Luncheon Address

12:30 p.m., Friday, April 24, 1981

International Lawmaking: A Process of Communication

*The Harold D. Lasswell Memorial Lecture*

by W. Michael Reisman**

Who can argue with the proposition that lawyers advising clients, judges responding to litigants’ claims, and countless individuals risking their treasure or their lives need to know, or at least are marginally better off if they know, what the law is? For the U.S. municipal lawyer, finding the law has apparently become so routinized a task that it rarely excites inquiry about how law is prescribed. If it did, the municipal lawyer would respond, probably with asperity, that law is made by, or by delegation from, the legislature, with some interstitial supplementing by the courts; and that the legislative and judicial production is accurately and conveniently reported by a small, specialized industry using advanced technologies of information processing.

Accurate or not, this view is so widely shared that, with the exception of those who function, in whole or in part, as lobbyists in political capitals, most domestic lawyers give little professional attention to lawmaking. Few law schools teach lawmaking or legislation; such courses as there are tend to focus on questions of authorization to legislate and on interpretation. For almost a century now, theoretical interest has been sporadic and slight. The great historicists in Germany and England were fascinated with lawmaking, though the self-imposed terms of their very mystical approach virtually excluded the possibility of international law. Since John Austin, lawmaking or the process of prescribing norms has not been a major concern of jurisprudence in the English-speaking world: it is relegated to the domain of “politics,” sharply distinguished from “law.”

The problem of lawmaking has always been more urgent and, apparently, more complicated in international law. For one thing, the familiar tripartite division of formal governmental institutions—executive, legislative and judicial—does not so obviously exist in the international arena. Hence international lawyers cannot, like their domestic counterparts, simply assume that law is made by the legislature and then get on with their work. Nor do international lawyers have a reporting service. Early in the century, international lawyers developed a myth, as it was described by Harold Lasswell, functionally equivalent to Aristotle’s tripartite division. Article 38 of the Statute of the International Court of Justice and of the Permanent Court before it, proclaimed that international law was made by treaties and by custom that evidenced general practice accepted as law and, in addition, international norms could be inferred from the general principles of law common to civilized states. Scholarly teachings and judgments were given a subsidiary role, facilitating the determination of the primary sources.

But if the formulae of Article 38 had any cogency in the past, how can they account for contemporary problems? Consider several examples. In 1979, plead-

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**Professor of Law, Yale Law School. This lecture draws, in part, on work on international prescription which has been supported by a grant from the National Science Foundation. I am grateful to Myres S. McDougal for his comments and criticisms.
ings in an important American case averred that the resolutions taken in formal conferences of OPEC, the Organization of Petroleum Exporting Countries, constituted international law. In 1975, the International Court held that a provision in a draft convention that failed to win the majority necessary under the parliamentary rules of the conference arena in which it took place, might nonetheless be international law. In 1980, former President Carter and the European Conference of Foreign Ministers seemed anxious to assume the same prescriptive consequence for a Security Council resolution that had been vetoed.

The League of Nations Covenant recognized the Monroe Doctrine as international law. Is it still international law? Is the Brezhnev Doctrine international law? Is the Carter Doctrine international law?

As a formal matter, the U.N. General Assembly was not endowed with lawmaking competence. Nonetheless, a number of scholars have ventured that the General Assembly “sometimes” makes law, whether by a mysterious “consensus,” as mystical as transubstantiation, by “instant” custom, or, as one learned professor apparently with interests in culinary matters put it, by “pressure-cooked custom.” In 1980, in the Filartiga case, the Court of Appeals of the 2nd Circuit seemed willing to accept the proposition that the General Assembly could and, in fact, had made international law.

Even within the confines of Article 38 of the Statute of the International Court, the problem for the scholar and the international practitioner is not a dearth of things that look like law. The international system produces documents in the legislatistic genre with promiscuous abandon. Much of it, as we all know, is not law. The phenomenon of pretended lawmaking is unusual but not unfamiliar to the domestic lawyer. Formal lawmaking bodies sometimes (and, some, often) emit communications that have the form of law but that close observers know are not law. A patent contradiction which makes the purported law unenforceable, the absence of necessary implementing legislation, insufficient enforcement machinery, an inadequate budget if a budget at all, or the delegation of implementation to a manifestly inadequate agency generally indicate that there was an intention to create not law but what I have called elsewhere lex simulata or lex imperfecta. There may be various reasons for these exercises. Thurman Arnold thought the creation of intentionally unenforceable law was an efficient and economic way of mediating between distinct classes and groups which had irreconcilably incompatible demands. Others think of it as a way of saving the conscience of a public that intends to continue to do things it still believes improper. These explanations are applicable to many international situations. But whatever the function and public value of lex simulata, the scholar and practitioner must be able to distinguish effective law from the enormous legislatistic babble of international politics. Assuming that an institution like the General Assembly which does not have a formal lawmaking competence may sometimes make law, or, conversely, that the treaty modality which is endowed with formal prescriptive competence may sometimes produce a document but fail to make law, the operational question for the lawyer advising private clients, the international politician bent on making law, and the scholar intent on understanding the process is when is law made and how. In response to this problem, diplomats and practitioners have begun to talk of “hard” and “soft” law. But the references of these terms are as ambiguous as the basic distinction they seek to draw. Some solidant “hard law” as, and may well have been intended to be ineffective. Some “soft law,” or bargains with the curious epithet of “gentlemen’s agreements” may, to the consternation of elites, prove to be quite effective.
Intimately related to the question of lawmaking, and of an equal importance to practitioner and scholar, is the question of when and how a law terminates. Because we have only a rudimentary international legislature, only rarely are there formal, express abrogations of prescriptions. Some conventions allow the parties to denounced at will, with only procedural requirements. But since, according to the Vienna Convention, norms originally expressed in conventional form may ripen into custom and then apply both to parties and nonparties, independent of their original instrument, how can the lawyer or scholar determine whether unilateral denunciation is still possible?

All of these practical and professional problems require for their solution a theory about how law is made that is cogent in formal institutional settings as well as in settings in which there is little specialized, institutionalized effective lawmaking. This is not an academic matter. The urgency of appropriate theory is underlined by the fact that we know that international law is being prescribed continuously and that it is sometimes made in virtually all of the institutions and through all of the modalities we have mentioned. We also know that some of the law prescribed is not compatible with common interests as we understand them; some may not be compatible with the security of states, including our own. If we fail to learn how to prescribe, the individual and collective consequences may be grave.

Unfortunately, the theories currently available do not address these practical and theoretical concerns. The institutional theory—that law is made principally by a legislature—is ludicrous in the international arena. Yet it would be a mistake to exclude institutions that purport to be legislatures from the purview of our inquiry. Equally inapplicable is the court theory, expressed jurisprudentially by John Chipman Gray and more grandiloquently by Justice Cardozo in *New Jersey v. Delaware*:

International law . . . has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality.

So few international cases reach courts, that if Cardozo’s judicial imprimatur were necessary, most of international law would be consigned to the twilight zone and beyond, indeed to Holland’s very “vanishing point of jurisprudence.” Yet one can hardly study the prescription of international law without examining international tribunals and their production.

One traditional international approach has called for an inquiry into something called *opinio juris*, what states believe law to be. Though we often say “The United States believes this” or “The Soviet Union believes that,” states don’t have minds. Elites who manipulate the symbols of states do, but they are rarely accessible and even more rarely cooperative. Hence the *opinio juris* test is extremely difficult to meet. But the core notion of expectations is extremely important.

Certain recent approaches seem more supple. Professor Dupuy, for example, in the Caltex Award, directly addressed the question of the prescriptive competence of the U.N. General Assembly. Noting the absence of a Charter authority, he nonetheless concluded that “. . . it is impossible to deny that the United Nations’ activities have had a significant influence on the content of contemporary international law.” “In appraising the legal validity of the above-mentioned Resolutions,” he continued, “this Tribunal will take account of the criteria usually taken into consideration, i.e., the examination of voting conditions and the analysis of
the provisions concerned.” While this seems to be a better tooled instrument of inquiry, you will notice that it still focuses only on a single moment dubbed “legislation,” tests its law status by reference to only two factors, and overlooks subsequent changes in thinking, talking and behaving which may be decisive in the formation or the dissolution of an erstwhile prescription.

The natural law theory, which holds that law is eternally there, only waiting to be expressed in explicit jural form, is inappropriate in a secular age; what is the natural law of the deep-sea mining of manganese nodules, of passage through straits or of diplomatic protection of multinational corporations? Yet natural law’s emphasis on the policing role of overriding principles should not be excluded. Whether these overriding principles are transempirical in origin or are based on empirically verifiable expectations, they may provide important stabilizations in the international system. The historical approach, that law is not and cannot be a purposive human creation, but emerges organically from group processes and structures, is daily controverted by manifest and effective lawmaker activities. Yet the inquirer would be remiss if he did not pay close attention to the impact of environmental factors on lawmakering. The Marxist conception that law is never an instrument for clarifying the common interests of a community but is simply, to use the memorable phrase of the Manifesto, the directives of the executive committee of the “ruling class” masquerading as the state, has no application in the heterogeneous international arena. Yet the emphasis in that view, as well as in classical positivism, on the abiding importance of the variable of control or effective power that is often concealed behind legalism, should not be overlooked.

Thus far we have spoken of lawmakering in the rather narrow terms of our profession. In a broader sense, of moment to lawyers and politicians as well as scholars, we are concerned not only with the processes in which certain policies that self-describe as law are made, but with the aggregate of processes in a community by which political perspectives at varying levels of consciousness are shaped and changed. Whether we are speaking of new foci of attention, new patterns of identification or disidentification, new selections of what “happened” in the past and what possibilities the future holds, or new transformations of aspiration and fantasy into concrete and exigent political demands, we are obviously addressing something of extraordinary importance to the lawmakering process. These subjectivities are often the substratum and the vanguard of lobbying and lawmakering; in some cases, they may substantially determine the law that finally emerges. Institutions like the U.N. General Assembly may, as Professor Dupuy observed, perform these prelawmaking functions. But let us not focus on a single institution. In the contemporary world communications system, which supplants the obsolete concept of geographic proximity with one of global electronic simultaneity, a complex network of public and private media arrangements addressed to an extraordinarily heterogeneous and modular world audience is engaged in this comprehensive pre- or sublawmaking function. Events that shape the attention focus of world audiences may include, for better or worse, the terrorists’ propaganda of the deed on through to the solitary artistic creation of an Uncle Tom’s Cabin, a Guernica, or a Heldenleben. The struggle over the soi-disant New International Information Order, a euphemism for a program to consolidate official elite control over the content of transnational communications, indicates the awareness and ambition of the international politician. The international lawyer and scholar cannot afford to ignore it.
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Harold Dwight Lasswell was deeply interested in these problems. Lasswell, one of the keenest observers of the social process in this century, early appreciated that many of the activities of some legislatures and all of the activities of others had little or no effect at all on the behavior of their presumptive audiences. He referred to their products as semantic or pretended law. As one of the founders of communications theory and propaganda analysis, Lasswell also appreciated that expectations that influence aggregate behavior could be and were shaped by many processes of communication besides those specialized processes we call legislation. In 1956, he proposed that the tripartite organic distinction, legislative, executive and judicial, that had dominated political science and law from the time of Aristotle be replaced, for the more intractable problems, by breaking down the operations of decision into seven functions: The gathering of intelligence, the promoting or lobbying of preferences, the prescribing of authoritative policy or lawmaking, the making of provisional characterizations of deviations from prescriptions or invoking, applying prescriptions, terminating prescriptions and appraising the aggregate performance of a community’s decision processes in terms of community goals.

The utility of this functional approach, particularly to the problem of international lawmaking, was readily apparent to Lasswell’s international law colleagues. In collaboration with Lasswell, Professor McDougal and I, and others, began to develop a theory of international prescription, one that would explain the phenomenon in scholarly fashion, facilitate judges’ and lawyers’ determinations of whether certain policies had been prescribed and hence should be applied, and help diplomats and politicians be more effective in making law, or, as is often the case, preventing certain undesirable policies from becoming law. The communications model was particularly attractive as it seemed more amenable, in the international political context, to empirical verification. Verifying opinio juris as autonomous subjectivity requires the cooperation of often inaccessible or hostile elites who are unlikely to submit to depth interviews. But communications from these same elites are available in abundance. Unhappily, Lasswell became ill and died early in the project, but the insights he had provided us continue to guide our work.

Put in simplest terms, lawmaking or the prescribing of policy as authoritative for a community is a process of communication. All groups are, perforce, communications networks. An indispensable part of the political processes of groups is communication. An ineluctable effect of all communication is political. Like any other communication process, prescription involves the mediation of subjectivities from a communicator to an audience and, in successful cases, a reception and incorporation by the intended audience, resulting in a set of appropriate expectations that are supposed to influence behavior and, contingently, to alert community enforcement responses when deviations are deemed to threaten public order. All this, of course, is obvious. The problem is how to think about it in a way that facilitates understanding and management.

In 1948, in a classic formulation, Lasswell characteristically captured it in a series of questions:

Who?
Says What?
In Which Channel?
To Whom?
With What Effect?
“Control Analysis” focuses on the Who, the communicators. “Content Analysis” focuses on the What. Those who look primarily at the institutions specialized to print, or audio or visual communication, the channels of communication, are engaged in “Media Analysis.” “Audience Analysis” focuses on the Whom and “Effects Analysis” focuses on the personal and social consequences of a flow of communications. Ideally, all these types of analysis should be studied in ensemble, but any one provides a useful window on the process.

The problems of applying this to the international political arena are as great as the rewards to be reaped. One operational difficulty is the very richness of the communications process. In periods in which elites concentrated power effectively and communications media were rudimentary, the Prince communicated with his counterpart primarily by means of his own diplomatic agents. Control, content, media and audience analysis appeared comparatively simple and manageable. But from the innovation of Gutenberg in Europe to the refinement of the cathode ray tube and the perfection of the simultaneous coordinated mediation of images and sound over great distances, the quantum of communication through time and across boundaries has been growing at a dizzying pace. With satellite communication now a commonplace, it is obvious that the planet’s potentialities as a comprehensively integrated, though complex, communications unit are increasingly realized.

In this unit, this “noosphere” to borrow Teilhard’s mystical metaphor, each of the components of communication becomes enormously more complex. While an elite monopoly of communication is still jealously sought in many parts of the world by control of media, censorship, jamming and so on, the proliferation of media and the potentiality of rapid transborder mediation of signs and symbols provides many enhanced opportunities for wider nonofficial and counter-official participation. An aged cleric’s speeches taped on cassettes, a carefully staged military action such as the Tet offensive, a terrorist raid virtually conceived as guerrilla theater, or a self-immolation in Vietnam or Czechoslovakia may now have enormous direct and indirect impacts on politically relevant groups throughout the globe, despite the efforts of elites to suppress them. A mass protest of Soviet human rights violations in New York, London or Paris, communicated around the globe in word and picture can reinforce demands for human rights and even punish the violator. In more indirect fashion, the exchange of goods and services itself has a substantial effect on the expectations and demands of those who enjoy and those who know they will never have access to them.

Parallel to the burst of interstitial channels of communication, there has been an explosion of official channels with specific political and lawmaking relevance. The traditional diplomatic conduits, by which territorial-based elites have communicated and clarified their common interests, continue to be important, but many other international conference and parliamentary arenas have come into operation. In some of these, nonofficial actors may participate in direct or indirect fashion. In all of them, the ever-present private media of the noncommunist, industrial world monitor and diffuse what they believe is occurring as rapidly as possible.

With extraordinary increases in the variety, number, and range of channels in international political communication, there has been a comparable increase in the size, complexity, and nature of the audience. Except for those who voluntarily and successfully privatize, virtually everyone in the world is a member of the prescription audience, though the significance and importance of different members will vary as a function of their interests and political relevance. At the same time, as a
number of scholars have suggested, there may have been an increase in the complexity of the personality structure of audience members.

Not everyone has viewed this democratization of prescription favorably. A number of scholars have noted that from the 19th century on, initially as a way of discrediting popular politics after the French Revolution, then as a convenient conception of Leninism and, ironically, consumer-oriented capitalism, large audiences were referred to as a “mass,” implying the passivity and characterlessness of a tabula rasa, to be shaped, inscribed, and jolted into action by the inundation of vast communications from some elite vanguard. Unquestionably, human beings can be manipulated, in varying degree, by signs and symbols, but the audience also communicates, ascribing expectations about authority and control, as we will see, even to the communicators themselves.

Expectations about appropriate behavior, some explicit, some at levels of consciousness so deep that people are not aware of them, are shaped in all of these processes of communication. If one is to understand and influence international lawmaking, plainly one must address the process in its rich totality.

For all of its formidable operational challenges, the communications model liberates the inquirer from the limiting and, in the international context, the distorting model of positivism, which holds that law is made by the legislature. From the standpoint of communications theory, some law may indeed be made by specialized lawmaking institutions, but any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered as functional lawmaking. Understanding how and where this is done is vital for determining when and what law has been prescribed and often for intervening and influencing future prescriptive trends.

The only way to grasp, indeed even to speak of this, is as an ongoing process in which the inquirer can systematically identify:

1. the full range of communicators and communicatees—including international and national officials, and nonofficial elites in every value process;
2. the subjectivities that animate all these actors—including their identifications, the matter-of-fact expectations of past and future that comprise their phenomenological world, and their demands for values. (Manifest demands may be described as objectives; more latent demands, sometimes held at levels so deep that communicators and communicatees are unaware of them, must also be explored for they are often decisive);
3. the many different situations, varying from value process to value process, in which subjectivities are mediated, in word and deed, and expectations about authority and control are shaped;
4. the resources and other bases of effective power and authority which all communicators and especially would-be prescribers employ to give weight to their words and deeds;
5. the different modalities and strategies of communication in different constellations of target-audience and elite rank-and-file;
6. the outcomes in shared expectation, of varying content, held with varying intensities, about appropriate future behavior.

In the international context, each of these phases of the communications process must be fleshed out if the inquirer is to track lawmaking. The first phase, communicators and communicatees, would include international and national officials, the elites of multinational enterprises, the media, many interest and pressure group leaders, and most human beings. For some norms, the relevant audience may include large numbers of people. For other norms, effectiveness may be achieved if a comparatively small group of elites comes to expect them. The second phase, the subjectivities of these participants in the communications proc-
ess, would vary from those identifying with a global system to those identifying only with a most exclusive unit; demands would vary from those for world order and justice to those of exclusive self-interest; expectations would vary from the most realistic to the most wildly fantastic.

The situations in which communications take place would include formal arenas like the U.N. General Assembly, the Security Council and international conferences, as well as informal private and even secret meetings. A situation, for our purposes, is any place in which pertinent subjectivities are mediated. It is urgent that the investigator avoid preconceptions about where prescription takes place. It is commonplace that international law is sometimes prescribed in a wide range of settings, varying from the most formal and specialized, for example a lawmaking conference, to the most informal, unorganized and apparently unauthorized, for example the behavior of two naval commanders in a maritime fishing dispute. It is equally commonplace that the events in these settings sometimes do not produce prescriptions, but only legislatistic communications. Modalities of communication would exhibit a similarly wide variety, in terms of instrument and degree of persuasion or coercion. The outcomes of the process must be expectations entertained by politically relevant groups that certain policies are authoritative and controlling.

All communications involve the mediation of subjectivities or messages. While much of general communications may, as I have suggested, be relevant to law formation, what is distinctive about prescriptive or lawmaking communications is that rather than transmitting a single message, they carry simultaneously three coordinate communication flows in a fashion akin to the coaxial cables of modern telephonic communications. The three flows may be briefly referred to as the policy content, the authority signal and the control intention.* Unless each of these flows is present and effectively mediated to the relevant audience, a prescription does not result. Equally important, even if the three components are initially communicated, they must continue to be communicated for the prescription, as such, to endure; if one or more of the components should cease to be communicated, the prescription undergoes a type of desuetude and is terminated.

Let us consider each of these communication flows in more detail. The content of a prescription, the norm—the injunction that one ought to do or refrain from doing something, or, writ large, the policy about the production and distribution of some value—is obviously an indispensable component. In statutes and the various forms of written agreements, the policy content is express, though not necessarily complete or unambiguous. But beware the fallacy of elevating form over substance. Explicit content does not automatically equal prescription. Bear in mind that not all communications in prescriptive form are intended to be prescriptions. Only some carry lawmaking intention. Some are pageantry, expressions of aspiration or voeux, affirmations of values with no expectation of their realization.

*Diagramatically, we have expressed this coordinate communication as follows:

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\text{Communicators} \quad \begin{cases} \text{policy content} \\ \text{authority signal} \\ \text{control intention} \end{cases} \quad \text{Target Audience}
\]

There may be subtle but nonetheless unmistakable indications of an absence of prescriptive intent. Consider, for a moment, the General Assembly’s adoption of the New Economic Order’s “Charter of Economic Rights and Duties of States”; we will return to it in more detail later. At one phase, the Assembly was invited to adopt the Charter “as a measure of codification and progressive development” of international law. Because of opposition, this self-description was abandoned when the Charter was submitted to the General Assembly for vote. But the legislatistic form of the Charter was not. It is at least arguable, as Professor Virally contends, that the deletion meant that significant parts of the group comprising the majority did not intend to make and did not believe that they were making law.

Where prescribing takes place less formally or in less organized settings, policy content may not be directly expressed, but be embedded in the situation. Where prescribing takes place behaviorally, content must often be inferred and is subject to different, inconsistent but reasonable interpretations. Consider a mundane example. In what appears to the actors within it to be a novel situation, a mother asks her child to refrain from doing something. When the child persists, the mother says, “Stop that or I’m going to tell your father.” In Lasswell’s terms, there are, of course, two or three decision functions being performed here: prescription, invocation and probably application. Other than the evocative or in Kelsen’s terms “dynamic” norm “obey your parent,” what is the policy content of the norm the erring child has violated? Though, in that particular case, both mother and child know exactly what offending behavior must stop if the child is to evade application by the father, mother and child may not know or may differ in understanding the policy content of the general norm applicable in future situations, where context and contingency may be quite different.

Similarly, consider a situation in which the Coast Guard of country A insists on escorting the fishing vessels of country B from waters that B’s fishermen have plied for generations. While the specification of A’s Coast Guard in that case is utterly clear, its prescriptive policy content is not. A’s acts may signal a permanent closing of areas theretofore open to international maritime users, or a short-term conservation, or a pollution-control effort, or the policy of a new security zone. Key elites in A may themselves be unsure of the policy content of that communication.

Can the General Assembly or smaller aggregations of would-be lawmakers do anything they want? In the period in which natural law doctrines waned and the secular dualism, championed by Emmerich Vattel, prevailed, state elites could apparently make lawful agreements no matter how morally odious their content might have been. But in the latter part of this century, elites have revived the notion of *jus cogens* or peremptory norm, from which derogation is not permitted. The importance of these planks of an international bill of rights cannot be overstated. *Jus cogens* has a very special reference to the determination of policy content. Even where the message of the policy content of a purported prescription is (or was) clearly expressed, the actual prescriptive policy content may be different. A superordinate norm, for example, Article 103 of the U.N. Charter or an existing or subsequently emerged *jus cogens*, may force revisions of the content of the prescription. Many other actors besides those manifestly prescribing play a role in the prescriptive function. In this latter respect, content has certain affinities to the second component of a prescription: its authority signal.

Let us turn our attention to this second communication flow in prescription. Other than as fitting objects of criminal justice, thugs are rarely brought into
polite legal discussion. It is a pity, because they are instructive as a power phenomenon. For this very reason, they were a major interest for Harold Lasswell who, like Pareto, insisted on including gangs in his itemization of political actors. Imagine four thugs sitting in a bar and deciding, meticulously following Roberts' Rules of Order, that all shopkeepers in the neighborhood will henceforth pay them 10 percent of gross receipts for "protection." Have they prescribed or made law? There is certainly a clear policy content and, alas, they may have the capacity to "enforce." But whatever the expectation of effectiveness, few would say, at least initially, that they had made law. Interestingly, if a parliament had said the same thing, few would gainsay that a prescription had been created.

Augustine remarked that a bandit is a little king and a king a big bandit. There is an important difference, in addition to size. What is missing in the thugs' enactment is what we may call the authority signal, a communication which attends the communication of policy content and control intention and which indicates to the relevant audience that the communicators are the appropriate lawmakers or, in more functional terms, have the authority to prescribe.

The base of authority may vary from the divine or monarchical to the constitutional and democratic. It may be formal and derivative or charismatic and patently contrary to formal law: "This is the law but I say to ye." There may be a single base of authority or, as in heterogeneous and pluralistic systems, multiple bases requiring very complex authority signals, going through several steps or phases, each component of which is directed at a different constituent group. There may be explicit authority, as when agents plenipotentiary carefully examine each other's authorizations, and very diffuse and implicit authority. And authority changes: witness changes in the role of the House of Commons, Congress' commerce clause powers, the foreign affairs power of the President, the U.N. General Assembly's assertions of prescriptive competence. The point of emphasis is that an indispensable component of the complex communication that is a prescription is some authority signal which distinguishes demands backed up only by credible threats—the demands of the thugs in our example—from law.

The authority signal is much more complex than the communication of policy content. While the command of what to do is essentially unilinear, the communication of authority is more of a closed loop. It is the audience, whether or not its members realize it, that endows the prescriber with the authority that renders his communications prescription. Hence the search for authority must be empirical in the broadest sense, rather than merely documentary. In many circumstances, authority may be subtle and diffuse. But its indispensability in prescriptions is clear.

We now address the third communications flow. One of the sillier notions that surfaces in jurisprudence with an almost schizothymic regularity is that lawmaking is essentially a polite ethical conversation, a dialogue requiring only content and authority; the latter often derived implicitly from the inherent cogency of the former. If that were the case, we would maintain cadres of philosophers and rhetoricians instead of police, armies and other specialists in violence. Plainly, lawmaking involves another component: power, the capacity and willingness to make a preferential expression effective. This third component, which we prefer to call the communication of control intention, is broader than the concept of sanction. All prescriptions, by definition, contain a sanction, either a threat of deprivation for noncompliance or a promise of reward for compliance. But the fact that the drafter added a sanction does not mean that potential decisionmakers whose jurisdiction will be invoked when there is a violation of the norm either have the
capacity or the will to enforce the norm. Whatever the sanction that may be explicitly or implicitly designated, it is delusory to call a statement in the subjunctive mood a prescription or law if it is not accompanied by a credible communication that those who are prescribing intend to and can make it controlling. Moreover, the communication of control intention must be continuous throughout the life of the prescription. Episodic violations of a norm, among other things, have a testing function for members of the community who wish to terminate it, pushing to see whether control intention has waned and whether the prescription may henceforth be violated with diminished likelihood of sanction or with impunity.

Control intention is not synonymous with potential power. In many cases, a state elite that has, in an arithmetic sense, adequate power bases to enforce an unpopular norm, will find it inexpedient to do so if it alienates allies or undermines processes for decisionmaking in which the elite recognizes a continuing interest. On the other hand, where brutal use of power is the cachet of an elite group, it may seek opportunities to convey control intention in a superfluously brutal fashion and enhance the terror on which it bases itself.

Determining control intention requires, perforce, as comprehensive as possible a survey of the power process and the interests of those who are most effective in it. For each purported prescription, the inquirer must first determine which groups, official or unofficial, constitute the effective power elite in the context in which the norm is to be implemented. This is no easy matter, for the power process is always potentially fluid. Sometimes only a few states may be critical. The inquirer must then identify the objectives of members of the elite constellation, the importance they attach to maintenance of the norm in present and projected contexts, and the actual value investment elites are willing to make to sustain the prescription. In pluralistic communities, inquiry must extend from the elite level to all relevant components of the domestic political process. Where power is widely shared, the process of control has many steps and links.

In this respect, Professor Tunkin’s view would appear to be flawed in key respects. While Tunkin’s analysis of lawmaker indicates his awareness of the necessary component of control intention, he believes it is fulfilled if the three “worlds” concur. Since one of the worlds is effectively controlled by the Soviet Union, the theory actually imports that the USSR reserves a veto power over prescription. Now as a factual matter, the USSR may have power in some contexts to veto a prescriptive endeavor. In contexts in which the Soviets do not have such effective power, to claim the veto as of right is better politics than science.

Control intention does not require unanimity or even wide consensus. It is well to remember that norms are prescribed because they are policies which part of the community does not voluntarily or spontaneously support. Norms become effective because some elites have enough interest to make them effective. They continue to be norms only so long as some are able and willing to make them effective. Norms are not the issue of an always benign process.

Recall the familiar language in mutual defense treaties that an attack on any member will be viewed as an attack on each and all. Reflect on the brief history of the Carter Doctrine. The inquirer will frequently discover, as we will see, that elite objectives change, that support for a prescription may wane or that language or language equivalents proclaiming unqualified support for a prescription actually conceal a limit.

It is the coordination of these three message flows—policy content, authority signal and control intention—that indicates prescription or, in popular parlance, makes law. Demands on others that are backed up only by threats, only by
control intention communications, may well shape the aggregate behavior of the target audience, if and so long as the demanders have and are willing to deploy the power they indicate. But it would be improper to designate their commands as prescriptive or law, though they may ultimately become such. "Power," Lasswell taught in one of his famous apothegms, "authorizes itself."

Conversely, demands rich in authority signals but without adequate control intention communications may yield, at least for some, expressions of morality. But again it would be improper to call them law unless, in the hypothetically possible but extremely rare case, the target audience is so enchanted or enthralled by the particular authority mystique that control intention is either unnecessary, or may be deemed to have ultimately been created.

The exact mix of authority signal and control intention required to prescribe varies from context to context. In groups in which there is a high sense of collective purpose, and common interests have been internalized in the personalities of politically relevant members, authority signals alone may be sufficient to create prescriptive expectations. In aggregates in which inclusive identifications and perceptions of common interest are low or merely rhetorical, the communication of control intention may be most important. Above all, this is an approach which focuses primarily on the communications themselves, in their diverse forms, rather than on the empirically more inaccessible and hence more difficult question of the subjectivities of elites.

Human consciousness is not distinct and isolated from social process but in constant interstimulation with it. Hence, as Lasswell observed, nonauthoritative practices that endure may become prescriptive. Since the function of prescription is that the target audience come to expect that certain practices and procedures should be followed, demands that were initially not prescriptive may become prescriptive.

Consider the Brezhnev Doctrine. Perhaps its origins may be found in secret elite understandings at the end of the Second World War. When it was first enunciated publicly to justify the Soviet invasion of Czechoslovakia in 1968, it was little more than a demand that a certain act be acquiesced to, but it was a demand distinguishable from the innumerable claims of any political moment in that it was backed up by a very credible communication of control intention. Though a number of Soviet scholars were quick to describe it as international law and even as a *jus cogens*, few outside the Soviet perimeter would have characterized it as law. Within 10 years, however, it may well have authorized itself to the point where Western protests of its exercise in future cases will be viewed in many quarters as the provocative challenging of an accepted norm. By the time this has occurred, it is quite likely that the Brezhnev Doctrine will be rationalized as a stabilizing norm which protects the vital interests of a major power and, by clarifying and clearly communicating its interests, contributes to world order. The problem of the disturbing content of the norm, to which we will return, will be ignored or understated.

A comparable development can be traced in the complex of lawmaking efforts generally called the NIEO, or New International Economic Order. The basic policy content of NIEO has been expressed, at least since the 1955 Bandung Conference, with little prescriptive effect. In the interim, the U.N. General Assembly was coming increasingly under the influence of a growing body of developing states which, for all of their diversity in interest, shared certain common experiences. By 1962, these states, now comprising a majority, initiated a decade of development and then a Geneva-based special organization, UNCTAD, which
tried to change the basic structure of world trade by passing resolutions with what can only be described as legal promiscuity. Raul Prebisch, himself the Secretary General of UNCTAD and the author of one of its basic economic theories, observed that unless these numerical majorities included or won the support of the economically effective Western powers, they would mean very little. Prebisch, a realist, grasped the indispensability of effective power to make law. The 1973 Yom Kippur war and the Arab use of the oil embargo were widely viewed, correctly or not, as a defeat of the Western industrial states, the commencement of a new era of Third World resource diplomacy, and a dramatic change in the distribution of global power. In a special session, shortly after the war, the General Assembly declared in the Declaration of the New Economic Order that the change in the political structure of world power would now be accompanied by a coordinate change in economic relations; shortly thereafter the Assembly adopted the Charter of Economic Rights and Duties of States, a document largely derived from UNCTAD and the often depreciated General Assembly resolutions of the previous decade.

The increasing willingness of Western lawyers, judges, and scholars to consider Bandung and UNCTAD demands, repackaged now as NIEO doctrines, as prescriptive can be traced to assumptions about two alleged changes: first, a change in the authority of the General Assembly to prescribe; second, and related to the first, a change in the international constellation of effective power after 1973, such that a new group committed to NIEO could supply sufficient control intention. Both of these assumptions may be unfounded; I believe they are flawed in several ways, but for the moment, we can cite this development as the beginning of the crystallization of a new norm with relatively constant content, through changes in two attendant communications: authority signal and control intention.

II

The communications model of prescribing and the conception of prescription as comprised of three coordinate communicative streams—policy content, authority signal and control intention—have a number of implications. Perhaps the most important is that for every prescription, this is a continuous process. Prescriptions, as such, never have the finality and permanence attributed to the decrees of the Medes and the Persians. The critical question is the existence and content of the expectations of politically relevant individuals and groups. These expectations will be sustained or changed by the continuation or abatement of streams of communication about the authority and credible control intentions of those whose support is needed for the norms’ efficacy. Changes in global authority structures, changes in the power process or reassessments by effective elites of the degree or intensity of their prospective interest in supporting prescriptions they sustained in the past may import the effective termination of a prescription despite the fact that it continues on the books and that some scholars and diplomats stoutly insist that it is law. On the other hand, appreciation of lawmaking as a process of communication may alert judges and other decisionmakers to rare opportunities in which their actions can contribute to the consolidation of a desirable policy into a prescription only then acquiring an adequate authority and control base.

There are numerous instructive examples of the international prescriptive process: self-determination, human rights norms, the continental shelf doctrine, the New Economic Order. Perhaps the points we have discussed in theoretical fashion can be most economically illustrated in a case study of the continuing efforts to prescribe a norm against testing nuclear weapons in the atmosphere.
From the earliest days of the nuclear age, the scientific and political elite appreciated that nuclear explosions in the atmosphere had definite though imperfectly understood and assessed costs in terms of effects on human beings within a certain proximity, and short- and long-term effects on the natural environment of the test. Hence the more democratic states with nuclear testing programs, either anticipating or deflecting a public reaction which might have jeopardized the tests, began to move them further and further from population centers. But the earth, like a spaceship, is a closed system. The further one goes from one’s own population centers, the closer performe one gets to another’s. Hence the search for distant sites was really, like the euphemistic “externalization of costs” in economic theory, a way of dumping an undesirable by-product, in this case nuclear filth, on someone else.

For the United States, in the late 1940s and early 1950s, the path of externalization went from the deserts of our own Southwest to Bikini Atoll in the Marshall Islands in 1946 and, in 1947, to what came to be the more permanent “Pacific Proving Grounds” at Eniwetok Atoll near Bikini. From time to time, areas of the high seas, initially 30,000 square miles, were closed. In 1954, an area finally including nearly 400,000 square miles of high seas was closed for almost six months.

Pacific basin states, whose elites unquestionably knew what was afoot, were in no position to lodge effective protests, even if they had wished to. We are speaking of a period before the burst of Third World membership in the U.N. General Assembly. Many of the basin states still had formal or de facto colonial status. Others, such as Japan and Australia, were part of the Western defense alliance. Australia was cooperating with some Western testing, Japan was a beneficiary of the nuclear umbrella and in any case was in no position to protest effectively. Among the Western elite there was a substantial consensus that, in Winston Churchill’s words: “There is only one sane policy for the free world . . . defense through deterrents.” In competition with the Soviet Union, this necessitated an ongoing nuclear development and testing program.

In 1954, the Marshall Islanders, supported by the Soviet Union and India, protested the tests to the U.N. Trusteeship Council, alleging a violation of the Trusteeship Agreement and the Charter. A majority of the Trusteeship Council rejected their move. At the time, the issue of lawfulness was primarily joined over the compatibility of the tests with the traditional freedoms of the law of the sea. Plainly, the tests closed substantial parts of the high seas, preventing the basic freedoms of transit, overflight and fishing. Some scholars, such as Margolis, argued that the U.S. tests were clear violations of the law of the sea. Other scholars, preeminently McDougal and Schlei, contended that the tests were lawful. They reasoned that the law of the sea, properly understood, allowed for innovative uses, initiated by unilateral claim, if the use could be shown to be nonaggressive, inclusively advantageous, consistent with basic Charter principles, reasonable and, in the context, as considerate as possible of lawful uses engaged in by others.

Protests notwithstanding, it is my impression that in terms of the expectations then prevailing, the tests were not viewed as unlawful. No matter. The Roman maxim *ex delicto jus non ortur*, like so many other venerable homilies, is simply wrong. New prescriptions frequently arise from violations of existing prescriptions. By the mid-50s, with the commencement of Soviet atmospheric testing, a norm had been prescribed to the effect that atmospheric testing over the oceans, in an appropriate fashion, was lawful in itself and a licit use of the high seas. Its
policy content was clear and moreover was now deemed to be consistent with the basic principles of the Charter. If it had initially been viewed as little more than a power play by the then preeminent global power, it had come to be widely expected and, by many, demanded as indispensable to the system of reciprocal deterrence on which minimum world order was based. Finally, both the USSR and the United States were conducting atmospheric tests over the oceans, with no intention of brooking interference; in the context, the requisite control intention accompanied the prescriptive communication.

By the early 1960s, the strategic and political situation had changed in many pertinent ways. The process of decolonization had accelerated. As a result, many former colonies were independent and gradually coalescing into a majority in the U.N. General Assembly. The elites of these new states had not been present at the creation of the norm we are examining; many felt it served neither their interests nor the goals of the minimum world order which they pursued. Second, the environmental movement, dormant in the previous decade, was becoming a more important factor in the industrial democracies of the world; its membership was becoming increasingly alarmed at what were feared to be the irreversible effects of atmospheric testing on the biosphere. Finally, the superpowers themselves had reached the point where atmospheric testing was deemed less vital to the progress of their own weapons' programs. A cessation of such tests could be contemplated if it were reciprocal. If a prohibition could be made universal, prevent Johnny-come-latelies to the nuclear club from engaging in this indispensable phase of development and thereby secure a superpower nuclear monopoly—so much the better.

The conjunction of all of these forces was the "Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water" of 1963, in which each signatory undertook to prevent nuclear weapon tests in the atmosphere or anywhere else if the test deposited radioactive debris outside of the state where the test took place.* Each of the superpowers undertook to proselytize in its own sphere of influence and, in short order, well over 100 states had become party to the treaty. In 1970, the Nuclear Non-Proliferation Treaty, with a similarly wide subscription, underlined certain policies implicit in the 1963 agreement. In the meanwhile, emboldened by what was apparently a new international policy, the General Assembly began to pass resolutions conveying a majority consensus that all atmospheric testing should stop.

*The key provisions for purposes of our discussion are

Article I (1) (a) which provided
1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:
(a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas; or
(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted. . .

Article IV provided:
This Treaty shall be of unlimited duration.
Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance.
A jurist in the late 1950s might have plausibly concluded that an international prescription permitted atmospheric testing. By 1970, he would have found it difficult to refrain from concluding that the permissive prescription had been terminated; that atmospheric testing was now prohibited. Content, authority signals and control intention all seemed to support the conclusion. To be sure, a few stubborn hold-outs—France, China, India and so on—had not joined the treaty refused to acknowledge that it was international law, and apparently were toying with nuclear weapons. Other states, such as Israel and South Africa, were party, but were nonetheless widely believed to have developed nuclear weapons and, at least for first-generation nuclear weapons, seemed to demonstrate that one could enjoy some of the strategic advantages of nuclear weapons without testing. But surely it was clear that all of these states were behaving unlawfully. If a court of law could have decided the matter, would it not, in Cardozo’s words, have given its imprimatur and attested to the jural quality of the prohibition?

The opportunity for a court to appraise the prescriptive process and, if possible, to contribute to the crystallization of a popular and apparently beneficial norm came in most timely fashion, thanks to France’s program for developing nuclear weapons. France had never accepted the Limited Test Ban Treaty of 1963, distrusted U.S. guarantees, and felt that the only security available to France would derive from its own nuclear arsenal. But, like Italy coming too late to an imperial game that others had benefited from and then declared ended, France was discovering, both domestically and internationally, that what the United States and the USSR had done lawfully in the 1950s was increasingly characterized as unlawful in the 1970s.

Like the states that had preceded it, France too was increasingly compelled to try to externalize the environmental costs of testing. French atmospheric testing started in French colonial areas of North Africa. When independence there, in effect, forced the French to move, popular dissatisfaction made the prospect of shifting the tests to a metropolitan area a very expensive political proposition. In 1968, France announced it would develop its own Pacific testing ground at Mururoa Atoll in French Polynesia. Tests were conducted there from 1966 to 1972.

Australia and New Zealand, the former only 6000 kilometers from the test area, protested the tests. When France persisted, they applied severally to the International Court of Justice, in the language of the Australian submission, “to adjudge and declare that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law and to order that the French Republic shall not carry out any further such tests.” They also asked for an injunction—“interim measures”—to bar the pending tests until their lawfulness could be judicially determined.

Now the injunctive competence of the International Court is, as is well known, controversial even when the jurisdiction of the Court is otherwise firmly grounded. In this case, jurisdiction was rather tenuous, for it rested on a multilateral treaty that appeared quite obsolete, the 1928 General Act for the Settlement of Disputes, and on a French adherence to the jurisdiction of the Court that contained an express reservation to “disputes concerning activities connected with national defense.” Indeed, France was so adamant about the inappropriateness of the Court’s exercising any jurisdiction that it refused to appear even to contest it. Nonetheless, the Court in a close vote ordered France, pending argument and final judgment, to “avoid nuclear tests causing the deposit of radioactive fall-out on Australian territory.”

An international court is, in large measure, an architect of its own jurisdiction,
using authority and control as its building materials. At this stage of international political development, it tends to be cautious, for a judgment that is repudiated harms the court's own prestige as a base of power. Sometimes the court may extend its jurisdiction boldly, despite a slim documentary base, confident that, in the context, the addition of its own decision will tip the balance in favor of compliance. In the case we are considering, the Court was building on an extremely meager jurisdictional foundation. What accounted for the boldness of the majority?

I believe that key judges, in what emerged as the majority, were appraising the flow of communications about atmospheric testing to determine whether a prescription had been created. They could have identified content prohibiting atmospheric tests, appropriate authority signals, and what would have appeared to be adequate indication of control intention. Moreover, the content of the norm might have appeared to many of the judges as progressive, conducive to improved world order, and worthy of their support. Quite plausibly, they could have assumed that (i) the prohibition had come to be expected and demanded; (ii) the United States and the USSR, in addition to many Third World countries, could and would sanction France if it persisted; and (iii) the mere prospect of that sanction might be enough to dissuade France from persisting in its atmospheric testing program. Certainly, if the Court put itself on the line and members of the United Nations realized that their principal judicial institution would be injured by noncompliance with a judgment, they might find an additional incentive for securing French compliance. And so the Court, in effect, enjoined France from testing, pending a final judgment, whose substance could no longer be terribly mysterious.

France ignored the injunction and tested. When the Court took the case up on the merits some six months later, it relied on statements by the President and the Minister of Defense of the French Republic announcing that France had satisfied the requirements of the atmospheric phase of the tests and did not plan to conduct any more of them. The Court, by a vote of nine to six, reasoned that the issue had become moot. The dissenting opinions noted that what Australia had sought was a declaration of the illegality of atmospheric nuclear tests and not a record of an essentially ambiguous French statement that it would, in the normal course of events, voluntarily refrain from exercising its right to test.

The implication that the Court was trying to duck the case was particularly puzzling because the Court had moved so boldly in the other direction a scant six months before. Equally puzzling was the sudden change in the normative status of the prohibition of atmospheric testing. Six months earlier, even the more prudent observer might have said that, with the statement of the Court at the interim measures phase, an inchoate norm with a "twilight existence," to borrow from Cardozo, had at last received a court's imprimatur and had emerged as real law. Now the norm had either retreated to the twilight zone or, in a more drastic move, completely vanished.

It should occasion no surprise that the reasons for this sharp change are not persuasively found in the judgment. It is the style of judicial redaction and, in part, an inherent feature of the formal language of law often to conceal the most compelling policy reasons for a decision. The International Court can be presumed, here, as in many previous cases, to have been concerned about its own effectiveness. In a number of cases after the Corfu Channel judgment, there are reasons to suspect that jurisdiction may have been rejected precisely because of a fear of the probable ineffectiveness of a subsequent judgment, either by repudia-
tion of the judgment itself or by a general rejection of a decisive norm on which it might have been based. But in the Nuclear Tests case, the communication of control intention that had appeared to accompany the prescription prohibiting atmospheric tests would have appeared ample enough to dispel the anxiety of the most timid of international judges. After all, both Superpowers appeared firmly committed to the prescription and a majority of U.N. members had expressed their support both by accession to the treaty and by voting for resolutions in the General Assembly. In those circumstances, the Court could safely conclude that the norm was law and that, should the addition of an ICJ judgment to the expectations of the world not deflect France from its intention to test, the Security Council, or the General Assembly under the Uniting for Peace Resolution, might initiate some enforcement. Once persuaded of its political base, the Court could easily have used the theory it devised in the Reparations case that a majority of the governments of the world could make law for the rest or, alternatively, have used the theory expressed in Article 43 of the Vienna Convention on the Law of Treaties. Either theory would have made the prohibition of the 1963 treaty operate *erga omnes*, against party and nonparty alike.

Curiously, in the brief period between the indication of interim measures and the judgment, the anticipated chorus of condemnation of France hardly materialized. In particular, the Superpowers, whose role in supporting the prescription in question was indispensable, took no meaningful steps indicating an ongoing commitment of control intention.

The reason for this relative silence is not hard to discern. Article 4 of the 1963 convention, while affirming that the instrument was of unlimited duration, permitted, in its second paragraph, a party to withdraw after three months advance notice “if it decides that extraordinary events, relating to the subject matter of this treaty, have jeopardized the supreme interests of its country.” The parties initiating the treaty had not contemplated an absolute prohibition, but one subject to reconsideration and denunciation. If the Court had acceded to the Australian claim, it would have had to transform the contingent prohibition on atmospheric testing into a permanent ban, no longer subject to denunciation. In short, it would have been obliged to change the norm involved, not only *vis-à-vis* France but also *vis-à-vis* the Superpowers.

From the perspective of Australia, New Zealand and other Pacific basin states that did not plan to acquire nuclear weapons, these changes may have been quite desirable. A prohibition that, for them, was already a de facto absolute became absolute de jure for all others. Since apparent nuclear parity already created the sterile balance of terror needed for world order, the nonnuclear states stood to gain nothing by further testing. To the contrary. Radio-nuclides have no nationality. Given their environmental and demographic health concerns, Pacific basin states were in a net better position if everyone, friend and foe alike, was henceforth prohibited from atmospheric testing.

This perspective could not have been shared by the Superpowers. For each of them, the prospect of the excision of Article 4’s denunciation privileges from the treaty imported major and potentially negative security implications. Part of the complex of motives that had produced the 1963 treaty was that a stage in weapons development had been reached by both superpowers at which further atmospheric testing was no longer exigent if the other superpower refrained from testing. But the situation could change and security considerations might then mandate a resumption of tests. A neutron bomb, for example, cannot be tested in the atmosphere by a party to the 1963 treaty, substantially reducing its utility, if a
decision is taken to add it to the national arsenal. In some scenarios or, as Lasswell put it, constructs of possible futures, that weapon might be critical for the balance of forces in the extremely important European theater. Moreover, in a new power constellation, nuclear proliferation might not be as undesirable as it had been. The United States may have come to see certain advantages to a nuclear China, as the USSR assessed the advantages it might gain from a nuclear India. In short, there were compelling reasons why the United States and, in symmetrical fashion, the USSR would be anxious to maintain the denunciation privilege and would, hence, oppose the prescriptive transformation that the ICJ would have been obliged to craft in order to sustain the Australian claim. Hence the rather deafening silence after the interim measures phase and the absence of agitation in organized arenas such as the United Nations.

France has stopped testing in the atmosphere. Perhaps the International Court can take some credit for that. It is possible that the prospect of an adverse judgment may have been an additional factor pressing France to terminate the offending tests. But the norm Australia and New Zealand sought to have confirmed was implicitly rejected. Paradoxically, the norm continued on the books as vigorously in December 1974 as it had in July 1974. Yet appraised in terms of a communications model, the modulation of control intention had been substantially changed. Henceforth, whatever the text and the authority, the norm in question could not properly be called a prescription.

III

Viewing international lawmaking as a process of communication in which three coaxial messages are modulated, creating and sustaining expectations of authority and control in the target audience, provides a guide for realistic orientation both to the scholar and practitioner. Using this approach, we are in a better position to make judgments about whether certain communications are law or are deficient in some significant way. With this method as a contrast, we can see that more traditional approaches, such as the enumeration of sources in the International Court’s Statute Article 38 are not wrong but are incomplete. Something may fall within one of the formal sources, but simply not be, or have ceased to be, law.

Consider the perplexing prescription problems we posed earlier. Using the communications model and the coaxial conception of three-part communications for prescriptive creation, it is clear that the resolutions of an organization like OPEC may be effective in certain contexts, but they cannot be characterized as international law, for they lack authority signals and, one would hope, adequate control intention. For analytic purposes, and with no disparagement intended, OPEC can be analogized to the band of thugs in the extortion example. As for the dicta in the Filartiga case, the competence of the General Assembly to make law, beyond a few technical areas specified in the Charter, cannot be generalized. Lawmaking efforts must be appraised, in each case, for appropriate authority signal and control intention, creating and sustaining prescriptive expectations. This empirical approach must be followed even within the bounds of a single instrument. One cannot speak meaningfully of the prescriptive force of the New Economic Order’s Charter of Economic Rights and Duties of States, but only of that of separate provisions. Some provisions have prescriptive intentions as well as appropriate authority signals and indications of control intention; some have none of these. For better or worse, it is true that the U.N. General Assembly sometimes prescribes. The point is to know when it is doing so. The International Court may
have been factually correct in saying, in 1975, that a rejected provision had become law. So too, President Carter and the European Council of Foreign Ministers in claiming that a draft Security Council sanction resolution against Iran was prescriptive even though it was vetoed. In both of those cases, however, policies in favor of formality may have been ignored to the detriment of the longer term interest of the parties. Unilateral pronouncements such as the Monroe Doctrine, the Brezhnev Doctrine and the Carter Doctrine may be prescriptive if they are accompanied by sufficient authority signals and control intention. I leave to you what I fear may be the melancholy task of appraising each for its prescriptive content and force.

IV

In the most immediate term, the theory propounded here can be used in rough and ready fashion by lawyers and courts to temper the more extravagant lawmaking claims of institutions that have developed automatic majorities suffering from legislative incontinence. In the longer term, it may alert governments to the implications of creating formal arenas for certain matters, unwittingly inviting consolidations of authority and control that will be used in ways adverse to common interests. For scholars and, through their efforts, for all who perform decision functions, ongoing analysis of international prescription in terms of a communication process yielding a tripartite coaxial message of content, authority and control intention may provide less impressionistic and more precise knowledge of the corpus of international law at any moment, as well as likely trends in the future. Empirical verification, though a formidable problem, will be far easier than trying to probe the psyches of elites.

Let me close with a caveat. A precise knowledge of what prescriptions exist will indeed facilitate some decisionmaking but it can never make it simple. If it could, judicial functions could be discharged by clerks and legal functions by typists. Even where norms are known with precision, their application in concrete cases is always a separate matter, requiring detailed consideration of the context, a reappraisal of the invoked norms for the conformity of the consequences of their application in the given context with community goals, and hence their interpretation, supplementation, and policing by appliers so that, in each case, they contribute optimally to basic principles of human dignity. It is, as Lasswell taught, conformity to those principles and not an atavistic aping of the past or a narcissistic replication of its own syntactic formulations that is the proper function of law and the true source of pride of lawyers.

THE DEMAND FOR ECONOMIC JUSTICE

The session was convened by the Chairman, William D. Rogers,* at 2:30 p.m., April 24, 1981.

REMARKS BY THE CHAIRMAN

This session is intended to examine what is, indeed, an economic chasm in the world that separates the countries of the North from those of the South: that

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*Of the District of Columbia Bar.