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Law and Power

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though probably unintentionally so. Likewise the conferment upon any tribunal exercising jurisdiction under the code of complete power to define the penalty to be imposed will, in spite of the very real excuse given in the comment ("it is not deemed practicable to prescribe a definite penalty for each offense"), alarm many.

It is the provisions regarding national armaments and propaganda, in Article 2, paragraphs (3) and (5), which raise the most serious questions. In the former "the preparation by the authorities of a State for the employment of armed force against another State (except for defense or under United Nations auspices)" is classified as an offense against peace and security, and so, in the latter, are "the undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State (or toleration of organized activity of this kind)." The former would open the door to charges against any rearmament program if alleged to be based on hostile intent, and the latter would ban any efforts to promote democratic or liberal reform in autocratic dictatorships. It is not believed that the former would have great effect, but such charges could certainly muddy the already clouded waters of international relations, waters clouded by just such charges today, very badly. Finally it is not believed that it is desirable to return to the anarchical doctrines of the nineteenth century and admit that the character of the political system of one country is of no concern to another, in contradiction to both the League Covenant and the United Nations Charter.

Fortunately there will still be ample time for critical appraisal of the draft code before adoption.

R. POTTER

LAW AND POWER

In our contemporary disillusionment it is again becoming the fashion to minimize both the rôle that law presently plays in the world power process and the rôle that, with more effective organization, it could be made to play in maintaining the values of a free, peaceful, and abundant world society. Two recent books offer perhaps the most vigorous, explicit, and articulate expression of this trend. One is Professor Hans J. Morgenthau's In Defense of the National Interest and the other is Mr. George F. Kennan's American Diplomacy 1900-1950. Both of these books inveigh mightily

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4 Report, p. 14; this JOURNAL, loc. cit., p. 132.
6 Report, p. 18; this JOURNAL, loc. cit., pp. 127, 128.
1 Hans J. Morgenthau, In Defense of the National Interest: A Critical Examination of American Foreign Policy (New York: Alfred A. Knopf, 1951, pp. xii, 242, $2.65); George F. Kennan, American Diplomacy 1900-1950 (Chicago: University of Chicago Press, 1951, pp. ix, 154, $2.75), reviewed below, p. 184. Our only present interest in these books is as exhibits of this trend. We do not purport to offer comprehensive review on other points. The books will be cited hereinafter as Morgenthau and Kennan.
against what is characterized as a “legalistic-moralistic” approach to foreign policy and demand a more free-wheeling use of “old-fashioned” diplomatic procedures in naked power calculations and practices. It is believed that this attitude profoundly misconceives both power and law and mistakes certain particular unfortunate attempts in policy formation and application for legal processes in general. Such misconceptions, if influential, could generate irrational policy decisions of irretrievable harm.

Legalism is for Professor Morgenthau one of the four intellectual errors (“deeply ingrained habits of thought, and preconceptions”) of American postwar foreign policy. Its companion errors are utopianism, sentimentalism, and isolationism. Though he nowhere makes clear what he understands by law, the context suggests that his reference is largely to doctrine and to judicial settlement. His most sustained attack is upon “intoxication with moral abstractions” which is alleged to constitute one of our “great sources of weakness and failure,” and he insists that the “legalistic approach, by its very nature, is concerned with isolated cases.”

“The facts of life to be dealt with by the legal decisions are,” he amplifies, “artificially separated from the facts that precede, accompany, and follow them and are thus transformed into a ‘case’ of which the law disposes ‘on its merits.’ Once a legal case has been decided or disposed of, the problem is solved, until a new legal case arises to be taken care of in similar fashion.” This legalistic approach is described as “but a logical development from the utopian, non-political conception,” as “following logically from the assumption that international politics is not a continuous struggle for power in which all great nations are of necessity involved.” Naive distinctions are made, Professor Morgenthau asserts, between peace-loving and aggressor nations, and hence between law-abiding and criminal ones, and “the peace-loving nations are necessarily those who defend the existing legal order against violent change and the aggressor nations are those who are oblivious of their legal obligations.” Thus it comes about that the “conflict between the two groups, instead of being seen in terms of relative power, is conceived in the absolute terms of peace, law, and order vs. aggression, crime, and anarchy,” and the United Nations becomes a forum for “legalistic exercises” which “have done nothing at all to bring closer to solution the great political issues outstanding between the contenders on the international scene.”

For one who would put the sword of power to law, Professor Morgenthau

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2 The quoted words are Mr. Kennan’s but Professor Morgenthau gives Mr. Kennan’s formulations his blessing in a highly favorable review in New Republic, Vol. 125 (Oct. 22, 1951), at p. 17.
3 Morgenthau, p. 91.
4 Id., p. 4.
5 Id., p. 101.
6 Ibid.
7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
is, however, remarkably unclear about what he means by power and, beyond a reiteration that "[f]oreign policy, like all politics, is in its essence a struggle for power, waged by sovereign nations for national advantage," he nowhere offers a comprehensive and consistent description of the world power process. Though late in the book he insists that we "must recognize that in Asia we are engaged in a struggle of ideas; a struggle for the minds of men" and that we "must understand that this struggle operates by rules as precise and ineluctable as those which govern economic and military warfare," his earlier repeated contrast of "moral principles" and "considerations of power" and his sharp admonition "that in politics moral right and legal title are as nothing in the face of superior power" suggest a conception of power that comes perilously close to simple physical force. Nowhere in his book does one get a glimpse of the great range of institutions other than the nation-state which people manipulate for purposes of power and other values or of the great range of values that people can use as bases of power for manipulating these institutions. His conception of the scope of power practices is similarly limited: the alternatives offered are "traditional diplomatic methods" and war. The voting procedures of the United Nations have been "ineffectual and inconclusive" and have simply strengthened "the legalistic approach to foreign policy." The traditional diplomatic methods are said to consist of "negotiations, bargaining, mutual concessions, compromises, with a negotiated settlement as the goal." The "pacifying function" of the negotiated settlement "consists in the reconciliation of apparently incompatible interests." The prerequisites to success are "strength and conflicting interests capable of reconciliation." Elsewhere in his book Professor Morgenthau attacks "pactomania" as an irrational faith in agreements that "do not register existing facts," and observes that from "that iron law of international politics, that legal obligations must yield to the national interest, no nation has ever been completely immune."

Despite his insistence upon "the national interest of the United States" as the "one standard of evaluation," it is not surprising that Professor Morgenthau offers few criteria for identifying that interest under contemporary world conditions. He does, however, make spirited defense of "the moral dignity of the national interest" and urges that "moralistic detractors of the national interest are guilty of both intellectual error and moral perversion." He finds "a profound and neglected truth hidden in Hobbes'
extreme dictum that the state creates morality as well as law and that there is neither morality nor law outside the state." 24 Within the United States, "what justice means" can "within wide limits be objectively ascertained," since "interests and convictions, experiences of life and institutionalized traditions have in large measure created a consensus concerning what justice means under the conditions of American society." 25 As between nations, "no such consensus exists" for "there exists no international society so integrated as to able to define for them the concrete meaning of justice and equality, as national societies do for their individual members." 26 Hence, the appeal by one nation to moral principle against another nation is but a perverted effort to project its own moral preconceptions under the guise of a universal morality! Later in the book practical reasons are also given for rejecting "sentimental" international standards of morality. Thus, the Truman Doctrine, insofar as it "defines its objectives and methods in terms of a world-embracing moral principle ... vitiates its consideration of the national interest and compels a foreign policy derived from it, as the results have shown, to be half-hearted and contradictory in operation and threatened with failure at every turn." 27 The doctrine has been the victim, "as all moral principles must be," of "two congenital weaknesses: the inability to distinguish between what is desirable and what is possible, and the inability to distinguish between what is desirable and what is essential." 28

Mr. Kennan's broadside against law and morality is brief, but even more comprehensive. After reviewing our failings in foreign policy for fifty years, he summarizes:

As you have no doubt surmised, I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems. This approach runs like a red skein through our foreign policy of the last fifty years. It has in it something of the old emphasis on arbitration treaties, something of the Hague Conferences and schemes for universal disarmament, something of the more ambitious American concepts of the role of international law, something of the League of Nations and the United Nations, something of the Kellogg Pact, something of the idea of a universal "Article 51" pact, something of the belief in World Law and World Government. But it is none of these, entirely. Let me try to describe it.

It is the relief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints. This belief undoubtedly represents in part an attempt to transpose the Anglo-Saxon concept of individual law into the international field and to make it applicable to governments as it is applicable here at home to individuals. ...
It is the essence of this belief that, instead of taking the awkward conflicts of national interest and dealing with them on their merits with a view to finding the solutions least unsettling to the stability of international life, it would be better to find some formal criteria of a juridical nature by which the permissible behavior of states could be defined.\textsuperscript{29}

Without attempting "to deal exhaustively with this thesis or to point out all the elements of unsoundness," Mr. Kennan nevertheless emphasizes "some of its more outstanding weaknesses":\textsuperscript{30}

First,

the idea of the subordination of a large number of states to an international juridical regime, limiting their possibilities for aggression and injury to other states, implies that these are all states like our own, reasonably content with their international borders and status, at least to the extent that they would be willing to refrain from pressing for change without international agreement.\textsuperscript{31}

It is an unfounded "American assumption that the things for which other peoples in this world are apt to contend are for the most part neither creditable nor important and might justly be expected to take second place behind the desirability of an orderly world, untroubled by international violence."\textsuperscript{32}

Second, the legalistic-moralistic approach "tends to confer upon the concept of nationality and national sovereignty an absolute value it did not have before."\textsuperscript{33} Mr. Kennan argues:

The very principle of "one government, one vote," regardless of physical or political differences between states, glorifies the concept of national sovereignty and makes it the exclusive form of participation in international life.\textsuperscript{34}

The appropriate "function of a system of international relationship" is not to inhibit change "by imposing a legal strait jacket upon it but rather to facilitate it: to ease its transitions, to temper the asperities to which it often leads, to isolate and moderate the conflicts to which it gives rise, and to see that these conflicts do not assume forms too unsettling for international life in general."\textsuperscript{35} This, however, is a task not for law which "is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected," but rather for "diplomacy in the most old-fashioned sense of the term."\textsuperscript{36} Elsewhere he suggests that "instead of making ourselves slaves of the concepts of international law and morality," we should "confine these concepts to the unobtrusive, almost feminine, function of the gentle civilizer of national self-interest in which they find their true value."\textsuperscript{37}

\textsuperscript{29} Kennan, pp. 95, 96.
\textsuperscript{30} Id., p. 97.
\textsuperscript{31} Id., p. 97.
\textsuperscript{32} Id., p. 96.
\textsuperscript{33} Id., p. 97.
\textsuperscript{34} Ibid.
\textsuperscript{35} Id., p. 98.
\textsuperscript{36} Ibid.
\textsuperscript{37} Id., p. 54.
Third,
the American concept of world law ignores those means of international
offense—those means of the projection of power and coercion over
other peoples—which by-pass institutional forms entirely or even
exploit them against themselves: such things as ideological attack, in-
timidation, penetration, and disguised seizure of the institutional para-
phernalia of national sovereignty. 38

This is because "the legalistic approach to international affairs ignores in
general the international significance of political problems and the deeper
sources of international instability." 39

Finally, the legalistic approach assumes too much "concerning the possi-
bility of sanctions against offenses and violations" and "forgets the limi-
tations on the effectiveness of military coalition." 40 The more "a circle
of military associates" widens, "the more difficult it becomes to retain
political unity and general agreement on the purposes and effects of what
is being done." 41

Overriding all these "theoretical deficiencies" "inherent in the legalistic
approach," Mr. Kennan finds, however, a still greater deficiency. 42 That
deficiency is:
the inevitable association of legalistic ideas with moralistic ones:
the carrying over into the affairs of states of the concepts of right and
wrong, the assumption that state behavior is a fit subject for moral
judgment. 43

Though rooted in "a desire to do away with war and violence," the legalistic
approach, "curiously but truly," "makes violence more enduring, more
terrible, and more destructive to political stability than did the older mo-
tives of national interest." 44 Moral indignation against law-breaking
must inevitably lead, it is urged, to insistence upon "reduction of the law-
breaker to the point of complete submissiveness—namely, unconditional
surrender," and, hence, "upon total war and total victory." 45 The maker
of a moral judgment who would snap at a gnat must apparently perfec-
tly swallow an elephant.

To expose fully the fallacies that permeate this now common argument,
so vigorously presented by Professor Morgenthau and Mr. Kennan, would
require comprehensive description of the world power process, with indica-
tion of the all-pervasive rôles that law and morality, when appropriately
understood, play in that process. Even the barest outlines of such descrip-
tion may serve, however, to spotlight major misconceptions.

Realistic description of the world power process must begin with a much
more comprehensive notion of power than that of simple naked force applied
by nation-state to nation-state. In most useful abstraction, power is con-

38 Id., p. 98.
39 Id., p. 99.
40 Ibid.
41 Ibid.
42 Id., p. 100.
43 Ibid.
44 Id., p. 101.
45 Ibid.
trol, control by people over other people—a relationship between people in a decision-making process in which some are able to make decisions for themselves and others by threats of severe deprivations or promises of high indulgence. Meaningful exposition of a power process must, therefore, make reference at least to the participants and their perspectives, including the demands they make on each other, the interactions in which they influence each other, the bases of their power, the practices they engage in, and the effects that they get.

Observing the world scene today we can see people making identifications and demanding values that transcend national boundaries because they have come to know that the conditions under which they can secure their values transcend such boundaries. The values they demand include not only power, but such other values as respect, enlightenment, wealth, well-being, skill, standards of right and wrong, congenial personal relationships, and security to pursue, preserve, and increase all values by peaceful procedures. They seek these values in both unorganized and organized ways. The institutions they organize for power purposes include not only nation-states and lesser "national" governmental units of varying degrees of independence, alliance, and subordination, but also international governmental organizations, political parties, pressure groups, and private associations which, though primarily concerned with some other value, in fact seek direct effects upon the power process. Participants in the world power process include, therefore, not merely individuals and nation-states, but also all of these other groupings and organizations. Decisions which affect the world distribution of power and other values are made at all points in this complicated matrix of inter-related institutions, and not simply in "old-fashioned" diplomatic negotiations. Bases of power for participants at these many points include not only naked force, but also the formal authority of governmental position and doctrine and effective control over resources and wealth, enlightenment, respect, skill, well-being and safety, conceptions of right and wrong, and loyalties. The naked force at the disposal of a participant is in fact but the register of its control over these other values. The practices by which participants with

46 For more detailed development see Lasswell and Kaplan, Power and Society (1950), especially Ch. V.

In his earlier Politics among the Nations (1948), Professor Morgenthau offers an appropriately broad conception of power:

"When we speak of power, we mean man's control over the minds and actions of other men. By political power we refer to the mutual relations of control among the holders of public authority and between the latter and the people at large." (p. 13.)

Some of the later refinements even in this book lessen, however, the utility of this broad conception.

such bases shape and distribute power and other values include not merely diplomacy and war, but a whole range of policy-forming and applying activities. Policies are formulated, prescribed, and reformulated and re-prescribed in agreements, conferences, resolutions, declarations, codifications, and customary behavior of foreign office and other officials as well as by judicial and arbitral opinion.\textsuperscript{48} Policies are applied in both international and national fora and in countless informal interactions. Most recently great constitutional charters, such as those of the United Nations and of some of the regional organizations, formulate broad policy objectives in terms of a morality common to most of mankind, commit their subscribers to reliance upon peaceful procedures alone for change, provide procedures for the continual review and reformulation of detailed policies, and attempt a better organization of sanctions to make certain that the policies so formulated are actually applied and enforced. Sanctions presently available extend in authority and fact beyond mere “military coalition” to the systematic use, by both international and national officials, of all base values by all methods—diplomatic, economic, ideological, and military.\textsuperscript{49} The effects of this power process upon the distribution of values in the world can, finally, best be summarized in terms of “interdependence,” an interdependence of peoples from antipodes to antipodes for all values, an interdependence which makes any conception of “national interest,” apart from the interest of most of the peoples of the world, the sheerest of illusions.\textsuperscript{50}

It is not a matter purely of verbal aesthetics what variables in this world power process are described as “law.” One’s use of a word of such critical significance may affect understanding and, hence, control.\textsuperscript{51} Thus, the


\textsuperscript{50} Secretary General Trygve Lie’s Introduction to his Sixth Annual Report to the United Nations General Assembly makes eloquent statement of these inter dependences. One relevant passage reads:

“I believe it is important to recall that the founding of the United Nations was motivated by a far more fundamental and lasting concept concerning the world than a passing wartime alliance of great powers. This is that the peace and well-being of all nations and peoples have become in the present age so intimately interrelated that it is necessary for them, despite all their differences, to join in a world-wide organization looking toward security from war, freedom and independence for the peoples, and mutual economic and social progress.” (The New York Times, Oct. 12, 1951, at p. 12.)

\textsuperscript{51} The argument in Williams, “International Law and the Controversy Concerning the Word ‘Law’,” 22 British Yearbook of International Law 146 (1944), that one’s use of the word is largely a matter of taste requires qualification in some degree. When one’s use of “law” and other words to describe significant variables in the world power process is either so ambiguous or so idiosyncratic as to confuse both himself and others

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critics of "law" who use the word to refer merely to authoritative rules or formal doctrine, policy crystallizations of the past, and who focus too sharply upon naked force as sanction may conceal from both themselves and others the true nature of the decision-making process. It is not suggested that past authoritative formulations of policy do not greatly influence decision-makers. Such formulations play varying roles in the perspectives of different decision-makers and it is only rational for present decision-makers to seek guidance from the experience of their predecessors. Decision-making is also forward-looking, however, and decision-makers respond in fact not alone to prior prescriptions but to a great many environmental and predispositional variables, including doctrines which formulate the effects of alternative decisions upon the groups which they represent or with which they identify and which state objectives and policies for the future. The process of decision-making is indeed, as every lawyer knows, one of the continual redefinition of doctrine in its application to ever-changing facts and claims. A conception of law which focuses upon doctrine to the exclusion of the pattern of practices by which it is given meaning and made effective, is, therefore, not the most conducive to understanding. It may be emphasized, further, that official decision-makers, the people who have formal authority and are expected to make important decisions, may or may not make the decisions in fact. Effective control over decisions may be located in governmental institutions, but it may also be located in political parties or pressure groups or private associations and the people exercising control may rely for their power not upon formal authority but upon wealth, enlightenment, respect or other values. Description which would concern itself with effects as well as with myth must take into account this structure of effective controls over apparent governors. Formal authority without effective control is illusion; effective control without formal authority may be naked force. A realistic conception of law must, accordingly, conjoin formal authority and effective control and include not only doctrine but also the pattern of practices of both formal and effective decision-makers. A democratic conception of law may also include, to add brief detail, a commitment to change by peaceful procedures and to policies which prescribe a wide sharing of power and other values, provision of procedures for the continual review and reformulation of policies and representation in those procedures of all people who are affected, provision of procedures for the interpretation and application of policies, and the balancing of effective power necessary to make procedures secure and to put policies into practice. Within the nation-state about the operation of such variables, a community interest in greater clarity may reasonably be asserted. How such words are used may indeed vitally affect the perspectives of decision-makers.

52 Some development of the theme is offered in McDougal, "The Role of Law in World Politics," 20 Mississippi Law Journal 253 (1949).
people do not rely alone upon the projection of doctrine to secure their values. They project doctrine in constitutional and other forms, but they also seek to balance power—within government, as between functions, legislative, executive, and judicial, and areally, from locality to state or province and region and nation; and between government and a host of non-governmental organizations, parties, pressure groups, and private associations of all kinds. Today many, if not most, observers would agree that no combination of traditional international doctrine and "old-fashioned" diplomatic procedures could be adequate to secure a comparable balance in the world arena. The United Nations, the specialized agencies, and the regional organizations offer the beginnings of new commitments and of new procedures designed to secure such a balance and to organize effective community coercion behind the doctrines of freedom, peace, and abundance. Our actual choice is not between traditional international doctrine and old-fashioned diplomacy but between these new commitments and procedures and world anarchy and violence. It would seem most irrational, by a simple misidentification of "law," to reject the new because the old has failed.

From this perspective, the detailed arguments of Professor Morgenthau and Mr. Kennan become irrelevant and unpersuasive.

Law is neither a frozen cake of doctrine designed only to protect interests in statu quo, nor an artificial judicial proceeding, isolated from power processes, as Professor Morgenthau suggests; when understood with all its commitments and procedures, law offers, as we have seen, a continuous formulation and reformulation of policies and constitutes an integral part of the world power process. Similarly, the moral goals of people—demands for values justified by standards of right and wrong—are not mere "abstractions" without antecedents or consequences. Such goals are rather the most constructive dynamisms of conscience and character and, when shared with others, are not "sources of weakness and failure," but rather the most dependable bases of power and successful cooperation. The moral perspectives of people, no less than naked force, are commonly re-

53 Reference to Professor Morgenthau’s Politics Among the Nations (1948) confirms the impression that his notion of law is so limited. Two illustrations from different parts are:

"Law in general and, especially, international law is primarily a static social force. It defines a certain distribution of power and offers standards and processes to ascertain and maintain it in concrete situations." (p. 64.)

"International law is a primitive type of law resembling the kind of law which prevails in certain preliterate societies, such as the Australian aborigines and the Yurok of Northern California." (p. 211.)

Suggestions that law and morality are something apart from, and superimposed upon, power processes may also be found in Politics Among the Nations; see Ch. VIII. It may be recalled that Malinowski, in Crime and Custom in Savage Society (1926), questioned the notion of frozen formalism even for primitive society.
garded as among the effective sanctions of law.\textsuperscript{44} The whole United Nations project and a host of other contemporary activities and commitments bear compelling evidence of moral perspectives that today transcend the boundaries of nation-states. To reject these growing common demands and identifications of the peoples of the world for a "profound and neglected truth" from Hobbes that "the state creates morality as well as law" and, hence, to conclude that it is moral perversion for a nation-state to clarify its interests in terms of a wider morality, is as fantastic as it is potentially tragic. Certainly it neither accurately reflects the aspirations of the free peoples of the world nor effectively promotes the clear interest of the United States in a more efficient organization of these peoples to suggest that the issue between the free world and the totalitarian is simply one of "relative power" and that distinctions between aggressor and non-aggressor nations are mere moral illusions serving to protect vested interests. The much belabored "sentimental" Truman Doctrine, though it may have miscalculated what was possible, did not miscalculate either our common interests with the other free peoples of the world or the conditions of interdependence under which such interests must be sought—or the wisdom in clarifying such interests and conditions in a way that enhances both our own power and that of the whole free world.

The specific strictures of Mr. Kennan are equally off point. His first itemized weakness of a "legalistic-moralistic" approach, that some states are not content with their present status and that other peoples have demands they put above peace, merely emphasizes a need for the legalization and moralization of peaceful change, with more effective legislative procedures and bigger and better economic development programs. His second alleged weakness, that such an approach by emphasis upon "one government, one vote" confers upon national sovereignty a new "absolute value" and tends to inhibit change, mistakes a single, present voting practice in international organizations for the whole of legal procedures, and underestimates the capacity of such procedures to effect peaceful change.

\textsuperscript{54} In an address delivered at the second annual meeting of the American Society of International Law on "The Sanction of International Law," Elihu Root wisely insisted that "The force of law is in the public opinion which prescribes it." This Journal, Vol. 2 (1908), pp. 451-453. In elaboration relevant here, he added: •

• "Beyond all this there is a consciousness that in the most important affairs of nations, in their political status, the success of their undertakings and their processes of development, there is an indefinite and almost mysterious influence exercised by the general opinion of the world regarding the nation's character and conduct. The greatest and strongest governments recognize this influence and act with reference to it. • • • It is difficult to say just why such opinion is of importance, because it is always difficult to analyze the action of moral forces; but it remains true and is universally recognized that the nation which has with it the moral force of the world's approval is strong, and the nation which rests under the world's condemnation is weak, however great its material power." (Ibid., pp. 455, 456.)

His third charge, that "the American concept of world law" ignores important contemporary modes of political attack, is true only in part and, insofar as it is true, could be corrected. His fourth point, that the "legalistic approach" overemphasizes the possibility of sanctions and the potentialities of "military coalition," states a limitation even more applicable to "old-fashioned" diplomacy and, as Korea has demonstrated, underestimates the promise of improved United Nations procedures. His major emphasis, that the "greater deficiency" is "the carrying over into the affairs of states of the concepts of right and wrong, the assumption that state behavior is a fit subject for moral judgment," approaches, and, but for other sad examples, would achieve, the incredible. How "states" alone of man's institutions can be immunized from rational evaluation in terms of the purposes they serve, or how a consequential morality can be made to stop short of appraising group behavior, is nowhere explained. With both law and morality eliminated, one can only wonder by what criteria Mr. Kennan proposes to settle disputes between states "on their merits."

It is urgently to be hoped that attacks upon law and morality which so profoundly misconceive law, morality and power, and their interrelations, will not cause many of us to mistake the real choice that confronts us. People whose moral perspectives preclude the deliberate resort to violence, except for self-defense or organized community sanction, have in the contemporary world only the alternative of some form of law. The choice we must make is not between law and no law, or between law and power, but between ineffective and effective law. It is a choice between the doctrines and techniques of power-balancing designed for the problems and conditions of bygone days, and contemporary commitments and techniques of power-balancing through appropriate international organization that offer hope of progressive and accelerating movement toward a unified world community—a choice in sum between, on the one hand, illusory doctrines, "old-fashioned" diplomacy, and spasmodic resorts to unauthorized violence, and, on the other hand, clear moral and legal commitments to freedom, peace, and abundance which are sustained by organized community coercion and which invoke, at both national and international levels, all the contemporary instruments of power, ideological and economic as well as diplomatic and military. It is commonplace wisdom today that progress toward a world governed by effective law depends in the long run upon a consensus of peoples. The rational way to promote such a world is accordingly, we suggest, not to deny, but rather to affirm and support, existing moral perspectives and legal procedures that work toward such consensus. From a world that had not suffered the many contemporary revolutions, Grotius offers appropriate reminder:

... law is not founded on expediency alone, there is no state so powerful that it may not some time need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many
foreign nations united against it. In consequence we see that even the most powerful peoples and sovereigns seek alliances, which are quite devoid of significance according to the point of view of those who confine law within the boundaries of states. Most true is the saying, that all things are uncertain the moment men depart from law.\textsuperscript{66}

MYRES S. McDOUGAL

ENDING THE WAR WITH GERMANY

Most of our Allies in the second World War, with the exception of the Soviet Union, have already some time ago declared by municipal law that the war with Germany has come to an end. This example has now been followed also by this country. H. J. Res. 289, passed long ago by the House of Representatives and passed by the Senate on October 18, 1951, was signed by the President the next day. Under this Joint Resolution the war with Germany came to an end on October 19, 1951, at 5:45 p.m. This action of the Congress was taken in pursuance of a communication\textsuperscript{1} which the President of the United States had sent on July 9, 1951, to the Vice President and the Speaker of the House. The Draft Resolution, annexed to this communication, proposed:

\textit{to terminate the state of war between the United States and the Government of Germany. Resolved by the Senate and the House of Representatives in Congress assembled, that the state of war declared to exist between the United States and the Government of Germany by the Joint Resolution of Congress, approved December 11, 1941, shall be terminated and such termination shall take effect on such date as the President shall by proclamation designate.}

As everything in the unique case of occupied Germany since 1945, this resolution again poses interesting problems in international law, especially: What is the significance in international law of the phrase “ending the war,” and what is meant by “Germany?”

War can come to an end, under the norms of international law,\textsuperscript{2} by peace treaty, through the mere end of hostilities and by what is known on the Continent as “\textit{debellatio}” and in Anglo-American law as “conquest and subjugation” of the enemy state.


\textsuperscript{1} Text in The New York Times, July 10, 1951, p. 12. For text of Joint Resolution and President’s Proclamation, see Supplement to this \textsc{Journal}, pp. 12–13.