

## THE INITIATION OF COERCION: A MULTI-TEMPORAL ANALYSIS

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The confusion<sup>1</sup> engendered by lack of clarity in fundamental conceptions such as "war," "peace," and "law" begins with, and is perhaps most clearly exhibited in, the traditional discussion of the many and disparate problems frequently subsumed under headings like "The Initiation of War," "The Commencement of War," "The Legal Meaning of War" and "State and Effects of War," or under the simple query "When does war exist (or begin)?" The orthodox debates here have been concerned mainly with determination of the beginning in time of a "legal state of war." They have usually centered on the necessity and the relative technical effect of a somewhat mystical *animus belligerendi*, manifested either in the shape of a formal declaration of war or some other modality, and of physical acts of coercion for the creation of such "state of war." The confusion in these debates arises from a shifting reference to and emphasis on the subjective *animus* of participants and the realities of their coercive practices, as well as to certain assumed consequences of such *animus* or practices, without relating either the *animus* or the practices to the larger context of any particular instance of international coercion and to the major community policies sought by authoritative decision-makers with respect to various specific problems in such context.

Some publicists, for instance, have rigorously insisted that *animus belligerendi* on the part of either the initiating or responding state is the prime requisite which must be unequivocally revealed and without which

\* The views expressed here are not to be imputed to the Government of the Philippines.

<sup>1</sup> This brief essay, essentially a note on a suggested methodology, is written as the second in a series of essays on the legal regulation of international coercion. The first essay, on the processes of coercion and of decision, will appear in the May, 1958, issue of the Yale Law Journal. Others will follow, dealing at length with the major types of problems, from the resort to coercion, through the management of combat and non-combat situations, to the termination of coercion. The documentation of this essay reflects its position in the series.

The perspectives with which we begin are indicated somewhat cryptically in the editorial "Peace and War: Factual Continuum With Multiple Legal Consequences," 49 A.J.I.L. 63 (1955).

not "war," or a "state of war," but only "reprisals," or "intervention," or some other "measure short of war" may be regarded as having been initiated. The formulation of this view achieved by Lord McNair about three decades ago is now classical:

. . . A state of war arises in International Law (a) at the moment, if any, specified in a declaration of war; or (b) if none is specified, then immediately upon the communication of a declaration of war; or (c) upon the commission of an act of force, under the authority of a State, which is done *animo belligerendi*, or which, being done *sine animo belligerendi* but by way of reprisals or intervention, the other State elects to regard as creating a state of war, either by repelling force by force or in some other way; retroactive effect being given to this election, so that the state of war arises on the commission of the first act of force.<sup>2</sup>

Other writers, in clear contrast, have de-emphasized the subjectivities of the participants and regard the commencement of "material war" as simultaneously inducing a "legal status of war." Among the more recent expressions of this position is Professor Kelsen's:

. . . A state of war in the true and full sense of the term is brought about only by acts of war, that is to say, by the use of armed force; and only such a state may be, but need not necessarily be, terminated by a peace treaty. Consequently war is a specific action, not a status. From the point of view of international law, the most important fact is the resort to war, and that means resort to an action, not resort to a status. Some writers consider the intention to make war, the *animus belligerendi*, of the state or states involved in war as essential. *Animus*

<sup>2</sup>"The Legal Meaning of War and the Relation of War to Reprisals," 11 Grotius Society Transactions 29 at 45 (1925). Among those who have shared this view is Quincy Wright, who wrote: "War begins when any state of the world manifests its intention to make war by some overt act, which may take the form of an act of war, a declaration of war or some ultimatum with a time limit—the existence of war is not dependent upon the type of operations undertaken by the belligerents." ("Changes in the Concept of War," 18 A.J.I.L. 755 at 758-759 (1924). Later, Professor Wright submitted that where both belligerents disclaim an intention to make "war," "a state of war does not exist until such time as third states recognize that it does." ("When Does War Exist?" 26 *ibid.* 362 at 366 (1932).) How the intention of a third state is relevant in inter-belligerent relations is not explained.

In his Report on the Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure Indicated in Article 16 of the Covenant, Particularly by a Maritime Blockade (8 League of Nations Official Journal 834 (1927)), the Secretary General of the League said: . . . "from the legal point of view, the existence of a state of war between two states depends upon their intention and not upon the nature of their acts. Accordingly, measures of coercion, however drastic, which are not intended to create and are not regarded by the State to which they are applied as creating a state of war, do not legally establish a relation of war between the State concerned."

Similar statements may be found in Lawrence, *The Principles of International Law* 309 (7th ed., Winfield, 1928); 2 Westlake, *International Law* 1-2 (1907); Castrén, *The Present Law of War and Neutrality* 31-34 (1954); 2 Møller, *International Law in Peace and War* 156 (trans. Pratt, 1935).

Professor Eagleton, too, seems to have shared this view: see "Acts of War," 35 A.J.I.L. 321 (1941). Cf. Starke, *An Introduction to International Law* 363 (3rd ed., 1954).

*belligerendi* means the intention to wage war. But this can only be the intention to perform acts of war, that is to say, to use armed force, with all the consequences international law attaches to the use of armed force.<sup>3</sup>

Still others have attempted, in interpreting the pattern of commitments under the Covenant of the League of Nations, to combine both these "subjective" and "objective" theories of "war" and assert that, while ordinarily *animus belligerendi* must be present for a "state of war" to commence,

. . . if acts of force are sufficiently serious and long continued, then, even if both sides disclaim any *animus belligerendi* and refuse to admit that a state of war has arisen between them, there comes a point at which the law must say to the parties, you are refusing to recognize the facts; your actions are of a kind which it is the policy of the law to characterize as war; and therefore, whatever you choose to say about it, you have in fact set up a state of things which in the eye of the law is a state of war.<sup>4</sup>

It should be observed that these formulations, like the comparable definitions of "war" which abound in the literature, make implicit, ambiguous and indiscriminate references to both the "facts" and certain asserted "legal consequences" of facts—to both the precipitating events of resort to, and exercise of, international coercion and the responses of authoritative decision-makers; in short, to both the process of factual coercion and the process of legal authority. Premised as they are on the ancient dichotomous categorization of "war" and "peace," there is apparent in these formulations no recognition that the initiation of coercion generates, not one unitary problem of ascertaining a precise moment in time for the beginning of a singularly elusive and all-sufficing "legal state

\* Principles of International Law 27 (1952). The protagonists of this side of the debate include Risley, *The Law of War* 81-82 (1897); Baty, "Abuse of Terms: 'Recognition'; 'War';" 30 A.J.I.L. 377 at 398 (1936); Ronan, "English and American Courts and the Definition of War," 31 A.J.I.L. 642 at 656 (1937); Green, "The Nature of the 'War' in Korea," 4 Int. Law Q. 462 at 468 (1951); Pye, "The Legal Status of the Korean Hostilities," 45 Georgetown Law J. 45 at 48-51 (1956). Cf. Hall, *International Law* 444-445 (8th ed., Pearce Higgins, 1924).

Professors Borchard and Stowell appeared to have favored this side: see Borchard, "War and Peace," 27 A.J.I.L. 114 (1933), and "When Did War Begin?" 47 Columbia Law Rev. 742 (1947); and Stowell, *International Law* 491 (1931).

Professor Hyde expressed the same view as Lord McNair (3 *International Law* 1693-1695 [rev. ed., 1945]), but proposed at the same time that "the character of the acts committed rather than the design of the actors should, and probably will be, regarded as decisive of the legal result." (*Ibid.* 1688).

<sup>4</sup> Brierly, "International Law and Resort to Armed Force," 4 Cambridge Law J. 308 at 313 (1932). Cf. Lauterpacht, "'Resort to War' and the Interpretation of the Covenant During the Manchurian Dispute," 28 A.J.I.L. 43 (1934), who does not accept the "intention" theory of "war," but at the same time suggests that "war" is not necessarily synonymous with the use of "armed force." These so-called "subjective" and "objective" theories are summarized and discussed in Eagleton, "The Attempt to Define War," *International Conciliation*, No. 291, p. 258 *et seq.* (1933), and in Williams, *Some Aspects of the Covenant of the League of Nations* 298 *et seq.* (1934).

of war,"<sup>5</sup> but rather a whole series of complex problems. The problems created in any particular instance of coercion, as will appear below, call for the resolution of very different types of conflicting claims asserted by various parties upon the initial stages of the process of coercion, and raise greatly differing issues of legal policy for the different officials who must reach a decision.

Increasing dissatisfaction with the traditional answers to the traditional question is in modest measure displayed in the recent literature of international law. A number of scholars have sought, with varying degrees of success, to bring significant clarification into the use of basic terms. Dr. Grob, for instance, rejects with deserved ridicule the absolutistic notion of "war in the legal sense" and of a "legal state of war." He contends that what must be looked for is not "one over-all legal definition of war" but rather a "variety of legal definitions."<sup>6</sup> Each "legal definition" he would formulate in relation to, and after ascertainment of, "the particular intent and purpose" of the specific "rule of law on war" which happens to be under consideration at a given time. The question whether any particular exercise of coercion "constitutes" "war" or not must, in his view, to be meaningful, specify a particular rule of law in relation to which the "existence of war" may be affirmed or denied.<sup>7</sup> In his analysis, to affirm or deny that a set of events marks the beginning or existence of "war" is to assert that the specified rule of law is or is not applicable to such events. The same exercise of coercion, which may "legally constitute" "war" in relation to one rule of law on war, obviously need not at the same stage "constitute" "war" in the sense of another rule; hence the relativity of which he speaks.<sup>8</sup> The applicability or non-applicability of a given rule to given facts, Dr. Grob explains, "depends upon its (the rule's) intent and purposes. It is the business of interpretation to furnish that answer. It cannot be gleaned from anywhere else."<sup>9</sup> Thus, for Dr. Grob, the basic task is reduced to the "interpretation" of legal technicality.

Professor Stone exhibits considerably more restraint and diffidence in his efforts at clarification. He still speaks of a "necessity," in view

<sup>5</sup> Professor Wright stated the traditional point succinctly: "the incidence of an act or declaration converting the state of peace into a state of war establishes a division in time before which acts of war are illegal and after which they are legal between belligerents . . ." ("Changes in the Concept of War," 18 A.J.I.L. 755 at 757 (1924)). Hence, traditionally, juristic effort has been directed towards determining what acts or declarations convert "the state of peace" into a "state of war." And see Déak, "Computation of Time in International Law," 20 A.J.I.L. 502 at 506-508, 514 (1926) for a plea, made with great seriousness, that the exact date, hour and minute for the beginning of a "state of war" be specified for the reason that "this changes profoundly the juridical situation of each country" (at 506).

<sup>6</sup> *The Relativity of War and Peace* 189 (1949).

<sup>7</sup> *Ibid.* 202.

<sup>8</sup> *Ibid.* 303: "Operations, as they progress . . . begin to be war legally at diverse points of time. The question 'when does war legally begin?' thus requires not one but several answers." See also *ibid.* 192, 194, 221-224, 318.

<sup>9</sup> *Ibid.* 204.

of the "wide ranging legal effects of war," of determining "*the* moment of its legal commencement." The problem, to him, is "plain enough." "War commences," Professor Stone writes, "when facts come into existence which satisfy the (above) definition of war."<sup>10</sup> Since his definition of war is no more revolutionary than a rephrasing of the "intention" or "subjective theory" of "war," he adheres closely to Lord McNair's formulation quoted earlier. That he does not escape the ambiguity resulting from a dual and simultaneous reference to "facts" and "legal consequences" is perhaps most clearly shown in his casual remark that "war begins with the earliest *operative event*."<sup>11</sup> Professor Stone, however, departs from the wholly conventional treatment of the initiation of coercion in two respects. First, he recognizes that "the moment" of commencement of war "on the international level" need not necessarily coincide with the beginning of war for differing "municipal legal purposes."<sup>12</sup> Secondly, in the course of discussing the "legal consequences of *undeclared* hostilities," he suggests that clarity in the question of "war or no war" may be approached by recognizing that varying answers may be given as "the purposes for which an answer is sought" vary.<sup>13</sup> He refers, as Dr. Grob did, to the purpose of individual rules or sets of rules of war law, and of individual provisions of such instruments as the Pact of Paris and the Charter of the United Nations. Unlike Dr. Grob,<sup>14</sup> however, he confines his suggestions to situations where the contending participants not only fail to issue formal declarations of war but also disclaim an intent to engage in war and describe their coercive operations by some other words.<sup>15</sup> The assumption of Professor Stone seems to be that the relativity of "war or no war" is precluded by a declaration of intent by either belligerent and that as soon as such a declaration is made, there can be but one unvarying answer, whatever "the purposes for which an answer is sought" may be.

While recognizing that some measure of clarification has been achieved

<sup>10</sup> Legal Controls of International Conflict 310 (1954). His definition of war is: "a relation of one or more governments to at least one other government, in which at least one of such governments no longer permits its relations with the other or others to be governed by the laws of peace." (p. 304.)

<sup>11</sup> *Ibid.* 310, note 75.

<sup>12</sup> *Ibid.* 310-311, 311, note 78. He gives some indication of what he means by "municipal legal purposes": "It has become . . . a matter of legislative prudence to fix explicitly the beginning and end of war for the purpose at hand in each major field of legislative endeavor. They may, for example, be fixed at one point in relation to wartime emergency powers, in another for regulation of private legal relations, and this even though the legislature may seem to have left the matter open." (p. 311.) Cf. Corbett, Law and Society in the Relations of States 212-213 (1951); and Green, "Armed Conflict, War, and Self-Defence," 6 *Archiv des Völkerrechts* 387, 424, 438 (1957).

<sup>13</sup> Stone, *op. cit.* 312. Professor Stone almost deprecates his own contribution, insisting that its value is "rather *de lege ferenda* than as a description of existing law," and describing his observations as "most tentative" and "by no means coherent with each other." (p. 313.)

<sup>14</sup> See Grob, *op. cit.* 283-302.

<sup>15</sup> Stone, *op. cit.* 312.

by both scholars, a measure which was anticipated by Judge Hudson,<sup>16</sup> it may be observed that both appear unduly preoccupied with the technical rules on which they have focused rather than on particular problems, particular policies and particular decision-makers. The task of clarification, as will be indicated below, involves deeper difficulties than either Dr. Grob or Professor Stone recognizes. It calls, contrary to the suggestion of the former, for much more than ascertaining the "legal meaning" of words used in particular formulations of prescriptions or the "exact intent and purpose" of the formulators.<sup>17</sup> It demands, notwithstanding the suggestion of the latter, that an inquirer go behind pronouncements of intent to the factual and policy problems which are just as varied and complex when such rituals are performed as when they are foregone. Both scholars exhibit little awareness of the number and complexity of the variables in the interrelated but distinguishable processes of coercion and of decision.<sup>18</sup> They do not emphasize, in particular, that the application or non-application of a particular rule to a particular situation of fact, if inquiry is to go beyond abstract and normatively ambiguous statements,<sup>19</sup> must be viewed as the product of a decisional process, and that such product can scarcely be meaningfully studied unless the decision-maker (the applier) is identified, his policy objectives clearly articulated, and the various conditions and the procedures of application specified.<sup>20</sup> Both scholars stop short of the effort to arrive at a comprehensive guiding theory for inquiry into the problems, policies and prescriptions relating to the initiation of coercion and violence. The several intellectual tasks indispensable to the achievement of deeper insight into the processes of coercion and decision and of

<sup>16</sup> See his "The Duration of the War Between the United States and Germany," 39 *Harvard Law Rev.* 1020 at 1020-1021 (1926).

<sup>17</sup> Dr. Grob conceives the basic task to be that of ascertaining the "legal reality," "the truth" and "legal meaning" of the "two central, all important terms 'war' and 'peace'" (p. 36), of determining "what the rules of law on war mean" (p. 188). His demand for "legal answers" leads him to say that "Arguing with *facts* alone will not do. Mere *facts* prove nothing" (p. 201; italics in the original). The conceptualism of his study thus does not extend to the clear relation of the facts of coercion and the process of decision.

<sup>18</sup> Some preliminary indication of what we mean by the process of coercion and the process of decision may be obtained from McDougal, "Peace and War: Factual Continuum With Multiple Legal Consequences," 49 *A.J.I.L.* 63 (1955). See also *id.*, "El Derecho Internacional como Ciencia Política," 3 *Revista de Derecho y Ciencias Sociales* Nos. 3-4, p. 142 (1957, Buenos Aires).

<sup>19</sup> For exposition of what is characterized as normative-ambiguity, see Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 *Yale Law J.* 203, 266-267 (1943).

<sup>20</sup> Amplification of this general point is offered in McDougal, "Law As a Process of Decision: A Policy-Oriented Approach To Legal Study," 1 *Natural Law Forum* 53, 54-58, 64-68 (1956); and *id.*, "The Comparative Study of Law For Value Purposes: Value Clarification As An Instrument of Democratic World Order," 61 *Yale Law J.* 915 (1952), 1 *A.J. Comp. Law* 24 (1952). See also Lasswell, "Current Studies of the Decision Process: Automation versus Creativity," 8 *Western Pol. Q.* 381 (1955); and Lerner and Lasswell (eds.), *The Policy Sciences* (1951). For an introduction to the theory of decision-making, see Bross, *Design For Decision* (1953).

closer approximation to community and preferred goals remain unperformed.<sup>21</sup>

Preoccupation with legal technicality is even more intense in Dr. Kotzsch's recent study.<sup>22</sup> Dr. Kotzsch, addressing himself, as Professor Stone did, to the problem of "war without a declaration of war," works out at labored length a distinction between "war in the material sense" and "war in the formal sense." "Formal war," in his sense, is no more than the "legal state of war" as conceived in all its rigor in traditional theory, while "material war" includes all factual situations of military conflict of some duration and extent (as distinguished from isolated acts of violence) where, through disclaimer or lack of a showing of *animus belligerendi*, no "legal state of war" is regarded as established. The main difference to which he points is in terms of "legal consequences" and lies in the extent of application of the law of war: "formal war" automatically brings about the full operation of all the rules of war and neutrality; "material war," on the other hand, as "institutionalized in the province of international law," initiates only a "selective" application of those rules.<sup>23</sup> The question "war or no war," he writes, following Dr. Grob, "henceforth must be specified by material or formal if a legal answer is sought."<sup>24</sup> In Dr. Kotzsch's scheme, there is not one intermediate status between "peace" and "war." There are instead, he asserts, two dichotomies—"peace" and "formal war," and "peace" and "material war."<sup>25</sup> The initiation of international coercion may thus mark the commencement of either "formal war" or of "material war," depending on whether or not there is an announced *animus belligerendi*. "War" having been split,

<sup>21</sup> A brief itemization of recommended "intellectual tasks" may be found in McDougal, "International Law, Power and Policy: A Contemporary Conception," 82 Hague Academy Recueil des Cours 137, 141 (1953); and in the article cited note 20 *supra*, 1 Natural Law Forum at 58-59. See also Lasswell, *The World Revolution of Our Time—A Framework For Basic Policy Research* (Hoover Institute Studies, 1951).

<sup>22</sup> *The Concept of War in Contemporary History and International Law* (1956).

<sup>23</sup> *Ibid.* 52-65, 234-235, 241-244. Dr. Kotzsch differentiates his distinction from that between "war in the legal sense" (war as a "legal condition") and "war in the material sense" (war as actual military operations) adverted to, for instance, by Professor Wright (*op. cit.* note 2 *supra*) in the following terms: "If we, however, replace the distinction of *war in the legal sense* and *war in the material sense* by that of *war in the formal sense* and *war in the material sense*, it is for the following reason: The former distinction implies the idea that *war in the legal sense* is of relevancy under international law whereas *war in the material sense* is not. This is not true. Both forms have obtained their meaning under international law. By customary international law legal consequences have been imputed to *war in the material sense*. . . ." (p. 52.)

<sup>24</sup> *Ibid.* 55.

<sup>25</sup> *Ibid.* 241-244. Compare Jessup, "Should International Law Recognize an Intermediate Status Between Peace and War?" 48 A.J.I.L. 98 (1954), and "Intermediacy," 23 Nordisk Tidsskrift for International Ret 16 (1953); and Schwarzenberger, "Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law," 37 A.J.I.L. 460 (1943). In McDougal, article cited note 18 *supra*, it was suggested, apropos of the proposals for recognition and elaboration of a new "status intermediate between war and peace," that a mode of analysis more comprehensive and flexible than either dichotomy or trichotomy may be required if clarity and rationality are to be promoted.

so to speak, into the "formal" and "material," he states that it ("war") no longer necessarily implies "the integral application of the sum-total of the laws of war."<sup>26</sup> One of his main concerns appears to be to fashion a doctrinal answer to belligerent claims, which have been asserted in the past, to avoid the thrust of the law of war and neutrality by labeling their physical operations with some other name. Dr. Kotzsch's aspirations in his scholarly study are admirable. It would seem open to serious doubt, however, whether its conceptualism, which is at times less than lucid, can offer more than minimal help in clarifying the problems of legal policy attendant upon the initiation of coercion and in increasing the incidence of rational decisions.

The first step, we submit, towards contact with reality is reference to, and careful orientation in, the factual process of coercion across national boundaries. In broad preliminary characterization, this process of coercion may be described in terms of various *participants* applying to each other coercion of alternately accelerating and decelerating degrees of intensity, for a wide range of *objectives*, utilizing *methods* which include the employment of all known distinctive strategies or instruments of policy, under the variable *conditions* of a world arena in continuous flux.<sup>27</sup> It may be observed that, in the course of this process of coercion, the participants assert against each other many varying claims respecting the lawfulness and unlawfulness of the particular coercive practices being utilized by or against them, invoking both world prescriptions and world opinion to fortify their respective assertions.

The description we suggest of factual coercion in terms of "process" is intended not merely to convey a sense of the variety in participant, purpose, modality and claim, but also to emphasize the facts of *continuity*—continuity in coercive action and reaction and in assertion and counter-assertion—and of *changing intensities in degree*, from the mildest to the most severe applications of coercion. Between the two extremes of "pure" peace and "total" war, the states of the world arena may in these terms be observed continuously to engage each other for power and other values, by

<sup>26</sup> *Op. cit.* note 22 *supra*, at 243. Through his two dichotomies (or trichotomy), he also attempts to resolve the old debate on the "subjective" and "objective" tests of the beginning or existence of war by combining the two: "The concept of *war in the material and formal senses* pays regard to both the purely objective test of war and the subjective test, which is the essence of the status theory of war. It resolves the doctrinal conflict between the objective and subjective theories of war by the assumption that these theories are not mutually exclusive but complementary" (pp. 54-55). The minor point has been suggested above that such observations are apt to be no more than exercises in legal syntactics unless both the perspectives of participants and their physical operations are considered in the larger context of the particular instance of coercion involved. The major point is that Dr. Kotzsch's framework for inquiry seems to us less than completely adequate even for the modest goal he set for himself—"to describe the modern concept of war in general international law" (p. 2; italics supplied).

<sup>27</sup> Compare Wright, "International Conflict and the United Nations," 10 *World Politics* 24, 34-44 (1957), who describes the processes of conflict among states in terms of the *parties*, their *relations*, and the *field* in which conflicts occur.

all instruments of policy, in a *continuum* of degrees in coercive practices, ranging from the least intense to the most intense.<sup>28</sup> From this orientation, to speak of the initiation of coercion is to refer to those stages of the factual process at which coercion is still at a relatively low degree of intensity but accelerating towards the peak intensity of maximum use of the military instrument for destruction.<sup>29</sup>

At such initiation stages of the coercion process, participants of all categories—including officials of the contending belligerents, officials of international organizations and of non-belligerents (who are non-participants in the process of coercion but nevertheless assert certain claims), and individual nationals of both the belligerents and non-belligerents—begin, as suggested, to make certain claims against each other. An indication of the rich complexity of the structure of such contraposed claims may be had even from impressionistic description.

Thus, in one type of controversy, a belligerent asserts, as against a target state and international officials who are representatives of the world public order, claims to initiate highly coercive or violent means of modifying the existing world public order and the world distribution of power and other values. The assertion of these claims frequently marks the culmination of a longer or shorter period during which an intensifying degree of coercion was exerted by and against the claimant through non-military instruments, or in which the dimensions of military force were kept short of open and substantial destruction. At a certain stage in intensity, officials of the target state may respond with claims to employ retaliatory coercion in the name of self-defense. International officials may, for their part, make claims to competence to characterize such coercion and violence as unlawful breaches of the public order of the world community and to take appropriate steps forcibly to redress such breaches.

Similarly, in another type of controversy, the belligerents, including both the attacking and defending states and, where community responsibility is successfully organized, international armed forces, make claims

<sup>28</sup> The point is made more or less explicitly in any number of studies on international relations; see, *e.g.*, Haas and Whiting, *Dynamics of International Relations*, Ch. 3 (1956); Morgenthau, *Politics Among Nations*, Chs. 3-6 (2nd ed., 1954); Strausz-Hupé and Possony, *International Relations*, Chs. 1-3 (2nd ed., 1954); Schwarzenberger, *Power Politics* 17 and Chs. 6-12 (1951); Kalijarvi and Associates, *Modern World Politics*, Ch. 3 (3rd ed., 1953). On the fluctuations and periodicity of the magnitude of coercion and violence over long periods of history, see 3 Sorokin, *Social and Cultural Dynamics* 259-380 (1937).

<sup>29</sup> *Cf.* 2 Wright, *A Study of War* 698 (1942): “. . . analysis of the military, psychological, legal, and sociological manifestations of war suggests that all may be regarded as variables which reach a certain threshold of intensity in actual war. War may therefore be regarded from the standpoint of each belligerent as an extreme intensification of military activity, psychological tension, legal power, and social integration—an intensification which is not likely to result unless the enemy is approximately equal in material power.” At 689: “. . . the time space continuum, which in a legal sense is designated a war, has not necessarily been accompanied by a unity or uniformity of intense military activity. While in international legal theory a state of war between two states begins and ends at definite moments of time, these moments have frequently been difficult to establish in practice.”

against each other to engage in the different component practices of military violence to secure their respective objectives. This general claim to employ the military instrument may be given operational meaning in terms of the detailed claims of each to apply violence in the capture or destruction of the other's bases of power by employing certain combatants with certain weapons, in certain areas of operations, and against certain objects of attack. The negating claim asserted in turn by each against the other is that the violence exerted is inhuman, unnecessary or disproportionate, or, in more detail, that certain combatants are unauthorized, that certain weapons are unlawful, that certain areas of operations are beyond permissible bounds, and that certain objects may not legitimately be captured or destroyed. Both belligerents may also, before or after the outburst of military violence, claim to cut off, with varying degrees of completeness, diplomatic and consular relations and the commerce, communication and transportation between them, and to terminate or continue observance of previous agreements with each other.

In still another type of controversy, representatives of the world public order claim, mostly after the stage of overt violence has been reached, competence to activate the commitments of third states to participate in organized community measures designed to repress violence characterized as unlawful. Non-belligerents may respond favorably and claim a right to participate, or unfavorably and set up claims to avoid participation, in community sanctions procedures. Where the pattern of community responsibility fails, and the international officials are unable effectively to assert claims of authority, a second set of claims assumes special importance. Belligerents demand from third states non-participation and non-augmentation of the other belligerent's power resources. Third states make countering demands for non-interference with their nationals, resources and normal activities.

In a fourth type of controversy, each belligerent may be observed to begin, at points of varying time before or after the stage of active military hostilities, making claims to exercise more or less comprehensive control over the industry, commerce, labor, communications, transportation, price and consumption levels, private agreements and property, and personal activities of individuals within its own territory. Internal value processes are governmentalized in increasingly high degree, in the effort to organize, maximize, manage and effectively utilize the belligerent's bases of power. Each belligerent further claims authority to define and discriminate between "enemy persons" and non-enemy persons, and to impose more rigid controls on the former's persons and property, both for preventing their utilization by the enemy belligerent and for satisfying its own military needs. The countering claim of "enemy persons" is for respect for their human dignity, loyalties and property.

There is a fifth type of controversy where individuals assert against other individuals, at differing points along the *continuum* of coercion, certain claims and counterclaims, the most conspicuous of which are to require, or refrain from, or terminate, the honoring of certain commit-

ments, and to certain specific interpretations of so-called "war clauses" in documents such as, for instance, insurance policies and charter parties. It is in connection with the latter type of claims that much of the judicial discussion on "When does (or did) war begin?" has taken place.<sup>30</sup> It is

<sup>30</sup>The "war clause" in life insurance policies is typically a clause excluding or limiting the liability of the insurer in case the insured dies as a result of, or while engaged in, service in the armed forces in "time of war." The wording of the "war clause" has, of course, varied in different policies. The technical issue, however, has usually been presented in the form of whether or not, at the time of the insured's death, there was "war" either between the state of the forum and another state or between foreign states.

The cases which arose in American courts during World War II commonly involved deaths which occurred on Dec. 7, 1941, during the attack by Japanese forces on Pearl Harbor. A group of cases—*e.g.* *West v. Palmetto State Life Ins. Co.*, 25 S.E. 2d 475 (1943), 202 S.C. 422; *Rosenau v. Idaho Mutual Benefit Assn.*, 145 Pac. 2d 227 (1944), 65 Idaho 408; *Savage v. Sun Life Insurance Co.*, 57 F. Supp. 620 (W.D. La., 1944); *Pang v. Sun Life Assurance Co.*, 37 Hawaii 208 (1945)—allowed recovery by the beneficiary, holding that because the U. S. Congress, to which the Constitution had allocated the power to declare war, had not declared war until Dec. 8, 1941, and had not made its declaration retroactive (as the President had requested) to Dec. 7, there was as yet no "state of war," or "war in the legal" or "constitutional sense," on the latter date. These cases relied on a concept that courts may not take judicial notice of the existence of a war until it is formally and officially declared by the Congress, and distinguished between an "act of war" and a "state of war." In *New York Life Ins. Co. v. Bennion*, 158 F. 2d 260 (C.C.A. 10th, 1946), 41 A.J.I.L. 680 (1947), cert. denied, 331 U. S. 811 (1947), noted in 56 Yale L.J. 746 (1947), however, the court, under an identical set of facts, denied recovery against the insurer, holding that the existence of a state of war was not dependent upon its formal declaration but was determinable from an appraisal of actualities, and that there had been a sufficient political determination (by the President) of the existence of war commencing with the attack on Pearl Harbor. *Cf.* *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N.E. 2d 687 (1942), where the insured seaman died when the *USS Reuben James* was torpedoed by German submarines on Oct. 30, 1941; and *Vanderbilt v. Travelers Ins. Co.*, 112 Misc. 248, 184 N.Y.S. 54 (1920), where the insured lost his life when the *Lusitania* was sunk.

A similar set of life insurance cases arose out of deaths which occurred during the United Nations action in Korea. *Beley v. Pennsylvania Mutual Life Ins. Co.*, 373 Pa. 231, 95 A. 2d 202 (1953), and *Harding v. Pennsylvania Mutual Life Ins. Co.*, 171 Pa. Super. 236, 90 A. 2d 589, rehearing denied, 95 A. 2d 221 (1953), held that since war had not been declared by Congress, the conflict in Korea did not constitute a "war" in the "constitutional" or "legal" sense, and permitted recovery against the insurer. Other courts have taken the opposite stand in a long line of cases: *e.g.* *Stanberry v. Aetna Life Ins. Co.*, 26 N.J. Super. 498, 98 A. 2d 134 (1953); *Langlas v. Iowa Life Ins. Co.*, 245 Iowa 713, 63 N.W. 2d 885 (1954); *Gudewicz v. John Hancock Mutual Life Ins. Co.*, 331 Mass. 752, 122 N.E. 2d 900 (1954); *Christensen v. Sterling Ins. Co.*, 284 Pac. 2d 287 (1955); *Western Reserve Life Ins. Co. v. Meadows*, 152 Tex. 559, 261 S.W. 2d 554 (1953), cert. denied, 347 U. S. 928 (1954); *Lynch v. National Life and Accident Ins. Co.*, 278 S.W. 2d 32 (1955); *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420 (D.C.S.D. Cal., 1953); *Gagliormella v. Metropolitan Life Ins. Co.*, 122 F. Supp. 246 (D.C. Mass., 1954); *Carius v. New York Life Ins. Co.*, 124 F. Supp. 388 (D.C.S.D. Ill., 1954); and *Wilkinson v. Equitable Life Assurance Society*, 151 N.Y.S. 2d 1018 (1956).

For cases involving charter parties containing "war risk" clauses, see *Kawasaki Kisen Kabushiki Kaisha v. Bantam Steamship Co. Ltd.*, [1939] 2 K.B. 544, and *Spanish Government v. North of England Steamship Co. Ltd.*, [1938] 54 T.L.R. 852.

perhaps an index of the extent of the common confusion that it is precisely this type of private claims in the resolution of which the world prescriptions and fundamental world community policies relating to coercion are really largely, if not wholly, irrelevant. The basic problem raised by these claims is not that of distinguishing between permissible and non-permissible exercises of coercion, nor that of formulating distinctions between the "legal" and the "non-legal" senses of "war" or "blockade" or comparable terms, as Professor Stone seems to suggest,<sup>31</sup> but rather that of discerning and giving effect, within the limits of any overriding community policy, to the major purposes and expectations which the private parties to the document in question sought to project.<sup>32</sup>

It is not, of course, meant to be suggested that in each and every context in which coercion is initiated, all the participants actually make all

<sup>31</sup> Stone, *op. cit.* 304, note 40, 310, note 77, 314, note 92.

<sup>32</sup> It seems fairly obvious that the question of the commencement or existence of a "state of war," or "war in the legal sense" or simply "war," between two countries as determined for the very different purposes of the world public order is but of tangential, if any, relevance to this problem, which calls essentially for the application of familiar principles of interpretation. The approach adopted in the *Bennion* case (note 30 *supra*), where the court inquired into the expectations of the parties as to what risks would be excluded exemplifies the point we are making. The court said: "The subject matter of the contract was a risk assured on the life of the insured by the Company, for a stipulated premium, and the use of the word war was obviously intended to denote a restriction or limitation upon the risk assumed. It is plain, therefore, that the definition given to the word war bears a direct relationship to the risk assumed. . . . Viewed in this light, it is also plain that when the parties used the word war, they had in mind the hazard to human life incident" (158 F. 2d at 265). Obviously, the hazard to life was not dependent on a situation of military violence being characterized as a "war" or "state of war." This approach was adopted in the cases arising out of the Korean conflict starting from the *Stanberry* case (note 30 *supra*).

In the *Kawasaki Kisen Kabushiki Kaisha* case (note 30 *supra*) the court refused to hold the steamship company liable for damages for canceling the charter-party under a clause authorizing such cancellation by either party "if war breaks out involving Japan." The court held in effect that the contingency provided for by the parties had occurred, despite the fact that neither Japan nor China (in 1937) had issued formal declarations of war and that the two countries maintained diplomatic relations with each other. Again, the risk that the parties sought to provide against did not depend upon the presence or absence of "*animus belligerendi*" in either or both countries. The Master of the Rolls said: "I am unable to accept the suggestion that there is any technical meaning of the word 'war' for the purpose of the construction of this clause. . . . It seems to me that to suggest that, within the meaning of this charter party, war had not broken out involving Japan on the relevant date is to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law rather than the common sense of businessmen."

In the *Spanish Government* case (note 30 *supra*), Lewis, J., did say that the word "blockade" in a clause to the effect that the vessel would not be bound to proceed to "blockade ports," was used in its "strict legal sense." However, regardless of whether a "strict legal sense" or some other sense was to be imparted to "blockade," the court explicitly found that the risk provided against never materialized, that the announced intention of the Franco Government to blockade certain ports was never carried out, and that there was no greater danger or risk of interference with British vessels after the Nationalist announcement than before.

the above types of claims. In any particular constellation of events, one or more of the participants may, for diverse reasons, refrain from asserting any one or more of the kinds of claims that such participants might otherwise be expected to assert. For instance, organs of international governmental organizations may restrain themselves from, or may postpone characterizing, exercises of coercion by a particular belligerent as non-permissible, or calling for collective enforcement action, because of low estimates of the degree of probable conformity.<sup>33</sup> Again, because of expectations of excessive material and human costs which a military response may occasion, a target nation-state may decline to claim to meet force with force. The bloodless conquest of Czechoslovakia and the military occupation of Denmark by Nazi Germany in 1939 and 1940 are obvious examples of this situation.<sup>34</sup> A belligerent of negligible military capabilities and with relative security from military attack may also content itself with controlling enemy persons or taking enemy property within its territory and not claim actively to use the military instrument. Certain Latin American countries which joined the Allied Powers in both world wars sequestered private German property without engaging in or contributing to actual military operations against Germany.<sup>35</sup>

From careful orientation in the processes of coercion and claim, the next step we recommend in the clarification of the ambiguous and confusing reference of the "commencement of war" is an equally careful orientation in the process of legal decision by which community intervention is organized in the attempt to regulate international coercion. This second process may be described, in highest-level abstraction, as was the process of coercion, in terms of certain *established decision-makers* seeking certain common policy *objectives* under the varying *conditions* of the world arena, by certain *methods* or *procedures* of formulating and applying authoritative prescriptions. From such perspective, it must be apparent that the great variety of claims asserted by varying parties at various points in the factual *continuum* of coercion, generate just as great a variety of policy problems, all traditionally lumped together under one simple label. It is to these "facts," claims and problems, that the different decision-makers, who include officials of international govern-

<sup>33</sup> Goodrich and Simons, *The United Nations and the Maintenance of International Peace and Security* 364-365 (1955), point out that this was an important reason for postponing action by the Security Council under Art. 39 of the Charter in the Palestine case, and for the delay in the determination by the General Assembly of the commission of aggression by the Peoples' Republic of China in the Korean case. Cf. on the point made in the text, Wright, "The Prevention of Aggression," 50 A.J.I.L. 514 at 516 (1956); and Lauterpacht, *op. cit.* note 4, *supra*, at 55, 59 (on the Manchurian incident of 1931).

<sup>34</sup> On the case of Czechoslovakia, see *Survey of International Affairs, 1938, Vol. 3*, pp. 247-288 (Royal Institute of International Affairs, 1953); on the occupation of Denmark, see "Hitler's Europe," *Survey of International Affairs, 1939-1946*, p. 519 *et seq.* (Royal Institute of International Affairs, 1954).

<sup>35</sup> See Grob, *op. cit.* 293-294, and Kotzsch, *op. cit.* 248-250; see also "The War and the Neutrals," *Survey of International Affairs, 1939-1946*, pp. 114-136 (Royal Institute of International Affairs, 1956).

mental organizations and judges of international courts and arbitration tribunals, as well as civil and military officials of both belligerents and non-belligerents, respond and attach "legal consequences" in the shape of decisions about the lawfulness or unlawfulness of any particular application or avoidance of coercion. The detailed issues of policy, as might be expected, commonly differ as the specific contexts and controversies differ.

Relying upon the categorizations used in sketching the structure of claims asserted upon the initiation of coercion, and anticipating in briefest outline the results of other inquiries, we may observe authoritative decision-makers to be seeking, in the belligerent *versus* target belligerent and international officials type of controversy, to prevent change through coercive procedures (or procedures involving a high degree of coercion), to promote change through non-coercive procedures (or procedures involving only a minimum degree of coercion) and to maintain a world public order of varying consistency with the values of a free society.<sup>36</sup> At the same time, the community seeks to harness coercion to the maintenance of order by authorizing coercion as an individual, group or community response to unauthorized coercion. These complementary policies are sought by invoking and applying, with varying degrees of success, fundamental prescriptions which discriminate between different coercive practices and characterize some as non-permissible and others as permissible.

In the controversies between belligerents about the conduct of hostilities, the authoritative decision-makers bring to bear the familiar, equally complementary, principles of military necessity and humanitarianism. The basic effort is to minimize the unnecessary destruction of values through the application of a law of war sustained by the same principle which sustains

<sup>36</sup> We have, for the purpose of economy in expression, spoken of "the" public order of the world community. It is a fact of contemporary international life, however, that there is no single world public order as such, or a single conception thereof. There appear, rather, competing demanded conceptions of world public order and of international law, some of which are compatible with the postulated goal of wide sharing of values while others are not. See, *e.g.*, Stone, *op. cit.* 57-64; Kunz, "Pluralism of Legal and Value Systems and International Law," 49 A.J.I.L. 370 (1955); Wilk, "International Law and Global Ideological Conflict: Reflections on the Universality of International Law," 45 *ibid.* 648 (1951); Schwarzenberger, "The Impact of the East-West Rift on International Law," 36 Grotius Society Transactions 229 (1950); Smith, *The Crisis of the Law of Nations*, Ch. 2 (1947).

On the Soviet conception of international law, see, *e.g.*, Hazard, *Law and Social Change in the U.S.S.R.*, Ch. 11 (1953); *id.*, *The Soviet Union and International Law* 189 *et seq.* (1950); Soloveitchik, "International Law as 'Instrument of Politics,'" 21 U. of Kansas City Law Rev. 169 (1953); Kulski, "The Soviet Interpretation of International Law," 49 A.J.I.L. 518 (1955); Schlesinger, *Soviet Legal Theory*, Ch. 10 (2nd ed., 1951); Taracouzio, *The Soviet Union and International Law* (1935); Kelsen, *The Communist Theory of Law* (1955).

On the Nazi German conception of international law, see Preuss, "National Socialist Conceptions of International Law," 29 Am. Pol. Sci. Rev. 594 (1935); Gott, "The National Socialist Theory of International Law," 32 A.J.I.L. 704 (1938); and Florin and Herz, "Bolshevist and National Socialist Doctrines of International Law," 7 *Social Research* 1 (1940).

the self-interest of belligerents—the principle of economy in the exercise of coercion and force.

In the confrontation of international officials or belligerents and non-belligerents about participation, two sets of policies, corresponding to the two sets of claims we have noted, are successively sought by the established decision-makers. In the first, the community attempts to secure the maximum possible of common responsibility for repressing coercion authoritatively designated as unlawful by limiting the extent to which non-participation is permissible. The complementary policy of minimizing involvement and localizing the area of violence is urged by those who seek possible advantages in non-participation. In the second set, authoritative decision-makers are seeking, in determining the relative rights and duties of belligerents and non-belligerents, to adjust and balance the contraposed policies of military effectiveness, in terms of the isolation of the enemy belligerent, and of reducing to a minimum the consequent disruptions of the value processes of non-belligerents.

In the fourth type of controversy, *i.e.*, belligerent *vis-à-vis* individuals in the belligerent's own territory, and insofar as the control of "enemy persons" is concerned, the competing policies to be reconciled refer to the security interests of the belligerent and to the human rights of "enemy" individuals. Respecting the control of enemy property, the basic policies discernible in the few vague and disputed limitations interposed by international law have been described in terms of the protection of private property and the encouragement of free worldwide circulation of wealth and of the satisfaction of the security and military needs of the belligerent. Substantially the same policies are at stake, though perhaps in differing degree, in the regulation and utilization by a belligerent of its own nationals and their property. Such policies are here, however, sought to be secured for the most part, if not wholly, through the medium of municipal rather than international prescription; decision-makers external to the state have imposed but few controls. The historic frame of reference for such problems is that which Professor Stone designated as "war" for "municipal legal purposes."

In the fifth type of controversy—individuals against individuals—authoritative decision-makers, in regulating private transactions involving what might be called an "enemy element," seek an equilibrium between protection of the military interests of the belligerent and maintenance of the stability of expectations created by such transactions. Like the preceding context, this is much regulated by municipal law.

With such brief orientation in both the practices of coercion and the responses evoked from the various authoritative decision-makers, it may now be possible to achieve some further clarification of the legal policy problems commonly associated with the initiation, as distinguished from the management and termination, of processes of coercion. We have, assuming the perspective of the non-participant observer, described the process of coercion in terms of accelerating and decelerating degrees of intensity—that is, in terms of stages in a process of constant change. We

have also noted that the participants in this process make different appeals to authority at different stages, to which appeals the established decision-makers of the world public order respond, invoking different sets of policies and supporting prescriptions in granting or denying such appeals. Considering both the differences in the claims presented to the authoritative decision-makers and the differences in the policies and prescriptions which such decision-makers deem relevant to the respective types of problems created by those claims, it would seem reasonably clear to an outside observer that there is no one, unique and unitary "when" question that can be fruitfully asked about the application of authority in processes of coercion. To raise, as earlier text-writers have commonly done, one single, undifferentiated "when does war begin" question is to attempt at once to comprehend and transcend all the varying categories of problems, thus placing an impossible burden on communication. Accordingly, the general "when" question about the rôle of authority in coercion processes must be individualized and asked in respect of each specific type of problem. To put the point more positively, the allegedly unitary question must be dissolved into a number of more specific inquiries of how, in differing specified configurations of interrelated and variable factors, certain decision-makers may be expected to respond to certain characteristic claims as to the lawfulness or unlawfulness of certain exercises or avoidances of coercion. So conceived, a "when" question may be regarded as a semantically equivalent, if cryptic, way of referring to the peculiar constellation of all the elements in a given context which elicits certain responses from decision-makers. In this sense, the conventional question "When does war exist (or begin)?" amounts, in equally conventional language, to the question of "What constitutes war?"

From these perspectives, to speak, for instance, of when coercion is prohibited (or when prescriptions on aggression, or threat to or breach of the peace, and self-defense become applicable) is only to refer to the totality of factors—like the chronological priority of resort to coercion; the type and intensity of the coercion exercised; the proportionality of the target state's coercive response; the objectives of both the initiator and the target states; the type and purpose of the decision demanded; the probability and costs of effective decision and so on—which decision-makers, explicitly or otherwise, take into account in characterizing certain applications of coercion as non-permissible. Similarly, to raise the question when non-participation is permissible (or when the rules on neutrality are applicable) is to pose for consideration the relative relevance for differing decision-makers of such factors as the formal commitments of the members of international security organizations, the procedures available for making operative such commitments, the non-member status of a participant or non-participant, the character and degree of participation demanded, the intensity, spatial location and extent of the violence involved, and the differences in power between the participants and non-participants. In like manner, to ask when certain modalities of combat are proscribed (or when certain rules on the conduct of hostilities are

applicable) is to inquire into the relevant details of the level of destruction sought or secured, which, in varying specific contexts, may include among others: the character and authorization of combatants; the type, magnitude and duration of the damage inflicted; the geographic locale of operations; the nature of the objects of attack and the degree to which they constitute effective enemy power bases; and the *quantum* of control achieved over such bases of enemy power. Again, to seek to determine when certain coercive controls may be taken by a participant over certain persons and resources in non-combat situations (or when rules, international or municipal, on the definition and treatment of "enemy" and non-"enemy" persons and property are applicable) is to consider the shifting patterns, as presented to decision-makers, of such elements as expectations of impending violence; the formal allegiance and factual loyalties of individuals; the ownership of property, public or private; the degree of actual control by the enemy; the location, type and possible uses of the property regulated; and the security and military needs of the acting participants. Finally, to inquire into when regulation of, or interference in, private transactions is permissible (or when certain rules on the effects of war on contracts are applicable) is to assess the impact on decisions of data like the location of the parties in relation to the line of war; the time, *i.e.*, the stage in the coercion process, of the formation of the agreement; the stage of performance of the contract; the effects of performance, in terms of the extent to which enemy resources may thereby be augmented or to which the belligerent's own resources may be diminished; and the timing of benefits.

From the above partial listing, it would appear fairly obvious that authoritative decision-makers, in reaching decision, in fact respond not merely to the time, *i.e.*, the particular stage in the process of coercion, at which the opposing claims to be accommodated are asserted, but also to the whole constellation of significant variables that make up the context of such assertions. The special significance to be accorded to the fact of the stage in the process of coercion is dependent upon the relation of such fact to the other equally important variables; the *datum* of time acquires relevance only within the other co-ordinates, as it were, of particular situations. Hence, as intimated above, "when" questions call for much more than a simple reference to the stage in coercive processes at which certain claims are made. They are appropriately posed, not in terms of the relation of some single factor, such as a declaration of *animus belligerendi*<sup>37</sup> or a cannon shot, to a calendar or clock, but in terms rather

<sup>37</sup> It is somewhat difficult to follow Professor Stone's position when he says that the 1907 Hague Convention III "lacks any substantial modern function" (*op. cit.* 309, note 66), considering that he follows Lord McNair in assigning the time stated in a formal declaration of war (when made), or the time of its communication, as "the moment of its (war's) legal commencement" (*ibid.* 310).

It is true, however, that the Convention is pointless insofar as the prevention of surprise attacks is concerned; for the period of time between the communication of the declaration or ultimatum and the beginning of hostilities was left undetermined, such that even an infinitesimal space of time would apparently satisfy the requirement of "previous warning." See Hall, *op. cit.* note 3 *supra*, at 451-452. Westlake,

of the relations of the different factors *inter se* and to the policies of world public order regarded as material to the type of problem under consideration.

An authoritative decision-maker, in determining the legal import to be ascribed to any particular constellation of variables on any specific problem, may and does rationally take into account sequence relationships of "beforeness," "afterness" and "simultaneousness" among variables (and this is what we mean by "stage" in a process of coercion). Once such decision-maker has determined to attach certain "legal consequences" (or apply certain prescriptions) rather than others, to the "facts" of coercion alleged before him, he may equally rationally and casually assign a calendar date for the beginning of the ascription of the determined "consequences" (or for the applicability of the prescriptions determined). But the assignment of time he makes is a function of his reaction to all the factors constitutive of the specific context and hence varies from problem to problem. Irrationality comes in when some subsequent decision-maker or commentator seizes on one date so assigned for one problem, objectifies it into a monistic concept of "*the commencement of war,*" and projects such concept as allegedly controlling for other problems in fact raising differing policy issues. Rationality, in fine, in the determination of "when war begins" requires not a marking of one or even a few dates in a calendar, nor a search for one decisive factor, for the applicability *in abstracto* of prescriptions, but rather the clarification of what world community policies are uniquely relevant to varying claims of authority at varying stages in coercion processes. A policy-oriented approach is not a single-factor but a multiple-factor approach; rational policy is not uni-temporal but multi-temporal.

Because of the difficulties thus indicated in isolating the special significance that the stage in the coercion process at which claims are asserted may have from the cumulative impact of all the other factors on decision, it would accordingly appear more rational to study that factor, insofar as it does have, in a particular type of controversy, any special significance, in the course of more comprehensive inquiries into each of the various types of controversies. Such a mode of inquiry might begin with a more careful discrimination of the different types of major recurring controversies and proceed, within each type of controversy, to a more comprehensive itemization of the factors significantly affecting decision.

*op. cit.* note 2 *supra*, at 267, noted that a "very moderate proposal" of a 24-hour interval made by The Netherlands' Delegation to the Conference of 1907 was rejected; contrast this with the fact that during the days of the ancient *jus fetiale*, provision was frequently made in declarations that hostilities would not begin till after 33 days (See 2 Phillipson, *The International Law and Custom of Ancient Greece and Rome* 200 (1911)). In our own age when rocket missiles and artificial satellites travel at velocities measured in tens of thousands of miles per hour, it would seem somewhat optimistic to suggest, as Professor Castrén does (*op. cit.* note 2 *supra*, at 99), that a "time of grace" or an "intermediary period" should be given in the future.

For the possible uses of a declaration of war in contexts other than the conduct of hostilities, see Eagleton, "The Form and Function of the Declaration of War," 32 *A.J.I.L.* 19 (1938).

From such contextual orientation, an inquirer might, it is to be hoped, much more effectively seek to perform the various intellectual tasks deemed essential to policy-oriented study, including: the clarification of policies, the observation and comparison through time of past trends in decision, the identification in relative detail of the more significant conditioning elements, the projection of past trends into future probabilities, and the recommendation of preferred alternatives designed to secure the values of a free society.<sup>33</sup>

<sup>33</sup> For further indication of what we refer to as "the values of a free society," see McDougal, *op. cit.* note 21 *supra*, 82 *Recueil des Cours* at 188-191 (1953); McDougal and Leighton, "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action," 59 *Yale L.J.* 60, 60-72 (1949). See also, generally, Lasswell and Kaplan, *Power and Society* (1950); Lasswell, *Power and Personality* (1948); and *id.*, "Political Power and Democratic Values," in Kornhauser (ed.), *Problems of Power in American Democracy* 57-82 (1957).