Demilitarization and Arms Control: Antarctica

Harry H. Almond Jr.
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by Harry H. Almond, Jr.*

I. INTRODUCTION

The characteristics of Antarctica have been widely examined in the literature.¹ The continent has been the subject of substantial exploration. Claims have been based upon discovery² and perhaps upon exploitation. Antarctica is also the subject of a regime that puts the

¹ See P. Quigg, A POLE APART: THE EMERGING ISSUE OF ANTARCTICA 243 (1983); P. Jes-sup & H. Taubenfeld, CONTROLS FOR OUTER SPACE AND THE ANTARCTIC ANALOGY (1959); F. Auburn, ANTARCTIC LAW AND POLITICS (1982); O. Schachter, SHARING THE WORLD'S RE-

ources (1977) (resource sharing); C. Christol, THE MODERN INTERNATIONAL LAW OF OUTER

SPACE 253 (1982) (outer space, the Moon Treaty, and the common heritage of mankind); M. Mc-

Dougal, LAW AND PUBLIC ORDER IN SPACE (1963) (outer space); see also Burton, New Stresses on

the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources, 65 VA.

L. Rev. 421 (1979); Bilder, The Present Legal and Political Situation in Antarctica, in THE NEW

NATIONALISM AND THE USE OF COMMON SPACES 167 (J. Charney ed. 1982). Discussion of the

Moon Treaty will be found in Committee print of the Agreement Governing the Activities of States on

the Moon and Other Celestial Bodies for the Senate Comm. on Commerce, Science and Transporta-


² The United States position concerning claims to Antarctica has been based upon discovery.

Secretary Charles Evans Hughes, however, is cited in 1 G. Hackworth, DIGEST OF INTERNA-

TIONAL LAW 399 (1940), as stating Hughes stated to the Norwegian Minister with respect to Ant-

arctica that the early bases for sovereignty, e.g. discovery, occupation, and settlement, are inapplicable today, especially in places such as the polar regions where actual settlement is impossible. See also id. at 450. When Admiral Byrd made territorial claims that the State Department seemingly confirmed, the above position became more controversial. Id. at 454. Hackworth also sets forth the claims made by other states based upon expeditions following the first World War. Claims were made in part through decree or usage. The polar regions of the Arctic were claimed, largely by Russia, through a "sector principle," running the claim from the subjacent land areas up the appropriate lines of longitude to the North Pole. Id. at 461. The "sector principle" has been rejected by the United States as the means for establishing Soviet claims to the Arctic Polar Regions. See 2 M. Whiteman, DIGEST OF INTERNATIONAL LAW 1268 (1963). The Soviet position and legal justication appear in Lakhtine, Rights Over the Arctic, 24 AM. J. INT'L L. 703 (1930); T. Taracouzio, SOVIETS IN THE ARCTIC 320 (1938). See also Toma, Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic, 50 AM. J. INT'L L. 611 (1956) (Soviet claims in
terrestrial claims aside and, for the term of the treaty, makes those claims inoperative.\(^3\) The climate is hostile to human presence and activity, but is also fragile. The environment and ecology would unquestionably be irreversibly disturbed by extensive activities among states and their enterprisory entities.\(^4\) Exploration so far has indicated the possibilities of minerals and fossil fuels on the continent and in the surrounding continental shelves and seabeds. The area is also a major source of sea-generated protein, primarily in the form of krill; and, if the ice can be transported in either a solid or liquid form, it would be an enormous source of fresh water.\(^5\)

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\(^3\) Article IV of the Antarctica Treaty of 1959 expressly sidesteps the claims for sovereignty or territory, but also declares that activities taking place while the Treaty is in force shall not constitute a basis for claiming territorial sovereignty. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. The legal effect of this article on states that have not ratified is controversial, but probably the article extends to those states because conduct contrary would be in derogation of the law established among a wide number of states under the Treaty. This, in any event, is a subject not pursued nor analyzed here. 2 M. WHITEMAN, supra note 2, at 1232. The Soviet Union, in its memorandum of May 2, 1958 based its territorial claims on the Russian explorers Bellingshausen and Lazarev and insists that with respect to such claims "it has not recognized and cannot recognize as legitimate any kind of separate solution for the problem of territorial possessions in [state sovereignty over] the Antarctic." Id. at 1254-55. See Waldock, Disputed Sovereignty in the Falkland Islands Dependencies, 25 BRIT. Y.B. INT'L L. 311 (1948) (English position); Richardson, New Zealand's Claims in the Antarctic, 33 N.Z.L.J. 38 (1957) (New Zealand's position).

\(^4\) Economic policy is the policy of the most appropriate choices relating to resources and the exploitation of them. It bears some resemblance to the policy choices and processes that states must pursue in addressing weaponry, self-defense, and the legitimate use of force through appropriate military measures. See A. REES, STRIKING A BALANCE: MAKING NATIONAL ECONOMIC POLICY ix (1984).

\(^5\) A general survey with respect to the Antarctic continent and regarding similarities in the legal controls for regulating activities on that continent and in outer space is in P. JESSUP & H. TAUBENFELD, supra note 1. The functional claims to Antarctica as a commons area arise in part because the entire globe is affected by the amount of fresh water locked in the ice, and because the climate of the globe is affected by the ice mass itself, and its location. Id. at 163. The other fea-
Partly because of these characteristics, Antarctica has been referred to as a part of the "global commons"—an area in which states have willingly foregone their competitive claims to exclusivity, to territorial possession, or to sovereignty. Such an arena lends itself, according to the expectations of many, to peaceful purposes and peaceful activities. As a United States representative has said:

[It is an area] beyond the jurisdiction of any state which [is] available for the use of all. . . . These commons are: first, the oceans, including the bottom of the oceans, that is the seabeds, beyond the limit of national jurisdiction; second, outer space, above the limits of national jurisdiction (wherever that may be); and third, Antarctica, although one must note that some states have still preserved their territorial claims to parts of Antarctica under the Antarctic Treaty regime.

While such terms as "peaceful purposes," "common heritage of mankind" and "global commons," along with the notions of "demilitarization" cannot be fully defined, they gain their policy content from the practice of states, practices which in turn strengthen and promote the policy content. More specific to Antarctica, notwithstanding the accelerated competitive processes among states throughout other areas of the world, states have attempted to establish Antarctica as an arena that will be free of armed combat or the hostile use of force during peacetime.

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6 See P. Quigg, supra note 1, at 177.

7 Id. Quigg cites an unpublished memorandum in the Department of State, entitled "A Few Thoughts on the Concept of the 'Common Heritage of Mankind.'" His comments indicate that many mining companies had argued that "common heritage" of mankind, as it appears in the Moon Treaty, and elsewhere, amounts to attaining the "basic goal" of redistributing the world's wealth. Such commentators point to the provisions of article 11 of the Moon Treaty. See Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature Dec. 18, 1979, U.N. doc. A/AC 105/L 113/Add. 4 (1979) [hereinafter cited as the Moon Treaty].

8 The term "common heritage of mankind" remains ambiguous in the practice among states. It has been used in the Moon Treaty, supra note 7, as well as in the Law of the Sea Convention, and it has been proposed for Antarctica. See United Nations Third Conference on the Law of the Sea, Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/CONF. 62/WP. 10/Rev. 3 (1980). According to an official of the United States at the Law of the Sea negotiations "common heritage of mankind" was defined as "those areas beyond the jurisdiction of any state which are available for the use of all. . . . These commons are. . . . Antarctic, although one must note that some states have still preserved their territorial claims to parts of Antarctica under the Antarctic Treaty. . . ." P. Quigg, supra note 1, at 177. Article 11 of the Moon Treaty modifies this definition as an area governed by an international regime.
Demilitarization is a strategy shared among states that are willing and able to maintain specified areas free of military activities during peacetime and during wartime. During peace they are expected to act as guarantors that the demilitarization will be maintained, but in the demilitarization of Antarctica, the guarantee of demilitarization is not through enforcement measures, but by the implied threats of each of the parties that if the area is violated, then they will respond in kind. Demilitarization depends upon the policy in context—i.e., on the policy shared in the demilitarization agreement and established through its provisions.

The effectiveness of demilitarization and of sanctioning or enforcement measures to maintain the demilitarized status depends upon the relations among the parties. The fundamental principle is that of stabilization: where the activities or policies of the parties are stabilizing with respect to the area, then the demilitarized status is maintained and strengthened. The Antarctic Treaty presupposes that through the development of a regime of cooperation and peaceful purposes demilitarization will be stabilized, and while its provisions are not "mandatory," they offer a framework and guidelines that the parties have adopted to ensure order and security on the continent.

The general considerations upon which effective arms control and demilitarization are based will be discussed, followed by the specific framework for the Antarctica Treaty, and then an appraisal of those policy factors that might destabilize their order and lead to "militarization." Consideration will then be given to how demilitarization is applied through other modalities such as the nuclear free zones, the zones of

9 The spread of militarization outside demilitarized arenas is far more troublesome today than in the past because of the availability of modern weaponry. This spread would seriously jeopardize any attempts to demilitarize such areas as Antarctica. See Djilas, The Militarization of the Soviet Bloc, Wall St. J., May 30, 1984, at 33, col. 4. While militarization in the Eastern European countries may lead to an erosion of the communist social orders, the impact would be far greater in the Soviet Union, since the influence the Soviets exert with their armies is not enough to offset the effects of a weakening local party and the exhaustion of its ideology:

At the same time, we see the same strengthening of the army's role inside the Soviet Union itself is already discernable. This is particularly evident now that Soviet army chiefs have begun to come forward publicly in matters ordinarily outside their realm. Still, while the army's expanded role means a proportionate weakening of the Communists Party's role within a country (as it has in Poland), in the Soviet Union an expanded military role also is an expression of imperialist aspirations: The army becomes the principal force for Soviet expansionism. Precisely because the Soviet Union is a powerful empire, such a shift in power could have far-reaching consequences.

Id.


11 See infra note 13.

12 The Antarctic Treaty, supra note 3, at art. IV.
peace, neutrality zones, and the arms reduction proposals for central Europe (the mutual and balanced force reductions). Terms such as "militarization," "demilitarization," "stabilization or destabilization," "aggression," and so on, used in conjunction with assessing demilitarization are normative-ambiguous, conveying both the notions of norms that are at least implied, and certain factual situations which are assumed. An attempt at clarifying these terms is undertaken in this analysis.

II. ARMS CONTROL: GENERAL INCLUSIVE AND EXCLUSIVE STRATEGIES

Shared arms control policies are aimed at a strategy for public order among states, and effectiveness and enforceability of those policies are measured by how far the actions and policies of states promote that shared order.13 Where the actions of the two major rivals, the United States and the Soviet Union, are most relevant, the trends so far have been for them to enter into bilateral arms control agreements (particularly with the major nuclear weapons under the SALT agreements) and to provide leadership in developing the multilateral agreements.14 The policy content of the arms control agreements remains ambiguous and fluid because it is dependent upon the rivals (and other states) stabilizing their relations, and then proceeding affirmatively toward common goals. Under these conditions, the arms control agreements along with arms control policies and decisions of the United States and the Soviet Union are applied as exclusive strategies aimed at gaining exclusive advantage over the rival.15 They are also inclusive strategies aimed at maintaining

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13 The design of an inclusive strategy between the United States and the Soviet Union to assure stabilization both in the processes and movement toward arms control, and in their relations in general, has been founded upon how they expect to deal with the use of force. Under the existing customary international law, the fundamental issue is not whether force is to be used, but whether the use of force is permissible. President Reagan outlined this issue, in part, in his address to Ireland’s Parliament. N.Y. Times, June 5, 1984, at A14, col. 1. This address shifts the stress from the declarations among states not to use force, with all of the accompanying problems of verification compliance, to actions that would symbolize and further the assurance of nonuse of force. It is noteworthy that such applications of a nonuse of force would be law-projecting, particularly as states, pursuing such concrete proposals as the President suggests, show that their patterns of conduct are those from which we can reliably deduce their intentions or expectations.


15 See S. GORSHKOV, THE SEA POWER OF THE STATE ix, 1, 279 (1979). Sergei G. Gorshkov, Admiral of the Fleet of the Soviet Union, in seeking to develop the navy of his own country, saw that a justification for reaching out or projecting naval and sea power required him to establish Soviet extraterritorial interests. Hence, his approach to naval strategy embodied in part a claim that these interests were entitled to protection or defense. Moreover, the experience of World War II convinced him that naval forces were employable as strategic forces.
or preserving the limited, but critical, public order that they need to make arms control measures effective.

Like arms control, demilitarization is a strategy shared among states for stabilizing their relations regarding a given area. To be effective and enforceable demilitarization demands, as does arms control, a shared policy among states and indicia designating either the breakdown or strengthening of demilitarization. The indicia can be found by careful analysis of the trends of states toward promotion of the existing order, or toward promotion of its dissolution, or replacement with a different order that might more effectively promote their own strategies, and strategic advantage.

Arms control, demilitarization, and other strategies intended to lessen the possibilities of armed hostilities and aggression engage the foreign relations among states in unique ways. Most states give their highest priority to their own security, both internal and external. Ideological and interest claims tend to enlarge what is to be included in a state's security ambit. But in pursuing effective arms control strategies, states, usually rivals, are compelled to refrain from actions that they believe are essential for security. In the arms control agreements states undertake to refrain from actions relating to the production and deployment of weapons. Accordingly, such states must moderate their exclusive strategies designed to promote their own security, and enter into a shared operative strategy designed to promote their mutual security through shared controls.

16 The weight of claims, in policy terms, is their effect on either the policies of rivals or the shared policies that they are shaping. Some indication of that weight may be found in the activities, and the influence associated with the activities of states. For this reason, if, as in outer space, military activities become a dominant element of the relations among states in Antarctica, or if military support activities dominate all other activities on the continent, it must then be presupposed that the military instrument is being shaped as the dominant strategy for projecting policies. In outer space, the United States and the Soviet Union have argued that "peaceful purposes" means, for the one non-aggressive purposes, and for the other purposes in which all military activities are eliminated. According to P. Jessup & H. Taubenfeld, supra note 1, at 268-69, the questions raised are:

How to assure a real separation of peaceful from military uses of atomic energy and now of outer space is indeed a key problem in a world bristling with antagonisms, rivalries, and fears. Can it be realistically expected that the novelty and present mystery of space assure the success of techniques which have failed to give general peace on earth?

They cite Congressman Teller:

National space policy, like national security policy, is determined primarily by the requirements of world politics. We do not want to carry on the burden of armament, but we find that national survival and the successful pursuit of our national objectives depend upon military strength. In the absence of agreed upon and workable international programs for control and use of outer space, the United States has little choice but to develop a national space policy as an integral part of its national security program.

Id. at 268-69.

17 See infra note 19.
The parties may tend (through application of the agreements) toward reshaping their undertakings and making them serve as abstract principles. Such principles will enable the states to interpret the agreement to satisfy their own changing security perspectives. They can then simultaneously retain a hold on the arms control framework in the agreement to use it for diplomatic purposes and ideological strategies. To the extent these tendencies prevail, they offset the shared objectives of arms control that are aimed at a shared, even if limited, public order, and the security that such an order affords.

The trends among states for adopting exclusive strategies aimed at strategic advantage are far too developed to expect from them an arms control agreement that will change their exclusive strategic objectives. Such strategic objectives are at best only tenuously moderated. To expect more is to ignore the practice and expectations among states. Moreover, the tendency to "count" the weapons or launching systems and to

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18 Ideological strategies embracing the intrusion of ideology as a means for securing the allegiance even of NATO governments are discussed in Wettig, The Western Peace Movement in Moscow's Longer View, 12 STRATEGIC REV. 44-54 (1984). Wettig argues that the Soviet Union has been perfecting the ideological instrument, not to gain control of the peace movements as the primary target, but to reach the more desirable and reliable political ally to be found in such groups as the West German Social Democratic Party. *Id.* Herein lies the possibility of exploiting the class struggle:

The objective of this strategy is the achievement of "victory without war" in the European arena. There is no real evidence thus far of a Soviet intent to invoke the military threat toward the solution of specific questions in their favor. Rather, Soviet military power is seen as a more general weight for conditioning the arena of perceptions and political interactions. The Soviet leaders are confident that the fruits of this strategy will ripen in time—in the East-West relationship as well as on the socio-political battlegrounds internal to the West.

*Id.* at 53.

19 The Department of Defense closely focused upon the balancing of force capabilities, and the belief that the Soviet Union is not affected or persuaded by arms control policy as a means to limit the arms competition. Part of the difficulty stems from the appearance of new weapons or from modernization, part is from the perceived thrust toward "superiority," and part because of the momentum in arms development that apparently cannot be turned around in the Soviet Union. See, e.g., D. RUMSFELD, REPORT OF SECRETARY OF DEFENSE, U.S. DEP'T OF DEFENSE 3, 8-13, 16-21, 24-28 (1978). Perceived dangers include first-strike, surprise massive attacks, and a sequential, escalated attack. Soviet commentators reach similar conclusions concerning U.S. weaponry, particularly new weapons. See Naumov, Some Criteria for Assessing Dangers in New Weapons Development, in THE DANGERS OF NEW WEAPON SYSTEMS 79 (W. Gutteridge & T. Taylor eds. 1983). Problems of this kind are made into "wicked problems," too complex for ease in decision, by the parallel development of a military strategy and doctrine that would utilize nuclear and other mass destruction weapons and, more importantly, would link strategic and military objectives with political objectives, distinguishing these from the traditional goal of destroying the enemy's armed forces, and rendering them incapable of continuing the struggle. When the political aim is to subordinate the enemy entirely, and not merely subject it to military defeat, then military strategy takes on a differing cast. For example, V.D. Sokolovsky, Marshall of the Soviet Union, introduces the principle of economy of force to ensure rapid takeover, in part because of the waste and possible deterioration of a nation through a future protracted conflict, and in part to gain the objectives with a minimum of loss,
use the counting framework as a "technical" means for balancing security becomes simply the process for isolating what is counted, leaving to each of the parties the absolute freedom to pursue a variety of their military strategies and measures, such as those directed to liberation movements and surrogate armies, to the development of the weapons that are not covered in the agreements, and to establishing, or seeking the fragmentation of each other's alliance structures and overseas military facilities. For these reasons, such trends place arms control in the gravest danger of becoming an isolated policy, i.e., a policy that includes little to be controlled, and excludes from control all that is not covered. These isolating perspectives flow over into demilitarization so that the undertakings to guarantee a demilitarized arena are situational, as is arms control, and effective only if situations make the sharing of the


Klaus Knorr after summing up nuclear strategy in the 1960's, declares that new weaponry seems easier to develop than public order, and "the military structure to support it." K. KNORR, ON THE USES OF MILITARY POWER IN THE NUCLEAR AGE 176 (1966).

See R. CLINE, WORLD POWER ASSESSMENT (A CALCULUS OF STRATEGIC DRIFT) (1975) for strategic assessments in terms of perceived power, identified by population, territory, economic capability, military capability, strategic purpose and the will to pursue a national strategy applicable in time of war and peace. Arthur Larson, perceives the importance of law in the settlement of disputes and assurance of legal compliance. Larson, ARMS CONTROL, DISARMAMENT, AND NATIONAL SECURITY 423 (D. Brennan ed. 1961). While law is of great importance here, the inquiry in the present paper suggests that the policy functions associated with law extend its importance beyond these factors in the entire policy process. See also H. BULL, THE CONTROL OF THE ARMS RACE 68 (2d ed. 1965), which considers arms control through disarmament and arms control without disarmament. While the objective of arms control agreements is to diminish the arms race, Bull declares:

Two facts stand persistently in the way of agreement: the inherent uncertainty as to what constitutes an equal balance between opponents, and the determination inherent in all military policy to err on the safe side. The imprecise and constantly changing balance that exists in the real world, and in the calculations and anxieties of statesmen, must be translated into the precision and fixity of a treaty.

Id. Y. HARKABI, NUCLEAR WAR AND NUCLEAR PEACE 1 (1966) indicates that strategy is now a peacetime policy, and shifts from war fighting perspectives to preventive deterrence perspectives. While this is a matter that makes the question of "defense" more ambiguous, a strategy with nuclear weapons where neither side would want them used against it can be formulated:

Strategy has been transformed into the art of non-war, of the prevention of war. Formerly defined as the skillful use of violence, it has become the 'skillful non-use of force.' Prevention of war is achieved by the threat of violence, that is, by the threat of retaliation in response to a provocation. Strategy has changed from the art of employing violence into the art of threatening violence, which is the art of deterrence. Deterrence is the exploitation of a threat without implementing it. In other words, deterrence is exploiting the very existence of weapons without activating them.

Id. at 1. While the Catholic Bishops, in their Pastoral Letter of 1983, condemned a balance of power through deterrence and the use of nuclear weapons, they did not declare that the nuclear weapons were, per se, illegal, or not to be used if need be in retaliation to a first use. J. CASTELLI, THE BISHOPS AND THE BOMB 185 (1983).
demilitarization policy desirable.\textsuperscript{21}

Additionally, because arms control and demilitarization are continuing applications of policy, leading to the development of law, the potential of both the effectiveness of the existing agreements, and of making arms control serve ever more effectively the objectives relating to war deterrence, is entirely "defined" in the policy function of application. This policy oriented, law-projecting activity can be aided by the way in which the agreements are drafted, but beyond the drafting efforts, the rivals must consider the institutions, procedures and process that will enable them to give continuing and molding effectiveness through application.\textsuperscript{22} It is obvious that such agreements will be meaningless if they are drafted beyond the policies or expectations of the negotiating states.

Rather, application engages the shared policy activities identified in "compliance"—a lawmaking process in its own right. Compliance is not the process of monitoring and verifying the activities of other parties to the agreement as such, but extends beyond these unilateral efforts, first into the shared implications of confidence building measures, and more deeply, into promoting the policies of the agreements.

The fundamental policy orientation of compliance means that the

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\item \textsuperscript{21} See infra note 22.
\item \textsuperscript{22} Global order, it is stressed in this paper, must be shaped through control over the use of force matched against common interests. This orientation is critical for demilitarization because the effectiveness of such a form of force control is dependent upon the relations and stability of relations among the guaranteeing states. In this sense, there are similarities between neutrality, neutralization, zones of peace, weapons free zones and the like, and demilitarization. But, while global order must be shaped into effectiveness and through common interests and shared policies, the establishment of global orders by treaty may amount to attempts to establish by fiat what states have no expectation of achieving. The English historian, Correlli Barnett, traces the English policy between the two world wars, leading to primary and almost exclusive reliance on the security afforded by the League of Nations, as the natural outcome of a nation that believed too strongly in "moral force." He observes:
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Moral force, or righteous indignation, was in fact the only means the British left themselves with which to influence the course of world affairs. For their parsonical belief in the powers of moral reprobation was accompanied by an equally parsonical dislike of 'immoral' forms of pressure, such as bribery, threats or force. The British ruling classes deliberately rejected from their thinking the fundamental operating factor in international relations—power . . . . To take note that power existed, and was the prime mover, was denounced as a cynical and immoral wish to play 'power politics' . . . . Naturally enough, in the prevailing atmosphere, much weight was also laid on the moral influence of the League, speaking as the voice of the world's conscience. It appeared therefore that the success for the new system of international law and order depended on there being no lawbreakers. 'Covenants without swords are but words,' bleakly wrote Thomas Hobbes in the seventeenth century. The League of Nations possessed no sword. How could it? The League, as such, enjoyed no kind of independent existence and authority at all. The widely made assumption that it did, as when men spoke of 'support for the League' or 'loyalty to the League,' was founded on mass self-deception.
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parties must communicate with each other, even more than they communicate their intentions through threat and counter-threat.\textsuperscript{23} Communications that meet high standards of reliability and trustworthiness, as well as timeliness and completeness, are essential if the arms control process is to extend beyond the simple checks and balancing of identifiable weaponry and delivery systems, and into the decision processes themselves. Speculation of how the Soviet Union perceives the actions or decisions of the United States and vice versa even by the most gifted commentators are at best a risky undertaking because the security of the states is involved, as well as the security of the public order for which the major rivals are fully and jointly responsible.

While some communications may be signaled through actions, activities and past practices or analysis of their official statements and declarations, these are not sufficient. Compliance to be effective cannot be simply the traditional diplomatic intercourse or negotiation process because the implications of security, an element of national power, appear across too wide a spectrum of a nation's activities. Moreover, communications are embraced in a competitive process and we are compelled to analyze not only the process, but its limitations and potentials against the claims, counterclaims and tolerances among the rivals and the global community. Regrettably, the necessity for high standards of communication has been the critical problem that states have faced in their recent practice and history, where wars and arms races can be traced to misinterpretation.

Beyond present compliance, a further problematic consideration is that, also like arms control, demilitarization can be reversed. Once a zone is demilitarized it does not lose its strategic character. The Rhineland, for example, demilitarized by the Treaty of Versailles,\textsuperscript{24} lost this

\textsuperscript{23} See infra notes 113-16 and accompanying text.

\textsuperscript{24} Demilitarization of the Rhineland was established by the Locarno Treaty, Oct. 16, 1925, 54 L.N.T.S. 291. Article 1 incorporated the stipulations of the Versailles Treaty. Articles 42 and 43 established the demilitarized zone in the Rhineland and collectively and severally guaranteed the demilitarization of the zone by the parties. Id. at 293. Germany justified the militarization of the Rhineland by arguing self defense, arising from the threat posed by the treaty of alliance between France and Russia of 1935, and further arguing that it was only reclaiming German territory. See 1 B. Ferencz, ENFORCING INTERNATIONAL LAW: A WAY TO WORLD PEACE 73-74, 375 (1983). Ferencz provides relevant parts of the Official Journal of the League of Nations with the debates on the reoccupation by Germany, ending with the resolution of the Council of the League of Nations instructing the Secretary-General of the League to notify the signatories of the Treaty that Germany had violated the Treaties of Versailles and Locarno. Germany's action, according to Maxim Litvinov, speaking for the Soviet Union, was that of "a country convinced of the injustice of its case, [that] confers upon itself, first the functions of a judge in its own cause, and then those of a sheriff's officer." Id. at 379. The President of the League of Nations Council saw the matter in terms of the global order processes and their impairment—the need to cooperate in "creating a true European solidarity." Id. at 383-84.

Germany's reaction through von Ribbentrop was that Germany must reject the resolution,
guarantee once the European allies signaled their intention not to oppose the reentry of German military forces into the area.\textsuperscript{25} Areas deprived by agreement of their military strategic value may recover that value if other strategic elements appear or are deliberately promoted by the guaranteeing states.

Therefore, arms control policies aimed at weapons, delivery systems, or their testing, production, research and deployment are also dependent upon the contracting states adopting affirmative measures to guarantee the deterrence equilibrium that is presupposed in arms control agreements.\textsuperscript{26} They are designed around an exchange of promises among the potential rivals, and they presuppose a shared strategy designed to make their deterrence balancing efforts operative. That strategy is in effect a public order whose effectiveness and enforcement is dependent upon implementing measures whenever the balance or balancing process is put in question or subjected to destabilization.

As an example, the major agreements such as those of the SALT, addressing the major nuclear weapons in terms of the ambiguous notion of "strategic weapons," contain a complex but not a comprehensive compliance system. The parties may dispute about compliance, and even about their verification and monitoring processes, and they have agreed to take these disputes to a standing consultative commission.\textsuperscript{27} But these procedures and this institutional arrangement does not guarantee compliance. The parties can carry out other threats to ensure compliance, but sanctioning measures are notoriously tenuous. For example, they can denounce each other's conduct, turn to international public opinion, introduce their controversies into the media, invoke the "supreme interest clause," and repudiate the agreement, or turn to other diplomatic or even economic sanctioning measures. But, between states of equal power, none of these measures has been particularly effective.\textsuperscript{28}

The arms control agreements are dependent and operative through awareness, a "fear"\textsuperscript{29} of the intolerable destruction that the major nu-

\textsuperscript{25} See generally I B. Ferencz, supra note 24, at 73-74.
\textsuperscript{26} See infra note 34.
\textsuperscript{29} "Fear" as the basis of order is decried by a labor leader, George Schilling: Fear is not the mother of progress and liberty, but oft times of reaction and aggression. Your agitation inspires fear; it shocks the public mind and conscience and inevitably calls forth strong and brutal men to meet force with force. By your mistaken methods, you have
clear weapons would create. Because deterrence is dependent upon the extra-agreement element of "fear" with regard to the use of nuclear weapons, all of the arms control agreements that do not have this linkage are tenuous. For example, controls over chemical and biological agents, over environmental modification techniques, radiation, and conventional weapons are imposed upon weapons with potential or actual military utility. These agreements have left open the military potential that lies in improved or modernized weaponry, as well as in stockpiles for use, once the arms control agreements are suspended, terminated or repudiated, through provision for maintaining stocks for "peaceful purposes." Because such purposes include the preparation of armed forces and citizenry to respond to or be immunized to attacks with such weapons, the amounts that may be stockpiled for these purposes are sufficiently substantial as to pose a military threat should hostilities break out.  

Arms control policy under the current arms control agreements and perspectives depends for its effectiveness upon the deterrence equilibrium. But, as already mentioned, this leads to an underlying need for a shared order and policy between the rivals as the guarantee. Short of that guarantee, they can at best face each other with equivalent amounts of power and force, checking and balancing as best they can under the regulatory mechanisms of "arms control" the continuously changing strategic conditions. When these perspectives are limited to the weapons themselves, the strategic conditions tend to be addressed in terms of the numbers (numbers of weapons, warheads, or quantities of destructive force reposed in the warheads, in the numbers of delivery systems but taking account of the effectiveness, survivability, vulnerability and the costs of these systems). But these policy perspectives are those referred to as "technical" or "military," and tend to leave out the "political" perspectives in which arms control policy and arms control agreements are more clearly perceived as strategies and the strategic instruments for achieving strategic advantage or strategic opportunities to be exploited at

the misfortune of repelling those you should attract, of antagonizing where you should unite in mutual sympathy and cooperation for common good.


31 The variety of delivery systems leads to the problem of monitoring or keeping track of one's rival: while this is referred to as the problem of verification, which includes both monitoring data, particularly the "relevant" data to the agreements, and evaluation of the data, i.e., the violation if any, and the weight of the violation, the more critical question is that of compliance. Because compliance is in part a lawmaking, law-projecting, and law enforcing and strengthening activity, and because the rivals sense that compliance extends deeply into constraints upon their freedoms, or, in the alternative, upon the preservation of their freedoms, compliance becomes the policy oriented issue that is fundamental to effective arms control policy. A longer paper upon compliance considered against these perspectives is being prepared.
the expense of one's rivals. Moreover, emphasis is upon deterrence that is increasingly based upon the reluctance of the rivals to consider the use only of the major nuclear "strategic" weapons in their military strategy, coupled with a growing interest in designing and probing military measures in which the risks or likelihood of hostilities escalating to the major weapons is reduced to "rational" proportions.

Moreover, deterrence, in a policy and decision making framework, with regard to war itself, is simple, until one experiences the conditions in which it applies and distinguishes these from what can so easily be put on paper. Von Clausewitz, in examining the decisions of the military

32 See Dyson, The Game of the Guerrilla, 15 YALE LIT. MAG. 71 (1984). According to Dyson, the Soviet Union has established a strategy of manipulation—a game—in which the rules of the game are formed by the Soviet Union, acting as "the manipulator," with the United States as "dupe." The prize of the game is the "victim-state," and the "staging area states" are states located near the victim state, but satellites of the manipulator. Within the victim state the "revolutionary front" establishes the casus operandi, replacing the casus belli. Id. While the activities pursued amount to a civil war within the victim state, the term "war," and hence the legal and policy implications of a war, are avoided. Id. With either the "short game"—a quick takeover, and the establishment of a new Soviet satellite—or with the "long game," in which the takeover requires manipulation through propaganda, protracted conflict through support of the revolutionary fronts, and so on, ultimately leads to the United States withdrawal, pressed by public opinion. Id. at 77. Dyson argues that the game exclusively benefits the Soviet Union, enables the country to benefit from its revolutionary zeal and more importantly the revolutionary experience of the 20th Century, and is legitimatized as a "war of liberation," aimed at the evils of racist, colonial or alien regimes. Id. at 80. Thus, a new means for aggression is established, through guerrilla warfare, and through the myth that guerrillas cannot be defeated on their home territory. Id. Dyson argues that we must recognize aggression for what it is, participate where we must in ending the game, because this is the only means to end aggression. Id. at 84-85.

33 Deterrence according to the major writers must include a minimal level of rationality—the shared perspectives that the rivals are going to act "rationally," within a framework where both sides can appreciate as to each rational perspectives as to the risks, costs, benefits and so on that go into the calculus of using force, the possibilities of escalation into nuclear warfare, and so on. See T. Schelling, The Strategy of Conflict (1960). Schelling considers these elements of a threat oriented and threat opposing strategy as a strategy shared by the rivals and shaped through the interdependence of the adversaries' decisions and on their expectations about each other's behavior. Id. at 83.

34 C. Von Clausewitz, On War 120 (M. Howard and P. Paret eds. 1976). Von Clausewitz indicates that in war fighting the goal is to subdue the enemy forces so that they can no longer fight, id. at 90, and that a demilitarized zone that remains a non-strategic zone can be maintained during combat as long as the zone is not needed for these objectives. Moreover, the elements in warfare that contribute to success can be summarized as the "strength of will," and the elements that "make up the climate of war," are then "danger, exertion, uncertainty, and chance." Id. at 104. These unknowns make the possibility of ascertaining when a zone becomes strategic during wartime or hostilities very different than that of ascertaining its strategic character during peacetime. During peacetime the zone may become strategic for assuring strategic advantage, for maintaining the deterrence equilibrium, or for strategic denial, but these perceptions are against deterrence itself, unless, of course, deterrence and defense are treated as inseparable. See generally Y. Harkabi, supra note 12. For the theory that a "game" is played, designed by the Soviet Union, to capitalize on the deterrence equilibrium, using surrogate armies, see Dyson, supra note 32, at 71. Sun Tzu, the ancient Chinese strategist, advised divide and conquer strategies in peacetime and in war, avoiding
commander in conducting strategies during hostilities, referred to the unknowns and uncertainties that defied comprehensive theory as "friction": "[T]he tremendous friction, which cannot, as in mechanics, be reduced to a few points, is everywhere in contact with chance, and brings about effects that cannot be measured, just because they are largely due to chance."

"Strategic deterrence," i.e., deterrence relating to the major nuclear weapons, but not the major conventional weapons or weapons of mass destruction, has a number of special properties that make its problems relatively easy to conceptualize. In particular, when they are at the strategic level, "the objectives of both players are clear-cut and have remained constant for many years. A single objective—preventing a strategic strike by the other party—is of overriding importance." When raised to the highest level of abstraction and generality, it has been claimed that deterrence is simply the persuasion of one's opponent that the costs and/or risks of a given course of action he might take outweigh its benefits. Here, as with the friction, the changing strategic conditions and strategies among the rivals or other players lead to situations that generate enormous complexity. But the most significant element about deterrence is that created by the major nuclear weapons, because this has made the strategies of the major rivals "peacetime" strategies, embracing their national power on a continuous, opposing basis, but operating through threats and counter-threats. Deterrence came into being with the advent of strategic bombing because it became possible to hurt an enemy grievously before (or without) destroying his military capability. With the opening of this possibility, the threat to hurt him could be separated, in fact and therefore in theory, from the threat to engage and destroy his forces.

With the changing strategic conditions, however, the rivals soon faced three levels of deterrence. The first level is that of checks and balancing of the strategic nuclear forces and the shared policy in avoiding a strategic strike (i.e., in the larger sense both a strategic first strike, or any strategic strike). Limited wars presuppose bargaining, negotiations and communications among the rivals so that the wars would end with both intact and able to overcome the differences that the wars presumably ad-

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35 C. VON CLAUSEWITZ, supra note 34.
37 Id. at 50.
38 Id. at 48.
39 Id. at 21.
dressed. Such wars lead beyond the more simplified notions of avoiding strategic first strikes to problems of greater complexity (decisions are not predictable) and to difficulties in measuring the relevant variables. With regard to these wars "deterrence . . . cannot be implemented by threatening a specific level of damage; and [they] do not involve a single kind of military power." 40

Selection of the proper military means in each situation is complicated by uncertainty about tactical requirements, as well as the "necessity to subordinate tactics to considerations of escalation control and to the political objectives of the conflict." 41

A second level of deterrence is that which is below the strategic. This level is different from the strategic level in that it uses means other than the threat of inflicting overwhelming military costs. This level is based on influencing the opponent's political calculus as to the risks and benefits of his potential actions. 42 "The operational criteria for selection among means are dominated not by technical or tactical but by diplomatic and political factors." 43

A third level of deterrence is that of crisis and crisis-preventive diplomacy. 44 When this level is encountered, the rivals introduce their strategic instruments, diplomatic, economic, ideological as well as military in such combinations and in such designs as to effectuate their purposes. These, too, are characterized by numerous and complex diplomatic and political factors.

There are hard decisions as to which means to choose, military, diplomatic, political, economic, covert, etc. 45 "In these situations, the requirements for implementing deterrence are much less a matter of acquiring, proving possession of, or using raw military capabilities than a matter of demonstrating concern, motivation, and commitment, and/or of communicating intentions." 46

Pursuing this theme further, in the third level of deterrence "attention focuses upon their intentions." 47 Objectives and means become more complex. Other policies appear "that intersect and overlap a nation's deterrence policies." 48 Calculations are frustrated when the crises are prolonged; the assessment of the effectiveness of deterrence policies placed in doubt. The variables may increase to such amounts as to make

40 Id. at 51.
41 Id.
42 Id.
43 Id. (emphasis added).
44 Id. at 51-55.
45 Id. at 50-51.
46 Id. at 52-53.
47 Id. at 53.
48 Id. at 54.
calculations and theory applying calculations uncertain. The problems raised are "context-dependent," ranging deeply into perceptions and perspectives of the players.49

The interaction of deterrence goals, foreign policy processes, defense and security policies, and the complex policy networks that make the applicable law largely a policy oriented, emerging process is apparent in the arms control context. The strategy of deterrence demands that the first threshold (avoiding a strategic strike) is both a "given" with regard to the relations of states and also a "necessity":

First, the new strategy of deterrence must use a threat of intolerable destruction, which as a threat must be absolutely effective as seen in the eyes of the threatener. Deterrence as a strategic policy only has meaning when people are confident that the retaliatory component of this policy will never be called on to function.50

Where arms control policies fall short of regulating the use of force, they permit the spill over into other areas not within the "control" of strategic deterrence and its equilibria. Consequently it is evident that the nations today must face the possibility that even the strategic equilibrium might be at stake because there is the possibility that it might no longer operate through the promise of intolerable destruction.51 This can only lead to the necessity of pursuing other alternatives, and in particular those relating to more effective balancing through foreign policies.52

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49 The problems of arms control, regulation of the use of force, and in general those involving the relations among states defy formulation. They are what two commentators call "wicked" as opposed to "tame" problems. See R. Mason & I. Mitroff, CHALLENGING STRATEGIC PLANNING ASSUMPTIONS: THEORY, CASES, AND TECHNIQUES 3 (1981). Wicked problems are those in which there is no definitive formulation of the problem itself; where the relationship between problem and solution is direct, because the solution "defines" the problem; where criteria cannot be advanced to determine correct or false solutions; where there is no finality in solving the "problem," because only new consequences must be faced, again as "wicked problems"; where there are no readily operational means for solving the problems; where explanations proliferate as we consider what ought to be the outcome and what is; where every problem becomes a "symptom of another problem," and each solution is a "one shot operation," because experimentation is not possible, and where accordingly each is unique. The approach taken in this paper is that the problem is replaced by a framework of inquiry, so that through controlled efforts at inquiry, the problem, or better, the perspectives, situations, strategies, participants, claims and outcomes are examined on a continuous basis, with a major objective being that of clarification.


51 See infra note 58.

52 See M. McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 261 (1961). Sanctioning goals and measures interact, and include prevention aimed at preventing the disruption of public order, deterrence concerned more directly with threats to public order, restoration of public order, rehabilitation and reconstruction, all of which are identified with strengthening public order after disruption. Id. at 287.

The same theme pervades the present study in which we speak of a shared strategy in deterrence
Because arms control policies intersect with foreign, defense, and security policies, the analytical framework of arms control must absorb the impacts of each of the other policy areas and assess them together. Deterrence is an instrument of foreign policy. As such, "its uses and limitations are very much affected by the nature of that foreign policy and by the sophistication and skill with which policy-makers use all instruments of policy, of which deterrence is but one, on behalf of national goals." Some form of "balancing of power" might be appropriate to provide for order-oriented checks and balancing to replace those in the weapons balancing process, or at least to replace the extensive and intensive devotion to arms control balancing as the end-all of stabilizing relations between the United States and the Soviet Union. Whatever balance of power means, it will not lead to a durable peace unless it is coupled with the further development and strengthening of institutions of international order. The U.S. must find a domestically acceptable image of world order, acceptable also to other nations, which is based on all of the mechanisms of international influence.

The policy orientation of arms control agreements now becomes clear: it is an orientation that necessarily requires a high level of flexibility in the agreements so that the players can accommodate their changing relations on a continuous basis. While such agreements can establish the ground rules for restraint, they are dependent upon the perspectives of rivals engaged in a competitive power process. Because such agreements are the outcome of the various stages in the relations among major states, it is more likely that those agreements are not the instruments to affect the perspectives of these states. They are more likely the reflection of those perspectives at a given stage in their relations, while the practice of both states shows, increasingly, that they have decided to turn to policies, measures and capabilities associated with defense. Moreover, that practice further shows that in their competitive relationships the major rivals do not intend to forgo the use of all of the strategies at their disposal (including military strategies) either to achieve exclusive strategic goals or, less frequently, the inclusive goals of global order. As this inquiry indicates, the fundamental challenge for the superpowers is to face the underlying value demands among peoples for human dignity, the cornerstone of a preferred global order.

— also the means to provide some economy in maintaining the balance, to the extent that the parties share in their strategy and by sharing reduce the costs of maintaining their mutual security. Economy of force is one of the "principles" of war, condensing for military commanders the experience of battlefield actions, and involving care in strategic planning and judgment by both political and military leaders. See DEPT OF THE ARMY, PUB. FM 100-1, at 15 (Aug. 1981).

54 Id. at 590.
III. THE ANTARCTIC FRAMEWORK

Conceptually, as long as Antarctica, along with the demilitarized or potentially demilitarized arenas, remains a nonstrategic arena, it may enjoy demilitarized status. This perspective is the counterpart of the concept of military utility with regard to weaponry; the arms control agreements over weapons can be maintained and promoted only as long as the parties either agree that the weapons lack military utility or, in the less credible situations, promise and are willing to refrain from invoking such weapons. With respect to both of these subjects, the controls are imposed over things or activities under conditions where those controls remain operative as long as the parties are induced to maintain them. If the strategic nuclear weapons establish an objective basis for control, emanating from mutual awareness of intolerable destruction, then provided that perspective is shared by the rivals, it will remain the operative element of deterrence. Once the operative element to deterrence is foregone by the parties, they are left with an agreement that can readily be terminated or denounced. They are also left with undertakings that can be gradually evaded through subterfuge, interpretation, or application (eventually becoming practice or an accepted course of conduct between them).

Demilitarization is then more tenuous than that of the arms control agreements for strategic nuclear weapons, and is more closely associated with a dependence upon the relations of the parties, i.e., more akin to the arms control agreements than the SALT agreements. The provisions of the agreement however establish a framework for order. For analytical purposes, the provisions are placed in separate categories as follows: (a) the undertakings to establish demilitarization in Antarctica primarily through self-imposed restraints upon engaging in military activities, in testing weapons of any kind, and in refraining from nuclear explosions of any kind;\(^55\) (b) supplemental arms control and demilitarization provisions through a variety of undertakings relating to compliance and patterns of conduct concerning territorial claims, inspections, exchange of data on a cooperative rather than a reciprocal basis;\(^56\) and (c) further undertakings for inspection (necessarily implying monitoring and overseeing) activities relating to activities on the continent, consultative meetings expected to further processes of joint decision and policy, and dispute settlement processes based upon article 33 of the United Nations Charter, but coupled with an agreement, at least, to invoke the International Court of Justice.\(^57\)

In some respects these provisions are hortatory, because there are no

\(^{55}\) The Antarctic Treaty, *supra* note 3, at arts. I, V.

\(^{56}\) *Id.* at art. III.

\(^{57}\) *Id.* at arts. VII, IX, XI.
sanctioning processes to compel states to behave along cooperative patterns. This would be tantamount to ordaining their relations along prescribed paths, clearly inconsistent with their expectations and past practice. States may choose to establish and abide by ordering processes, but this presupposes that the "rationality" they expect from each other is the same. It is abundantly clear in their practice that "common interests," "common goals," "shared policies," "reasonableness" in general or in behavior, and even the perceptions of "reciprocity," or "reciprocal treatment" are all at best ambiguous, and shaped only through long and substantial practice.58

A. The Treaty Itself

The relevance of the Antarctic provisions to the strategic perspectives associated with establishing the continent as a strategic arena needs to be stressed in this inquiry. The arms control provisions in the Antarctic Treaty include articles I, V, VI, VII, X and XI.59 These undertakings support arms control and stabilization through a variety of means.60 Articles I and V are particularly pertinent to establishing the demilitarized area. Article I of the Antarctic Treaty supports demilitarization in part by affirmative elements such as those relating to the freedom of states to engage in scientific and associated studies, and in joint undertakings to determine the future of enterprise and pollution control.61 These are not affirmative measures whereby the contracting states

58 Demilitarization and the related measures of arms control are posited upon the assumptions of rationality: states and their decision makers are assumed to act rationally; that is, to the extent of exercising judgment with respect to the use of the weapons under control. These assumptions are subject to conditioning elements: perspectives that engage the potential use of nuclear weapons that would fall short of intolerable and widespread, long lasting and severe destruction might open the way to the use of such weapons, and then the escalation to further, tolerated and reciprocal destruction is increasingly probable. See W. Barrett, Irrational Man (A Study in Existential Philosophy) (1958). With the decline of religion, and the adoption of new faiths in collectivized or totalitarian doctrine such as communism, where that faith dies, there is the possibility of violent reaction. See McDougal & Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, in Studies in World Public Order 769, 773 (1960). The essay develops a framework for asserting and adjusting claims among states, balanced out through standards of reasonableness. In the context of the law of the sea, the freedoms of the seas, and the testing of the hydrogen bomb, they observe in language also useful to this paper: "[f]or all types of controversies the one test . . . is . . . what, considering all relevant policies and all variables in context, is reasonable as between the parties . . . ." Id. at 778.

Through the operation and application of this standard upon the claims processes, through reciprocal interactions, through the establishment and shaping of mutual tolerances, and accordingly through the processes of unilateral claims among states and reciprocal tolerance, law itself develops according to McDougal and Schlei. Id. at 773. Customary international law thereby evolves through the practice of states.

59 The Antarctic Treaty, supra note 3.

60 Id.

61 Id. at art. I; see also Dep't of the Army, supra note 52, at 4.
will actively and specifically guarantee that the area will remain demilitarized. Negative undertakings are set forth; the contracting states undertake to refrain from various military activities and from the testing of weapons or conducting nuclear explosions in article I and V.62

Article II serves arms control through a supportive feature because it makes scientific investigation a primary goal of the contracting states, and proposes that the results of scientific studies be exchanged on a cooperative basis.63 While the practice of the United States and the Soviet Union may lead to scientific studies that relate to potential military uses and activities, it is evident that if this article is to serve order-promoting objectives between them, both their studies and the data exchanged should be on the freest and most open basis. Article III affords detailed support to these objectives.64 Should they be the primary goals, and reasonably approximated, then there will be a good opportunity for Antarctica to be free of tensions and competing claims. Withholding such data, or the pursuit of studies for strategic advantage leading to clandestine research, would tend in the opposite direction.

The contracting states have not expressly preserved their rights with respect to the use of force. This, however, is not an ambiguous element in the Treaty. The United Nations Charter is expressly included in numerous arms control agreements,65 notably with regard to demilitarized areas.66 But the Charter is incorporated into the relations of states wherever those relations are established, and applies to their transnational activities without exception.67 Accordingly, through articles 2(4) and 51, and related articles, the Charter preserves the right of self defense, and includes all the rights under customary international law that make the use of force permissible.68

This can only mean that the parties have not chosen to give up this right, nor even introduced a policy to refrain from the use of force subject to express reservations relating to the reserved right to self defense as with the Kellogg-Briand Pact.69 The full implications of the rights of self-defense can appear only in the practice of states responding to and

62 The Antarctic Treaty, supra note 3, at art I, V.
63 Id. at art II.
64 Id. at art. III.
66 Id.
67 U.N. CHARTER arts. 1, 2.
68 Id. at arts. 2(4), 40, 51, 52, 53.
69 Renunciation of War as an Instrument of National Policy [The Kellogg-Briand Pact], Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57. A further possibility is that the Parties to the Antarctic Treaty may impose a separate treaty regime either by express agreement or simply by implication. The result would be the establishment of a separate legal order applicable to the continent governing the use of force. This of course is nothing more than the development of the customary international law itself, or the imposition of the United Nations Charter, or both, upon the
reflecting the conditions that cause them to perceive threats to their security. Moreover, those full implications cannot be confined, except perhaps through positive or affirmative efforts to reduce the situations from those of a threat to those of a reasonable, perhaps high, degree of reliance and confidence among states. We cannot predict, but we can reasonably assume, that should the contracting states determine that Antarctica provides an arena in which efforts relating to self-defense are required, then they will act accordingly. And under these conditions they will recognize as legal, under the Treaty, their activities relating to weapons testing, military exercises and the like, modifying the Treaty through amendments or otherwise.

Demilitarization in Antarctica is primarily established in Articles I and V(1) of the Antarctic Treaty:

**Article I**
1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons.
2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

**Article V**
1. Any nuclear explosions in Antarctica and the disposal there of radioactive material shall be prohibited.

Demilitarization under these provisions raises the possibility that the permitted military personnel and military equipment, though incontinent, and has the added feature that it would be applicable to all states, and not limited to those that are party to the Antarctic Treaty.

70 The Antarctic Treaty, *supra* note 3, was signed in Washington on December 1, 1959, and entered into force June 23, 1961. A number of states have ratified with a statement declaring their policy or understandings. See DEP'T OF STATE, TREATIES IN FORCE 201 (Jan. 1, 1984).

71 *See generally* B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975). Claims for a “definition” of demilitarization can only accommodate the policies—usually the opposing policies—of competing states, and the policies that may evolve as their relations, or as their “vital” or “supreme” interests command. Aggression conveys the supplementary idea established in the Kellogg-Briand Pact, *supra* note 69. The preamble to this pact declared that the parties were “convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process.” Article I declared that they condemned “recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.”

The United Nations definition of aggression is limited to providing a form of advice and counsel to the Security Council pursuant to its competence under article 39 of the Charter to determine “the existence of any threat to the peace, breach of the peace, or act of aggression.” U.N. CHARTER art. 39. The role of the International Court of Justice in these determinations has not yet become clear, though the Court could be invoked to determine the reach of this provision if the issue were raised among states.
tended for neutral "scientific research or for any other peaceful purposes," will necessarily entail development that is neutral as to policy or policy goals. However, the outcomes may be used for non-neutral military purposes if the parties choose to do so. The interaction of technologies for the sciences and for military activity cannot be divorced from each other, nor by agreement alone effectively monitored and controlled.

Demilitarization for Antarctica, or for any other arena, must be shared among the parties to the agreement, since they must guarantee and monitor that status. While demilitarization may be clearly associated with setting aside an arena for "peaceful purposes," states reserve for themselves the right of self-defense and other rights for the use of force under the United Nations Charter. Thus, demilitarization during armed conflict is the subject of special agreements among states, and such agreements would be required during war, notwithstanding the Antarctic Treaty.

In addition, demilitarization in Antarctica cannot be separated from other policies adopted among states to govern their relations, including arms control. Demilitarization is expected to serve similar goals to arms control, and like arms control in general, its effectiveness depends upon rivals foregoing their competitive claims with respect to the matters to be controlled. These objectives were set forth by Richard Nixon in his book *Real Peace.* Nixon first argued that "detente" with the Soviet Union—the release of tensions—was dependent upon deterrence, that is, the will to fulfill U.S. goals in the maintenance of peace:

> War can come from five principal sources. It could result if the military superiority of an aggressive power were to go unchallenged. It could result if a leader were to miscalculate what actions by him would provoke a military response from his opposite number. It could result if the major powers were drawn in on opposite sides of a war between minor powers. It could result if a nuclear missile were to be launched accidentally. It could result if a madman were to capture power and embark on an aggressive war.

Recommending that the United States must seek as its "first goal" the restoration of military balance (i.e., to assure deterrence), Nixon noted that arms control might then be pursued, with the understanding that it "cannot be separated from the question of national security." An arms control agreement to reduce the risk of war must "advance six goals":

> First, it must create a military balance between the superpow-

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73 *Id.*
74 *Id.*
75 *Id.* at 37-39. Nixon observes as to the six criteria that arms control agreements will not contribute to peace unless the political differences that can lead to war are reduced. Hence linkage with aggression—the SALT II and Afghanistan—was crucial in action "not just in theory." The
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Second, it cannot allow either superpower to have a credible first-strike capability. Third, it must provide the means for each side to verify the compliance of the other. Fourth, it must restrict the testing of new missile technology that would destabilize the strategic balance. Fifth, it must reduce, not merely limit, the nuclear arsenals of the superpowers.

Sixth, it should allow for replacing fixed, land-based, multi-balances in arms control agreements must be based on "equality," but equality in numbers is not the sole criterion. First strike weapons must be denied and prohibited. Technology can be shared, but only if "true" arms control is achieved (i.e., satisfying the six criteria). Compliance may ultimately require on-site inspection.

Soviet commentators and officials rarely mention deterrence with respect to arms control. The writings of their military officers emphasize defense almost entirely. The highest officials stress the general objective of reducing the arms race in outer space and elsewhere, preventing the "militarization of space," and attack the United States for proposing chemical weapons disarmament. See Chernenko, Replies to Pravda on Arms Race, 22 ATLANTIC Q. 10 (1984). The perspectives on militarization may tend to be confused with "militarism" in general, and confuse us in assessing the risks of war in social orders that are readily and rapidly mobilized for war and that possess fully organized military forces that have been tested through countless exercises. See Radway, Militarism, 10 INT'L ENCYCLOPEDIA OF THE SOCIAL SCIENCES 300 (1968).


As used in this Act—

(a) The terms "arms control" and "disarmament" mean the identification, verification, inspection, limitation, control, reduction, or elimination, of armed forces and armaments of all kinds under international agreement including the necessary steps taken under such an agreement to establish an effective system of international control, or to create and strengthen international organizations for the maintenance of peace.

From a policy perspective section 2, describing the "purpose" of arms control and disarmament for the United States, is also important. These two sections illustrate the complex interactions between the branches of the United States government and the perspectives of a government that perceives arms control as a separate and perhaps somewhat autonomous policy activity promoted through an agency.


The competitive processes among states have been intensified through the technologies and increased organizational capabilities at their disposal. Such processes extend far back into the relations among political entities, and find their source, in part, in the reach for scarce resources, for controls over persons and territory, and for establishing the bases of power for the purposes of security. See H. LASWELL & A. KAPLAN, POWER AND SOCIETY (1950). Power presupposes a "deference value," and perhaps also presupposes controlling influence over others. "The experiential data of political science are acts considered as affecting or determining other acts, a relation embodied in the key concept of power. Political science, as an empirical discipline, is the study of the shaping and sharing of power." Id. at xiv.

The German government, prior to the first World War, perceived itself as a rival and com-
warhead missiles with mobile, single-warhead ones. This would eliminate first strike capabilities on both sides.

While it is self-evident that this program for arms control and deterrence would necessarily entail a substantial restructuring of perspectives and attitudes between the United States and Soviet Union, the Nixon "agreement" is seemingly a framework for effective arms controls, and as a framework would offer guidelines as to whether the actions of either side are stabilizing or destabilizing. If the framework were given further content, then arms control policies, agreements and measures—including demilitarization of Antarctica—could gradually

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81 Trends in Soviet internal or domestic policy clearly impact on the foreign policy of that state. Ulam, Stalin-Thirty Years Later, The Christian Science Monitor, Mar. 4, 1983, at 23, col. 1. Adam Ulam suggests that the foreign policy component is imperialist, and the domestic component authoritarian or totalitarian. There appear to be vulnerabilities however in each component.

82 See Ford, The Soviet Union: The Next Decade, 62 FOREIGN AFF. 1132 (1984). Ford first considers the extraordinary use by the Soviet Union of the political and legal principle of "peaceful coexistence." The Soviets use it as a diplomatic and ideological strategy and combine it with the threat factor of military support. This principle was formally adopted in a bilateral agreement between the United States and the Soviet Union in 1972. See Basic Principles of U.S.-Soviet Relations, DEPT STATE BULL. 898-99 (May 29, 1972). Brezhnev stated at the time of signing that the struggle for "peaceful coexistence" "in no way implies the possibility of relaxing the ideological struggle." Article 24 of the Soviet Constitution of 1977 cemented the foreign policy objective that the principle would promote the struggle of peoples for national liberation.

83 Nixon concludes his review of present affairs:
The Soviets' goal is to dominate the world. They want to win, but without war. We also must try to win, but through peace. Our goal should be to engage them in a peaceful competition between our systems that will foster peaceful change in theirs . . . . Our strategy for peaceful competition affects all of our global relationships. We must unify the economic power of the industrial democracies so that we gain political concessions from the eastern bloc in exchange for our economic cooperation . . . . Unfortunately, the realities in Eastern Europe force us to accept the fact of Soviet hegemony, but we must never agree to the principle of it. We cannot set the liberation of the captive nations as our short-term policy goal, but we must never cease to proclaim it as our long-term goal.

R. NIXON, supra note 72, at 95.

84 Soviet strategy at the highest level can be studied through the documentary records of the Congress of the Communist Party of the Soviet Union. Their strategy of pursuing Soviet policies through liberation movements, and through wars of liberation, was enunciated clearly, for example, in the report by Leonid Brezhnev to the 26th Congress. See Report by Leonid Brezhnev to the 26th Soviet Congress, 8 CURRENT SOVET POLICIES 8 (1981).

85 J. TRISKA & R. SLUSSER, THE THEORY, LAW, AND POLICY OF SOVIET TREATIES 248-83 (1962) discuss Soviet treaties of non-aggression, neutrality and peace. The non-aggression pacts made before World War II were either denounced or abrogated by the Soviet Union. These agreements were based upon the implementation of the Kellogg-Briand Pact, supra note 69, and were made as part of the Soviet "struggle for peace."

86 The erosion of demilitarization may occur in differing ways depending upon the nature of
be assimilated, so that the change in perspectives, though gradual, would be identifiable and manageable.\textsuperscript{87}

The present inquiry pursues the alternative themes suggested here. One approach for arms control involves the possibility of pursuing a public order either between the major rivals or in the global order sense, following the attempts that led to the League of Nations and the United Nations.\textsuperscript{88} The other theme, that of maintaining at least minimum public order whose security will be protected against the outbreak of nuclear war and the ultimate destruction of that order, is a separate, but current, approach, in which the United States and the Soviet Union are able only to provide military checks and balances against each other’s actions, communicated through threats and counter-threats. This larger policy environment is the environment in which demilitarization of Antarctica, or of the high seas, or outer space, must be considered, and in which realistic assessments of the claims of the two rivals must be made as they compete against each other.

Article IV contains potentially harmful impacts with respect to stabilizing Antarctica against becoming a strategic arena.\textsuperscript{89} It seemingly covers the possessory and territorial claims of the parties while the Treaty is in force. But it attempts to condition the legal effects or impacts of state practice; i.e., it seems to claim that while states may engage in activities that might through custom and practice be perfected into possessory claims, for the purposes of the Treaty at least, they will not be so treated. Moreover, the article cannot affect what states might do during the review or amendment processes, or the possibility that they might

demilitarized arenas: militarization of outer space is almost inherent in the strategic competition and the strategic arena to be found there; militarization of Svalbard (or Spitzbergen) might occur if the Soviet presence became so large as to be controlling; militarization of Antarctica might occur with increased presence of national stations, coupled with the reassertion of territorial claims, or with the competition over resources, or all of these; and militarization of border areas as with the Rhineland through claims such as the Germans made of self-defense. The overall relations among the states today evidence the increased use of surrogates, and also the changing strategic military instruments applied with respect to changing perspectives of extraterritorial or strategic interests, so that demilitarization could be affected by organized groups, though this is less likely in Antarctica.

\textsuperscript{87} One authority in the United States believes that the Soviet Union does not share United States' goals with respect to arms control and disarmament, but sees the possibility of using the instruments of that policy as strategic instruments to further Soviet goals relating to communism. \textit{See} T. \textsc{Wolfe}, \textsc{Soviet Strategy at the Crossroads} (1964).

\textsuperscript{88} Many of the groups and important figures that have supported world government have been identified as utopians or idealists whose plans would lead to illusion, and increase the possibility of tension and warfare. More recently, these individuals have been described as the "coercive utopians," i.e., those whose "programs, if implemented, will accelerate the decline in our standard of living, erode our democratic system, and may well result in the loss of genuine national dependence." \textit{See} R. \textsc{Isaac} \& E. \textsc{Isaac}, \textsc{The Coercive Utopians: Social Deception by America's Power Players 2} (1983); \textit{see also} W. \textsc{Kuehl}, \textsc{Seeking World Power} (1969).

\textsuperscript{89} The Antarctic Treaty, \textit{supra} note 3, at art. IV.
reject the treaty if they believe that their interests in establishing territorial or substantial possessory claims outweigh their interests in preserving the arena as a "global commons." 90

Article V clearly forbids nuclear explosive devices, whether exploded for peaceful or military purposes. 91 It also establishes indirectly the possibility that nuclear power plants, or the use of nuclear power in general, in the area must be precluded. 92 It is ambiguous with respect to nuclear powered vessels or submersibles. Article VI limits the area covered by the Treaty, excluding the high seas. 93 Because the continental shelves and the potential for an "exclusive economic zone" remain unclear, these will become matters that will need attention at the review conferences. If resolved for substantial exploitation close to Antarctica, they are likely to have a destabilizing effect on state relations to the extent that they lead to competition regarding the resources in the zone.

Article VII provides for monitoring and verifying related activities of the parties. 94 It is dependent upon the parties providing for free and open visits and exchange of observers which is a matter that may either be promoted or discouraged in state practice. If the parties find means to exploit the ambiguities in the provision, or refrain from cooperative practices, they will ultimately undermine the stabilizing thrust of this provision. But the provision as drafted is unlimited with respect to what may be monitored and verified. It would require compliance with demilitarization i.e., on site and full inspection of all activities, stressing those activities that might lead to a breakdown in the treaty. 95 It extends to all areas, to all facilities, 96 in part to assure that they are not "military" facilities, though article I permits military personnel to carry out activities at stations on the continent. 97 It extends to all ships and aircraft, 98 permitting the use of aerial observations, 99 and requiring only prior notice of the investigatory activities. 100 It is a more extensive verification provision than that to be found in the arms control agreements, largely because it affords on-site inspection without conditions or qualifications.

Article X imposes the United Nations Charter on the parties. 101 However, article X also declares that the parties assure that no one is to

90 Id.
91 Id. at art. V.
92 Id.
93 Id. at art. VI.
94 Id. at art. VII.
95 Id.
96 Id.
97 Id. at art. I.
98 Id. at art. VII.
99 Id.
100 Id.
101 Id. at art. X.
engage "in any activity in Antarctica contrary to the principles or purposes of the present Treaty."\textsuperscript{102} The reference to purposes is ambiguous. Its reach will depend upon whether the parties share in processes for maintaining the continent for peaceful purposes as a global commons and in keeping it fully demilitarized. Article XI supports the peaceful, cooperative ambit of the Treaty through its provisions for the application of article 33 of the United Nations Charter, which ensures the peaceful resolution of disputes and provides for recourse to the International Court of Justice, subject to the consent of the parties to the jurisdiction of that Court.\textsuperscript{103}

**B. Antarctic Claims Processes Among States**

States are perceived as making and exchanging claims and counter-claims regarding all aspects of their relations: their policies, claims to power, influence, and prestige, their claims to values and the legitimacy of their claims regarding the value demands of peoples, and their claims to law itself. From these activities states form their relations and perspectives relevant to these relations and activities. Through these processes they encounter their competitive demands on each other. From the outcomes of these processes, nation-states establish their tolerances, and these tolerances are the key element in the development of their law. Inherent in these processes is the unraveling of states' demands on each other, their identifications with values and value demands, and their expectations. Law, policy and strategy flow from the processes, and thus afford us the framework of inquiry into the development of policy in the largest sense by discerning the extent to which policy can be shared. Noting the trends and conditioning factors that have shaped policy in the past and extrapolating into the future, we are afforded an operative inquiry process that enables us to innovate appropriate policy and decision alternatives for the future. This framework of inquiry has been developed by Professor Myres S. McDougal and his associates,\textsuperscript{104} and is applied to the analysis in the present section to de-

\textsuperscript{102} Id.

\textsuperscript{103} Id. at art. XI. Only tenuous reliance can be expected on decisions of the International Court of Justice (ICI) with respect to issues involving the use of force. An international court, constituted like the ICI, can neither dictate nor even formulate such a complex problem as that regarding the use of force because states must find through their practice and relations what will exemplify their shared expectations. They can do so in many areas, but in the use of force we are left largely—as in the law of war—with general, abstract standards and conclusions. The problems the Court faces here are "wicked problems," as discussed earlier, \textit{supra} note 19. For illustration of the difficulties in defining aggression, see \textit{Aggression: Conceptual Issues}, in \textit{The Encyclopedic Dictionary of Psychology} 13 (R. Harré & R. Lamb eds. 1983); B. Ferencz, \textit{Defining International Aggression} (1975).

\textsuperscript{104} M. McDougal, H. Lasswell & J. Miller, \textit{The Interpretation of Agreements and World Public Order: Principles of Content and Procedure} xvi-xvii (1967).
militarization and to its strategic implications.

While states engage in claims imposed upon each other, states' legal order presupposes that they have a shared policy, along with common goals and interests. The effectiveness of the legal order and the support through that order of demilitarization depends upon the accommodation of policies and relations that are in general hostile and adversarial between the Communist states on the one hand, and the Western states including Japan on the other.\footnote{Id. at 27-29.} Interpretation, along with the law-projecting activities of application and invocation of the Antarctic Treaty, depends upon the parties establishing on a continuing basis their shared expectations.\footnote{Id.}

Clearly the parties, even after they have entered into their agreements, continue in their practice and relations to introduce further claims in particular with respect to the agreements themselves. Article 31 of the Vienna Convention on the Law of Treaties recognizes that:

\begin{quote}
[T]here shall be taken into account, together with the context . . . (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties . . . .
\end{quote}


With respect to the written undertakings in international treaties and agreements, and with respect to other communications, including communications in any form, these authorities are stressing the changing relations and the changing claims that are inherent in the practice of states. Like the United States Constitution, the written documents demand the flexibility of reasonable change. Otherwise, they would need to be replaced on a continuing basis. That flexibility is established through the continuing impacts of claims, through a "subsequent practice" which molds and develops the "law" of the treaty to fit the shared expectations, and through expectations themselves that the parties are adjusting and accommodating policies or relations that cannot be wholly fixed by legalistic instruments. While some agreements lend themselves to, and are compelled to assume, restrictive interpretations, particularly those that

\footnote{Id. at xvii. The authors seek out a far wider reach among participants to establish community expectations than those that might be among the few selected as spokesmen of a given government in negotiating and concluding the treaty text. Id. The same approach mentioned here for interpretation extends to the process of application. Id. at xix.}
are security-sensitive, the multilateral agreements, and in particular those that lead to the constitution of public order, call out for liberal interpretations. These liberal interpretations are required to assume that the fundamental purpose of order is not impaired or jeopardized by claims for a strategic advantage, and for a claims process that promotes such claims.

The flexible and progressive nature of international law is a factor in assessing both customary international law and the law of treaties. Article 31 of the Vienna Convention refers to "relevant rules of international law applicable in the relations between the parties," and necessarily includes those rules that might affect relations that have arisen after the treaty has been concluded. While the legislative practices of the United States, for example, are not incorporated into international law as such, it is at least arguable that the changing international law may affect the law of treaties when there is an inconsistency between the two. This is one of the features attributable to the jus cogens, and perhaps would include new international law that the parties are both claiming, and sharing, to be made applicable by them (by implication) to their treaties. To a certain extent acquiescence in activities that are questionable under the arms control agreements, or even violative of the agreements, might lead the parties through that process of claims, and even though the process is in part tacit, to modify the agreement itself. With regard to the bilateral commitments, at least, the parties can through a shared understanding "look the other way" as to some of the provisions, or some of the interpretations, or with respect to some of the undertakings that are deemed to be "ambiguous" and therefore subject to development through practice.

Some scholars have noted that there is a progressive and developing international law and international justice. The experience of two costly world wars have stimulated a need that civilized mankind convert moral ideas into recognized laws. These scholars assume that the peoples throughout the world have already begun adopting widening perspectives concerning the optimization of opportunities and social orders dedicated to human dignity. The term "civilized mankind" is used in such a sense, so that a part of this shared perspective concerning international law is that the values will be those associated with human dignity and not with intensifying and concentrating the claims of a few to naked power.

The deterrence processes, along with a general shared military strategy, and the balancing processes engaging self defense are among the differing options that may be adopted by states, or forced upon them, as

108 Id.
110 Id.
part of their ordering processes. While such processes lack the authority and perhaps the control of law itself, they have some of the indicia of law, and they contain policy content that gives them some "substance" analogous to law itself. The ordering processes just mentioned differ from each other in their goals. Deterrence differs from other processes in that it seeks order through equilibria processes involving weapons, threats and defense, affording its limited order through what little stability may be maintained once hostilities break out.

All of these processes can support the legal order among states, and be shared by them. When they are supportive of law, they give the law greater strength in general, and particularly through enforcement measures when all are willing to share in the overall interests of the global community. But the processes can also impose limitations on the further growth of law if rival states are able only to maintain order through the deterrence equilibrium and are unable to build further upon that order. Moreover, strongly exclusive components in a system of defense policies projected among nations can be self-defeating because defense and aggression depend upon the observer and the claimants, and because escalation of violence under the claims of self-defense may lead to irrational behavior or perceptions. Yet defense and the balancing of states who claim the right to maintain defensive postures, even in present circumstances where a major nuclear war might be "irrational," are inevitable in the relations among states that have not achieved a global order and the security expected in such order. Deterrence expected to sustain demilitarization in Antarctica, or elsewhere, is dependent upon states moving far closer to shared policies than are required in their other arms control efforts, because so much depends upon their guaranteeing, by force if necessary, the demilitarized status.

It is evident that the United States and the Soviet Union, either bilaterally, or multilaterally, are currently engaged in an informal process, seeking and shaping the indicia of minimum public order by their gradual adherence to and molding of the deterrence components into a shared strategy. These states, through arms control policies, based upon mutual awareness, if not fear, of the destructiveness of major strategic weapons, are also invoking and strengthening the indicia of public order presupposed by such policies.

Public orders, maintaining in reasonable balance confrontational situations even for a prolonged period of time are not unknown in history. But even in this process the United States and the Soviet Union are grad-

111 See generally G. Snyder, DETERRENCE AND DEFENSE (TOWARD A THEORY OF NATIONAL SECURITY) (1961); McDougal, Law and Power, 46 AM. J. INT'L L. 102 (1952); RESTRAINTS ON WAR (Howard ed. 1979).

ually directing themselves toward an ultimate goal that can sustain and be sustained by demilitarization efforts in Antarctica and elsewhere both in weapons control or in orienting weapons toward peaceful activities. The overall logic of their stand-off with nuclear weapons is that the use of such weapons escalates or can escalate to a point approaching unlawfulness. The shared expectation gradually forming may be that such unlawfulness in use (the threats to use aside) arises because the weapons cannot be legally controlled beyond deterrence. Of course the full implications for global order or global “peace” from this set of relations remain indecisive.\(^{113}\)

When hostilities are pursued in the traditional sense, i.e., as they have been pursued in the past, the principle of the economy of force applies to all weapons. This principle applies because, as an operating principle, it is presupposed that destruction would not be absolute.\(^{114}\) But such a principle may be inapplicable to weapons of mass destruction if stretched beyond its operational limits. Then the impacts on law from the use of such weapons in sustained attacks or attacks causing universal, severe, and long-lasting destruction may parallel the physical impacts in the use of such weapons. With the destruction of what people have built into their civilizations and destruction of their social orders, we would no longer be able to speak intelligibly about law.

A common assumption is that deterrence is a continuing process only of balanced or reciprocated threats, and remains effective as such. It is assumed never to be a process of reciprocated uses of weapons (at least of weapons of the destructive force of the major nuclear weapons). In traditional legal concepts such a balancing process is easily identified as a threat of aggression, but this is too facile a characterization. The threats are more justly characterized as mutual in nature, with a mutual goal. That goal is minimum public order itself, even if that order is seemingly fragile under such a system. In any event, the assumption that threats, but not uses, may be contemplated both for law and policy, comports with two claims: first, that there may be a deterrence against use that provides the current order short of hostilities, and second, that deterrence during the use of weapons (i.e., during hostilities) is deterrence aimed only at moderating the destruction otherwise permitted by war itself.

Interaction of defense and deterrence strategies is inevitable, though each has some impact in arenas covering policy and decisions that are mutually exclusive. Defense strategies necessarily engage capabilities be-

\(^{113}\) See generally Aron, Peace and War (A Theory of International Relations) (1966). Aron declares that three “peace” categories may be adopted for global orders. These are: (1) peace by equilibrium; (2) peace by hegemony; and (3) peace by empire.

yond those demanded for deterrence because they necessarily involve capabilities to pursue and, presumably, to survive an armed conflict. The intermediate zone—defense strategies designed to provide a basis for negotiations during hostilities but not necessarily to enable one side to prevail or survive—have not been closely appraised at the present time. Moreover, it is not yet clear how far the "linkage" if any, between defense strategies and capabilities on the one hand and the lesser needs for deterrence strategies and capabilities on the other, extends.

All of these strategies provide the "umbrella" under which demilitarization as a shared strategy for Antarctica is appraised. But they compel the subordination of demilitarization, both as a general strategy of relations among states and as an effective measure of arms control, which is a specific strategy of relations among states, to that of the fundamental relations themselves. We are always thrown back to fundamental relations of major rivals that inevitably must address and provide some modus vivendi concerning their competitive processes in general, and their tolerances regarding the uses or the support of the uses of force as strategic instruments in shaping states' relations.

Given this need for flexible and ever changing processes, the analysis of the claims process is projected toward those claims among states following the framework of Professor W. Michael Reisman. As Professor Reisman indicates, the process extends across a wide spectrum of communications among the participants—it includes demands and response, activities identified with a decision process and the enforceability of those decisions. The process of claims in this framework includes claimants, their perspectives, situations in which the strategies and claims are presented among the participants, and the strategic modalities and procedures in which claims are set forth. This analytical framework enables us to envision the complex interaction of policy that extends to the process, as well as the emergence from the claims made and countered of the tolerances that lead to authority and control with respect to future decisions and actions.

1. Claimants

Claimants among the participants in Antarctica pursue both exclusive and inclusive strategies for strategic and policy goals. Foremost among the participants or players in Antarctica today are the nation-states. The area has not been sufficiently established for commercial enterprise. Claimants are likely to include international or inter-governmental organizations, the various agencies and organs of the United

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116 Id. at 159.
Nations, and others as the activities among states accelerate. Claims by the lesser developed countries already associated with such projected principles as the "common heritage of mankind," and claims of blocs through alliances, allegiances and common commitments are likely to arise if states find that individually they cannot achieve goals such as increased participation in the decisions affecting the continent, or if they require the groupings for raising capital for enterprise.

Claims by scientific groups, either for continued and unrestricted freedom for scientific investigation or for freedom from encroachments by enterprises that might lead to severe impacts upon the ecology or environment, are to be expected. Claims by private groups or entities primarily for enterprise or commercial activity will quickly arise once the continent is opened to exploitation for its resources or wealth. Claims from the socialist countries regarding enterprise are most likely to come from the trading instruments; the state trading entities of those countries.

2. Perspectives

The claimants present in Antarctica, the nation-states, are already engaged in relations that are adversarial or competitive elsewhere on earth. The perspectives of these claimants (including the values that they identify as most significant), their demands on each other (and on their citizens), and their expectations particularly respecting use of force (or associated with what they expect from cooperative activities or from maintaining peaceful relations), are major factors in establishing the development of law that they will share. The Western nations and the Communist states have now begun to freeze their opposing value expectations.\textsuperscript{117} There are strong tendencies in the West to reassert the values of human dignity, while the Communist states are reaffirming their need for security, protected in large measure through naked power itself.

The claims process where the two rival blocs of states are actively involved in presenting claims and demands for the purpose of responses that might lead to favorable outcomes is ultimately aimed at a convergence in the overall process. Hence, the goal is a "more inclusive authority system" in which the rivals share expectations and tolerances about their behavior and policy.\textsuperscript{118} However, realistic perceptions compel attention to the continuing hostility, and to manifestations of military actions that, based on past trends in the patterns of behavior of other states, could lead to tensions and perhaps conflict. Accordingly, the differences in perspectives may lead to the claims process and the search for accommodation, but the differences if intractable or treated as such could lead to more serious escalation of the conflict itself.

\textsuperscript{117} Id. at 158.

\textsuperscript{118} Id. at 159.
There are conflicts which precipitate claims, but these are largely due to the differences in perspectives of each claimant.\textsuperscript{119} However, these differences come together and join in the claim processes due to the more inclusive authority system in which they seek to participate.\textsuperscript{120} The very act of claim processing reinforces this authority for both claimants and decision makers.\textsuperscript{121} The strategies appear both inside and outside the claims process itself; claims may be asserted through a variety of strategic instruments.\textsuperscript{122}


Claimants pursue their strategies in a variety of situations. The situations, which are the loci of the claims processes, include the fora and institutions established for such processes, disputes, and disagreements appearing in articles IX, XI, and XII of the Antarctic Treaty.\textsuperscript{123} The claims may also be entertained in the United Nations fora, including those of the agencies and organs, or in fora established pursuant to article 33 of the United Nations Charter. Because these situations are at times controlled by the parties, the parties' choice of those situations in which the processes may take place may determine the outcomes. Professor Reisman observes that "situations have great influence on the form and content of a claim, and the investigator may require entirely different sets of tools for identifying claims in different situations."\textsuperscript{124}

With regard to Antarctica, the participants may be unsure of themselves in the consultative meetings, or be unable to expect the outcomes they desire; the meetings are thus limited to superficial matters.\textsuperscript{125} Disputes over compliance with the Antarctic Treaty provisions, with the free exchange of scientific investigators, or with issues ranging around prior consent may require negotiation among the groups involved. More se-

\begin{enumerate}
\item[119] See supra notes 111-12 and accompanying text.
\item[120] Reisman, supra note 115, at 159.
\item[121] Id.
\item[122] Id.
\item[123] The Antarctic Treaty, supra note 3.
\item[124] Reisman, supra note 115, at 159.
\item[125] See Joyner, Anglo-American Rivalry After the Falklands/Malvinas War: Laws, Geopolitics, and the Antarctic Connection, 15 LAW. AM. 467 (1984). Joyner discusses the various efforts of the Consultative Party system under article IX of the Antarctica Treaty and points out that the present system using consultative efforts is preferable to alternatives. Id. at 499. Evan Luard suggests that the competition over the resources in the Antarctica might lead to conflict and that the present consultative system will not work where only a few countries participate and where the Treaty itself does not include some 130 nations. Luard, supra note 112, at 1184-88. Luard recommends a resource management regime superimposed upon the existing treaty, while recognizing that the treaty itself may be superannuated. Id. at 1188-92. See generally Joyner, Oceanic Pollution and the Southern Ocean: Rethinking the International Legal Implications for Antarctica, 24 NATURAL RESOURCES J. 40 (1984).
\end{enumerate}
vere allegations of violation, such as those relating to the demilitarization of the continent, would quickly escalate to the diplomatic fora, probably between the foreign ministers or heads of state. While the Antarctic Treaty has provisions for a variety of fora, and while the parties might be able to draw upon other fora such as those mentioned above, it appears that such agreements must be drafted with a view toward future disputes and differences. If analyzed comprehensively, it appears that the institutions and procedures that might be shaped and adopted would be among the most important considerations in treaty making. They would not be treated as matters, following earlier precedents, that are added at the close of the negotiations as the "final clauses," or as "boilerplate."

4. Strategies

States employ strategies to achieve, promote, or project their policies. While current strategies extend substantially beyond military strategy, (in large measure because of the advent of deterrence as a fundamental strategy), states are compelled to turn to other instruments to project their policies. Strategy at one time meant merely commanding the military and preparing for war. Strategy is no longer a wartime concept, but now includes consideration of nonmilitary factors such as, economic, political and technological considerations. Strategy is now an inherent part of statecraft which controls the resources of a nation, including military resources, to achieve a vital end.

States and other participants communicate claims through a variety of strategies and strategic instruments. Examples of strategies include law and legal processes, the legal instruments that convey law and policy among states, and the communications that achieve this conveyance in general. All of the strategic instruments of policy are available to states to be designed, shaped and aimed at the appropriate goals. But it bears emphasis that these are strategies that may be aimed at inclusive goals; in short at a public order expected to be shared and through the actions and decisions of the states translated into being. And the same states perhaps

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126 See supra note 103 and accompanying text.
127 E. EARLE, MAKERS OF MODERN STRATEGY (MILITARY THOUGHT FROM MACHIAVELLI TO HITLER) viii (1943). Other essays on strategy in this volume provide further insights of major contributors to the study of strategy. The author cites Alexander Hamilton. Id. at 117-18. Hamilton was enunciating a basic principle of statecraft when he said that safety from external danger is "the most powerful director of national conduct;" even liberty must, if necessary, give way to the dictates of security, because to be more safe men are willing "to run the risk of being less free." THE FEDERALIST No. 8 (A. Hamilton). Adam Smith and Friedrich List are cited in the same passage. E. EARLE, supra, at 117-18. Adam Smith, who believed the material prosperity of the nation to be founded upon a minimum of governmental interference with the freedom of the individual, was willing to concede that this general principle must be compromised when national security is involved, for "defense is of much more importance than opulence." Id.
concurrently or separately may introduce exclusive strategies, aimed once again at the minimum order of a confrontational claims process. The strategies, in short, as they are set out in the claims processes, determine whether those processes are strengthened toward order (or toward at most a minimum order), in which the adversaries in Antarctica are gradually adjusting their relations to competition and competitive struggle with prospects of military confrontation and conflict.

In the arms control sense the strategies of states, whether designed for deterrence or to lessen the likelihood of establishing strategic arenas in areas such as Antarctica, ultimately are shared. As noted, the claims process itself may lead to converging perspectives, and this will likely lead to the appeal of a more inclusive authority system. The strategies, even if opposing, may lead to a common strategy that is shared. This would be true even if the “ground rules” turn out to be those relating to how the confrontation among rivals is to take place. The outcome of strategies presented as claims, from the interdependence and interdeterminancies of decision, the shared strategy, both conditions and determines the actions of the rivals or players. The business of action and response, of claim and counterclaim, produces at least a rudimentary basis in law, even if not readily perceived as such.

128 See supra note 118 and accompanying text.

129 The term “strategy” is taken here from the theory of games, which distinguishes games of skill, games of chance, and games of strategy, the latter being those in which the best course of action for each player depends on what the other players do. The term is intended to focus on the interdependence of the adversaries’ decisions and on their expectations about each other’s behavior. This is not the military usage.

130 T. Schelling, The Strategy of Conflict 3 (1960). The “strategy” shared here among states, and aimed at common interests or identified as the process of emerging common interests, is a threat-counter-threat process: the resulting and slowly developing public order that rivals share comes about through an accommodation that they force upon each other, at first with regard to the major nuclear weapons and then, presumably, by the reciprocal tolerance associated with other weapons, linked perhaps with the nuclear weapons equilibrium. Rational behavior, communications at least at the necessary minimum, and compliance processes are all factors in the operation of this strategy. As indicated earlier in this paper, supra notes 13-54 and accompanying text, this is a strategy of converging interests, and is not the same as the exclusive military strategies, even though it may be the outcome of unilateral claims and strategies intended by the possessors for more exclusive goals. The complex business of a strategy relating to the termination of agreements or understandings among states for demilitarization or arms control, associated with the application of the perspective of a fundamental change in circumstances, is assessed by A. David, The Strategy of Treaty Termination: Lawful Breaches and Retaliations (1975). The strategy of imperial Rome co-opting client states in a hegemonial base is reviewed in E. Littwak, The Grand Strategy of the Roman Empire: From the First Century A.D. to the Third (1976). Modern strategies and the assessment of those strategies call for trend analysis, because the historical instances, while showing the formulation of attitudes among policy-makers in general, are unique instances. Trend analysis, according to Professors McDougal and Lasswell is “concerned with specific features of the future that are ever emerging from the past,” and the analyst “needs to be especially sensitive to time, and to forecast with reasonable accuracy passage from one configuration of events to the next.” H. Lasswell & M. McDougal, Legal Education and Public Policy: Profes-
According to Schelling, states have turned from military strategy and the use of military capabilities in combat (particularly where they are equally matched), because "the instruments of war are more punitive than acquisitive."\textsuperscript{131} States have turned military strategy into projecting coercion, intimidation and deterrence. Deterrence is based upon intentions; influencing the intentions and actions of the opposition. Your deterrent actions must be persuasive, or else it will sound like a bluff; not having much deterrent effect.

Strategies may be communicated in various ways through diplomacy, negotiations, bargaining and other means of communication established through negotiation, or pursuant to the traditional state practice. Strategies may also be communicated through actions; actions may be addressed directly or indirectly. The adoption of legislation, appropriations and authorization relating to weapons, for example, may affect the policies and future communications. The legislative process, being a
communications process, is subject (at least in a free society) to manipulation and to participation by special interest groups, including foreign lobbies. Legislation may affect the deployment and the production and testing of weapons, as well as their modernization.

The instruments of strategy (the design of the capabilities and material resources and the strategic policy) may go hand in hand. Thus, a nation seeking to promote exclusive strategies for commanding strategic advantage can adapt its ideological, diplomatic, economic and military instruments of strategy. These factors may outweigh decisions dictated through scarce resources, and may determine the timing choices. For example, the Soviet Union, in its challenge toward the Western legal processes and the values implicit in them, has promoted the consensual principle, the principle of peaceful coexistence, and the Brezhnev doctrines. Because Soviet perspectives envisage the demise of the capitalist system and its replacement by communism, and because these perspectives lead to an activist role, the principles just mentioned become both legal principles and principles supporting the larger policy of the Soviet Union.

Thus, customary international law becomes recognized by the Soviet Union if subjected to prior consent of the Soviet Union. The principle of peaceful coexistence legitimizes the wars of liberation against the bourgeois societies and the Brezhnev Doctrine establishes the socialist commonwealth of states as an entity separate from and outside the international legal order. A member cannot withdraw from this order and attempts to withdraw can be forcibly opposed by the other members. Similar innovative challenges to the legal order in Antarctica can be envisaged, unless the Communist and Western states reach a shared policy and common goals for the continent.

5. Specific Claims

1. Global Order Claims

States, in their relations and transnational activities, pursue their own goals and those goals associated with establishing order, but they may choose to seek only that form of public order that is congenial to their ideologies and to the value demands that they are promoting. The

133 See Legal Aspects of the Invasion and Occupation of Czechoslovakia, supra note 132.
134 Id.
135 Id.
Soviet Union clearly pursues its own global order processes and claims that the Western states are pursuing others. The Soviets view Western goals as being not only hostile to those of the Soviet Union, but inconsistent with the Marxist-Leninist outcomes that are the only ones the Soviet Union is willing to support. Entirely different cultural experiences, traditions and processes in the Soviet Union and in Russia distinguish the perspectives of that nation from those of the West. These differences also affect the differing perspectives among communist states that have their traditions in Western values.

"Liberty" in the sense of freedom to participate, freedom to share in controlling decisions, and freedom to establish the perspectives of authority among all the peoples in America was the leading theme behind the American revolution. All of the founding fathers were in agreement that liberty was their goal and that the safeguards must be national in scope and power.

This theme does not appear in the 20th Century revolutions. Those revolutions have been driven instead by utopian claims, and then fulfilled through centralized, bureaucratic and totalitarian systems which deny these freedoms. These "utopias" appear to have neither the appropriate cultural base nor the wide-ranging social perspectives necessary to sustain and promote the social order processes associated with such goals. The Communist revolutions, or Marxist revolutions, are utopian in goals, but elitist in rule. Nevertheless, all actions and decisions among Western and Communist social orders include both those that relate to working within the existing public order, as well as those that relate to establishing the constitutive base that will create and allocate authority and competence which is so essential to a sustained public order. In these decisions, as in the decision flow itself, are to be found the claims processes, evidencing the challenge and threat from the two major blocs that oppose each other today.

2. Claims to Regulate the Use of Force

Major claims and strategies with regard to state relations concern the regulation of the use of force. While regulation for global order perspectives would employ community policies reflecting these perspectives where the challenge relates to the global order itself, there are, in opposition, claims that would make force permissible to revolutionize and re-

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137 Id.*
place the existing global order emanating from the Communist doctrine, and claims that would make force permissible exclusively to satisfy the policies associated with the existing global order. Because these claims and competitive challenges constitute the framework in which the relations of states are currently perceived, there are marked differences in what uses of force are permissible (lawful, or "legitimate"). The Soviet Union insists that wars of liberation are "just wars," and that the use of force in those activities seeking self-determination and escape from the colonial rule (which rule is, by definition, exclusively imposed through capitalist systems) are legitimate. The Soviets claim that the individuals involved are "freedom fighters" entitled to legal protections and privileges, and that opposition to such activities is a form of aggression. The Soviet Union also insists that once states are drawn into the closer-knit group of states whose foreign policy has become that established by the Soviet Union, the Brezhnev Doctrine applies (being applicable then to a "socialist commonwealth of states"). In the Soviet view, the Brezhnev Doctrine entitles the Soviet Union, along with other members of the commonwealth, to take the necessary action, including military intervention and military action, in order to maintain and protect the commonwealth even from internal disruption of the communist social order.

These differing perspectives lead in turn to perspectives that are so different among the Communist and Western nations as to make attempts at "defining" aggression, or regulating the use of force against standards that determine its permissibility, extremely tenuous. It is likely that should force be required in Antarctica, or should war or armed combat break out on the continent, the demilitarization of the area would cease. The arena would then become a strategic arena, and the applicable law would fall back into claims and counterclaims, appearing primarily as threats and counter-threats justified by both sides in terms of "self defense," with allegations by both that their rivals were "aggressors."
3. Claims to Regulate the Use of Weapons

Claims to regulate the use of weapons among states are established primarily under the framework of the law of war. The law of war is composed largely of customary international law, or of the customary international law embraced within treaties and international agreements. Pursuant to the Geneva Protocols of 1977, which draw upon this customary international law, states would be expected to enter into special agreements during wartime to ensure that demilitarized zones remain free of combat operations. These claims extend broadly; they move beyond the weapons to claims affecting what targets might be attacked, what methods of attack might be undertaken, how much force (proportionality) may be used to pursue an attack, and what conditions determine the right to use the weapons and to conduct the attacks during combat (military necessity). While the law and authority system regulat-

do to protect or defend themselves and their interests. With the threats that are facing them, their arms control balancing efforts must assimilate their security perspectives and this simply means that states will not refrain from pursuing whatever measures and whatever weaponry appear to be needed for security and defense purposes, even while they are pursuing arms control policies. It may be said that arms control policy is a changing policy depending upon how far states are willing to share a public order and the security it offers to replace their claims on self-defense. In any event, the claims for self defense are so far reaching that it is unlikely that an antisatellite agreement could exclude at least some measures for defending space objects, or using space objects for defending their interests in general. It cannot be too emphatically stressed that the claims process among states determines the development of both law and order among them and that their treaties and agreements today very pointedly reserve their rights to self defense, either directly or by incorporating the United Nations Charter, and then either expressly or by implication.

Arms control policy is still at a stage in which broad or generalized principles constitute the fundamental framework of the agreements, even though specific weapons are identified. This arises out of two factors: even when specific language is used, the parties will pursue the ambiguities of policy inherent in the provisions and language if necessary for their vital purposes. Second, even though they seek specifically to cover identifiable weaponry, the parties cannot achieve arms control unless they reach very deeply into controlling the use of force through legal measures and regulation. The relationship, then, between arms control, controls presently imposed by the jus ad bellum, or law relating to aggression, and even the jus in bello, or law relating to the conduct of hostilities, is a relationship based upon inhibitions concerning the use of force. However, attempts in arms control agreements to regulate the use of force have two-fold difficulties. If such regulation continues to be through promissory restraints on the use of force, that regulation amounts to a restraint exclusively on decisions, and enforcement is extremely tenuous. Second, because it is sought through arms control agreements, it becomes an issue of verification, and there is no way to verify a violation of conduct not to do a thing, except when the prohibited conduct is occurring. In short, there is no extra-enforcement “measure” identifiable in terms of the agreement as there is, for example, with nuclear weapons, where both sides are presently perceived to share their fear of intolerable destruction in the event of use. With those agreements there is the possibility of enforcement during wartime, but not with arms control agreements relating to weapons that may be destructive, but have military utility.

ing these activities among states would apply to Antarctica in the same manner as elsewhere, the issue remains open as to whether the Antarctic Treaty would be applicable during wartime. Even if that was the expectation of the drafters, a further unresolved issue is whether the treaty would then be denounced and the Antarctic made the scene of warfare and military operations.147 This again is a question whose answer would depend upon whether the arena had become, in the perceptions of the belligerents, a strategic area where the parties might introduce the scarce resources of combat, or undertake from the area activities that would most likely support, without waste, the war effort itself.148

147 See Shapley, Pax Antarctica, 40 BULL. ATOMIC SCI. 30, 30-32 (1984). Deborah Shapley, observes that:

the Treaty has succeeded partly for political reasons—its terms admirably prevent any party from losing anything it thinks important . . . individual nations see the Treaty as a means to gain something—a voice in a future resource gold mine. . . . [L]uck has also contributed to this success. Military technology has evolved so as to make the Antarctica even less important strategically than in 1961. . . .

. . . . [M]ilitary planners in the late 1950's and early 1960's worried that the Soviet Union might loop ICBM's the 'wrong' way round the Earth—over the South instead of the North Pole—to evade north-pointing U.S. defenses. But the idea of this Fractional Orbital Bombardment System faded, leaving Antarctica useless for missile tracking.

Id. Shapley concludes with a more telling argument that embraces the political relations of the parties, implying that they have not for reasons of their own discovered strategic opportunities to exploit:

The future success of the Treaty may depend less on the Treaty's uplifting language or on what is said in Treaty group meetings or at the United Nations. So far, it has succeeded because the political balance of the region has held—between East and West, claimant and nonclaimant, large and small nations. In the difficult tests ahead, the parties to the Treaty must follow wise national policies of their own to maintain this balance and to help advance this key arms control accord.

Id.

148 See Deane, Kass & Porth, The Soviet Command Structure in Transformation, 12 STRATEGIC REV. 55, 62 (1984). The authors quote N.V. Ogorkov, Chief of the General Staff of the Soviet Union, who argues that weapons technology leads to new strategic military measures that will determine future warfighting. He states:

A deep—indeed, fully revolutionary—change in military affairs is currently occurring in connection with the development of thermonuclear weapons, the stormy evolution of electronics, the development of weapons based on new physical principles, as well as due to the wide qualitative improvement of conventional weapons systems. This, in turn, impacts on all other aspects of military affairs, primarily on the development and improvement of the forms and methods of military operations and, consequently, on the organizational structure of troops and naval forces and on the improvement of armament systems and command and control organs. Realization of this dialectical process is particularly important at the current state when on the basis of scientific-technological progress the main weapons systems are being renewed practically every ten to twelve years. In these conditions, a retarded reconstruction of views and stagnation in the elaboration and implementation of new issues of military development are fraught with serious consequences.

Id. at 62.
4. Claims to Regulate the Decisions

The demilitarization of Antarctica presupposes that the contracting states have entered into their treaty in order to enable them to participate in the most significant decision affecting their respective areas. Clearly among such decisions are those relating to the preservation of the area as a demilitarized area. This raises a question: whether, through the participation of numerous states, the possibility of preserving demilitarization is enhanced in view of the larger number of states affecting the decision process, supporting the authority system, and establishing control over the decisions that are made? In short, the question is that of the effectiveness and enforceability of law itself. This issue is part of the larger problem of establishing stabilized relations among states, applicable to all arms control arenas that might be the subject of arms control initiatives, and also applicable to all arenas involving (or potentially involving) the use of force itself on a transnational basis.\textsuperscript{149}

\textsuperscript{149} See Brzezinski, \textit{From Arms Control to Controlled Security}, Wall. St. J., July 10, 1984, at 36, col. 4. Arms control is a peacetime policy shared among states and its principal goal is to maintain through such controls a balance in weapons capabilities and a weapons posture that will lead to deterrence regarding use of such weapons in the initiation of hostilities, or in some perspectives, regarding the use of such weapons during the escalation of hostilities. Policies based upon self-defense differ, because states then traditionally perceive their goals in terms of the preferred outcomes of hostilities. In arms control processes the security of the participating states is mutually shared—the arms control policy is effective only because they can mutually share their objectives. Zbigniew Brzezinski describes a differing but presumably shared policy in which the parties seek “controlled security,” and he suggests that the development of this balancing process and equilibrium arises where one of the sides—in the present case, the Soviet Union—has given up on arms control policy and strategy. The Soviet Union has done so by insisting that the United States accept a new balance with regard to the Pershing and related missiles in Europe. Brzezinski believes this would lead to a change in the arms control balancing, and in short to Soviet weapon superiority through launching or delivery superiority, and through weapons superiority per se. In this context, there is a shift to new factors: to increased weapons modernization and the competition that arises in modernization and the need to develop verification capabilities that are rapidly stretching beyond our grasp. He states:

It will be increasingly difficult to impose effective and verifiable limits on these [new] weapons. The verification problem is becoming increasingly acute, given the mobility of the new systems and the opportunities for rapid reloading and covert deployment. The question of how to control qualitative improvements plagued SALT II negotiators and, at best, only a partially satisfactory response was developed. Their difficulties pale in comparison. Adequate verification of both qualitative and quantitative limits would require access to storage facilities and even perhaps to production centers. As a consequence, it is realistic to conclude that for both political and technological reasons, the chances of a truly comprehensive agreement, which can be reliably verified, are rapidly fading.

\textit{Id.}

Under these circumstances Brzezinski favors strategic defense systems such as those proposed by the Reagan administration. Such a defense may not safeguard society, but “it can increasingly complicate the planning and execution of an effective first strike.” \textit{Id.} In this sense it would restore deterrence that is gradually being dissipated, and, in fact, is essential for that purpose. The counterpart to this effort with weapons may exist with other arms control measures such as demilitarization,
In part these claims to regulate decisions have found root in Soviet proposals, purporting however to be arms control agreements. As with attempts to control and limit acts of aggression through a systematic imposition of authority there is a belief that some controls, presumably effective and enforceable, might be achieved if rival states conclude and ratify treaties and agreements that would make "aggression" appear in the form of the use of force itself. In recent Soviet "arms control" proposals for outer space, for example, the operative provisions would reach, in part, to weapons—prohibiting their deployment or launching and use in outer space—and in part to their use under any circumstances. Such proposals are ambiguous because they do not clarify what states would be expected to reserve under their claims of "self defense," let alone establish when "self defense," itself an ambiguous term, is to be invoked. These proposals, when generalized along with similar proposals that promise "no first use" of nuclear or mass destruction weapons, are based upon an exchange of promises. Such promises are enforceable only by the system of guarantees to respond by counter-threats, or by withdrawing from the agreement.

Other arms control efforts that might be considered for Antarctica seemingly lack substance as well. While demilitarization might be under consideration for strengthening procedures, several experiences

the subject of the present paper. Attention there must be centered on the effectiveness and the will of the parties to guarantee the demilitarization status. The demilitarization process, a process beyond the simple guarantees partly expressed and partly implied in the Antarctica Treaty, must then be molded around a framework of operability: i.e., around the means to ensure that if actions are taken contrary to the demilitarization established they can immediately be countered. A failure to maintain demilitarization in response to a challenge to establish strategic claims to Antarctica would be tantamount to a larger challenge for superiority in the area of the continent itself.

150 See U.N. CHARTER arts. 2(4), 39, 51.
152 See generally Bundy, Kennan, McNamara & Smith, Nuclear Weapons and the Atlantic Alliance, 60 FOREIGN AFF. 753 (1982); Kaiser, Leber, Mertes & Schulze, Nuclear Weapons and the Preservation of Peace: A German Response, 60 FOREIGN AFF. 1157 (1982). But see THE APOCALYPTIC PROMISE 5, 23, 273, 401 (E. Lefer & E. Hunt eds. 1980). Proposals for a nuclear freeze have similarities to demilitarization to the extent that the freeze affects the addition of armaments, their deployment, or their modernization. The nuclear freeze is often combined with a no-first-use proposal intended to reach the nuclear weapons. But here the issue turns on the deterrent equilibrium itself, because deterrence is believed to be the outcome not only of the balancing of weapons, but of the existence of weapons whose destruction is so intolerable that states possessing these weapons have a genuine reason for refraining from using them, apart from the promises of guarantees made in an agreement. No first use would deny the credibility of this threat and counterthreat balance, and favor only the party that might first be willing to threaten, and then, if necessary, invoke such weapons.

153 See generally A DOCUMENTARY HISTORY OF ARMS CONTROL AND DISARMAMENT (T. Dupuy ed. 1973); W. ORVIK, THE DECLINE OF NEUTRALITY, 1914-1941 (1971); USGPO, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 409, 436, 478, 728 (1978); Storr, The
would appear to be uncertain and tenuous: the Latin American Nuclear Freeze Zone Treaty, the zones of peace, neutrality and security zones, mutual and balanced force reductions, and so on.

MBFR Process and its Prospects, 27 ORBIS 999 (1984); J. HEADLAM-MORLEY, STUDIES IN DIPLOMATIC HISTORY (1930). The most effective demilitarized zone currently in practice is the demilitarized border of the United States and Canada. The unique relationship between the two countries and their common background supports the effectiveness of this area.

154 See President Reagan’s Address From Washington, Jan. 16, 1984, 22 ATLANTIC Q. 4 (1984); General Secretary Chernenko’s Address of April 9, 1984, 22 ATLANTIC Q. 10 (1984). The Soviet Union tends to concentrate its policies on potential adversaries so that its global policy is subordinated to “neutralizing” or perhaps eliminating its rivals, and maintaining its security against each of them. President Reagan suggests a larger global policy aimed at reducing and eventually eliminating the threat and use of force in solving international disputes, reducing the stockpiles of armaments and establishing a better working relationship with the Soviet Union.

155 The Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 634 U.N.T.S. 281. Additional Protocol I, Feb. 14, 1967, T.I.A.S. No. 10147, 634 U.N.T.S. 362. Additional Protocol II, Feb. 14, 1967, 22 U.S.T. 754, T.I.A.S. 7137, 634 U.N.T.S. 364. This treaty was designed to include, among the ratifying states, those states that were sovereign states in the Western Hemisphere below the Rio Grande. Two additional Protocols, to establish the full coverage against the introduction of nuclear weapons in the area covered by the Treaty reach to states that are not territorial sovereigns. The Treaty, in addition to the arms control limitations on the weapons and testing, also prohibits the use, so that if applicable during wartime would purport to deny the use of the weapons in combat. Because the United States believed that if other nuclear weapons states were drawn into combat in the treaty area this would be tantamount to the introduction of nuclear weapons, the United States included an understanding (reservations are not permitted under the treaty) that a Contracting Party assisted by a nuclear weapons state would be acting inconsistent with that party’s obligations. Difficulties arise because the treaty area covers the high seas, and the United States refused to make them a nuclear free zone. The United States also declared that the contracting states had not waived their exclusive rights to grant or deny transit or transport privileges so that the issue of nuclear armed ships or aircraft would be avoided.

156 See USGPO, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1732, 1843, 1846 (1979). The United States position on “zones of peace” is not unlike that of the position taken with respect to nuclear-free zones or weapons-free zones. With respect to the Indian Ocean, for example, the United States declared that primarily the Ocean must not to be the locus of an arms race among rivals; that it was to be established consistent with the rights of self defense of nations under the United Nations Charter, and consistent with the freedom of the seas. Moreover, the United States would not agree to withholding nuclear weapons from its naval vessels, though the United States had proposed negotiations with the Soviet Union to this end. The United States has taken the position, however, that agreements entered into will be strictly construed against the obligations, rather than the spirit of the agreements.


158 C. BLACK, R. FALK, K. KNORR & O. YOUNG, NEUTRALIZATION AND WORLD POLITICS 147-48 (1968). Neutralization, as used by the authors, anticipates that an inhabited state will be the subject of such action. However, the similarity of neutralization with demilitarization in the perspectives of these authors appears in the following:

The conclusion that we reach is as tentative as it is complex. The acceptability of neutralization depends on the comparative merits of diplomatic alternatives. The stability of neutralization depends on the congruence of the objectives of the guarantor powers inter se
Each of these cases depends on complex verification and compliance networks, upon monitoring and inspection faithfully performed (perhaps through international as well as state by state control systems), upon procedures and institutions fully applied for resolving differences and disputes and, perhaps more importantly, for projecting and developing more effective and controlling law itself. Analysis of these other measures is a subject in itself, but the limited practice among states with respect to their application makes their adoption for strengthening demilitarization in Antarctica a speculative matter.

5. Claims for Regulation Through Checks and Balancing

Minimum global order and global order processes, and the security associated with these processes, are promoted through a checks and balancing process presently applicable to arms control, or to “balancing of power” among nations that effectively (or seemingly) insures them against uncontrollable uses of force. Such minimum order processes may be a strategy shared among states (and to this extent an inclusive strategy), even if they are the outcome of their separate and individual measures. This outcome is dictated by the action-response nature of

and vis à vis the neutralized state itself. The maintenance of neutralization rests on a combination of many factors, including the good faith of the guarantors, the capacity of the neutralized state for autonomy, the will and capability of the guarantor powers to take action if the terms of neutralization are brought into jeopardy, and the effectiveness of any machinery set up to preserve neutralization.

Id.

The arrangements for the neutralization of Laos, and a proposed neutralization treaty are included in this text, building upon the above conclusions. It is noteworthy in each of these and in the above conclusion that neutralization depends ultimately upon the relations among the guarantor states—often today rival states—maintaining through their own actions a checks and balancing action, either separately or jointly, to ensure that neutralization is maintained, and that neutralization like demilitarization is most likely to break down once the area covered becomes strategically important (in war or peacetime).


160 The proposals that are antecedent in recent years to the mutual and balanced force reductions, include the so-called “Rapacki Plan,” named after the Polish Foreign Minister who introduced it. 2 DEPT OF STATE, DOCUMENTS ON DISARMAMENT:1945-1959, doc. 315 (1960). The Soviet Union first proposed disengagement of forces, force reductions and possible consideration of inspection through Eisenhower’s open-skies proposal on November 17, 1956. 1 DEPT OF STATE DOCUMENTS ON DISARMAMENT: 1945-1959, doc. 183, at 726-29 (1960). The Rapacki Plan was announced on November 4, 1958, proposing an atom-free zone in Central Europe.

161 See generally 2 J. BUTLER, GRAND STRATEGY: SEPT. 1939 - JUNE 1941, at 567 (1957); M. BOTHE, K. PARTSCH & W. SOLE, NEW RULES FOR VICTIMS OF ARMED CONFLICTS (1982); RESTRAINTS ON WAR (M. Howard ed. 1979).

162 Order promoting activities, actions and decisions among states are of great significance,
states engaged in variants of an arms competition, and in fact is established through the natural or inherent rivalry among major states competing for scarce resources (or, when treated as a scarce resource, competing for power itself).

The checks and balancing process provides order between rival states opposing each other, largely in confrontational modes. These states are sharing, at a minimum, a "rational framework" within which they can calculate the risks of aggression or the use of force, and in which they share the sense that both sides believe that they have reasonably similar risk perceptions. The process may involve at least minimal communications to avoid deception, surprise or subterfuge. Deception is avoided with respect to the weapons covered in their agreements, their arms control arrangements, and with respect to the rules of the game for using force.

The checks and balancing process proceeds through a changing posture of threat and counter-threat, not unlike that found generally in the relations among hostile states, but it is more closely oriented with regard to the arms control component to the elements that make up that component. While they may not fully share an understanding relating to deterrence and the maintenance of a deterrence equilibrium, the effectiveness of their checks and balancing process depends on reaching a deterrence outcome, regardless of what it is called (or whether it even has a name). However, the strategic balancing is part of a dynamic process, and hence the arms control component tends to become enlarged, ex-

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163 See V. Lenin, Selected Works, Vol. X, at 112, 137, 139 (1943). The doctrine of "divide and conquer" was adopted as an appropriate strategy by Lenin in attacking, at the lowest cost, his capitalist enemies.


165 Confidence building measures have appeared in the bilateral context of SALT II, and in the multilateral context of the Helsinki Accords. In the bilateral sense, the measures are used to promote compliance with the arms control agreements. Lewis and Lorell declare the "potential role" with respect to the multilateral expectations of the 35 nation Conference on Disarmament in Europe (Stockholm, January, 1984) "to help defense nascent crises, to reduce the escalatory risks inherent in crisis situations, and to lessen international tensions in general." Lewis & Lorell, Confidence-Building Measures and Crisis Resolution: Historical Perspectives, 28 ORBIS 281 (1984). The authors mention the use of such measures during wartime — "for example, avoidance of direct attacks on national command-and-control facilities," and attributed restraint on all sides not to use lethal gases during World War II to such measures. Id. at 287.
tending to a quest for balancing the impact of alliances and strategic bases of power.

These same assumptions and perspectives apply to demilitarized areas such as Antarctica because they can be translated into principles of stabilization applicable to the making of determinations about the relations of the rivals, and because demilitarized areas, while they are not readily perceived in terms of deterrence, are readily established in terms of their strategic importance. Antarctica is thus a continent where, because the competitive elements among states so far have been minimal (in part through the Antarctic regime, and in part through the natural obstacles to exploitation), the strategic element is dormant.

Comparison with other demilitarized areas illuminates the uniqueness of each of these, so that analogies among demilitarized areas are very limited. Each develops its strategic elements in accordance with circumstances that vary as to each. Svalbard (Spitzbergen) is a naturally strategic arena because it commands the Barents Sea and the Kola Peninsula, as well as the Arctic itself. Its significance to the United States and the Soviet Union needs no emphasis here. Areas such as the Rhineland could be demilitarized and maintained as such only as long as guarantor states in the vicinity were able, through force if necessary, to maintain the demilitarized status. The high seas have only just begun to offer the possibility of resource development, but states with differing perspectives on exploiting, mining, and drawing down on the resources in the seabeds were unable to agree upon a regulatory system that would satisfy their economic goals and policies. The strategic nature of this arena remains in question, but will be revealed once competition for the resources begins in earnest.

Outer space is an area now proposed for demilitarization.

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166 See H. Kissinger, AMERICAN FOREIGN POLICY II (1969); see generally L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 8 (1933). Checks and balances are the appropriate balancing process to preserve and promote order where there are differing, competing and usually opposing power entities or power blocs. The experience of the United States shows that this process, if regulated so that the process itself is maintained and not upset, is the effective means to enforce stability. It presupposes as with competition in general that some "regulatory" mechanism is operative. The rivals are not expected to seek to destabilize the system for their own strategic or competitive advantage, or to take over the system and replace it with their own. The same perspective appears in THE FEDERALIST No. 51 (J. Madison). Madison declares:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other . . . the private interests of each individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.


168 Agnew argues that the Soviet antisatellite weapon is so crude that it cannot operate effectively for anti-satellite purposes. Yet at the same time he "perceives" that the Soviet weapon can
However, its strategic significance flows from a variety of factors: resources are available for exploitation; transit and transportation are probable uses, (demanding, however, claims to launching and orbiting arenas that necessarily foreclose others from simultaneous use); communications, reconnaissance, earth sensing, broadcasting and television networking, weather and navigation support activities, and so on. These require exclusive orbits in areas that must be limited or they cannot be performed effectively (again foreclosing others once they have been occupied). The establishing of space stations and platforms, manned or unmanned, and the limited number of LaGrange locations (a maximum of five), where stations are equally pulled by gravity so that they can be permanently located, means that only a few states can enjoy their benefits.

Accordingly, while Antarctica forms a working "model" to consider the proposals for outer space, upon analysis it is evident that the uniqueness of the arenas makes them less comparable than might at first be supposed. Outer space, unlike Antarctica, offers proximity or adjacency that has strategic importance for military activities. Outer space is so readily exploited that commercial or private enterprisory activities can be easily shifted to military activities and purposes. The technologies associated with such activities are readily applied to military uses, particularly with respect to access, maneuvers, launching techniques, repairs and the like. These all can lead to ease of interference, or ease of frustration of the missions of rival space craft and satellites. The anti-satellite implications of peaceful activities are inherent in those activities, and the only restraint upon whether use for military or peaceful purposes is either self-imposed or is in response to an exchange of agreements not to interfere. The extraordinary potential for command, control, communications and intelligence through space satellites, along with the requisition of peaceful space objects for these purposes, is beyond the expectations of effective enforcement by an agreement built around promises.

reach and destroy a United States shuttle. Agnew would have us examine Soviet intentions with a view toward reaching an arms control agreement applicable to such weapons before the technologies are unleashed. Yet in the same article he points out that the existing ICBM weaponry and technology would, with little or no more research and testing, produce substantial antisatellite capabilities. Agnew, ASAT: What are the Russians Really Up To?, The Washington Post, Aug. 28, 1984, at A15, col. 5.

6. Miscellaneous Claims

Other claims are involved with respect to Antarctica. These overlap those already mentioned, and again are analyzed in terms of inclusive and exclusive strategies and goals. These claims, in large measure, are the claims of states other than the major rivals, i.e., other than those of the United States and the Soviet Union. Moreover, so far the claims are of individual states, not of blocs of states, as with the Moon Treaty. Such claims advanced by blocs of states with common interests or by alliances can be expected when the interested parties seek greater participation through the power of mutual support and claim.

But, as discussed previously, we can anticipate a wide range of specific claims regarding perspectives, including: those just mentioned with regard to the preferred public order systems; claims regarding situations (those identified with how matters, decisions and policies shall be pursued, imposed or enforced, or differences resolved); claims regarding bases of power in the area (including those that may be possessory at first, and then raised to territorial claims, and ultimately leading to competitive situations that might jeopardize the demilitarization of the continent); and claims regarding modalities or the procedures or institutions for resolving claims. The interaction of these claims and claims processes with states' strategies and policies promotes the competitive processes. At the same time, states seek to exploit the outcomes that might come from participating in those processes.

IV. PROJECTIONS FOR THE FUTURE OF ANTARCTICA

The conditions for stabilization in Antarctica are primarily associated with relations and actions among states. Most particularly associated with stabilization are the claims processes shared among them, which are designed to maintain demilitarization, and to control actions and decisions that might lead to the continent becoming a strategic arena. These conditions for stabilization can be attained if resource development is itself constrained. If resource development is permitted to occur, stabilization can only be achieved through participation of the contracting states to avoid tensions and conflicts over the resource claims. It is evident that these conditions require deliberate action: the possibilities and pressures for possessory claims, associated with resource development; and for territorial claims, associated in general with national prestige, are fairly great. Stabilizing conditions would also account for pollution and ecological control and protection, for denying and preventing military activities of any kind on the continent, and for

169 The Moon Treaty, supra note 7.
170 See supra notes 115-22 and accompanying text.
increased efforts at scientific exchange and cooperation. All activities among states include competitive elements. Cooperation among them is at best an activity in which competition is either regulated, or is an activity that can be readily shared; such as the postal services, telephonic communications, and so on.

Unlike outer space Antarctica offers less in the form of strategic factors that are associated with military postures and strategy. The advent of weapons that are delivered through ballistic and cruise missiles, the growing technologies related to submarines and other submersibles, and the possibilities in outer space itself, limit the attraction of Antarctica, and reduce the willingness of states to allocate scarce resources, for strategic or other purposes, at the present time, to the continent. They may, at best, find measures that can provide limited uses: means for hardening the snowbound surfaces for transport or aircraft, means for exploiting the surrounding seas or continental shelves, or for working beneath the surface.

Projections into the future suggest that the Antarctic regime may continue without substantial change for a brief period into the immediate future. But the future remains murky primarily because the relations among rivals are unclear. With support from increased showing of restraint among the rivals and of greater attention to a public order for their relations in general, in addition to a gradual reduction of their weaponry and their recourse to the use of military measures, we could anticipate an Antarctica that will remain non-strategic and a part of the "global commons." In the section relating to specific claims among the participants, it was noted that the traditional claims processes among states determine the future of the public order that they may be choosing to establish.

Unfortunately, states in their relations today have assumed confrontational postures and have thrust at each other entirely different global perspectives. Because these perspectives are fundamentally different, ensuring a public order in Antarctica that fulfills the needs for optimizing human dignity will require a shift in the design and use of our policy instruments. This shift must be more emphatically aimed toward taking from the Soviet social order processes all those elements that are congenial to our own. The shift must be toward supporting those features in the Soviet Constitution and law and policy, even if more rudimentary with regard to human rights than ours, that might be more promising for these goals. While such a shift does not contemplate refraining in any way from the measures required for our own defense, it does entail a careful, yet cautious, development of strategic instruments of policy that will encourage needed change and accommodation in Soviet policy. Such a policy for the United States is both supportive of stabilization in our relations with our major rival in Antarctica and else-
where, and of positive measures that will reduce the strategic competition in areas such as Antarctica.

V. THE COMMON INTEREST IN STABILIZED RELATIONS

1. The Claims Process and Establishment of Public Order

All states have an interest in promoting public order, because through that order, they are able to promote their own security with an economy of effort, to ensure the legitimacy and support of their actions and decisions, and to provide for the preservation and promotion of the values they prize. As long as they meet with opposition from other states, they act through a variety of strategies in claims processes: they impose their claims and demands upon each other, some of which they tolerate, while others they oppose, sometimes with military force. As this claims process proceeds, a convergence of interests develops and tendencies appear that are inclusive in nature, laying the groundwork for a common interest. Under present circumstances, the primary common interest dictated by the rivalry of the United States and the Soviet Union is in avoiding the intolerable destruction of the major nuclear weapons, and because both sides maintain such weapons, both maintain a mutual interest in deterring or preventing any war that might lead to the use of the major weapons.

This broad policy based process is also the process associated with the development of customary international law. The convergence of interests, and the development of mutual or reciprocal tolerances are associated with the development of such law. While the process is necessarily slow (particularly because the major political entities have deeply opposed value systems and are heavily armed by a rapidly advancing technology), convergence itself is recognizable, and the process can be assessed as order-promoting. Law supports the development of public order, and is reciprocally supported by it so that the decisions and actions identified with the claims among states take on a constitutive importance.

The claims process among states reflects the realities of their behavior. As the process proceeds, tendencies toward a convergence of interests appear. As the separate, exclusive strategies, and the sanctioning instruments that all states employ, the ideological, diplomatic, economic and military policy instruments, are opposed by each other, outcomes result that suggest reciprocal tolerances with regard to what is permitted and what is not permitted.

In the assessment of the realities of state behavior—realities that make arms control and disarmament efforts effective and realities that make demilitarization an effective measure of the contribution of arms control to the stability among states—it is necessary to look to the way in
which states are making claims and demands upon each other, what they are demanding from each other, and the measures they are taking to ensure that those demands are satisfied. It is necessary, as well, to look to the credibility and perceptions of others concerning their decisions, the expression and implementation of their will to act, and their perspectives relating to the use of force.\textsuperscript{171}

Through the claims processes states will ultimately establish their security, because those processes include the entire range of communications and relations in which they go about building security, including resorting to the use of force. Through such processes, states establish public order, though they might deliberately choose to challenge each other over the public order that they are demanding and are willing to fight for, and over the means that they might use to achieve public order goals.\textsuperscript{172} In pursuing their claims they are projecting and relying upon power and influence, because these are critical among the instruments available among states for both security and order-oriented purposes.\textsuperscript{173}

\textsuperscript{171} As long as demilitarization remains effective it will serve the general arms control goals. If it falls apart then, of course, there is a potential for the increased costs of exploiting the areas such as Antarctica for their full strategic possibilities. The Congressional Budget Office of the Congress of the United States has determined that arms control agreements must not be inconsistent with the goals of security of the nation, that these goals are dependent upon military capabilities and the modernization and introduction of new weaponry (because the process cannot be controlled between the rivals), and hence the agreements are primarily useful as a means of saving money in the overall business of ensuring self-defense. \textit{CONGRESSIONAL BUDGET OFFICE, AN ANALYSIS OF ADMINISTRATION STRATEGIC ARMS REDUCTION AND MODERNIZATION PROPOSALS} (1984). The further goal of arms control aimed at the peaceful settlement of disputes is not mentioned in the report:

The analysis in this chapter suggests that it will be difficult— in the absence of arms control—to save substantial amounts of money, especially in the near term, without harming the survivability and effectiveness of U.S. strategic forces. The Congress has already reviewed and approved major modernization programs in every part of the strategic triad, and it is not likely to alter them without an arms control agreement. Perhaps even more than in the past, therefore, arms control offers the most reasonable hope of achieving substantial cost savings.

\textit{Id.} at 57-58.

\textsuperscript{172} See M. McDougal & F. Feliciano, \textit{Law and Minimum World Public Order} (1961); Howard, \textit{The Causes of War}, 8 WILSON Q. 90, 99-100; see also J. Headlam-Morley, \textit{supra} note 168, at 254 (1984); W. Kuehl, \textit{Seeking World Order (The United States and International Organization to 1920)} (1969). The promotion of global order entails the legal regulation and control over the use of force because it is unrealistic to insist that states will abandon their claims to use force when they believe that such uses are legal or permissible, including those uses in self-defense. This perspective compels us to accept weapons in a checks and balancing process intended and expected to deter the uses of force and to shift state policies toward a shared global order. But fundamental assumptions are involved here, i.e., that states will give up those competitive pressures and demands that are so great and that they will use force with respect to promoting or defending the "interests" they entail: "Arms races may . . . be the result of a quite deliberate assertion of an intention to change the status quo, as was, for example the German naval challenge to Britain at the beginning of this century." Howard, \textit{supra}, at 100.

And through the public order they seek to establish, states are always insisting that their actions, decisions and policies are legitimate, while those of their opponents are not.\textsuperscript{174}

As this inquiry indicates, the process may lead to an "equilibrium" in which by the checking and balancing of the aggression or perceived aggression, the rivals attempt to prevent serious destruction of the values they wish to protect. Or, such inquiry may proceed through a concerted or at least reasonably shared effort to establish the institutions and processes that can serve common interests and goals. With respect to both of these orientations, the measuring standard relates to the common interest in stability, and to relations sufficiently stabilized so the risks of violence or hostilities breaking out will be minimized. Where the major rivals are engaged in serious confrontations, their primary interest is first and foremost in minimum public order and minimum stability commensurate with maintaining that order.

Demilitarized arenas are arenas in which the states guaranteeing demilitarized status have either determined that the arena will remain free of hostile combat because it is not a strategic arena, or because they believe that even if it is strategic in nature, they can check each other from

\textsuperscript{174} That the calculation among states with regard to their actions, particularly their adoption of military measures, must now take account of nuclear weapons and the perceived probability that the use of such weapons may lead to "suicide" is noted by Howard, \textit{supra} note 172:

When the decision to go to war involves the likelihood, if not the certainty, that the conflict will take the form of an exchange of nuclear weapons from which one's own territory cannot be immune, then even for the most bellicist of leaders, even for those most insulated from the pressures of public opinion, the calculation that they have more to gain from going to war than by remaining at peace and pursuing their policies by other means will, to put it mildly, not be self-evident. The odds against such a course benefiting their state or themselves or their cause will be greater, and more evidently greater, than in any situation that history has ever had to record. Society may have accepted killing as legitimate instrument of state policy, but not, as yet, suicide. For that reason I find it hard to believe that the abolition of nuclear weapons, even if it were possible, would be an unmixed blessing. Nothing that makes it easier for statesmen to regard war as a feasible instrument of state policy, one from which they stand to gain rather than lose is likely to contribute to a lasting peace. \textit{Id.} at 103.

Clearly Howard is making assumptions of his own, and equally clearly he is overlooking the tendency among strategists to seek continuously those games where the "rules" might enable them to move more freely, and where those rules may include military measures. In overlooking these elements and factors, Howard does not here (and does not intend to) examine the situations in which states, designing and applying their strategies, are in search of more effective means to promote or defend the policies of their governments. \textit{See generally} Dyson, \textit{The Game of Guerrilla}, 150 YALE LIT. MAG. 71 (1984). Dyson's thesis is that under the nuclear stalemate and perhaps aided and abetted by it, the United States has accepted a "game" designed by the Soviet Union, and controlled by it, aimed at reaching Soviet objectives either through situations that can be exploited directly or indirectly by such forces or by the Soviet Union, or, as in Afghanistan and Eastern Europe, through direct action by the Soviet Union, where the United States has been tested and found wanting.
utilizing it for strategic advantage. The claims process with respect to demilitarization is one that relates to either of these two perspectives. Such a process presupposes for Antarctica that claims for strategic preferences, in resources or in establishing presence for example, will be checked or balanced among the claimants. It also presupposes that claims for participation in the making of decisions and the development of policies relating to the continent will either be shared to the advantage of each, or, if a few seek control, then only those maintaining control will have controlling decisions, and the other participants will be effectively vetoed.

But demilitarized arenas are arenas in which states have no reason to compete. Once they perceive that their interests are engaged, that competition within the arena is rising, and that their exclusive claims for security or public order are involved, it is likely that the will to maintain the arena as a demilitarized arena will erode. Once states perceive the need to engage in the arena for their own self-defense, or for establishing a critical base of power, the demilitarized status cannot last.

These are the perceptions, even if limited in their effectiveness, of demilitarization for Antarctica. However, they compel us, as do arms control measures, and the perspectives on strategy, deterrence, and the repeated efforts to regulate the use of force, to recognize that the will of states to pursue public order suffused by a common interest is the crucial factor in making demilitarization in particular, or arms control in general, effective. Little can be said about whether the adoption of arms control measures or demilitarization will improve stability in the relations among states, or will lead to better relations among them. The practice among states so far indicates that they can, and are willing, to pursue such policies and the agreements projecting such policies, notwithstanding the realization that they are competitors for power and influence, and competing in such a way that none of their efforts and negotiations can be reasonably identified as leading to common interests beyond that of avoiding nuclear war. Yet the claims process is a process of converging interests, and if the goals that are sought in arms control are not reduced to the pettiness of weaponry that has relatively little military utility and to demilitarization efforts in which the actions of states are primarily non-aggressive, then there are opportunities to be exploited that might lead to a shared public order, and a common interest both in sharing it and in achieving it.

175 C. von Clausewitz, supra note 34, at 90-91, 97, 177.
176 With demilitarization, or with arms control in general, the issue is moving from "offsetting deterrent capabilities" to a moderated form of deterrence employing defense and meeting traditional expectations. This was expressed by Ambassador Paul H. Nitze on March 28, 1985, in the Alastair Buchan Memorial Lecture at the International Institute for Strategic Studies in London:

[A]rms control should be viewed as one element of our security policy. It compliments the
measures that we must take unilaterally, such as maintaining weapons and forces necessary for an adequate deterrent. Arms control is not a substitute or replacement for adequate defenses. Indeed, experience indicates that, while arms control hopefully can play an important role in enhancing our security . . . what we are able and willing to do for ourselves is more important . . . . Whether or not we have arms control agreements, it is necessary [to] have sufficient military forces, both conventional and nuclear, to deter an armed attack by the Soviet Union and its associates.