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Case Western Reserve Journal of International Law

Volume 9 | Issue 2

1977

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Recommended Citation

Harry H. Almond Jr., *Law and Armed Conflict: Some of the Shared Policies*, 9 Case W. Res. J. Int'l L. 175 (1977)
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Law and Armed Conflict: Some of the Shared Policies

*by Harry H. Almond, Jr.**

THE INTERNATIONAL LAW of armed conflict has tended to simply mirror the practices developed by States when actually engaged in such conflict.[1] The objective of these laws, in the past, has been protection of human values.[2] To further this objective, the laws regulate the freedom of the belligerents in the use of their weapons and in the methods of attack which they might employ.[3] Much of the policy which is shared by States is codified in treaties such as the Geneva Conventions of 1929 and 1949, establishing protections for the victims of armed conflict

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[1] The practice of the United States and of other States may be found in 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW (1968); 2 L. OPPENHEIM, INTERNATIONAL LAW (7th ed. 1952). *See* DEP'T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE (rev. 1976). *See also* DEP'T OF THE NAVY, NWIP 10-2, LAW OF NAVAL WARFARE (1955), which is in the process of revision.

[2] Lauterpacht, *Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206 (1949).

[3] For a variety of views on this subject, *see* I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); H. LEVIE & J. CAREY, WHEN BATTLE RAGES, HOW CAN LAW PROTECT? (1971); J. STONE, LEGAL CONTROLS OF ARMED CONFLICT (1971); C. POMPE, AGGRESSIVE WAR — AN INTERNATIONAL CRIME (1953); A. MCNAIR AND A. WATTS, THE LEGAL EFFECTS OF WAR (1966). *See also* LAW AND RESPONSIBILITY IN WARFARE — THE VIETNAM EXPERIENCE (P. Trooboff ed. 1975); R. Bindschedler, A RECONSIDERATION OF THE LAW OF ARMED CONFLICTS (1971); F. FRAENKEL, MILITARY OCCUPATION AND THE RULE OF LAW (1944); G. VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY (1957); J. MOORE, LAW AND CIVIL WAR IN THE MODERN WORLD (1974); THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (C. Black and R. Falk eds. 1971); R. TUCKER, THE JUST WAR (1960); THE INTERNATIONAL LAW OF CIVIL WAR (R. Falk ed. 1971); S. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR (1972); L. KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW (1956); F. GROB, THE RELATIVITY OF WAR AND PEACE (1949); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973); B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION — THE SEARCH FOR WORLD PEACE (1975); J. STONE, AGGRESSION AND WORLD ORDER (1958); A. THOMAS AND A. THOMAS, THE CONCEPT OF AGGRESSION AND INTERNATIONAL LAW (1972); B. BRODIE, WAR AND POLITICS (1973). The texts, articles and monographs on this subject are very extensive, and the selection here is primarily to provide a variety of reviews.

and for prisoners of war,[4] and the Hague Conventions, particularly the Hague Regulations, which were annexed to the Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land.[5] Two protocols, presently under review at diplomatic conferences in Geneva, are aimed at supplementing this "international humanitarian law."

Although these shared policies are reviewed against the background of the *jus ad bellum* and *jus in bello*, continuous clarification and reexamination are required even when war is not threatened because a process of coercion is continually taking place. This process is affected by major new developments in weapons and military technology which are moving mankind toward a far greater destructive[6] and disabling force than ever known in the past.[7] Increased accuracy,[8] continuous improvements in launching and delivery capabilities, and the development of sophisticated, powerful weapons for use beneath the seas and in outer space,[9]

[4] *See* THE LAWS OF ARMED CONFLICT (D. Schindler and J. Toman eds. 1973); THE LAW OF WAR — A DOCUMENTARY HISTORY (L. Friedman ed. 1972).

[5] *Infra* note 24.

[6] The destructive force of nuclear weapons can be seen in World War II. According to R. WEIGLEY, THE AMERICAN WAY OF WAR 359, 365 (1973), the total casualties of prolonged bombing of Germany by the Allies were 305,000 killed and 780,000 injured. The casualties resulting from the "small" atomic bombs at Hiroshima and Nagasaki were 115,000 killed, and an even larger number wounded.

[7] *See* McDougal and Feliciano, *International Coercion and World Public Order: The General Principle of the Law of War*, 67 YALE L.J. 771 (1958); McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 HAGUE RECUEIL 137 (1953); M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (1961).

[8] The importance of targets and targeting accuracy and therefore of discriminating weapons and methods of attack during World War II is brought out by Albert Speer, who declared: "The American attacks, which followed a definite system of assault on industrial targets, were by far the most dangerous. It was in fact these attacks which caused the breakdown of the German armaments industry. The night attacks did not succeed in breaking the will to work of the civilian population." Cited in R. WEIGLEY, *supra* note 6. In a war involving nuclear weapons, it also seems evident that the targets must be the adversary's nuclear weapons capabilities.

[9] Sokolovsky observed with respect to Soviet military strategy: " . . . Soviet military strategy takes into account the need for studying questions concerning the use of outer space and aerospace vehicles to strengthen the defense of the socialist countries. This must be done to insure the safety of our country, in the interest of whole socialist commonwealth, and for the preservation of peace in the world. It would be a mistake to allow the imperialist camp to achieve superiority in this field. We must oppose the imperialists with more effective weapons and methods for the use of space for defense purposes. Only in this way can we force them to renounce the use of space for a destructive and devastating war." V. SOKOLOVSKY, MILITARY STRATEGY 305 (1963).

make a new appraisal of the institutions and procedures for controlling weapons technology an immediate necessity.

Policies among States with respect to their conduct, interactions, claims, and communications affect the legal order which they share.[10] International law — the law of a world legal order — is a future-oriented policy. The flow of decisions which characterizes that law shows that it is an on-going process — that process being of greater real significance to the decision-maker than is the hardened, black-letter rule. According to Professor McDougal,[11] international law is:

> . . . the comprehensive process of authoritative decision, transcending all territorial boundaries, by which the peoples of the world clarify and implement their common interests.

To a certain degree, international law is self-enforced:

> When we look at any community, that is, any group of people exhibiting interdeterminations and interdependences, we can observe a process of effective power in the sense that decisions are taken and enforced whether particular people like it or not. Such a process is observable on a global scale. Even the Russians, the Communist Chinese and ourselves are scorpions in the same bottle who must take each other's decisions into account.[12]

A number of major issues have arisen which call for a fresh examination of the policies underlying the law of war. To understand the nature of these problems and issues, it is necessary to recognize that the dialectics of State behavior compel us to view armed conflict within the wider scope of general coercion.[13] The on-going process of coercion reveals a pervasive and distinct character.

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[10] T. TARACAUZIO, THE SOVIET UNION AND INTERNATIONAL LAW 311 (1935); THE SOVIET IMPACT ON INTERNATIONAL LAW (H. Baade ed. 1965); K. GRZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW (1970); J. HILDEBRAND, SOVIET INTERNATIONAL LAW (1968); J. TRISKA AND R. SLUSSER, THE THEORY, LAW, AND POLICY OF SOVIET TREATIES (1962).

[11] McDougal, *The Law of the High Seas in Time of Peace*, 25 NAVAL WAR COL. REV. 35, 36 (1973).

[12] The struggle between liberal Western democratic ideas and Soviet Marxism is examined in Davenport, *Civilization at Risk*, 20 MODERN AGE 266 (Summer 1976).

[13] The framework of the public legal order is described by M. MCDOUGAL, H. LASSWELL AND I. VLASIC, LAW AND PUBLIC ORDER IN SPACE, 95-96 (1963) as follows:

"In largest perspective, the process of authoritative decision today exhibited by the most comprehensive earth-space community like the comparable processes exhibited by its various lesser component communities, may be seen to com-

Coercive behavior occurs whenever there are uses, attempted uses, or preparations to use force capable of destabilizing the social order of the target State. This definition of coercion embraces, for example, the conduct of organized groups which seek to compel others, notably governments, to meet their demands. Owing to the nature and destructive force of today's modern weapons, particularly nuclear weapons, the process of coercion begins with the preparation of those weapons or their agents because the acquisition itself of such weapons is a threat.

This process extends not only to force which may amount to war, *de facto* or *de jure*, but also to hostilities which fall short of war. It extends to insurrections, "wars of national liberation,"[14] and outbreaks of civil violence, particularly where the size of the groups involved is large or the weapons used are advanced. But seeking the threshold of violence at which the interests of States conflict is an ambiguous and largely fruitless task, particularly in view of the fact that isolated outbreaks can easily escalate into, or are sometimes already part of, a concerted plan to impose coercion.

The process of coercion envelopes many areas, of which actual violence is only one. It may be involved in the negotiations, or the follow-up, or even the implementation of a "settlement" of a conflict. The outcomes of the Korean and Southeast Asian conflicts are two recent examples of coercion in these areas.

prise two different types of decision: those which establish or constitute the major features of the general process of decision, and those which make particular applications of the authority so established to specific controversies between participants about the distribution of values. The first, or 'constitutive,' type of decision embraces all the important decisions, made in response to the basic claims to competence indicated above, which identify the decision-makers authorized to act upon behalf of the community, project basic community goals for the guidance of particular decisions, establish all necessary structures of authority, provide bases of power in authority and other values for support of decision, stipulate and legitimize the use of different strategies in persuasion and coercion in taking and enforcing decisions, and facilitate the final outcomes in decision with respect to all the different functions. The second type of decision, referred to as 'particular applications,' embraces the whole flow of responses by authoritative decision-makers to that great bulk of continuing, particular claims, described above as relating to access, minimum order, responsibility for deprivations, jurisdiction over particular activities, acquisition of resources, and so on. It is these latter decisions, past and probably future, which are the principal focus of the subsequent chapters of this book, and some general orientation in contemporary constitutive process would appear necessary to their rational consideration and appraisal."

[14] A Soviet scholar's assessment of wars of national liberation is in G. STARUSHENKO, THE PRINCIPLE OF NATIONAL SELF-DETERMINATION IN SOVIET FOREIGN POLICY (n.d.). *See also* LENIN ON THE NATIONAL LIBERATION MOVEMENT (1960).

This more remote use of coercion shows that the strategic instruments of States, those by which their foreign policies are conducted, operate to reinforce one another.[15] Among States with clearly defined foreign policies and with clearly established purposes in pursuing their foreign affairs, these strategies necessarily act in concert with each other.[16] Under these circumstances, even if coercion is not directly applied, a major State has ready access to it. Other States are made aware of the coercive capabilities of these powers. It is apparent, therefore, that a State may apply coercion through economic, diplomatic or ideological means. Under the umbrella of military power, a State can first use these other strategies, firm up their use by acting in concert with other powerful States, and seek command and control over the transnational decision process. Only if these other strategies fail will a major power be compelled to give precedence to a military threat. However, the growing advances in weapons and the resultant threat induced by their mere acquisition suggest that the force of economic and diplomatic strategies and ideological declarations is always derived from an overhanging military threat. These strategies are not different forms of coercion; they are simply different masks for one coercive force: military power.

ISSUES

In view of the ever-widening reach of the process of coercion and the ever-increasing military power upon which it is based, a number of policy considerations need to be reexamined. Among them are the following:

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[15] "Wars of national liberation" are an instrument of Soviet foreign policy directed at the West, and justified within if not sanctioned by "peaceful coexistence." Referring to the wars in Vietnam and Algeria as examples, Khrushchev declared on Jan. 6, 1961, "This is a liberation war, a war of independence waged by the people. It is a sacred war. We recognize such wars; we have helped and shall continue to help peoples fighting for their freedom . . . These uprisings cannot be identified with wars between countries, with local wars, because the insurgent people fight for the right of self-determination, for their social and independent national development; these uprisings are directed against corrupt reactionary regimes, against the colonialists. The communists support just wars of this kind whole-heartedly and without reservations, and march in the van of the peoples fighting for liberation." Cited in H. SCOTT, SOVIET MILITARY DOCTRINE: ITS CONTINUITY 1960-1970, 82-83 (1971).

[16] *Cf.* M. MCDOUGAL, H. LASSWELL AND I. VLASIC, *supra* note 13, at 360, on "Claims Relating to the Maintenance of Minimum Order." A detailed review of strategies and objectives is pursued in chapter 4.

1. The principle of military necessity;
2. The prevention, deterrence or reduction of impermissible coercion, and;
3. The commitments toward the maintenance of international peace and security made under the United Nations Charter.

A brief comment with respect to the background against which these issues exist is in order. In all activities and interactions among States, the major cause of tension is the claim that each State may determine for itself as a "sovereign State" those actions it will take to satisfy its exclusive or "national" interests. But, in the gradually emerging recognition that no State can secure its vital or fundamental interests by itself (particularly in view of the differences in development of military technology), there is an increasing desire for inclusive, world-community oriented action for international peace and security. Detailed analysis tends to reveal more subtle tensions: The Soviet Union and Communist States in general consider that the "human rights" provisions of the United Nations Charter[17] are subordinate to the over-riding importance of "security." They also tend to believe that the dialectics of world history will lead to a "socialist commonwealth of States." When this happens, "security" will be achieved, and only then can "human rights" be sought.[18]

But even without this closer analysis, one can see that the framework of interaction among States is imposed by the realities of a real world in which a military confrontation between the major States will unleash a destructive force the outcome of which is beyond the capabilities of their officials and their institutions to control. The search for a "controlled" outcome of nuclear warfare continues, but time favors the technological advance of weapons over the ability to control their spread and use.[19] Technology in weapons has tended, in the last four decades, to outstrip the means by which their effective assimilation into armed con-

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[17] The views of the Soviet Union as to peaceful coexistence are examined in R. ALLEN, PEACE OR PEACEFUL COEXISTENCE (1966).

[18] Lauterpacht, *Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354 (1944).

[19] Past trends with respect to the management of major armed conflicts show two things. First, the process of managing an armed conflict is in actuality "shared" by the belligerents in the sense that both are concerned with avoiding total loss through "total war." Technological developments providing for destruction beyond the experience of past combats and conflict indicate that a future armed conflict will overreach these capabilities and that the outcome can be expected to move toward total destruction.

flict can be controlled. As a result, the risk level to the social order has grown more rapidly than have the institutions and procedures which are supposed to make the outcomes of a major armed conflict manageable.

Increased mobility of persons across transnational boundaries means that individual conduct could involve a single State or even a number of States. If one lone terrorist[20] were to get control of nuclear explosive devices, he would be beyond the control of any State if he were willing to use them.

The development of modern weaponry is, therefore, a major factor that has created a need among States to reestablish a shared policy concerning the control of weapons and their components, their use, and threats of their use. The proliferation of nuclear weapons has created the possibility of world-wide destruction in the event of a conflict among major States. Therefore, there must be a continuous process of inquiry, similar to that of the physical scientists, to provide the institutional bases and procedures which can operate effectively to prevent and deter the use of these weapons.

Because the process of coercion has such a broad reach, it is apparent that its control involves a multivariant set of policies. Variants include policies with respect to technological developments and the objectives, motivations, and "needs" of the States.[21] Certain policies, however, expressed in the simplified forms followed in the brief discussion below dominate the current legal framework.

THE PRINCIPLE OF MILITARY NECESSITY AND THE PRINCIPLE OF HUMANITY[22]

The "law of war" embodies two fundamental, usually opposed, policy goals. One is exemplified in the claim of the belligerents

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[20] On terrorism, see bibliography in INTERNATIONAL TERRORISM AND POLITICAL CRIMES (M. Bassiouni ed. 1975). *See also* INTERNATIONAL TERRORISM AND WORLD SECURITY (D. Carlton and C. Schaerf eds. 1975). For a general legal treatment, with emphasis on the law of war, *see* J. BOND, THE RULES OF RIOT (1974).

[21] For a detailed review, *see* Frank, *Nuclear Terrorism and the Escalation of International Conflict*, 29 NAVAL WAR COL. REV. 12 (1976). With respect to the present means of deterring and preventing terrorism, Frank declares: "My own view is that nuclear terrorism is probably inevitable. We have already witnessed several terrorist or terrorist related incidents involving nuclear materials." *Id.* at 15.

[22] Citations on military necessity may be found in 2 WORLD POLITY (1958) which has an extensive bibliography; *see also* O'Brien, *The Meaning of "Military Necessity" in International Law*, 1 WORLD POLITY 166 (1957), and his citations,

to their legal right to engage in armed conflict until their adversary's will or capability to resist is overcome. This claim is promoted by an appeal to military necessity, which creates the freedom, subject to the restraints of international law, to pursue a conflict by attacking and, if necessary, destroying legitimate military targets and objectives with discriminating weapons. The other policy goal, imposed by the world community, is that belligerents respect the humanitarian elements underlying the world order.

The humanitarian element is actually inherent in the practical application of the principle of military necessity. It is manifested in the restraints imposed by international law. Law of war restraints on weapons use and manner of attack operate to effect humanitarian outcomes. One restraint is the demand that States use those discriminating weapons at their disposal. This requires the States to single out as targets only legitimate military objectives and, therefore, to avoid attacking the civilian population. A further restraint is the requirement that the use of weapons, the mounting of attack, and the methods of armed conflict meet the legal standard of reasonableness. This legal standard requires that the force used shall be proportionate to the military objective to be attained. The humanitarian principle is conveyed by the prohibition against weapons or attacks that might cause unnecessary suffering, and by the rules that have been derived from the practice of States. The principle is extended to some weapons by agreements denying belligerents the legal right to use those weapons in armed conflict. Other derivative law denies the belligerent the right to engage in excessive force against his adversary, regardless of the level of the conflict. This policy extends beyond armed conflict *per se*, to all forms of coercion. It has led to the declaration of customary law in the law of war treaties, such as the Geneva Protocol of 1925[23] (banning the use of lethal chemicals) and the Hague Regulations of 1907.[24] This policy is the

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Downey, *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251 (1953). These articles give a detailed analysis of "necessity" and policy views which differ from mine. O'Brien, for example, favors natural law as the basis for military necessity. Note that this premise conflicts with that of Marx and Hegel who argue that territorial integrity and sovereignty of the State transcend the rights of citizens.

[23] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061.

[24] Hague Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

basis for seeking the supplementary law in the Protocols presently under consideration in the diplomatic conferences in Geneva.

The jurists and the courts have elaborated the principle, drawing on the practice of States to give it legal content. The Nuremberg Tribunals described the principle of military necessity as follows:

> Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.[25]

This opinion is reinforced by a separate opinion of the Nuremberg Tribunal emphasizing that the principle of military necessity is subject to international law. The principle of military necessity, in other words, cannot be considered as a defense for violating rules of international law. Instead, it is my view that it operates within, and as part of, international law, as moderated by the principle of humanity:

> It is the essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly — and at the sole discretion of

[25] *The Hostages Case*, 11 TRIALS OF WAR CRIMINALS 1253-54 (1950).

> any one belligerent — disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.[26]

As Professor Castren[27] has pointed out, the principle of military necessity was originally established as a relatively general principle from which we could derive, out of the practice of States, an elaboration of certain usages into accepted rules. Some of the older German writers, particularly at the time of the First World War, took the view that it was permissible to ignore the laws of war derived from this principle when a situation of extreme distress arose. As to this, Professor Castren points out:

> This view is expressed by the slogan 'Kriegrison geht vor Kriegsmanier,' that is to say military expediency overrides the usages of war. This catch phrase is dangerous and misleading in so far as it refers in a general way to the usages of war without mentioning the laws of war, and it may thus give the impression that even the laws of war are no more than usages without sanctions. In point of fact the expression 'Kriegsmanier' also comprises the laws of war, both written and customary, but even this does not really improve the matter . . . This view of the elasticity of the laws of war must be absolutely rejected as it cannot be legally justified and as its practical consequences are most dangerous. It would enable combatants to justify any deviation from the laws of war on the real or supposed ground of military necessity and would soon lead to complete anarchy. The evaluation of military necessity may often be extremely precarious owing to the uncertainty and elasticity of this concept . . .
>
> It should further be noticed that from a legal standpoint comparatively few rules, designed to cover situations of military necessity, are exceptional rules from which it is not possible to draw general conclusions and hardly even decisions by way of analogy. The laws of war are the result of a compromise between military and humanitarian interests, and the necessities of war have already been sufficiently observed in the framing of these rules.[28]

The principle of military necessity is not a legal precept, useful only to jurists or legal advisors in preparing their advice to governments. It speaks to the commander in the field and to the officials in government who direct the course of hostilities, and who are the ultimate policy and decision-makers. These officials

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[26] *The Krupp Trial*, 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 139 (1949).

[27] E. CASTREN, THE PRESENT LAW OF WAR AND NEUTRALITY (1954).

[28] *Id.* at 65-66.

are also those who, under law, are responsible for engaging in and prosecuting armed conflict. To a certain extent the restraints on military necessity flow from the "psychological set" established in these policy-makers, whose intentions and deliberations may be called into question. Opportunities and options available to them to avoid situations that might lead to unnecessary suffering can be raised to call leaders to task. In a world much aware of and sensitive to public opinion, demands for investigations into policy and for participation in decisions with respect to conflict can operate as strong incentives for compliance with international norms. Such demands call for adherence to the "rule of law" and to the firm practice of fairness and justice.

The moderating principle of humanity introduces a separate yet intimately related element of policy in the operation of the principle of military necessity. Perhaps it is correct to say that its operation is necessary in the application of the principle of military necessity, because the operation of one without the other makes principles intended to regulate violence meaningless. The Department of the Navy, in its Law of Naval Warfare (NWIP 10-2), declares:

> The principle of humanity prohibits the employment of any kind or degree of force not necessary for the purpose of the war, i.e. for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.[29]

The principle of humanity as described, becomes a kind of mirror image of the principle of military necessity. In its comments, the Department of the Navy adds the following:

> In allowing only that use of force necessary for the purpose of war, the principle of necessity implies the principle of humanity which disallows any kind or degree of force not essential for the realization of this purpose; that is, force which needlessly or unnecessarily causes or aggravates both human suffering and physical destruction. Thus, the two principles may properly be described, not as opposing, but as complementing each other. The real difficulty arises, not from the actual meaning of the principles, but from their application to practice.[30]

Paragraph 41 the Department of the Army's The Law of Land Warfare (FM 27-10), declares:

> 41. Unnecessary Killing and Devastation.
> . . . . loss of life and damage to property must not be out of proportion to the military advantage to be gained. Once a fort

[29] DEP'T OF NAVY, *supra* note 1.

[30] *Id.*

> or defended locality has surrendered, only such further damage is permitted as is demanded by the exigencies of war, such as the removal of fortifications, demolition of military buildings, and destruction of stores.[31]

The principle of military necessity is implemented in the practice of States in the conduct of war. In no other field of international law is practice so important; the stakes involved are humanitarian standards. But attempts to apply the principle beyond the actual practice of States in armed conflict would be tantamount to raising illusions. Resort to barbarous practices in a major conflict between the major States would amount to a retreat from the humanitarian standards so far attained. But the realities of such circumstances would compel us to apply lower standards to the practical application of the principle and rules of the law of war. The treaties, codifications of rules in international agreements, and international agreements in general which seek to impose greater reasonableness and higher standards of humanity all depend in their application and their outcomes upon practice. This is what "respect" for the law of war is all about.

In the growth and development of the international law of armed conflicts, there are analogies to the common law process. The "law" must clearly be found in the practice of States — a practice that reveals the expectations of those who participate in its application and restraints. The four Geneva Conventions of 1949, in their common Article I, at best anticipate the hopes of the draftsmen in declaring that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."[32]

Professor McDougal, in referring to customary international law, declares:

> What is important in the development of international law by custom is, we may emphasize, the crystallization of perspectives among peoples, and especially among their effective decision-makers, that certain past uniformities in decision will, and should be observed in the future.[33]

With respect to the great powers, such as the United States and Soviet Union, the process by which the customary law develops appears in "mutual tolerance" and "mutual restraint," and the process itself comes alive in the practice between them:

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[31] DEP'T OF ARMY, *supra* note 1.

[32] Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, [1956] 6 U.S.T. 3316, T.I.A.S. No. 3364.

[33] M. MCDOUGAL, H. LASSWELL & I. VLASIC, *supra* note 13, at 243.

> Obviously, the main reason for this mutual tolerance lies in the expectations that attempts to obstruct by one side might automatically result in countermeasures by the other side, with probable losses to both. The fact that the two polar blocs possess weapons of mass annihilation and are equally vulnerable against each other no doubt in a very large measure account for their willingness to seek compromise through tacit mutual restraint. Our emphasis upon the reciprocities and tolerances exhibited in confrontations between the great powers should not, however, detract from comparable attitudes occurring almost daily in interactions involving minor powers.[34]

If the United States claims to advance human dignity in the world order, and if the process creating customary law is accepted as described, there is then a duty on such States as the United States to assume a leading role in such development in its practice, shaping the attitudes of other States to the same ends.

The clauses on denunciation in the four Conventions each rightly contain the language which declares that their substance, in the customary international law, continues to apply even if the Conventions are denounced:

> The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.[35]

Article 60 of the Vienna Convention on the Law of Treaties, which is not yet in force, codifies the customary international law that humanitarian obligations do not terminate:

> 5. Paragraphs 1 to 3 (which provide for termination of treaties) do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular in provisions prohibiting any form of reprisals against persons protected by such treaties.[36]

If the shared policies of States with respect to their law governing armed conflict were to be implemented solely in their practice during armed conflict, the growth of that law would be incredibly slow. Past trends in all armed conflicts clearly reveal this fact and need not be examined here.[37] To ensure protection

[34] *Id.* at 45.

[35] *Supra* note 32, art. 142.

[36] Vienna Convention on the Law of Treaties, May 23, 1969, 24 U.N.G.A., Doc. A/CONF. 39/27.

[37] "What is important in the development of international law by custom is,

of humanitarian values, particularly in view of the new weaponry, more is required than statements such as the formal acceptance by States of obligations or commitments in their treaties,[38] the remarks their delegates make for the "negotiating record," and the debates and positions taken with respect to United Nations General Assembly resolutions, among others. Ratification of a treaty or adherence to a treaty and its "obligations" are at best legalistic formalities that are meaningless without implementation. Therefore, the policy of States must be to provide for effective implementation during periods when conflict is not underway.[39]

Wider implementation of the law of war treaties has been contemplated and even required in such treaties as the Geneva Conventions of 1949, but the effectiveness of the implementation makes great demands upon States to "open up" their social orders to permit wider participation within their bureaucracies by the general public. It requires dissemination and explanation of the treaty texts, which unfortunately are instruments of such complexity as to defy any but the specializing lawyers to understand them. It requires a sound program of instruction to be associated with the application of the treaty provisions. It calls for a clear understanding on all levels of policy and decision-making of the general structure of the law of war and its policy. Instruction and dissemination must extend to the public at large, as well as to the command levels of the armed forces and to armed forces personnel.

The humanitarian thrust of the principle of military necessity depends for support in part upon the behavior of commanders in conducting hostilities. The related principle of economy of force,

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we may emphasize, the crystallization of perspectives among peoples, and especially among their effective decision-makers, that certain past uniformities in decision will, and should, be observed in the future." M. MCDOUGAL, H. LASSWELL & I. VLASIC, *supra* note 13, at 243.

[38] Professor Tunkin described the reception and adherence of the USSR to customary international law to be that which it chose to accept. He is cited in M. MCDOUGAL, H. LASSWELL, & I. VLASIC, *supra* note 13, at 130-131, as follows: "It is true that the Soviet Union did not accept all the norms which at the time of her emergence were considered as norms of general international law. But the Soviet Union refused to recognize only reactionary norms . . . It is not therefore inaccurate to assert that with the appearance of the Soviet State some norms of the then international law, rejected by the Soviet State, ceased to be norms of general international law, but it is of importance to add that this limitation took place at the expense of reactionary norms of international law. As to democratic norms of general international law, the Soviet Union never rejected them."

[39] *Cf.* Przetacznik, *The Socialist Concept of Protection of Human Rights*, 38 SOCIAL RESEARCH 337 (1971).

shared by the States, offers more support.[40] This principle is described by Professor Weigley as follows:

> It refers less to the modern sense of 'economy' implying minimum expenditure of resources than to the judicious employment and distribution of force . . . it has been taken to mean that the most discerning use of combat power will permit the commander to accomplish his mission with minimum cost.[41]

According to Professor Osgood:

> It prescribes that in the use of armed forces as an instrument of national policy no greater force should be employed than is necessary to achieve the objectives toward which it is directed; or, stated in another way, the dimensions of military force should be proportionate to the value of the objectives at stake.[42]

Professor McDougal comments on this policy:

> The only assumption necessary to the usefulness of a formulation in terms of economy of force is the assumption that men may, by modification of their conscious attitudes, in some measure anticipate through time the probable effects of alternative courses of action and thus either maximize their gains or minimize their losses.[43]

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[40] An "economy in force" principle can be traced to SUN TZU, THE ART OF WAR 39 (S. Griffith trans. 1971): "Only when the enemy could not be overcome by these (i.e., other) means was there recourse to armed force, which was to be applied so that victory was gained: (a) in the shortest possible time; (b) at the least possible cost in lives and effort; (c) with infliction on the enemy of the fewest possible casualties."

[41] R. WEIGLEY, *supra* note 6, at 214.

[42] Professor Osgood's remarks are cited by M. MCDOUGAL & F. FELICIANO, *supra* note 7, at 35.

[43] M. MCDOUGAL & F. FELICIANO, *supra* note 7, at 35-36. They further observe: "Past applications of coercion may be described in terms of the actors' objectives and calculations of proportionality, and comparison may be made of effects achieved. . . . Formulations in terms of economy in force, specifically related to community perspectives both of purpose and proportionality, may, further, be projected into the future as appropriate criteria for authoritative decision. Whatever successes the law of war has in the past achieved, and there have been some, are testimony to the efficacy of this effort . . . It is sometimes suggested that men shape the proportion of their violence not so much from perspectives of economy, or of humanitarianism, as from fear of reprisals. The short answer is that minimizing risks of reprisal is precisely an aspect of economy in force. An application of force that results in the applier's sustaining retaliatory destruction can scarcely be described as economic. In terms of effects upon the humanitarian goals we recommend, moreover, it does not matter too much whether decision to limit destruction is based upon calculation of long-term self-interest, whether for preserving potential assets of minimizing risks of retaliation, or upon humanitarianism for fellow man." *Supra* note 7, at 36.

The principle of military necessity, therefore, is supported by the "realities" of the conduct of armed conflict. It gains content through the "realities" of governments, their officials and others who participate in the decisions and policies toward conflict, and through the manner in which hostilities are carried out. The principle reflects the standards of reasonableness, which in "open societies" can serve to give it greater effectiveness.

THE POLICY OF DETERRENCE

A second set of policies associated with the process of coercion is to be found in deterrence.[44] These policies extend to matters of arms control and disarmament, management of the outbreak of terrorism, and initiation and escalation of conflicts. A more detailed analysis would reveal their relationships to other sanctioning goals such as the prevention of violence and the corrective measures to be used against those who attempt or engage in impermissible violence.

Shared policies establishing the basis for deterrence are set forth in the "master agreement" between the United States and the Union of Socialist Republics, calling for a balance of equal security as a fundamental goal of their negotiations.[45] Equal security is established, however, not only by balancing the weapons with which we confront one another, but by holding one another's populations as hostage as the ultimate stakes of a nuclear war.[46] Since the inception of deterrence with strategic nuclear weapons, there has emerged a realistic recognition throughout the world that this process can be stabilized by further efforts toward general and complete disarmament, or can be destabilized by asym-

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[44] A. GEORGE & R. SMOKE, DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE (1974). *See also*, J. COLLINS, GRAND STRATEGY (1973).

[45] Limitation of Strategic Offensive Arms, June 21, 1973, 24 U.S.T. 1472, T.I.A.S. No. 7653. The Agreement reads, in part, ". . . in particular both Sides will be guided by the recognition of each other's equal security interests and by the recognition that efforts to obtain unilateral advantage, directly or indirectly, would be inconsistent with the strengthening of peaceful relations between the United States of America and the Union of Soviet Socialist Republics."

[46] The balancing of equal security has certain inherent limitations because it only operates between the United States and the Union of Soviet Socialist Republics. What happens to such a balancing process in the event that a third State, China, for example, becomes a major nuclear power with strategic weapons? How does the balance operate if even smaller nuclear powers proliferate, particularly in view of the need to avoid the outbreak of any nuclear war and the possibility of escalation?

metries inherent in the factors that must be used to establish the balance itself.

The present practice of the major Powers reveals their tacit understanding that nuclear conflicts between them cannot take place[47] (unless, of course, one side can shift the balance substantially in its favor) because the outcomes would be overwhelmingly catastrophic to the social orders, to human life, to property and to the future of society.[48] The shared policies concerning the desirability of limiting nuclear conflicts present ambiguities.[49] Limited conflicts cannot escalate into nuclear conflicts, even into "limited" nuclear conflicts, unless the belligerents have access to and are willing to assume the risks of the use of nuclear weapons, or unless their reliance upon conventional weapons begins to fail. It is, therefore, difficult to determine whether a limited nuclear conflict in which a major power is engaged, or in which it supports or assists another State, will extend beyond its control into an unlimited nuclear conflict.[50] To the extent that the shared policy and expectations with respect to the use of nuclear weapons are shifted when the balance between States is destabilized, nuclear weapons will no longer serve to deter coercion. Deterrence is also weakened as policymakers become convinced that nuclear weapons are simply conventional weapons whose destructive force has been quantified.

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[47] Wohlstetter, *The Delicate Balance of Terror*, 37 FOR. AFF. 211 (1959).

[48] *Cf.* R. WEIGLEY, *supra* note 6, at 477: "The very hardening of the missile sites of both rivals, which enhanced the deterrent effect of both retaliatory forces and the stability of nuclear balance during the 1960's, would make controlled and discriminating general war unlikely in the 1970's if deterrence should fail, because destroying the enemy's strategic force would require so overwhelming a weight of nuclear weapons that it would be bound to destroy much or most of his society in the process. It remains difficult also to imagine tactical nuclear war that would not be either a very brief eruption giving way quickly to a different kind of bargaining if the world were very lucky, or the prelude to general war. Because the record of nonnuclear limited war in obtaining acceptable decisions at tolerable cost is also scarcely heartening, the history of usable combat may at last be reaching its end."

[49] Deterrence and military strategy are in the view of some commentators clearly not limited to the use of military measures alone. Schelling declares: "Military strategy can no longer be thought of, as it could be for some countries in some areas, as the science of military victory. It is now equally, if not more, the art of coercion, of intimidation and deterrence." T. SCHELLING, ARMS AND INFLUENCE 34 (1966).

[50] The extent to which the equal balance between the United States and USSR can continue to provide an effective base for world "security" depends upon such circumstances as the policies of China — not a party to the strategic arms limitation agreements such as the ABM Agreement.

The process of deterrence operates not only against those engaged in armed conflict but also against those who might initiate such conflict. Also, it operates to supplement or support the legal restraints imposed upon States by establishing a "countervailing" force which an adversary may not wish to see unleashed. The legal right of reprisal, for example, applies to deter unlawful uses of weapons or attacks. But the exercise of that right requires the use of weapons or methods of attack otherwise illegal and therefore presupposes that the capabilities to carry out reprisal are available. It operates in law at least to deter continuation or repetition of the unlawful conduct. Lethal gases, for example, regarded as unlawful and restrained by the Geneva Protocol of 1925,[51] if used by an adversary would entitle the other side to retaliate in kind, or, according to some views, to retaliate with other unlawful measures in order to compel compliance with the law of war.

Because the legal right of reprisal depends upon the capabilities to retaliate in kind with unlawful weapons, its operation tends to limit the reach of arms control agreements. Provisions calling for "nonuse"[52] of weapons or methods of attack, taken literally as absolute restraints, are unrealistic, or subject to subterfuge, or will become illusory in practice. Even worse, the agreements are subject to termination under international law and by their own terms, and this reality compels us to anticipate that most States will seek to be prepared for reprisal. Resolutions in the United Nations lack legal force but the resolution process appears to provide the means by which States can claim that they are "peace-loving."

It is apparent that the policy and process of deterrence calls for weapon capabilities even where the weapons are banned.[53]

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[51] *Supra* note 23.

[52] The United States position on a proposal by the USSR for a draft treaty that would be directed to the non-use of force declared that such a proposal merely confuses the wider perspectives of the United Nations Charter, and tends to reduce their value, particularly those relating to human rights and to the peaceful settlement of disputes. *See* statement by Rosenstock, U.S. Representative, Sixth Committee, Press Release USUN-156 (76), Nov. 22, 1976.

[53] Deterrence, according to Brodie, "uses a kind of threat which we feel must be absolutely effective, allowing for no breakdowns ever. The sanctions, to say the least, are not designed for repeating action. One use of it will be fatally too many. Deterrence now means something as a strategic policy only when we are fairly confident that the retaliatory instrument upon which it relies will not be called upon to function at all." B. BRODIE, STRATEGY IN THE MISSILE AGE 272-273 (1965).

An agreement not to use weapons, made in peacetime between States reasonably willing at that time to compromise and enter into "binding" undertakings, dictates that those States will conform to the agreement or to the underlying law of war in armed conflict. Because such agreements necessarily extend to "contracting States," by logic they do not apply to non-contracting States. As such, States may be anticipated to narrowly construe such agreements, and consider themselves free to prepare for conflicts against the non-Parties as they see fit. The treaties could be worded to avoid this outcome, but up to the present, even their language has not attempted to limit this freedom as to non-contracting States.

The policies and process of deterrence must be applied once an armed conflict has been concluded as well as during times when a conflict seems imminent or possible. Conflicts terminating in "unconditional surrender" permit the total disarmament, and the reconstruction and rehabilitation of an adversary. But, as the events in Korea and Southeast Asia have indicated, a State must be prepared to enforce the "peace" or armistice and establish a policy to deter misconduct. Failing to do so will mean that a State cannot achieve a "peace with honor," but at best will attain illusion and cynicism, encouraging future misconduct.

As already indicated, the dynamics of deterrence apply to peacetime policies addressing coercion, and, in particular, to the policies of arms control. The arms control policy of the United States is described by its fundamental legislation as "an important aspect of foreign policy," which "must be consistent with national security policy as a whole."[54] The "formulation and implementation of United States arms control and disarmament policy" must be "in a manner which promotes the national security."[55] That policy is to be implemented in international agreements "including the necessary steps taken under such an agreement to establish an effective system of international control."[56] National security is to be protected under United States practice by verification sufficient to ensure compliance by all Parties.

But, almost by definition, arms control policy in its implementation through international agreement (aside from some very exceptional cases) must be a shared policy with other States. The

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[54] Sections 2 and 3 of the Arms Control and Disarmament Act, 75 Stat. 631, 22 U.S.C. § 2551 (1974).

[55] *Id.*

[56] *Id.*

deterrence maintained must be a realistic deterrence, because a breakdown in this process, or in the balance of equal security, is a breakdown of mutual security. Dangerous tensions inevitably result. A piecemeal approach creates obvious risks because arms control, as part of a policy of substantial and effective deterrence, must maintain symmetry. Current developments in the arms control agreements so far reached clearly do not create complete symmetry.[57] On the other hand, the arms control process as a "way of life" between potential adversaries is as important — perhaps more important — than the agreements reached.

The process of deterrence as it applies to arms control, applies primarily to the use of weapons.[58] But, because weapons are designed to be used in armed conflict, arms control policy, and the agreements by which it is implemented, will not deny a Party the use of the "controlled" weapons wherever there are reasonable expectations that the weapons will be used or will be required for effective prosecution of a conflict. The speculative nature of this problem is such that the weapons chosen so far, as "controlled" weapons, are those not in preferred use today. Moreover, arms control policy and the public interest in such policy will tend to outstrip the realities of deterrence. There may be strong tendencies to move the control process beyond its practical application to armed conflict. The security thus afforded becomes illusory if not hazardous, particularly where such "policy" begins with restraints on the preparations for defense and security, such as budgetary limitations and withdrawal of military forces in the belief that nondeployment zones are moving constructively ahead. Pressures to move unilaterally are evident in the attempts to "control" the use of riot control gases. It is thought that these

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[57] One of the difficulties with the arms control agreements is that they provide expressly for termination of "denunciation." When a State is confronted with sticking with the agreement or denouncing it, with no middle ground, the denunciation, as in the case of Japan's denunciation of the Washington Naval Treaty, effective Dec. 31, 1936 may be the start of a major arms race. *See* R. WEIGLEY, *supra* note 6, at 247.

[58] Helsinki Accords, 62 DEP'T STATE BULL. 323-350, No. 1888 (Sept. 1, 1975), which reads, in part: "The participating States recognize the interest of all of them in efforts aimed at lessening military confrontation and promoting disarmament which are designed to complement political detente in Europe and to strengthen their security. They are convinced of the necessity to take effective measures in these fields which by their scope and by their nature constitute steps towards the ultimate achievement of general and complete disarmament under strict and effective international control, and which should result in strengthening peace and security throughout the world." The Helsinki Accords are in 14 INT'L LEGAL MATERIALS 1292 (1975).

gases should not be used by a belligerent in combat because they would give the appearance of lethal gases, and encourage an adversary to engage in retaliatory "gas warfare."

The policies of deterrence are not identical to the shared policies which regulate armed conflict itself. Although they apply in part to armed conflict, they apply to other conduct of States as well. Deterrence dominated the policy currently shared concerning nuclear and other mass destruction weapons. Deterrence here assumes that the weapons cannot be used because their destructive capabilities would create a conflict whose conduct could not be guided by prior practice. Nuclear and mass destruction weapons if unleashed in combat would necessarily establish a new practice and therefore a new set of attitudes as to the operation of military necessity. The legal elements of reasonableness which confine the belligerents to discrimating weapons, to forbearance from attacking the civilian population, and to restriction of the targets to be attacked, plus the standard of proportionality, would be put in question if mass destruction and nuclear weapons were used. The humanitarian elements which the law of war presently incorporates would be thrust aside.

As we move toward these ultimate weapons of destruction, we are compelled to move toward ultimate policies which would effectively deny the use of such weapons. But as the previous analysis indicates, the policies must address and lead to the elimination of the weapons themselves.[59] Rather than rely upon illusory demands of "non-use" or "no first use," or the illusory claim that a State which enters into such an "arms control obligation" is effectively restrained by its "solemn" promise, made in "good faith," or on the operation of "binding" promises inherent in *pacta sunt servanda.*

THE POLICIES OF AGGRESSION AND SELF-DEFENSE[60]

More effective management of the process of coercion might best occupy the attention of policy and decisionmakers during times in which armed conflict is not underway. But the realities

[59] Willot, *Political Strategy and Armaments Control* in NATO REV. (Aug. 1976), declares in a valuable analysis: "The most important consequence of the discussions on general and complete disarmament at least for the time being, has undoubtedly been to convince the two superpowers, and a certain number of other States, that there could only be full nuclear disarmament within the framework, and as a conclusion, to full and general disarmament."

[60] On aggression and self-defense, *see generally* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW (1965).

of the adversary process among the major powers reveal that confrontations among them are also part of their differing and opposing claims to control the decisions in world affairs. Such a competition, if prolonged and intensified, provides a destabilizing force to deterrence and to any attempt to pursue at the least a minimum world public order. The choices in this pursuit lie with the States themselves. As Professor McDougal has succinctly pointed out:

> Complete disorder, failure to forbid even the most intense and comprehensive destruction of values, is not only possible but has in fact long characterized the perspectives of traditional international law. If, on the other hand, the deliberate choice is made to pursue at least a minimum of order in the world arena, the coercion that is to be prohibited clearly must be distinguished from that which is to be permitted. The conceptions both of impermissible and of permissible coercion are thus necessary in the theoretical formulation of authoritative policy as well as in the practical application of that policy to interacting human groups.[61]

Unquestionably the very deep differences in the ideologies of East and West encourage confrontations that fall short of war, particularly where, taken in the widest perspective, States such as the Soviet Union seemingly have committed themselves to the pursuit of domination of the world order. The Soviet Union has portrayed the Western States as inevitable sources of future world conflict. In conjunction, the Soviets have utilized "wars of national liberation" as policy instruments aimed at the West. The East has claimed the exclusive right to engage in such "just wars" and has labeled reciprocal Western actions "illegitimate."[62] This policy posture has led to further claims that the freedom fighters in wars of national liberation thus defined are entitled to preferential treatment both as to capture and as to the weapons used against them.

Whether preparation for armed conflict is for a State's national security and self-defense or for aggression, becomes a major question in the ideological dimensions of coercion. One side's preparation for conflict can be viewed as an act of aggression or threat of aggression by the other side. The very concepts of

[61] M. McDOUGAL AND F. FELICIANO, *supra* note 7, at 128-129.

[62] On the views of the USSR on self-determination and the "wars of national liberation," from an abundant literature, *see* G. STARUSHENKO, *supra* note 14; R. Allen, PEACE OR PEACEFUL COEXISTENCE? (1966); LENIN ON THE NATIONAL LIBERATION MOVEMENT, *supra* note 14. Wider perspectives are afforded in R. EMERSON, FROM EMPIRE TO NATION chs. 16-17 (1960).

self-defense and aggression lose their meaning in the adversary process, and the ambiguities engendered maintain and support the tensions between adversaries. Even the exercise of the United Nations General Assembly, leading to a "definition" of aggression, served only to preserve the troublesome ambiguities which produce confrontations.[63]

Concurrent with these developments, there have been reinforcing doctrines such as the Brezhnev Declaration at the height of the Czechoslovakian crisis, establishing a special international right of intervention in order to protect and promote the "socialist commonwealth of States."[64]

The dangers and grave risks associated with the latest developments in weapons and weapon systems suggest that an armed strike commencing an "armed attack" could occur with little warning. To the extent that States have a right of self-defense under Article 51 of the United Nations Charter, that right has been affected and shifted by modern weapons technology — now a major policy factor. Self-defense, in view of these developments, becomes an extremely complex question of policy and States will feel an increasing need to claim the right of self-defense as security is destabilized by weapon proliferation.

The claims of States with respect to weapons find considerable prominence in the debates and resolutions of the United Nations. Numerous resolutions are pressed relating to the cessation of nuclear weapons tests, the renunciation of the use of force, prohibitions addressing the first use of nuclear weapons, and termination of military research. As long as the major States confront one another, those resolutions suggest that certain asymmetries between "open" and "closed" societies are being addressed.[65]

[63] Definition of Aggression, 29 U.N.G.A. Res. 3314, adopted without vote, Dec. 14, 1974. The fundamental question of aggression appears to revolve around "intent," which is approached, tentatively, in Article 2, declaring the first use of armed force by a State "in contravention of the Charter" shall constitute *prima facie* evidence of aggression, in the absence of justifying circumstances. The ambiguities in this provision are such that even acts "in contravention of the Charter" may be justifiable.

[64] On the Brezhnev "doctrine," *see* Legality of Czechoslovak Invasion Question in U.N. Special Committee on Principles of International law, DEP'T STATE BULL. 396-401 (Oct. 14, 1968). Article 1 of the Soviet-Czechoslovak Treaty on Stationing of Soviet Troops, in force, Oct. 18, 1968, justifies Soviet troops in Czechoslovakia "for the purposes of ensuring the security of the countries of the socialist commonwealth against the increasing revanchist aspirations of the West German militarist forces." Article 2 declares that their "temporary presence" does not violate the sovereignty of Czechoslovakia.

[65] "Open societies" such as the United States draw in greater participation in decisions with respect to the armed forces. *Cf.*, for example, S. Res.

Moreover, the continuous attention to such resolutions tends to shift the attention of governments from the real business of general and complete disarmament and the creation of substantial international controls required to afford the equal security upon which all parties insist.

The impact of these new conditions upon the traditional international law has been primarily to separate the law of "war" into a *jus ad bellum* and *jus in bello.* Extreme proponents of the Communist version of the "just war" principle therefore declare that a State found to be an "aggressor" under the criteria of the "just wars" principle is not entitled to the protections and rights afforded by the law of war. Accordingly, the policies that underlie these forms of confrontations lead first to the replacement of the notions of aggression with new notions characterized under the "just war" doctrine. These are then thrust into the law of war, displacing the humanitarian policies and protections which the law of war now encompasses.[66]

For these reasons, the policies relating to aggression and self-defense need continuous clarification, particularly as they apply to the overall process of coercion. Firm principles firmly adhered to serve the interests of security of the United States. When secure, the United States is better equipped to maintain international security.[67] As Secretary Kissinger pointed out:

> Those ages which in retrospect seem most peaceful were least in search of peace. Those whose quest for it seems unending appear least able to achieve tranquility. Whenever peace —

2956, 92d Cong., 2d Sess. (1972), passed over President Nixon's veto on Nov. 7, 1973.

[66] I share the view with those who argue and are persuaded that the United Nations Charter contemplates that the world order, and its security, call for both the system of effective restraints upon the use of force and for a social system upon which order rests "promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion." *See generally* Articles 1, 55 and 56 and the Preamble of the Charter.

[67] A deeper analysis into Soviet military doctrine and strategy is not within the scope of this paper. It is noteworthy, however, that Soviet texts show an emphasis upon the following: (a) that a future armed conflict with the West is within the area of reasonable expectations; (b) that preparation for such a conflict must be made so as to minimize the destructive impact on the USSR and its territory; and (c) that the matter is in any event "political" in nature, which means that the "humanitarian" element of the law of war must be largely cast aside, while the armed forces are indoctrinated with an attitude and orientation of mind and belief that accepts the West as their implacable enemy. *See generally* the series referred to as SOVIET MILITARY THOUGHT, which are translations of the fundamental Soviet views by the U.S. Air Force.

> conceived as the avoidance of war — has been the primary objective of a power or a group of powers, the international system has been at the mercy of the most ruthless member of the international community. Whenever the international order has acknowledged that certain principles could not be compromised even for the sake of peace, stability based on an equilibrium of forces was at least conceivable.[68]

CONCLUSION

A variety of strategies and instruments are available to governments in pursuing their foreign policies.[69] These include, in addition to military instruments and policies, economic, ideological and diplomatic strategies addressing the wider goal of exerting control over the processes by which the world order arrives at decisions. The claims and counterclaims which adversary States or blocs of States are making in their competition for power and in the process of coercion, extend, in the final analysis, to this goal. Coercion may now be established through weapons with far greater destructive force than those previously known to man, and the decision process in managing a conflict[70] using those weapons,

[68] H. KISSINGER, A WORLD RESTORED 1 (1973).

[69] Soviet military doctrine, which tends to be "political" in nature, characterizes all non-Communist States as "imperialist," drawing from this that they are therefore "aggressors." This doctrine holds that a major war with the "imperialist" States is "inevitable," unless, of course, the "imperialists" can be compelled through overwhelming military and economic power to desist their "imperialistic conduct." *See* SCOTT, *supra* note 15, at 81-82, where Krushchev is quoted on Jan. 6, 1961 in his speech, "For New Victories of the World Communist Movement," as follows: " . . . The U.S. imperialists are bent on bringing the whole world under their sway, and are threatening mankind with nuclear missile war . . . The facts indicating that the imperialists are pursuing a policy of outrageous provocations and aggressions are countless . . . Wars arose with the division of society into classes. This means that the ground for all wars will not be completely eliminated until society is no longer divided into hostile, antagonistic classes . . . The imperialists are preparing war chiefly against the socialist countries, and above all against the Soviet Union, the most powerful of the socialist countries . . ." For development of this theme in countless writings of Soviet spokesmen, commentators, officials and military commanders, *see* SCOTT, *supra* note 15.

[70] V. SOKOLOVSKY, *supra* note 9, at 278-98, emphasizes civil defense to protect against the unbalancing thrust of nuclear weapons. He declares: ". . . The decisive weapons in modern warfare are strategic nuclear weapons, and the long-range delivery systems for these weapons are located far from the front line or the border, far beyond the theaters of military operation. Unless one annihilates or neutralizes these weapons, it is impossible to prevent the destruction of a country's populated centers and it is impossible to count on successfully achieving the aims of the war — even if one destroys the troop units deployed in the combat theaters. Since the Soviet armed forces have powerful long-range weapons — strategic nuclear missiles — it is possible to strike directly

and its outcomes, may be strained beyond the capabilities of governments and their institutions. Consequently, the competition among States presently proceeds under an umbrella of mutual deterrence, based on the equal security of the major powers.[71]

If the policies of governments will be to continue treating war "as an instrument of policy," concerns for the future of the world public order will be raised. But where "war" is read to mean the use of military strategies, the views of Clausewitz[72] remain significant and bear repeating.[73] The question which remains open[74] is how far, even in limited war, a State can engage in war "as policy"[75] before it loses its control of policy?[76] Still, the policy element remains:

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at the enemy's strategic nuclear weapons, his economic base, and his system of government and military control . . . we should remember that no matter how effective the system of antiaircraft and antimissle defense, we must have ready civil-defense forces and weapons for the rapid removal of the results of nuclear attacks, evacuation of the population from regions subjected to nuclear attack. . . . In addition, there must be corresponding preparation of the population to operate under an enemy nuclear attack."

[71] The theory of limited war is a theory that even under the nuclear umbrella, a limited conflict may be pursued, and war retained as an "instrument of policy." *See generally*, R. OSGOOD, LIMITED WAR, 13-27 (1957).

[72] Clausewitz, as the excerpt indicates, emphasizes the separation of decision and policy between the political officials and military officers. This view is accepted by the USSR. *See* L. GOURÉ, WAR SURVIVAL IN SOVIET STRATEGY 23 (1976): "The premise of Marxism-Leninism on war as a continuation of policy by military means remains true in an atmosphere of fundamental changes in military matters. The attempt of certain bourgeois ideologists to prove that nuclear missile weapons leave war outside the framework of policy and that nuclear war moves beyond the control of policy, ceases to be an instrument of policy and does not constitute its continuation is theoretically incorrect and politically reactionary."

[73] Aron, *Reason and Power in the Thought of Clausewitz*, 39 SOC. RES. 599 (1972).

[74] *See generally*, P. PARET, CLAUSEWITZ AND THE STATE (1976).

[75] Although there are limitations upon the use of war as an instrument of policy — in large measure because the citizens' armies and citizen participation tend to affect its use — there is still little evidence to show that any State views its use in any other way. For a study on this subject, *see* J. SHOTWELL, WAR AS AN INSTRUMENT OF NATIONAL POLICY (1929). Unfortunately, the "alternatives to war" appear in the form of dispute-settling mechanisms, which fail to recognize, as Clausewitz does, that conflict is endemic, and that therefore the decision process needed is one of conflict regulation. *See* R. DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY 223 (1959). *See also*, MILITARY POLICY AND NATIONAL SECURITY (W. Kaufman ed. 1956).

[76] According to Griffith, "Sun Tzu's realism and moderation form a contrast to Clausewitz's tendency to emphasize the logical ideal and the 'absolute,' which his disciples caught on to in developing the theory and practical of 'total war' beyond all bounds of sense." *Supra* note 40, at 5. The first of Sun Tzu's

Now, this (political) unity is the conception that War is only a part of political intercourse, therefore by no means an independent thing in itself.

We know, certainly, that War is only called forth through the political intercourse of Governments and Nations; but in general it is supposed that such intercourse is broken off by War, and that a totally different state of things ensues, subject to no laws but its own.

We maintain, on the contrary, that War is nothing but a continuation of political intercourse, with a mixture of other means. We say mixed with other means in order thereby to maintain at the same time that this political intercourse does not cease by the War itself, is not changed into something quite different, but that, in its essence, it continues to exist, whatever may be the form of the means which it uses, and that the chief lines on which the events of the War progress, and to which they are attached, are only the general features of policy which run all through the War until peace takes place. And how can we conceive it to be otherwise? Does the cessation of diplomatic notes stop the political relations between different Nations and Governments? Is not War merely another kind of writing and language for political thoughts? It has certainly a grammar of its own, but its logic is not peculiar to itself.

Accordingly, war can never be separated from political intercourse, and if, in the consideration of the matter, this is done in any way, all the threads of the different relations are, to a certain extent, broken, and we have before us a senseless thing without an object . . .

. . . we (must) reflect that real war is no . . . consistent effort tending to an extreme, as it should be according to the abstract idea, but a half and half thing, a contradiction in itself; that, as such, it cannot follow its own laws, but must be looked upon as part of another whole — and this whole is policy.

. . . If War belongs to policy, it will naturally take its character from thence. If policy is grand and powerful, so also will be the War, and this may be carried to the point at which War attains to *its absolute form* . . .

. . . the next question is, whether *policy* is necessarily paramount and everything else subordinate to it.

That policy may take a false direction, and may promote unfairly the ambitious ends, the private interests, the vanity of rulers, does not concern us here; for, under no circumstances can the Art of War be regarded as its preceptor, and we can only

"Estimates" declares: "1. War is a matter of vital importance to the State; the province of life or death; the road to survival or ruin. It is mandatory that it be thoroughly studied." *Supra* note 40, at 1.

look at the policy here as the representative of the interests generally of the whole community.

The only question, therefore, is whether in framing plans for a War the political point of view should give way to the purely military (if such a point is conceivable), that is to say, should disappear altogether, or subordinate itself to it, or whether the political is to remain the ruling point of view and the military to be considered subordinate to it.

That the political point of view should end completely when War begins is only conceivable in contests which are Wars of life and death, from pure hatred . . . The subordination of the political point of view to the military would be contrary to common sense, for policy has declared the War; it is the intelligent faculty, War only the instrument, and not the reverse. The subordination of the military point of view to the political, is therefore the only thing which is possible.

. . . in one word, the Art of War in its highest point of view is policy, but, no doubt, a policy which fights battles instead of writing notes.

According to this view, to leave a great military enterprise or to plan for one, to *a purely military judgment and decision* is a distinction which cannot be allowed and is even prejudicial. Indeed it is an irrational proceeding to consult professional soldiers on the plan of a War, that they may give *a purely military opinion* upon what the Cabinet ought to do. But still more absurd is the demand of Theorists that a statement of the available means of War should be laid before the General, that he may draw out a purely military plan for the war or for a campaign in accordance with those means. Experience in general also teaches us that notwithstanding the multifarious branches and scientific character of military art in the present day, still the leading outlines of a War are always determined by the Cabinet, that is, if we would use technical language, by a political not a military organ.

None of the principal plans which are required for a War can be made without an insight into the political relations; and, in reality, when people speak, as they often do, of the prejudicial influence of policy on the conduct of a War, they say in reality something very different to what they intend. It is not the influence but the policy itself which should be found fault with. If policy is right, that is, if it succeeds in hitting the object, then it can only act with advantage on the war. If this influence of policy causes a divergence from the object, the cause is only to be looked for in a mistaken policy.

. . . Therefore the actual changes in the Art of War are a consequence of alterations in policy; and, so far from being an argument for the possible separation of the two, they are, on the

contrary, very strong evidence of the intimacy of the connection.[77]

In conclusion, an appraisal of the policies of States at the present time reveals: (a) Strong indications that "war as an instrument of national policy" will continue to guide the actions of States, notwithstanding the risks of nuclear warfare and the grave possibility that a variety of mass destruction weapons will be used.[78] Such actions will be pursued as they were in the past, but under more hazardous conditions, either in the context of the "limited war," or in the context of the use of military instruments to sustain and effect national policies. Such policies would then be supported by threat, the potential of surprise, or perhaps actual attack, giving effectiveness to the other foreign policy instruments of diplomatic, economic or ideological strategies. This appraisal also reveals: (b) That the policies of States addressing the *jus ad bellum* and *jus in bello* are beginning to converge, so that States will be tempted to decide that just as coercion extends over a continuum, so also do the policies underlying national conduct, which bear marked similarities over that entire continuum.

This second trend, the extension of State policy over the entire continuum of coercion, is unfavorable to the establishment of a world order in at least one major respect. It has conditioned some States, particularly those in the Communist bloc, not to favor the protection and promotion of human rights or humanitarian goals. In place of those goals, these States have sought internal and external security through their policies, in accordance with the now familiar perspectives of the Brezhnev Doctrine and with the search for a world-wide "socialist commonwealth of States." To the extent that these policies remain in the ascendant and displace the humanitarian elements in the law of war, we must expect that they will cause increasing destabilization in a world order, already excessively characterized by destabilizing elements.

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[77] 3 K. CLAUSEWITZ, ON WAR 121-130 (J. Graham trans. 1940).

[78] These are the policies of nations such as the United States which are committed to a democratic form of government. When the United States entered into the First World War, it lacked the organizational base to carry on that war. *See generally*, H. DEWEERD, PRESIDENT WILSON FIGHTS HIS WAR (1968). The conclusion of the war revealed that the nation was unable to benefit from a war that might be an "instrument of national policy." Although President Wilson might have been a "special case," DeWeerd observes: "Against the advice of his friends and advisors, Wilson stubbornly refused to compromise with his adversaries in the Senate over reservations to the peace treaty. In the end he destroyed the fruits of victory, which were won at such a great cost in lives and suffering." *Id.* at 252.