each of two opposing propositions an element of validity which when combined will produce a more serviceable guide than either principle standing alone. Interstate commerce must not be taxed by the states; interstate commerce may be made to pay its way. A state may exclude a foreign corporation from local business; a state may not condition the admission of a foreign corporation on its relinquishment of a constitutional right. The power to tax involves the power to destroy; the legislative motive for a tax is immaterial. In the control of public carriers a state may not regulate interstate commerce; a state has undoubted power to protect the safety of its inhabitants. These abstractions, arrayed in intransigent hostility like robot sentinels facing each other across a border, can become useful guardians on either hand in the climb to truth if they can be made to march together. Somehow the lifeblood of the concrete problem tempers the mechanical arrogance of abstractions." Freund, *Thomas Reed Powell*, 69 *HARV. L. REV.* 800, 802-03 (1956).

Application has also been made of the notion of polarity in the more rarefied region of legal philosophy. See COHEN, *REASON AND LAW* 4, 6-7 (1950).

137. Each particular rule, however, points to certain specific factors and policies, and the significance of any specific factor or policy in a given case depends upon its interrelation with other factors and policies, including the presence or absence of such other factors and policies, in total context. Cf. the formulation of the functions of rules or principles of interpretation in *The Law of Treaties*, in *HARVARD RESEARCH ON INTERNATIONAL LAW* 937-38 (1935).

as including: the detailed clarification of the world community policies at stake in the prescriptions and procedures about permissible and nonpermissible coercion and the lawfulness or unlawfulness of particular exercises of coercion; the identification and description of trends in decisions with respect to all such problems and of the shifting constellations of variables that bear upon decision; the critical projection of observable trends and the estimation of the probable shape of future decision; the appraisal of both trends in the past and probable developments in the future in terms of their consistency with clarified policies; and the search for alternatives in prescription and procedure better designed to secure the preferred goals of maximum human dignity and minimum destruction of human values.

All this essay attempts, however, is briefly to observe, with respect to each of the several types of controversies, some of the fundamental policies which authoritative decision-makers have in the past labored to secure in passing upon the lawfulness of specific claims to exercise or defend against coercion, and to make certain suggestions, tentative and impressionistic, as to possible lines of further clarification of the requirements of rational community policy with respect to the various types of particular controversies.¹³⁸ As the factors that affect decision in the world arena shift toward inclusive rather than exclusive determination of community policy, the basic policies at stake in characterizations of coercion as permissible or impermissible may, hopefully, be clarified to the advantage of a public order of freedom and the complementary policies appropriate in each type of controversy may be more sharply delineated and balanced in favor of humanitarianism. The principal difficulty in past efforts to clarify and formulate such policies has stemmed largely from conditions of decentralization in the world arena. The elementary degree of organization of authority and centralization of effective power, in the very arena of interaction for the regulation of which policies are sought to be prescribed and applied,¹³⁹ has thus put the highest premium upon the effective competence of each state by its own unilateral decision and action to preserve and defend its security.¹⁴⁰ This characteristic decentralization, exhibited most obviously in the lack of specialized institutions for the continuous and effective clarification and application of community policy about coercion, has infected with formidable ambiguity both the characterization of unlawful coercion and the detailed prescriptions of the fundamental policy of minimum destruction of values. Decentralization has thus resulted in the relatively heavier weighting of the set of policies, such as those embodied in self-defense and military necessity, conferring upon participants a broad unilateral discretion to secure and perpetuate

138. We propose to deal at greater length and in detail with each of the major problems or types of controversies in subsequent essays. In the present essay, the treatment of each problem or type of controversy will necessarily be only illustrative.

139. See Kelsen, *Collective Security Under International Law* 1-39 (1957).

140. The decentralization of the international system, a condition under which each state was responsible for its own defense, made it necessary at times to have recourse to anticipatory self-defense. Fenwick, *International Law* 231 (3d ed. 1948).

their exclusive values, rather than upon the complementary set of policies emphasizing the more inclusive claims of minimum destruction and humanitarianism. As conviction of the common interest in postponing Armageddon grows, and slow, if tortuous and scarcely observable, progress is made toward more effective organization and centralization in the world arena, the hope that may be held out is that the set of policies embodying the restraint of coercion and the promotion of humanitarianism may rise in the balance and that the scope of permissible coercion may gradually be attenuated and more exacting standards of humanity formulated and applied.

MAJOR PROBLEMS AND GENERAL PRINCIPLES: THE COMMON INTEREST IN
MINIMUM DESTRUCTION OF VALUES

Community Prohibition of Resort to Coercion

The most difficult problem which today confronts world public order is that of characterizing and preventing unlawful violence. The history is familiar how over the centuries, through *bellum iustum*, the covenant of the League of Nations, the Pact of Paris, the judgments at Nuremberg and Tokyo, and the charter of the United Nations, the public order of the world community has at long last come to a prohibition of certain coercion as a method of international change and to a distinction between permissible and nonpermissible coercion.¹⁴¹ It is equally well-known that before this prohibition and distinction were achieved, and the supporting principles of community concern and collective responsibility institutionalized,¹⁴² however weakly, traditional doctrine recognized in each state an uncontrolled faculty, as a sovereign competence and prerogative, to prosecute its rights, real or imagined, by recourse to coercion and violence.¹⁴³ Such doctrine of course reflected the then dominant patterns of multipolarity and power balancing in the world arena and the completely decentralized and unorganized character of the community of states, as well as the atomistic conceptions of state security and the limitations of the available military technology.

The basic complementary policies embodied in the contemporary prescriptions on recourse to coercion are reasonably clear. In its prohibition of certain co-

141. See MARTIN, *COLLECTIVE SECURITY: A PROGRESS REPORT* (1952); POMPE, *AGGRESSIVE WAR, AN INTERNATIONAL CRIME* (1953); WEHBERG, *THE OUTLAWRY OF WAR* (Zeydel transl. 1931); Komarnicki, *La Définition de l'Agresseur dans le Droit International Moderne*, 75 *HAGUE RECUEIL* 1 (1949); Tucker, *The Interpretation of War Under Present International Law*, 4 *INT'L L.Q.* 11 (1951); Von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 *AM. J. INT'L L.* 665 (1939); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *HAGUE RECUEIL* 455 (1952).

142. See HOGAN, *INTERNATIONAL CONFLICT AND COLLECTIVE SECURITY: THE PRINCIPLE OF CONCERN IN INTERNATIONAL ORGANIZATION* (1955).

143. See SHOTWELL, *WAR AS AN INSTRUMENT OF NATIONAL POLICY* 14 (1929); cf. POMPE, *op. cit. supra* note 141, at 138-52; 1 WRIGHT, *A STUDY OF WAR* 331, 335-41 (1942); McNair, *Collective Security*, 17 *BRIT. Y.B. INT'L L.* 150, 151 (1936); Nussbaum, *Just War—A Legal Concept?*, 42 *MICH. L. REV.* 453, 476 (1943).

ercion, the community attempts to effect a policy of promoting change through procedures of peaceful persuasion. The assumption that underlies this policy is that coercion and violence, necessarily entailing the destruction of values, are not suitable instrumentalities for asserting and prosecuting claims for change.¹⁴⁴ In characterizing certain other coercion as permissible, the community seeks quite rationally to utilize coercion as an instrument of order by authorizing its use for community police actions, and acknowledges the still low degree of organization attained by permitting individual and collective self-defense as a response to unlawful coercion.¹⁴⁵ The technical legal concepts by which such policies are sought, sometimes summed up as an attempt to secure and maintain a "community monopoly of force,"¹⁴⁶ are equally complementary: for characterizing nonpermissible coercion, there are such phrases as "war of aggression," "crimes against peace," "threats to the peace," "breach of the peace," "acts of aggression," "threat or use of force," "intervention," and so on; for designating permissible coercion, the terms are "self-defense," "collective self-defense," "police action," "enforcement measures," "reprisal," and so forth.

In the framing of the United Nations Charter, the deliberate choice was made to keep these technical characterizations as ambiguous as they appear.¹⁴⁷ For the past decade, however, a tremendous resurgence of agitation for their clarification has appeared. The principal effort has so far centered about a "definition of aggression," upon the assumption that if aggression is clarified, self-defense and justifiable police action will not be far behind. Many definitions, both official and unofficial, have been offered in many bodies, both official and unofficial. Some definitions are enumerative in approach, attempting a catalogue of concrete situations of aggression and reciting such "first shot" items as a declaration of war, invasion, bombardment, landing of troops and supporting of armed bands.¹⁴⁸ Others are generic or catchall formulations seeking to cover

144. Thus, the Nuremberg Tribunal, echoing Dubois's "*omne bellum in se malum et illicitum*," quoted in Possony, *Peace Enforcement*, 55 YALE L.J. 910, 912 (1946), said: "War is essentially an evil thing. Its consequences are not confined to the belligerents alone but affect the whole world.

"To initiate a war of aggression . . . is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." *Opinion and Judgment*, in NAZI CONSPIRACY AND AGGRESSION 16 (1947).

145. Cf. Kelsen, *op. cit. supra* note 139, at 25.

146. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 13-15 (1952).

147. See Report of the Rapporteur (Boncour) of Comm. III/3 to Comm'n III of the San Francisco Conference, 12 U.N. CONF. INT'L ORG. DOCS. 505 (1945); Goodrich & Hambro, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 263-66 (2d rev. ed. 1949).

148. The example par excellence of an enumerative definition is that proposed by the Soviet Union, found, in its more recent form, in U.N. Doc. No. A/AC.77/L.4 (1957). The Soviet draft definition finds its prototype in the London Conventions for the Definition of Aggression of 1933, 147 LEAGUE OF NATIONS TREATY SERIES 67, 77 (1933); 148 *id.* at 211, and in the Draft Act prepared by the 1933 Geneva Disarmament Conference, Committee on Security Questions, Conference for the Reduction and Limitation of Armaments [1933], *Politis Report*, 2 CONF. DOCS. (1935.IX.4) 679-90 (1935).

any threat or use of force by one state against another, in any manner, open or covert, and whatever the weapons, for any purpose other than for self-defense or police action.¹⁴⁹ Still other definitions endeavor to combine the enumerative and generic approaches.¹⁵⁰ Amid all this intellectual contention, one strongly held view—the present official position of the governments of the United States and the United Kingdom—is that all attempt at definition is futile, that all definitions would restrict the freedom of decision-making organs of the United Nations to determine aggression from the particular and peculiar circumstances of each instance of coercion.¹⁵¹

It is of course as futile to seek a reificatory, absolutist and all-sufficing definition of aggression as of any other legal concept or word.¹⁵² But the impossibility of absolute precision does not necessarily render complete confusion desirable. In this most fundamental problem of all, as in lesser problems, legal principles might be formulated which would serve the same function that other legal principles serve—that of bringing to the focus of attention of a decision-maker relevant factors in context which should rationally affect decision.¹⁵³ From

149. See, *e.g.*, the draft definitions that were submitted to the International Law Commission by Mr. Alfaro, U.N. Doc. No. A/CN.4/L.31, at 27 (1951); 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. Yepes, U.N. Doc. No. A/CN.4/L.12 (1951). See also the Iraqi draft definition, U.N. Doc. No. A/AC.77/L.13, Annex II, at 5-6 (1957); Alfaro, *La Cuestión de la Definición de la Agresión*, 59 REVISTA DE DERECHO INTERNACIONAL 361 (Cuba 1951).

150. The draft definitions proposed in 1956 by Iran and Panama, U.N. Doc. No. A/AC.77/L.13, Annex II, at 4-5 (1957); Paraguay, *id.* at 3-4; The Dominican Republic, Mexico, Paraguay and Peru, *id.* at 9-10, are the more recent examples. Earlier ones include the formulations submitted by Mexico and Bolivia. U.N. Doc. No. A/AC.66/L.11, Annex (1953).

151. See the statements of the representative of the United States (Mr. Klutznick) in the Sixth Committee of the General Assembly, U.N. Doc. No. A/C.6/SR.519, at 14-18 (1957), and of the representative of the United Kingdom (Mr. Vallet), U.N. Doc. No. A/C.6/SR.523, at 2-5 (1957). See also Fitzmaurice, *The Definition of Aggression*, 1 INT'L & COMP. L.Q. 137 (1952).

152. Cf. Dias, *Mechanism of Definition as Applied to International Law*, 1954 CAMB. L.J. 215, 219.

153. It is sometimes suggested that the clarification of legal principles has no significant part to play in the prevention of catastrophic violence. The prevention of such violence, the argument runs, must depend upon new dispositions of effective power and not upon rearrangements of authoritative words.

This argument underestimates the degree to which a careful clarification of authoritative community goals may aid in securing the necessary sustaining dispositions of effective power. One of the lessons of contemporary science about human behavior is that it helps in creating the conditions necessary for the achievement of a goal to have the goal more sharply delineated. The clarification in detail of distinctions between lawful and unlawful coercion will not, of course, of itself establish all the necessary conditions for restraint of unlawful coercion. But it may perform the very necessary task of outlining the major contours of the effects sought—in terms of which alternative choices in the rearrangement of effective power and in the adoption of new modalities in practice must be appraised. The clarification of community goals about "aggression" need not retard and might even stimulate the establishment of more effective institutions for the performance of various

this perspective, the basic task is one of categorizing such variable contextual factors with respect to the distinction between permissible and nonpermissible coercion. Inquiry of the kind recommended above into the processes of coercion and decision suggests that such a categorization might include interrelated factors like the following:

(a) The chronological factor of priority in resort to coercion of substantial degree, not in terms simply of the "first shot" but of all modes of coercion.¹⁵⁴

(b) The occasion for the coercion—whether the purpose exhibited by the initiator, objectively ascertained, is to attack and acquire values held by the target-state or to conserve and protect its own values, and whether the initiator seeks exclusive or inclusive values.

(c) The type and intensity or the consequentiality of the coercion threatened or exercised.¹⁵⁵

necessary policy functions, the adoption of more effective programs in economic development and trade, the more general promotion of human rights and freedom of inquiry and communication and the creation of progressively more comprehensive regional organizations.

154. The element of priority in time has been stressed by Spiropoulos, who regards it as "logically inherent in any notion of aggression. Aggression is presumably: acting as first." U.N. Doc. No. A/CN.4/44, at 65 (1951). See also the statements of Politis in *Records of the Conference for the Reduction and Limitation of Armaments*, 2 MINUTES OF THE GEN. COMM'N 500 (League of Nations, Ser. B 1933). Priority can, of course, be determined only within a specific delimited time sequence. The delimitation of the relevant time sequence is primarily a function of the definor's choice of the material causative factors. To give in all cases exclusive significance to the "first shot"—to overt military violence—may be grossly to underestimate the potentialities of all the contemporary modes of exercising coercion, both military and nonmilitary. On the "first shot" test, Judge Moore dryly observed that "the law does not require a man who believes himself to be in danger to assume that his adversary is a bad shot." 6 MOORE, COLLECTED PAPERS 445 (1944).

155. There was some appreciation of the relevance of this factor in the discussions in the 1956 Special Committee. Certain delegates argued that "since certain degrees could be said to exist in the use of force and not all of them were serious enough to describe as aggression . . . the use of force had to be sufficiently serious to constitute aggression." It was urged, in particular, that "frontier incidents" would have to be excluded from the possible forms of aggression. U.N. Doc. No. A/AC.77/L.13, at 19 (1957). Similarly, many delegates advanced the view that "economic or ideological aggression did not entitle individual States to the same defensive action as did armed attack," *id.* at 22, the premise being, it appears, that "economic and ideological aggression" do not exhibit the same intensity of coercion as does "armed attack."

Recognition of the importance of the factor of consequentiality, as well as of the complementary factor of proportionality, seems implicit in the proposal of the Netherlands representative that the Committee address itself to defining and clarifying the term "armed attack" as used in U.N. CHARTER art. 51. "The crucial point," in the view of the Netherlands representative, "was to determine the cases of the use of armed force in which a State might go to war in self-defense." He observed further that in cases of "border incidents," a state could resort to "limited action in self-defense," based on its function "to maintain law and order in its territory." U.N. Doc. No. A/AC.77/L.13, at 42 (1957). See also *id.* at 49, 58, 59; and the view of the Iraqi delegate that the Soviet draft definition "lacked a distinction between acts of force which did constitute aggression and acts of

(d) The realism of expectations created in the target-state by the intensity and proportions of the coercion threatened or exercised as to the necessity, or imminence of necessity, of resort to countercoercion for the maintenance of its freedom of decision-making and of its territorial base.¹⁵⁶

(e) The type and intensity or degree of proportionality of the coercive response of the target-state to the coercion initiated against it.

(f) The relative willingness of the contending participants to accept community intervention for the cessation of violence and nonviolent procedures for settlement.¹⁵⁷

(g) The type and purpose of the decision demanded from an authoritative decision-maker.¹⁵⁸

(h) The probable effectiveness and costs of decision.¹⁵⁹

force which did not," and that "the gravity of the act and of the situation in which it was happening should be taken into account," *id.* at 50.

156. Cf. POMPE, *AGGRESSIVE WAR, AN INTERNATIONAL CRIME* 102-04 (1953), whose views were adopted and elaborated by the Netherlands representative in the 1956 Special Committee. The Netherlands representative urged that the criterion distinguishing armed attack from other uses of force not entitling the target state "to take the action provided for in Art. 51 [was] . . . the use of force in such circumstances that the victim-State had no means other than military to preserve its territorial integrity or political independence. In case the use of force was such that United Nations intervention could provide sufficient protection, an armed attack within the meaning of Article 51 did not exist." U.N. Doc. No. A/AC.77/L.13, at 63-64 (1957). See also Röling, *On Aggression, on International Criminal Law, on International Criminal Jurisdiction*, 2 *NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT* 167 (1955); *The Report of De Brouckère*, in DOCUMENTS OF THE PREPARATORY COMMISSION FOR THE DISARMAMENT CONFERENCE, LEAGUE OF NATIONS ser. III, pt. 93, at 100-01 (Doc. No. C.740.M.479.1926.IX) (1926); U.N. Doc. No. A/AC.66/L.11, at 20 (1953).

157. U.N. CHARTER art. 40 authorizes the Security Council, for the purpose of preventing "an aggravation of the situation," to "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable," and to "take account of failure to comply with such provisional measures." The same power has been exercised by the General Assembly under the "Uniting for Peace" resolution. See U.N. Gen. Ass. Res. No. 378(V), U.N. GEN. ASS. OFF. REC. 5th Sess., Plenary 308 (1950), entitled "Duties of States Upon Outbreak of Hostilities." Cf. Professor Wright's suggestion that refusal "to accept an armistice proposed in accordance with a procedure which [a state] has accepted to implement its no-force obligation" may be taken as a test of aggression. Wright, *The Concept of Aggression in International Law*, 29 *AM. J. INT'L L.* 373, 395 (1935). See also Wright, *The Test of Aggression in the Italo-Ethiopian War*, 30 *id.* at 45 (1936).

158. The discussions in the General Assembly and in the 1953 and 1956 Special Committees on the question of defining aggression indicate growing recognition that criteria of aggression may differ as the types and purposes of decision differ. See, e.g., 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); U.N. Doc. No. A/AC.66/L.11, at 34-35 (1953); U.N. Doc. No. A/AC.77/L.13, at 36 (1957). See also POMPE, *op. cit. supra* note 156, at 66-71, 95-115; STONE, *LEGAL CONTROLS* 331, 333, conceding that criteria for purposes of "peace enforcement against states" and criteria for purposes of "punishment of individuals" may vary, but denying that a "workable definition" is available to meet either purpose.

159. See notes 112-15 *supra* and accompanying text.

Still another factor, somewhat less obvious, perhaps deserves no less attention: the anticipated impact of a proposed decision on the values of the system of world public order to which the decision-maker adheres. The debates in the United Nations show clearly that representatives of states adhering to a totalitarian world public order consistently assess proposals on this basis. From a perspective which postulates the desirability of maintaining and furthering a public order honoring human freedom, the suggestion may be ventured that so long as competing systems of world public order remain, it may at best be simple Utopian idealism for decision-makers committed to nontotalitarian conceptions of world public order to reject that factor as of no relevance at all.¹⁶⁰

Different decision-makers with different responsibilities do and must, of course, weight varying factors differently in differing contexts. The function of the United Nations representative in preventing or repressing aggression and in activating the machinery of collective security, the function of the official of a nation-state in deciding upon the necessity of countering coercion and the function of the judge on an international tribunal charged with allocating criminal liabilities after the cessation of violence are obviously quite different. The judge imposing penalties may have to consider many mitigating and perhaps exculpating circumstances; he may require a high degree of proof without weakening any deterrent effect of criminal sanctions. But in a world in which the major powers are continuously observing each other and calculating every change and proposal for change in terms of possible effects upon relative fighting potential, ready to act upon the split second with all contemporary instruments of vast destruction,¹⁶¹ the United Nations representa-

160. This proposal that a decision-maker take into account the anticipated impact of alternatives in decision upon the values of the system of world public order to which he subscribes has encountered the objections that it ignores that "justice is blind" and requires a decision-maker to abandon impartiality for identification with one or the other of the contending participants. The answer is that the symbol of justice as a blind goddess, balancing scales evenly between unknown parties, comes from the assumed relevance of analogy to a completed legal system—that is, to municipal systems, exhibiting a single inclusive public order and a high degree of consensus among members about how values should be shaped and shared. The analogy scarcely appears apt when it is considered, as we have emphasized, that the contemporary world arena exhibits not one completed, inclusive public order but a number of incomplete, exclusive, contending orders, each with its own perspectives about law and about how values should be shaped and shared. The rational course for a decision-maker subscribing to the values of freedom, who locates himself in time and conceives his task to be that of moving an incomplete public order of freedom still further toward completion in practice as well as in theory, would appear to be to appraise carefully the significance of all the factors in any particular context which may affect movement toward or away from the order he seeks. To permit decision to be controlled mechanically by the presumed dictates of an inappropriate analogy from a very different public order, especially when representatives of opposing world orders do not so handicap themselves, could be suicidal.

161. The possibility and perils of a surprise attack appear to be enhanced as the velocity and destructiveness of contemporary weapons systems increase. The chilling possibilities of mistakes in identification may also increase. Hanson Baldwin writes that there

tive and the nation-state official must be authorized to act quickly and upon less exacting requirements of proof, if authority is to have any substantial purpose. The traditional requirements imposed upon resort to self-defense—a realistic expectation of instant, imminent military attack and carefully calculated proportionality in response—may, in more particular, require some redefinition to take into account the potentialities of the newer technology of violence.¹⁶² From this perspective, the emphasis in the United Nations Charter upon “armed attack” as the precipitating event for the legitimate recourse to self-defense may appear most unrealistic.

Community Regulation of Participation in Coercion

The consideration of community regulation of participation involves two closely interrelated but perhaps distinguishable problems: the first requires a determination of the degree of common responsibility available for the maintenance of public order and of the extent to which nonparticipation is permissible; and the second requires a determination, in whatever degree nonparticipation is permissible, of the relative rights and duties of belligerents and nonparticipants in particular situations.

With respect to the first problem, the technical doctrines and detailed rules of nineteenth-century neutrality sought to limit involvement in, and the spatial extension of, violence. These doctrines and rules were originally formulated in a multipolar arena of participants of relatively equal power¹⁶³ and, as al-

have been instances when the United States Strategic Air Command bombers, carrying nuclear explosives, were ordered on an emergency takeoff after radar screens registered what appeared to be large numbers of unidentified planes approaching United States bases. In the case of ballistic missiles, Mr. Baldwin observed that recall after launching is impossible and that the period of control, in the sense of capacity to destroy the missile in flight, is measured in minutes. *N.Y. Times*, Feb. 4, 1958, p. 16, cols. 5-6.

162. At least two points about contemporary weapons require consideration. One is that missile weapons make necessary a very short “reaction time”—the time required for reacting with defensive and offensive measures to enemy attack or threat of attack. It has been estimated that present radar systems can give at most fifteen to twenty minutes warning of an attack by means of missiles. Hanson Baldwin, *id.* Feb. 5, 1958, p. 14, col. 2; *International Security: The Military Aspect*, in *SPECIAL STUDIES REPORT II*, 56 (Rockefeller Bros. Fund 1958). Obviously, there may be very little time and opportunity for calculation of proportionality. The second point is the possibility that, under certain conditions, the initial attacks may prove decisive. See Beukema, *Warfare and Military Organization*, in *MODERN WORLD POLITICS* 374, 378 (Kalijarvi ed. 1953). While this possibility may be curtailed, so far as concerns the superpowers vis-a-vis each other and to the extent that an “atomic stalemate” exists and is maintained, it cannot be entirely ruled out, even as between the superpowers. The equilibrium represented by an “atomic stalemate” is extremely delicate and precarious.

163. See, generally, Jessup & Deak, *The Origins*, in 1 *NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW* (1935); Phillips & Reede, *The Napoleonic Period*, in 2 *id.* (1936). The structure of the arena permitted the operation of power balancing of which the possibilities of nonparticipation were a function. See Morgenthau, *The Problem of Neutrality*, 7 *U. KAN. CITY L. REV.* 109, 112-16 (1939); Morgenthau, *The Resurrection of Neutrality in Europe*, 33 *AM. POL. SCI. REV.* 473, 480-83 (1939); Wright, *International Law*

ready suggested, were but one expression of an overriding policy of permitting, in an unorganized and decentralized community of states, the resolution of issues by the relative strength of the contending participants. The most basic premise of the whole structure of prescription and doctrine was that recourse to violence was an exercise of the discretionary competence of a sovereign state and that other states were not entitled to sit in judgment upon the legitimacy of either belligerent's cause.¹⁶⁴

Again, however, developments in recent decades have caused once hallowed doctrines to atrophy. The emergence of a community prohibition upon recourse to violence, supported by commitments as in the United Nations Charter to a common responsibility for the maintenance of public order, have destroyed the more important policy premises of traditional doctrines of neutrality and raised grave questions of the degree to which shared responsibility can endure claims of impartiality. The words of the United Nations Charter do authorize the Security Council¹⁶⁵ and perhaps even the General Assembly, if certain provisions be appropriately interpreted,¹⁶⁶ to call upon both member and non-member states to participate in varying degree in measures designed to repress violence authoritatively characterized as unlawful.

Nonetheless, to suppose that either claims to nonparticipation or the doctrines of neutrality have entirely departed would be extremely rash. Amorphous groupings of "uncommitted" states have appeared, and recognition of the increasingly massive destructive capabilities of contemporary weapons makes a policy of restricting involvement in coercion and violence seem considerably more rational than it did not too long ago.¹⁶⁷ Moreover, most observers agree that the formal prescriptions of the charter leave many gaps through which permissible nonparticipation may still assert itself.¹⁶⁸ Because of the veto, the

and Power Politics, 2 MEASURE 123, 126 (1951); Wright, *The Present Status of Neutrality*, 34 AM. J. INT'L L. 391, 410-14 (1940).

164. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 25-26 (1944); 2 OPPENHEIM-LAUTERPACHT 639, 644; POLITIS, *NEUTRALITY AND PEACE* 4-14, 83-84 (1936); Komarnicki, *The Place of Neutrality in the Modern System of International Law*, 80 HAGUE RECUEIL 399, 411-12 (1952); Lauterpacht, *Neutrality and Collective Security*, 2 POLITICA 133, 146 (1936).

165. U.N. CHARTER art. 2, paras. 5, 6; *id.* art. 25; *id.* c. VII.

166. U.N. CHARTER art. 2, paras. 5, 6; *id.* arts. 10, 11, 12, 24, para. 1. The "Uniting for Peace" resolution, U.N. Gen. Ass. Res. No. 377(V), U.N. GEN. ASS. OFF. REC. 5th Sess., Plenary 302 (1950), has been the subject of controversy in which much erudition and exegetical talent have been expended. See, *e.g.*, KELSEN, *RECENT TRENDS IN THE UNITED NATIONS* 959-90 (1950); STONE, *LEGAL CONTROLS* 266-78; Andrassy, *Uniting for Peace*, 50 AM. J. INT'L L. 563 (1956). The controversy as to the "constitutionality" of the resolution may have become largely academic. In the Suez and Hungarian cases, the Security Council itself invoked the resolution and called the General Assembly into emergency sessions.

167. Cf. Morgenthau, *Neutrality and Neutralism*, 11 Y.B. OF WORLD AFFAIRS 47, 67-75 (1957).

168. See, *e.g.*, the analyses set out in 2 OPPENHEIM-LAUTERPACHT 645-52; TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 171-80 (1957); Komarnicki, *The Problem*

Security Council may not be able to reach a decision or, if it does, may call for participation by only a few states or in differing degree. The powers of the General Assembly have been generally disputed, as well as the powers of the organization as a whole with respect to nonmembers. A state demanding the advantages of nonparticipation may, accordingly, still be able to do so in the vestments of respectable authority; that it is able to do so is again but a reflection of the rudimentary character of the organization observable in the world arena.

Thus, the second problem about participation must often be faced, that of determining the relative rights and duties of belligerents and nonparticipants. Traditionally, authoritative decision-makers have sought to reconcile and accommodate the contraposed policies of military effectiveness, in terms of permitting a belligerent to effect the isolation of its opponent, and of minimizing unnecessary disruptions of the value processes of nonparticipating states.¹⁶⁹ The reconciliation is achieved through complementary concepts: on the one hand, "rights of belligerents," "duties of neutrals," "angary and requisition," "blockade," "contraband," "unneutral service" and "ultimate destination"; on the other, "rights of neutrals," "duties of belligerents," "inviolability of neutral territory," "ineffective blockade" and "freedom of the seas." Some of these technical doctrines and the detailed policies they embody conceivably will survive into the future. What is certain, however, is that to whatever degree they do survive, they will be refashioned by specific practical interpretations to fit the special conditions and demands of future wars, with their own peculiar limits or lack of limits.

One further point that perhaps may be given emphasis is that here, as with the problem of impermissible resort to coercion, a decision-maker sharing the values of a nontotalitarian world public order might again rationally take into account the probable consequences for such values of any particular decision demanded. Neither the unfortunate circumstance that the United Nations cannot reach a "binding" decision in a particular case nor the inability or unwillingness of some states to assume a full share of responsibility for the maintenance of public order requires a state to demand all the rights and assume all the duties of traditional neutrality. A resolution of the General Assembly, coupled with the general commitment of members embodied in article 2(5) of the

of Neutrality Under the United Nations Charter, 38 *TRANSACT. GROT. SOC'Y* 77 (1952); Lalive, *International Organization and Neutrality*, 24 *BRIT. Y.B. INT'L L.* 72 (1947); Taubenfeld, *International Actions and Neutrality*, 47 *AM. J. INT'L L.* 377 (1953). The possibility of permanent neutrality for a member also exists, where such neutrality is accepted by the permanent members, as in the case of Austria. See Kunz, *Austria's Permanent Neutrality*, 50 *AM. J. INT'L L.* 418 (1956); Verdross, *Austria's Permanent Neutrality and the United Nations Organization*, 50 *id.* at 61.

169. Cf. Jessup, *Today and Tomorrow*, in 4 *NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW* 12-13 (1936); Morgenthau, *Neutrality and Neutralism*, 11 *Y.B. OF WORLD AFFAIRS* 47, 52, 53 (1957). In chapter two, Professor Jessup makes the point that economic motives and interests frequently underlie the respective claims and countering claims of belligerents and neutrals. See also CASTRÉN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 425-27 (1954).

charter, may be construed to authorize a state to appraise the lawfulness of each belligerent's cause and accordingly to discriminate in its demands.¹⁷⁰ In such decision and discrimination, the effects of any resolution urged on the values of a world public order honoring freedom need not be left unconsidered.

Regulation of the Conduct of Hostilities

In the regulation of hostilities, the patterns of specific controversy to which authority must respond are established by the reciprocal claims of the participants to apply violence against each other's bases of power, by employing certain combatants and weapons, in certain areas of operation, against certain objects of attack.

For resolving such controversies, authoritative decision-makers bring to bear the familiar complementary policies of military necessity and humanitarianism.¹⁷¹ In all the many varying contexts, these polar policies struggle for recognition and ascendancy or compromise: permissible destruction is characterized in such technical terms as "combatant," "unprivileged belligerency," "military objective," "permissible weapon," "war booty" and "legitimate reprisals"; nonpermissible destruction is described in such terms as "noncombatants," "civilian immunity," "open city," "nonmilitary objective" and "unlawful confiscation."

The key concept in this structure of doctrine is of course that of military necessity, which affects both the formulation of general prescriptions and their concrete application in particular instances. In a form of statement which adds a few words to the general principle of economy in the exercise of force, this concept may be said to authorize such destruction, and only such destruction, as is necessary, relevant and proportionate to the prompt realization of legitimate belligerent objectives.¹⁷² Since it is not feasible, as a practical matter, to quantify

170. See MARTIN, *COLLECTIVE SECURITY: A PROGRESS REPORT* 146 (1952); 2 OPPENHEIM-LAUTERPACHT 652; Komarnicki, *The Problem of Neutrality Under the United Nations Charter*, 38 *TRANSACT. GRO. SOC'Y* 77, 85-86 (1952); Woolsey, *The Uniting for Peace Resolution of the United Nations*, 45 *AM. J. INT'L L.* 129, 134 (1951). Even the failure of the Assembly to arrive at a recommendation need not mean lack of formal authoritative bases for permissive participation and discrimination. Residual bases may be available in art. 51 of the charter and the Pact of Paris. See 2 OPPENHEIM-LAUTERPACHT 651; Lalive, *supra* note 168, at 81-82; Komarnicki, *The Place of Neutrality in the Modern System of International Law*, 80 *HAGUE RECUEIL* 399, 480-82 (1952).

171. Explicit recognition of the complementary, rather than contradictory, character of these principles may be found in DEPARTMENT OF THE NAVY, *LAW OF NAVAL WARFARE* §§ 220(a), (b) (1957), quoted in TUCKER, *op. cit. supra* note 168, at 369 n.11. See also Dunbar, *The Significance of Military Necessity in the Law of War*, 67 *JURID. REV.* 201, 212 (1955).

172. Comparable formulations abound in the literature. See, e.g., HALL, *INTERNATIONAL LAW* 83 (Higgins ed. 1924): "When violence is permitted at all, the amount which is permissible is that which is necessary to attain the object proposed. The measure of the violence which is permitted in war is therefore that which is required to reduce the enemy to terms." 3 PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 78 (3d ed. 1885):

and precisely to measure the amount of destruction necessary, the fundamental policy embraced in this concept must be modestly expressed as the minimizing of unnecessary destruction of values. Because the law of war is designed for the benefit of all mankind and not merely of certain belligerents, most observers agree, further, that this most basic policy of the minimum unnecessary destruction of values applies to all forms of hostilities, irrespective of the characterization of the resort to violence as lawful or unlawful,¹⁷³ of the formal character of one or the other participant as an intrastate rebel group or unrecognized government or authority,¹⁷⁴ or an international organization,¹⁷⁵ of the intensity

"The great principle upon which all these rules are framed, is that of, on the one hand, compelling the enemy to do justice as speedily as possible, and, on the other hand, of abstaining from the infliction of all injuries both upon the subjects of the enemy, and upon the Government and subjects of third powers, which do not, certainly and clearly, tend to the accomplishment of this object." BIRKENHEAD, *INTERNATIONAL LAW* 218 (Moelwyn-Hughes ed. 1927): "The general principle must always be observed that only such violence is permissible as is reasonably proportionate to the object to be attained."

173. Lauterpacht, *Rules of War in an Unlawful War*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 89 (Lipsky ed. 1953); Lauterpacht, *The Limits of the Operation of the Laws of War*, 30 *BRIT. Y.B. INT'L L.* 206 (1953). In the first article, Judge Lauterpacht expressed certain qualifications as to the applicability of the law of war in an unlawful war, at least one of which—that only "laws of warfare in the strict sense of the word," as distinguished from rules relating to the acquisition of title to property, are so applicable—he discarded in the second article. See also TUCKER, *op. cit. supra* note 168, at 4-11; Kunz, *The Law of War*, 50 *AM. J. INT'L L.* 313, 317-19 (1956). As to the decisions of the war crimes tribunals on this point, see, e.g., *Trial of List*, 8 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 34, 59 (1949); *Trial of Altstotter*, 6 *id.* at 1, 52 (1948); *Trial of Von Leeb*, 12 *id.* at 1, 123-26 (1949); *Re Christiansen*, case No. 121, *DUTCH SPECIAL COURT AT ARNHEM, ANNUAL DIGEST* (1948).

174. While in traditional law, recognition by the legitimate government of the belligerency of the rebel groups has been regarded as a formal condition for the applicability of the law of war, there is recent awareness that the fundamental policy of minimum unnecessary destruction of values is independent, in its application, of a formal recognition of belligerency. Thus, although the 1949 Geneva Conventions do not purport to be applicable as such in civil wars, they set forth minimum standards to be observed by each party to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Art. 3 of all four Conventions.

Again, art. 13 of the Wounded and Sick Convention, and art. 4 of the Prisoners of War Convention, include, among the persons entitled to their protection, "members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power."

175. See JESSUP, *A MODERN LAW OF NATIONS* 213 (1948); 2 OPPENHEIM-LAUTERPACHT 224-25; Baxter, *The Role of Law in Modern War*, 47 *PROC. AM. SOC'Y INT'L L.* 90 (1953); Kunz, *The Law of War*, 50 *AM. J. INT'L L.* 313, 319-20 (1956). See also Taubenfeld, *International Armed Forces and the Rules of War*, 45 *AM. J. INT'L L.* 671, 676-79 (1951), who, however, makes the cryptic statement that "all in all, it cannot be said that the laws of war, in their old form, are *prima facie* binding on international forces on a strictly legal basis." Compare Wright, *The Outlawry of War and the Law of War*, 47 *AM. J. INT'L L.* 365, 374-75 (1953); Committee on Study of Legal Problems of the United Nations, *Should the Laws of War Apply to United Nations Enforcement Action?*, 46 *PROC. AM. SOC'Y INT'L L.* 216 (1952).

of the violence and its extension in time and space;¹⁷⁶ and of recognition or nonrecognition of the existence of a technical state of war.¹⁷⁷

The basic difficulty in this fundamental policy principle of military necessity is reasonably obvious. It contains an inherent and infinitely manipulatable obscurity in its reference to the "legitimate" objectives of violence.¹⁷⁸ The basic principles and most of the prescriptions on the management of hostilities were first formulated before the public order of the world community, by imposing a prohibition upon resort to violence and distinguishing between permissible and nonpermissible violence, began to seek to regulate the objectives of violence. Thus, in their formulations of the principle of military necessity, commentators have frequently referred to belligerents' objectives in terms of military aims so expansive as to cover every possible objective: "the overpowering and utter

176. Kunz, *The Law of War*, 50 AM. J. INT'L L. 313, 321 (1956); see GROB, *THE RELATIVITY OF WAR AND PEACE* 217-18 (1949).

177. Article 2 of all four 1949 Geneva Conventions declares the Conventions applicable to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." This provision apparently does not cover a situation, such as the Sino-Japanese hostilities in 1937, where both parties refuse to acknowledge the existence of a state of war. See Kunz, *The Geneva Conventions of August 12, 1949*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 305 (Lipsky ed. 1953). But see Yingling & Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 394 (1952).

178. The obscurity is rooted in the difficulty in distinguishing the total political objectives of a belligerent in resorting to coercion from specific military objectives sought in the course of conducting hostilities. The total political purposes of a belligerent may be characterized as impermissible in the sense that the initial resort to coercion is regarded as unlawful. This does not mean, however, that authoritative decision-makers either do or should deny to such a belligerent, because of the nonpermissible character of its total purposes, the application of the principle of military necessity in determining the lawfulness or unlawfulness of specific acts done during the course of hostilities. Compare Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365, 371 n.28 (1953). The problem of determining whether a state has by its total political purposes and acts breached the community prohibition upon resort to violence is very different from the problem of determining the responsibility of individuals for specific acts of destruction. Though failing in its efforts to prevent unlawful resort to violence, the general community of states may still seek to secure a policy of minimizing unnecessary destruction of values during hostilities and, for that end, impose the same standards of humanitarianism upon both the belligerent exercising lawful defense or engaging in police action and the aggressor-belligerent. In some limited contexts of active combat, a distinction may be drawn, in appraising the necessity for specific acts of violence, between total political purposes and specific limited operational military objectives, such as the capture and occupation of a particular locality and the advance to or retreat from a particular line or zone, and necessity measured against those specific limited military objectives. See, e.g., *United States v. List*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 759, 1295-97 (1949); *United States v. Von Leeb*, *id.* at 462, 541, involving charges of unnecessary devastation, where the necessity for the devastation was measured against the specific military purpose of successful retreat in the face of advancing Russian forces; the accused were found not guilty. In other contexts, however, the distinction becomes difficult to make. Consider the continuing debate about the legal justification of strategic bombardment and of the decision to drop the atomic bomb on Hiroshima and Nagasaki.

defeat of the enemy,"¹⁷⁹ "complete surrender,"¹⁸⁰ "complete submission"¹⁸¹ or "victory."¹⁸² But the world arena presents little agreement on the legitimate objectives of coercion and violence and substantial agreement is unlikely so long as rival systems of world public order, totalitarian and free, compete for supremacy. The further clarification of the detailed limits of permissible violence in the conduct of hostilities must await still further clarification of permissible objectives in resort to violence.¹⁸³

The best that can be done by way of clarification is to review the compromises between military necessity and humanitarianism which earlier authoritative decision-makers have effected in the various types of controversies arising out of the conduct of hostilities and to suggest alternatives in compromise which may be more compatible with the values of a free society in the world arena probably emerging. Detailed clarification could extend into volumes; this essay can only touch quickly a few major points.

Combatants

Decision-makers have sought to protect combatants against surprise¹⁸⁴ and to limit the involvement of individuals in war and their subjection to direct

179. 2 OPPENHEIM-LAUTERPACHT 225.

180. Downey, *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251, 254 (1953).

181. 3 HYDE, INTERNATIONAL LAW 1801 (2d rev. ed. 1945). The old War Department Field Manual, FM 27-10, DEPARTMENT OF WAR, RULES OF LAND WARFARE §§ 22-23 (FM 27-10, 1940), used the same term. The new FM 27-10, DEPARTMENT OF THE ARMY, LAW OF LAND WARFARE § 3 (FM 27-10, 1956), states that "The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes." DEPARTMENT OF THE NAVY, THE LAW OF NAVAL WARFARE § 220(a) (1957), on the other hand, speaks of military necessity as permitting "a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life and physical resources."

182. STONE, LEGAL CONTROLS 351.

183. It is obvious enough that any particular quantum of instrumental violence can be appraised as necessary or unnecessary, not *in vacuo*, but only in context and in relation to a determined purpose or objective. If characterization of violence in terms of lawfulness or unlawfulness depends upon appraisal of necessity, the purpose or objective must be relevant in that characterization. The problem of indicating the purpose or objective against which necessity is to be measured, however, is not eliminated by frequently difficult distinctions between military purposes and ultimate political purposes. Military purposes are not fixed constants; they are, at least in broad outline, determined and controlled by the character and scope of the political purposes of the belligerent. See note 92 *supra*. The narrower or broader the scope of political objectives characterized as permissible, the narrower or broader will be the legitimate military purposes; and as legitimate military purposes are narrowed, the quantum of violence necessary for their achievement, and hence, in general principle, lawful, tends to diminish. See note 178 *supra*; cf. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 49 (1957).

184. Belligerents are, it is said, entitled to know who their enemies are. See THE GERMAN WAR BOOK 61 (Morgan transl. 1915); Cowles, *Recent Practical Aspects of the Laws of War*, 18 TUL. L. REV. 121, 133 (1943). See also WINFIELD, THE FOUNDATIONS AND FUTURE OF INTERNATIONAL LAW 70 (1941).

attack¹⁸⁵ by confining permissible combatancy, carrying with it a right to admission to prisoner-of-war status upon capture, generally to a well-defined category of individuals—members of the public armed forces of participating states exhibiting certain prescribed indicia. The realism of this policy may differ as future wars are total or limited.

Areas of Operation

The delimitation of permissible areas of operation is based on deference to claims of nonparticipant states to "inviolability" of their territory, waters and airspace. However, the nonparticipant's tolerance of, or inability to prevent, unilateral violation of its territory may convert such territory into a permissible area of operation.¹⁸⁶ The recent Geneva Conventions and contemporary discussions of limited war raise the possibility of establishing, by mutual agreement, zones of immunity in the territories of participants for the special protection of certain classes of individuals.¹⁸⁷ The policy of limiting the involvement of states and individuals in war is here again evident.

Weapons

The permissible or nonpermissible character of the employment of a particular weapon or mode of attack has in broad principle been made by decision-makers to turn upon the proportionality between the deprivation of values incidental to the use of the weapon or mode of attack and the military advantage accruing to the belligerent user.¹⁸⁸ As already mentioned, only weapons whose use has resulted in incidental value deprivations obviously superfluous and grossly disproportionate to the ensuing military advantage have been characterized as

185. The immunity from direct attack accorded by traditional law to the noncombatant individual assumed that that individual was a harmless nonparticipant. FENWICK, *INTERNATIONAL LAW* 554 (3d ed. 1948); HALL, *INTERNATIONAL LAW* (Higgins ed. 1924); 3 HYDE, *INTERNATIONAL LAW* 1799 (2d rev. ed. 1945).

186. See 3 HYDE, *INTERNATIONAL LAW* 2337-39, 2340-41 (2d rev. ed. 1945); 2 OPPENHEIM-LAUTERPACHT 678-80; SMITH, *THE LAW AND CUSTOM OF THE SEA* 145 (2d ed. 1950). See also *Coenca Brothers v. German State*, case No. 389, *ANNUAL DIGEST* (1927-28); *The Anna Maria*, case No. 174, *ANNUAL DIGEST* (1946); *The Tinos and other vessels*, in GARNER, *PRIZE LAW DURING THE WORLD WAR* 228-30 (1927). The last two cases involved conversion of neutral waters into a permissible area of operations for purposes of exercise of the right of capture.

187. See art. 23 of the Wounded and Sick Convention, arts. 14, 15 of the Civilians Convention, and the Draft Agreements relating to Hospital Zones and Localities annexed to both conventions.

188. HALL, *INTERNATIONAL LAW* 635-36 (Higgins ed. 1924), who also observed that "the amount of destruction or suffering which may be caused is immaterial if the result obtained is conceived to be proportionate"; GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 282 (1920); 3 HYDE, *INTERNATIONAL LAW* 1813-18 (2d rev. ed. 1945); SPAIGHT, *WAR RIGHTS ON LAND* 76-77 (1911). Conventional expression of the general principle involved is found in the Declaration of St. Petersburg of 1868 and art. 23(e) of the Hague Regulations.

nonpermissible and effectively outlawed.¹⁸⁹ Since such weapons are by definition militarily inefficient—value deprivations necessitate the expenditure of force—the compromise in favor of military necessity is obvious.

In particular, it may be noted that the argument about the supposed non-permissible character of nuclear weapons is derived principally by analogy from earlier prescriptions about poisonous gas, poisoned arms and other weapons causing disproportionate suffering.¹⁹⁰ Analogies are important, however, only so far as the policies they suggest are relevant; and analogies here suggest only the requirements, again, of compromise between military necessity and humanitarianism. In the context of the contemporary world arena, a very strong case would have to be made to establish that no possible uses of nuclear and thermonuclear weapons could conceivably be within the scope of military necessity for objectives legitimate by standards making reference to human dignity. The very difficulty in securing explicit agreement about the effective control of such weapons must suggest expectations of their military effectiveness and the perils of relying upon any alleged limitations derived from analogies. The rational position would appear to be that the lawfulness of any particular use or type of use of nuclear and thermonuclear weapons must be judged, like the use of any weapon or technique of warfare, by the level of destruction effected—in other words, by its reasonableness in the total context of a particular use.¹⁹¹

Objects of Attack

Under traditional doctrines, belligerents have been granted a wide discretion in selecting and attacking the opponent's bases of power—human, material or institutional—which, in substantial degree, are being used for belligerent purposes. When the purposes of attack have been achieved, however, and the

189. See text at note 111 *supra*. The determination of what value deprivations may be designated as "incidental" may, of course, present perplexing difficulties. These difficulties include the demarcation of the boundaries of a physical target and the variable capability of weapons and modalities of attack for confining destruction within such boundaries. Where the target selected is not possessed of spatial dimensions, such as "enemy morale," the possibility of determining the incidental character of deprivations may reach the vanishing point.

190. See Sack, *ABC—Atomic, Biological, Chemical Warfare in International Law*, 10 *LAW GUILD REV.* 161 (1950). STONE, *LEGAL CONTROLS* 343, states that "radio-active substances are clearly 'poisonous' or at least 'analogous substances' in any functional sense" and that they "in a sense, cause injuries and inevitable death beyond the needs of military operations." See also SPAIGET, *AIR POWER AND WAR RIGHTS* 275-76 (3d ed. 1947); Moore, *The Present State of International Law*, in *REPORT OF THE 46TH CONFERENCE, INTERNATIONAL LAW ASSOCIATION* 12, 31 (1954).

191. Cf. TUCKER, *op. cit. supra* note 183, at 55, who distinguishes between uses "against military objectives in the proximity of the non-combatant population" and uses "exclusively against military forces in the field or naval forces at sea." It may also be noted that the yield of nuclear explosives is subject to control and that low-yield weapons adapted to tactical uses are now commonplace. See REINHARDT & KINTNER, *ATOMIC WEAPONS IN LAND COMBAT* (1953). We share the common humanitarian hope that such weapons may eventually be outlawed. The humanitarian realist must recognize, however, that successful outlawry will depend upon consensus and effective multilateral implementation.

objects of attack deprived of their character as effective bases of enemy power, the principle of humanitarianism becomes applicable and makes further violence, already militarily unnecessary, impermissible.¹⁹² Such is the principal burden of the recent Geneva Conventions.

Special questions have sometimes been raised about the law of air warfare—in particular, about legal limitations on strategic bombardment—in connection with this problem of permissible objects of attack. While the determination of what, in specific contexts, may legitimately be regarded as a military objective involves some difficulties, air warfare would not appear to present any unique issues: the purpose and level of destruction obtained are of prime importance to legal policy, not the modality of delivery. The advent of ballistic missiles, which can be launched from the surface or beneath the surface of land or sea and from the air, will perhaps serve to underscore the irrelevance of traditional distinctions about modality of delivery.¹⁹³ It is possible, nevertheless, that all modalities of destruction, not merely strategic air power, may remain subject to one overriding inhibition which Judge Lauterpacht has described as “an absolute rule of law.” He writes:

“[I]t is in [the] prohibition, which is a clear rule of law, of intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to the licence and depravity of force. . . . It is clear that admission of a right to resort to the creation of terror among the civilian population as being a legitimate object *per se* would inevitably mean the actual and formal end of the law of warfare. For that reason, so long as the assumption is allowed to subsist that there is a law of war, the prohibition of the weapon of terror not incidental to lawful operations must be regarded as an absolute rule of law.”¹⁹⁴

The essentially modest character of this “absolute rule” needs no underlining.¹⁹⁵

192. Arts. 23(c), (d) of the Hague Regulations; HALL, *INTERNATIONAL LAW* 473 (Higgins ed. 1924); 2 OPPENHEIM-LAUTERPACHT 338; 2 WHEATON, *INTERNATIONAL LAW* 165 (Keith ed. 1944). On the criminality of refusing quarter, see *The Abbaye Ardenne Case*, 4 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 97 (1948); *Trial of Von Ruchteschell*, 9 *id.* at 83 (1949).

Even Clausewitz, who is not commonly accused of being a humanitarian, wrote: “The military forces must be destroyed, that is to say, put into such a condition that they can no longer continue to fight. We take this opportunity to explain that . . . the expression ‘the destruction of the enemy’s military forces’ is to be understood only in this sense.” VON CLAUSEWITZ, *ON WAR* 19 (Jolles transl. 1943).

193. It may be, however, that intercontinental ballistic missiles when combined with high-yield dirty thermonuclear warheads cannot, with the present low capabilities of guidance systems for precision, be used without forfeiting all possibilities of keeping some limits on destruction. Such weapon systems may reduce the conception of purpose and level of destruction—reasonableness in the total context of particular uses—to marginal utility.

194. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 *BRIT. Y.B. INT’L L.* 360-69 (1952).

195. One difficulty is that, conceding the lawfulness of certain political and strategic objectives, certain forms of “terrorization,” such as terror bombing, when carried out

Reprisals and Superior Orders

A more comprehensive presentation than can be attempted here would survey the detailed policies and decisions on the various defenses which an individual accused of violating the law of war may interpose to shield himself from criminal punishment—such as “military necessity” in its most specific sense, reprisals, official capacity and superior orders. Perhaps reprisals and superior orders, however, merit a few words.

Reprisals may be described as violent measures which would otherwise be unlawful, invoked as a response to and a sanction against the prior unlawful violence of the enemy. While reprisals have frequently been the subject of extravagant claims, it is a mistake to regard the doctrine of reprisals as a denial of law or of the possibility of law.¹⁹⁶ The world public order, on the contrary, authorizes reprisals as a last desperate measure to secure law-conforming behavior. The first effort of such order is to prevent change by violent procedures; when that effort fails, resort is next had to the law of war to minimize the inevitable destruction of values; when observance of the law of war breaks down, the only immediate recourse of the injured is to reprisals in the hope of creating expectations in the enemy of the desirability of a return to observance of that law. Other decision-makers may, of course, have an opportunity to review the judgment of the acting belligerent as to the propriety of the occasion and proportionality of the response in reprisal, but in a world arena, organized as at present, no effective alternative to such immediate administration of reciprocities in benefit and injury is apparent.

The somewhat vague formulation of principle governing superior orders represents what clearly is a compromise between the requirements of maintaining military discipline in armies¹⁹⁷ and the necessity of securing enforcement of law through the imposition of individual criminal responsibility. Were both official capacity or “act of state” and superior orders, as formulated in

under certain circumstances and within certain limitations, might conceivably result in less aggregate destruction of values than other alternatives in the application of violence. It has also been difficult in practice to distinguish the effects of the bombing of cities for purposes of destroying military installations and transportation and communications systems from those of bombing for purposes of terror. Where nuclear explosives are used, it may be even more difficult to make this distinction.

196. It comes too close to such a view to say, as Professor Hyde did, that “when opposing belligerents reciprocate in dealing with each other as the law forbids, their conduct is extra-legal and finds no proper place in a system of law purporting to govern the conduct of States at war.” 3 HYDE, INTERNATIONAL LAW 1841 (2d rev. ed. 1945). See also STONE, LEGAL CONTROLS 354, where the sweeping statement is made that belligerents’ duty to observe the law of war is “not absolute but conditional” on reciprocation. Compare Westlake’s view that the unlawful acts of its enemy do not loose a belligerent from law but entrust it with the right to redress of a violated obligation. 2 WESTLAKE, INTERNATIONAL LAW 114-15 (1907).

197. See *Trial of Von Leeb*, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 73 (1949).

their most absolute assertions,¹⁹⁸ unconditionally accepted as absolving defenses, there would be little left of a law of war; for superior orders would result in an indefinite regressive transmission of responsibility until the very apex of the authority and control structure in the belligerent state is reached,¹⁹⁹ while "act of state" would serve to shield those who stand at the top of the structure. The present flexible doctrine has at least the virtue of authorizing a decision-maker to take into account in any particular situation relevant variables, such as the patency or obscurity of the illegal character of the order, the relative positions in the hierarchy of command of both the superior issuing the order and the subordinate complying with it, the time of the commission of the offense and the specific tactical military situation at such time.²⁰⁰

Belligerent Occupation

In this context, one of the participants has so far succeeded in his active exercise of violence as to acquire, establish and solidify effective control over portions of the territory of the other. The reduction of enemy territory and of its people and resources to the firm possession of a belligerent deprives the enemy of their use as effective bases of power. The occupant then seeks to police and utilize the captured bases of power so as to sustain and augment his own means of carrying on combat in still unoccupied areas. In this time period, after successful invasion but before final victory, the expectations of all parties about future permanent authority in the area are obscure; but some temporary authority must be conceded, and the inhabitants, for whom life must go on, present against the occupant counterdemands for continuity and minimum dislocation of their value processes.

Here again, as in the context of active combat, the basic policy consistently sought by authoritative decision-makers is an equilibrium between the requirements of military necessity and humanity, or the minimum unnecessary destruction of values. The applicable prescriptions on the one hand concede authority to the occupant to safeguard his military security by policing the occupied area and punishing inhabitants who commit hostile acts directed against him and,

198. See, e.g., Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L L. 407, 416-18 (1943); Schick, *War Criminals and the Law of the United Nations*, 7 U. TORONTO L.J. 27, 45 (1947-48).

199. See *Trial of Von Leeb*, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 71 (1949); Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 70 (1944). See also GLUECK, *WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT* 141 (1944); Berger, *The Legal Nature of War Crimes and the Problem of Superior Command*, 38 AM. POL. SCI. REV. 1203 (1944); Sack, *Punishment of War Criminals and the Defence of Superior Orders*, 60 L.Q. REV. 63 (1944); Wright, *War Crimes Under International Law*, 62 L.Q. REV. 40, 45 (1946).

200. See, e.g., *Trial of Von Leeb*, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 71-74 (1949); *Trial of Masuda*, 1 *id.* at 71 (1947), 5 *id.* at 18-19 (1948); *Trial of Greifelt*, 13 *id.* at 1, 69 (1949); *Trial of Milch*, 7 *id.* at 42 (1948). See also Dunbar, *Some Aspects of the Problem of Superior Orders in the Law of War*, 63 JURID. REV. 234, 251, 253-55, 261 (1951).

on the other hand, require him to respect the lives, loyalties and, in general, the human dignity of the inhabitants. In like manner, while the relevant prescriptions permit the occupant to secure the satisfaction of his military needs out of the resources and labor of the occupied territory, they simultaneously restrict the permissible extent and character of that utilization in deference to the domestic needs and loyalties of the inhabitants. The familiar technical terms for incorporating one set of policies include "belligerent occupation," "maintenance of *vie publique*," "war treason" and "requisitions and contributions"; the opposing policies are expressed by "premature annexation," "usurpation of sovereignty," "unlawful alteration of fundamental institutions," "unlawful subversion of allegiance" and "disproportionate requisitions and contributions."

For some illustration of the details of the continuing complementarity of policy and prescription, some of the more important provisions of the 1949 Geneva Civilians Convention, which supplements the 1907 Hague Regulations in concise formulation of both inherited principles and new prescriptions, may be mentioned. The Civilians Convention prohibits the cruder forms of violence and brutality, such as extermination, murder, torture, corporal punishment, mutilation and scientific experiments;²⁰¹ vicarious punishment, such as collective penalties, reprisals against inhabitants and their property and the taking of hostages;²⁰² and individual deportations and mass forcible transfers of the population to the home country of the occupant.²⁰³ The Convention enjoins respect for "the persons [of the inhabitants], their honour, their family rights, their religious convictions and practices, and their manners and customs" and demands special protection for women against rape, enforced prostitution and any form of indecent assault.²⁰⁴

At the same time, however, the Convention permits the occupant to take such measures of control and security in regard to the inhabitants as may be "necessary as a result of the war."²⁰⁵ For "imperative military reasons," for instance, the occupant may require the total or partial evacuation of a given area²⁰⁶ and "for imperative reasons of security," he may confine the inhabitants to assigned residences or intern them.²⁰⁷ More generally, the occupant is permitted by the Convention to subject the inhabitants to regulations essential to the security of the occupant and the members and property and communications of the occupation forces or administration,²⁰⁸ and to punish with imprison-

201. Art. 32. For general surveys of the Civilians Convention, see Gutteridge, *The Protection of Civilians in Occupied Territory*, 5 Y.B. OF WORLD AFFAIRS 290, 297-308 (1951); Gutteridge, *The Rights and Obligations of an Occupying Power*, 6 *id.* at 149, 160-69 (1952).

202. Arts. 33, 34.

203. Art. 49, para 1.

204. Art. 27.

205. *Ibid.*

206. Art. 49, para. 2.

207. Art. 78.

208. Art. 64, para. 2.

ment or death, after judicial proceedings complying with certain minimum procedural standards of fairness,²⁰⁹ those who violate such regulations.

Among the more pressing problems in this area is the treatment of inhabitants who join guerrilla or partisan forces or resistance movements. Guerrilla forces and their operations have in the past been characterized by mobility, stealth and secrecy, and an ability to sink at will into the protective anonymity of the civilian population.²¹⁰ It is these characteristics of guerrilla techniques that occupants have found vastly annoying, dangerous and difficult to counter. Presumably because of the peculiar danger to the occupant's security posed by guerrilla forces, both traditional law and the Geneva Civilians Convention have left the occupant free to visit death on captured inhabitants who are members of such forces.²¹¹ All that the Civilians Convention does is to require a previous judicial determination of the fact of participation in guerrilla activities.²¹²

The 1949 Geneva Prisoners of War Convention does now include among the categories of captured persons entitled to prisoner-of-war treatment members of "organized resistance movements belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied."²¹³ The revolutionary character of this rule is, however, less real than apparent. For the same convention requires members of organized resistance movements to exhibit all the indicia of legitimate combatancy—responsible command; a fixed, distinctive, recognizable sign; open carrying of arms; and observance of the laws of war. Compliance with all these requirements without members of guerrilla or resistance movements discarding their character as

209. Arts. 65-77 constitute a rough and ready code of criminal law and procedure applicable in cases of violations of the occupant's security legislation.

210. For description of guerrilla techniques and tactics, see LEVY, *GUERRILLA WARFARE* (1942); MIKSCH, *SECRET FORCES: THE TECHNIQUE OF UNDERGROUND MOVEMENTS* chapters 2, 3 (1950).

211. The tribunal in *Trial of List*, 8 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 34, 58 (1949), asserted that "in no other way can an army guard and protect itself from the gaddy tactics of such armed resistance" and that "members of such resistance forces must accept the increased risks involved in this mode of fighting." The war crimes tribunals commonly held that civilians not exhibiting the indicia set forth in art. 1 of the Hague Regulations were not permissible combatants and that their execution, as such, did not constitute a war crime. See, e.g., *Trial of Von Leeb*, 12 *id.* at 85-86 (1949); *Trial of Ohashi*, 5 *id.* at 27-29 (1948); *Trial of Bruns*, 3 *id.* at 21 (1948).

212. See arts. 64-75. Article 68 does limit the imposition of the death penalty to cases of espionage, "serious acts of sabotage" and "intentional offenses which have caused the death of one or more persons," and adds the condition that "such offenses were punishable by death under the law of the occupied territory in force before the occupation began."

The requirement of judicial determination of participation in guerrilla activities had been laid down by the war crimes tribunals. The execution of persons charged with sabotage and guerrilla warfare, without such previous determination or trial, was punished as a war crime. See, e.g., *Trial of Shinohara*, 5 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 32 (1948); *Trial of Motosuke*, 13 *id.* at 129-30 (1949); *Trial of Hisakasu*, 5 *id.* at 70 (1948); *Trial of Altstotter*, 6 *id.* at 96-104 (1948).

213. Art. 4(A)(2).

secret underground forces seems difficult indeed.²¹⁴ Thus, whether a consistent application of the fundamental community policy of minimizing unnecessary destruction of values would not require the reassessment of the position in law of resistance movements, and possibly their legitimation and admission of members to prisoner-of-war status, still appears open to question. Experience in previous major wars would seem to point both to the military effectiveness of resistance movements in immobilizing and compelling dispersion of occupation troops, and in disrupting the highly complex logistics of modern war, and to the minimal deterrent value of expectations of death upon capture.²¹⁵ If the military utility of partisan war does substantially outweigh the value deprivations incident to capture and if the threatened value deprivations are, in point of fact, ineffective to secure the occupant against guerrilla attacks by inhabitants, the assertion might be made with some degree of plausibility that such deprivations of values are unnecessary and pointless.²¹⁶ The realism of any new line of compromise between the competing policies will, of course, differ as future wars are total or limited.

Prisoners of War

Since prisoners of war constitute bases of enemy power already effectively neutralized by capture, the further direct application of violence against them

214. Cf. STONE, *LEGAL CONTROLS* 565. See also Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 *BRIT. Y.B. INT'L L.* 323, 327-28, 336-37 (1951); Ford, *Resistance Movements in Occupied Territory*, 3 *NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT* 355, 379 (1956).

215. See, e.g., FURNISS, *AMERICAN MILITARY POLICY* 413-23 (1957); STONE, *LEGAL CONTROLS* 564; Donovan, *Secret Movements, Espionage and Treachery*, in *MODERN WORLD POLITICS* 308, 324 (Kalijarvi ed. 1953); Baxter, *So-Called "Unprivileged Belligerency": Spies Guerrillas, and Saboteurs*, 28 *BRIT. Y.B. INT'L L.* 323, 334 (1951); Kueder, *"Territorial War": The New Concept of Resistance*, 32 *FOREIGN AFF.* 91 (1953); Papagos, *Guerrilla Warfare*, 30 *id.* at 215 (1952). For an account of the guerrilla or resistance movements in occupied Europe during the second World War, see *HITLER'S EUROPE, SURVEY OF INTERNATIONAL AFFAIRS 1939-1946*, 327-37 (Italy), 419-34 (France), 561-68 (Poland), 650-72 (Yugoslavia) (Royal Institute of Int'l Affairs 1954). See also DALLIN, *GERMAN RULE IN RUSSIA 1941-1945: A STUDY IN OCCUPATION POLICIES* (1957). The very intensity and widespread character of guerrilla war in the occupied countries testify to the weak deterrent effect, if any, of execution and torture upon capture. Neither the German nor the Japanese occupation forces were particularly lenient with captured guerrillas or partisans. The current experience of the French armies in Algeria and their continuing inability—despite fierce repressive measures—to stop Algerian guerrilla rebels tend to sustain the point made.

216. Of course, the more effective guerrilla warfare becomes the more insistent becomes the occupant's interest in effectively combatting it. What we suggest is that denial of prisoner-of-war rights may be an uneconomical and inefficient way of dealing with guerrillas. Cf. the observation in STONE, *LEGAL CONTROLS* 567 n.25, that "a belligerent may often find it preferable to offer guerrillas the privileged status of prisoners of war if they surrender, rather than to expend the resources necessary to overcome and destroy them by force." See also VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 52 (1957); Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 *BRIT. Y.B. INT'L L.* 323, 337 (1951).

would result in a destruction of values without military significance.²¹⁷ Nonetheless, the captor-belligerent does assert claims to exercise coercive control over prisoners of war for certain purposes, such as the maintenance of his military advantage through their continued neutralization and the utilization of their labor. On the other hand, the captive personnel as well as their home state make countering demands for enjoyment of certain minimum values during captivity.

That the prescriptions applicable here, codified in the 1949 Geneva Prisoners of War Convention, represent once more an attempted balancing of the same polar policies sought by authoritative decision-makers in other contexts is clear. The Geneva Convention seeks to extend the humanitarian benefits of prisoner-of-war treatment by attempting to catch as many as possible in its categorization of those entitled to such treatment. The categories include, aside from members of the regular armed forces, militias, volunteer corps and guerrillas who exhibit the prescribed marks of permissible combatants, the armed forces of an unrecognized power, civilian contractors and aircraft crews, war correspondents, members of labor and welfare units, crew members of merchantmen and civil aircraft and participants in a *levée en masse*.²¹⁸ But deferring to the security needs of the captor power, the Convention leaves it free to deny prisoner-of-war status to spies, saboteurs, deserters from its own forces, traitors and perhaps parole violators. Similarly, while the Convention requires that prisoners of war must at all times be humanely treated and protected from mental and physical violence and immunized from reprisals,²¹⁹ prescribing in minute specification the details of the required standard of treatment, prisoners of war are declared subject to the laws, regulations and orders of the captor power, violation of which renders them liable to disciplinary or penal, judicial sanctions.²²⁰ Again, though the Convention obliges the captor power to respect the loyalties and human dignity of the captured personnel, it permits the captor to augment his resources by exacting compulsory labor from prisoners of war for certain projects which, while not of a distinctly military character, are of substantial value to his over-all war effort.²²¹

Among the problems of contemporary interest involving prisoners of war is that of compulsory repatriation. The Convention states that captured personnel "shall be released and repatriated without delay after the cessation of hostilities."²²² During the Korean armistice negotiations, a very large number

217. Under the general principle of military necessity, as that principle was formulated above, there can, of course, be no necessity for killing prisoners of war who have ceased to be effective units of enemy power. It is perhaps for the purpose of shielding this rule of general protection from eroding exceptions that operational necessity which may in varying degree be generated by pressure from forces other than the captured personnel is not accepted as a defense to a charge of killing such prisoners. See, e.g., *Trial of Thiele and Steinert*, 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS 56 (1948). See also DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE ¶ 85 (FM 27-10, 1956).

218. Art. 4.

219. Art. 13.

220. Art. 82.

221. Arts. 49-50.

222. Art. 118.

of communist prisoners held by the United Nations Command refused to be repatriated to North Korea and the People's Republic of China. Mr. Vishinsky demanded the repatriation of each and every prisoner including the unwilling and insisted vehemently that article 118 was a "clear" and "categorical formula," a "principle of international law," which needed no interpretation.²²³ He pointed at the same time to article seven, which provides that prisoners "may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention." The position officially taken by the United Nations was that neither the general prescriptions of international law nor the particular ones of the Geneva Convention required the United Nations forcibly to repatriate prisoners in fact unwilling to go home. The submission has been made that this stand is sustained by a realistic conception of the nature and functions of the familiar principles of interpretation and by the independent right of states to grant asylum and that it is the conclusion compelled by a deep commitment to humanitarianism and the goal values of free world society.²²⁴ Such submission seems persuasive. No set of words can, apart from context, have any one "clear," "unambiguous" or "literal" meaning that of itself compulsorily determines decision, whatever the particular circumstances may be. A rational theory of interpretation must recognize that treaty words acquire meaning in specific controversies only from context and in terms of the major purposes and demands of the parties to the treaty.²²⁵ There is no question that the major purpose of articles 118 and seven was humanitarian in character—for the benefit of the prisoners, to prevent abuse by coerced retention or waiver—and that forcible repatriation despite the prisoners' well-founded expectations of severe deprivations upon return does not serve that purpose.

Enemy Persons and Property Within a Belligerent's Territory

The problem arises largely with respect to enemy persons and property found within the territory of a belligerent or its allies upon the outbreak of hostilities. The characterization, it is important to note, is of "enemy" persons and property and not of "alien nationals." Recognition is developing that the niceties of "nationality" law, devised for other purposes, have less relevance to purposes of control of an enemy's bases of power than factual loyalties and group membership which transcend both national boundaries and technical niceties.²²⁶

223. U.N. GEN. ASS. OFF. REC. 7th Sess., 1st Comm. 37 (1952-53).

224. Charvat & Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391 (1953). See also Gutteridge, *The Repatriation of Prisoners of War*, 2 INT'L & COMP. L.Q. 207 (1953); Mayda, *The Korean Repatriation Problem and International Law*, 47 AM. J. INT'L L. 414 (1953); Schapiro, *Repatriation of Deserters*, 29 BRIT. Y.B. INT'L L. 310 (1952).

225. For amplification and documentation of this theme, see McDougal & Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258 (1951).

226. See DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II*, 46-51 (1943). See also LAFITTE, *THE INTERNMENT OF ALIENS* 35 (1940), who, speaking primarily of the refugees from Nazi Germany, urged that "we discriminate, not between Britons and

Upon control of enemy persons found in a belligerent's territory, international law would appear to interpose but few limits. Complementary policies are here again contraposed and compromised in terms of the security needs of the belligerent²²⁷ and of the human rights of the individual. Whether even in time of peace, however, the alien national is entitled to protection by standards of civilized justice or merely to equal treatment with nationals is still debated. For nationals of the belligerent, the common assumption is that international law offers no protection, other than in relatively obsolete doctrines of humanitarian intervention. When violence breaks out, restraints may a fortiori be even more modest, unless the Nuremberg judgment be thought to afford some degree of protection by its limited concept of crimes against humanity.²²⁸ The recent unprotested practice of states presents such measures as the registration and compulsory detention of aliens, or detailed regulation of their activities, and, in some instances, even sterner measures for nationals.²²⁹ The 1949 Geneva Civilians Convention does seek to establish a modicum of human rights for alien nationals caught in the hands of belligerents,²³⁰ but it yields, as was of course necessary, to the security interests of the belligerent as determined, in the first instance, by the belligerent himself.²³¹

The protection which international law affords to enemy property found in a belligerent's territory is disputed. Unquestionably, a belligerent may seize and apply such property to its purposes during war. Whether international law imposes upon the belligerent a duty either to restore or to pay for such property after the termination of hostilities, however, has recently been questioned. A number of reputable writers have, in surveying past practices, been able to find such a duty.²³² But this finding seems to represent both a somewhat selec-

'aliens,' or between 'friendly aliens' and 'enemy aliens' in the present way, but between those who stand for freedom and those who stand for tyranny in every country. This division cuts right across all nationalities. The real 'aliens' are the 'Nazis of the soul' of all countries, including our own. . . . Our real friends are not to be determined by tests of birthplace, nationality or language, but by their past and present conduct in the struggle against authoritarian forms of government."

See also the United States' Emergency Detention Act of 1950, 64 STAT. 1019 (1950), 50 U.S.C. §§ 811-26 (1952), which authorizes, in cases of an "internal security emergency" brought about by invasion, declaration of war or insurrection in aid of a foreign enemy, the apprehension and detention of any person "as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage"; the United Kingdom's Emergency Powers (Defence) Act, 1939, 2 & 3 GEO. 6, c. 62, § 1(2)(a).

227. STONE, *LEGAL CONTROLS* 443-44.

228. See Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1946).

229. The *cause célèbre* is, of course, the detention and relocation of Japanese-Americans in the second World War. See Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Note, *Alien Enemies and Japanese Americans: A Problem of Wartime Controls*, 51 *id.* at 1318 (1942).

230. Arts. 13-46.

231. See, *e.g.*, arts. 5, 41.

232. Borchard, *The Treatment of Enemy Property*, 34 GEO. L.J. 389 (1946); Jessup, *Enemy Property*, 49 AM. J. INT'L L. 57 (1955); Sommerich, *A Brief Against Confiscation*,

tive reading of past practice and a projection of future decision which appears highly optimistic when the variables which are likely to affect such decision are considered. It would seem most difficult to find, in realistic observation of the varied practice and opinion in the past, a crystallized community expectation of a duty to return property.²³³

The basic policies are commonly posed in terms of the inviolability of private property and individual rights and the encouragement of the worldwide circulation of capital on the one hand, and of the interests of the belligerent and the maintenance of certain standards of world order on the other. Such basic policies, all in a measure persuasive, are best debated not in the abstract but with reference to specific controversies in context. Among the many different factors in a particular context which might rationally affect policy choice may be listed such items and considerations as: the types and characteristics of owners of claimed property; the prior use of the property, as an instrument of economic warfare or otherwise; the degree to which the property was controlled by the enemy state; the type of world public order the enemy state seeks to establish, totalitarian or free; the relation of the war waged to the public order of the organized community; possible future uses of the property and its relation to the security of the state; and any needs for recoupment for war damage by the enemy. When such factors are reviewed in particular context, the possibility of a realistic determination of the probable effects of alternative decisions upon both commerce and security is enhanced.

Termination of the Process of Coercion

In terminating the process of coercion, belligerents seek to disengage themselves and return to persuasion as a mode of interaction. Factually, the context of decelerating coercion may present the participants in many differing degrees of intensity of combat, in many different postures of relative victory and defeat, in many different degrees of consensus, both tacit and explicit, about the cessation of coercion and subject in varying degree to the intervention of third states or international organizations.

In so complex a process, many difficult legal problems naturally arise from the contraposed claims of the participants. Between belligerents, problems arise over the timing of the cessation of hostilities, the repatriation of prisoners, the

11 LAW & CONTEMP. PROB. 152 (1945). See also CASTRÉN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 118-19 (1953); Reeves, *Is Confiscation of Enemy Assets in the National Interest of the United States?*, 40 VA. L. REV. 1029 (1954); Wright, *War Claims: What of the Future?*, 16 LAW & CONTEMP. PROB. 543 (1951).

233. See CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 216 (1951); 2 OPPENHEIM-LAUTERPACHT 326-31; STONE, *LEGAL CONTROLS* 435; *Report of the Special Committee to Study the Dirksen Bill*, in SECTION OF INTERNATIONAL AND COMPARATIVE LAW, AMERICAN BAR ASS'N, PROCEEDINGS 52 (1955); Rubin, *The "Inviolability" of Enemy Private Property*, 11 LAW & CONTEMP. PROB. 166 (1945). See also SCHISGALL, *THE ENEMY PROPERTY ISSUE* (Public Affairs Pam. No. 246, 1957), which collects the arguments for and against return.

restoration of territory and property taken, the cession of territory and property, responsibility for unlawful destruction and violence, the resumption of treaty obligations and peaceful procedures generally, and so on. Between belligerents and nonparticipants, the questions concern responsibility for unlawful destruction, the repatriation of property looted and smuggled by the enemy and the restoration of normal peaceful intercourse. Private individuals and groups, acting sometimes across and sometimes within national boundaries, contest the continuing enforceability of agreements, the restoration of property taken and transferred by the enemy and the interpretation of "duration of war" clauses in private agreements. Between individuals and belligerent states, freedom from personal restraint, amnesty, the release or return of property sequestered or vested and the liquidation of various internal wartime controls are relevant questions. And between different branches of the government within the same state, decisions to continue or terminate extraordinary war powers must be made.

The sources of policy upon which authoritative decision-makers will draw for the solution of such diverse controversies are many and varying. It is futile to subsume all these problems, of such different policy import, under a few vague principles about the "termination of war,"²³⁴ as is commonly done.²³⁵ About many of these problems, international law has had little or nothing to say, and decision is appropriately founded in national law. Even for problems appropriately regarded as in the domain of international concern, however, there has been very little development of customary international law. Practice, apart from explicit agreement, has been so diverse that contention abounds on most problems as to what authoritative expectation requires. The result has been that belligerents, in so far as their foresight and degree of consensus

234. See, e.g., CASTRÉN, *op. cit. supra* note 232, at 132-37; 2 OPPENHEIM-LAUTERPACHT 596-620; STONE, *LEGAL CONTROLS* 639-46.

235. On the parallel subsumption of disparate problems under the label of "the commencement of war," see McDougal & Feliciano, *The Initiation of Coercion: A Multi-Temporal Analysis*, 52 AM. J. INT'L L. 241 (1958). Just as discussions on the commencement of war have frequently been concerned with determination of the beginning of a "state of war," so discussions on the termination of war have commonly centered on ascertainment of the cessation of the "state of war." The most that efforts at clarification of the different "termination" problems have thus far achieved is the recognition that the "date of termination of a war according to a particular State's municipal law" does not necessarily coincide with the date of termination "under international law." See STONE, *LEGAL CONTROLS* 643; Hudson, *The Duration of the War Between the United States and Germany*, 39 HARV. L. REV. 1020 (1926); Kunz, *Ending the War With Germany*, 46 AM. J. INT'L L. 114, 118-19 (1952); Note, *Judicial Determination of the End of the War*, 47 COLUM. L. REV. 255 (1947), distinguishing between "termination of war under international law," "termination of wartime legislation" and "effects of termination of war on private legal relations."

For surveys of cases on "termination of war" for various municipal purposes, see Roberts, *Litigation Involving "Termination of War,"* 43 KY. L.J. 199 (1955); Note, *Termination of a War*, 4 WYO. L.J. 115 (1949). See also French, *The End of the War*, 15 GEO. WASH. L. REV. 191 (1947).

have permitted, have sought to prescribe for termination problems by agreement as explicit as possible in truces, armistices²³⁶ and treaties of peace.²³⁷ The most important law governing the termination of coercion is thus, perhaps, those fundamental principles for the interpretation of agreements mentioned in the discussion of repatriation of prisoners of war. The continuing importance of such principles might be further demonstrated by reference to the controversy between the Egyptians and Israelis as to the meaning of their uneasy armistice.

THE COMMON INTEREST IN AN INCLUSIVE PUBLIC ORDER OF FREEDOM

In projecting these broad outlines of policy-oriented inquiry, and in offering certain possible clarifications of some of the more fundamental policies, we have sought neither to minimize nor to exaggerate the potential role of law in controlling and regulating international coercion. The contemporary world arena exhibits, unfortunately, all too many factors which tend to confer upon the attitude of cynical disenchantment with law at least the appearance of realism:

neither the leaders nor the peoples of the world have yet clarified a common interest in economizing the use of force or in establishing appropriate institutions for securing such interest;

the public order presented by the world arena is composed not of a single inclusive order, moved by common policies, but of several competing, exclusive orders, moved by the most disparate policies;

the policies which move some of these contending world public orders reject not only the values of human dignity, implicit in the principle of economy of force, but even the very distinction between means and ends;

contemporary technology makes possible a concentration and application of naked force hitherto inconceivable even in megalomania's wildest dreams; and so on.

The cumulative import of contemporary scientific analysis and observation of factors affecting individual and collective choices is, however, that over a period of time most men do and can act to maximize their values, conscious and unconscious, and that such values include, if not a large measure of humanitarianism for their fellow man, at least a demand for self-preservation.²³⁸ The

236. See, generally, MAURICE, *THE ARMISTICES OF 1918* (1943); Graham, *Two Armistices and a Surrender*, 40 AM. J. INT'L L. 148 (1946); Graham, *Armistices—1944 Style*, 39 *id.* at 286 (1945).

237. See, generally, Fitzmaurice, *The Juridical Clauses of the Peace Treaties*, 73 HAGUE RECUEIL 259 (1948); Metzger, *The Liberal Japanese Peace Treaty*, 37 CORNELL L.Q. 382 (1952).

238. See note 95 *supra*. See also PERSONALITY IN NATURE, SOCIETY AND CULTURE (Kluckhohn, Murray & Schneider ed. 1955); PARSONS, *THE STRUCTURE OF SOCIAL ACTION* (2d ed. 1949); STAGNER & KARWOSKI, *PSYCHOLOGY* (1952). That men generally

world arena, fortunately, exhibits certain factors, countervailing the pessimistic, which suggest that the hope of an increasing role for authority in the control and regulation of international coercion is not entirely illusion:

the peoples of the world, and especially their leaders, have begun to recognize the imperative need to establish at least minimum controls to lessen the risk of their common destruction by miscalculation or inadvertence, whatever the system of world order demanded;

the peoples of the world may be observed further, beyond demand for survival, to express increasing common demands for many shared values and increasingly to exhibit recognition of their common interdependence in the achievement of such values;

despite the contending public orders, there is a slow trend toward inclusive rather than exclusive determination of global policy on some problems, as well as some movement toward the expansion and improvement of specialized institutions for the performance of policy functions;

some observers are beginning to perceive that the almost inconceivable concentration of force made possible by modern technology might, by appropriately shared perspectives, be brought to the support, rather than the destruction of an inclusive public order; and so on.

From these tentative initial clarifications of a common interest in survival and other values could come a more comprehensive and creative clarification of the common interest of all peoples of the world in effective community monopolization of force behind an inclusive public order of safety, freedom, and abundance and in a wide sharing of responsibility for the maintenance of such order. From such comprehensive clarification of common interest could come the detailed initiatives and dispositions of effective power necessary to invention and establishment of the appropriate institutions and procedures for securing and preserving such interest. To these ends, lawyers may most effectively contribute, in performing their special roles in the clarification of common interest and invention of alternatives, not by the repetitive reiteration of overoptimistic faith in inherited ambiguous technicalities, but by the systematic application of certain important emphases:

that clarity in thought requires a careful distinction of the processes of coercion from the processes of authoritative decision;

that rationality in decision and recommendation demands that one pierce through technical rules and concepts to the underlying fundamental policies

tend to act to maximize their values is a premise basic in contemporary theories of economic analysis, see LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* (1950); SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* (1948); and in the theories of games and of decision-making, see *THE POLICY SCIENCES* (Lerner & Lasswell ed. 1951); LUCE AND RAIFFA, *GAMES AND DECISIONS* (1957); VON NEWMANN & MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (3d ed. 1953); Lasswell, *Current Studies of the Decision Process: Automation Versus Creativity*, 8 *WESTERN POL. Q.* 381 (1955).

and continually appraise such rules and concepts in terms of contemporary and projected policies;

that both relevant policies and technical rules are commonly and necessarily formulated in pairs of opposites and that the appropriate function of such formulations is not to dictate decision but to guide decision-makers to all the factors in a context which should be taken into account in making rational decision; and, finally,

that responsible decision-makers who share the values of a free society may appropriately give effect to such values not only in their formulation of principles but also in their specific interpretations and applications.

It is by the consistent maintenance of these emphases, in the employment of all his special intellectual skills for inquiry into the basic specific problems of international coercion, that the lawyer who values human dignity may make his richest contribution to moving the general community of mankind from its present incomplete and disorganized structures and processes of authority, harassed by contending exclusive orders, toward a more inclusive world public order in which the values of a safe, free and abundant society are honored not merely in theory but in practice.

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