

Law And Peace*

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The establishment and maintenance of a comprehensive peace, through law rather than by arbitrary violence and coercion, is today commonly regarded as one of humankind's most urgent and difficult problems. To achieve a productive understanding of what law may contribute to peace, of the inextricable interrelations of law and peace, it is necessary that we observe the larger context of global processes of interaction that contain and condition both law and peace. We must formulate appropriate conceptions of law and peace, note the inadequacies in our inherited theories and procedures designed to serve peace and, finally, apply to the general problem, and numerous particular problems of promoting peace, certain relevant intellectual tasks. These tasks, extending beyond the unsystematic, anecdotal pursuit of random strategies in effective power, or the traditional logical derivation from allegedly autonomous legal rules, include the postulation and clarification of basic community goals, the examination of past trends in the achievement of such goals, the exploration of the factors that affect degrees in achievement, the projection of possible futures, and the recommendation of alternatives in decision process and particular decisions that promise a higher degree of success.

We proceed to explore these points of inquiry and intellectual tasks *seriatim*.

I. THE LARGER CONTEXT

In realistic perspective, it can be observed that the whole of humankind today constitutes a single comprehensive community, entirely comparable to its many internal territorial and other communities, in the sense of interdetermination or interdependence in the shaping and sharing of all values.¹ This larger community is composed, not merely of an aggregate of nation-states, but of expanding billions of individual human beings who create, in addition to nation-states, a whole host of other groupings and associations, such as international governmental organiza-

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1. Detailed description is offered in McDougal, Reisman & Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 805 (1988).

tions, political parties, pressure groups, and private associations specialized to all demanded values, in activities increasingly transcending all territorial boundaries. The interdependences that characterize this larger community process, and all its internal component communities, include both those within any, and every, particular value process and those that cut across all value processes. The interdependent activities within, and across, all value processes stimulate, affect and are affected by all decision processes, lawful and unlawful.²

A most important component in this larger community process is an ongoing, all pervasive process of effective power, totally global or earth-space in reach, in which decisions are in fact taken and enforced by severe deprivations or high indulgences, oftentimes irrespective of the wishes of any particular participant.³ For some centuries nation-states have been, and remain, through the resources and people within their boundaries, the principal institutions through which people wield effective power and have engaged in a continuous balancing of such power. In a world in which people and goods are in continuous and increasing movement, the bases of power are no longer hermetically sealed within the boundaries of particular nation-states. Resources are important only as potential values, dependent upon transnational activity; and as science and technology advance and universalize, enlightenment and skill, as well as conceptions of rectitude and responsibility, become of increasing significance as bases of power.

Upon close examination, it may be observed that the decisions taken within this comprehensive process of effective power are of two different kinds.⁴ Many decisions are of course taken through sheer naked power or from considerations of expedience, without regard for common interest. Goliaths do not always live, or balance power, easily with pygmies. Many other decisions, however, may be observed to be taken from perspectives of authority, in the sense that they are made by the persons who are expected to make them, in accordance with criteria expected by community members, in established structures of decision, with enough bases in effective power to secure consequential control, and by authorized procedures. The continuous flow of this second type of decision may be realistically described as a comprehensive process of authoritative decision by

2. These interdependences are minutely outlined in M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* ch. 1 (1980) [hereinafter McDUGAL, LASSWELL & CHEN].

3. See generally, McDougal, Reisman & Willard, *The World Process of Effective Power: The Global War System*, in *POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW* 353 (M. McDougal & W. Reisman eds. 1985); G. SCHWARZENBERGER, *POWER POLITICS* (3d ed. 1964); W. Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1 (1973).

4. For descriptions of these two types of decisions and their interrelations, see M. McDUGAL & W. REISMAN, *INTERNATIONAL LAW ESSAYS* (1981) and M. McDUGAL & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY* ch. 1 (1981).

which the effective elites of the global community, after the fashion of elites in lesser communities, seek to clarify and secure their common interests. The decision processes of the most comprehensive, global community affect the shaping and sharing of values both as between and within all its constituent communities, of whatever geographic or functional reach. The decision processes of the lesser regional, national, and local communities in turn affect the distinctive decision processes and value allocations of the larger community which they comprise. The two different kinds of decisions that comprise the global process of effective power, those that employ arbitrary coercion and violence and those that seek through authority to minimize such coercion and violence, are obviously in continuous interaction and struggle. The most comprehensive global community process thus moves incessantly through a continuum between two polar extremes; that of the most intense violence and coercion, sometimes described as "war", and that which emphasizes persuasion and community organized coercion, sometimes described as "peace".

It can be observed, further, that the most comprehensive process of authoritative decision exhibited in the global community, as in lesser component communities, is also composed of two different though closely interrelated types of decision. The first are the constitutive decisions which establish and maintain a process of authoritative decision. These are the decisions that identify and characterize decision-makers, postulate and specify basic community policies, establish appropriate decision structures, allocate bases of power for decision and sanctioning purposes, authorize procedures for the making of different kinds of decisions, and secure the performance of all the different decision functions (intelligence, promoting, prescribing, invoking, applying, terminating and appraising) necessary for clarifying and securing the more detailed policies of the larger community.⁵ The second type of authoritative decisions are those that continuously emerge from global constitutive process to establish and maintain a public order: these are the decisions that determine how resources are allocated, planned, developed and employed, how wealth is shaped and distributed, how human rights are promoted and protected or deprived, how enlightenment is encouraged or blighted, how health is fostered or neglected, how rectitude and civic responsibility to the larger community are matured or repressed, and so on through the whole gamut of demanded values.⁶ The quality of the constitutive process that a community can establish tremendously affects the quality of the public order it can achieve; conversely, the quality of the public order a community achieves reciprocally affects the quality of the constitutive process it can establish.

5. The basic features of the existing global constitutive process are described at length in the references in note 4 above and in McDUGAL, LASSWELL & CHEN, *supra* note 2.

6. For an outline of claims for the protection of public order values, see McDUGAL, LASSWELL & CHEN, *supra* note 2, ch. 3.

II. A RELEVANT CONCEPTION OF LAW

The most relevant conception of law in the global community, as in lesser communities, is, as indicated above, in an ancient tradition revived by the American Legal Realists, that of a comprehensive process of authoritative decision.⁷ It is the process, a component of the global process of effective power, by which the politically relevant members of the larger community seek to clarify and secure their common interests and to minimize and regulate the assertion of arbitrary, unauthorized violence and coercion, the other component of the global process of effective power. It will be observed that, as authoritative decision, the term "law" includes reference to both authority, in the sense of community expectations about the requirements of decision, and control, in the sense of actual participation in the making and enforcement of decision. It may need emphasis that the most minimal conception of law requires uniformities in decision in accordance with community expectation; law is the very opposite of the arbitrary, unauthorized use of violence and coercion. The members of the global community, as in lesser communities, who are concerned with the shaping and sharing of values will, further, focus attention, not upon isolated, anecdotal decisions, but upon the whole, comprehensive flow of authoritative decision.

A conception of law, whether for the global community or lesser communities, as a body of rules, though again of ancient origin, is hopelessly myopic. In pluralistic and rapidly changing communities, rules are always complementary, ambiguous, and incomplete. They do not apply themselves, and technology has yet to invent their automation. The only empirical reference, as faint as it sometimes is, of rules is to decision. For established decision-makers, and others, the function of rules is to state community goals and to guide toward the factors in many varying contexts that may affect rational choice. Rules are, thus, but one component, however important, of a comprehensive process of authoritative decision.

The conception of "international law" as a body of rules regulating the interrelations of nation-states is doubly myopic.⁸ Beyond the infirmities of its over-estimating of the potentialities of rules, it has infirmities in the scope of the activities it seeks to make subject to law. The activities of humankind in global community process today spill across the boundaries of nation-states in an ever accelerating and intensifying rate. The contemporary conception of "transnational law" takes only a beginning account of the importance of individual human beings, and their multiplicitous associations and groupings, in these new, transnational ac-

7. Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971). Background is given in W. REISMAN & A. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* (1987).

8. This theme is documented historically in McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 189 (1967).

tivities.⁹ A rational concern for peace in either a minimum or optimum reference, must take these activities into still further account. The law relevant to peace cannot be confined to the coordination of the activities of nation-states. An appropriate law extends, must be extended, to the whole global process of authoritative decision that guides and regulates human activities across nation-state boundaries. In comprehensive conception this process of decision includes among its component features, and interrelates, all the various "roads" to peace indicated in the call for this symposium, such as international governmental organization, third-party decision-making, the facilitation and protection of diplomacy and negotiation, conflict resolution, the organization of deterrence, the management of collective security, and so on.

III. A RELEVANT CONCEPTION OF PEACE

The most relevant conception of peace must make reference to the least possible application of violence and coercion to the individual human being and to the freedom of access of the individual to all cherished values. For community members and their decision-makers alike, a viable conception of peace cannot today be limited to reference to a mere absence of armed, and international, conflict. The peace demanded by contemporary humankind is not that of the concentration camp (however large) or that of the living dead (whatever the community).

The conception of peace, as contraposed to war, in the historic literature of international law is most imprecise.¹⁰ The words "peace" and "war" are characteristically employed, in high ambiguity, to make simultaneous reference both to the presence or absence of the facts of transnational violence and coercion and to the legal consequences to be attached by authoritative decision to different intensities in violence and coercion. The facts to which reference is made are those of the global process of effective power in which many different participants (state and non-state), for many varying objectives in expansion or conservation, employ all instruments of policy (military, diplomatic, ideological, and economic), in alternative stages of acceleration and deceleration in intensity of violence and coercion, in attack upon the bases of power (people, resources, institutions) of other participants, and are themselves in turn the targets of attack. The legal policies and sanctioning consequences that the authoritative decision-makers of the global community apply to the different aspects of this continuous process of violence and coercion vary with many particular problems, such as the minimization of major coercions, the conduct of hostilities, the termination of hostilities, the regulation of minor coercions, and so on. In a first effort to minimize major violence and coercion, through a law of "aggression" and "self-defense," authorita-

9. P. JESSUP, *TRANSNATIONAL LAW* (1956).

10. For comprehensive review, see M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961) [hereinafter McDUGAL & FELICIANO].

tive decision-makers seek to prevent alterations in the existing distribution of values among nation-states by processes of unilateral and unauthorized coercion and to promote value changes and adjustments by processes of persuasion or by community-sanctioned coercion. A second effort, when persuasive strategies fail and violence and coercion break out, is to reduce to a minimum the unnecessary destruction of values by defining with as much specificity as possible the permissible maximum of violence and destruction in particular types of situations. It has been many times documented that our inherited concepts of "peace" and "war," making such ambiguous reference to this vast maze of facts and legal policies, cast but a darkening light upon the difficult problems in public order that presently confront humankind.

It is suggested that a more relevant conception of peace can be found in a specification of contemporary notions of world public order. A distinction is sometimes made between "minimum order," in the sense of the minimization of unauthorized violence and coercion, and "optimum order," in the sense of the greatest access of the individual human being to the shaping and sharing of all the values of human dignity.¹¹ It would appear, however, that both these kinds of allegedly different public order goals are indispensable to any workable conception of peace. Even when conceived in the minimum sense of freedom from the fact and expectation of arbitrary violence and coercion, peace may be observed increasingly to be dependent upon maintaining people's expectations that the processes of effective decision in public order will be responsive to their demands for a reasonable access to all the values we today characterize as those of human dignity. When peace is more broadly conceived as security in position, expectation, and potential with regard to all basic community values, the interrelationship of peace and human rights quite obviously passes beyond that of interdependence and approaches that of identity. Hence, for reasons of interdependence or identity, there can be but one answer to President John F. Kennedy's question "Is not peace, in the last analysis, basically a matter of human rights?"¹²

The basic community policies that underlie conceptions of peace and human rights are in any democratic community the same policies that underlie all law. Hence, it is no metaphor to conclude that peace and law may appropriately be described as one side of the coin (of community process and effective power) of which arbitrary violence and coercion are the other side.

11. McDUGAL, LASSWELL & CHEN, *supra* note 2, ch. 5.

12. THE INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES, COMMON SECURITY: A BLUEPRINT FOR SURVIVAL 8 (1982):

A secure existence, free from physical and psychological threats to life and limb, is one of the most elementary desires of humanity. It is the fundamental reason why human beings choose to organize nation states, sacrificing certain individual freedoms for the common good - security. It is a right shared by all - regardless of where they live, regardless of their ideological or political convictions.

IV. FORMULATING THE PROBLEM

The rising, common demands of peoples about the globe for increased protection from arbitrary violence and coercion and for greater participation in the shaping and sharing of all cherished values are written large in contemporary shared consciousness. Yet the expectation of impending major violence and coercion, employing weapons of apocalyptic destructive potential, continues to hang over the world, threatening and intimidating all peoples and in measure paralyzing "human rights" efforts to increase the participation of all individuals in the shaping and sharing of values. It is this disparity between the demands of the peoples of the world and responding community achievement that constitutes the most general problem in shaping a global legal process designed better to secure peace, whether peace is defined in minimum or optimum terms.

Utopian proponents of peace sometimes ignore that all efforts to improve authoritative decision for better securing peace, however defined, must take place within the context of the contemporary global process of effective power. This process of effective power, as we have noted, exhibits the major nation-states of the world, and especially those possessing nuclear weapons and the capabilities for chemical and biological warfare, engaged in a process of continually balancing power among themselves and others and taking all measures necessary to insure that no single state and its allies are able to secure a position of completely dominant, centralized power.¹³ There is no way that peoples cherishing peace and common interest in all the values of human dignity, can avoid direct confrontation with peoples employing violence and coercion for purposes of expansion in special interest and, when necessary, themselves employing military force and other coercion in defense of their values. Humankind has, unhappily, demonstrated down through the millennia that it is sometimes willing to employ the most destructive, unauthorized violence and coercion against others not merely for self-protection, but to secure demanded, though unwanted, changes in the others. The threats and horrors of the contemporary scene need no new depiction or emphasis.

Alleged realists, in contrast, sometimes ignore that authority, as community expectation, is itself a form of effective power, and a form that can be changed and improved. A most important base of power for the decision-makers in any community derives from the expectations of the members of that community that these are the established decision-makers and that they are authorized to make certain decisions, by specified criteria of common interest, and to invoke certain sanctioning consequences to secure compliance. In an age of instantaneous global communication, this form of effective power, with its appeal to world opinion and shared conceptions of rectitude, has enormous and increasing importance.

13. Relevant historical perspectives are delineated in F. HINSLEY, *POWER AND THE PURSUIT OF PEACE* (1963); C. MURPHY, *THE SEARCH FOR WORLD ORDER* (1985).

For perspicuous proponents of peace, the realistic and immediate challenge is that of introducing into the global process of effective power more collectivized, perhaps even more centralized, perspectives and operations of authority, sustained by control. It is not, however, to be assumed that humankind is limited in choice between an anarchy of allegedly equal, independent, and sovereign territorial communities and some fantasied omniscient universal state with all its threats to freedom and the values of human dignity. The words federal, confederal, region, alliance, and coalition are primarily meaningful in the present discussion in their suggestion of the infinite variety of potential modalities in organization. The parts may be related to the whole in many different, and changing, ways in a moving context. In the complex contemporary global community process, there can be no magical modality or gimmick for securing peace.

It is of course necessary in any effort toward improvement, to begin with the existing global process of authoritative decision, already collectivized in higher degree than many observers are aware. There is urgent need for reexamination of the competences accorded, in the United Nations and elsewhere, for minimizing resort to major violence and coercion and for the revision of these competences to make them accord more with a genuine democracy and the capabilities for responsibility in the enforcement of decisions. One promising alternative requiring consideration, as we will develop below, is that of enhancing the competence of regional organization and functional groupings. Many improvements could be made also in the multitudinous decisions emerging from global constitutive process in regulation of all the public order values other than power, such as wealth, enlightenment, health, and so on. It is the flow in outcomes of decision with respect to these values that constitute the subject matter of human rights and conditions the achievement of peace in both minimum and maximum conception.

V. THE INADEQUACIES OF EARLY THEORIES AND PROCEDURES

For some centuries the dominant conception of international law has been, as we are too often reminded, that of a body of rules that regulate the interrelations of nation-states.¹⁴ Grotius, building upon a number of predecessors, established himself as the founder of modern international law by recognizing the increasing importance of the nation-state and by outlining a procedure by which an unorganized community of states (without centralized legislative, executive, and judicial institutions) could minimize the occurrence and devastation of major violence and coercion, through assertions of reciprocity and retaliation. In Grotius' eloquent

14. This history is stated in detail in McDUGAL, LASSWELL & REISMAN, *supra* note 8; see also THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW (R. Macdonald & D. Johnstone eds. 1983); see also MORISON, *The Schools Revisited*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW ch. 5 (1983); see also W. SCHIFFER, THE LEGAL COMMUNITY OF MANKIND (1954).

words "Quod tibi non vis, alteri non facias": what one does not wish done to himself, he should not do to others.¹⁵ This perception of common interest was built upon the fact, dubbed by later French scholars as *le dédoublement fonctionnel*, that the same states that are claimants in one case may be sitting as judges, through world opinion, in the next comparable case. In a community of a large number of states of relatively equal effective power, even so primitive a procedure could do substantial justice and maintain a modest peace. Grotius ransacked many versions of natural law, sacred and profane, and a great range of prior practices by states and other participants in search of appropriate authoritative rules.

In a recent book, *Visions of World Order*, the late Julius Stone reviews the major historic frames of jurisprudence and considers their past and potential contributions to world public order.¹⁶ It is clear from Stone's presentation, and other surveys, that none of the major frames of jurisprudence either recognize the degree of collectivization in the contemporary global process of authoritative decision or escape from the shackles of the limited conception of international law as a body of rules regulating the interrelations of states. In some frames the notion of community is truncated or imprecise, not permitting either comprehensive or detailed description. Many conceptions of effective power stop short with the nation-state as participant, and ignore authority as an important base of power transnationally. Most frames define authority either in transempirical (religious or metaphysical) terms or in ambiguous, tautological syntactic reference, encouraging endless verbal disputations about the true source of the "obligation" or "binding force" of international law. Many frames can conceive of control as emanating only from organized and centralized governmental structures, thus foredooming inquiry at both international and national levels. The futility of each major, inherited frame may be noted.

The oldest frame of jurisprudence, commonly described as that of "natural law," deriving from times when religion and notions of physical nature were often merged with law, did achieve conceptions of a larger community of humankind and of a common human nature and, hence, make immense contribution to the development of transnational perspectives of law. The conception of authority propounded by this frame was, and is, however, characteristically in terms of religious or metaphysical references, admitting of diametrically opposite interpretations, and, on the rare occasions when the control dimension of power is addressed, the conception of control put forward is observable only in appeals from naked power. The frame does not focus squarely upon common interest as a

15. H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRITISH YEAR-BOOK OF INT'L L. 1 (1943), reprinted in H. LAUTERPACHT, INTERNATIONAL LAW (collected papers, E. Lauterpacht ed. 1975); T.C. ASSER INSTITUTE, INTERNATIONAL LAW AND THE GROTIAN HERITAGE 1985 (a commemorative colloquium held at The Hague, 8 April 1983 on the occasion of the Fourth Centenary of the Birth of Hugo Grotius).

16. J. STONE, VISIONS OF WORLD ORDER (1984).

guide to decision and characteristically makes unverified assumptions about human nature (social or asocial) and by logical derivations from such assumptions seeks to establish a body of prescriptions relating to world public order, including peace. The greatest difficulties for world public order are created by this frame when assumptions about the nature of individuals are transposed to territorial communities and such entities are believed to have absolute, unmodifiable attributes of equality, independence, and sovereignty.

The positivist frame, in contrast with natural law, assumes that the several nation-states constitute the principal communities of humankind and that whatever transnational community exists, if any, is composed only of these nation-states. The conception of law propounded by this frame, in an ill-defined confusion of both authority and control, is in terms of rules established by nation-state officials, as developed from an earlier version of the commands of the sovereign. Since the devotees of this theory can observe no global "sovereign," with centralized legislative, executive and judicial institutions and officials, their theories by definition preclude a conception of international law as law. Indeed, the more bold devotees of this frame flatly assert, in obedience to John Austin's specifications, that international law is not law. A second version of this frame, described as "dualist," asserts that, though both national law and international law are equally law, they have a completely different set of decision-makers, policies, structures, and procedures. A third version, known as "monism," finds authority, not in a "sovereign" decision-maker, but in some postulated global *grundnorm*, located in either agreement or custom, and asserts that this *grundnorm*, by some mysterious derivational magic, without regard for effective power, dictates the content of the law both of the larger community and of all its lesser communities. It will be noted that these two latter versions of the positivist frame both build upon the assumption that international law is merely a body of rules that govern the interrelations of states. These rules are to be found, in theory, largely in the *past* practices of states. The goofus bird flies backward because, though it has no care for where it is going, it likes to know where it has been.

The historical frame, with its emphasis upon the parochial uniqueness of every particular territorial community, has had great difficulty in achieving a conception of transnational community. Though this frame does, in contrast with that of natural law, seek to ground law in empirical social process, the conception of law with which it commonly works is that of some mysterious *geist* or spirit, which supposedly in any particular community emanates from its people as does their language, religion, poetry and music. In such an approach, the lines between authority and control are completely blurred, and few proponents of the approach are able to isolate authoritative decision or a comprehensive constitutive process of decision from the whole flow of particular events in which values are shaped and shared. The deep and pervasive determinism in the notion that law is somehow forever fixed by an ineluctable fate at some

point in the past discourages all effort toward innovation and change and renders sterile the various intellectual tasks indispensable to rational decision.

Similarly, the sociological frame, despite its characteristic concern for the scientific study of explanatory factors and social consequences, unhappily takes its basic conceptions of community and law largely from the positivist frame. Too often its notion of community process is confined to activities within the nation-state, in neglect of the whole hierarchy of interpenetrating community processes from local through national and regional levels to the global. It commonly finds authority in rules established by nation-state officials, and even the most realistic proponents of the frame, find control only in organized and centralized institutions. Hence, the conception of international law for this frame continues to be that of a supposed body of rules governing the interrelations of nation-states, in disregard of the role of other participants in transnational community and power processes and without clear focus upon authoritative decision transcending state lines. The scientific study in any community of the causes and consequences of "rules," without clear relation to decision, is a difficult task, and can scarcely be expected to contribute greatly to the maintenance or improvement of world constitutive process and public order.

The particular policies and procedures developed, under the aegis of these inherited theories about international law, for the control of major coercion and violence, sometimes called force, were most primitive.¹⁷ There have, of course, for some centuries been reasonably observed policies for the protection of diplomats and facilitation of diplomacy; for the making, application, and termination of international agreements; for the protection of nationals abroad from abuses by other states; and for the peaceful settlement of disputes, as through conciliation, mediation, and arbitration. With respect to the more direct control of major coercions and violence, the policies and procedures developed were, however, far from being adequate or consistently observed. The most important effort to control major coercion and violence, with roots reaching far back into the Middle Ages, derived from a distinction between just and unjust wars.¹⁸ The basic thrust of *bellum iustum* was that resort to major violence could be regarded as legitimate self-help only for certain objectives, such as redressing a received wrong, a wrong "serious and commensurate with the losses the war would occasion" and which could not "be repaired or avenged in any other way." The effective power of the Papacy made possible some centralized administration of so general a concept of necessity and consequentiality. Yet even this modest effort to control major coercion and violence fell before changes in community and effective

17. McDUGAL & FELICIANO, *supra* note 10, chs. 1 and 3; H. Waldock, *The Regulation of the Use of Force Between States*, 81 HAGUE RECUEIL DES COURS, 1952-II, at 455.

18. J. JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* (1981).

power processes in the eighteenth century, and by the nineteenth century, the requirement of *bellum iustum* was brought to an unobtrusive demise.

In the nineteenth and early twentieth centuries, resort to coercion came to be regarded as a prerogative of sovereignty, the legitimacy of which non-participating states were not competent to judge. In the international law of the time, as Eugene Rostow has written, "war was the sport of princes and the privilege of states, and could be undertaken for power, glory, revenge, or many reasons beyond considerations of self-defense."¹⁹ International law offered no general prohibition of violence and made no clear distinction between impermissible and permissible coercion. It attempted only the regulation and the humanization of violence once violence had in fact been initiated. Contending belligerents were regarded as upon a plane of "juridical equality" and third states that chose not to participate were said to be under a duty of "neutrality." In deep paradox, though states were said to have a fundamental right to independent existence, there was no prohibition against states waging war and destroying one another. Decisions were to be taken by the relative strength of states and violence was permissible, not only for self-help and self-vindication in the conservation of values, but also for effecting changes in the international distribution of values. In only less paradox, a few authoritative prescriptions purported to govern the employment of minor coercions, limited in dimension and objective, sometimes labelled as "retorsion," "reprisal," "intervention," or "pacific blockade," and so forth, and generally categorized as "measures short of war." Any such governance was of course illusory: the initiating state could at any time designate its operations as "war" and avoid the thrust of limitation.

The movement in the twentieth century toward a general prohibition of major coercion and violence, and toward a collectivized administration of that prohibition, is traceable through the Covenant of the League of Nations, the Pact of Paris, and the Nuremberg verdict, with culmination in the core provisions of the United Nations Charter.

It requires only brief note that for centuries international law purported to offer little protection to the citizens of a state against that state. Traditional law exhausted its concern for human rights with the modest protection afforded aliens.²⁰

VI. THE CONTEMPORARY AUTHORITATIVE POSTULATION OF BASIC PUBLIC ORDER GOALS

In 1945, spurred by the "rising, common demands" of individual human beings from every corner of the globe to be free from "the scourge of war" and for greater participation in the shaping and sharing of all the values of human dignity, the framers of the United Nations Charter ef-

19. Rostow, *Disputes Involving the Inherent Right of Self-Defense*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 264, 283 (L. Damrosch ed. 1987).

20. C. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1967).

fecting two revolutionary changes in historic international law: in core provisions, the Charter postulated, and authoritatively prescribed, both a general prohibition of the unauthorized employment of major coercion and violence and a new protection of the fundamental human rights of individuals, even against their own states.²¹ In its preambular clauses and the statement of goals in Article 1, the Charter clearly recognized the intimate interdependence, if not identity, of peace and human rights and made the protection of human rights coordinate with the maintenance of peace. In Article 2(3) the Charter prescribed: "All members shall settle their international disputes by peaceful means in a manner that international peace and security, and justice, are not endangered."

The most difficult problem for law in any community, a problem greatly magnified in the global community by gross inequalities in the distribution of effective power, is that of characterizing and minimizing unlawful coercion and violence. In Articles 2(4) and 51, and certain auxiliary articles, the United Nations Charter makes an indispensable distinction between impermissible and permissible coercion and violence and projects a set of complementary prescriptions, whose unitary and overriding policy is that of protecting and promoting peaceful change.

The most important of the new policies, that of a general prohibition of unauthorized major coercion and violence, is stated very broadly in Article 2(4), which reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

It was, however, recognized that in the still primitively organized global community, offering only modest expectation of the capability of the general community for protecting its members, some right of self-defense by states is indispensable to the maintenance of even the most modest minimum order. Hence, Article 51 of the Charter reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security"

The historic right of states to self-defense did not require them, like sitting ducks, to await armed attack, and it is clear, despite occasional literalist interpretations, that the framers of the Charter had no intent to preclude response to *imminent* attack and to impose suicide. The most rational construction of these complementary policies contraposed in Articles 2(4) and 51 would appear to be: the right of self-defense established by the Charter, as in traditional practice, authorizes a state which, being the target of activities by another state, reasonably decides, as third-party observers may later determine reasonableness, that such activities require

21. The first of these developments is described in MCDUGAL & FELICIANO, *supra* note 10, ch. 3; the second in MCDUGAL, LASSWELL & CHEN, *supra* note 2, ch. 4.

it to employ the military instrument to protect its territorial integrity and political independence, to use such force as may be necessary and proportionate to its defense.²² The employment of force that creates this expectation in a target state is in violation of Article 2(4) and is commonly characterized as "aggression," the unlawful complement to lawful self-defense.

Learning from the obvious difficulties in Grotius' *dédoublement fonctionnel* and the failures of the League of Nations, the framers of the Charter projected, for the detailed administration of this basic distinction between impermissible and permissible coercion and violence, a highly collectivized and centralized structure of decision-making. Thus, in Article 24(1) the Security Council, with its veto for the protection of permanent members, was accorded "primary responsibility for the maintenance of international peace and security," and the members agreed that the Security Council, "in carrying out its duties under this responsibility," acted on their behalf. In other chapters of the Charter, elaborate provision was made both for the peaceful settlement of disputes and for employment of organized community force in the maintenance of public order. In Article 39 the Security Council was authorized to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to recommend or take appropriate measures "to maintain or restore international peace and security." In other articles possible measures, of varying intensity in coercion, are outlined in detail. The capstone Article 25 provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

The United Nations Charter, despite all its emphasis upon the importance of (and modest prescription about) human rights, does not itself project a comprehensive and detailed bill of human rights. This gap in constitutive prescription has, however, been remedied by a sequence of cumulative subsequent developments. Building upon the provisions of the Charter, the main features of a comprehensive global bill of rights have been prescribed, if not yet effectively applied, through a whole host of authoritative communications, including The Universal Declaration of Human Rights (now largely customary law); The Covenant on Political and Civil Rights; The Covenant on Economic, Social and Cultural Rights; The Genocide Convention; and multiple specialized and regional pacts; as well as by national constitutions and the vast flow of judicial and other decisions that create the expectations of customary law. The outcome is, thus, an authoritatively prescribed global bill of human rights entirely comparable in content and reach to that maintained in contemporary, more mature national communities.²³ It embraces the fundamental policies that underlie all law in any community that seeks a genuine clarifica-

22. The detailed application of this test is outlined in MCDUGAL & FELICIANO, *supra* note 10, ch. 3.

23. This thesis is documented in MCDUGAL, LASSWELL & CHEN, *supra* note 2, ch. 4.

tion of the common interests of its members. A world public order of human dignity may endure many variations in the practices by which particular values are shaped and shared if major value goals are kept compatible and all practices are evaluated and accommodated by the criteria of common interest.

VII. TRENDS IN PAST ACHIEVEMENT OF BASIC GOALS

It is common knowledge that the highly collectivized and centralized structure of decisionmaking projected by the United Nations Charter for characterizing and minimizing major coercion and violence was stillborn. So complex an administrative structure, requiring the careful coordination of member states, could not survive the vast disparities in the effective power and interests of member states and the mounting intensity of the struggle between an expansive totalitarian public order and an opposing order at least aspiring toward the values of human dignity. As the horrors of worldwide war have receded, the perception and clarification of a common interest between the contending orders has become more and more difficult.

In consequence of this failure of the projected centralized structure of decisionmaking, the larger community of humankind has been thrown back, for making the difficult distinction between impermissible and permissible coercion and violence, upon Grotius' ancient *dédoulement fonctionnel*, in which the several states themselves make the necessary evaluations and undertake appropriate sanctioning measures. In such a context it cannot be surprising that states commonly make the evaluations in terms of their own special interests, including the interests of the public order to which they adhere. It is not believed, however, that the great bulk of humankind, taken as individuals, have abandoned their demand to be free from the "scourge of war," or have lost the realistic expectation that some stable, uniform administration of the distinction between impermissible and permissible coercion and violence is indispensable to even minimum attainment of a law-governed global community. The states of the world, and the whole of humankind as expressed through the many media of world public opinion, do continue to challenge and evaluate the behavior of states by the criteria of Articles 2(4) and 51. The hope would appear to remain that more centralized and more effective procedures for the administration of an indispensable policy can still be achieved. In the light of such expectations and hope, it can scarcely be said, with realism, that Articles 2(4) and 51 are dead and that humankind is again without authoritative prohibition of major coercion and violence.²⁴ At least for the proponents of a public order of human dignity, the understanding remains that the application of major coercion and violence to the human person is fundamentally incompatible with basic

24. The question is raised by T. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

human rights and that a global community that genuinely aspires toward the values of human dignity must continue to seek to minimize major coercion and violence as an instrument of change, or as an instrument obstructing peaceful change.

A principal obstacle to the uniform application of Articles 2(4) and 51 has been in the insistence, from the beginning, by the Soviet Union that "wars of liberation" are not subject to Article 2(4). This concept, designed to facilitate totalitarian expansionism, is derived from an earlier idiosyncratic distinction between "just" and "unjust" wars. The distinction reads:

- (a) *Just* wars, wars that are not wars of conquest but wars of liberation, waged to defend the people from foreign attack and from attempts to enslave them, or to liberate the people from capitalist slavery, or, lastly, to liberate colonies and dependent countries from the yoke of imperialism; and
- (b) *Unjust* wars, wars of conquest, waged to conquer and enslave foreign countries and foreign nations.²⁵

In more modern formulation the concept and its justification are thus stated by Professor Tunkin:

Modern international law also provides for the right of colonial peoples and dependent countries to use armed force against metropolies interfering with efforts of the peoples of corresponding countries or territories to realize their right to self-determination. Such use of armed force is also a justified form of self-defence. While in a general form that proposition follows from the United Nations Charter itself, it finds more concrete expression in numerous international documents, including the Geneva agreements of 1954 concerning Indochina, and numerous resolutions of the United Nations General Assembly, especially in the Declaration on Principles of International Law of 1970.²⁶

This alleged exception to Article 2(4) has, as is well known, been employed by the Soviets to justify interventions in many countries in Europe, Asia, Africa, and Latin America.

In supplement to this alleged exception from Article 2(4) of "wars of liberation," the Soviets have in relatively recent times sought to establish an allied exception known as the "Brezhnev Doctrine." This doctrine is designed to justify Soviet intervention in states already "socialist" to preclude their choice to become other than socialist. In its most authoritative statement, this doctrine reads:

There is no doubt that the peoples of the socialist countries and the Communist Parties have and must have freedom to determine their

25. History of the Communist Party (Bolsheviks), Short Course 167-168 (Commission of the Central Committee of the C.P.S.U.(B) ed. 1939), as quoted in McDUGAL & FELICIANO, *supra* note 10, at 186.

26. G. TUNKIN, LAW AND FORCE IN THE INTERNATIONAL SYSTEM 85 (1983).

country's path of development. However, any decision of theirs must damage neither socialism in their own country nor the fundamental interests of the other socialist countries nor the worldwide workers' movement, which is waging a struggle for socialism. This means that every Communist Party is responsible not only to its own people but also to all the socialist countries and to the entire Communist movement. Whoever forgets this in placing sole emphasis on the autonomy and independence of Communist Parties lapses into one-sidedness, shirking his internationalist obligations.²⁷

The statement adds:

Each Communist Party is free in applying the principles of Marxism-Leninism and socialism in its own country, but it cannot deviate from these principles (if, of course, it remains a Communist Party). In concrete terms this means primarily that every Communist Party cannot fail to take into account in its activities such a decisive fact of our time as the struggle between the two antithetical social systems — capitalism and socialism.²⁸

The violence with which this doctrine has been, and is being, applied in Eastern Europe and elsewhere needs no new description. The totality of these claims for exception from Article 2(4), through both wars of liberation and the Brezhnev Doctrine that the Soviet Union asserts is aptly summarized by Professor Michael Reisman:

The Soviet claim was and continues to be that, the U.N. Charter notwithstanding, the Soviet Union maintains the right to support those struggling against existing governments if their struggle is consistent with historical laws, of which the Soviet government is the exclusively authorized interpreter. If the groups succeed, the Soviet Union has the additional right and obligation to make sure that their members and constituents do not change their minds in the future. A scholar of no less stature than Professor Tunkin has sanctified the doctrine as a *jus cogens*.²⁹

Incredibly enough, the International Court of Justice in the recent *Nicaragua* case would appear, perhaps maladroitly, to have conferred its authority upon "wars of liberation."³⁰ At one point in its opinion, the

27. Kovalev, *Sovereignty and the International Obligations of Socialist Countries*, Pravda, September 26, 1968, quoted in McDUGAL & REISMAN, *supra* note 4, at 176.

28. *Id.* See also Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1981).

29. Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171, 188 (1988).

A possible change in Soviet attitudes toward both "wars of liberation" and the Brezhnev Doctrine is indicated in M. Gorbachev, *Reality and Safeguards for a Secure World*, Sept. 17, 1987, U.N. Doc. A/42/574, S/194143 (Sept. 18, 1987). Unhappily, there would appear to be some dissension in the ranks. See *Gorbachev Deputy Criticizes Policy*, New York Times, Aug. 7, 1988, at 11, col. 1. Even Mr. Gorbachev himself sometimes wavers. See *Dissenters Stay Silent*, The Times (London), July 15, 1988, at 6, col. 6. The changes under way would appear to be in the direction of greatly improved world public order.

30. Case Concerning Military and Paramilitary Activities in and Against Nicaragua

Court in piety, as excessive as impossible, declares its complete neutrality between contending systems of world public order. It writes:

The finding of the United States Congress also expressed the view that the Nicaraguan Government has taken "significant steps towards establishing a totalitarian Communist dictatorship." However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural systems of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.³¹

Yet in its holding the Court finds in the acknowledged hostilities of Nicaragua against El Salvador no "armed attack" against El Salvador or even threat of "armed attack" against El Salvador or any other state; hence, it denies the United States the right to participate in the collective defence of El Salvador and legitimizes the factual intervention by Nicaragua. As Judge Schwebel writes, in dissent, this was in substance to honor "wars of liberation."³² Judge Schwebel, finding the errors of the Court conspicuous, writes:

The Court appears to reason this way. Efforts by State A (however insidious, sustained, substantial and effective), to overthrow the government of State B, if they are not or do not amount to an armed attack upon State B, give rise to no right of self-defence by State B, and hence, to no right of State C to join State B in measures of collective self-defence. State B, the victim State, is entitled to take counter-measures against State A, of a dimension the Court does not specify. But State C is not thereby justified in taking counter-measures against State A which involve the use of force.³³

He adds confirmation of his interpretation by noting a negative inference from an earlier reference by the Court to "wars of decolonization," a kind of war not involved in the case. Thus, while professing not to be able to create a double standard, by its decision the Court in fact creates a double standard in favor of an expansive totalitarianism.³⁴ The question before the Court was not whether Nicaragua's choice of a public order was "a violation of customary international law," but whether Nicaragua's attacks upon its neighbors were in accord with conventional and custom-

(Nicar. v. U.S.) 1986 I.C.J. 14.

31. *Id.*, para. 263.

32. Dissenting Opinion, para. 174-81.

33. *Id.*, para. 175.

34. *Id.*, para. 178, referring to paragraph 206 of the Judgment of the Court.

ary international law.³⁵

The decision and opinion of the International Court of Justice in the *Nicaragua* case, most unhappily, raises grave questions about the capabilities of a judicial body, under the contemporary circumstances of contending world public orders, to make rational decisions in the common interest about the regulation of major coercion and violence. At the jurisdictional phase of the case,³⁶ the Court held, contrary to all prior law, that it had jurisdiction over a state that had not consented to such jurisdiction, and in favor of a state that had no standing to sue except by the most factitious creation of the Court. At the merits phase, the Court demonstrated that it had few capabilities for discovering or recognizing the facts relevant to rational decision, and even less capabilities for evaluating such facts by the criteria that much of the world regards as expressed in the United Nations Charter and customary international law.³⁷ Hersch Lauterpacht could have been right in his famous insistence that in the abstract no dispute between human beings is inherently non-justiciable.³⁸ His conclusion can, however, have little relevance to a struggle between contending world public orders in which all common interest, beyond bare human survival, seems at times to have disappeared.³⁹

It should be no cause for wonder, in an infectious deterioration of policies and procedures for the regulation of major coercion and violence, that the United States, as a principal proponent of a public order of human dignity, should begin in measure, for self-help, to adopt policies

35. My criticism of the Court is both of its holding that an actual "armed attack" by Nicaragua upon El Salvador was necessary before the United States could come to the aid of El Salvador and of its finding that what Nicaragua was doing did not amount to an armed attack upon El Salvador. In the light of this holding and this finding, it does not matter that the Court did not explicitly state that it regarded "wars of liberation" as lawful; by its decision it honored such an expansionist war in fact.

36. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Jurisdiction and Admissibility*, 1984 I.C.J. 392.

It should perhaps be noted that the writer was of counsel to the United States Government at this phase of the case.

37. See Norton, *The Nicaragua Case: Political Questions before the International Court of Justice*, 27 VA. J. INT'L L. 459 (1987); J. MOORE, *THE SECRET WAR IN CENTRAL AMERICA* (1987); R. TURNER, *NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS* (1987).

The decision is discussed, in varying terms of approval and disapproval, in a sequence of comments in *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (1987). A particularly perceptive comment is that of J. Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135 (1987).

See also H. Almond, Jr., *The Military Activities Case: New Perspectives on the International Court of Justice and Global Public Order*, 21 INT'L LAW. 195 (1987); Macdonald, *The Nicaraguan Case: New Answers to Old Questions*, 1986 CAN. Y.B. INT'L L. 127; Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 VAND. J. TRANSN'L L. 53 (1987).

38. H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933).

39. McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

and procedures parallel to those employed by the Soviet Union. Through the Monroe Doctrine and participation in the Organization of American States the United States has long of course sought to preclude outside states from acquiring territorial power in the Western hemisphere. More recently, Presidents as diverse in general perspective as Kennedy and Johnson have made pronouncements, in content comparable to the later Brezhnev Doctrine, designed to justify interventions against totalitarian expansion into this hemisphere.⁴⁰ Even the House of Representatives joined in support of these pronouncements. It resolved that:

- (1) any [international communist] subversive domination or threat of it violates the principles of the Monroe Doctrine, and of collective security as set forth in the acts and resolutions heretofore adopted by the American Republics; and
- (2) in any such situation any one or more of the high contracting parties to the Inter-American Treaty of Reciprocal Assistance may, in the exercise of individual or collective self-defense, which could go so far as resort to armed force, and in accordance with the declarations and principles above stated, take steps to forestall or combat intervention, domination, control and colonization of whatever form, by the subversive forces known as international communism and its agencies in the Western hemisphere.⁴¹

In contemporary times Presidents Carter and Reagan have extended comparable doctrines to the Persian Gulf and Saudi Arabia.

Another important obstacle to the rational, uniform application of Articles 2(4) and 51 derives from the attempt, as illustrated by the International Court of Justice in the *Nicaragua* case, to cut down the reach of the historic right of self-defense.⁴² It is not always recognized that in the global community Articles 2(4) and 51 are as wholly complementary as are the prohibition of violence and the permission of self-defense in mature national communities. Some state officials and scholars have taken the position that Article 51 imposes upon states a higher degree of necessity than that of customary international law and requires states to await the inception of actual armed attack, without option to respond to realistic expectations of imminent attack. This interpretation of Article 51 is based upon an allegedly literal interpretation of the words "armed attack" regarded as an isolated component of the article. It may be noted, however, that such interpretation introduces the words "only if" into the Article and is contrary to all the important canons for the interpretation of international agreements.⁴³ The negotiating record indicates that the framers of the Charter sought only, by introducing the words "armed at-

40. The various pronouncements of United States officials are summarized in Reisman, *supra* note 29.

41. As quoted in Reisman, *supra* note 29, at 177.

42. Rostow, *supra* note 19; O. Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

43. This position is fully developed in McDUGAL & FELICIANO, *supra* note 10, at 217, 232.

tack," to immunize regional security arrangements, and especially the Inter-American system envisioned by the Act of Chapullepec, from the jurisdiction of the Security Council. There was no expressed intent to forbid response to threat of imminent attack. The most relevant Committee Report reads: "The use of arms in legitimate self-defense remains admitted and unimpaired."⁴⁴ The principle of interpretation by the subsequent conduct of states obviously can give little comfort to those who urge new limitations. Most importantly, the principle of effectiveness in interpretation by major purposes makes the asserted limitation of self-defense to the actual inception of armed attack an absurdity. In an age of increasingly awesome instruments of destruction and highly sophisticated coercion by instruments other than the military, the state that awaits armed attack, can expect only quick transition to oblivion. It defies not merely major purposes, but even common sense, to think that a prescription in effect imposing suicide could either create the expectation, indispensable to law, of its enforcement, or that it could be enforced.

It may be recalled that the United Nations Charter makes the protection of human rights coordinate with, if not inclusive of, its prohibition of unauthorized coercion and violence. It is presently being greatly debated among scholars and others in what degree the core provisions about human rights are, like the provision for self-defense in Article 51, completely complementary with Article 2(4).⁴⁵ Most observers agree that the long enjoyed practice of humanitarian intervention, for the protection of a state's nationals and sometimes others, has not been outlawed by Article 2(4). It would thwart reason to hold that a constitutional Charter so greatly emphasizing human rights should be interpreted to abolish an historic remedy so effective in the protection of human rights, a remedy which does not in fact threaten territorial integrity and political independence.

The more intense contemporary controversy centers most directly upon whether it is lawful for one state to interfere (engage or assist in coercion and violence) in the internal affairs of another state for a range of objectives. Unhappily, the discussion is carried on in terms, such as "intervention," "counter-intervention," "civil war," "self-determination," "spheres of influence," "reprisals," "retaliations," and so on, which make so ambiguous a reference to both facts and legal policies that it is often difficult to know what is being asserted. One suggestion appears to be

44. McDougal & Feliciano, *supra* note 10, at 236.

45. See, *inter alia*, Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); *The Use of Force in Contemporary International Law*, 78 PROC. AM. SOC'Y INT'L L. 74 (1984); *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985); *The Emperor Has No Clothes: Article 2(4) and the Use of Force in Contemporary International Law*, ch. 1 in UNITED NATIONS FOR A BETTER WORLD (J. Saxena and others, eds. 1986) 3; Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984); *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); *International Law in Theory and Practice*, 178 RECUEIL DES COURS, 1982-V, ch. VII, VIII; Cutler, *The Right to Intervene*, 64 FOREIGN AFF. 96 (1985).

that the self-determination of states is the paramount policy of contemporary international law and that the proponents of human dignity may intervene in other states to protect or promote self-determination, even as totalitarian states do in promotion of totalitarian public order. In response other commentators, not always taking a position upon the Soviet claims, insist that such intervention would be in clear violation of the allegedly literal and neutral words of Article 2(4). A counter-response is that the proponents of human dignity may lawfully intervene after, but not before, expansive totalitarians have intervened in a state. In such controversy it is sometimes forgotten that what is involved in all instances is the application of the larger community's fundamental policy, as embodied in Articles 2(4) and 51, against *change* by coercion and violence and that the objectives of a state, whether for expansion or conservation, are among the most important features of the factual context for evaluating the lawfulness or unlawfulness of a state's action.

It has long been urged that the rational application of Articles 2(4) and 51, in clarification of common interest, requires in every instance of challenged coercion and violence, not mere logical derivation from allegedly autonomous (policy neutral) rules, but rather a careful, configurative examination and appraisal of the many relevant features of the larger context of the coercion and violence.⁴⁶ In an earlier statement, noting that the relevant features of the context in any instance of challenged coercion and violence were many and complex, we summarized:

Even the most modest suggestion must include the varying characteristics of the participants, and of their allies and affiliates; the distribution of perspectives of attack and defense, expansion and conservation, deliberateness and coincidence, inclusivity and exclusivity, consequentiality and inconsequentiality; the *locus* of events, as within a single community or transcending different communities, and the geographic range of the impacts of events; the timing of events, and their continuity or discontinuity; the differential distribution of the bases of effective power; the variety and characteristics of the different strategies — diplomatic, ideological, economic, and military — employed; and the various outcomes in intensity and magnitude achieved, of the fact, and expectation, of coercion and destruction of values.⁴⁷

46. This position is believed to be established in McDUGAL & FELICIANO, *supra* note 10, ch. 3.

47. McDougal, *Foreword to J. MOORE, LAW AND THE INDO-CHINA WAR* (1972).

For example, in relevant prescription the customary right to use force in self-defense is limited by the criterion of *necessity* to defend against an imminent, or exercised, use of force against the territorial integrity of a state or its political independence, and by the requirement of *proportionality* of the action taken in self-defense. Thus, the action defended against has to be appraised in its entire context: the participants have to be determined, their objectives (e.g., whether they are expansionist or conservative in nature), the situation of decision, the bases of power behind the activities, the strategies employed, and their immediate outcomes in intensities of coercion. If the activities complained of would lead a disinterested third party to reasonably conclude that use of the military instrument is

It is no revolutionary idea, alien to the common interest that must be effected by all law, that the kind of public order demanded by a state be taken into account in appraising the lawfulness of its acts of coercion and violence. In endorsing this idea, more than twenty-five years ago, Florentino Feliciano and I wrote:

Lest the contrary impression arise by default, it may be made clear that, in contrast with the quoted Soviet doctrine, we make no proposal for incorporation of a double or multiple standard in the conception of permissible coercion. The policy we recommend is, on the contrary, that of demand for effective universality, for the uniform application to all participants of a basic policy that excludes the acquisition or expansion of values by coercion and violence. In urging the explicit examination of the fundamental public order perspectives of participants, in particular their definitions of the legitimate purposes of coercion, the hope is precisely that decision-makers may thereby escape the double standard which in specific interpretations may be created against those who do not accept as permissible the use of coercion for expansion. We think of the interest to be clarified, the demand for change by noncoercive and nonviolent procedures only, as a general community interest, as the long-term interest of all individual states, and recognize that there must be a promise of reciprocity from states who reject totalitarian conceptions of world order.⁴⁸

What the proponents of a public order of human dignity cannot accept is that a double standard be established that discriminates in favor of expansive totalitarianism.

VIII. THE CONDITIONS AFFECTING ACHIEVEMENT OF BASIC GOALS

By considering the conditions that have affected past failures in humankind's achievement of a stable minimum public order, an observer may be able to feed back to the clarification of goals, enhance understanding of past trends, and prepare for the projection of probable futures and a more rational choice among policy options. The conditions that have affected past failures are commonly described, at high level abstraction, in terms, first, of the contemporary anarchy of multitudinous states, exhibiting both a most uneconomic relation of peoples to resources and immense differences in effective power, and secondly, of the continuing struggles between contending systems of world public order, expres-

urgently required to protect the target country's territorial integrity and political independence, then the target country may employ force in a reasonably proportionate response — the proportionality of the defensive action, again, being determined through comprehensive contextual analysis.

Such a contextual examination of the events in the Nicaragua case would reveal the Soviet Union and Cuba as participants along with the Sandinistas and would note the expansionist nature of their objectives. For an outline of the necessary examination and appraisal in a comparable case, see M. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963).

48. McDOUGAL & FELICIANO, *supra* note 10, at 187 n.156.

sing diametrically opposed conceptions of the relation of the individual human being to the state. To make this high level description of overriding conditions meaningful, however, it must be given operational indices in terms of a maze of interacting predispositional and environmental variables.⁴⁹ The predispositional variables are the subjectivities of individual human beings, including their demands for values, their identifications with others, and their expectations about the context of interaction; these relevant subjectivities may be organized by employment of the maximization postulate, that individuals adopt one response rather than another when they expect to be better off in terms of all their values by the response chosen. The environmental variables are the features of the larger community context, which both condition and constrain predispositions. These environmental variables may economically be described in terms of population, resources, institutions, and outcomes in value shaping and sharing. A most convenient way of achieving comprehensive description of any community process, it may be recalled, is in terms of individual human beings, with varying patterns of demand, identification and expectation, employing resources, through institutional practices, for maximization of value outcomes.

It has already been noted that a most important variable in the contemporary global process of effective power is what is commonly referred to as "the rising, common demands" of peoples for greater participation in the shaping and sharing of all the basic values of human dignity. Different peoples, conditioned by differing cultural traditions and modes of social organization, may of course pursue and achieve the same basic values through different modalities and nuances in institutional practice. Unhappily, in a world of contending public orders and immense contrasts in development, peoples nurtured in differing parochial communities may tend to express special, rather than common, interests. Unable to clarify and agree upon common interests, peoples often become preoccupied with short-term, immediate payoffs rather than long-term consequences. It is possible that as the respect revolution accelerates, people's demands for new participation in the different value processes will become more realistic in recognition of the need for reciprocity and common interest. The universalizing demands of individuals for greater participation in all value processes can be expected to continue to affect all effective and authoritative decision.

The identifications upon behalf of which demands for values are asserted today range from the whole of humankind to small parochial groups. The earliest parochial identifications with the family and the tribe were broken, in part, by the advent of cities, facilitating the later identifications with larger states. In more recent times, the "nation-state" has been the symbol about which individuals could organize their collec-

49. These variables are outlined and described in some detail in McDUGAL, LASSWELL & CHEN, *supra* note 2, at ch. 1.

tive identifications, and most states have of course sought to inhibit more inclusive identifications that might limit their power. It would appear, however, that the potentialities for individuals to acquire and sustain more inclusive identifications, at least for the promotion of minimum order, are strengthening. The increasing tempo of interaction in all value processes around the globe, facilitated by modern communication and transportation, allows an individual not merely to change geographic location, but also to change "place" through identifications with many different functional groups. Individuals who participate in a vast global network of territorial and functional activities may be able better to identify with a common humanity and to demand its common interest.

The expectations of the peoples of the world about the conditions that affect minimum public order and their individual security, the expectations that in turn affect all effective and authoritative decision, vary tremendously in comprehensiveness and realism. The greatest contemporary failure in realism is in the lack of appreciation of the comprehensiveness and depth of the interdependences, affecting both minimum and optimum order, of all peoples everywhere with regard to the shaping and sharing of all values. No less importantly, in a world in which the giant powers continuously balance weapons capable of instantaneous global destruction, most peoples, elite and rank and file alike, are obsessed by a pervasive expectation of violence that affects all choices among alternatives in value shaping and sharing. Fortunately, the spread of new techniques of communication and modern education make it possible for individuals everywhere to acquire a new realism about the conditions, not merely of continued existence, but of improved public order. As the network or interaction and the perception of interdependence expand, more and more peoples may come to perceive that the assertion of special interest, against common interest, is not compatible with survival. Some of the more important environmental variables that characterize the contemporary global community process, affecting all public order, may be indicated in the following tabular, if somewhat anecdotal, form:⁵⁰

1. Security

Continuing confrontations of the major powers, with rising expectations of violence. Threats of nuclear destruction and of chemical and biological warfare. The acquisition of contemporary instruments of destruction by smaller powers. The rise and spread of private violence and terrorism.

2. Population

The accelerating rate of increase in population growth. The uneven distribution of peoples in relation to resources and increasing barriers to migration.

50. This presentation is adapted from McDougal, *International Law and the Future*, 50 Miss. L. J. 259 (1979).

3. Resources

The spoilation, pollution, and exhaustion of resources at an accelerating rate. Increasing violation of physical and engineering unities in the use of resources. The growing monopolization of sharable resources, with restraint upon scientific inquiry about resources. The promise and threat of both deliberate and accidental climate and weather modification. The continuing diversion of important resources to destructive purposes.

4. Institutions

The antiquated nation-state structures, with their disregard of physical, engineering, and utilization unities. The continuing weakness of international governmental organizations. The lack of development of functional transnational associations devoted to values other than power and wealth. The relative immunization of wealth and other private associations from transnational authority.

5. Particular Value Processes Within Global Community Process

(1) Power

The retreat of democracy and rise of totalitarianism within many different communities. The increasing centralization, concentration, and bureaucratization of power even within nominally democratic communities. The increasing monopolization of the effective bases of power within different communities.

(2) Wealth

The continued prevalence of individual poverty. Unequal distribution of wealth both within and across community lines. Inadequate regulation of transnational monetary units. Governmental interferences with private trade. Arbitrary seizures and confiscations of property rights. Irrational allocations of resources and unequal development. Continuing cycles of depression and inflation.

(3) Respect

Widespread denials of individual freedom of choice about social roles. Increasing individual differentiations and group hatreds upon grounds (race, sex, religion, language, national origin) irrelevant to individual capabilities and contributions. Massive encroachments upon individual autonomy and privacy through modern technology and increasing governmental bureaucratization.

(4) Well-Being (Health)

Continuing high mortality rate and low life expectancy in many parts of the world. Increasing threats of famine, epidemics, and disease. Indiscriminate mass killings in armed conflict and other interactions. Unexplained disappearances. The globalization of the practice of torture as a deliberate instrument of policy.

(5) Enlightenment

Continuing high rates of illiteracy and differential access to information in many communities. Deliberate fabrications and disseminations of misinformation. Wholesale indoctrinations and brainwashings. The withholding and suppression of the information necessary to independent appraisals of policy.

(6) Skill

The unequal distribution of skills in modern technology and the rapid obsolescence of skills by changes in technology. The brain drain from the developing countries to the developed. Restrictions upon the freedoms of skill groups to organize and to function.

(7) Affection (Loyalties)

The requisition of loyalties in the name of the state and the undermining of more universal loyalties. Severe restrictions upon freedom of association. Governmental frustration of congenial personal relations and employment of social ostracism as sanctions.

(8) Rectitude

Denials of freedom to worship and choose secular criteria of responsibility. The politicization of rectitude. Restrictions upon association for religious purposes and intolerance and persecution of religious minorities. The rise of messianic religious fundamentalism.

The intense interdependences among all the predispositional and environmental conditions make it possible to effect changes in the larger global community process, including movement toward a more stable minimum public order, by making changes in, and managing, the various particular conditions.

IX. POSSIBLE FUTURE DEVELOPMENTS

Law is interested in the past and the present in aid of inventing and making the future. Even in relation to a problem as difficult as that of establishing and maintaining a stable minimum world public order, the projection of possible futures, when inspired and disciplined by knowledge of past trends in achievement and their conditioning factors, may serve to stimulate creativity in the invention and evaluation of improved alternatives in decision. One procedure for inquiry about the future, invented by the late Harold Lasswell some fifty years ago, is that of deliberately formulating provisional maps of "developmental constructs" of future possibilities that range through a broad spectrum from the most optimistic to the most pessimistic.⁵¹ When this method of inquiry is applied to the problem of minimum world public order, the contrast in rival constructs is stark.

The most optimistic construct projects increasing progress toward a wider and more responsible sharing of power and a greater production and wider sharing in all the values of human dignity among the peoples of the world. This construct builds upon various assumptions about predispositional and environmental variables and their interaction. It projects, thus, that the widespread demands of peoples for a greater and more rewarding participation in all value processes will not diminish, but will rather intensify, that the contemporary and largely parochial identifi-

51. H. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935); *THE WORLD REVOLUTION OF OUR TIME: A FRAMEWORK FOR BASIC POLICY RESEARCH* (1951). See also Eulau, *H. D. Lasswell's Developmental Analysis*, XI W. POL. Q. 229 (1958); W. ASCHER, *FORECASTING: AN APPRAISAL FOR POLICY-MAKERS AND PLANNERS* (1978).

cations of peoples may, despite recurrent phases of fragmentation, expand toward recognition, not merely of common humanity, but of shared community, and that peoples will achieve increasingly realistic perception of, and expectations about, their indissoluble interdependences in relation to the shaping and sharing of all values. This construct, considering environmental variables, projects assumptions that the accelerating rate of population growth can be controlled, that the resource-environment of the world can be protected from exhaustion and spoilation, that science and science-based technology can create vast new resources, and that more economic governmental and value-functional institutions can be created, and so on.

The most pessimistic construct regards the direction of history as reversing itself and moving toward an aggregate of militarized and garrisoned communities, controlled from the center and modelled on the prison. This trend could culminate in an all comprehensive, single totalitarian state, with a system of public order that, when finally entrenched, organizes the global community into a vast hierarchical pattern under the rule of a self-perpetuating military caste. This construct builds upon the assumptions, among predispositional variables, that the peoples of the world will not be able to clarify their genuine common interests, but will rather pursue short-term special and exclusive advantages, that the identifications of peoples will remain territorially bound and parochial, rather than extending to a common humanity, and that peoples' expectations will in general remain diffuse, truncated, and unrealistic, and include, in particular, an anticipation that violence will be so high and pervasive as to provide a chronic justification for the continuing military mobilization of humankind. The assumptions made in this construct about environmental variables are of course largely the opposite of those that sustain the optimistic construct.

Whatever mid-abstraction constructs may be drawn between these two extremes, most observers today agree that contemporary world public order is undergoing transformations of unprecedented magnitude and scope and that such change is likely to continue at an accelerating rate. Happily, it is not necessary to regard any particular developmental construct as inevitable in outcome. The future may, in ways about which we do not yet know, be inevitable, but statements about the future, made in light of present knowledge, cannot fathom the inevitable and may be accorded differing degrees of probability, subject to change. It is this indeterminacy of the future that presents the proponents of a world public order of human dignity with the opportunity, as well as the desperate necessity, to refashion the global constitutive process of authoritative decision in modalities better designed to secure both minimum public order and other community demanded values.

X. ALTERNATIVES FOR AN IMPROVED WORLD PUBLIC ORDER

It may aid understanding of the need for a comprehensive approach to recall the intimate interrelations within the global community process

(interrelations emphasized in our opening paragraphs about the larger context) of effective power, the constitutive process of authoritative decision, and the public order achieved in the protection of demanded values. It is the global process of effective power that establishes and maintains, as one of its components, the global constitutive process and, hence, identifies the basic policies to be sought in authoritative decision. It is the global constitutive process that establishes and maintains the larger community's most minimum order, in the sense of prohibiting and regulating major coercion and violence, and aspired optimum order, in the sense of promoting the greatest production and widest sharing of all demanded values, and it is upon this existing, contemporary constitutive process that observers and decision makers who would promote peace, whether conceived in a minimum or optimum terms, must eventually focus their recommendations for change and improvement. Yet, through a grip of converse determination, effective power in the global community may be based upon participation in any and all the value processes other than power (wealth, enlightenment, respect, well-being, skill, rectitude, loyalty), and the kind of constitutive process the larger community of humankind can achieve is highly dependent upon the kind of public order it can establish in relation to all values. In consequence of all these intense interdependences in effective and authoritative decision and in choices in particular value processes, movement toward (or away from) both minimum order and optimum order in global community process may be affected, and managed, by decisions and choices about any feature of the larger community process.

The task of highest priority, for all who are genuinely committed to the goal values of a world public order of human dignity, would accordingly, appear to be that of creating in the peoples of the world the perspectives necessary for accelerated movement toward a more effective global constitutive process of authoritative decision. It has already been indicated that it is in the conflicting, confused, and disoriented perspectives of peoples — as manifested in exorbitant demands for special, rather than common, interests; in syndromes of parochial, exclusive identifications; and in chronically unrealistic expectations about the larger context — and not the inexorable requirements of technologically malleable environmental variables, that perpetuate the existing conditions of contending world orders and appalling threat to the whole of humankind.

The optimalization postulate (that individuals act within their capabilities to maximize their values), and the many historic successes of law as an instrument for the clarification of common interest, would suggest that by appropriate modifications in perspectives the peoples of the world can be encouraged to move toward both the establishment of more effective decision process and the making of more rational specific decisions about public order values. It is hardly a novel thought that the factors — culture, class, interest, personality, and crisis — which importantly condition peoples' perspectives can be modified to foster constructive rather than destructive perspectives. The distinctive perspectives that must be

created in promotion of a more viable global constitutive process include, as indicated above, a trilogy of demands, identifications and expectations. The demands that require strengthening are those that insist upon the greater production and wider sharing of all human dignity values and which emphasize the protection of common rather than special interests. The identifications that require enhancement are those that most nearly embrace the whole of humankind and achieve increasing pluralistic expression in both territorial and functional groupings. The relevant expectations must include the recognition that all peoples, everywhere, are irrevocably interdependent for securing all values, even survival, and that all peoples, without exception, have more to gain and less to lose, for themselves and all with whom they identify, by the establishment and maintenance of a secure global minimum order, rather than by exercise of unilateral coercion and violence. The task for proponents of a world public order of human dignity is, in particular, that of establishing credible expectations that they do genuinely accept the basic policy of minimum order, that coercion and violence are not to be used for change, or to obstruct peaceful change, and that they are willing reciprocally to accord the benefits of this policy even to those who do not share their vision of world order. The contemporary technology of communication and collaboration, fortunately, makes possible the widespread generation and communication of these relevant perspectives.

There are of course multitudinous modalities in institution and policy that might be employed, if appropriate perspectives could be created in the peoples of the world, to improve the existing global constitutive process of authoritative decision toward a more secure, free, and abundant world public order.⁵² For centuries philosophers, clerics and kings have proffered plans for perpetual peace, and contemporary proposals abound for various forms of world government and lesser modifications of prevailing institutions and practices. The difficulty with the proposals envisaging grandiose transformations in existing structures and practices is that they seldom consider the means necessary to translate the vast changes they propose into reality. The difficulty with the more modest proposals is that they are fragmented and anecdotal in form, dealing with isolated features of rule or procedure or structure, and are not put forward in appropriate relation to the processes of effective power and authoritative decision which they are designed to affect. What is urgently needed, in more rational approach, is the creation of competent agencies, both public and private, for undertaking a systematic canvass of every

52. For an introduction to the literature, see B. FERENCZ, *A COMMON SENSE GUIDE TO WORLD PEACE* (1985); B. FERENCZ, *THE INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES, COMMON SECURITY: A BLUEPRINT FOR SURVIVAL* (1982); R. FALK, *THE END OF WORLD ORDER* (1983); MCDUGAL & FELICIANO, *supra* note 10, ch. 4; J. MIKUS, *BEYOND DETERRENCE: FROM POWER POLITICS TO WORLD PUBLIC ORDER* (1988); S. MENDLOVITZ, *ON THE CREATION OF A JUST WORLD ORDER: PREFERRED WORLDS FOR THE 1990's* (1975); J. PERKINS, *THE PRUDENT PEACE* (1981); Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 *YALE L. J.* 969 (1975).

feature of effective power, constitutive process, and public order decision to ascertain a wide range of possible improvements and to establish priorities among potential improvements in terms of relation to human dignity values, temporal need and acceptability, economy, and effectiveness.⁵³

It is most unlikely, so long as the contention between rival systems of world public order intensifies, that the major states of the world can be persuaded to take important steps by agreement toward the greater collectivization and centralization of the existing global constitutive process. It is too difficult to clarify a common interest between a public order dedicated to expansion by major coercion and violence and those who regard change by peaceful procedures only as indispensable to any law and stable public order. The most that the proponents of a world public order of human dignity may now be able to do would appear to be to achieve and promote enlightenment about the conditions of minimum order, the potentialities of an optimum world public order, and the policies and measures that might, through appropriate interpretations of existing agreements and the uniformities of customary law, gradually move humankind toward the necessary changes in global constitutive process. Such a stance may be criticized as mere incrementalism, in a situation of desperate need, but it could be made an incrementalism guided by a clear vision of basic goals and a realistic understanding of the conditions of their achievement.

In the absence of comprehensive and detailed studies, it is difficult to offer definitive illustration of the changes in policies and measures that might transform the existing global constitutive process into a more effective instrument of minimum and optimum order. It may be remembered that the existing, most comprehensive process includes all the decisions that identify authoritative decision-makers, project the basic policies of the larger community, establish appropriate structures in aid of decision, allocate bases of power for sanctioning purposes, prescribe procedures for the making of particular decisions, and secure the performance of all the different types of decision functions (intelligence, promotion, prescription, invocation, application, termination, appraisal) that are necessary to the making and application of community policy. The significance of any change or improvement in a particular feature of this process must of course depend at any given time upon both the configuration of all other features of the process and impacts from protected features of value processes other than power. It may be possible, however, to make highly impressionistic, even cryptic, suggestions of the kinds of policies and measures that could, in appropriate context, point in the direction of a more secure, free, and abundant world public order.

We proceed phase by phase through the existing global constitutive

53. It could have been in recognition of this need that the United States Institute of Peace was established.

process.

A. *Participation in Decision Making*

Seek a more genuinely representative and responsible balancing of power through the creation of more rational intergovernmental regional organizations.

Encourage the creation of political parties, pressure groups, and private associations dedicated to all values for participation in transnational activities.

Recognize the importance of the individual human being, as ultimate actor in all organizations, through provision of increasing access to all authoritative arenas.

B. *Perspectives: Basic General Community Policies*

Reinforce commitment to minimum order, that no change be effected by coercion and violence, by explicit recognition of the complementarity of Articles 2(4) and 51 of the United Nations Charter, emphasizing a broad conception of self-defense.

Interpret Article 2(4) of the Charter to prohibit "wars of liberation."

Interpret Article 51 of the Charter to authorize states to take measures in self-defense when attack is imminent, without awaiting the fact of armed attack.

Reinforce commitment to optimum order by consolidating the emergence of a global bill of human rights through appropriate interpretation of the Charter, the major covenants, national decisions, and customary behavior.

C. *Arenas: Structures of Authority*

1. *Establishment*

Balance structures of authority in geographic range between centralized and decentralized, and integrate in a way to take into account the intensity of impacts within different geographic areas.

Expand the scope and authority of the executive within international governmental organizations.

Staff parliamentary bodies more effectively in aid of intelligence and appraisal functions for the better clarification of policies.

Multiply occasional conferences for employment of the diplomatic instrument in the clarification and projection of policies.

Provide panels of skilled experts for the voluntary adjudication (mediation, conciliation, arbitration) of disputes. With modern technology, these panels could be moved quickly about the world for sessions in convenient locations.

2. Access

In promoting policies of openness and responsibility, aggrieved individuals and groups might be allowed to represent themselves or to be represented by others (including institutionalized ombudsmen) in a wide range of structures of authority.

Compulsory jurisdiction for adjudication might be increased with respect to matters not involving state security.

D. *Bases of Power*

The promotion of minimum and optimum order might be enhanced by a more pluralistic distribution of both authority and effective control.

1. Authority

Insofar as compatible with the genuine security interests of states, reject claims of "political questions" and "domestic jurisdictions" that immunize activities from legal evaluation.

For the protection of inclusive interests, accord inclusive institutions a more ample competence with respect to the intelligence, promotion, appraisal, and invocation functions; with respect to the prescription, application, and termination functions, accord a broad competence on matters that do not endanger the security of states.

Allocate to the separate states the competence necessary to protect their exclusive interests, and settle conflicts between states by the criteria of reasonableness as determined through a disciplined, systematic examination of the features of the larger context that affects interests.

2. Control

Through coalition, alliance, and regionalization, seek a more rational organization of the control of the resource bases of the earth-space community.

By agreement and unilateral action, reduce the resources being devoted to armaments and military purposes.

Expand multiple networks of transnational associations, governmental and private, to increase the greater production and wider sharing of all the values that affect power, as well as the quality of life.

Encourage educational institutions to increase their inquiries about the conditions, policies, and alternatives necessary to an improved world public order.

Employ the technology of modern communication to promote a world public opinion that demands and sustains a public order of human dignity.

E. *Strategies: Authoritative Procedures*

Seek an appropriate integration in support of public order of all strategies (diplomatic, ideological, economic, and military), with a strong emphasis upon persuasion rather than coercion.

In revival of Chapter VII of the United Nations Charter, collectivize and centralize such coercion as may be necessary and proportionate to the maintenance of public order.

Enhance the diplomatic instrument by minimizing the employment of special majorities and vetoes, other than in relation to matters affecting the security of states, and by rationalizing the law of international agreements.

Maintain free transnational channels of communication for more effective employment of the ideological instrument.

Employ the economic instrument to improve the channels of trade, financial assistance, and development in the greater production and wider distribution of goods and services.

In performance of decision functions, employ the best available scientific procedures in exploration of facts and potential policies, and make findings as dependable, contextual, and creative as possible.

In prescriptive and applicative decision, final characterization of facts and policies should be made deliberate, rational in relation to goals, and non-provocative, employing contextual analysis in evaluation and choice of alternatives.

F. *Outcomes in Particular Types of Decisions*

The culminating outcomes of constitutive process include both the establishment and maintenance of the process itself and a continuous flow of particular decisions affecting all public order values.

1. The Intelligence Function

(gathering, processing, and disseminating information relevant to decision)

Accord international governmental organizations the resources necessary to increase their role in inquiry and communication about the goals, trends, conditioning factors, possible futures, and alternatives relevant to improved minimum and optimum order.

2. The Promotion Function

(taking initiatives and mobilizing opinion toward prescription of community policies)

Encourage, by according appropriate access to authority and other resources, a tremendous expansion of pressure groups and private associations dedicated to mobilizing the predispositions necessary to an im-

proved world public order.

3. The Prescribing Function

(projection of community policy that is both authoritative and controlling)

Recognize the increasing role of international governmental organization in creating and communicating expectations about future decisions.

Weight voting in international governmental organization and special conferences in ways to secure higher conformity with genuine democracy and responsibility.

Establish distinctive specialized institutions, manned by scholars and experts rather than by representatives of governments, for the clarification and recommendation of policies upon important particular problems.

Improve facilities and policies for the making of multilateral agreements for the projection of authoritative general community policy.

Recognize the dominating importance of uniformities in state decision and practice in creating expectations about the requirements of future decision.

Understand the interlocked, cumulative impact of communication from all sources in creating expectations about future decision.

4. The Invoking Function

(provisional characterization of events in terms of community prescriptions)

Aggrieved participants in global community process might be afforded opportunities in appropriate arenas to make timely, non-provocative initiations of the application function to redress putative wrongs.

A specialized invocation competence might be accorded the Secretary-General of the United Nations or established ombudsmen.

5. The Applying Function

(authoritative characterization of events in terms of community prescription and management of sanctioning measures to secure conformity)⁵⁴

Encourage the resolution of controversies by the parties themselves through diplomacy, mediation, and conciliation.

Maintain panels for third-party adjudication when participants consent. Create specialized, perhaps mobile, panels for particular problems.

Within national constitutive processes, establish unequivocally that

54. The paper in this symposium by Professor Bilder offers examples of alternatives that might be considered for improvement of the application function. Bilder, *International Third Party Dispute Settlement*, 17 DEN. J. INT'L L. & POL'Y 471 (1989).

international law is the law of the land, to be applied by all branches of government; reduce to minimum effect all doctrines of governmental immunity, act of state, political questions, and so on.

Whatever the arena of application, emphasize the importance of procedures for inquiry that both employ a contextual examination of facts in relation to major community goals and principles for the interpretation of prescriptions that emphasize such major goals in all factual contexts.

6. The Terminating Function

(putting an end to prescriptions and arrangements effected under prescriptions)

Establish specialized agencies for reviewing existing prescriptions and arrangements, identifying the obsolete or obsolescent, and recommending measures for ameliorating the destructive costs of necessary change.

7. The Appraising Function

(evaluating decision process in terms of achievement of basic community goals and ascribing responsibility)

Establish specialized agencies, insulated from immediate pressures of threat or inducement, for the continuous appraisal of successes and failures in the management of authoritative decision and for the recommendation of decision process and decisions better designed for the realization of major goals.

A comprehensive inquiry would of course add exploration of the impacts of the protected features of the larger community's various value processes upon the establishment and maintenance of constitutive process.

An appropriate concluding note of restrained optimism may perhaps be that voiced by my late colleague, Harold Lasswell, in closing his book on *The Future of Political Science*:

It is impossible to contemplate the present status of man without perceiving the cosmic roles that he and other advanced forms of life may eventually play. We are, perhaps, introducing self-awareness into cosmic process. With awareness of self comes deliberate formation and pursuit of value goals. For tens of thousands of years, man was accustomed to living in relatively local environments and to cooperating on a parochial scale. Today we are on the verge of exploring a habitat far less circumscribed than earth. The need for a worldwide system of public order — a comprehensive plan of cooperation — is fearfully urgent. From the interplay of the study and practice of cooperation we may eventually move more wisely, if not more rapidly, toward fulfilling the as-yet-mysterious potentialities of the cosmic process.⁵⁵

55. H. LASSWELL, *THE FUTURE OF POLITICAL SCIENCE* 242 (1963).