

1969


# Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry

Myres S. McDougal

Harold D. Lasswell

Lung-chu Chen  
*New York Law School*

Follow this and additional works at: [http://digitalcommons.nyls.edu/fac\\_articles\\_chapters](http://digitalcommons.nyls.edu/fac_articles_chapters)

 Part of the [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

---

## Recommended Citation

63 Am. J. Int'l L. 237 (1969)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

## HUMAN RIGHTS AND WORLD PUBLIC ORDER: A FRAMEWORK FOR POLICY-ORIENTED INQUIRY \*

By Myres S. McDougal,\*\* Harold D. Lasswell,\*\*\* and Lung-chu Chen \*\*\*

From the Universal Declaration of Human Rights in 1948, through the adoption of the International Covenants on Human Rights in 1966, and to the Proclamation of Teheran in 1968, the human rights program under the auspices of the United Nations has represented a tremendous collective effort and symbolized the common aspirations of mankind for increasing the protection of all basic human values. This program, as greatly agitated and accelerated by the process of postwar decolonization and the rapid emergence and multiplication of newly independent states, has burgeoned far beyond the contemplation of the founding fathers of the United Nations.

Yet, few tasks confronting the world community today remain more vital to its future than the defense and fulfillment of the basic values of the individual human being. Despite recurrent syndromes of national and ethnic parochialism, the vast majority of the peoples of the world continue to demand for themselves, and to acknowledge for others, certain fundamental rights to the minimum conditions of a dignified human existence. Deprivations of human rights visited upon one individual or group are increasingly perceived to be a personal deprivation for any observer and a potential threat to all freedom. Indeed, the knowledge is now pervasive that no people can really be secure in basic rights unless all peoples are secure.

Despite the rapid proliferation of international agreements, documents, and literature concerning human rights, the difficulties inherent in the program are, however, many and substantial. The successive efforts in formulating new community aspiration, though impressive in number, have failed to obtain wide acceptance as authoritative prescription. Even when the formal ratification of agreements has been achieved, the profound incongruence in the expectations of authority and control is of commonplace knowledge. Nation-states continue to engage in immense value deprivations of the individual and show little readiness to accommodate themselves to more inclusive authority. The predispositions of the effective élites in the different communities around the globe have not been sufficiently mobilized to establish and maintain the necessary processes and procedures for enforcement and, in the absence of a workable enforcement system, the authority and control made available to international governmental organizations have been most limited. From the perspective

\* This outline has been prepared as a preliminary guide to our own future studies and is published in its present form both for inviting criticism and for offering stimulus to others.

\*\* Of the Board of Editors.

\*\*\* Yale Law School.

of the relevant features of a comprehensive world constitutive process, the necessary decision functions have not been adequately perceived and performed. Due in some measure to the lack of a comprehensive and rigorous framework of inquiry, even an appropriate intelligence function is not available to guide prescription and application.<sup>1</sup>

Even the very concept of "human rights" itself does not escape a high ambiguity. The fundamental content of the concept and of the various component rights has remained controversial, and discussion has too often proceeded in terms of highly technical, normative-ambiguous legal concepts which purport to make simultaneous reference to varying factual contexts, to claims made to authority, and to responses by authoritative decision-makers. Hence, the performance of the intellectual skills appropriate to any rational problem-solving has been impaired.

Given the enormous importance of the task, timely and concerted effort would appear urgent. The scholar, being relatively absolved from day-to-day routines and immediate issues, may conceivably, if appropriate intellectual skills are mobilized, make significant contribution to the guidance of community prescription and application.

Fundamental to the scholar's meeting such a challenge must be a clear focus on what is meant by "human rights" and on the context in which they are sought. We can observe that the whole of mankind today constitutes a "world community" characterized by a high degree of inter-determination and interdependence. Although the traditional rôle of the individual in transnational interactions tends to be obscured by a pawn-like sense of political impotence due to his passive acquiescence and ignorance of the potentialities of his participatory rôle, interdependence has made world power processes and world law as relevant to each individual as the decisions made in the municipality in which he lives.

A systematic examination of the increasing rôle of the individual in world affairs would require a careful orientation to and description of a comprehensive *world social process*, in terms of a set of interlocking, transnational functional and geographic interactions; of the global or

<sup>1</sup> In his stimulating book, *The Politics and Dynamics of Human Rights* 98, 99 (1968), Mr. Moses Moskowitz issues a formidable challenge:

"(I)nternational human rights is still waiting for its theoretician to systematize the thoughts and speculations on the subject and to define desirable goals. Intelligent truisms do not necessarily add up to a theory. No one has yet arisen to draw together into a positive synthesis the facts and fancies which emerge daily from events of bewildering complexity and to carry on an authentic debate. International concern with human rights is still very much a theme begging for a writer. And the scholar has not yet appeared to redress the distortions through a calm and systematic application of facts, to ground abstractions in the specific, and to define the limits of discourse. In the absence of a definite body of doctrine, as well as of deeply rooted convictions, international human rights have been dealt with on the basis of the shifts and vagaries of daily affairs and of evocations of daily events. There is a great need for technical resources and ability to channel the facts to greater effect. Human rights as a matter of international concern is an untrodden area of systematic research. But still a greater need is for superlative virtuosity to deal with international human rights in their multiple human dimensions."

earth-space *process of effective power* which is an integral part of the larger transnational community matrix; and of the *processes of authoritative decision*, including a *world constitutive process*, maintained by the holders of effective power for clarifying and securing their common interests. By constitutive process we refer to those features of authoritative decision which provide an institutional framework for decision and allocate indispensable functions in the making and application of law. The particular decisions which emerge from constitutive process in regulating the shaping and sharing of values other than power may be described as "public order" decisions. These may relate to respect (recognition and honor), enlightenment (the gathering, processing and dissemination of information), well-being (safety, health and comfort), wealth (control of resources), skill (opportunity to acquire and exercise capability in vocations, professions and the arts), affection (intimacy, friendship, and loyalty) and rectitude (participation in forming and applying norms of responsible conduct).

The focus of inquiry about "human rights and world public order" which we recommend is not exhausted by concern for the rôle the individual plays in the above-mentioned community processes, commonly phrased in terms of "the rôle of the individual in international law." Nor is our focus confined to the protection which the individual can secure from world constitutive process for participating in the value process that is specialized to the shaping and sharing of "respect," though respect is an essential component of what is known as "human rights." Rather, our concern extends to the protection and fulfillment which the individual can secure at all community levels from the world constitutive process of authoritative decision with reference to all values. The assumption upon which we build is that a minimum defense and fulfillment of all values—power, respect, enlightenment, well-being, and so on—is indispensable to an effective "human rights" program that seeks in the contemporary era to achieve a dignified human existence for every individual.

Similarly, a concern for the "implementation" or "enforcement" of human rights which would be realistic must extend, beyond isolated procedural gimmicks and gadgets, to a comprehensive inquiry about the whole world constitutive process of authoritative decision, considering in detail how decision-makers, established goals, structures of authority, bases of power, authorized strategies, and decision functions may be changed for the better promotion and securing of individual rights. The conventional usage about constitutive process based on organic classifications has tended to stifle creativity and to cause the overlooking of many feasible measures. Analytically, a decision process, which is authoritative and controlling, may be said to be comprised of seven functions: intelligence, promotion (or recommendation), prescription, invocation, application, termination, and appraisal. In brief:

1. Intelligence is the obtaining, processing, and dissemination of information (including planning).

2. Promotion (or recommendation) is the advocacy of general policy.

3. Prescription is the crystallization of general policy in continuing authoritative community expectations.

4. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions.

5. Application is the final characterization of concrete circumstances according to prescriptions.

6. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect.

7. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and of responsibility therefor.<sup>2</sup>

Once observational standpoint and focus of inquiry are clear, the employment of a configurative approach may economically proceed. Such an approach must have at least three principal characteristics: it must be contextual, in the sense that all features of the social process of immediate concern are related to the manifold of events comprising the relevant whole; it must be problem-oriented, in the sense that explicit and deliberate search is made for better alternatives for clarifying and securing human rights; and it must be multi-method in that it cultivates a great range of intellectual and other strategies.<sup>3</sup> The effectiveness of such an approach to problem-solving about human rights must depend in large measure upon a systematic and disciplined performance of a series of distinguishable but interrelated intellectual tasks. These include: 1. Clarification of the goals of decision; 2. Description of the trends toward or away from the realization of these goals; 3. Analysis of the constellation of conditioning factors that appear to have affected past decision; 4. Projection of probable future developments, assuming no influence by the observer; 5. Formulation of particular alternatives and strategies that contribute, at minimum net cost and risk, to the realization of preferred goals.

From the perspectives thus established, it is the purpose of this statement to outline a tentative framework of inquiry about "human rights and world public order" which could enable scholars to enhance their contribution to the securing of basic rights and the establishment of preferred public order. A comprehensive agenda of inquiry would include:

First, a careful delimitation of the problem, highlighting the significant features of the process of value deprivations of the individual, the process of claim, and the world constitutive process of authoritative decision;

<sup>2</sup> A detailed description of constitutive process may be found in McDougal, Lasswell, and Reisman, "The World Constitutive Process of Authoritative Decision," 19 *J. Legal Ed.* 253, 415 ff. (1967).

<sup>3</sup> The requirements of a configurative approach are indicated in McDougal, Lasswell, and Reisman, "Theories about International Law: Prologue to a Configurative Jurisprudence," 8 *Va. J. Int. Law* 188 (1968).

Next, clarification of the fundamental community goals (policies) essential to the defense and fulfillment of human values of the individual, with balanced emphasis on content (values to be defended) and procedure (the constitutive process through which human values are to be protected);

Next, a survey of trends of past decision with regard to all past and prospective types of controversy, ascertaining the degree of approximation toward recommended policies, and analyzing factors conditioning past decisions;

Finally, appraisals in terms of past inadequacies and future promise, and recommendation of alternatives in structures and strategies essential to optimal realization of "human rights."

For illustrating the potentials of a more extended inquiry, we will outline the process of value deprivation of the individual, the process of claim, and the constitutive process of authoritative decision and note certain possible clarifications of fundamental community policies. Our treatment here must of necessity be brief, tentative and impressionistic: we will emphasize the features of the process of deprivation most relevant to appraisals of lawfulness, of the process of claim most significant for the clarification of basic policies, and of the process of decision most amenable to change for the better securing of preferred policies.<sup>4</sup>

#### THE PROCESS OF VALUE DEPRIVATION OF THE INDIVIDUAL

The process of interaction in which the value deprivations of the individual, commonly characterized as infringements of "human rights," occur is an integral part of a more comprehensive world social process in which groups and individuals employ strategies, affecting resources, through institutions to attain their goals. Deprivations of values may of course occur not merely as denials of a share in a static quantum, but also as denials of potential achievement. Our concern is for the deprivation of opportunity for higher achievement, as well as for denial of realization of established standards. The process of deprivation can be described in terms of the participants involved, their perspectives, the situations of their interaction, the base values at their disposal, the strategies employed, and the outcomes and effects achieved.

##### *Participants*

The participants in the process of interaction are group and individual. It is convenient for the present purpose to categorize participants in terms of deprivors (those who impose value deprivations) and deprivées (those who sustain value deprivations).

With respect to deprivors, officials at all levels of government—national, sub-national, and, to a far lesser extent, international—are primary par-

<sup>4</sup>The detailed study of past trends in decisions, factors affecting decisions, probable future developments, and possible alternatives in principle, structure, and procedure must of course be reserved for more extensive future presentation.

ticipants. Non-officials, whether belonging to political parties, private associations and pressure groups or simply acting as individuals, also play a significant part in imposing deprivations.

Because of the prominent rôle nation-states play in imposing deprivations, it is relevant to investigate within any given territorial community such factors as are known to affect or which are considered likely to affect such deprivations. Included are the demographic composition, structures of power-shaping and sharing, public order demanded and projected, recent history in terms of colonial relationships, scope of exposure to the transnational interactions, and development in wealth and other value-institution sectors.

As far as deprivées are concerned, individual human beings are, of course, the ones who sustain deprivations either as individuals or as members of pluralistic groups. Attention may be called to the various grounds upon which discriminatory deprivations are commonly imposed, including: biological characteristics (race, sex, age), culture (nationality), class (in reference to wealth, power, respect, rectitude, and all other values), interest (group memberships), and personality.

### *Perspectives*

While the objectives of the participants in the process of deprivation extend to a wide range of values, the emphases and modalities of demand may vary tremendously in particular cases.

The objectives of deprivors may relate to common interests, both inclusive (importantly affecting a number of participants or the whole community) and exclusive (importantly affecting only a single participant), or to special interests (asserted on behalf of particular participants against the community); they may be conservative (of the interests sought to be protected) or destructive (of the interests of others). The magnitude of deprivation contemplated may also radically vary from instance to instance. It is of particular importance that latent (or disguised) objectives be distinguished from manifest (proclaimed) objectives.

On the part of deprivées—though intensity in demand and realism in expectation may vary—there is a growing uniformity of demand in all values, particularly in terms of a basic minimum essential to a dignified human existence. Deprivations sustained by many individuals in many communities tend to be internalized and tolerated; but there is a rising expectation that endurance is no answer to deprivation and that things can be changed for the better by means of external as well as internal agitation and action.

### *Situations*

The situations in which value deprivations of the individual take place relate to geographical features, temporal features, degree and kind of institutionalization, and levels of crisis.

The geographical ramifications and impacts of a given deprivation may be universal, regional, national, or sub-national in scope. Within a particular community impacts may be central or peripheral. An innovative practice may or may not provoke counter-efforts to restrict its diffusion. The duration of a given practice may be temporary or permanent and its manifestation may be occasional or continuous.

The cultural matrix of deprivations may or may not be institutionalized. Deprivations may be organized or unorganized, patterned or unpatterned, centralized or decentralized, secret or open.

The crisis features of deprivational contexts may exhibit many differing degrees in intensity of expectation. Crises may also be related to values primarily affected. Consider war and internal violence (power); depression and inflation (wealth); epidemics and other natural disasters (well-being); the communications revolution, exposing many people to the stress of new maps of nature and man (enlightenment); the rapid obsolescence of skill because of the technical revolution (skill); confrontations among classes and castes (respect); conflicts among churches and religions (rectitude); and the dislocations of the family caused by mass migration from rural to urban areas (affection).

### *Base Values*

Potentially all base values may be employed for either imposing deprivations or defending against deprivations.

Concerning deprivors, totalitarian regimes have distinguished themselves not only by arrogating all choices into the sphere of public order but also by commanding practically unlimited authority to deprive individual values. In terms of effective bases of power, the disparity is particularly acute between developed nations and developing nations; as a result, they differ in emphasis and direction in their respective human rights programs.

As far as deprivées are concerned, their vulnerability to, or ability to resist, deprivations depends in large measure upon the kind of public order system—totalitarian or non-totalitarian—in which they live. The degree to which authority is available for the defense of human rights varies immensely from community to community.

### *Strategies*

Deprivors employ all the conventional forms of strategy—diplomatic, ideological, economic, and military instruments. While the former two forms mainly involve the manipulation of symbols, the latter two involve resources. Essential to policy consideration is the degree of coerciveness; description may be made in terms of a continuum of coercion and persuasion. Attention is drawn to deprivational measures that are imposed irrelevantly to individual merit, or that inflict losses and frustrations beyond the minimum requirements for dignified existence as a human being.



On the part of deprivées, one may note their frequent and intense resort to the ideological instrument (to the mass media) and the dramatization of their resistance against deprivation by way of non-violent (at times violent) demonstrations (either organized, or unorganized). The trend is world-wide, though the degree of impact differs.

### *Outcomes*

Even a cursory look at daily events around the world leaves no doubt that large-scale value deprivations of individuals and pluralistic groups continue to prevail, though the nature, scope and magnitude of values at stake do differ from one community to another and occasion to occasion. The deprivations which may give rise to demands for human rights relate potentially, if not in existing tragic fact, to every value and to every detailed phase of value process. In comprehensive perspective, all values are continuously involved, and detailed specification of the aggregate flow of deprivations must require the relating of particular deprivational outcomes to the different phases of value process. Some of the relevant questions, which will be more comprehensively and systematically outlined below, include:

Are individuals denied general participation in a given value process? Is their participation restricted on grounds irrelevant to individual merit and contribution? May specialized groups be formed and are they accorded appropriate participatory rôles in the process? (Participation)

Are deprivations aimed to prevent individuals or groups from acquiring demands for power, respect, enlightenment, and so on? (Perspectives)

Are individuals and groups given opportunity to initiate and constitute institutions specialized to a given value? Are they given free access to institutions specialized to the values at stake in any particular context? Are they given free access to other institutions affecting value outcomes? Are their values deprived disproportionately because of crises? (Situations)

Is the process of authoritative decision available to defend and fulfill demanded values? Is participation in each of the other value processes available to enhance bases of power? Are individuals with special needs given special assistance to overcome handicaps? (Base Values)

Are deprivées subjected to coercive or discriminatory strategies? (Strategies)

Do deprivations prevent or hinder participation in the culminating decisions and choices by which values are shaped and shared? Are individuals and groups accorded a basic minimum of values essential to a human existence? Are they denied additional benefits despite special contributions? (Outcomes)

### *Effects*

Regarding the post-outcome consequences, extending beyond immediate deprivées and deprivors, note must be taken of the accentuation and

amelioration of trends in relation to demanded goal values. Patterns in innovation, diffusion, and restriction may be observed. Aggregate trends may be summarized in terms of the shaping and sharing of all basic values, with indication of the direction and degree of movement toward or away from a free world society.

### *The Context of Conditions*

Because of the interdependences brought about by accelerating changes in science and technology (particularly communication), in population growth, in the demands and identifications of peoples, and in techniques of organization, there is a rising, common demand among peoples for the greater production and wider sharing of all the basic values and an increasing perception by them of their inescapable interdependence in the shaping and sharing of all such demanded values. Peoples everywhere, élites and non-élites alike, are exhibiting increasing identifications with larger and larger groups, extending to the whole of mankind. In an earth-space arena in which mass destructive means intimidate and threaten mankind, no people can be fully secure unless all peoples are secure. Security, in a minimal sense, depends upon the abundant production and wide sharing of all other values; broadly conceived, the "human rights" and "security" of any people and all peoples may thus be said to be not only interdependent but identical.

This accelerating interdependence manifests itself, however, in a world in which diverse systems of public order contend and in which continuing crises of national security episodically accentuate the movement toward garrison-police states whose distinctive features are increasing militarization, governmentalization, centralization, concentration, and regimentation. With "power" so dominant an interest, other values are highly politicized; and it is small wonder that the world-wide human rights program exhibits some of the symptoms of incipient paralysis.

### THE PROCESS OF CLAIM

The focus here is upon the process by which participants make claims to secure the prescription and application of community policies regarding human rights. It is convenient to consider briefly the claimants, their objectives, specific types of claims, and the conditions peculiarly affecting claims.

#### *Claimants*

All participants in the world social process (the process of interaction) make claims to established decision-makers for prescribing and applying community policies regarding human rights. Of particular importance are nation-states, non-governmental organizations, and individual human beings.

### *Perspectives*

The most general objective of claimants in invoking the processes of community decision in controversies about human rights is of course to secure prescription and application of general community policies in the resolution of such controversies.

The range of values demanded, the sense of realism, and the intensity with which claims are pressed forward, vary according to context. It appears that certain manifest demands for the protection of human rights may well be disguised strategies for the attainment of other ends, such as the mere harassment of an adversary.

In terms of identification, claimants either demand for the self, or for others (groups such as racial and linguistic minorities, or certain individuals), or in the name of humanity. Note that in many communities many people who suffer deprivations are conditioned or forced to endure them in silence.

The more detailed objectives of claimants may be most economically described in terms of particular types of controversy.

### *Specific Types of Claim*

In formulating specific types of claim, we are guided by several considerations. We seek to present as comprehensive and realistic a map as possible in a way that does not prejudice a much-needed sense of proportion and priority. Special attention is paid to both content and procedure: content in terms of basic values to be defended, and procedure in reference to the constitutive process of authoritative decision essential to defend and fulfill demanded values. A further concern is to facilitate a systematic inquiry that is contextual, problem-oriented, and multi-method, and that moves back and forth between the part and the whole.<sup>5</sup>

The following itemization, it is stressed, is tentative and eclectic.

## *I. Claims Relating to the Process of Value Deprivation*

### *A. Claims Relating to Power*

#### *Claims Relating to Participation*

Claims to recognition as a human being

Claims to admission to group membership (nationality)

Claims to be accepted as a participant for comprehensive power purposes

<sup>5</sup> Compare the map of "civil liberties" presented by Professor McCloskey in "Constitutional Law: Civil Liberties," 3 *Int. Encyclopedia of Social Sciences* 307, 308 (1968). The framework we suggest is designed both to seek a needed comprehensiveness and to facilitate the systematic, detailed specification of particular claims.

The specification we offer under each value heading in terms of the detailed phases (particular practices) of value process is intended to be illustrative only. Different emphases are sought under different value headings. Thus, in more comprehensive presentation, the sub-goals of prevention, deterrence, restoration, rehabilitation, reconstruction, and correction specified in relation to strategies for "well-being" could with equal relevance be specified for each of the other values.

*Authoritative*

Office-holding

Voting

*Controlling*

Participation in all other value processes

Claims not to be denied participation for reasons irrelevant to merit:

Race (color)

Sex

Language

Literacy

Religion

Political or other opinion

National or social origin

Property

Birth or other status

Age

Illness (defect, mental incapacity)

Alienage

Non-identification (disloyalty)

Claims to an appropriate group that will protect human rights ("self-determination")

*Claims Relating to Perspectives*

Claims to be free (after exposure to adequate enlightenment) to acquire, or not to acquire, a demand for power

*Claims Relating to Arenas**Geographical*

Claims to access to territory

Members

Non-members

Claims to asylum

Claims to freedom of movement (including residence)

Claims to freedom of egress

Claims to freedom from arbitrary expulsion

*Temporal*

Claims to continuation of rights

*Institutions**Authoritative*

Claims to freedom to initiate and constitute institutions specialized to power

Claims to freedom of access to adequate institutions specialized to power

*Controlling*

Claims for freedom to initiate and constitute institutions specialized to values other than power

Claims for freedom of access to adequate institutions specialized to values other than power

*Civic*

Claims to a civic domain (free of power decisions)

*Crisis*

Claims to receive a proportionate degree of public support despite crisis:

Crises in security

Crises in power

Crises in respect

Crises in enlightenment

Crises in well-being

Crises in wealth

Crises in skill

Crises in affection

Crises in rectitude

*Claims Relating to Base Values**Authoritative*

Claims that the processes of authoritative decision are available to defend and fulfill all rights ("equality before the law," "equal opportunity," "equal rights")

Claims to freedom from arbitrary confinement

*Controlling*

Claims that participation in each of the other value processes is available to defend and fulfill all rights

Claims for special assistance to overcome handicaps

*Claims Relating to Strategies**Singly*

Claims to employ the diplomatic instrument

Claims to employ the ideological instrument

Claims to employ the economic instrument

Claims to employ the military instrument (right to bear arms)

*In Combination*

Claims to employ, and to be free from, persuasion

Claims to employ, and to be free from, coercion

*Claims Relating to Outcomes*

Claims that the community maintain and afford appropriate access to institutions specialized to each of seven functions

Intelligence (access to information relating to decision process)

Promotion (freedom to organize and participate in pressure groups and parties)

Prescription (voting)

Invocation (open access and effectiveness)

Application (fair trials, etc.)

Termination (referendum, assertion of unconstitutionality)

Appraisal (participation in commission of inquiry)

*Claims Relating to Effects*

Claims relating to outcomes with respect to each of the other seven values

### *B. Claims Relating to Respect*

#### *Claims Relating to Participation*

Claims for respect as a human being (freedom from caste)

Claims for respect for meritorious contribution to the community

Claims not to be denied respect for reasons irrelevant to merit (race, etc.)

Claims that groups are to be accorded respect (minority protection, no group libel)

#### *Claims Relating to Perspectives*

Claims to be free to acquire a demand for respect (Claims to be free from state and non-state conditioning)

#### *Claims Relating to Situations*

##### *Institutions specialized to respect*

Claims for freedom to initiate and constitute institutions specialized to respect

Claims for freedom of access to institutions specialized to respect

##### *Institutions not specialized to respect*

Claims for freedom of access to institutions not specialized to respect

##### *Crisis*

Claims that respect be proportionately accorded despite crisis

#### *Claims Relating to Base Values*

##### *Authoritative*

Claims that the process of authoritative decision is available to defend and fulfill respect

##### *Controlling*

Claims that participation in each of the other value processes is available to defend and fulfill respect

Claims for special assistance to overcome handicaps not attributable to merit

#### *Claims Relating to Strategies*

##### *Singly*

Claims to be free of private vilification

Claims to be free of public vilification (official and non-official) as an individual

as a group

Claims to be free from the withholding of goods or services as a denial of respect

Claims to be free from use of the military instrument as a denial of respect

##### *In Combination*

Claims for freedom to give or withhold respect on proper grounds

Claims to freedom from coercion as a denial of respect (*e.g.*, slavery, forced labor, demonstration, imprisonment for debt, prisoners of war)

#### *Claims Relating to Outcomes*

Claims for a basic degree of respect as a human being (honor, reputation, private choice)

Claims for further respect rewards for meritorious contribution

Claims for the removal of discrimination

In the process of authoritative decision

In other value processes

Claims for the protection of privacy

*Claims Relating to Effects*

Claims relating to outcomes with respect to each of the other seven values

*C. Claims Relating to Enlightenment*

*Claims Relating to Participation*

Claims to general participation in receiving and giving enlightenment

Claims to be free of restrictions for reasons irrelevant to merit (race, etc.)

Claims for group participation in opportunity to acquire and disseminate knowledge

*Claims Relating to Perspectives*

Claims for freedom to acquire the demand for enlightenment

Claims to be free from state conditioning with regard to thought process

Claims to be free from private conditioning

*Claims Relating to Situations*

*Institutions specialized to enlightenment*

Claims for freedom to initiate and constitute institutions of enlightenment

Claims for freedom of access to institutions of enlightenment

*Institutions not specialized to enlightenment*

Claims for freedom of access to institutions not specialized to enlightenment

*Crisis*

Claims that enlightenment not to be denied disproportionately to crisis

*Claims Relating to Base Values*

*Authoritative*

Claims that the process of authoritative decision is available to defend and fulfill participation in the enlightenment process

*Controlling*

Claims that participation in each of the other value processes is available to the extent necessary to enlightenment

Claims for special assistance

Claims for freedom to acquire and employ appropriate language

*Claims Relating to Strategies*

*Singly*

Claims for freedom in small group communication

Claims for freedom in access to and employment of mass communication

Claims for freedom in the assembly of appropriate resources for enlightenment

Claims for freedom to employ the military instrument to preserve enlightenment

*In Combination*

Claims to freedom from coerced deprivation of enlightenment (censorship, indoctrination)

*Claims Relating to Outcomes*

Claims to basic enlightenment (gathering, disseminating, enjoying)

Claims to additional enlightenment on merit

Claims that there be no discrimination apart from merit

Claims to enlightenment of special relevance to one's position in the world

Claims to freedom from distortion

Claims for disclosure

*Claims Relating to Effects*

Claims relating to outcomes with respect to each of the other seven values

*D. Claims Relating to Well-Being*

*Claims Relating to Participation*

Claims for the right to life

Claims for general participation in the realization of bodily and mental health and development (more than simple survival)

Claims to be free of restrictions for reasons irrelevant to merit (race, etc.)

Claims for group survival and development (claims to freedom from denial of group survival and development) (no genocide)

*Claims Relating to Perspectives*

Claims for freedom to acquire the demand for life and its full development

Claims for freedom to depart or continue life

*Claims Relating to Situations*

*Geographical*

Claims for an environment that is conducive to survival and development

*Institutions specialized to well-being*

Claims for freedom to initiate and constitute institutions specialized to well-being

Claims for freedom of access to institutions specialized to well-being

*Institutions not specialized to well-being*

Claims for freedom of access to institutions not specialized to well-being

*Crisis*

Claims not to be denied well-being disproportionately to crisis

*Claims Relating to Base Values*

*Authoritative*

Claims that the process of authoritative decision is available to defend and fulfill well-being



*Controlling*

Claims that participation in each of the other value processes is available to defend and fulfill well-being

Claims for special assistance

Claims to be a beneficiary of science and technology

*Claims Relating to Strategies*

Claims for the employment of appropriate strategies in relation to health for

prevention

deterrence

restoration

rehabilitation

reconstruction

correction

Claims for freedom from coercive strategies

Claims to be free to accept or reject medical service (right to die)

Claims for freedom to accept or reject transplantation and repair (surgical intervention, drugs, communicative therapy, situation therapy)

Claims to employ specified strategies in birth control (family planning, abortion)

*Claims Relating to Outcomes*

Claims to a basic minimum in safety, health, and comfort

Claims for additional opportunities in accordance with choice (the range of choice: body form (cosmetic surgery); choice of sex; choice of organs (mechanical and human transplantation); choice of children (number, sex and other genetic characteristics))

Claims for the employment of genetic engineering for insemination (artificial insemination; incubation outside the body; choice of psychophysical pattern)

Claims for progress toward optimum somatic and psychological development through life

Claims to a merciful euthanasia

*Claims Relating to Effects*

Claims relating to outcomes with respect to each of the other seven values

*E. Claims Relating to Wealth**Claims Relating to Participation*

Claims for general participation in wealth-shaping and sharing (right to work; right to invest, employ resources; right to enjoy; right to joblessness)

Claims for freedom from restrictions irrelevant to capabilities for contribution (race, etc.)

Claims for freedom of association and group shaping and sharing of wealth (producers; entrepreneurs; laborers; consumers; investors)

*Claims Relating to Perspectives*

Claims for freedom to acquire (or reject) a demand to participate in the wealth process

*Claims Relating to Situations**Institutions specialized to wealth*

Claims for freedom to initiate and constitute institutions specialized to wealth

Claims for freedom of access to institutions specialized to wealth

*Institutions not specialized to wealth*

Claims for freedom of access to institutions not specialized to wealth

*Crisis*

Claims that wealth not to be denied disproportionately to crisis

*Claims Relating to Base Values**Authoritative*

Claims that the process of authoritative decision is available to defend and fulfill wealth demands

Claims for a degree of protection in the employment of resources in the wealth process (right to property)

Claims to the continuing accumulation of assets

*Controlling*

Claims that participation in each of the other value processes is available to defend and fulfill wealth demands

Claims for special assistance

Claims to employ resources for productive purposes (Claims for freedom from wasteful use of resources)

Claims that resources are open to exploitation and development ("economic self-determination"; "permanent sovereignty over natural wealth and resources")

*Claims Relating to Strategies*

Claims for freedom to employ all relevant strategies in the production, conservation, distribution, and consumption of wealth

Claims to be free from coercive strategies

Claims to be free from discriminatory strategies (*e.g.*, discriminatory wages)

Claims to be free from capricious and arbitrary management

*Claims Relating to Outcomes*

Claims to a basic minimum of benefits from the wealth process (guaranteed income; social security; abolition of poverty)

Claims to the enjoyment of benefits on the basis of contribution to the process

Claims to the maintenance of high level of productivity (rising standard of living)

*Claims Relating to Effects*

Claims relating to outcomes with respect to each of the other seven values

*F. Claims Relating to Skill*

*Claims Relating to Participation*

Claims for unrestricted opportunity to acquire and exercise socially acceptable skill

Claims for opportunity to have latent talent discovered

Claims not to be denied opportunity to acquire and exercise skill for reasons irrelevant to merit (race, etc.)

Claims that groups are to be accorded skill

*Claims Relating to Perspectives*

Claims to acquire a demand for, and capability of, skill expression

*Claims Relating to Situations*

*Institutions specialized to skill*

Claims for freedom to initiate and constitute institutions specialized to skill

Claims for freedom of access to institutions specialized to skill

*Institutions not specialized to skill*

Claims for freedom of access to institutions not specialized to skill

*Crisis*

Claims that skill not to be denied disproportionately to crisis

*Claims Relating to Base Values*

*Authoritative*

Claims that the process of authoritative decision is available to defend and fulfill participation in the skill process

*Controlling*

Claims that participation in each of the other value processes is available to the extent necessary to skill

Claims for special assistance

Claims for freedom to acquire and employ appropriate language

*Claims Relating to Strategies*

Claims for exposure to a training of a content appropriate to a culture of science and technology

Claims for exposure to strategies in training relevant to a culture of science and technology (Claims for exposure to good teaching)

Claims to be free from coercive strategies (other than those inherent in the process of compulsory education)

Claims for exposure to a socialization process that enables the individual to acquire the motivations and capabilities appropriate to the performance of adult rôles in value processes

*Claims Relating to Outcomes*

Claims for a basic minimum of skills relevant to effective participation in all value processes

Claims for additional acquisition of skill in terms of talent and motivation

Claims to the acquisition of skills appropriate to the age in which one lives

*Claims Relating to Effects*

Claims relating to outcomes with respect to each of the other seven values

### *G. Claims Relating to Affection*

#### *Claims Relating to Participation*

- Claims to give and receive affection on a reciprocal basis
- Claims for freedom from restrictions irrelevant to capabilities (race, etc.)
- Claims to give and receive loyalty to groups of one's choice
- Claims for freedom of association

#### *Claims Relating to Perspectives*

- Claims for freedom to acquire (or reject) a demand to participate in the affection process

#### *Claims Relating to Situations*

##### *Institutions specialized to affection*

- Claims to initiate and constitute intimate and congenial personal relationships
- Claims for freedom of access to institutions specialized to affection (adoption, legitimacy, proper spouse)
- Claims for recognition of membership in specialized groups

##### *Institutions not specialized to affection*

- Claims for freedom of access to institutions not specialized to affection

##### *Crisis*

- Claims that affection not to be denied disproportionately to crisis

#### *Claims Relating to Base Values*

##### *Authoritative*

- Claims that the process of authoritative decision is available to defend and fulfill affection demand

##### *Controlling*

- Claims that participation in each of the other value processes is available to defend and fulfill affection demand
- Claims for special assistance (capability of loving and being loved)

#### *Claims Relating to Strategies*

- Claims for freedom in the cultivation of love and loyalty
- Claims to be free from coercive strategies
- Claims to be free from discriminatory strategies

#### *Claims Relating to Outcomes*

- Claims to a basic minimum of love as a human being (Claims to a basic minimum necessary for individuals to acquire the motivations and capabilities to function effectively in shaping and sharing values)
- Claims for additional affection in terms of capability and contribution

#### *Claims Relating to Effects*

- Claims relating to outcomes with respect to each of the other seven values

### *H. Claims Relating to Rectitude*

#### *Claims Relating to Participation*

- Claims for freedom to participate in the formulation and application of standards of responsibility (norms of responsible conduct)

Claims for freedom from restrictions irrelevant to capabilities (race, etc.)

Claims for freedom of association for rectitude purposes

*Claims Relating to Perspectives*

Claims for freedom to acquire a demand on the self to act responsibly

Claims for freedom to choose among justifications of responsible conduct (secular and religious justifications; empirical, transempirical, or metaphysical justifications)

*Claims Relating to Situations*

*Institutions specialized to rectitude*

Claims for freedom to initiate and constitute institutions specialized to rectitude

Claims for freedom of access to institutions specialized to rectitude

*Institutions not specialized to rectitude*

Claims for freedom of access to institutions not specialized to rectitude

*Crisis*

Claims that rectitude not to be denied disproportionately to crisis

*Claims Relating to Base Values*

*Authoritative*

Claims that the process of authoritative decision is available to defend and fulfill freedom of choice in rectitude

*Controlling*

Claims that participation in each of the other value processes is available to defend and fulfill freedom of choice in rectitude

Claims for special assistance

*Claims Relating to Strategies*

Claims for freedom to employ all relevant strategies in the pursuit of rectitude

Claims to be free from coercive strategies

Claims to be free from discriminatory strategies

*Claims Relating to Outcomes*

Claims to a minimum opportunity to receive positive evaluation of rectitude as a human being

Claims for the maintenance of an order in which individuals demand of themselves and others that they act responsibly

Claims for movement toward a more perfect participation of all in responsible conduct

*Claims Relating to Effects*

Claims relating to outcomes with respect to each of the other seven values

II. *Claims Relating to Permissible Derogation from Established Standards*

*Claims Relating to Crises in Security*

(external security—threats of force, war, invasion, occupation; internal security—revolution, coup d'etat, insurrection, internal violence, civil disobedience)

*Claims Relating to Crises in Power*

(governmental breakdown, strikes by governmental employees, strife for succession, fraudulent election)

*Claims Relating to Crises in Respect*

(wholesale denial of human dignity, genocide, confrontations among classes and castes, collective defamation)

*Claims Relating to Crises in Enlightenment*

(large-scale breakdown in communication, seizure of facilities)

*Claims Relating to Crises in Well-Being*

(epidemics and natural disasters such as earthquakes and floods, famines, population explosion)

*Claims Relating to Crises in Wealth*

(depression, speculative booms, monopolization of resources, deficit in balance of payments, acute shortage of food and other goods)

*Claims Relating to Crises in Skill*

(drastic shortages, sudden displacement, excessive automation)

*Claims Relating to Crises in Affection*

(withdrawal of loyalties and commitment, large-scale dislocations in family patterns, mass migration)

*Claims Relating to Crises in Rectitude*

(conflicts among religions, conflicting secular ideologies, dissolution of sense of responsibility)

### III. *Claims Relating to the Constitutive Process of Authoritative Decision*

*Claims Relating to Participation**Claims Relating to Perspectives**Claims Relating to Situations**Claims Relating to Base Values**Claims Relating to Strategies**Claims Relating to Outcomes*

Intelligence

Promotion (Recommendation)

Prescription

Invocation

Application

Termination

Appraisal

*Claims Relating to Effects**The Context of Conditions*

Generally speaking, all the variegated features of the world social process are relevant to the process of claim with respect to human rights. Of special significance is the availability of access to the mass media or other channels of effective communication for those deprivées who are subject to totalitarian control or arbitrary physical confinements. When denied adequate protection and effective remedy, deprivées tend to act together in groups, organized or unorganized, to engage in non-violent (sometimes vio-

lent) demonstrations to dramatize grievances and appeal to world attention. This strategy of desperation, though often falling short of achieving immediate gains, is increasingly taken in the expectation that unceasing provocation (agitation, confrontation) is necessary to change the *status quo*.

#### THE CONSTITUTIVE PROCESS OF AUTHORITATIVE DECISION

The process of authoritative decision to which claimants may turn for resolution of controversies about the defense and fulfillment of human rights is the comprehensive "constitutive process" of the world arena, to which reference has already been made. This process, too, may be described briefly in terms of participants, perspectives, arenas, base values, strategies, outcomes and effects. We emphasize features explicitly related, or which could be specialized, to the protection of human rights.

##### *Participants*

In most comprehensive conception, relevant decision functions are performed, with varying degrees of prominence and limitation, by all the participants in the world social process; *i.e.*, nation-states, international governmental organizations, political parties, pressure groups, private associations, and the individual human being. While the public functions of prescription and application are necessarily restricted, in terms of direct participation, to a very small group of officials, international as well as national, participation in all other functions presents almost unlimited democratic potential for non-official participants. The numerous non-governmental organizations (NGO's), of which many have consultative status with the United Nations Economic and Social Council (*e.g.*, the International Commission of Jurists, International League for the Rights of Man, the International Council of Women, the Anti-Slavery Society, the International Committee of the Red Cross, World Federation of Trade Unions, the World Jewish Congress), in particular, have been most active in this regard.

##### *Perspectives*

The objectives in relation to human rights for which the world's effective élites establish and maintain the constitutive process of authoritative decision are most explicitly stated in the United Nations Charter, and further articulated in the Universal Declaration of Human Rights, the International Covenants on Human Rights, other treaties and declarations in reference to every value-institution process. These goals range from a minimum public order in the maintenance of security to many of the essential components of an optimum public order system, in which all values are abundantly produced and widely shared. The sum of these developments has created a set of widely shared expectations that the protection and fulfillment of human rights are a matter of "international concern" and not of the exclusive "domestic jurisdiction" of particular territorial communities. Some of the more important policies are presently so intensely demanded that they appear to be acquiring the status of *ius cogens*,

subject to modification only through extraordinary procedures. Omnipresent, however, is the recognition that the rights of any particular individuals or groups must be framed with due accord for the rights of others and that even the most intensely demanded individual rights must upon occasion, as in times of crisis, be accommodated to the overriding common interests of all community members.

### *Arenas*

Five types of institutional structures may be identified, which recur in both official and unofficial interactions, and which, in their varying degrees of organization, exhaust international interaction patterns.

1. Diplomatic: This arena, characterized by inter-élite communications, has relatively a long tradition and is the most frequent locus of human rights controversies.

2. Parliamentary-diplomatic: Occasional conferences are of increasing importance. A most recent example is the International Conference on Human Rights held in Teheran in 1968.

3. Parliamentary: The principal permanent prescriptive arenas are the General Assembly of the United Nations and its subsidiary entities (*e.g.*, the Third, First, and Fourth Committees, the Special Committee of Twenty-Four on decolonialization, and the Special Committee on South Africa), the Economic and Social Council and its functional commissions—the Commission on Human Rights (including the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the *ad hoc* committee on periodic reports) and the Commission on the Status of Women. The secondary arenas include the Security Council and the Trusteeship Council.

4. Adjudicative: Typical examples are the International Court of Justice, arbitral tribunals, the European Court of Human Rights, and the Human Rights Committee under the International Covenant on Civil and Political Rights.

5. Executive arenas: These arenas include international secretariats of both official and non-official participants and executive arenas of nation-states. Official international secretariats concerned with human rights include: U.N. Secretariat, Office of the U.N. High Commissioner for Refugees, UNESCO, ILO, WHO, UNICEF, FAO.

In terms of geographical range, institutional structures can be classified as universal, general, plurilateral, regional, and bilateral.

### *Base Values*

Base values at the disposal of international governmental organizations include grants of authority from nation-states and control over enlightenment (world opinion), skills, wealth (resources), well-being, loyalties, conceptions of rectitude, and military forces. While customary international law has long embodied authoritative prescriptions for the protection of aliens, nation-states are only just now beginning to exhibit a readiness to commit themselves through treaties, such as the two International Cove-



nants on Human Rights, to the enactment of the necessary legislation and to taking other appropriate measures for securing stipulated rights to their nationals. By the proposed new treaties any failures in performance that can be proved will of course make available to the other parties to the Covenants all the sanctions that are ordinarily available for violation of treaty obligation.

Potentially available in support of human rights measures is of course that great reserve of effective base values under the exclusive command of nation-states. One important development in recent times is the enhanced expectation of the protection of human rights on the national level through invocation of that complex network of national constitutions recently created under the inspiring impact of the United Nations Charter and the Universal Declaration of Human Rights.

### *Strategies*

Because of their limited resources, international governmental organizations have tended to emphasize the use of signs, particularly through the ideological strategy, to expose glaring value deprivations of the individual, and to enlighten and stimulate members of the public as vanguards of human rights. The relevance of recourse to economic and military strategies, emphasizing the manipulation of resources, is, however, exemplified in the sanctions invoked against South Africa and Southern Rhodesia, and all strategies are of course potentially available, both inclusively and exclusively. The selection of a particular strategy depends upon what decision function is to be performed and many variables in the context to which it is addressed.

### *Outcomes*

Concern here is twofold: first, for the actual allocation of competence between international governmental organizations and other inclusive decision-makers and nation-states in matters relating to human rights and, secondly, for the detailed performance, both inclusively and exclusively, of all seven functions of decision to which we alluded earlier.

It is still not uncommon for a nation-state to invoke the "domestic jurisdiction" concept in an attempt to preclude inclusive competence to prescribe and apply policies regarding human rights. Yet, predominant expectation today accords a very high competence both to international governmental organizations and to other inclusive decision.

The detailed practices by which the seven particular authority functions are performed today document an expanding inclusive competence.

1. *Intelligence*: The function of gathering, evaluating, and disseminating information relevant to decision-making about human rights is performed by both official and non-official participants. Appropriate authority is conferred upon various United Nations structures and other international governmental bodies. Numerous activities include seminars (interregional as well as regional), fellowship programs, advisory services of experts, special studies, exchanges of information and documentation, tech-

nical assistance, press and information services, the reporting system, presences of observers, fact-finding missions, and investigation.

2. *Promotion (Recommendation)*: The activities, authorized and actual, of many intergovernmental agencies are primarily promotional. For instance, the General Assembly, the Economic and Social Council, and various specialized agencies are noted for having made recommendations, covering a wide range of values, to their members. The NGO's prominent rôle in promoting the protection of human rights is evident.

3. *Prescription*: As a process of communication, prescription proceeds on three levels: (1) the designation of policy (specification of factual contingencies, formulation of norm and projection of sanction), (2) the creation of expectations about the authority of the policy so designated, and (3) the creation of expectations about the community control to sustain such policy. Thus conceived, prescription includes the outcomes both of formally authoritative prescribing processes and of unorganized interaction. It is, functionally speaking, broader and more specific than the commonly used term "legislation," an organic concept that presupposes the existence of a centralized prescribing body.

All the different historic modes of international law-making—including explicit formulations in agreements and official declarations and implicit communications through uniformities in behavior—are available for human rights as for other problems.

Customary prescription, through communications by uniformities in behavior, is importantly illustrated in the traditional minimum standards of treatment for aliens and the resurgent doctrine of "humanitarian intervention." Since the establishment of the United Nations, however, international prescriptions regarding human rights have mainly been effected by multilateral treaties, as exemplified by the Genocide Convention and the International Covenants on Human Rights submitted to the various governments for ratification.<sup>6</sup> Increasingly, recourse has been made to engage

<sup>6</sup> The efficacy of international agreement formulated under the auspices of the United Nations is demonstrated by sixteen multilateral treaties covering all the basic values with varying scope. In chronological order these treaties are:

1. Convention on the Prevention and Punishment of the Crime of Genocide, 1948;
2. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949;
3. Convention relating to the Status of Refugees, 1951;
4. Convention on the International Right of Correction, 1952;
5. Convention on the Political Rights of Women, 1952;
6. Slavery Convention signed at Geneva on Sept. 25, 1926, and amended by the Protocol opened for Signature or Acceptance at the Headquarters of the United Nations on Dec. 7, 1953;
7. Convention Relating to the Status of Stateless Persons, 1954;
8. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956;
9. Convention on the Nationality of Married Women, 1957;
10. Convention on the Reduction of Statelessness, 1961;
11. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962;

the United Nations machinery in what is euphemistically known as "quasi-legislation," in the form of declarations, resolutions and recommendations. The evolution of the Universal Declaration of Human Rights as "quasi-legislation" has been most remarkable. When the Universal Declaration was adopted unanimously in 1948 by the General Assembly, the general expectation was that it mirrored merely "a common standard of achievement," devoid of legal enforceability. In the past two decades, however, the Declaration has been affirmed and reaffirmed by numerous resolutions of U.N. entities and related agencies, invoked and reinvoked by various participants, and incorporated into many international agreements and national constitutions; it has also found expression in judicial decisions (international as well as national). Accordingly, the Declaration is now widely acclaimed as a "Magna Carta" of mankind, to be complied with by all the participants in the world arena.<sup>7</sup>

These different modes of prescription are not mutually exclusive; depending upon context, one mode may be more economic and effective than another. The crucial consideration is not so much in the precise modality of formulation and communication as in the degree to which the policies projected become a part of the working expectations of community members. As we have elsewhere suggested:

If principles of authority are to control the flow of decision, it is ultimately essential that they be embodied in the expectations of the effective participants in the world community. At no time can it be taken for granted that human expectations, or the demands and identifications with which they interlock, are unchanging. Nor can it be validly asserted, without appropriate verification, that the words of treaties or other written documents, mirror community expectations. Since viewpoints are in flux, today's structure of expectation is open to change, and in fact is bound to change, as new conditions arise and new suggestions are put forward and assimilated.<sup>8</sup>

---

12. International Convention on the Elimination of All Forms of Racial Discrimination, 1965;

13. International Covenant on Economic, Social and Cultural Rights, 1966;

14. International Covenant on Civil and Political Rights, 1966;

15. Optional Protocol to the International Covenant on Civil and Political Rights, 1966; and

16. Protocol Relating to the Status of Refugees, 1966.

<sup>7</sup> For eloquent statement of the history and impact of the Universal Declaration, see E. Schwelb, *Human Rights and the International Community* (1964).

Other examples of the employment of declarations for creating community expectations include the Declaration of the Rights of the Child (1959); the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); the Declaration on Permanent Sovereignty over Natural Resources (1962); the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (1963); the Declaration on the Promotion Among Youth of the Ideas of Peace, Mutual Respect and Understanding Between Peoples (1965); the Declaration on the Elimination of Discrimination Against Women (1967); and the Declaration on Territorial Asylum (1967).

<sup>8</sup> M. S. McDougal, H. D. Lasswell, and I. A. Vlasie, *Law and Public Order in Space* 146 (1963).

4. *Invocation*: In the field of human rights, the "state-to-state" complaint system, as unsatisfactory as it is, remains the principal modality for invoking protection of the individual. In contexts in which there are threats to the peace or acts of aggression, international agencies, such as the Security Council, may act.

Obviously, effective protection of individuals must depend in no small measure upon the ability of the individual himself to invoke decision when he feels that prescriptive misfeasance or nonfeasance has occasioned an unlawful value deprivation. Hence there are a growing concern and effort for making more available "individual petition" (individual "communication") in matters relating to human rights, as exemplified by the European Convention on Human Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. Notice should also be taken of the invocatory rôle of the individual under the U.N. Trusteeship system. Of late, focus of interest has been on the proposal for establishing a United Nations High Commissioner for Human Rights, acting as an "ombudsman" of mankind.

5. *Application*: The detailed relation of human rights prescriptions to particular instances of controversy still occurs primarily in state-to-state negotiations, though courts, arbitral bodies, and international commissions play an increasingly important rôle.

In the pre-enforcement phase, a variety of activities is undertaken by different agencies for the purposes of exploring and characterizing relevant facts and policies. In conventional terms the reference includes: "investigation," "fact-finding," "hearings," "on-the-scene observation," "general comments," "reporting," "negotiation," "good offices," "mediation," "commissions of enquiry," "conciliation," "arbitration," and "adjudication."

The focus of current interest, given the limited authority and resources available to the United Nations and other international governmental organizations, is understandably on "enforcement." The unhappy experience of the United Nations in undertaking sanctions against South Africa and Southern Rhodesia has highlighted both the limitations and potentialities of the United Nations in this regard.

Although the economic and military measures of sanction are presently limited, the diplomatic and ideological sanctions promise a great potential. Exclusions of Members and refusals of assistance, when taken jointly by major international governmental organizations, could have significant impact on target states. An unceasing "publicity war" that seeks to expose glaring value deprivations and arouse the conscience of mankind is increasingly perceived to be fundamental and indispensable. Sanction measures of course must be closely related to the sanctioning goals—prevention, deterrence, restoration, rehabilitation and reconstruction.

6. *Termination*: Practices for the termination of prescriptions and arrangements have traditionally been unorganized, depending upon the myths and procedures of customary international law. In the recent past,

however, there has been a trend toward seeking termination in organized authoritative arenas, such as various entities of the United Nations and *ad hoc* international conferences.

7. *Appraisal*: Participation in appraisal is probably the most democratic of all functions. All participants—both official and non-official—are constantly evaluating authoritative decision in terms of the indulgences and deprivations which it occasions them and others with whom they identify or disidentify. Of particular significance is the periodic reporting system with regard to human rights.

### *Effects*

The longer-term consequences of the outcomes in particular prescriptions and applications, taken in aggregate, obviously affect not merely the distribution of values among the immediate claimants and the lesser communities in which they interact, but also the kind of comprehensive public order, human dignity or other, which the general community can achieve. Of particular importance for future decision process is the change in the long-term perspectives of individuals around the globe.

### *The Context of Conditions*

The conditions which may in measure affect the world constitutive process of authoritative decision in prescription and application relating to human rights are obviously the same as those affecting the process generally, and again include the whole world social process. Of special significance are the diversities inherent in the contending systems of world public order and changes in interdependences. Concomitant with the enhanced perception of interdependence and the growing identifications with humanity, one may observe in all parts of the world an increasing awareness and concern that mankind has not yet created the legal institutions or processes of authoritative decision adequate to clarify and secure common interests, in the protection of human rights as well as in other sectors, under conditions of contemporary interdependence. From peoples living in the shadow of possible ultimate catastrophe, yet tantalized by the promise of a potential abundance hitherto unknown in the production and sharing of all values, the demand for a more effective and adequate legal protection of human rights becomes ever more insistent.

### CLARIFICATION OF GENERAL COMMUNITY POLICIES

The relevant observational standpoint is that of citizens who are identified with the future of mankind as a whole rather than with the primacy of any particular group.

The comprehensive set of goal values which we recommend for postulation, and for detailed clarification and implementation, are those which are today commonly characterized as the basic values of human dignity, or of a free society, the thrust of which is toward the greatest production and widest possible distribution of all basic values. These are the values

bequeathed to us by all the great humanistic, democratic movements of mankind; and such values are being ever more insistently expressed in the rising common demands and expectations of peoples everywhere. Rhetorically at least, most contending systems of world public order are unified in proclaiming the dignity of the human individual and the need of a worldwide public order in which this ideal is authoritatively pursued and effectively approximated. The potential rival goal of adopting human "indignity" and of perfecting law as an instrument of a self-selected caste aggrandizement receives little explicit allegiance.

The basic values presently demanded in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights, and other agreements, programs and documents concerning human rights, are formulated at sufficiently high levels of abstraction to facilitate a contextual examination of the entire world community process in which their clarification and implementation are sought and to permit references to many different cultural and institutional modalities. The basic goal values postulated for future world public order cannot of course be made expressive only of the exclusive, parochial values of some particular segment of the larger community, but they can admit a very great diversity in the institutional practices by which they are sought and secured. In different particular communities and cultures very different institutional practices may contribute equally to overriding goals for the increased production and sharing of values. When overriding goals are accepted, experiment and creativity may be encouraged by the honoring of a wide range of functional equivalents in the institutional practices by which values are sought.

The important challenge to both scholarly observers and authoritative decision-makers, who accept and seek to implement the rising common demands of mankind, is that of effectively performing all the various intellectual tasks outlined above for relating the postulated broad general preferences (for shared power, shared respect, shared enlightenment and so on) to all the particular choices which must be made in different specific contexts in the prescription and application of an international law of human dignity.

In meeting this challenge both observers and decision-makers could be aided by a more comprehensive and detailed map of the processes of interaction, claim, and decision in which specific controversies and opportunities for authoritative intervention occur and by a comprehensive set of principles of content and procedure to assist them in exploring particular contexts and securing appropriate accommodation of the inclusive interests of all peoples in the clarification and maintenance of human rights and the abiding exclusive interests of particular territorial communities in occasional derogations from optimum standards in the protection of individual rights.

Principles designed to assist in the identification of inclusive interests in the clarification and maintenance of human rights might extend, beyond general preferences for high levels of production and wide sharing in all

value processes, to the more detailed specification of presumptive preferences for each particular value, phase by phase of value process. Such specification might embody preferences in relation to each value, as our summary of types of claims above suggests, as follows:

*Participation*

- Widest possible access compatible with other overriding community values;
- Freedom from discrimination irrelevant to merit;
- Freedom to form groups;

*Perspectives*

- Freedom to acquire demands for values;
- Freedom to maintain multiple identifications;
- Opportunity to achieve realism in expectations;

*Situations*

- Freedom from interference in initiating and constituting institutions;
- The establishment and maintenance of specialized and non-specialized institutions, adequate to maximize human potentials;
- Freedom of access to appropriate institutions;
- Compulsory access when necessary to responsibility;
- Freedom from deprivations disproportionate to crises;
- Optimum adjustment of institutions in space (territorially and pluralistically) and through time for the realization of purposes above;

*Base Values*

- Access to authoritative decision to defend all rights;
- Access to controlling value processes:
  - Basic minimum;
  - Equal access (protection against monopolization);
- Opportunity for continuing accumulation of values;
- Special assistance to overcome handicaps in achieving access;

*Strategies*

- Freedom to employ effective strategies in the shaping and sharing of values;
- Preference for persuasive, rather than coercive, strategies;
- Freedom from discriminatory strategies;

*Outcomes*

- Access to a basic minimum of benefits;
- Enjoyment of further benefits on the basis of contribution;
- Maintenance of high levels of production, conservation, distribution and consumption.

A more comprehensive specification of principles would of course seek explicitly to relate necessary choices with respect to any particular value to its aggregate consequences for the shaping and sharing of other values and, hence, to community security in the sense of high position, expectancy, and potential with respect to all values.

If basic goals in the protection of human rights are to be fulfilled, the standards indicated with respect to each particular value process must be

given the utmost deference compatible with aggregate achievement. The precise delineation of the rights of any particular individual in any particular context must, however, always require an infinitely delicate reconciliation with the comparable rights of other individuals; and, in the domain of human rights as in other domains, the protection accorded the individual's rights and freedoms must, on occasion, especially in times of crisis, be accommodated to the overriding inclusive interests of all community members. Hence, derogation from established standards with respect to certain rights may become permissible under certain conditions of necessity if the measures taken in derogation are kept proportional to such necessity, and if responsibility to review by the general community is acknowledged.

Let it be said immediately that a certain minimum of values indispensable to a dignified human existence must be prescribed as immune from all claims of derogation at all times. Notably among these are the right to life, freedom from torture and inhuman treatment, freedom from involuntary human experimentations, freedom from slavery, the slave trade and servitude, freedom from imprisonment for debt, freedom from retroactive application of criminal punishment, the right to recognition as a human being, and freedom of thought, conscience and religion. These rights and freedoms are indispensable to a dignified human existence and must remain wholly intact from derogation upon grounds of crisis. In terms of our basic postulation, it can never be necessary to encroach upon these rights and freedoms, even in time of emergency. Nor would their deprivation ever be proportional. If the emerging concept of *ius cogens* is to be given rational meaning in the context of a world public order of human dignity, its bedrock must be in this minimal protection of human rights.

The principle of necessity becomes applicable when a crisis is so serious and imminent as to create in a territorial community reasonable expectations—as third-party observers may determine reasonableness—that measures of derogation are necessary to conserve its community interests. Such a necessity can be ascertained by considering a given context in terms of (1) *participants*: officials and non-officials involved; (2) *perspectives*: degree to which the general community is identified (identification), degree to which necessity is perceived (expectation), and demands in terms of which derogation is sought, including security (external and internal), power, respect (deference to the rights or reputations of others), enlightenment (prevention of the spread of rumors), well-being (public health and safety), wealth, skill, affection (special protection for the youth and children), and rectitude (morality); (3) *situations*: proximity and degree of concentration (geographical features), degrees of imminency and suddenness (temporal features), pattern and degree of anticipation (institutionalization), and potential crises that would call for derogation (crises); (4) *base values*: degree of impairment of all relevant values; (5) *strategies*: availability of non-derogating strategies; (6) *outcomes*: degree of actual threat to all eight values; and (7) *effects* (longer-term consequences).



The principle of proportionality requires that measures in derogation by a government be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of derogation under the established conditions of necessity. Values must not be unnecessarily destroyed. The requirements of proportionality can be ascertained by relating to the process of responses to crises: (1) *participants*: officials involved and non-officials affected; (2) *perspectives*: expectations of necessity; projected objectives for prevention, deterrence, restoration, rehabilitation and reconstruction; and relation to basic constitutive goals; (3) *arenas*: agencies involved (executive, administrative, legislative, or judicial); (4) *base values*: use of authority or naked power; (5) *strategies*: procedural requirements; (6) *outcomes*: proportion of deprivation to permissible objectives and exigencies of the situation; and (7) *effects*.

The principle of responsibility demands that the honoring of an authority for derogation does not extend to the exaltation of unilateral decision by a particular government over inclusive decision by the general community. An initiating government, in making a first provisional decision that the conditions of necessity are such as to require an immediate undertaking of derogation measures in defense of community interests, must not act arbitrarily, but responsibly in conformity to required standards. It must be willing to submit its initial decision of derogation to third-party review. Its report to an inclusive authoritative decision-maker must stipulate, among other things, the existence of a formal state of emergency, as officially proclaimed; measures taken in derogation and justifications therefor; areas affected; and date of termination. A serious review from general community perspectives of the conditions of necessity and the requirements of proportionality must require systematic and disciplined appraisal of many features of the context of a particular event.

Principles designed to assist in the evaluation of alternatives in world constitutive process for their potential impact upon the implementation of human rights could be related to all phases of such process and in minute detail to each of the seven authority functions. Thus, formulations could be suggested in terms of universality and responsibility in participation, conformity to established inclusive and exclusive interests in manifested perspectives, the compulsoriness and openness of arenas, the balance between inclusive and exclusive control of base values, the degrees of coercion in strategies, and economy in performance of functions. Alternative modalities for the performance of different functions could be appraised in terms of their effectiveness, promptness, dependability, credibility, and so on.<sup>9</sup> The continuously pertinent questions are: What do these policies dictate in detail with respect to the protection of human rights and how can the predispositions of effective élites be molded in a way to persuade them to accept and implement such details?

Principles of procedure designed to assist in the application of principles of content about the processes of interaction, claim, and decision might invoke the effective and economic performance of the other related

<sup>9</sup> For elaboration see McDougal, Lasswell, and Reisman, note 2 above.

intellectual tasks: the description of past trends in decision about comparable controversies and their consequences; inquiry about factors affecting decisions and consequences; inquiry about future probabilities in decision and factors; and the systematic evaluation of alternatives in myth, institution, and strategy. The urgent objective in formulating such principles is to afford guidance to decision-makers in achieving both the delicate and inescapably necessary adjustment of the rights of different individuals among themselves and the proper balancing of the exclusive rights of individuals in relation to the aggregate, more inclusive rights of the general community in times of crisis. It would not appear impossible to devise principles of contextuality, of economy in the exploration of potential facts and policies, of historical inquiry, and of assessment of the consequences of alternative decisions which might greatly expedite both prescription and application.

In conclusion we would emphasize that the animating conception of any international law of human rights is, at its core, a humanistic world view: a conception of the human being as an end in himself and a legitimator of power and not as an instrument of a corporate society, deriving his right to existence from that society. This root conception of "international concern" antedates the so-called "modern law of nations," with its dogmatic emphasis upon state sovereignty, and goes back to the very origins of international law and sources of humanism. With the advent of the nation-state system, this conception was relegated to the position of a marginal *exception*. The Enlightenment's reinstatement of the individual as of central concern has only now begun to reshape the basic constitutive structures of the world process of decision. Decisions in regard to human rights, as to all areas of public order, must inevitably involve a careful balancing of legitimately complementary interests: the total value welfare of an individual taken alone, with the total value welfare of other individuals, both taken alone and as components of groups. For better securing the destinies of a world community process centered upon man, it is, therefore, crucial that the basic policies of a public order of human dignity be more appropriately articulated and applied.