1979

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INTERNATIONAL LAW AND THE FUTURE*

Myres S. McDougal**

"Modern man peers eagerly back into the twilight out of which he has come, in the hope that its faint beams will illuminate the obscurity into which he is going; conversely his aspirations and anxieties about the path which lies before him sharpen his insight into what lies behind . . . . Past, present and future are woven together in an endless chain."1

THE RELEVANCE OF THINKING ABOUT THE FUTURE

It should require no elaborate demonstration that the founders of these Memorial Lectures, in directing that all lectures be concerned with the role of law in the future, were possessed of very wise insight. In its most useful conception, dating far back into antiquity, law is regarded as a process of authoritative decision through which the members of a community seek to clarify and secure their common interests; in any conception which aspires to keep touch with empirical reality, law must be regarded as making some ultimate reference to decision.2 The making of any decision of community importance, whether by the criteria of authority or of naked power and whatever the size of the community, requires a choice in the present among future alternatives in action and outcome. It is the distinctive task of lawyers,

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* This Article is a revised version of the Fifth Annual Memorial Law Lectures delivered at the University of Mississippi Law Center on November 15, 16 & 17, 1978. A few first efforts to speak about the future of international law established the impossibility of that task within three hours. What is attempted here is the outlining of a framework of inquiry which, if executed, might make some sense of the study of the future of international law.

In preparing this outline I have drawn upon studies made under a grant from the National Science Foundation (Grant No. SOC 76-22335).

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functionally conceived, both to establish and maintain a community process of authoritative decision and to direct and manage that process to clarify and secure the common interests of community members in demanded values. Hence, however much lawyers may venerate the past and futilely endeavor through the doctrine of precedent to effect its repetition, their primary concern must be effectively to intervene in the present for managing the future on behalf of the communities and private clients they represent. The maxim "governer c'est prévoir" expresses not merely a Gallic but a universal wisdom.

The late Walton Hamilton, a quondam professor in the Yale Law School, was wont to exhort his students that lawyers could not be goofus birds. A goofus bird, he would explain, flew backwards: it liked to know where it had been, but had no care for where it was going. Lawyers, Hamilton insisted, could rationally be concerned with the past only for the light it shed for decision in the present about a preferred future distribution of values.

In recent decades, moved perhaps by an increasing sense of both global community and impending threat, scholars and statesmen alike have exhibited an intensifying concern about the international law of the future, both in general and in relation to specific problems. One early influential general study by Professor Lassa Oppenheim, the author of a classic and still important textbook, was entitled simply "The Future of International Law," and was translated from the German and widely circulated by the Carnegie Endowment for International Peace. At the close of World War II the American Bar Association, under the stimulus of Manley O. Hudson, a former judge of the Permanent Court of International Justice and a professor of law at Harvard, under-

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1 Michael Reisman has appropriately emphasized that lawyers must continuously make judgments about the future. In Reisman, Private Armies in a Global War System: Prologue to a Decision, 14 Va. J. Int'l L. 1, 33 (1973), he writes:

Lawyers too often overlook the painfully obvious fact that though the events which precipitate decisions come from the past, decisions themselves are future-oriented; the test of their quality is not whether they conform to the past, but rather whether they structure processes and value allocations in the near and distant future in preferred ways.

The important question is whether we can achieve a method of inquiry that will improve the lawyer's assessment of, and intervention in, the future.

4 This maxim is recalled in D. Gabor, Innovations: Scientific, Technological, and Social 151 (1970).

5 L. Oppenheim, The Future of International Law (1921).
took a much more ambitious collective study entitled “The International Law of the Future: Postulates, Principles, and Proposals.” More recently, Sir Gerald Fitzmaurice, a former president of the International Court of Justice, made a Special Report to the prestigious Institut de Droit International upon “The Future of Public International Law and of the International Legal System in the Circumstances of Today.” Unhappily, in the light of “the circumstances of today” these studies make somewhat sad reading: the conception of law that inspires them is that of the positivist tradition, which accepts international law only uncomfortably, and they do not systematically locate international law in the larger social and effective power processes of which it is a part and which it in turn affects. The problems anticipated in the earliest studies are not the important problems of today and the solutions suggested, in terms of black-letter rules, approach being quaint. Studies of this type do not appear to offer fruitful models for inquiry about the future.

Of somewhat greater though still incomplete relevance and promise is a vast range of studies of relatively contemporary origin stimulated both by developments in the social sciences and by various kinds of utopian aspiration. The earliest, and perhaps least sophisticated, of these studies are those that formulate and project detailed proposals for centralized “world government,” without taking into adequate account all the different features of world processes of effective power which must condition a higher degree of centralization in global constitutive process. The most intellectually sophisticated of contemporary studies are those by “systems” or “limited factor” analysts who hope that by the isolation and manipulation of a number of key variables they can avoid the drudgery of contextuality and perform a number of intellectual tasks relevant to inquiry about global decision pro-

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cesses. Lawyers will understand why observers who have an inadequate conception of authority as a factor affecting decision and who hope, in a single set of words, to describe past decisions, to account for the factors affecting decision, to predict future decision and to state what future decision ought to be, have not met with a high degree of success in inquiry.

The many publications by the most recent World Order Models Project\(^1\) appear to combine both the hopes and difficulties of the two earlier kinds of studies: the problems with which these later studies work are not operationally specified in terms of disparities between demanded values and their achievement; the diffuse problems announced are not systematically located within the embracing world social and power processes; and the various intellectual tasks relevant to inquiry and decision are not deliberately and systematically performed.\(^1\) The famous studies by the Club of Rome,\(^1\) whatever the merits of their controversial modelling techniques and whatever the validity of their substantive forecasts, have, like the more modest proposals from the Trilateral Commission,\(^1\) sought and had but a glancing, indirect

\(^{1}\) Representative studies are cited and appraised in McDougal, Lasswell, and Reisman, supra note 2, at 275-89.


\(^{13}\) One relevant study is Cooper, Kaiser and Kosaka, Towards a Renovated International System, in The Trilateral Commission, The Triangle Papers No. 14 (1977). See also, Bergsten, The Reform of International Institutions, in The Trilateral Commission,
effect upon considerations of the future of international law and
protected features of world public order. By far the most useful
studies of the future of international law and world public order,
upon which we can build, have come from Professor Richard A.
Falk, writing alone or in collaboration with Professor Cyril E.
Black and others.¹⁴ In an immense flow of books and articles
Professor Falk has described our present perils with respect to
many public order values and has made very specific suggestions
for improvement of the legal processes indispensable to the pro­
tection of such values. We may despair of his hope of the creation
of an autonomous global law which can reconcile and accomodate
incompatible value systems, and disagree with some of his diag­
noses and solutions, without rejecting the main thrust of his en­
terprise.

It is common ground among most observers today that con­
temporary world public order is undergoing transformations of
unprecedented magnitude and scope and that such change is
likely to continue at an accelerating rate. The important changes,
occuring under the influence of a universalizing and modernizing
science and technology, relate to every feature both of the social
processes transcending particular community lines and of the
processes of authoritative decision by which such social processes
are guided and regulated. The continuing transformation in the
features of global social process may be observed in terms of
changes in the number and characteristics of actors or partici­
pants, individual and group; in the values demanded by individ­
ual human beings, and their images of the past and the future;
in the geographic, temporal, and institutional settings of interac­
tion; in the varying importances of conceptions of authority, res­
ources, knowledge, and other values as bases of power; in shift­
ing emphases upon coercion and persuasion in the management
of diplomatic, ideological, economic, and military strategies; and
in fluctuations of the different values actually shaped and shared,
both as between communities and as among individuals within

¹⁴ See R. Falk, A STUDY OF FUTURE WORLDS (1975); R. Falk, LEGAL ORDER IN A VIOLENT
WORLD (1968); R. Falk & C. Black (eds.), THE FUTURE OF THE INTERNATIONAL LEGAL ORDER
(1967-1972); R. Falk, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970); Falk, supra
Note 13.
different communities and on a global scale. The continuing transformation in the features of the global constitutive process of authoritative decision may be observed in terms of changes in participation in decision-making, governmental and other; in the basic policies for which decision process is maintained; in the expansion or contraction of structures of authority; in the rationalization of the procedures for making different types of decisions; and in the different types of decisions actually made in the prescription and application of law for interactions transcending particular communities. So vast are the changes in both these processes, the global social process and the global process of authoritative decision, Professor Falk concludes that we are today in a stage of transition comparable to that in 1648 when, with the Treaty of Westphalia, the more comprehensive public order was moving from feudalism and papal guidance to the nation-state system. In our present stage, Professor Falk finds, we are certainly moving from nation-state predominance to a more pluralistic institutional setting, geographic and functional, with the individual human being playing an increasingly important role and with central guidance coming from an as yet unidentified source. Most importantly, almost all observers today conclude that humankind, the great mass of individual human beings, is affected by an interdependence in the shaping and sharing of all values in a much higher degree than ever before.

It is almost equally common ground among observers today that there is little "inevitability" about the direction, benign or self-destructive, in which future world public order may move. Few still assume, as many Western thinkers are said once to have assumed, that humankind is embarked upon automatic progress toward perpetual peace, the parliament of man, the abolition of disease and poverty, and a heavenly public order of absolute respect for human dignity. Conversely, however, no one has yet been able conclusively to establish that humankind is so irrational that it must of necessity despoil and destroy its planet and eliminate itself in nuclear holocaust. About the only certainty we can even tentatively enjoy, contemporary historians tell us, is that the future will be unlike the past. Thus, E.H. Carr writes

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16 A good survey of contemporary attitudes is offered by J. McHale in The Future of the Future (1971).
that, in history, as contrasted with science, "the presumption is not that the same thing will happen again, but that the same thing will not happen again." He explains:

In science the drama repeats itself over and over again because the dramatis personae are creatures unconscious of the past or inanimate objects. In history the drama cannot repeat itself because the dramatis personae at the second performance are already conscious of the prospective denouement; the essential condition of the first performance can never be reconstituted.

The prevailing attitude of contemporary observers is well stated by another writer:

Faith in the inevitability of unilinear progressive development has been considerably undermined in the West by now. It has been replaced by abstract models of alternative futures thought to have been made possible by developmental sequences that have already occurred. Changes in philosophical approaches to scientific methodology, not to speak of the calamitous history of our century, have forced upon us a sharp cleavage between scientific and moral perspectives on the historical process. Present-day Western Thinkers, deprived of a plausible faith in a benign historical Providence, find themselves hoping that a degree of choice or collective "free will" exists, by means of which we may choose from among a number of varying possible futures. Even the austere secularity of "policy analysis" is based on the assumption that some such freedom exists.

It is this indeterminacy about future world public order that presents contemporary humankind with the opportunity, as well as the desperate necessity, to plan and shape a public order more in accord with its demanded values. The great bulk of humankind, thanks to a growing enlightenment and to modern technologies in communication, is beginning to understand today, perhaps for the first time in history, that the different peoples of the world do in fact constitute a single community, bound in an irretrievable interdetermination not merely for simple survival but also in the achievement of all demanded values. The important

18 Id. at 5-6.
20 R. Falk, A Study of Future Worlds at xxvi (1975) (point made by Mendlovitz in
question is whether the insight inherent in this contemporary perception of community can be brought to bear, not alone in the single task of forecasting, but in performing all the various intellectual and practical tasks necessary to the planning and shaping of a viable world public order.\textsuperscript{21} Humankind, aided by its lawyers, has had an immense and rich experience in planning for and securing the shaping and sharing of values both in local, metropolitan, regional, and national geographic communities and in vast, often transnational, collective enterprises functionally dedicated to such particular values as wealth, religion, enlightenment, skill, and so on. The overriding problem in rational concern about the future of public order is how to bring this experience to bear in clarifying and securing the common interest in a community of global dimensions.

Any serious concern for intervening in and shaping the future features of world public order must of course require the systematic and disciplined employment of a comprehensive set of distinguishable but interrelated intellectual tasks.\textsuperscript{22} Even the task of forecasting or prediction, commonly associated with thinking about the future, cannot be effectively performed as a separate and independent operation isolated from all other relevant intelle-

\textsuperscript{21} The necessity for planning is stressed in J. \textsc{McHale}, \textit{supra} note 16. See also S. \textsc{Clough}, \textit{Basic Values of Western Civilization} (1960); Shubik, \textit{Information, Rationality, and Free Choice in a Future Democratic Society}, 96 \textit{Daedalus} 771 (1967).

\textsuperscript{22} \textsc{R. Falk} \& \textsc{C. Black}, (eds.), \textit{The Future of the International Legal Order} (1969) states:

In seeking to make a distinction between eschatology and utopia, and predictions and conjectures based on such objective analysis as is today possible, particular attention should be given to those images of the future that are based on an explanation of the past and present. It is not possible to know even the near future in any detailed or comprehensive sense, but it is possible to identify the institutional continuities, developmental trends, systemic structures, and values, central problems, and relationships of constants and variables that have proven to be reasonably reliable. Even if a forecast does no more than suggest and evaluate a range of possibilities, it limits to this extent the uncertainties that lie ahead.

\textit{Id.} at 12. Much of the "theory" developed by contemporary political scientists seems to be concerned with the scientific task only and to place an impossible burden upon "theory," unaided by contextual examination. When no clear focus is made upon decision, and when authority is not included among the variables affecting decision, it is not surprising that performance of even the scientific task must struggle. See, for example, \textsc{Waltz}, \textit{Theory of International Relations}, in \textit{Handbook of Political Science} 1-85 (F. Greenstein \& N. Polsby eds. 1975).
lectual tasks. For realistic and useful inquiry, the first task is to know precisely what it is that we seek to anticipate or shape, and what our major goals and commitments are. A second task is historical, that of drawing upon the wisdom of the past: what can we learn from past successes and failures about comparable problems and where do we stand now in approximation to demanded goals. A third task is the scientific, the task so much emphasized in much contemporary "systems" and "limited factor" theorizing: what are the factors that appear to have affected past successes and failures and are these factors likely to have comparable effects in the future. A fourth task focuses explicitly upon forecasting or the projection of future developments: what are possible future developments, assuming no effective intervention, with respect to the specified problems, and what indices of probability can be assigned to the different possibilities. It should be obvious that even reliable forecasting requires, beyond the extrapolation of past trends, the careful evaluation of such trends in the light of scientific knowledge and the potentialities of change. The final task is that of evaluating and inventing alternatives in action that will promote change in the direction of demanded goals. It is not being suggested that these different intellectual tasks can or should be performed in some rigid, innate, chronological order, but rather that all are intimately interrelated, with effective performance of anyone being dependent upon effective performance of the others, and that all are indispensable in rational concern about the future.

From this perspective, it becomes clear that the framework of inquiry appropriate to concern about the future of international law and of the public order that it protects is that same deliberately policy-oriented, problem-solving, and multi-method framework that is most appropriate for effective inquiry about

One of the best discussions of forecasting is W. Ascher, Forecasting: An Appraisal for Policy-Makers and Planners (1978).

The interrelations of the different tasks are documented, with bibliography, in G. Bremer & R. Brunner, Political Development and Change (1975).

For the interrelations of these tasks, see H. Lasswell, Preview of the Policy Sciences (1971).

One of the more sophisticated studies of the future of law in a particular field is Macneil, The Many Futures of Contracts, 47 S. Calif. L. Rev. 69 (1974).
law and public order in any of the lesser communities of the globe. Elsewhere, in collaboration with associates, we have sought to outline in some detail the major features of such a framework of inquiry.\textsuperscript{25} These features include, in brief, the establishment of an observational standpoint in identification with the largest relevant community and all its component communities; the systematic formulation of problems in factual terms of disparities between demanded values and their achievement; the postulation of a comprehensive set of recommended community goals; a conception of law in terms not of rules only but of a continuous process of authoritative decision; the relation of authoritative decisions to the larger community social and effective power processes by which such decision is affected and which it in turn affects; and, finally, the systematic employment with respect to specified problems of all relevant intellectual tasks including the detailed clarification of goals, the description of past trends in decision in terms of approximation to clarified goals, the analysis of conditions affecting decision, the projection of possible future developments, and the invention and evaluation of appropriate alternatives in decision.

In these lectures the most that I can hope to achieve is to suggest, and perhaps modestly to illustrate, how a deliberately policy-oriented framework of inquiry might be employed, in greater comprehensiveness and detail, in exploration of the potentials of law for coping with some of the more important emerging problems in contemporary world public order. In pursuit of this not unambitious enterprise, I propose to proceed, seriatim, through the following headings:

I. The Global Focus: The Transnational Character and the Interdetermination of Contemporary Problems
II. The Postulated Goals of a World Public Order of Human Dignity: The Clarification of Basic Community Polities
III. The Role of Authoritative Decision in Clarifying and Securing Common Interest: International Law in Policy-Oriented Conception

\textsuperscript{25} See references in note 2 supra. A comprehensive bibliography by F.W. Tipson is appended to TOWARD WORLD ORDER AND HUMAN DIGNITY (W. Reisman & B. Weston eds. 1976).
IV. The Main Features of Contemporary Global Constitutive Process and Public Order
V. The Conditions Affecting World Public Order
VI. Possible Futures in World Public Order
VII. Alternatives for an Optimum Future World Public Order

I. THE GLOBAL Focus: THE TRANSNATIONAL CHARACTER AND INTERDETERMINATION OF PARTICULAR PROBLEMS

From his vantage point in Apollo 8, Frank Borman is reputed to have made this observation about the "unity of the world":

The view of the earth from the moon fascinated me—a small disk, 240,000 miles away. It was hard to think that that little thing held so many problems, so many frustrations. Raging nationalistic interests, famines, wars, pestilence don't show from that distance. I'm convinced that some wayward stranger in a spacecraft, coming from some other part of the heavens, could look at earth and never know that it was inhabited at all. But the same wayward stranger would certainly know instinctively that if the earth were inhabited, then the destinies of all who lived on it must inevitably be interwoven and joined. We are one hunk of ground, water, air, clouds, floating around in space. From out there it really is "one world." 26

From any anthropological perspective, it is easy to observe that humankind is today confronted with not merely some important transnational problems, but that practically all of humankind's important problems are transnational and interconnected in origin and impact. 27 Because of this transnational origin and interdetermination in impact any effective and continuing solutions for these problems must be equally transnational and comprehensive. For economic recall, some of these more important problems may be indicated in tabular form, first with regard to the major features of the larger landscape of global social process,

26 The source of this quote has escaped my filing system.
and secondly, with regard to particular value processes within the larger process.

A. Problems Related to Major Features of Global Social Process

1. Security

(Whether defined in terms of minimum order, the prevention of unauthorized coercion, or of optimum order, the maintenance of high position, potential and expectation with respect to all values)

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

2. Environment

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

3. Population

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

4. Institutions

The antiquated nation-state structures, with their disregard of physical, engineering, and utilization unities. The continuing weakness of international governmental organizations. The lack of development of functional transnational associations devoted to values other than power and wealth. The relative immunization of wealth associations from transnational authority.
B. Problems Related to Different Value Processes Within Global Social Process

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

2. Wealth

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

4. Well-Being (Health)
Continuing high mortality rate and low life expectancy in many parts of the world. Increasing threats of famine, epidemics, and disease. Indiscriminate mass killings in armed conflict and other interactions. The globalization of torture as a deliberate instrument of policy.

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

6. **Skill**

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

7. **Affection (Loyalties)**

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

8. **Rectitude**

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

It is the interdependences of all peoples upon a global scale within any particular value process that establishes that all of humankind's contemporary problems are transnational in origin and impact and, hence, require transnational solutions. These interdependences may be easily indicated for any categorization of particular values. Thus, with respect to power, all too recent history makes it clear that how power is structured internally within a community affects how that community seeks to exercise power in the global arena. In a comprehensive arena in which humankind is threatened and intimidated by mass destruction weapons, and in which states' elites are obsessed by expectations

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28 These interdependences are systematically developed in M. McDougal, H. Lasswell & Lung-Chu Chen, Human Rights and World Public Order [hereinafter cited as Human Rights and World Public Order].
of impending violence, every proposed measure of cooperation about wealth, enlightenment, and other values will be appraised in terms of possible effects upon fighting power and defense capability; the respect for individual human dignity that even a democratic state can maintain is in measure a function of its position in the more inclusive arena. The interdependences of the global wealth process are dramatically documented in the pervasive dislocations of an unstable monetary unit and the world-wide sweep of alternating economic depression and inflation. The spread of epidemics and the poisoning of resources, as affecting well-being, have never been known to respect the artificial boundaries of nation-states. Enlightenment about world-wide interdependences and the demands, identifications, and expectations of other peoples is clearly indispensable to rational decisions about security, power, and other values. In a context of universalizing science and technology, skills developed in one community travel at increasing tempo throughout the globe. As transnational mobility expands, changes in loyalties to individuals and groups are increasingly broadside in impact. Much of the armed conflict in the world today, ignoring all geographic boundaries, exhibits deep religious and other rectitude motivations. With regard to respect, finally, one important factor in contemporary world politics affecting every decision is the accumulated resentment of millions of individuals caused by long endured discriminations, deprivations and humiliations.

It is the interdependences between different value processes (effects of power upon wealth, of wealth upon power, and so on) upon a global scale that establishes the interconnectedness, or inescapable interdetermination, of all of humankind's contemporary problems and their solutions. In a recent study of human rights, in collaboration with associates, we have documented interdependences of this type with regard to a number of representative value processes. In initial demonstration, we wrote:

Thus, the power of any participant in the world arena is obviously influenced by the levels of physical and mental well-being within its own community and in other communities. Since rational decision making is unattainable without access to a flow of comprehensive, dependable and pertinent knowledge and information, the dependence of power upon the production and distribution of enlightenment is evident. The influence of wealth on power is indicated by the changing roles of industrial-
ism and the allocation of resources in the contemporary world, as exemplified by the dramatic upsurge of the influence on the part of OPEC countries in the wake of the global energy crisis. The impact of respect on power has been cogently demonstrated by the postwar movements of decolonization and nation building . . . . The effect of skill is occasionally decisive and always significant. In modern polities the dissolution of traditional patterns of authority and control created vast audiences of conflict-ridden persons eager to find a new world view. Hence specialists upon mass communication are able to exploit their propaganda skills on behalf of nationalism, proletarianism, anarchism and other rival ideologies. Power is, similarly, affected by the pattern of affection and loyalties in society. The component groupings in society often conflict with one another to control the sentiments of the individual . . . . Finally, power is modified by effective conceptions of rectitude. Unhappy recent events make it clear the confrontations and confusions in rectitude standards (e.g., whether waging a particular war is morally just or unjust) can frustrate the fighting will and capability of a great power to conduct a war.29

A comparable demonstration could be made, and has been made, with regard to all other important value processes.30

If the intellectual tasks necessary to affecting the future features of world public order are effectively and economically to be performed, it is indispensable that we seek a much more precise and detailed formulation of problems than that employed in the somewhat impressionistic and synoptic presentation above.31 It is one of the tenets of a policy-oriented framework of inquiry that particular problems are most effectively and economically formulated in terms of disparities between demanded values and their achievement in community process. When problems are explicitly, comprehensively, and sharply formulated in terms of social process events, comparable through time and across community boundaries, it may become possible to achieve a detailed clarifi-

29 Id. at 47-63.
30 Id. at 53-54.
31 Unhappily, many books written from political science perspectives offer little more than anecdotal information. Without carefully defined value and institutional categories for the specification of problems, they achieve little general theory and proffer a most inadequate theory for performance even of the scientific task. For examples, see R. Keoane & J. Nye, Power and Interdependence (1977); S. Hoffman, Primacy or World Order (1978).
cation of basic community policies in relation to particular problems, to appraise past trends in decision in terms of their approximation to preferred policies, to identify the important predispositional and environmental factors affecting decisions and outcomes, to estimate the probable costs and benefits of the different options in decision to common interest, and to devise alternatives in decision better designed to serve preferred community policies.

A principal difficulty of the World Order Models Project, for illustration, is that it has not achieved an economic categorization of problems. The problems specified in many studies are "war, poverty, social injustice, environmental decay, and alienation." These problems are apparently derived from values—"peace, economic well-being, social justice, ecological stability, and positive identity"—which are neither comprehensive nor homogeneous and which make reference to a confused maze of institutional details. The particular categorizations appear to have been chosen because of their acceptability in different cultures. It is recognized by Professor Mendlovitz, the principal director of the Project, that these problems are "vaguely operationalized," but he asserts that this is irrelevant. The fact is of course that the way problems are operationalized is of the utmost importance to the outcome of inquiry. What is needed are formulations that are acceptable as matters not merely of taste to different cultures, but which can be made to transcend differences in culture, community, and time in a way to facilitate the comparisons in goal, trend, and condition indispensable to creativity. It will be an accident if studies that do not adequately operationalize problems make enduring contribution.

The mode of operationalizing problems that we would recommend begins with the adoption of a set of value categories taken from ethical philosophers and other normative specialists—such as power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude—with supplementation by a set of institutional practices borrowed from cultural anthropologists—such as participation, perspectives, situations, base values, strategies, and outcomes. By employment of appropriate operational indices the value categories can be made completely comprehensive. By employment of the institutional practices as such operational

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\(^{22}\) S. Mendlovitz, supra note 10, at xii.

\(^{23}\) Id.
indices, inquiry may be made as detailed as may be required. Problems in authoritative decision, as integral components of power processes, can be described in terms of decision-makers, basic policies, structures of authority, bases of power, strategies, and decision outcomes. In our study of human rights we have proffered a comprehensive outline, too voluminous to be reproduced in a lecture, of both public order and constitutive decision problems in these terms. If our thesis that there is a human rights dimension in every social interaction and every authoritative decision is correct, then at least a comparable outline might be adapted to broader purposes.

II. THE POSTULATED GOALS OF A WORLD PUBLIC ORDER TO HUMAN DIGNITY: THE CLARIFICATION OF BASIC COMMUNITY POLICIES

The first task for one who would shape features of future world public order, as of any social process, is, of course, to be clear about major goals or commitments and to command intellectual procedures for relating high-level goals to particular instances of choice. A clear sense of direction is necessary to the effective performance of all relevant intellectual tasks, and a comprehensive map of fundamental preferences is indispensable to rational calculation of the costs and benefits of different alternatives in decision.

One who is committed to the values of human dignity will, because of the demands he makes upon himself for a democratic sharing of power, seek in his most basic postulation of goals to incorporate the value demands most widely held within his community insofar as these demands are compatible with the values of human dignity. Happily, contemporary global social process does exhibit many peoples, widely dispersed in different territorial communities and cultures, making “rising common demands” for the greater production and wider sharing of all those values today commonly described as of human dignity. Though


35 These demands are described and documented in HUMAN RIGHTS AND WORLD PUBLIC ORDER, supra note 28, at ch. 1. See also E. LAZLO, ET AL., GOALS FOR MANKIND (1977) (a report to the Club of Rome on the New Horizons of Global Community); J. MCHALE & M. MCHALE, BASIC HUMAN NEEDS (1978).
the words "human dignity" are asserted to be of relatively recent origin, the image of man as capable of respecting himself and others, and of participating constructively in a more abundant shaping and sharing of human dignity values, is a culmination of many converging trends in thought, both secular and religious, extending far back into antiquity and coming down through the centuries with expanding cultural and geographic reach.\textsuperscript{36} Hence, we assert no arbitrary and idiosyncratic preferences when we recommend for deliberate postulation in inquiry and decision all those values recently transformed into authoritative global community prescription in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights and its Protocol, and International Covenant on Economic, Social, and Cultural Rights, and a whole host of ancillary expressions, general, regional, and national. This emerging global Bill of Rights can indeed be perhaps most aptly described as an intense postulation and commitment by most of humankind.\textsuperscript{37}

Upon close examination the prescriptions in the emerging global Bill of Rights will be seen, as in any bill of rights, to be both complementary in form and highly ambiguous in particular terms. In a pluralistic society of scarce resources that honors many values, these qualities are both desirable and inevitable. The basic thrust of all the new prescriptions is, however, in accordance with the dictates of human dignity, toward the greater production and widest possible distribution of all important values, with a high priority accorded persuasion over coercion in the modalities of production and distribution. By the employment of appropriate operational indices for high-level terms, these prescriptions may be administered to honor a very great diversity, in different territorial communities and cultures, in the institutional practices by which values are sought and secured. When overriding goals are appropriately maintained, experimentation and creativity may be encouraged by the honoring of a wide range


\textsuperscript{37} For more detailed exposition, see Human Rights and World Public Order, supra note 28, at ch. 4.
of functional equivalents in institutional practices.

The opportunity of contemporary scholars and decision-makers is to build upon these new prescriptions to achieve a map of preferred values and institutional practices that can be made as comprehensive and detailed in reference as occasion and particular problems may require. Toward this end we would recommend systematic employment of the same set of value categories (power, respect, enlightenment, well-being, wealth, skill, affection, and rectitude) and of the same set of institutional practice or phase categories (participation, perspectives, situations, base values, strategies, and outcomes) that were suggested above for employment in the specification of particular problems.

The most comprehensive and detailed specification of presumptive preferences about world public order must extend beyond the general projection of high levels of production and a wide sharing of benefits in all value processes to an itemization of preferences value by value and phase by phase within each value process. The kind of outline that might be employed in the more detailed specification of postulated goals with respect to any particular value process may be indicated in tabular presentation:

**Outcomes**

- Achievement of an optimum aggregate in the shaping and sharing of the value;
- Access to a fundamental share of benefits;
- Enjoyment of further benefits on the basis of merit and contribution;

**Participation**

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

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38 This table is taken from *id.* at ch. 5. In this chapter we offer some illustration of possible policies with respect to both public order and constitutive process.
Perspectives

Freedom to acquire demands for the value;
Opportunity to discover latent capabilities for participation;
Opportunity to acquire capabilities;
Opportunity to exercise capabilities;
Freedom to establish and change identifications;
Opportunity to achieve realism in expectations;

Situations

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

Base Values

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

Strategies

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

By employment of some such outline with regard to all cherished
values, scholars and decision-makers might be able to achieve a more comprehensive map of their fundamental preferences about features of world public order and, hence, to increase the rationality of their calculations in appraisal of the costs and benefits of different options in the making of particular decisions.

The global constitutive process of authoritative decision, as a component of the global process of effective power, admits of clarification through precisely the same modalities. The literatures of political thought, jurisprudence, and international law are vast reservoirs of potential preferred policies with respect to every phase of constitutive process. The suggestion we make is that the quality of all decision functions might be greatly improved if scholars and decision-makers gave more attention to making completely explicit their more fundamental preconceptions about every feature of constitutive process.

Broad postulations of fundamental preferences about either public order or decision process do not, of course, automatically apply themselves in particular instances. For the relation of high-level preferences, inevitably both complementary and ambiguous, to particular instances of choice in context, decision-makers require detailed principles of application, both of content and procedure: Principles of content to specify the features of social interaction, claim to authority, and authoritative decisions deserving attention; and principles of procedure to offer an economic agenda and techniques for bringing pertinent content under observation. For lawyers with a long and rich experience in developing and employing principles for the application of international agreements, constitutions, statutes, precedents, and custom, the task of inventing appropriate principles to relate high-level preferences to specific choices can cause no insuperable difficulty.39

39 For an indication of possibilities, see HUMAN RIGHTS AND WORLD PUBLIC ORDER, supra note 28, at ch. 5; M. McDougal, H. Lasswell & J. Miller, The Interpretation of Agreements and World Public Order (1967); McDougal, The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo (Ass'n of the Bar of the City of New York, 1978).
III. The Role of Authoritative Decision in Clarifying and Securing Common Interest: International Law in Policy-Oriented Conception

It is easiest to understand international law by recalling our notions of law in any community. It has already been suggested that, in one ancient tradition, law is best regarded as a process of authoritative decision in which the members of a community collectively—through the careful articulation of shared demands and expectations and the employment of many different institutions and intellectual procedures—seek to clarify and secure their common interests. By a community we make reference to any territorial grouping within which the members are constrained by interdeterminations or interdependences in the shaping and sharing of values. In any particular community there can be observed, among its value processes, a process of effective power in the sense that decisions are made and enforced, by severe deprivations or high indulgences, irrespective of the immediate wishes of the targets of decision. Upon close examination these effective power decisions may be observed to be of two different kinds: first, those that are taken by sheer naked power or calculations of expediency; and second, those that are made in accordance with community expectations about how, and with what content, they should be made. It is these latter authoritative decisions, those made in accordance with community expectation and disposing of enough effective power to be put into controlling practice, that, we suggest, are in any community most appropriately regarded as law.

A careful examination of the comprehensive process of authoritative decision within any particular community will reveal that this process, also, is made up of two different kinds of decisions. There are the decisions that establish and maintain the process of authoritative decision and there are the decisions made by this process in controlling and regulating the different value processes within the community. Decisions of the first type identify and characterize authoritative decision-makers, state and specify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for the making of different kinds of decisions, and secure the performance of all the various kinds of decisions (intelligence, promoting, prescription, invocation, ap-
plication, termination and appraisal) necessary to the effective administration of community policies. These are the decisions that we label "constitutive," with reference obviously somewhat broader than the more traditional word "constitutional." The second kind of decision, which for convenience, we may call "public order," emerging in continuous flow from constitutive process, are those that determine how resources are allocated, planned, developed, and employed, and how wealth is produced and distributed, how human rights are promoted and protected, or not protected from deprivation, how enlightenment is encouraged or blighted, how health is fostered or neglected, how rectitude and civic responsibility are matured or repressed, and so on through the whole gamut of community values. Any comprehensive inquiry about the law, past or future, of a community must accordingly take into account the entire flow within that community of both constitutive and public order decisions.

It will be no news to many of you that our inherited schools of, or emphases in, jurisprudence have had the greatest difficulty in establishing an appropriate conception of and framework of inquiry about international law. The earliest frame of reference, the natural law, with its notions of a larger community of human-kind and of a common human nature transcending different communities, did of course make immense contribution to the origin and development of transcommunity perspectives of law. Its conception of authority, however, was characteristically in terms of religious or metaphysical absolutes that could be differently interpreted; its concern with control was largely in terms of appeals from naked power to its transempirical conceptions of authority;

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Some of the difficulties in clarifying a transnational common interest are emphasized, perhaps over-emphasized, in A. Bozeman, The Future of Law in a Multicultural World (1971).
and its methods of inquiry emphasized syntactic derivation, along with other mysterious modes of consulting the oracles. It was not, and is not, a frame of reference designed to guide inquiry about empirical decision. The historical frame of reference, with its highly parochial conceptions of unique national communities and of law as some mystic force endlessly and uncontrollably spewing—like language, music, and art—from within these unique communities, is of course completely antithetical to any genuine understanding of international law.

The frame of reference that has been most detrimental to effective inquiry about international law is, however, the positivist or analytical school. The principal tenet of this school, it will be remembered, is that the nation-state constitutes the principal community of humankind and that authority and control, "law," are to be found in the perspectives, "commands," of nation-state officials. Since the proponents of this theory can observe no "sovereign" global state with centralized legislative, executive, and judicial institutions, it becomes within their syntax an apparent contradiction in terms to refer to international law as law. Somewhat disturbed by the obvious disparity between their syntax and the realistic role of authority in transnational interactions, proponents of the theory have sought to cope with their contradiction in three different ways: by a dualism, which asserts that both national and international law are "law," but with completely different decision-makers, policies, and structures of authority; by a monism, which grounds authority in some postulated grund-norm on a global level, and asserts that this grund-norm, by some mysterious derivational magic, dictates the content of the law of all lesser communities; and, finally, by a "non-law" bias, which asserts flatly that since international law does not, in obedience to John Austin's specifications, derive from a "sovereign" source, it cannot be law. Yet, all these positions, observably, remain in patent conflict with the facts of transnational life. The same state officials who prescribe and apply national law are the most important officials in transnational processes of authoritative decision, pursuing much the same policies in much the same structures of authority. It is yet to be demonstrated that all the different intellectual and practical tasks that must be performed in transnational processes of authoritative decision can be effected by logical derivation from a single grund-
norm, explicitly denied relation to processes of effective power. Though some decisions in global interaction are still taken, as in lesser communities, by naked power, many important decisions are increasingly taken from perspectives of authority, that is, in accordance with expectations of members of the larger community about how decisions will be taken. It is not the immediate threat of naked power, but rather the perception of common interest—with its promise and threat in reciprocity and retaliation—that affords ultimate sanction for international law, as for most law.

Similarly, the sociological frame of reference, despite its formal emphasis upon search for the causes and consequences of law, has made but little contribution to inquiry about international law. In too great dependence upon the positivist school, most of the proponents of this frame continue to regard the relevant community as that composed of nation-states and to define international law as a "body of rules" that governs the interrelations between nation-states. Often concerned primarily with effective power, they can find little role for rules as expressions of authority and, without an observational standpoint independent of that of nation-state officials, they have difficulty in identifying a common interest for the guidance of decision. Even the most realistic of the proponents of this frame, such as Weber and Timasheff, accept the positivist notion that authority and control must come from organized and centralized institutions, and hence have difficulty in making an appropriate place for international law. Only Georges Scelle, who built upon Grotius as well as the cultural anthropologists, could observe, in his notion of a dedoublement fonctionelle that the fact that in transnational decision state officials must be alternatively both claimants and judges affords opportunity for, and requires, even in an unorganized arena, through the potentialities of reciprocity and retaliation a genuine effort to clarify the net advantage in common interest.

In recent decades, happily, there has been increasing recognition that international, or perhaps better transnational,\footnote{In \textit{Transnational Law} (1956), Judge Philip Jessup wrote: "I shall use instead of 'international law,' the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." \textit{Id. at}} law in
the global community is very much like law in any community, with some slow movement toward employment of that frame of reference which we described above as "deliberately policy-oriented, problem-solving, and multi-method" for inquiry about the role of law in the larger community. In this frame of reference, the observational standpoint assumed is that of a citizen of the larger community of humankind who identifies with the whole of that community and seeks to clarify and secure the common interests of its members. Authority is conceived in terms of community expectations about future decision, and control in terms of actual participation in decision. Both authority and control are regarded as of empirical reference, admitting of detailed inquiry: there is no need for any infinitely regressive search for the "basis of obligation" in international law; one has only, as Bentham adjured long ago, to open one's eyes and observe transnational expectations about future decision and transnational practices in control. International law is defined in terms, not merely of the rules that officials use in explaining and justifying decision, but as decision that combines use authority and control, and as a continuous flow of decision with transnational impacts which establishes both a constitutive process and public order. Systematic efforts are made to relate problems, claims to authoritative decision, and authoritative decision itself to the larger global community value processes of which they are a part and which they in turn affect. Relevant inquiry, finally, whether for scholarly purposes or guidance of decision, is regarded as extend-


ing beyond derivational exercises to include all the intellectual tasks necessary to the clarification and securing of community policy.

A policy-oriented framework of inquiry has, thus, no difficulty in observing, as we have already in some measure documented, that humankind does today constitute a global or earth-space community, entirely comparable to its internal component communities, in the sense of interdetermination and interdependences in the shaping and sharing of values. It is the larger community process, composed of many different and interpenetrating lesser community processes, which stimulates claims to authoritative decision, affects the process of decision, and is in turn affected by decision. It is, hence, indispensable to effective inquiry to have a realistic map or model of the larger global process. The major features of the larger global community process may be roughly mapped in the categorizations recommended for the description of any value process. We illustrate:

**Participation**

The actors in global community process include not merely “nation-states” but individual human beings and all their groups, both functional and territorial, private and governmental, organized and unorganized. These individual human beings are multiplying at an accelerating rate and employ many changing patterns in the making, managing, and unmaking of their different groups. Convenient categorizations of organized groups include governments, political parties, pressure groups, and private associations devoted to different values. Unorganized groupings include culture, class, interest and personality.

**Perspectives**

The “rising common demands” of individuals from every segment of the globe for greater participation in the

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44 In the summaries that follow I draw upon collaborative work, both published and unpublished, with Michael Beisman, Lung-chu Chen, the late Harold Lasswell and other associates.
shaping and sharing of all values have been widely documented. The identifications of particular individuals with other individuals about the globe exhibit wide fluctuations, in expansion or contraction, based on many different grounds. The expectations of individuals about the conditions that affect the achievement of their demands—the degree, for example, of their perception of community—vary greatly both in comprehensiveness and realism.

Situations

Transnational interactions in every value process are increasing in frequency, intensity, and range of impact at an ever accelerating rate. With the practical annihilation by technology of distance, and with the new access to outer space, the geographic ramifications of interaction are in constant flux. Through instantaneous global communication time has been compressed and the larger community made for many purposes a single open forum. In a technologically differentiated society, all activities manifest a persistent trend toward greater centralization, concentration, bureaucratization, and regimentation. The shadow of nuclear war and lesser threats of large-scale, impending deprivations with respect to all values create a constant state of crisis for all interaction.

Base Values

While any value may potentially serve as a base for the shaping and sharing of other values, enlightenment and skill become increasingly important as science and technology advance. The significance of resources and features of the physical environment, as potential values, requires continual reassessment in the light of science and technology. The importance of authority in promoting and stabilizing interaction varies with the effectiveness of constitutive processes within all the different interpenetrating communities. Both values and potential values are most uneconomically distributed both within particular communities and across particular community lines.
Strategies

The strategies invoked by actors in managing base values include all contemporary instruments of policy—commonly characterized as diplomatic, ideological, economic, and military—and these are employed both singly and in combination, and with many differing degrees in persuasion and coercion, for both production and destruction of values. The potentialities of the diplomatic, and ideological in the management of symbols and perspectives, and of the economic and military in the management of resources and capabilities, are, again, constantly changing with knowledge, skill, and other features of the context.

Outcomes

The outcomes of the most comprehensive process of interaction may be observed in a flow of indulgences and deprivations with regard to all values, as manifested in varying patterns of accumulation and distribution and in different impacts upon different individuals, groups and particular communities. From a long historical perspective, the trend would appear to be toward a greater production and wider distribution of all values; yet it is obvious that the contemporary global community has scarcely begun to mobilize its full potential for meeting the "rising common demands" of humankind. The point of present relevance—for establishing a global community—is that all individual human beings, whatever their varying group memberships, can be observed to be completely interdependent—because of the interdeterminations outlined above both within any particular value process and as between all value processes—in the shaping and sharing of all values. What any one individual can get for himself and those with whom he identifies is in the long run a function of what all other individuals can get.

Through a policy-oriented framework of inquiry, one has, further, no difficulty in observing that one most important component of global community process is a process of effective power, equally global in its reach. It is this process of effective
power that both controls or affects interactions in social process without regard to the requirements of authority and establishes a global constitutive process of authoritative decision for the promotion and stabilization of a more economic and humane social process. It is this process of effective power, to specify its importance in more detail, which establishes the basic policies for which constitutive process is maintained and managed. For the mapping of effective power, it is convenient, again, to employ the same categorizations suggested for any value process. We illustrate:

*Participation*

The nation-state, specialized to demanding power, is still the most conspicuous wielder of effective power in the global arena. The nation-states of the world are, however, no longer compartmentalized, isolated boxes; they operate in everchanging groupings and coalitions and are interpenetrated by multiplying pluralistic groupings. Nuclear weapons may be making the present territorial structure of the world arena as obsolescent as the cannon ball made walled cities. Through their bases in transnational authority, international governmental organizations play an increasingly important role. A vast network of political parties, pressure groups, and private associations (primarily dedicated to values other than power), of varying geographic reach, increasingly achieve power outcomes.

*Perspectives*

The demands for power in the name of particular nation-states and the ideological splits between democratic and totalitarian states, as well as between developed and developing states, continue to handicap the discovery of common interest. The identifications and loyalties of individuals, still largely affixed to particular nation-states, remain parochial and fragmented, without

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*One useful introduction is G. MODELSKI, PRINCIPLES OF WORLD POLITICS (1972). See G. SCHWARZENBERGER, POWER POLITICS: A STUDY OF INTERNATIONAL SOCIETY (2d rev. ed. 1951).*
adequate perception of larger community. The expectation is pervasive that conflicts between major states will ultimately be settled by violence. The calculation of the advantages and disadvantages of alternative strategies continues to reflect the special interests of particular states.

**Situations**

The inherited territorial structuring of the world arena is only precariously stabilized, with a continual balancing and rebalancing of major powers in bipolar, tripolar, and multipolar equipoise. The confrontation is, however, global, with universalization of the military arena. The accelerating rate of interaction in both governmental and non-governmental activities generates crises of increasing intensity, not merely in power, but in all value processes.

**Base Values**

The capabilities for effective power (potential values) in resources, people, and value-institutions are still predominantly under the control of particular nation-states and are very unevenly distributed about the world. The vast differences in the domain, range, and scope of control over potential values by the superpowers as contrasted with the mini-states are evident. The perspectives (loyalties, demands, and expectations) that are components of effective power are highly volatile and subject to manipulation. Skills in violence, propaganda, agitation, and group organization have long been important in effective power; modern science and technology are enhancing the relevance of more general enlightenment and skills. International governmental organizations have begun to break the monopoly of the nation-state over authority as a base of power; private associations, such as the great multinational business enterprises, have begun to break comparable monopolies over other values.
**Strategies**

All participants in effective power employ all the different instruments of policy—diplomatic, ideological, economic, and military—in an unceasing process to secure power outcomes. Major attacks upon, or interference in the internal affairs of other territorial communities, is not confined to the military instrument or even to governmental action. Coercion is applied by the diplomatic, ideological, and economic instruments, and private armies abound. The development and proliferation of nuclear, as well as of chemical and biological, weapons may change all previous patternings in confrontation, encirclement, and penetration.

**Outcomes**

In comprehensive sum, the most relevant outcome is an immense flow of decisions, some taken arbitrarily by naked power and others taken in conformity with community expectations about authority, which not only determines the fundamental power configurations of the global community but which also controls or affects fulfillments and deprivations with respect to all other values. A realistic and detailed summation could make reference to a pervasive insecurity of all individuals everywhere in terms of position, potential, and expectancy with regard to all values.

A policy-oriented framework of inquiry will, finally, investigate and stress the importance of the comprehensive process of authoritative decision that is a component part of the global process of effective power. It must of course be recognized that many features of transnational processes of authoritative decision are of relatively recent origin. For millenia humankind lived in isolated groupings with little physical contact, much less cooperative interaction. As populations increased and interactions became more frequent, the civilizations of China, India, Greece, and Rome all recognized expectations of authority and control that transcended different territorial communities and employed these expectations as important instrumentalities for the clarification and maintenance of common interest. The Greek concep-
tion of a natural law based upon a common human nature and shared by all humankind, which was developed by the Romans into a *ius naturale* and a *ius gentium* applied to many different peoples, has for centuries inspired international lawyers. The papacy long administered a higher law of God and natural law to many different peoples. When feudalism and Christian unity in Western Europe began to break up and the modern nation-state to emerge, the great founding fathers of contemporary international law—Vitoria, Suzrez, Grotius, Christian Wolff, Vattel, and so on—were able, by drawing upon both natural law and the practice of states, to construct a “law of nations” appropriate to a relatively decentralized, unorganized community, which could operate by promise of reciprocity and threat of retaliation. The development of more permanent structures of authority has come slowly through the experience of the Concert of Europe, the League of Nations, regional organizations, and, finally, the United Nations and its associated structures. The end result is, however, the establishment of a comprehensive global process of authoritative decision, including both constitutive and public order decision, entirely comparable to that today maintained in even the more mature national communities. It remains to examine these developments in some detail.

IV. **The Main Features of Contemporary Global Constitutive Process and Public Order**

It is not easy to shape the future if we do not know whence we have come and where we are. In our exploration above of the global community and effective power processes we noted the relatively recent emergence of a comprehensive transnational process of authoritative decision. Though this process of authoritative decision has not yet achieved that high stability in expectations about authority and in degree of effective control over constituent members that characterizes most mature national communities, it still proffers in somewhat more than rudimentary form all the basic features essential to the making and application of law on a global scale. In recent decades this process of authoritative decision, stimulated by the wielders of effective power, has been expanding and improving itself at an accelerating rate and, whether our concern is for major structural alterations or for lesser, more opportunistic reforms, this is the process
with which we must begin if we are to make any rational connection between where we are now and where we wish ultimately to go. It is important, therefore, that we examine in some detail the basic features both of contemporary global constitutive process, the process which establishes and maintains authoritative decision, and of global public order, the flow of decisions taken by constitutive process in the control and regulation of all other community value processes. We begin with constitutive process and employ the same categorizations recommended for the description of the community and effective power processes.48

A. Contemporary Global Constitutive Process

1. Participation

In recent times, largely within this century, there has been a very considerable, though not as yet complete, democratization of participation in global constitutive process. The nation-state, through its officials, remains of course the overwhelmingly predominant decision-maker. There has, however, with the disintegration of former empires, been a tremendous multiplication in the number of states, with a rapid disappearance of dependent entities. Unfortunately, because of the formal myth of "equality" of states—according all states, inter alia, equal votes whatever their populations and bases of power—this multiplication of new entities has not always had beneficent results for either democracy or responsibility.

Beyond the multiplication of state entities, there has been a vast proliferation of non-state entities performing important decision functions in constitutive process. A host of international governmental organizations, with the United Nations as a general-purpose core supplemented by many specialized and regional auxiliary institutions, both offers unique, distinguishable participants in decision-making and affords indispensable structures of authority for the interaction of other participants. Political par-


ties and orders, strengthened by modern techniques of mass communication and transportation, through their organization and management of particular nation-states directly affect the performance of many functions in authoritative decisions. Pressure groups dedicated to particular power objectives, in multiplying number, both achieve official affiliation with authoritative structures and affect important decision functions, such as intelligence, promoting, invoking, and appraising. Private associations, primarily dedicated to values other than power, are increasingly transnational in membership, goals, areas of activity, resources, and strategies and affect many important functions in the making and application of law. The great multinational business enterprises, primarily seeking wealth, and church organizations, primarily concerned with rectitude, offer examples. The individual human being is of course the ultimate actor in all these groupings, and the individual may act not only in the name of some grouping, but as an individual qua individual, to affect important decision functions. It is merely the blind or naive who can today describe nation-states as the only appropriate “subjects” of international law.

2. Perspectives

The perspectives incorporated into authoritative prescription in global constitutive process would appear to exhibit, in formulation if not in consistent application, both an increasing stability in perception of common interest and a turgid, but perceptible, movement toward the demands, identifications, and expectations appropriate to a public order of human dignity. Contemporary prescriptions increasingly reflect a shared perception of the inescapable interrelations of minimum order, in the sense of the minimization of unauthorized coercion, and of optimum order, in the sense of maximizing the production and distribution of all values.

The prescriptions directed toward minimum order center upon the United Nations Charter and attendant customary expectations which distinguish between permissible and impermissible coercion.\(^{4}\) From the “*bellum iustum*” of early writers and

through the Hague Conferences, the League of Nations, the Kellogg-Briand Pact, and the Nuremberg Verdict to Article 2(4) and various ancillary provisions of the United Nations Charter, there had developed for the first time in authoritative general community prescription a viable prohibition of unauthorized coercion across state lines. As specified in Article 2(4), states are to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the [organization]." It does not weaken this commitment that in Article 51, and attendant customary expectations, an inherent right of self-defense is also acknowledged. The right of self-defense has been found indispensable in even the most mature national communities, and in the decentralized, relatively unorganized global community it is especially important, when subjected to appropriate review, as a sanctioning measure for minimum order. All that is required for avoiding confusion are appropriate intellectual and practical procedures for examining and appraising particular contexts of coercion.

The prescriptions directed toward optimum order center upon that great bulk of recently emerged prescriptions about human rights. It has already been suggested that these prescriptions have begun to take on both the form and substance of the basic bills of rights long established and maintained within the constitutive processes of many national communities. The high intensities with which the peoples of the world are in fact demanding the new human rights policies are manifest both in the vast flow of authoritative prescription and in an even vaster outpouring of non-official expression. These policies have been made into law by the United Nations Charter and the many general and specialized covenants, as well as by the customary expectations, confirmed by many international and national decisions, which have come to attend both these multilateral agreements and the Universal Declaration of Human Rights, once thought to be mere aspiration. Certainly these policies can, further, be unmade as law only by the same complex modalities, deliberate agreement

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44 U.N. CHARTER art. 2, para. 4.
45 This thesis is documented at length in HUMAN RIGHTS AND WORLD PUBLIC ORDER, supra note 28, at ch. 4.
and non-deliberate customary behavior, by which they have been made into law. These new human rights policies have also, as in national bills of rights, been made applicable to all actors in the larger global social process, including international governmental entities and officials, nation-states and their officials, and all non-governmental groups and individuals. Increasing efforts are being made, in final parallel, to afford individual human beings effective opportunity to challenge arbitrary deprivations of rights in appropriate structures of authority. This new global bill of rights covers in substance, it may be added, the whole spectrum of values contemporarily cherished by humankind, beginning with collective political emancipation and moving to individual enjoyment of greater participation in the shaping and sharing of all values.

The basic policies of the larger community about the management and enjoyment of great sharable resources, such as the oceans, air space over the oceans, international rivers, the polar regions, and outer space, inspired and informed by the expanding identifications of many decision-makers and by an increasingly common map of reality, continue to seek a balancing of inclusive and exclusive interests that will promote a net, aggregate common interest. In recognition of the ecological unity of the entire earth-space environment, an overriding goal is increasingly formulated, not so much in terms of a simple conservation of resources in a pristine state of nature as in promotion of an economic and constructive, appropriately conserving, employment in the greater production and wider distribution of all cherished values.

3. Arenas

In a state-centered world, the comprehensive global arena is still characterized by the absence of adequate centralized institutions designed to serve the different decision functions. Yet the structures of authority and other situations in which the decision-makers of global constitutive process interact have begun to exhibit both a considerable expansion and some modest movement toward an organized, permanent, inclusive form. It has been a principal contribution of the United Nations, and of the many specialized agencies and regional organizations, to supply these new structures of authority as a sort of improved backbone or
skeleton for global constitutive process. The traditional structure for interaction in international law has of course been the diplomatic arena, with its state official to state official communication, but the new international governmental structures of authority have tremendously enhanced opportunity for even this elite interaction. The holding of occasional, impermanent conferences for particular problems, which might be described as the establishment of parliamentary-diplomatic arenas, has also greatly increased in frequency, with a great array of conferences being in continuous session about the globe, with some, such as the Law of the Sea Conference, approaching permanency. The most dramatic recent change has of course been the development, as within the United Nations General Assembly and the corresponding structures in various specialized and regional organizations, of bodies that approach the form, and engage in the functional activities, characteristic of genuine legislative or parliamentary bodies in national constitutive processes. The established adjudicative arenas, characterized by third-party decision and distinctive procedures and criteria of decision, include not only various transnational judicial bodies and ad hoc arbitral tribunals, but also the courts of the different nation-states. Executive arenas, still quite weak and inadequate, include the secretariats of international governmental organizations, occasional specialized bodies such as the United Nations Security Council, and the executive arenas of nation-states. In addition to these formal, governmental structures, there are the multiplying situations, constituted by the patterns of interaction in the burgeoning private non-governmental associations primarily dedicated to values other than power, in which many important decision functions are performed.

Similarly, though some authoritative arenas remain closed to some participants in the process of effective power, there would appear to be a slow movement toward increased openness in access. Thus, though individuals and private associations are denied direct access to the International Court of Justice and to some arbitral proceedings, they have always had such access to national courts and their own foreign offices or state departments, and in recent years there has been an increasing establishment of specialized bodies, such as with respect to human rights and wealth transactions, to which even non-governmental claimants are accorded direct access.
Because of accelerating interdependences among participants in effective power, there has been also a slow parallel movement toward establishing compulsory jurisdiction over states and other actors who in fact affect community policy in particular interactions. Though the jurisdiction of the International Court of Justice is still based largely upon consent, agreements for compulsory arbitration or conciliation abound, and there appears a grudging willingness to submit to compulsory specialized procedures on specialized problems recognized as urgent, such as in the application of the Vienna Convention of 1969 on the Law of Treaties and in the proposed conventions emerging from the Law of the Sea Conference. Non-governmental participants have of course always been subjected to compulsory jurisdiction in national courts, and a rapid attenuation of historic doctrines of governmental immunity would appear to be making even nation-states more and more subject to the rule of law within such bodies.

4. Base Values

The base values that sustain authoritative decision in the global community, as in national communities, include both authority, that is, community expectations about decision, and capabilities in fact, that is, control over resources, people, and value-institutions. Though many of the more important bases for influencing decision remain under relatively exclusive control of nation-states, there appears to be a modest trend toward allocating to representatives of the inclusive community the authority and other assets required for the better securing of both minimum and optimum order.

The most encouraging development with respect to authority has been in the continuing expansion of the concept of "international concern" (the inclusive competence of the general community) with an appropriate attenuation in the concept of "domestic jurisdiction" (the exclusive competence of states). This distinction, reflecting the necessity of a continuing allocation and balancing of competence between center and peripheries, is inherent in the very conception of international law, even of a world rationally organized on a regional geographic basis, and is now authoritatively made in terms of the development of "international relations" or interdependences, that is, in terms of
the relative impact of activities on inclusive and exclusive interests. Thus, the competence of the general community is slowly being extended, through all necessary decision functions, to all matters of genuine transnational impact.

The traditional principles of state jurisdiction, which allocate among states the competences accorded under the rubric of "domestic jurisdiction," are also coming to be framed and interpreted in terms of the relative impact of activities on different exclusive interests. A principle of territoriality, reflecting the interests of a state in its own internal social process, authorizes states to prescribe and apply law to all events occurring within their boundaries, irrespective of the involvement of nationals or non-nationals. A nationality principle, recognizing the importance of individuals in community process, authorizes states to make and apply law to their own nationals, wherever they may interact or be. A protective principle (sometimes labelled that of "impact territoriality") authorizes states to take measures against deliberate attacks or other impacts upon their security and other values. A passive personality principle, in complement to the nationality principle, authorizes states to make and apply law to those who injure their nationals, wherever the events may occur. A principle of universality, appraising certain events (such as those involved in war crimes, piracy, slave trading, and genocide) as threatening the common interests of all humanity, authorizes any state securing effective control over the actors to apply certain inclusive prescriptions. In a global social process in which people and goods are in constant movement, states with effective control over persons and resources often forego their own authority, under doctrines of "act of state" or governmental immunity, to defer to the authority of other states that have made prior legislative, executive, or judicial decrees. Taken in sum, these more general principles of jurisdiction and a host of auxiliary principles, when appropriately applied in careful contextual examination of the differing features of interaction, serve importantly to protect and regulate an expanding transnational social process.

It is in the allocation of capabilities in fact, effective controls over peoples and resources, that contemporary constitutive process is most handicapped. The particular states, with large historic controls over peoples and resources, are highly reluctant, in
the absence of guarantees of security, to yield any important controls to the organized agencies of the general community. As among the states themselves, the differences in effective controls over peoples and resources are such as to make difficult any organized cooperation which reflects a genuine sharing of both power and responsibility. In such a context international governmental organizations perforce remain in some measure stillborn or impotent, in enforced reliance upon the annual contributions of states for survival, as well as for operation. It may be noted, however, that an allocation of controls over resources designed to secure an appropriate balance between inclusive and exclusive decision-making need not necessarily require complete centralization; a pluralistic or regional distribution of resources and values could better maintain an appropriate balance. In an earlier, and perhaps too optimistic, statement we wrote:

The worldwide spread of enlightenment and skills, facilitating perception of interdependences and common interests, and modern institutions of instantaneous communication have, of course, concentrated immense assets in the hands of inclusive decision-makers. The expanding identities and loyalties of peoples, as transnational interactions accelerate, and the increasing internationalization of standards of rectitude and of respect for human rights add to these assets. More tangible assets may, perhaps, yet be found in the great sharable resources—such as the oceans, the airspace over the oceans, the polar areas, and outer space—which, despite recent inroads on behalf of special interests, are still largely under inclusive competence and control.50

5. Strategies

The strategies employed in constitutive process by authoritative decision-makers in performance of different decision functions include both all those more formalized procedures specialized to different functions and different structures of authority and all the basic instruments of policy—diplomatic, ideological, economic, and military—employed in the more comprehensive social and effective power processes. The more formalized proce-

dures are in constant process of revision by decision-makers in the structures of authority within which they are specialized to different decision functions, and in sum constitute a vast store of professional knowledge for lawyers who seek to inform and affect decision. Influenced by expanding scientific knowledge and skills in observation, improvements in the modalities of communication and cumulative experience in large scale administration, all these procedures would appear to be undergoing a slow rationalization in terms of economy and effectiveness. The exploration of potential facts in controversy, and of potentially relevant community policies, is being made more contextual and, hence, both more dependable and creative. The final selection and characterization of both facts and policies is being made more deliberate and, hence, more rational in relation to common interest. Measures in enforcement of authoritative decision are being built both more comprehensively and more selectively upon different features of social and power processes and, hence, achieving greater effectiveness in controlling practice. Developments such as these are of course most economically studied in relation to different decision functions, and it is convenient in a quick overview to concentrate only on the basic instruments of policy.

a. The Diplomatic Instrument

The most important decisions taken in international law remain in the countless and continuing communications from state official to state official. The availability of more continuous, permanent, and inclusive fora for communication, as in the structures of the United Nations, and its auxiliary agencies, has, however, brought new dimensions to the traditional interactions of state officials, affording new opportunities to air grievances, to express aspirations, and to engage in reciprocal intelligence and influence. The older diplomacy of occasional and elitist communication is being transformed into a more continuous, and democratic, parliamentary representation and activity. In addition, important new multilateral conventions have been projected, and accepted, for rationalizing the facilities and immunities of diplomats and for clarifying a more viable law of international agreements. Insofar as executive and judicial arenas rely upon the diplomatic instrument, new procedures are constantly being devised and tested.
b. The Ideological Instrument

The tremendous importance of the ideological instrument is in its potentials for mobilizing world public opinion, not merely occasionally against particular instances of barbarism, but continuously in sustained support of all the decision functions indispensable to minimum and optimum order. The new techniques of instantaneous communication about the globe, to mass audiences as well as elite groups, promise both greatly to democratize participation in global constitutive process and profoundly to affect the effectiveness with which all decision functions are performed. Because of their limited access to resources, international governmental organizations have found the ideological instrument of especial importance. One dramatic example of this importance occurred when in the context of the Cuban Quarantine televised pictures of Soviet missiles in place in Cuba were introduced into the Security Council discussion, changing the whole tenor of the debate.

c. The Economic Instrument

The management of goods and services and the direct control of resources have long been used by state officials to affect transnational decision outcomes, in times both of peace and war. In contemporary times, the economic instrument appears equally at the disposal of the general community of states through a growing network of international governmental organizations, both general and particular. The recent positive employment of the instrument in what is known as "development programs" is in fact designed to promote within specified areas an increased production and distribution of all values. The success of the OPEC organization in managing the production and distribution of oil for political purposes offers a dramatic example of more comprehensive potentialities. The insistent demands of the developing countries within the United Nations structures for a "new international economic order" are well known to include demands also for a wholesale restructuring of global constitutive process.

d. The Military Instrument

The military instrument is as available, and perhaps as necessary, for the maintenance of public order between states as
within particular states. In an unorganized, decentralized world arena, it is indispensable that the general community should continue to honor, as the contemporary community does, appropriate measures in, and capabilities of, self-help, authoritatively labelled as "self-defense," "collective self-defense," "police action," "humanitarian intervention," "reprisals," and so on. The United Nations Charter would appear, for example, to have strengthened rather than weakened the lawfulness of occasional unilateral resort in appropriate context to the military instrument for the protection of human rights. With the failure of the original plan to establish within the United Nations a permanent military force for the maintenance of minimum order, the United Nations has had only minor successes in assembling and employing small forces in scattered parts of the world. The immediate prospects do not look bright for a more ambitious inclusive employment of the military instrument in support of general community policies. In an earlier statement we summarized:

The promise of the integrated employment by the organized general community of all four instruments of policy, in the management of all relevant base values, for the improvement of sanctioning process in the establishment and maintenance of desired world public order remains, of course, largely for future exploration. In the meantime, the more important sanction for transnational law, as for most national law, resides in the perception by community members of their interdependences and common interests and in their expectations about reciprocal, unilateral indulgences and retaliations in relation to such interdependences and interests.\(^1\)

6. Outcomes

The culminating outcomes of the comprehensive constitutive process are of course the authoritative decisions which in sum, and in varying degrees of conformity to projected policies, delimit the major features of world public order, including the continuing establishment and maintenance of constitutive process itself. In common parlance the different types of relevant decisions are traditionally described as legislative, judicial, executive, and administrative; these words, however, make more of a vague ref-

\(^{1}\) Id. at 384.
ference to varying structures of authority, in which different types of decisions are performed, than achieve a precise differentiation between different types of decisions. In an effort toward greater precision, proponents of policy-oriented inquiry recommend categorizations of different decision functions, or types of decisions, in terms of intelligence, promotion, prescribing, invoking, applying, terminating, and appraising. Each of these different categories of decision admits, in its turn, of minute description in terms of distinctive goals, decision-makers, structures of authority, base values, strategies, and outcomes. Each type of decision, though distinctive in goal, is of course closely interrelated with all other types, with the effective performance of any one being dependent upon all the others. With the gradual modification and improvement of all the different features of the larger constitutive process, described above, there has been a parallel, slow improvement in the more detailed features of the different particular functions, or types of decision. It would appear that most of these functions are being made more inclusive, in the sense of comprehending all participants who in fact affect or are affected by community process; more rational, in the sense of conformity of particular outcome to established community policy; more economic, in the sense of expenditure of community resources; and more integrative, in the sense of molding potentially divisive claims into the perception and fact of common interest. We briefly note developments, seriatim, with regard to each particular type of decision.

a. Intelligence

The intelligence function—with its distinctive goal of gathering, processing, and disseminating the information necessary to rational decision—is open to all participants in global social process. Traditionally, the gathering and processing of transnational intelligence is one of the oldest activities of state officials, and such activities—both legal and illegal—continue on a vast scale. More recently, intelligence has become one of the principal chartered functions of international governmental organizations, and the United Nations and other organizations are engaged in tremendous efforts in relation to a great variety of problems. The enhanced participation in transnational activities of political parties, pressure groups, private associations, and individual human
beings has also immensely enhanced facilities for gathering and disseminating the information relevant to rational decision. The newer technology for observation and communication made possible by outer-space instrumentalities, and other developments, still further augments potentialities. The massive and complex intelligence required for coping with all the immense problems presently confronting humankind, such as with respect to environmental protection and human rights, will not, however, be easily acquired and maintained. In mounting insecurity, the nation-state remains characteristically unwilling to submit itself to external scrutiny and to engage in the necessary cooperative intelligence activities. It is, further, as many observers have noted, not so much new intelligence in the gathering of information that the world situation requires, as new intelligence in the processing and dissemination of available information in comprehensive, centralized planning for major goals.52

b. Promotion

The promoting function, which adds the intensity of demand to expectation in the advocacy of policy alternatives, benefits equally with the intelligence function from the new democratization of participation in global processes of effective power. On the transnational level, as contrasted with the national, state officials, often representing large groups of states, are among the most active proponents of change. One primary purpose for which political parties are organized, transnationally as well as nationally, is the promotion of explicit programs. Pressure groups, by definition directed toward particular power and policy purposes, are increasingly active in the open structures of global constitutive process. Private associations, primarily specialized to values other than power, commonly seek power effects of transnational geographic reach in relation to the particular value to which they are specialized. The promise as well as the threat of the promotion function resides in the ease with which all these participants can, in the context of the contemporary communications revolution and the openness of the new structures of authority, formulate and propagate demands and organize public or bloc opinion

in favor of new authoritative prescription.

c. Prescription

The projection of authoritative prescription—with its communication both of a policy content and of expectations of authority and control—goes forward in the global community, as in its lesser component communities, by a great variety of modalities, from the most deliberate, organized, and specialized to the least deliberate, unorganized and non-specialized. The most deliberate modality of prescriptions, in which states cooperate with one another in explicitly formulating and undertaking policy commitments is of course the international agreement in its many protean manifestations. It is sometimes rather futilely debated whether agreements are law or a source of law, what agreements are “law making” and what are not, and in what degree agreements can make law for non-parties; yet, despite all these quibbles over technicalities, the agreement process has for many centuries been made to serve humankind well in the formulation and projection of general community policies, in what is not uncommonly called “international legislation,” about most important transnational problems. The least deliberate modality of prescription may be observed in the lineaments of “customary law,” probably the most pervasive and important law in any community, in which expectations about policies, authority, and control are generated by uniformities in cooperative behavior, both official and nonofficial. In theory, international law is created only when there is a “material element,” the flow of uniformities in behavior or decision, accompanied by a “psychological element” or opinio juris, certain subjectivities of “oughtness” or “lawfulness,” through a substantial period of time. In the facts of actual practice, the flow of behavior or decision need not be entirely uniform, the subjectivities of lawfulness are commonly derived from the behavior and other features of the context, and the time period required can be very short when general expectations about policy, authority and control are clear.53

The most striking recent development in the prescribing function builds upon the new role in global constitutive process

of international governmental organizations. Contemporary prac­
tices in the United Nations and auxiliary bodies have both given
a tremendous boost to the more traditional modes of lawmaking
and added a new dimension that reflects a much closer approxi­
mation to genuine parliamentary enactment. The combined roles
of the International Law Commission and of the General Assem­
bly, through various committees, have greatly enhanced and ra­
tionalized lawmaking by multilateral agreement, as illustrated in
many important new conventions, such as those about outer
space, human rights, and the law of agreement-making itself.
More importantly, the new opportunities afforded by the General
Assembly of the United Nations, and by other more specialized
bodies, to the representatives of the different particular commu­
nities of the world to announce their conceptions of prevailing
international law and to present these conceptions in formal reso­
lutions for acceptance or rejection by other representatives, have
greatly eased the historic burden of identifying and clarifying the
content of customary law. Certainly the modality of the General
Assembly resolution greatly foreshortens the time necessary for
establishing customary law and increasingly affords the repre­
sentatives of states, whatever may have been the past uniformi­
ties in practice or decision about a particular problem, an eco­
nomic mode for formulating and expressing their consensus in a
form that is beginning more and more to resemble national legis­
lation. Whether any particular resolution of the General Assem­
bly constitutes or makes law must of course depend upon many
variables, including the history and deliberateness of considera­
tion, the degree of state support and of participation by non­
governmental groups and individuals, relation to past policies
and more fundamental community policies, the sanctioning mea­
sures contemplated and established, and so on. Clearly, however,
if inherited prescriptions about the major problems of the larger
community are inadequate, the prescribing process offers few
impediments to their being made more adequate.54

54 For the classic study of the role of United Nations agencies in making law, see R.
Higgins, The Development of International Law Through the Political Organs of the
United Nations (1963). A comprehensive review of modalities is offered in E. McWhinney,
d. Invocation

The opportunity for injured parties to invoke community prescriptions in challenge of alleged violations is of course indispensable to effective rule by law. Historically, the modalities of invocation in transnational arenas have long been characterized by state to state complaint, with individuals and private associations being made dependent upon the states of their nationality for surrogates or champions. All participants in global social process have, however, long had access to national arenas for the invocation of transnational prescriptions, and, as has been observed above, there is an accelerating trend toward the creation of more transnational arenas to which individuals and private associations are accorded access. Though the potentialities for invocation do not yet approach preferred policies, the opportunities for community members who would complain about the violation of prescription are increasing.

e. Application

The task of putting transnational prescriptions into controlling practice, by their application in particular instances of difficulty or controversy, has historically gone forward in claims and counter-claims from foreign office to foreign office and within national structures of authority, such as courts. It has already been observed that, in ancient insight, the fact that in this process the same state officials have to serve alternately as both claimant and judge affords at least some stimulus to clarifications and applications in terms of common interest. Most comprehensively considered, application includes a whole sequence of steps: the exploration of potential facts and policies; the characterization of certain facts and policies as relevant; the relation of the relevant policies to the relevant facts; the projection of a future relation between the parties; and the selection of appropriate sanctioning or enforcement measures. The slow approximation toward performance of the application function in these comprehensive terms through "negotiations," "good offices," "mediation," "commissions of inquiry," "conciliation," and "arbitration" to "adjudication" is a matter of common knowledge. We have already noted the increasing creation of new institutions for disinterested third-party application, characterized by both openness in access and compulsory obligation to respond.
The increasingly important role of the United Nations Security Council in highly contentious matters is of common knowledge. Fortunately, also, it appears possible to achieve a new comprehensiveness and rationalization of inherited principles of application for exploring and characterizing potential facts and potential policies.

\( f. \) **Termination**

In a global arena with a still imperfect prescribing function and characterized by periodic outbreaks of naked power it is important to have specialized criteria and procedures for putting an end to prescriptions and other arrangements when they cease to reflect appropriate public order goals. Most comprehensively conceived, termination includes exploration of the facts about the alleged obsolescence of questioned arrangements, the clarification of relevant community policies about termination, the cancellation or reaffirmation of the prior arrangements, and the minimization of the losses entailed in cancellation or reaffirmation. Historically, termination has of course often been effected by the same prescriptive processes that brought the older arrangements into existence. Yet additional criteria and procedures have been found in a complex of prescriptions about the termination of agreements, in specified requirements for customary change (desuetudo), and in the provision of specialized collective procedures for mobilizing public opinion and guiding change. The same development of new specialized procedures within the United Nations structures that has brought a new effectiveness and flexibility to the performance of the prescribing function has resulted in comparable improvement in putting an end to outmoded prescriptions and arrangements, permitting in particular the more rational amelioration of losses and costs.

\( g. \) **Appraisal**

Appraisal is a very sensitive aspect of the intelligence function which focuses explicitly upon the decision process in evaluation of how effectively and how economically it is achieving established goals. The sequence of activities in appraisal includes the gathering of the requisite information about the decision process, the processing of the information in evaluation and recommendation of appropriate change, and the dissemination of the findings
and recommendations to relevant audiences. In this function, participation is most democratic and is continuous, however badly exercised. Authoritative decision-makers, within both international and national structures, are constantly engaged in the observation and evaluation of themselves and others. More importantly, all other participants in effective power—political parties, pressure groups, private associations, and even individuals—are equally constantly involved in appraisal, both in general and in relation to particular features of decision. It is of course this function which affords academic critics the opportunity to sit in judgment upon officials and others.

B. Contemporary Global Public Order

The public order established and maintained by global constitutive process could be described in terms of the protection afforded and regulation achieved by authoritative decision with respect to every feature of global social process. The trend would appear, again, toward a slow improvement in an emerging global society, though a society not as well managed, or as secure, as the society achieved in more mature national communities. The most comprehensive description would make reference to the degree to which the different participants in global social process are protected in the establishment and maintenance of their own internal constitutive and public order processes and in their interactions with other participants; the extent to which appropriate situations of interaction in all the different value processes are maintained about the world; the modalities by which the different resources comprising the physical environment—land masses, rivers, oceans, air space, outer space, atmosphere, and so on—are allocated for inclusive and exclusive uses and how these uses are regulated and protected; the degree of success achieved in facilitating persuasive, and in restraining and minimizing coercive, employment of the various strategies (diplomatic, ideological, economic, and military) in the shaping and sharing of values; and, finally and most importantly, the degree to which demanded outcomes in the different value processes (wealth, respect, enlightenment, and so on) are in fact achieved and pro-

55 Illustrating this possibility is B. Murty, Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion (1968).
tected. It is possible here only to make brief and suggestive indication of the kind of detail that would be relevant in such comprehensive inquiry.

The protection accorded the nation-state in global social process is, for quick illustration, the principal subject matter of traditional conceptions of international law. It is the global constitutive process that identifies which territorial entities are to be regarded as "nation-states" and establishes their "legal personality" in processes of authoritative decision, specifies what purposes are permissible or impermissible to these entities in their interactions with other such entities and lesser participants, indicates the structures of authority (internal constitutive processes) required of a nation-state for effective participation in external affairs with other states, regulates the acquisition of, and sharing in the enjoyment of, bases of power (resources, people) by different nation-states, seeks to control the exercise by nation-states of the different instruments of policy in both persuasion and coercion, and, finally, allocates among the different nation-states the competences ("jurisdiction") to engage in the various authority functions (prescribing, applying, and so on) in the making and application of law to events in global social process. In a vast and continuing flow of decision, global constitutive process establishes for any particular territorial community a modest but viable security in relation to all these different features of interaction.

The obvious Achilles heel in global public order is in the failure of constitutive process to establish enough effective control over the different nation-states to preclude resort to unauthorized coercion and violence. The number one problem of mankind remains, as we have indicated above, that of security in the sense of establishing a minimum order, in control of unauthorized coercion and violence, which will permit more effective pursuit of an optimum order in maximization of the shaping and

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For a broad review of contemporary practice, see De Arechaga, International Law in the Past Third of a Century, 1 Recueil Des Cours 9 (Hague Academy of International Law, 1978).
sharing of all values. Through articles 2(4) and 51 of the United Nations Charter, and many ancillary prescriptions, the global community has at long last achieved a workable distinction between impermissible and permissible coercion, admitting of application in particular instances in support of minimum order. It remains, however, for the community to establish an appropriate institutional framework both for disinterested, third-party appraisal of particular instances of alleged impermissible coercion and for the application of appropriate sanctioning measures in preventing and deterring coercion and in restoring and rehabilitating public order. Though contemporary nation-states receive tremendous benefits from constitutive process, they have as yet been only imperfectly subjected to its complementary burdens. 57

Another participant in global processes receiving immense protection from constitutive process is the international governmental organization. These organizations not only play an important role in constitutive process, most especially in supplying structures of authority and in performance of particular functions, but have their every feature and activity determined by such process. Their legal personality and roles, their membership, their structures of authority, their bases of power and procedures, and the decisions they can make are all subjected to comprehensive and minute prescription. Because of the derivative bases of power of these organizations, constitutive process is, perhaps unfortunately, much more effective in restraining the impermissible activities than it is with respect to nation-states. 58

Still another participant in global processes, for further illustration, that receives at least modest protection from, and considerable subjection to, constitutive process is the transnational business enterprise. 59 These enterprises are governed by a vast and complex flow of authoritative decisions that determine their


59 For a balanced review, see L.N. Cutler, Global Interdependence and the Multinational Firm, in Foreign Policy Association 239 Headline Series 1 (1978).

The content of H. Steiner & D. Vagts, Transnational Legal Problems (2d ed. 1976) largely relates to this protection.
establishment as independent entities (internal constitutive processes) and legal personality, their access to the different geographic areas of the world, any special advantages in authority (immunities and facilities) they may receive, the protection of their property and other resources, their labor relations, their making of agreements and subjection to delictual responsibility, their subjection to taxation and other national legislation (monetary, trade, anti-monopoly, and so on), and finally, their claims to enjoyment of the profits and other benefits of their enterprise. Indeed, including features of both public and private international law, constitutive process in relation to transnational business enterprises is so well developed as to exhibit various uniquely relevant prescriptions, such as those with respect to the competences of states to make and apply law, limitations upon the competences of states for the protection of aliens, limitations upon the relevance of state immunities and “acts of state,” provision of special competences to states to protect their nationals, and so on.

In contemporary global constitutive process, even the individual human being is accorded some protection under an immense body of prescription, including both the recent human rights prescriptions and the older doctrines about the rights of aliens, and is afforded access to many structures of authority, national and international, for securing this protection. For many centuries the individual human being has been made subject to duties under international law prescriptions with respect to war crimes, piracy, slave-trading, and so on. Certainly, it is no longer accurate to describe individuals as mere “objects,” rather than “subjects,” of international law.

The public order presently established for the protection of the environment leaves of course much to be desired. Our inherited prescriptions about the allocation and exploitation of the

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resources, which in sum comprise the environment, are not, however, as archaic, irrelevant and inadequate as sometimes suggested. The global constitutive process, in recognition of the exigencies inherent in cooperative, interdependent exploitation, seeks through a variety of prescriptions and institutions to impose restraints upon the assertion of special interests, even in relation to the land masses, and to encourage the mutual recognition and reciprocal protection of common interests, especially in relation to sharable resources. In one set of prescriptions, those relating to the allocation of resources, the community projects an economic, productive balancing between inclusive and exclusive uses and the establishing of the great sharable resources of the globe—that is, those admitting of a high degree of shared use by reasonable accommodation—such as the oceans, the airspace over the oceans, international rivers, the void of outer space, and the celestial bodies, as of relatively inclusive use and competence, not open to exclusive appropriation by particular states. The present ongoing, collective effort to write a new law of the sea, characterized by importunate claims to monopoly of a kind not heard for some two hundred years, raises some doubts about the continuation of this inherited policy, but it is not yet clear in what degree and for how long the claims to monopoly will succeed, or whether they will spread to other resources. In another set of prescriptions, in regulation of the injurious use of resources, the community seeks through explicit multilateral agreement and customary law to minimize and restore the losses caused both by major, deliberate attacks by states on each other's territorial integrity and by the less comprehensive, often unintended, deprivations that inevitably attend transnational interaction; in some situations these prescriptions build upon reasonableness and in others they impose absolute liability. Still other prescriptions, such as the historic international law of the sea, are designed to protect and facilitate the productive and harmonious inclusive enjoyment of sharable resources. For some centuries our inherited law of the sea, employing a few simple customary rules in a largely decentralized and unorganized arena, has served the func-

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42 M. ARSANJANI, INTERNAL RESOURCES IN WORLD PUBLIC ORDER: EXCLUSIVE USES AND INCLUSIVE COMPETENCES (forthcoming, University of Virginia Press); O. SCHACHTER, SHARING THE WORLD'S RESOURCES (1977).
tion of clarifying and securing, by reciprocal indulgences and restrains, the common interests of all peoples in the greatest possible production and distribution of values from the oceans, and in recent times a comparable regime is being extended by both agreement and customary development to the enjoyment of the resources of outer space. The more active performance of appropriate planning, developmental, and enterprisory functions with respect to all resources comprising the environment is, further, being stimulated by an immense proliferation of international governmental organizations and private associations, specialized and non-specialized, general and regional. Some amelioration of the obvious inadequacies in the relation of peoples to resources is, finally, beginning to be achieved in an accelerating movement toward a more rational regional organization of world society and in the contemporary human rights prescriptions that honor freedom of movement between communities and freedom to change community memberships, as well as a right of self-determination for certain communities.

Another relevant way of describing contemporary global public order would be in terms of the protection afforded, or not afforded, to the different features of each particular value process. Thus, the global wealth process, which brings affluence to some and poverty to many, could be described in terms of protected participation, perspectives, access to situations, base values, and strategies in the making of agreements and imposing of deprivations, and outcomes in the production and distribution of goods and services. Professionals in this area are aware of an immense body of prescriptions relating to the maintenance of a monetary unit, the stimulation and protection of transnational investment and development, the promotion and protection of transnational trade, the transfer of technology and skills, and so on.

Similarly, when respect is conceived, not merely as mutual

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deference, but as the reciprocal honoring of individual freedom of choice about participation in the different value processes, the protected features of a global respect process could be described in comparable terms. While the various communities of humankind have seldom approximated the full achievement of respect in the sense specified above, the increasing rhetorical acceptance in modern times of human dignity as the overriding goal for all communities is significant. The overriding importance of freedom of choice in the shaping and sharing of all values is beginning to be articulated and established as authoritative general community expectation in a wide range of formal expressions at both the transnational and the national levels. Community prescriptions clearly prohibit the most glaring forms of deprivation of freedom of choice, such as slavery and slave-like practices, caste, and apartheid. In addition a general norm of non-discrimination is rapidly emerging as an accepted prescription of international law. This authoritative norm of non-discrimination is comprehensive in reference both to protected rights and to impermissible group characterizations. It forbids, in general, all differentiations made on grounds irrelevant to individual capabilities and contributions, such as race, sex, religion, political opinion, language, and nationality.

In the global well-being process, while human miseries such as disease, hunger, violent death, high mortality rate, low life expectancy, mental disturbances, slums, genocide, and ecocide continue to exist in many parts of the world, the importance of maintaining optimum standards of health, safety, and comfort has gained wide and authoritative recognition. To fulfill the projected goal of affording the individual "the right to a standard of living adequate for the health and well-being of himself and of his family," and "the enjoyment of the highest attainable standard

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66 Human Rights and World Public Order, supra note 28, describes in detail the protection accorded this value. Chapter 3 offers outlines for describing the protection accorded to all the eight values we employ in inquiry about social process. Cf. C. Jenks, Law, Freedom and Welfare (1963).

67 See C. Jenks, supra note 66, at 468-560.

68 See id. at 561-796.

of physical and mental health,"70 community efforts, both trans­
national and national, have been directed to the provision of
medical care, prevention of disease, healthful housing, appropriate
food and clothing, sanitation, healthy working conditions, appro­
priate leisure and recreation, and necessary social services. Guided by a broad perspective about the values of well-being,
community efforts are directed to the attainment of
"environmental and industrial hygiene,"71 to a wide range of mea­
sures aiming at the objectives of prevention, deterrence, restora­
tion, rehabilitation, reconstruction and correction, and, ulti­
mately, to the task of minimizing unauthorized coercion and viol­
eence (global, regional, national, or local).72

In the global process of enlightenment, although barriers to
the gathering, processing and dissemination of information and
knowledge continue to exist in many parts of the world, transna­
tional prescriptions have been formulated to protect the "freedom
to seek, receive and impart information and ideas of all kinds,
regardless of frontiers,"73 through all media. Toward this goal,
positive facilities, governmental and private, are increasingly
provided to promote inquiry, communication, education, and
training. Education at all levels is increasingly made available,
and equally accessible, to all, under the constraints of varying
conditions in particular communities, with a shared goal of fos­
tering "the full development of the human personality," fortify­
ing "respect for human rights and freedoms," promoting
"maintenance of peace," and enabling "all persons to participate
effectively in a free society."74 Transnational cooperation to pro­
mote the sharing of information, scientific knowledge, and cul­
tural exchange across state boundaries, though not without diffi­
culty, has tremendously expanded.

70 International Covenant on Economic, Social and Cultural Rights, art. 12(1),
reprinted in U.N. HUMAN RIGHTS INSTRUMENTS, supra note 69, at 5.
71 Id. art. 12(2)(b), U.N. HUMAN RIGHTS INSTRUMENTS, supra note 69, at 5.
72 See Caldwell, Well-Being: Its Place Among Human Rights, in TOWARD WORLD
73 International Covenant on Civil and Political Rights, art. 19(2) reprinted in U.N.
HUMAN RIGHTS INSTRUMENTS, supra note 69, at 11. See also Universal Declaration of
Human Rights, art. 19, reprinted in U.N. HUMAN RIGHTS INSTRUMENTS, supra note 69, at
2.
74 International Covenant on Economic, Social and Cultural Rights, art. 13(1),
reprinted in U.N. HUMAN RIGHTS INSTRUMENTS, supra note 69, at 5.
In a world of universalizing science and technology, the skill process takes on added dimensions. New technologies and skills developed in one community have application far beyond its borders and travel with an accelerating tempo about the globe. Despite the existence of recognized centers of creativity, no single state has a monopoly of innovation in technology and skill. Thus, transnational prescriptions governing programs for transfer of technology and skill, for technical exchange or assistance, proliferate. Notable advances have been made in the formulation and application of transnational prescriptions governing the acquisition and exercise of skills through attainment of freedom from forced labor, freedom of association for trade union purposes, freedom for collective negotiation, freedom from discrimination concerning employment or occupation on such invidious grounds as race, sex, and religion, the right to work, articulation of fair labor standards, and provision for access to vocational training.75

In the global process of affection, although pursuit of congenial personal relationships continues to be frustrated or stifled in many parts of the world through such measures as prohibition of interracial or interreligious marriages, networks of secret police and informers, and excessive demands for absolute loyalty and submission to the state, considerable transnational protection is afforded the individual for the shaping and sharing of affection. The family, while in crisis at a time of rapid social change, is regarded as "the natural and fundamental group unit of society," and, hence, to be accorded "the widest possible protection and assistance."76 Voluntarism is a manifest policy in community prescriptions regarding the formation, maintenance, and termination of marital relationships. No less manifest is the trend toward equality of the spouses in their rights and responsibilities concerning marriage, during marriage, and after its dissolution. The complementary policy of responsibility is given expression through special measures for the protection of children, especially


in cases of the dissolution of marriage. As transnational mobility grows, families are widely dispersed across boundary lines for purposes of work, travel or study, and a new network of friendship is, increasingly, established transnationally. While transnational prescriptions that facilitate the whole process of self-determination and decolonization have significantly contributed to group loyalties and solidarity in the name of the nation-state, the contemporary global movement for human rights has developed the potentialities for adapting local doctrinal systems and sentiments to more inclusive loyalties and identification with entire humanity.

In the global process of rectitude, while religious persecution and conflict are far from a thing of the past, the recent transnational effort regarding matters of fundamental belief of right and wrong has been largely confined to the task of giving more specific content to the comprehensive, general protection accorded freedom of belief. The comprehensive “freedom of thought, conscience and religion,” as projected, includes “freedom to maintain or to change [one’s] religion or belief, and freedom, either individually or in community with others and in public or private, to manifest [one’s] religion or belief in worship, observance, practice and teaching.” The world community has yet to reach a consensus as to a system of presumptively authoritative, detailed expectations that can be invoked or applied in the area of religious discrimination. The intensified demands manifested in the drafting of a declaration and a convention concerning religious intolerance and discrimination and in the global ecumenical movement have nonetheless exerted a profound impact upon the perceived policies in the realm of rectitude norms. It is more widely understood than ever before that religious freedom is not ultimately to be linked to faith in any particular version of divinity. The confrontations between proponents of a single God and proponents for a plurality of gods have brought home the good

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faith and the depth of commitment of all concerned. A parallel effect can be seen in a comparable confrontation among exponents of divinity and secular champions of an impersonal flow of determining forces in the universe. A further striking development relates to the increasing tolerance of the doubters or searchers who have chosen to withhold commitment to any theological or metaphysical body of doctrine and practice. Other concerns of rectitude norms relate to varying conceptions of individual and collective responsibility in national and international systems of criminal law and to accommodations between diverse systems, by extradition, protection of political offenders, rights of asylum, formulation of minimum standards for the treatment of prisoners, and so on.

V. THE CONDITIONS AFFECTING WORLD PUBLIC ORDER

If we are effectively to anticipate, much less to shape, the international law of the future, we need to know something of the conditions that have affected present achievement, and may continue to bear upon the future. It is implicit in all that we have said above that international law, like other law, is affected by a vast complex of conditions. When law is conceived as a process of authoritative decision through which the members of a community seek to clarify and secure their common interests, the most important conditioning variables are of course to be found within the subjectivities of community members. Social scientists have long effectively employed what is known as the maximization postulate, which asserts that people adopt one response rather than another when they expect to be better off in terms of all their values by adopting the response chosen. From the vantage point of this postulate, any choice by community members among alternative legal strategies, or among alternative features of potential processes of authoritative decision, can be expected to be a function of the totality of their predispositions: their demands for values, their identifications, and their expectations about the context of interaction. Predispositions are not, however, the sole determinants of outcomes in interaction; expecta-

79 See HUMAN RIGHTS AND WORLD PUBLIC ORDER, supra note 28, at 653-89.
80 More detail about the themes in this section appears, with citations, in HUMAN RIGHTS AND WORLD PUBLIC ORDER, supra note 28, at chs. 1 & 5.
tions may be mistaken. The constraints that are in fact imposed by environmental variables—resources, people, value-institutional practices—are of equal relevance. Hence, whether one's concern is for the shaping of some relatively specific practice in international law with respect to some particular problem or for the larger outlines of future global public order, relevant inquiry must take into account a relatively large range of both predispositional and environmental variables.\textsuperscript{8} It is convenient, as indicated, to categorize predispositional variables in term of demands, identifications, and expectations and environmental variables in terms of peoples, resources, and value-institutional practices. We take a brief look at both sets of variables and consider implications.

The most important variable in the contemporary global processes of effective power, if in a complex of indetermination any one variable can be said to be most important, would appear to be what is commonly referred to, as above, as “the rising common demands” of all peoples for the basic values of human dignity. While different peoples located in different parts of the world, and conditioned by varying cultural traditions and modes of social organization, may assert these demands in different modalities and nuances of institutional practice, the important fact is that the peoples of the world, whatever their inherited differences in culture and institutional practice are ever more insistently demanding the greater production and wider distribution of all these basic values and that the processes of authoritative decision in all their communities, including the global, be brought to bear to facilitate and protect such production and distribution. These universalizing demands for a wider participation in all the value processes making for a dignified human existence must affect all future decisions, effective and authoritative. Unhappily, in a world divided by contending ideologies and public order systems (especially in relation to wealth), and characterized by communities in different stages of development, some of the demands most intensely asserted are less than comprehensive in terms of the

values sought and often exclusively parochial in geographic reach, emphasizing special rather than common interests.

The identifications in the name of which demands are asserted range today between embracing the whole of humankind to bestowing primary loyalties upon miniscule parochial groups. The earliest syndromes of parochialism, reaching back to the family and the tribe, were first broken by the advent of cities, permitting identifications with the public order of civilized states. In most recent times the “nation-state” has been the principal symbol about which individuals could organize their collective identifications. In a context of deep insecurity, it can be expected that nation-states, old and new, will compete so intensely for the loyalties of individuals as to inhibit more inclusive identifications. It would appear, however, that the potentialities for forging and sustaining more inclusive identifications are strengthening. The accelerating tempo of global interaction, facilitated by modern methods of communications and transportation, allows a person not merely to change physical location, but affords opportunity to change one’s “place” in the world through a continuing process of identifying with a multiplicity of human groupings. Individuals who seriously take one another into account in a vast network of territorial and functional activities are better able to identify with one another in terms of a common humanity and to act together more expeditiously in common cause.

The expectations of the people of the world about the conditions that affect the securing of their values, the expectations that in turn affect all decision, vary tremendously in their comprehensiveness and realism. These expectations require relation to all values and to every feature of each value process. The greatest contemporary failure in realism is in the lack of appreciation of the comprehensiveness and depth of the interdependences of all peoples everywhere with respect to the shaping and sharing of all values. With much more realism, in a world in which the giant powers continuously balance weapons capable of instantaneous global destruction, most peoples, elite and rank and file alike, are obsessed by a pervasive expectation of violence that affects all

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82 The relevance of all types of subjectivities is developed in Lasswell, Future Systems of Identity in the World Community, in 4 R. Falk, & C. Black (eds.), The Future of the International Legal Order 1 (1972).
choices among alternatives in decision. Fortunately, the spread of modern education and new techniques of communication make it possible for individuals everywhere to acquire a new realism about the conditions, not merely of continued existence, but of improved public order. As the network or interaction and perception of interdependence expands, more and more peoples may come to perceive that all the major problems of transnational impact require the clarification and securing of common interest. Such shared perception of common interest is a first vital condition for rational collective decision.

The relevance of population characteristics among the environmental variables relates to numbers, rates of growth, and distribution in relation to resources. The recent explosive growth in the population of the globe is one of the most salient trends in human history. Given the present rate of growth, the total population of the globe is expected to double again within thirty-five years. With few habitable open spaces remaining, and with states characteristically erecting national barriers to immigration, a maldistribution of peoples in relation to resources is likely to continue into the foreseeable future. The problems posed by this accelerating growth and maldistribution of peoples are not confined to Malthusian concern about food supply, but affect the entire quality of life, including the shaping and sharing of all important values. Fortunately, population problems, like most of the others confronting us, are human-made and subject to being brought under human control. Though many of the important choices affecting population growth are private choices within protected civic order, many of them can be affected by authoritative decision in the name of public order. Certainly the maldistribution of peoples in relation to resources can be corrected by authoritative decision that moves toward a more rational regional organization of the world.

The important resources that affect degrees of achievement in global public order appear to be both diminishing in quantity and deteriorating in quality. The contemporary energy crisis and the major problems it exacerbates emphasize the potential threats from impairment of resources upon the enjoyment and fulfillment of all values. An important reality of the earth, given

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the levels of technology in immediate prospect, is the relatively finite quantity of the resources available to maintain human existence. Despite divergent forecasts, it would appear that many key resources may in the not too distant future become depleted or too expensive to exploit. Similarly, the mismanagement of resources has, as already noted, created an ecological crisis of global proportions that threatens the quality, if not the existence, of life. Though the nature, degree, and tempo of damage to the environment differ from region to region and community to community, the crisis is comprehensive in total impact. The deterioration of the environment is not, however, as yet irreversible, and the importance of any particular resource is a function of many factors, including the state of technology, available manpower and skills, and efficiency in social organization. The role of technology is especially crucial, and many constraints upon resources have been, and can still be, overcome by advancing technology. It is contemporary technology that has built global and regional networks of communication, production and transportation and enabled people, ideas, and goods and services to move quickly and frequently across frontiers than ever before, establishing a more rational and economic relationship between manpower and resources. The prophets of doom could still be disappointed by future technological developments.

The inherited value institutions of contemporary global public order, established at various community levels (regional, national and local, as well as global), are of course among the most important variables affecting future public order. These institutions would appear, unfortunately, to lack an appropriate balance at the different community levels. It is no news that since the rise in the mid-seventeenth century of the modern state system, the world arena has been characterized by the predominance of territorially organized nation-states. The quantity and quality of transnational interaction has been largely shaped by the patterns of cooperation and coercion established, or tolerated, by the elites of states of varying composition capabilities, and ideological orientation. Despite the increasingly varied and important roles played by non-state organizations, especially by those primarily dedicated to values other than power, these organizations have had, often quite arbitrarily, to adjust their activities to the constraints of the territorial context. The power ascendancy of the nation-state has been so built into the perspectives of all actors
that a bias in favor of calculating advantages and disadvantages in terms of a particular nation-state dominates most activity and decision. It may be recalled, however, that all the existing institutions, however state-centered and tradition-bound, were created by human beings, and can be changed to serve common interests when such interests are appropriately clarified and perceived.

It should require no new emphasis that all these variables are in constant interaction, each affecting the other, and all in sum establishing the global interdependences described above both within any single value process and as between all value processes. These variables acquire and assert their significance in the processes of interdetermination in which the global social process, the process of effective power, the global constitutions process of authoritative decision, and the protected features of public order all reciprocally condition each other. The outcomes in any particular value process are, in utmost realism, conditioned, not merely by all the other features of that process, but by the outcomes and distinctive features of all the other value processes. The lawyer or other proponent of change who would be effective—whether his concern is for immediate or long-term, or particular or aggregate, outcomes—must have a focus of attention and theory of inquiry, however difficult the task, that adequately takes into account all these different interrelationships.

VI. POSSIBLE FUTURES IN WORLD PUBLIC ORDER

If humankind is to survive in any condition other than that of sheer barbarism, there will of course continue to be an international law, or process of authoritative decision, in which the members of a transnational community seek to anticipate the costs and benefits of alternative decisions and to shape the features of a preferred world public order. A deliberately policy-oriented framework of inquiry will put more emphasis upon understanding, insight, and the possibilities of change than upon the potentialities of predictions in specific instances. Yet, even policy-oriented inquiry can observe that the projection of possible futures, when disciplined by knowledge of trends and conditions,

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44 This is a repeated emphasis of Falk. See Falk, A New Paradigm for International Legal Studies: Prospects and Proposals, 84 Yale L.J. 969 (1975).
may serve to stimulate creativity in the invention and evaluation of alternatives in future decision.\textsuperscript{85} It is common knowledge that in recent times many new schools of "futurologists" have emerged among intellectuals about the world who seek to improve, and have made many suggestions about the improvement of our intellectual tools for peering into the future.\textsuperscript{86} Unfortunately, not many of these newly arrived prophets have yet focused upon the immense problems of global public order, and the few who have so addressed themselves have not always had, as suggested above, a realistic map of the interrelations of authority, effective control, and social process.

One procedure for inquiry about the future—made popular, if not invented, by my late colleague, Harold Lasswell, some fifty years ago—is that of deliberately formulating provisional maps or "developmental constructs" of future possibilities that range through a broad spectrum, from the most optimistic to the most pessimistic.\textsuperscript{87} By provisionally adopting a spectator's stance, as free as possible from the distorting effects of goal commitment, an observer may be able, by perceiving future contingencies previously overlooked, to improve fundamental strategy. A realistic projection of probable future developments can seldom be made by a simple extrapolation of the past. The course of future development depends rather upon the total constellation of many conditioning factors that may, or may not, support the direction and intensity of trend. To arrive at a disciplined estimate of possible

\textsuperscript{85} More detail about the themes in this section appears, with citations, in Human Rights and World Public Order, supra note 28, at ch. 5.


\textsuperscript{87} The basic study is H. Lasswell, World Politics and Personal Insecurity (1935).
futures, it is necessary to estimate the continuing presence or absence, strength or weakness, of the various conditioning factors. The policymakers of a community may be able by outlining favorable and unfavorable developmental constructs, on the basis of existing knowledge of past trends and conditions and of critical estimates of the interplay of such trends and conditions, both to sharpen the realism of their projections and to increase the inventiveness they bring to the choice of alternatives.

The principal question for an observer who cherishes the values of human dignity is whether future movement in global public order will be toward or away from the practices and institutions of human dignity. The two most comprehensive, dramatically opposed, constructs that might be developed present very different images of emerging global public order. The optimistic construct projects that progress toward achieving a wider sharing of power and a greater production and wider sharing of values in a public order of human dignity will continue. The pessimistic construct projects a sequence that moves with an increasing centralization, concentration, and militarization of power, towards a global public order of garrison prison states with a new order of castes.88

The long, historic trend away from impoverished caste societies will, the optimistic construct specifies, continue until a free and abundant peoples' commonwealth is achieved on a global scale.89 A peoples' commonwealth is characterized in this conception by the shared participation of all individuals in both production and enjoyment in all value processes. This construct builds of course upon many assumptions about conditioning variables and their interaction, including contemporary notions of human nature and social process. It projects, thus, that the "rising common demands" of peoples for a greater and more rewarding participation in all value processes will not abate, but rather inten-

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88 An even more pessimistic construct appeared in the New York Times as these lectures were being delivered. Under the heading "Doomsday Debate: How Near the End?" consideration is given to the possible instant extinction of the human race by a number of possible natural catastrophes. Comfort is offered the reader by the suggestion: "Scientists have . . . redoubled their efforts to learn why the dinosaur suddenly died out 65 million years ago after having flourished for 140 million years." N.Y. Times, Nov. 14, 1978, § C (Science), at 1, col. 1.

89 Some possibilities are considered in G. Mische & P. Mische, Toward a Humane World Order (1977).
sify; that the contemporary parochial identifications of peoples, despite recurrent waves of fragmentation, will expand toward recognition of common humanity; that the peoples of the globe will achieve increasingly comprehensive and realistic perception of their indissoluble interdependences with respect to all values; that the wildly accelerating rate of population growth will be brought under control; that technology will create ample resources and that enough enlightenment will be achieved to permit maintenance of the environment as a livable habitat; that more economic governmental and functional institutions can be created and maintained; and so on. These are pretty strong assumptions, but they are not entirely without reinforcement from past trends and a growing enlightenment.

The trend toward the values of human dignity is at least as ancient as the beginnings of urban civilization, and recent centuries have, with the accelerated development of science and technology, brought an acceleration in the tempo of change. This acceleration in the tempo of change has increased the awareness among all peoples of interests that involve all members of the human race in a common destiny. There are few compelling grounds for believing that science and science-based technology will be abandoned, that interdependences will lessen, and that humankind will not be able to perceive its interdependences. Certainly there are no convincing grounds for forecasting that significant numbers of the world’s intellectuals and professionals will cease to affirm and clarify the conception of human dignity, or to evaluate the functioning of public and private institutions according to their positive or negative impacts upon the realization of the values of human dignity.

The pessimistic construct, in contrast, regards the direction of history as revising itself, moving toward a world of militarized, garrisoned communities, controlled from the center and modelled on the prison. The trend could be toward a comprehensive totalitarian state with a system of public order that, when finally entrenched, organizes the world community into a vast hierarchical pattern under the effective rule of a self-perpetuating military

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Some of the dangers are recounted in the not entirely pessimistic projections of R. Heilbroner, An Inquiry into the Human Prospect (1974).

caste. This construct builds upon very different assumptions from the optimistic, about possible developments among the conditioning variables of global social and effective power processes. It builds upon such unhappy possibilities as that the peoples of the world will not be able to clarify a long-term common interest, but will rather pursue short-term, special exclusive advantages; that the identifications of peoples will remain territorially bound and parochial rather than extending to a common humanity; that peoples' expectations will in general remain diffuse and unrealistic and that, in particular, the expectation of violence will be sustained at such a high level as to serve as a chronic justification for the continuous military mobilization of human resources; that efforts to control the accelerating role of population growth will fail or be only partially successful; that the physical resources comprising our ecologically unified environment will continue to be despoiled and exhausted; that technological developments, such as with respect to nuclear power or communications, will be used for destruction and oppression rather than for the construction and promotion of freedom; that all the major value processes of global society will become increasingly politicized, bureaucratized, and centralized; and so on. Whatever the particular problems with which one is concerned, it requires no specialized enlightenment or skills to ascribe some probability to this construct, and thus to view the future with some alarm.

Happily, it is not necessary, as was observed in our introductory inquiry about the relevance of thinking about the future, to regard any particular developmental constructs about the future as inevitable. The future may, in ways about which we do not yet have knowledge, be inevitable, but statements about the future are not inevitable and may be accorded differing indices of probability. The appropriate use of the anticipation of future contingencies is to employ it as a means for increasing the likelihood that humankind can avoid the undesirable and achieve the desirable. Such achievement must depend both upon the mobilization of peoples' attention and energies and the devising and execution of policy strategies appropriate to the major problems and opportunities of the global arena. However grim the prospects for a global public order that secures human dignity values, adverse estimates of probability cannot be permitted to affect personal and collective commitment to human dignity values as a fundamental and enduring goal.
VII. Alternatives For an Optimum Future World Public Order

If humankind is not to go the way of the dinosaur, it may behoove us to take measures. The culminating task in deliberately policy-oriented inquiry is the invention, evaluation, and selection of policy alternatives. All the other tasks in the clarification of goals, description of trends, analysis of conditions, and projection of future possibilities are but preludes. The critical and difficult job is to devise strategies in decision that will span the gap between generalized goals and the more specific or aggregate outcomes sought in public order. This task, building upon performance in all the others, involves the identification of possible options in institution and practice, the comparative appraisal of such options in terms of both immediate and long-term costs and benefits in all values, and the making of necessary final commitments to decision and action. What is sought are options in institution and practice that will both facilitate the effective management of any particular problem upon which attention may be focused and yet contribute to the long-run effective management of the whole aggregate of major problems that besets contemporary public order.

There is of course no dearth in recommendation, either ancient or modern, about how global constitutive process and public order might be changed for the better. For centuries philosophers, clerics, and kings have proffered plans for perpetual peace, and contemporary proposals for world government, and lesser modifications of the existing anarchy, abound. Some of these proposals envisage grandiose transformations in the structures and processes of authoritative and effective power, others, in contrast, are characterized by concern for small changes about particular problems in incremental, cosmetic gimmickry. The difficulty with the grandiose approach is that its proponents seldom offer the hands and feet necessary to put the vast changes they

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81 The themes here are developed in more detail with references, in M. McDougal & F. Feliciano, supra note 47, at 261-383; Human Rights and World Public Order, supra note 28, at ch. 5; M. McDougal, H. Lasswell & I. Vlasic, supra note 64, at 1025-1103.

82 For summary, see U.S. Dep't of State, Reform and Restructuring of the U.N. System, (Selected Documents No. 8, 1978); R. Angell, The Quest for World Order (1979); L. Berec & H. Targ, Reordering the Planet: Constructing Alternative World Futures (1974); M. McDougal & F. Feliciano, supra note 47, at 263-67, 367-75.
recommend into reality; the difficulty with the more humble approach is that the proponents of fragmented and anecdotal options offer little other than hands and feet, or isolated features of rule and procedure, without adequate relation to the larger processes of authoritative decision and effective power. Considered comprehensively most of the proposals share a but modest regard for the context of clarifying policies and conditions which affects both rationality and acceptability.

It may aid understanding of the necessities of a more comprehensive and systematic approach to recall the intimate interdependences, within any community, of constitutive process, public order decision, and all other value processes. The degree to which a community can achieve desired outcomes within any particular process is a function not merely of the economy of the institutional features of that particular value process, but also of the outcomes and features of all other value processes including especially those of the community's constitutive process and of the effective power process that maintains constitutive process. It is the constitutive process, through its protection and regulation of the different value processes, which determines the kind of public order a community can achieve; yet the kind of public order a community achieves (in terms of the shaping and sharing of wealth, enlightenment, skill, well-being, and so on), through a grip of converse determination, affects both effective power and the kind of constitutive process a community can maintain. Opportunities for change and improvement in global public order can, hence, be found not only in every feature of global constitutive process but also in every feature of inherited global public order and of the component power and other value processes. What is most urgently needed, in more rational approach, is understanding of these larger interrelationships and the establishment of institutional structures, both official and private, that can make systematic and continuous canvass of all features of global interaction for ascertaining the entire range of possible improvements and for establishing priorities among potential improvements in terms of conformity to human dignity, values, temporal needs, economy, effectiveness, and so on.

The range of potential, functionally equivalent improvements in institution and practice that might be employed in global constitutive process and public order decision to enhance the common interest in protecting and securing human dignity
values is almost infinite in detail and nuance. These possible improvements relate, as has been emphasized above, to every feature of both constitutive process and public order decisions. The literature about world government and lesser reforms of which we have been so critical, is filled with suggestions, and in earlier statements we have both reviewed and appraised these suggestions and ventured a few recommendations of our own.\textsuperscript{93} Even an impressionistic itemization here, without careful references to overriding policies and the context of contemporary conditions, of what would appear to be among the more promising suggestions would, however, give a disproportionate sense of the importance of such particular possibilities. There can be no escape, if relevant improvement is to be effected, from the continuous, systematic, and disciplined appraisal of multiple, changing options in context.

The effective key to the improvement of global constitutive process and public order decision, to insuring that some of the many equivalent options for improvement are in fact put into practice, is of course to be found in the management of the global process of effective power, that is, through modification of the perspectives of the elite who maintain that process. Since in the contemporary global arena effective power is widely diffused and is based upon participation in all other value processes, this task becomes, most comprehensively, that of generating appropriate perspectives through all the global community's different value processes. It has already been suggested that it is the conflicting and disoriented perspectives of peoples—as manifested in demands for special interests, syndromes of parochial identifications and chronically unrealistic expectations—and not the inexorable requirements of technologically malleable environmental variables that perpetuate the existing difficulties in world public order. The maximization postulate, and the many historic successes of law as an instrument for the clarification of common interest, would suggest that the peoples of the world can, through appropriate modifications in perspectives, be encouraged toward the establishment of more effective processes of authoritative decision. It is a matter of scientific knowledge today that the

\textsuperscript{93} See M. McDOUGAL & F. FELICIANO, supra note 47, at 261-383; M. McDOUGAL, H. LASSWELL & I. VLASIC, supra note 64, at 1025-1103.
factors which importantly condition individual perspectives—such as culture, class, interest, personality and crisis—can be managed in a way to foster constructive rather than destructive perspectives. Competent specialists have long recommended promising alternatives in communication and collaboration designed to cultivate perspectives more appropriate to a public order of human dignity. In a very fundamental sense, this is one of the tasks of all education.

The distinctive kinds of perspectives—demands, identifications, and expectations—required for moving toward a more free, secure, and abundant global public order are more than implicit in our analysis above. In collaboration with associates, in a recent study of human rights, we summarized:

The demands which need strengthening are, of course, those which emphasize common rather than special interests and which insist upon the greater production and wider sharing of all values compatible with human dignity. The identifications best designed to sustain a world public order of human dignity are those which most nearly embrace all humankind and achieve pluralistic expression in both functional and territorial groupings. Finally, the proponents of human dignity must establish in themselves and others credible expectations that they do accept the fundamental principle of minimum public order, precluding unauthorized coercion and violence, and that the peaceful cooperation of all peoples in the greater production and wider sharing of all values is a feasible and imperative goal. . . . The reality of contemporary interdependences, in all value processes at all community levels and transcending manifold barriers, must be brought home to all inhabitants of our planet.  

The task of generating and sustaining the perspectives indispensable to movement toward a more humane global public order thus requires, in sum, that all who cherish the values of human dignity—whether authoritative decision-makers, community members, scholars, or advocates—seize every opportunity to make the choices that favor and to create the public opinion that supports the values of human dignity. Changes in the direction of an improved constitutive process can be effected only if many

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*44 HUMAN RIGHTS AND WORLD PUBLIC ORDER, supra note 28, at 444.
individuals, located in many different territorial and functional structures and processes about the globe, adopt both parallel and joint strategies to insure that the most fundamental, demanded policies are taken into account. The more intense the commitment and the more simultaneous the activities in many different parts of the world, the greater the possibilities of appropriate transformation, major or minor. There is, we repeat, a plentitude of equivalent models about features of both constitutive process and public order decision which could be adapted to serve the values of human dignity on a broad scale if peoples have the will to put such models into practice. The effective elites who establish and maintain authoritative decision must be made realistically to perceive that they and all with whom they identify have more to gain and less to lose by genuine efforts to change, rather than to continue, the arrangements and practices that promote human indignity and universal insecurity. The best hope that we can enjoy is perhaps to be found in the continuing, exploding demands of peoples around the world for the better securing of their human rights and in the realization, emphasized at the beginning of these lectures, that no future, however grim it may appear, can be known to be inevitable. An appropriate note of restrained optimism was voiced by my late colleague, Harold Lasswell, in concluding his book on *The Future of Political Science*:

> It is impossible to contemplate the present status of man without perceiving the cosmic roles that he and other advanced forms of life may eventually play. We are, perhaps, introducing self-awareness into cosmic process. With awareness of self comes deliberate formation and pursuit of value goals. For tens of thousands of years, man was accustomed to living in relatively local environments and to cooperating on a parochial scale. Today we are on the verge of exploring a habitat far less circumscribed than earth. The need for a worldwide system of public order—a comprehensive plan of cooperation—is fearfully urgent. From the interplay of the study and practice of cooperation we may eventually move more wisely, if not more rapidly, toward fulfilling the as-yet-mysterious potentialities of the cosmic process.44