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Harry H. Almond
National War College

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Harry H. Almond
The National War College
Washington, D.C. 20319

Abstract

The interaction of the public legal orders of states upon each other, and upon the emerging public legal order in outer space, and in general, has long been recognized "by civilized nations." The perspectives of this civilizing process as the perspective of law are critical, because law has always been identified as the assurance of protections it affords to peoples--or to states. This is the correct meaning of "equality before the law." It is also the reason why the concern with human rights goes to the essence of the legitimacy of any legal order. Moreover, the peoples of states, as the United Nations Charter declares at the outset, are the true repositories of "sovereignty" among, within and between states.

In a true spirit of détente, disagreements among jurists like those that arise from the states from which they come, are relieved and moderated by open debate, by recourse to scientific and objective perspectives, by reasoned argument, and by the continuing and candid exchange of views. Jurists for this reason, as professional members of an internationally-oriented endeavor, extend their own efforts and analysis far beyond governments, primarily because they are not constrained in their communications with each other. It is under these conditions that the present inquiry examines the general principles of law, and seeks their constructive application in order to make public order-projecting recommendations for decision-makers.

The policy content is a critical indicia of law-projecting decisions, and shares with the authoritative element of such decisions and their controlling force, the three factors that characterize the law-oriented policy processes. Against these elements of policy, authority and control, this inquiry examines and compares the views of two distinguished jurists: Professor Grigori Tunkin of the Soviet Union and Professor Myres S. McDougal of the United States. This inquiry is preliminary in nature intended to consider the differences in perspectives of these jurists, and also intended to consider the policy implications arising from those differences.

Accordingly, the primary focus is upon clarification of policies relating to the global social processes. It is assumed that most jurists will agree that the law itself and the legal instruments of law are, like all strategies, aimed at strategic goals, and applied as strategic instruments of policy, among the major power blocs, and by smaller states and regional groupings of states as well. Because in their

relations generally, these strategies determine in large measure the shaping of law, jurists are compelled to face strong tendencies, which, if unchecked under law, will degenerate into instruments of naked power. Such instruments can undermine the existing law, and deny the flourishing of law itself. Jurists engaged in justifying the use of naked power as advocates of the policies of states to control, without invoking valid and validated claims to authority, become part of a state's strategic policy apparatus.

Jurists, then, face the possibilities in the growing tolerances for naked power and its exercise that their common quest for serving global order, for accommodating and adjusting the differences of opposing social orders, and for helping to shape strategies and the global social order itself toward peace and security, will falter or fail. Such jurists will be diverted from an effective pursuit for the optimization of the value demands of peoples, projected in the civilizing and law-oriented claims for human dignity, and the quest to uncover and overcome the obstacles in achieving these goals. Like the Melians arguing before the Athenians in Thucydides' Peloponnesian War they will be tempted to acquiesce to naked power alone.

I

Public legal orders among states and within states must address at the outset the most critical concerns that all states share in all of their relations with each other. This is the concern with operational security--both internal and external security. This is a concern with the fundamental policy that is present both in the regimes expected to regulate territorial air space and the policy to be shared among states in regulating activities in outer space. The policies of states associated with this concern determine the relevant principles of law that can be drawn from the public legal orders of states and applied in their shared public legal order, whether that is the general legal order--and international law, or the law relating to outer space.

In this inquiry the primary focus is upon the legal regulation of force and, because much has been developed regarding this complex subject, two leading jurists have been selected for views, believed to be representative of significant perspectives relating to the regulation of relations among states. Professor Grigori Tunkin, primarily in his THEORY OF INTERNATIONAL LAW,¹ and Professor Myres S. McDougal, distinguished jurist in the United States afford an opportunity to compare the differing perspectives of two major jurists, and from the comparison to draw out possible alternatives in which jurists in general might better serve the global community in establishing public order and security. Because in these endeavors the focus is upon the relations of states in all the arenas in which they are competing with each other, these relations, in a competitive power process, become the primary focus of inquiry. No jurist can

*Professor of International Law and Strategic Studies, National War College, Washington, D.C. Adjunct Professor at Georgetown University and American University, Washington, D.C. The views expressed are the personal views of the author and not of any of the institutions.

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absent himself from this process and also aim at workable recommendations for a single state or for the global community at large, nor can he omit the overriding thrust of the United Nations Charter and its controls.

The overriding perspective then is that which perceives nation-states confronting each other, largely through the major power blocs, acting to support and benefit from their actions in a competitive power process. Such a perspective perceives a loosely-organized order among states. Foremost in the demands among states and their peoples is first to build upon the minimum order that they can establish, to then seek through arms control and other foreign policy initiatives, the means to reduce hostility, and pursue the measures that strengthen that order and sustain it. A more substantial global public order must await the practice of states. The policy dimensions of law are clearly established when we seek the primary "source" of law among states in their practice--i.e., in their behavior patterns, evidenced in their relations, and most specifically in their actions, and in their decisions and policy, their tolerances for behavior, and in the reciprocities that are associated with their claims and counterclaims relating to what conduct is permissible or impermissible.

Codification and attempts through far-reaching treaty provisions are meaningless if they are not validated by the practice of states. The "general principles of law" drawn from the public legal orders become largely abstractions, depending for their policy content upon application--and therefore upon the practice of states themselves. Foremost in the expectations among states under these conditions is that they will be able freely to act in their own self-defense.

II

The perspectives of all states regarding the emerging public legal order among states necessarily include as the foremost issue that which relates to the regulation of the use of force. While our perspectives also embrace expectations that "peaceful purposes" must be served in outer space, that states must engage in "peaceful activities," and that outer space is the "province of mankind," all of these remain at best policy goals or principles whose policy content is to be established in the future practice among states.

Most important in our perspectives is that which relates to the competitive power process in which "sovereign" states find themselves. It is possible to consider this process as innate to the behavior of states that are drawn toward absolute sovereignty, and it is also possible to perceive that such expectations lead, necessarily, to limiting public order, primarily by limiting the application of community policies to the law-making activities of states. States engaged in competitive processes aimed at power tend, in the extreme, to favor naked power--power free of the conditions imposed through law. If these tendencies are not moderated, they are fed by actions and policies of states aimed at military measures--at making the military instrument the primary strategic instrument of policy.

The regulatory framework among states relating to controls over international coercion--and more emphatically over the use of force in their relations--is to be found in the United Nations Charter, and in customary international law, supplemented by the law established among them to further the expectations in this body of law through international treaties and agreements. The effectiveness of that regulatory framework is to be found in the application, the shared invocation, and in the development--through institutions procedures, and processes--of the prescriptive law. The prescriptive law is to be found in the general norms such as Article 2(4) of the United Nations Charter, amplified by other articles such as Article 2(3), and balanced by the realistic perception that states must seek their own measures for self-defense--with or without the aid of alliances--pursuant to Article 51.

Further prescription as such is not needed: the Charter and customary international law, coupled with ample practice among states, reveals that no aggression is to be tolerated, that the use of any weapons--not just the nuclear and mass destruction weapons--for aggression is equally prohibited, that behavior that is aggressive, hostile or confrontational whether within the social orders among and of states or among them is contrary to the expectations of the global community. For this reason, attention to prescribing new law for nonaggression, for restraints on the use of weaponry--first use or all uses, and so on, are redundant and draw attention from far more significant tasks. The effectiveness of law among states like that within them depends upon an effective framework for projecting law as policy--and this makes important demands upon all of those implementing measures that depend upon reliable, effective, comprehensive and timely communications that are accurate and conducted in good faith. The present relations among states suggest that the task of jurists in promoting this great law-making effort is formidable, and that the obstacles lie in the great divergence in value demands--at least those promoted and made among the major decision-makers of states.

When states are insecure in their relations, it is abundantly evident that their prescriptions--their prohibitions on the use of force or violence or their undertakings to refrain from the use of force--must be balanced against what they perceive to be intrusions upon their security. For this reason, the efforts to "define" aggression have failed to enter into practice--and hence into effective law.² For this reason, also, states have pursued their efforts to test and ensure the reliability of weaponry produced through modern technologies. And, because compliance goes to the essence of mutual and shared security, and depends upon sound communications among them, it is evident that all proposals for outer space to regulate weaponry or the use of force in that arena will be countered by the overriding claim involved in self-defense.

Furthermore, because self-defense in any context means the use of weapons, ready, available and tested as reliable, to counter aggression or the use of weapons for aggressive purposes, all states will insist that whatever actions are taken

concerning the control of weapons, they will retain for themselves the weapons needed for self-defense. This can only mean that their space objects whether defended from outer space--by themselves or through other space objects--or from launchings from the land or from the atmosphere--must be defended by force when necessary. The weapons used for this purpose are weapons to be directed to the space objects, or satellites, of aggressor states, and, accordingly, self defense means the right to test, determine the reliability and ensure the readiness of anti-satellite weapons, and, when necessary to use them to counter an armed attack. This entire framework is preserved in outer space, because the outer space treaties have incorporated without affecting this development the United Nations Charter. To prohibit such weapons for such purposes would be tantamount to withholding a claim to self defense, and, more particularly, to amending the United Nations Charter, or rendering it inapplicable in outer space.

Perceived in this way, the relations of states in outer space are an extrapolation without substantial change of their terrestrial relations. The United Nations Charter and international law applicable in general are applicable to those relations and to their activities in outer space.

III

Jurists are concerned with the value demands that are established among peoples and states and affecting their behavior, as well as with their expectations regarding violence, because these are interrelated. Western commentators have symbolized the greater reach of western values as the values among its peoples and that these are turned toward optimizing the public orders that promote human dignity. A distinguished panel concerned with balancing out the weaponry and the potential for nuclear war referred to as the Scowcroft Commission (i.e., named for the Chairman, Brent Scowcroft), identifies the concerns of the Western nations with the impacts of those social orders that would impair or jeopardize these values:

The members of the Commission fully understand not only the purposes for which this nation (the United States) maintains its deterrent, but also the devastating nature of nuclear warfare, should deterrence fail. The Commission believes that effective arms control is an essential element in diminishing the risk of nuclear war--while preserving our liberties and those of like-minded nations. At the same time the Commission is persuaded that as we consider the threat of mass destruction we must consider simultaneously the threat of aggressive totalitarianism--our task as a nation cannot be understood from a position of moral neutrality toward the differences between liberty and totalitarianism. These differences proceed from conflicting views regarding the rights of individuals and the nature of society.³

The two distinct, yet interacting, objectives of the United Nations Charter echo the concerns set forth in the excerpt just cited from the Scowcroft report. The Charter--in the preambles and in its purposes, and in such operative provisions as Articles 55 and 56--makes clear that the United Nations would be meaningless if states were not dedicated both to optimizing the claims for human rights of their citizens, and to maintaining for them, internally, and externally international peace and security.

The practice of states amply reveals that simply prescribing "guarantees" of human rights is also meaningless, unless the individual is given effective processes and procedures for remedy and correction against the abuses of officials. The far-reaching principles embraced in "due process of law" commencing in England before articulation in the Magna Carta, but clearly signalled in ancient Greece have now been promoted in the important basket of the Helsinki Accords.⁴ These differences identified in the Scowcroft report are differences that are fundamental in the perspectives of the totalitarian states and the Western democracies.

Moreover, the Scowcroft Report points out that the threat is not simply the threat of nuclear weapons nor of modern weapons technology. The threat that all states face comes from the unleashed violence of warfare and aggression. Nuclear weapons exist, hence there is the danger they might be used. But conventional warfare, destructive in its own right, can lead to nuclear warfare:

There can be no doubt that the very scope of the possible tragedy of modern nuclear war, and the increased destruction made possible even by modern nonnuclear technology, have changed the nature of war itself. This is not only because massive conventional war with modern weapons could be horrendously destructive--some fifth million people died in 'conventional' World War II before the advent of nuclear weapons--but also because conventional war between the world's major power blocs is the most likely way for nuclear war to develop. The problem of deterring the threat of nuclear war, in short, cannot be isolated from the overall power balance between East and West. Simply put, it is war that must concern us, not nuclear war alone.⁵

These are perspectives, then, that embrace the insistence that the value demands that have so long been shaped in Western democracies, that at a minimum such demands are those relating to optimizing a public order of human dignity within and among states, that arms control must during the process of optimization of such a public order ensure that no war between the "world's major power blocs" breaks out, and that, to ensure this, there be, by fair implication, optimizing efforts and optimized communications processes among rivals as well as among cooperative states.

Professor Grigori Tunkin has been selected as the leading Soviet jurist primarily to consider the claims that he is making for international law and to contrast those claims with those of Professor Myres S. McDougal. The comparisons that are made here are designed, primarily, to draw upon those claims that appear to be most representative of the Soviet Union and of the Western democracies. Accordingly, misperceptions in this analysis should be considered as part of an on-going process of clarification--and the correction and critique--that is associated with the development of any science.

Perhaps the two fundamental principles of Professor Tunkin relate to those of "consent" and to "peaceful coexistence."⁶ While the policy implications of these principles, and the impacts of each of them on shaping a global community policy will be considered more fully, the principle of consent when related to international law, is the policy of the right of a "sovereign" state to determine when it will be legally bound by that law. The far-reaching impact of this perspective is seen when it is clear that consent applies to customary international law as well as treaty law. Moreover, Professor Tunkin argues that it is a principle that is shared by the emerging nations--because they cannot be compelled to accept the traditional law that developed among the capitalist nations--and by the Soviet Union, because it is driving toward the development of new legal principles more realistically identified and validated by the global social order.

Professor Tunkin in appraising Article 38(b) of the International Court of Justice declares that "it would be more accurate" to use the words "recognized as an international legal norm" instead of "accepted as law." Article 38(b) states:

[Article 38 a.b] The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- b. international custom, as evidence of a general practice accepted as law.

He then adduces from this argument and the more "accurate" rendition that the principle of consent is applicable to customary international law. But read in the context of the entire provision, Western scholars, and Western practice, treat the provision differently. It is a provision in which custom itself is identified as "evidence" of a general practice among states accepted as law. The final phrase of Art. 38(b)(1) relates to the end-product of a process--the outcome in which law emerges from custom and usage. The differing perspectives identified by Professor McDougal appears later in this paper.

Clearly, however, we are facing differing interpretations and differing recommendations by jurists to policy-makers. As to these, Hans Kelsen declared in his *THE LAW OF THE UNITED NATIONS* [New York, 1950, p. xvi]:

The task of a scientific commentary is first of all to find, by a critical analysis, the possible meanings of the legal norm undergoing interpretation; and then to show their consequences, leaving it to the competent authorities to choose from among the various possible interpretations the one which they, for political reasons, consider to be preferable, and which they alone are entitled to select. A scientific interpretation has to avoid giving countenance to the fiction that there is always but a single 'correct' interpretation of the norms to be applied to concrete cases. This fiction, it is true, may have some political advantages.

The deeper implications of Kelsen's observations have been suggested in this paper--particularly with respect to states making their claims and counterclaims, in cases such as these, over the meaning of legal norms, and more particularly with respect to fixed outcomes of a given methodology of interpretation.

In order to assure that no confusion is attached to this principle, the following citation* is invoked at length: [88-89]

This conception is in crying contradiction with the basic generally recognized principles of modern international law, the principle of equality of states, in particular.

It is beyond dispute that equality of states signifies only juridical equality, which may not accord with the actual inequality of states in international relations. There is a certain contradiction here between the real relations and juridical relations. No doubt the position of the majority of states, the Great Powers in the first place, is of decisive significance in the creation of generally accepted norms of international law are equivalent to each other. This juridical equality is of great importance. It means that in international relations no group of states, not even in majority of states, can create norms binding upon other states, or has the right to attempt to impose these norms upon other states.

Customary norms of international law being a result of agreement among states, the sphere of action of such norms is limited to the relations between the states which accepted these norms as norms of international law, i.e., the states participating in this tacit agreement.

*From Tunkin

The sphere of action of a customary principle or customary norm of international law may gradually expand. This, as a rule, is the way customary norms of international law become generally recognized norms. There are several cases of the declaration of a single state becoming a point of departure. Many principles of international law were proclaimed, for instance, by revolutionary France in the 18th century. Among them were the principles of respect of state sovereignty, noninterference in the internal affairs of another state, equality of states, and the principle that war operations must be directed against military objects only and cannot be directed against the civilian population. The Soviet state has advanced the principle of banning aggressive wars and treating such wars as crimes, the principle of self-determination of nations, the principle of peaceful co-existence, and a number of other principles of international law. In all these cases, the principles originally proclaimed by a single state were gradually recognized by other states and have become, partly by custom and partly by treaty, generally recognized principles of modern international law.

This proposition about the spheres of influence of customary norms is of special significance to modern international law, which regulates the relations between states belonging to two opposed social systems. Only a customary rule which is recognized by the states of both systems can now be regarded as a customary norm of international law.

The concept that customary norms of international law recognized as such by a large number of states are binding upon all states not only has no foundation in modern international law but it is fraught with grave danger. This concept in essence justifies the attempts made by one group of states to impose upon other states, the socialist states, for instance, or the newly emerging states of Asia and Africa, certain customary norms which, while regarded perhaps by this group of states as customary norms of international law, have never been accepted by the new states and which may prove partly or wholly unacceptable to these new states. Obviously, this tendency to dictate norms of international law to other states is, under present conditions, doomed to failure. But it is no less obvious that such attempts at dictation may lead to grave international complications.

In practically all cases when it is necessary to establish the existence of one or another generally recognized norm of international law, the usual procedure is to investigate if "universal practice" exists; and in case such practice does exist, if it has been recognized as a norm of law, and how many states have recognized such practice as a norm of law.

Because of the importance of the impact of this principle, further citations from Professor Tunkin are needed to establish its reach. Analyzing the Statute of the International Court of Justice, he states in his text, THEORY OF INTERNATIONAL LAW, at pages 123-125:

(2) A customary norm as the result and embodiment of tacit consent. The operative sphere of a customary norm.

What is recognition by states of a specific rule as a norm of international law? What is the essence of such recognition? Recognition or acceptance by a state of a particular customary rule as a norm of law signifies an expression of a state's will, the consent of a state, to consider this customary rule to be a norm of international law. It must be emphasized that one is speaking of recognition "as a norm of international law" and not "as a legal norm" the norms of national legal systems of other states. Moreover, courts of states frequently apply norms of foreign law.

But the Statute of the International Court refers to recognition of a particular rule as an international legal norm or, more precisely, of a norm of general international law. The Statute speaks of "general practice," "accepted as law"; that is, local customary international legal norms are pushed to the side. Such norms exist, although they do not play a large role in the general system of international law.

Thus, the bonds between a state accepting a customary norm of international law and the other states who already have recognized this norm are basically identical with those bonds established among states with the aid of an international treaty.

Consequently, the essence of the process of creating a norm of international law by means of custom consists of agreement between states, which in this case is tacit, and not clearly expressed, as in a treaty.

If a customary norm of international law is the result of agreement between states, the operative sphere of this norm is limited to relations between states who have recognized it as a norm of international law, that is to

to relations between those states who are parties to the corresponding tacit agreement.

The operative sphere of a principle or customary norm of international law may gradually expand, and it is by this means, as a rule, that customary norms of international law become generally recognized. There are frequent instances when the declaration of a single state is a formative moment. Many principles of international law were proclaimed, for example, by revolutionary France in the eighteenth century. Among them are the principles of respect for state sovereignty, noninterference, equality of states, and the principle that military operations must be directed only against military objects and not against the civilian population, and others. In the Decree on Peace and other state documents, the Soviet state advanced the principles of the prohibition and criminality of aggressive war, the principle of self-determination of nations, the principle of peaceful coexistence, and a number of other principles of international law.

One should not forget, however, the specific feature of international law that subjects of international are themselves the creators of norms of international law. The fact that states are bound by prevailing norms of international law does not preclude the possibility of their creating new norms of international law by treaty or custom that may differ from prevailing norms. With regard to norms of international law which are not of an imperative character, the question is resolved relatively simply.

A new norm deviating from a prevailing norm (and, consequently, recognized by the respective powers) will, of course be binding only upon states which have recognized it, and this new norm replaces the respective old norm in relations among these countries. The latter, however, will be operative among states which still have not recognized the new norm gradually may be expanded at the expense of reducing the operative sphere of the old norm, and ultimately the new norm may completely supplant the old norm.

Assuming that the principle of consent had been adopted by the Soviet Union as one of the fundamental principles of international law, this would mean or imply several policy features: (a) international customary law that Western states invoke or rely upon as the legitimatizing or legalizing basis establishing what is permissible or impermissible will not necessarily

be "recognized" by the Soviet Union, in particular in those situations where it determines that it is not legally bound; (b) international treaty law operates most explicitly through an instrument clearly evidencing the consent of the Soviet Union, but even here that consent will depend upon what the Soviet Union perceives as the legally binding obligations established by the operative provisions of the agreement, and, in the event of dispute, will depend during negotiations for settlement or adjustment, upon its perception of how far its consent has extended.

Professor Tunkin enlarges upon the interaction of treaty law and customary international law, building however upon the full thrust of his notion of the principle of consent: First, it must be clarified that he is concerned with norms of international law--i.e., with the black-letter type rule, and not with law that falls short of a "norm" or general rule [142]:

International treaty and international custom are the two methods of creating norms of general international law. The essence of these methods lies in agreement between states as regards recognition of a specific rule as a norm of international law....In principle it is possible to change a customary norm by means of treaty and a treaty norm by means of custom.

While treaty law is readily to be found, modifying customary international law, according to Professor Tunkin, the modification of treaties through customary international law--following the report of the International Law Commission [1964], and in particular the impact of subsequent practice of states--clarified by the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) [Merits, Judgment of 15 June 1962]--must evidence the consent of the parties, that is, all of the parties:

The Commission [International Law Commission] was far from thinking that any practice might modify the provisions of a treaty. The Commissions's draft contains two essential elements. Practice must testify to an agreement of the parties to modify a provision of the treaty. As the Commission points out in the commentary to this article, "in formulating the rule in this way the Commission intended to indicate that the subsequent practice even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question." [citations in the text]. [145-6]

The "regulations" of international organizations may also be accepted as international law--the determining factor however is that of consent, and the the regulations are characterized "in essence" as "international treaties." [106]. However, the treaties of international

organizations are "always of a secondary nature," i.e., "treaties of international organizations, in contrast to treaties between states, contain, at the present time at least, only local norms."
[113]

The consensual principle, coupled with the Marxist-Leninist perspective, compels Professor Tunkin to reject a global social and global legal order unless it is based upon the coming together of the classless society. In accepting a "world state," he first declares that as states proceed to "socialism," they must over time cast aside the "deep roots of national discord and economic, political and cultural inequality," then observes [374]:

It is necessary to point out that the view, widely held in the West, that the Soviet Union and Soviet jurists oppose a world state, oppose an effective international organization, while western countries and western jurists favor a world state in principle and therefore an effective international organization, is completely unjustified.

Marxism-Leninism links the possibility of a world association of nations first and foremost with the liquidation of capitalism as the last exploitative socio-economic formation and with the creation of a socialist society. "The purpose of socialism," wrote V.I. Lenin, "is not only to eliminate the splintering of mankind into petty states and any isolation of nations; is not only the rapprochement of nations but also their amalgamation." But in order to create the conditions for this, more than just the liquidation of private ownership and the creation of a socialist state is needed. Lenin pointed out that national and state differences among peoples and countries will last "for a very, very long time even after realization of the dictatorship of the proletariat on a world-wide scale."

Even on the domestic plane in a number of instances socialism inherits from capitalism such deep roots of national discord and economic, liquidate them. In international relations, naturally, the matter is far more complex. Each state represents both a political and an economic unit. With the various historical strata of contradictions between states and between nationalities are associated a number of economic, political, cultural, and other problems.

Within the framework of the world socialist system, however, these differences and contradictions gradually are being overcome on the basis of a new socialist social

structure and Marxist-Leninist ideology. Various forms of state unions of socialist states are possible on the path to a classless, stateless communist society. The creation of a world federation or another form of uniting free states and nations is conceivable, therefore, only on the path of liquidating private ownership, exploitation, class and national contradictions, on the path of constructing socialism and communism.

While the principles of consent and peaceful coexistence are the fundamental pillars in Professor Tunkin's framework of positive international law, a further dimension appears in his interpretation of the policy content of the United Nations Charter--i.e., the Charter itself entails the principle of peaceful coexistence [p. 71-72]:

The experience of states of the two systems [i.e., socialist and capitalist] and, especially, the cooperation of these states during the Second World War led to the principle of peaceful coexistence being placed at the base of the United Nations Organization.... Although the term "peaceful coexistence" is not used in the Charter, the principle of peaceful coexistence runs throughout the Charter of this international organization. The preamble of the Charter speaks of the determination "to save succeeding generations from the scourge of war," "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." States are called upon "to practice tolerance and live together in peace with one another as good neighbors." [Article 1, further, sets forth the elements of peaceful coexistence]. Finally, the United Nations Charter says that this international organization must be "a centre for harmonizing the actions of nations in the attainment of these common ends," having in view, naturally, the harmonized actions of states of different social systems. The inclusion of the principle of peaceful coexistence in the United Nations Charter was a decisive state in the process of transforming this principle into a generally recognized principle of international law.

For the detached observer, the policies supported by Professor Tunkin have the same force as the veto power that can be exercised in the Security Council of the United Nations. The overall thrust of this perspective is of course consistent with the fundamental principles of Marxist-Leninist framework for the Soviet Union itself--so that the "logic" of the framework is simply the outcome of Soviet perspectives (assuming again that Professor Tunkin correctly declares what these are in his text) regarding its own social order.

The other fundamental principle is that of peaceful coexistence. This principle is identified as one that has "been further developed in documents of the Communist party of the Soviet Union and of the Soviet government, in the practical policy of the Soviet state" [35]. More specifically, the principle embraces a number of principles, described, and cited in, the Program of the Party, because it:

presupposes: renunciation of war as a means of deciding questions in dispute among states, settling them by negotiations; equality, mutual understanding, and trust among states, having regard to each other's interests; noninterference in internal affairs, recognizing for every people the right independently to decide all questions of their own country; strict respect for the sovereignty and territorial integrity of all countries; the development of economic and cultural cooperation on the basis of complete equality and mutual advantage. [35-36]

Peaceful coexistence, in its more specific context, embraces the following: (a) realistic perception that there is a "struggle" to be maintained as ideological or as opposing value struggle between the socialist and capitalist social orders; (b) full support *including* military support and assistance to liberation movements involving in wars of liberation against the capitalist social orders; (c) identification of all liberation struggles and those of the socialist states as "just wars;" and (d) the ultimate realization of the Marxist-Leninist goal in which the claims to private property and the existence of social orders based upon classes, with their inevitable class struggle, will disappear with the rise of the socialist commonwealth of states. Professor Tunkin declares in the following passage [35-37]:

The Leninist teaching on the peaceful coexistence of socialist and capitalist states has been further developed in documents of the Communist party of the Soviet Union and of the Soviet government, in the practical policy of the Soviet state. A detailed characterization of peaceful coexistence has been given in the Program of the CPSU. "Peaceful coexistence," says the Program of the CPSU, "presupposes: renunciation of war as a means of deciding questions in dispute among states, settling them by negotiations; equality, mutual understanding, and trust among states, having regard to each other's interests; noninterference in internal affairs, recognizing for every people the right independently to decide all questions of their own country; strict respect for the sovereignty and territorial integrity of all countries; the development of economic and

cultural cooperation on the basis of complete equality and mutual advantage.

Peaceful coexistence is not some sort of idealist concept, divorced from reality; it reflects the laws of relations among socialist and capitalist states.

Relations among states always have been characterized by a struggle among them. The roots of this struggle, which had a varying degree of intensity, are found in the class contradictions of society.

The concept of peaceful coexistence is based on and reflects this law. "Peaceful coexistence," says the Program of the CPSU, "serves as the basis of peaceful competition between socialism and capitalism on an international scale and is a specific form of class struggle between them."

Of course, states, not classes, enter into international relations; international relations are relations among states. But the foreign policy of states is determined by the predominant classes in these states; this is class policy. Therefore, the struggle of the two systems, socialist and capitalist, affects relations among socialist and capitalist states.

Thus, the specific feature of this "class struggle" consists, first and foremost, in the fact that this struggle manifests itself in relations among states, and not directly between classes.

At the same time, the concept of peaceful coexistence does not allow every means of struggle among states; it precludes armed struggle and permits only peaceful competition among them. Consequently, reflecting the true inevitability of struggle among states of the two systems, the concept of peaceful coexistence includes this struggle. But struggle does not preclude cooperation. In reality, struggle and cooperation exist simultaneously in relations among states of the two systems and in international relations in general; cooperation has been permeated by struggle. The intensity of struggle and the degree of cooperation differ in relations among various and between one and the same states on various questions and at various times.

In defining the position of the CPSU on this question, the Secretary General of the Central Committee

of the CPSU, L.I. Brezhnev, stated in one of his recent speeches: "The CPSU has proceeded and is proceeding from the fact that class struggle of the two systems--capitalist and socialist--in the sphere of economics, politics, and, of course, ideology will continue. It could not be otherwise, for the world view and class objectives of socialism and capitalism are opposed and irreconcilable. But we shall strive so that this historically inevitable struggle follows a course not threatened by wars dangerous conflicts, or an uncontrolled arms race. This will be an enormous gain for the cause of peace throughout the world and for the interests of all peoples and all states..

The far-reaching implications of this principle of peaceful coexistence will be appreciated only as the "correlation of forces in the world arena" [42] strengthen the socialist community. During this period the transition in policy sense from capitalism and socialism will take place [21], and the capitalist system--identified by Professor Tunkin as states "whose social system is characterized by the existence of private ownership and of the means of production and the exploitation of man by man" [36],--will be replaced by a socialist social order. The principle of peaceful coexistence presupposes, building upon the principle of consent discussed earlier, that the capitalist and socialist states can enter into international agreements. But it is clearly implied in the context of Professor Tunkin's text that these international agreements must serve the socialist--i.e., Marxist-Leninist--goals, tactics or strategies or they would by definition be unacceptable to the socialist states.

The full policy impact of the principle appears in the following statement in which peaceful coexistence is said to be unable to embrace policies that oppose communism--and in the context in which the statement appears--Marxist-Leninism, and its value demands:

The concept that during the past fifty years the developmental base of general international law has contracted in consequences of the existence of states of two opposed social systems and opposed ideologies, as well as the emergence of a large number of new states whose cultural heritage is substantially different from western civilization, is widely disseminated in the bourgeois doctrine of international law. Politically, this concept reflects first and foremost the influence of the policy of anti-communism, which rejects peaceful coexistence of states with opposed social systems and the possibility of agreement between them. Bourgeois legal doctrine is its theoretical

base. [22-23]

In short, Professor Tunkin's perspectives draw upon policy content--but that policy content and its context are limited to those of Marxist-Leninist, and to the inevitable suppression of capitalism and imperialism in the "struggle" between the two social systems. The invocation of a global public or legal order would be meaningless under these perspectives if that order were to entail capitalist or democratic value demands of the capitalist systems. And most fundamental are the two principles of consent with regard to what law shall be binding and peaceful coexistence, operating together to legitimize the Soviet policy goals that are associated with supporting its own policies under Marxist Leninism.

Professor Tunkin claims that through Marxist-Leninist framework he is afforded the only theory that "allows us to explain scientifically both the existence of contemporary general international law and its social nature." This theory shows that such law develops "on the basis of the general tenets of historical materialism." In summary:

International law, just as law in general, is a category of the superstructure. Therefore, the general law of the development of human society having the closest relationship to international law is the law of the dependence of the social structure on the base; that is, the economic structure of society. [234]

Applying the policies of Marxist-Leninism, with their impact on law and upon policy in general, and their larger impact upon the inevitable development of the social orders within and among states, Professor Tunkin claims that the forces within the socialist states have a monopoly on promoting peace, because:

..the principal factor in increasing the effectiveness of the United Nations as an instrument of peace and international cooperation is the forces which could exert pressure upon the ruling classes and the governments of states whose policy does not correspond to the interests of peace and consequently the requirements of the United Nations Charter. There are such forces in modern society; these are the forces of peace. [380]

Of course, the Western scholar is certain to find these perspectives ambiguous, assertive and inconsistent with his own. But he may, like Professor Myres S. McDougal find that they are tendentious promoting the policies of one state, and insisting that those policies for the purposes of that state and in general must be established. The fundamental policy in Professor McDougal's approach is to seek the optimization of human dignity, within social orders and among them. This is consistent with the Western tradition of

democratic orders and processes.

Law--both municipal and international law--has always been policy oriented, but the policies of law are often frozen, from the policies and conditions affecting those policies, when the law was first crystalized into norm, rule or standard. Moreover, legal policy has tended to be identified with legalistic policy--with policy that is limited to promoting the limited perspectives of a rigid legal order and legal process. In modern times, however, the policies of public law have shifted so that they embrace the larger decision flow of states and their governments, but are distinguished from that flow by the authority associated with legal decisions, by their controlling effect on the decisions, and by their policy content. Oliver Wendell Holmes, a noted American jurist, declared:⁷

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

The policy framework of Professor McDougal is best expressed by the following:

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

to be put into controlling practice, that, we suggest, are in any community most appropriately regarded as law.

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

A policy-oriented framework of inquiry has, thus, no difficulty in observing, as we have already in some measure documented, that humankind does today constitute a global or earth-space community, entirely comparable to its internal component communities, in the sense of interdetermination and interdependencies in the shaping and sharing of values. It is the larger community process, composed of many different and interpenetrating lesser community processes, which stimulates claims to authoritative decision, affects the process of decision, and is in turn affected by decision. It is, hence, indispensable

to effective inquiry to have a realistic map or model of the larger global process.

For the relations among states, this policy framework is perceived against the competitive social and power processes, because, perceived realistically, states in their practice are found to seek influence, prestige, respect, and to secure these through power and through values that support either their acquisition of power, or their denial of power to others. As with Professor Tunkin, change is accommodated in this approach. Professors Lasswell and Kaplan declared, for example:⁹

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.

This empirical grounding of political abstractions may be expressed by formulating the subject matter of political science in terms of a certain class of events (including "subjective" events), rather than timeless institutions or political patterns. We deal with power as a process in time, constituted by experientially localized and observable acts. Both structures and functions are construed as abstractions from what is empirically given as process. This orientation in political inquiry may be designated the principle of temporality.

The principle of temporality does not imply a concern with only changes in situations rather than with states of affairs. Inquiry deals with both sorts of problems and may be designated as equilibrium or developmental analysis accordingly.

Some resemblance to one aspect of the principle of peaceful coexistence appears in this perspective, because while that principle is directed to a pre-ordained outcome, it must deal with adjustments between nations with differing perspectives. However, while the theory of Professor Tunkin presupposes the pre-ordained outcome, the theory of Professor McDougal and others presupposes only that adjustment itself may be the outcome, and will be a prolonged process at least as long as nations do not destroy each other and the earth itself. To this end the publicist Walter Lippmann noted:¹⁰

When full allowance has been made for deliberate fraud, political science has still to account for such facts as two nations attacking one another, each convinced that it is acting

in self-defense, or two classes of war, each certain that it speaks for the common interest. They live, we are likely to say, in different worlds. More accurately, they live in the same world, but they think and feel in different ones. It is to these special worlds, it is to these private, or group, or class, or provincial, or occupation, or sectarian artifacts, that the political adjustment of mankind in the great society takes place.

How do states behave in a competitive power process? Because they are seeking power, how do they seek to acquire that power? What appeals are drawn to common goals--of mutual security, of global order, of the maintenance of international peace and security? Professor McDougal extends his inquiry beyond the traditional law into the strategic instruments of policy--into those that are ideological, economic, and diplomatic as well as military. A variety of changing strategies is examined and the connection of these policy-oriented activities with the emergence of with the choices that are made to shaping law are identified. Such strategies--and the choices involved--may extend to the negotiation and conclusion of international treaties and agreements, but then they may also be extended to the actions, policies and decisions relating to the kind of customary international law that is expected or identified with the larger goals of community policy.

Analysis and inquiry into these larger and enveloping processes demand a comprehensive framework that enables the scholar to perceive and to follow the development of law itself, to see its limitations, particularly when expressed against the policy goals expected from law, and to provide the decision and policy-maker with alternatives, choices or modifications to his own. The norms of international law--largely prescriptive in nature when we look to global processes--are in place, but for the purposes of effective regulation of the use of force there is missing the institutional and procedural framework, as the following excerpt of Professor McDougal makes clear:¹¹

The public order established and maintained by global constitutive process could be described in terms of the protection afforded and regulation achieved by authoritative decision with respect to every feature of global social process. The trend would appear, again, toward a slow improvement in an emerging global society, though a society not as well managed, or as secure, as the society achieved in more mature national communities. The most comprehensive description would make reference to the degree to which the different participants in global social process are protected in the establishment and maintenance of their own internal constitutive and public order processes and in

their interactions with other participants; the extent to which appropriate situations of interaction in all the different value processes are maintained about the world: the modalities by which the different resources comprising the physical environment--land masses, rivers, oceans, air space, outer space, atmosphere, and so on--are allocated for inclusive and exclusive uses and how these uses are regulated and protected; the degree of success achieved in facilitating persuasive, and in restraining and minimizing coercive, employment of the various strategies (diplomatic, ideological, economic, and military) in the shaping and sharing of values; and, finally and most importantly, the degree to which demanded outcomes in the different value processes (wealth, respect, enlightenment, and so on) are in fact achieved and protected. It is possible here only to make brief and suggestive indication of the kind of detail that would be relevant in such comprehensive inquiry.

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

different features of interaction.

The obvious Achilles heel in global public order is in the failure of constitutive process to establish enough effective control over the different nation-states to preclude resort to unauthorized coercion and violence. The number one problem of humankind remains, as we have indicated above, that of security in the sense of establishing a minimum order, in control of unauthorized coercion and violence, which will permit more effective pursuit of an optimum order in maximization of the shaping and sharing of all values. Through articles 2(4) and 51 of the United Nations Charter, and many ancillary prescriptions, the global community has at long last achieved a workable distinction between impermissible and permissible coercion, admitting of application in particular instances in support of minimum order. It remains, however, for the community to establish an appropriate institutional framework both for disinterested, third-party appraisal of particular instances of alleged impermissible coercion and for the application of appropriate sanctioning measures in preventing and deterring coercion and in restoring and rehabilitating public order. Though contemporary nation-states receive tremendous benefits from constitutive process, they have as yet been only imperfectly subjected to its complementary burdens.

Customary international law, in these perspectives, unlike those of Professor Tunkin, is an enterprise related to the choices evidenced in the behavior of states. Even if states are free to act as they choose, or even if they insist upon such freedom, they reveal what they believe to be the legitimate or permissible way to act by acting. The communications in this process relating to custom, and ultimately to customary international law, appear in the actions, but also the accompanying statements, declarations, and claims that they are making to each other. Professor McDougal identifies the process in which customary international law develops:¹²

The technical requirements for establishing a customary prescription in international law are, despite some controversy among the doctors, most frequently stated as embracing "two essential elements": a "material" element in certain past uniformities in behavior and a "psychological" element, or *opinio juris*, in certain subjectives of "oughtness" attending the uniformities in behavior. It is,

nevertheless, easily observed, and generally agreed, that both these required elements admit of flexible and many varying interpretations. The relevant uniformities in behavior may include the acts and utterances not only of officials, national and international, located at many different positions in structures of authority, but even of individuals and representatives of private associations and nongovernmental pressure groups. Such acts may also vary enormously in the amount of repetition they exhibit and in the duration of time through which they occur. The subjectivities of oughtness required to attend such uniformities of behavior, which subjectivities may on occasion be proved by mere reference to the uniformities in behavior, may relate to many different systems of norms, such as prior authority, morality, natural law, reason, or religion. The honoring in law-creating consequences even of subjectivities asserted in the beginning in direct contravention of prior authority in fact suggests as we have intimated above, that the only subjectivities required are those merely of expectation of future uniformities in decision, whatever the accompanying norms of justification. Similarly, the factual or literary evidences to which decision-makers are authorized to resort for information about past behavior and subjectivities embrace not merely the familiar items of international agreements, resolutions of international organizations, public utterances by international and national officials, diplomatic correspondence and instructions, the writings of publicists, and so on, but also "every written document, every record of act or spoken word which presents an authentic picture of the practice of states in their international dealings."

Professor Tunkin, it will be recalled, built his theory upon the consent of states. They must consent to legally binding obligations. They may also enjoy equality, sovereignty, independence, but each of these, in the legal sense, falls under consent, and to a large extent, consent may be implicitly related to power. The consent of a smaller state to the demands of a larger state may, in the appropriate negotiations, be simply deference to the power of the larger or more powerful nation. The same possibility of deference or submission lies with the deeper implications of equality and sovereignty, or even with the right to enjoy the freedom of unopposed domestic

jurisdiction, pursuant to Article 2(7) of the United Nations Charter.

The larger perspective entertained by Professor McDougal leads to the growing web of customary international law, ultimately denying all states, large or small, the claim that it is withholding consent to legal obligations. The enveloping web is one that operates in a way through "precedent," so that states become the beneficiaries and also the subjects of their prior decisions, actions and policies: they are not free under this perspective to adopt one policy today, and then later to repudiate it, if the global community has been led to perceive the actions of that states and others as actions and decisions that must conform to law. They are subject to trends in the decision flow--perhaps a more precise perspective than that of precedents these they oppose if they refuse to be a member of the global community. According to Professor McDougal these trends enable us, *inter alia*, to follow the development of law and policy:¹³

[Trend thinking] considers the shape of things to come regardless of preference. His goals clarified, a policy-maker must orient himself correctly in contemporary trends and future probabilities. Concerned with specific features of the future that are ever emerging from the past, he needs to be especially sensitive to time, and to forecast with reasonable accuracy passage from one configuration of events to the next. For this purpose he must have at his disposal a vast array of facts properly organized and instantly accessible....The results of trend thinking must continually be evaluated by the policy-maker in the light of his goals; the task is to think creatively about how to alter, deter, or accelerate probable trends in order to shape the future closer to his desire.

But Professor Tunkin argues that the concept of community is without foundation, and hence he might insist that the growth of community, whose law and policy are inconsistent with that established under the tenets of Marxist-Leninism, is illusory or at best transitory. At page 27 in his treatise, he points out that law--seemingly the traditional law from the context of the excerpt below--does not have its basis in community:

The concept that the basis of law is community, particularly a common ideology, is completely unfounded. Proponents of this concept frequently point out that in the absence of a specific community between people, the existence of law in general and of international law in particular is impossible. Of course, in the absence of a specific community between people, the

existence of human society, and consequently of law, is inconceivable, but it still does not follow that this community is the reason for the formation of law or is reflected in law. The history of human society shows completely the opposite: in a pre-class society, where this community between people was more significant, there was no law: only with the emergence of class contradictions, with the destruction of the tribal community, does law emerge.

Law, including international law, emerged not as a result of an increase in community among people, but as a result of the division of society into classes and the formation of new class contradictions unknown to tribal society. International law, just as municipal law, is a phenomenon peculiar to a class society.

The theoretical unfoundedness of the concept of a common ideology as a necessary condition for the existence and development of international law does not make this concept less dangerous.

While both Professor Tunkin and Professor McDougal have identified the policy orientation of law, and the policy projection inherent in the legal process, it is evident from the materials presented so far that what they expect from the legal process varies substantially. Professor Tunkin clearly espouses the policies of his government and projects those policies into international law. These are not policies that are to be shared on the basis of compromise or adjustment with the opposing, competing or differing policies of the Western states. They are, through the principle of peaceful coexistence, policies to supplement those that are no longer needed in the traditional international law as the Marxist-Leninist structure for the allocation of authority and competence emerges among states. Moreover, there are no alternatives: while the period of transition may be long, the ultimate outcome is not in doubt.

Global public order under the perspectives of Professor Tunkin is one, then, that remains very loose in its organizational features, because there is no possibility for accommodation toward a global order that embodies the economic perspectives of the capitalist states. The class nature within those states are the "deep roots of wars," according to Professor Tunkin:

The theoretical unfoundedness of bourgeois concepts and plans to create a world state is determined by the basic unfoundedness of bourgeois methodology,

which is characterized by the divorcing of the superstructure from the base. A state is regarded as something that can be reconstructed as a cardinal form at the will of politicians and jurists irrespective of the economic structure of society. The causes of war, whose liquidation is the leitmotif of all plans for a world state, bourgeois scholars misrepresent as state sovereignty, whereas the very existence of sovereign states is a nature consequence of the economic structure of society, and both sovereignty and the state will disappear only when this structure is changed.

The deep roots of wars are found in the economic system and in the specific class structure of society which it determines. Moreover, bourgeois concepts of a world state originate, and by their class nature cannot but originate, from the possibility of creating a world state and liquidating wars without affecting the economic system of capitalism. [375]

Professor Tunkin believes that a world state would oppose "social revolutions" because such plans "are linked in imperialist ideology with the struggle against social revolutions and the national liberation movement." The proposals for a world state, in short, are an ideological strategy, misleading peoples "both on the internal and international plane." On the one hand they "parry the blow from the capitalist system, alleging the roots of wars are not linked. On the other, they undermine the very cause of peace itself." [375-7].

Of course, the support of "social" revolutions is not limited to Marx, nor to Marxist-Leninist teachings, nor to the policies of the socialist bloc. Thomas Jefferson supported such revolutions, and, though some argue without evidence that he would even have supported revolutions by violence, his primary goal was to ensure that society itself would be able to adjust. And he foresaw that the progressive social orders would have provisions and expectations for adjustment structured within them, and the procedures and processes (e.g., voting, referendum, and so on) to enable such adjustment to proceed.

Professor Tunkin, and other Soviet commentators, find ample provision for the subordinate principles flowing from the principle of peaceful coexistence in the United Nations Charter, and, they have identified most of the purposes and objectives of the Charter against the perspectives of coexistence. But it is clear that the principle extends deep into an on-going, future oriented policy, to be aided, where appropriate, by deliberate actions and assistance. The declaration of General Secretary Leonid Brezhnev of the Communist Party of the Soviet Union before the 26th Congress unambiguously proclaims full support against what must clearly be the Western world:¹⁴

Comrades, declares Brezhnev, no one should doubt that the CPSU will continue to consistently pursue a course aimed at the development of cooperation between the USSR and the liberated countries and at the consolidation of the alliance of world socialism and the national liberation.

Moreover, there is no room for compromise with regard to these perspectives. They are not only irreconcilable according to Professor Tunkin with those of the bourgeois states, but they are inevitable, and must not be opposed, or there is the possibility that peace itself will be endangered. Victor P. Karpov, while First Secretary of the Embassy of the Soviet Union in Washington, made this abundantly clear in summarizing his own essay, "The Soviet Concept of Peaceful Coexistence and its Implications for International Law,"¹⁵

We are convinced that the principle of peaceful coexistence should be the basic of the whole structure of contemporary international law. Only if it is based on the principle of peaceful coexistence can international law best promote the cause of peace and mutual understanding between nations.

The perspectives of Professor McDougal reveal instead how states are behaving in their relationships with each other under current circumstances. They have at best a loosely organized community. This community affords them minimum order and security, and unless sustained, they will fall back increasingly upon unilateral measures to achieve order out of enveloping chaos and anarchy, primarily through their own power, particularly military power. However, the global community at large has adopted norms--important to enough of them to be projected as law regulating the primary concern that they all share, i.e., law regulating the use of force. Unquestionably, the effectiveness of this law is dependent upon enforcement. But this is presently dependent primarily upon the checks and balancing that arises in the deterrence equilibrium regarding the nuclear weapons. Until an effective means to replace the checks and balancing process appears, that process must be nurtured to include the weapons emerging from the advancing military technologies. Yet, it must be stressed, the process of checks and balancing is dependent almost entirely on the communications involved in the threats and counterthreats to use or at least to have available the very weapons that are being checked. This, of course, provides--and reflects--the ambiguous basis of relations among states in their competitive power process.

Emphasizing the shaping of global social processes as a positive approach to this problem, Professor McDougal draws attention to the interaction of decision, policy, law and enforcement in the following excerpt¹⁶:

Systems of public order are embedded in a larger context of world events which is the entire social process of the globe. We speak of "process" because there is interaction, of "social" because living beings are the active participants, of "world" because the expanding circles of interaction among men ultimately reach the remotest inhabitants of the globe....Within the vast social process of man pursuing values through institutions utilizing resources, we are especially concerned with the characteristic features of the power process... Within the decision-making process our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions. Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorized or not. The conjunction of common expectations concerning authority with a high degree of corroboration in actual operation is what we understand by law....Within the distinctions thus developed, we are able to clarify what is meant by a system of public order. The reference is to the basic features of the social process in a community--including both the identity and preferred distribution pattern of basic goal values, and the implementing institutions--that are accorded protection by the legal process.

VI

Conclusions to an inquiry into perspectives relating to regulating the use of force among states are always, at best, tentative. Two leading commentators have been chosen to review the prominent perspectives of jurists that come from the Soviet Union and the United States, and it is obvious that such an inquiry can be at best preliminary. But such an inquiry is fruitful because it enables, through comparison, for an approach to be made concerning theories about law, the legal process, and the legal order. Moreover, it is part of the larger process of clarification--a task that is imposed relentlessly upon the detached scholarly observer if he is to seek and make useful proposals for alternative policies and decisions.

Professor Tunkin's principles that supplement or are embraced by, the principle of peaceful coexistence provide his framework for regulating the use of force--at least in normative or prescriptive terms. While little emphasis is given to the critical policy functions identified in the application, recommendations for modification and shaping, appraisals, and even for the interpretation and where appropriate the termination of the proposed

norms, Professor Tunkin indicates the wider reach in such principles as the principles of non-aggression [49 et seq.], peaceful settlement of disputes [57 et seq.], self-determination of peoples [60 et seq.], the principle of peaceful coexistence itself [69 et seq.], disarmament [75 et seq.], respect for human rights [79 et seq.], and prohibition of war propaganda [83 et seq.], and includes the renunciation of the use of force in the principle of nonaggression.

Clearly he intends that all of these principles are mutually supporting and reinforcing in their impact. But ~~the~~^{the} principle of nonaggression, ~~which~~ "emerged at first as the prohibition of aggressive war, being transformed later into the principle of the prohibition of the use or threat of force." Treaties and international agreements embodying this principle are traced by Professor Tunkin, and the United Nations Charter--Articles 2(4) and 2(3) in particular--is marked as "an important new stage in the development of the principle of nonaggression." [52].

Yet Professor Tunkin's observations are ambiguous in this important context. He seemingly suggests that while international law provides valuable norms and that such norms appear to be the end product of its effort, it leads toward the application of a higher principle of peaceful coexistence--operating directly but not necessarily as law upon the relations among states:

Contemporary international law prohibits states from resorting to war against other states. But this does not mean, of course, that with the emergence of the principle of nonaggression international law as a system of norms regulating specific social relations has become weaker. The international legal prohibition of aggressive war undoubtedly was a step forward on the path of transforming international law into a more effective measures means of securing peace, of developing the peaceful coexistence of states. And if with the prohibition of aggressive war international law turned its face toward peace for the first time in history, then its role in securing peaceful coexistence has grown and it consequently has become more effective. [56]

The ambiguity in these observations arises from the language used--perhaps through the translation itself--because, while it stresses the principle of peaceful coexistence as operating to assist policy during the transition presupposed by Professor Tunkin from a global grouping of states with capitalist and socialist systems to a grouping of states entirely with socialist or communist systems, it is also, subsequently identified as a principle of international law. In either event, the purpose is clear: the principle of peaceful coexistence operates as the "higher law," a kind of ground-norm for the transition. In this sense, it bears resemblance

to those who professed a "higher law" in the natural law, and earlier in the "divine law" legitimatizing the absolute power of the Medieval kings.

With the emerging minimum order for outer space now in view, the other principles might quickly be mentioned. The policy goals associated with Professor Tunkin's principles would then need attainment. For example, the principle of disarmament would call for "general and complete disarmament," replacing the arms control features and deterrence equilibria that now characterize the undertakings regarding outer space. [75 et seq.]. This would be closely associated with the operation of nonaggression, but the principle, so far, has not reached the stage where it can be said to be "completely formulated." [78 et seq.]. Accordingly, what is needed, presumably to fulfill the principle in outer space is the conclusion of "an international agreement" for disarmament at least for outer space [78-79].

But, while disarmament has not become an operative principle, at least through international agreement, the "obligation to strive for disarmament by the conclusion of an international agreement has special significance." [79 et seq.].

While Professor Tunkin--surely with all other responsible commentators and jurists--is intent upon the prohibition of war and the use of force or threat of force inconsistent with Article 2(4) of the United Nations Charter, he limits his goal to the prohibition of "aggressive" war, opening the possibility to the permissibility, and to the standards for establishing the permissibility of those wars that are not "aggressive." (i.e., the wars of liberation, and the wars in which socialist states are engaged in defending themselves against nonsocialist states). But for jurists, his observations are limited to formulating and seeking the wide recognition of legal norms, even if they in themselves provide only limited restraint:

Even though establishing a legal norm which prohibits war does not mean that war is eliminated, a real diverse influence of the norm upon the conduct of subjects of international law is possible. The actual guarantees of the effectiveness of an international legal norm may be legal or nonlegal. [77-8].

Professor Tunkin's framework and analysis compels us to conclude that through the principles of consent and peaceful coexistence and the methodologies of Marxist-Leninism, the Soviet Union is afforded the legal basis and the policy guidelines to pursue its own objectives--in short, to achieve the goals that it associated with the inevitable outcome of a Marxist-Leninist methodology. Such an approach would turn the existing treaties and international agreements into transitional structures, wherever those agreements, or the law that is established under, and in accordance with such agreements, are inconsistent with Soviet goals assuming they are those proclaimed by Professor Tunkin. This of course does not mean that current agreements are not validated by the consent of the Soviet Union, but it does

mean that they are subjected to the continuation of the consensual processes of that nation. It may mean--but this is a question to be addressed by Soviet colleagues in the effort to provide further clarification--that the present treaty structure will continue at least until the larger setting among states--the adoption by the preponderance of states of socialism--has been attained.

These are perspectives that when examined against those of the West leave the outcome in ambiguity, because the Soviet Union would be compelled through its practice, and through future negotiations, and future treaties, to achieve the goals that Professor Tunkin sets forth. This would mean that the perspectives relating to the regulation of territorial air space by legal processes in the Soviet Union are expected to become the perspectives for regulating outer space. In particular, it means that the principles for assuring minimum order in outer space will be identified, at least by scholars who are adopting the views of Professor Tunkin, with the effective application first of the principle of peaceful coexistence. Ultimately, minimum order is assured only with the completion of the transition period when we will then perceive the disappearance of the capitalist state, the capitalist approach and the bourgeois methodologies and approaches to law that are inconsistent with these far-reaching structural changes.

While these perspectives follow a pre-ordained path, the "bourgeois methodology" of Professor McDougal suggests, instead, that law and its authority and controlling effects will gradually develop and emerge with the widening participation of those involved in the law-projecting processes. Professor McDougal emphasizes that we must displace doctrine, states;¹⁷

Sanctions presently available extend in authority and fact beyond mere "military coalition" to the systematic use, by both international and national officials, of all base values by all methods--diplomatic, economic, ideological, and military." The effects of this power process upon the distribution of values in the world can, finally, best be summarized in terms of "interdependence," an interdependence of peoples from antipodes to antipodes for all values, an interdependence which makes any conception of "national interest," apart from the interest of most peoples of the world, the sheerest of illusions.

It is not a matter purely of verbal aesthetics what variables in this world power process are described as "law." One's use of a word of such critical significance may affect understanding and, hence, control. Thus, the critics of "law" who use the word to refer merely to authoritative rules or

formal doctrine, policy crystallizations of the past, and who focus too sharply upon naked force as sanction may conceal from both themselves and others the true nature of the decision-making process. It is not suggested that past authoritative formulations of policy do not greatly influence decision-makers. Such formulations play varying roles in the perspectives of different decision-makers to seek guidance from the experience of their predecessors. Decision-making is also forward-looking, however, and decision-makers respond in fact not alone to prior prescriptions but to a great many environmental and predispositional variables, including doctrines which formulate the effects of alternative decisions upon the groups which they represent or with which they identify and which state objectives and policies for the future. The process of decision-making is indeed, as every lawyer knows, changing facts and claims. A conception of law which focuses upon doctrine to the exclusion of the pattern of practices by which it is given meaning and made effective, is, therefore, not the most conducive to understanding. It may be emphasized, further, that official decision-makers, the people who have formal authority and are expected to make important decisions, may or may not make the decisions in fact. Effective control over decisions may be located in governmental institutions, but it may also be located in political parties or pressure groups or private associations and the people exercising control may rely for their power not upon formal authority but upon wealth, enlightenment, respect or other values. Description which would concern itself with effects as well as with myth must take into account this structure of effective controls over apparent governors. Formal authority without effective control is illusion; effective control without formal authority may be naked force. A realistic conception of law must, accordingly, conjoin formal authority and effective control and include not only doctrine but also the pattern of practices of both formal and effective decision-makers. A democratic conception of law may also include, to add brief detail, a commitment to change by peaceful procedures and to policies which

prescribe a wide sharing of power and other values, provision of procedures for the continual review and reformulation of policies and representation in those procedures of all people who are affected, provision of procedures for the interpretation and application of policies, and the balancing of effective power necessary to make procedures secure and to put policies into practice. Within the nation-state people do not rely alone upon the projection of doctrine to secure their values. They project doctrine in constitutional and other forms, but they also seek to balance power--within government, as between functions, legislative, executive, and judicial, and areally, from locality to state or province and region and nation; and between government and a host of nongovernmental organizations, parties, pressure groups, and private associations of all kinds. Today many, if not most, observers would agree that no combination of traditional international doctrine and "old-fashioned" diplomatic procedures could be adequate to secure a comparable balance in the world arena. The United Nations, the specialized agencies, and the regional organizations offer the beginnings of new commitments and of new procedures designed to secure such a balance and to organize effective community coercion behind the doctrines of freedom, peace, and abundance. Our actual choice is not between traditional international doctrine and old-fashioned diplomacy but between these new commitments and procedures and world anarchy and violence. It would seem most irrational, by a simple misidentification of "law," to reject the new because the old has failed.

Jurists need no longer spend their efforts in reflecting on the intolerable destruction promised by the major nuclear weapons, or for that matter, by all of the major conventional weapons, and the weapons of mass destruction. These are among the givens or political realities that we are compelled to face. However, matters that now require their time are first the clarification of opposing views relating to how law is to be projected and made effective in the future, the extent to which law can be promoted through institutions and procedures and an operative legal process, and the extent to which law may be made a shared strategy for common goals.

All law is dependent for its development upon communications and communications supportive

activities. The communications process for effective law are those that assure timely, reliable, comprehensive and open communications. The communications that are critical for the shaping of effective law require the open dialectical process and balanced and responsible criticism that will give jurists, on a global basis, the prestige and influence that they must have with the decision and policy-makers they are to advise.

Communications arenas in the largest sense are those involving the peoples of the world, because they are most likely to gain or lose through decisions relating to the security among nations. The challenges and threats among opposing social orders are most frequently made under hostile conditions, promoting secrecy, and denying the communications channels operative effectiveness.

Accordingly, as in the arms control agreements in general, it is becoming increasingly evident that the law that can be projected in the future into outer space and in general will depend upon the major power blocs entering into communications, devising more effective communication channels, offering more opportunity to their peoples to interact and communicate with each other, and using such communications to seek out common goals. This is not a recommendation that can be readily adopted, particularly when the past practice is examined. Yet even in the specific instances of extending the reach of the arms control agreements to qualitative changes in weaponry it has become increasingly evident that unless the communications-oriented "confidence building measures" [and "compliance" building measures] can be confidently installed, and effectively applied, there is little likelihood for real progress. But if they are installed, there is a strong likelihood for the development of law itself, and much that was discussed in this paper may find itself modified by the new and increasingly common perspectives shared among peoples everywhere. These will be perspectives that genuinely seek the optimization of public dignity.

The efforts of jurists, however, are designed to provide constraints and guidelines consistent with law--justification and rationalization of the conduct of states is recognized by all as the activity of the advocate who may too often freely dispose of his law as an instrument to serve his client. Accordingly, the fundamental question for jurists of our era is whether there is to be the common, shared attitudes toward law within a community among states, under shared concepts of law, and aimed at common goals, or whether the law to be imposed is that law that is invoked in accordance with the strategies of a single state, imposed through the exercise of power, but justified in terms of special privilege and protections.

All of our law--treaty law and customary international law--under the broadest rubric of "compliance"--must be law in which we share expectations as to effectiveness and enforcement. This is particularly true for the undertakings concerning the use of force and weapons, but it is also true for the larger strategic goals of a community that seeks to avoid nuclear

destruction. It is caught in the observations of Professor Myres McDougal and his associates:¹⁸

The primary aim of a process of interpretation by an authorized and controlling community decision-maker can be formulated in the following proposition: discover the shared expectations that the parties to the relevant communication [the term "communication" being used in the largest sense of intercourse among states] succeeded in creating in each other. It would be an act of distortion on behalf of one party against another to ascertain and to give effect to his version of a supposed agreement if investigation shows that the expectations of this party were not matched by the expectations of the other. And it would be an obvious travesty on interpretation for a community decision-maker to disregard the shared subjectivities of the parties and to substitute arbitrary assumptions of his own.

In a loose order among states in which those states are competing increasingly in situations in which their interests overlap and interact, and compete, and are opposing, there are dangers enough that there may be a shift from the "interests" of states entitled to protection to interests identified exclusively with the potential "aggression" and "self-defense"--ambiguous notions symbolizing uses of force, and embracing ambiguous notions of regulation.

ENDNOTES

The purpose of these endnotes is to provide the sources of citations in the body of the paper, and to provide supplemental material that bears upon the arguments and reasons set forth in the paper. Neither the paper, nor this supplemental material, can adequately convey the full reach of the subject pursued, and it must be identified as a preliminary inquiry. Moreover, because competing policies among governments, addressed by jurists, are necessarily matters of controversy, it is presupposed that the inquiry and the inquiries of others will proceed along the critical path that may lead to constructive outcomes.

Western perspectives on Soviet law are collected conveniently in Hans W. Baade, editor, *THE SOVIET IMPACT ON INTERNATIONAL LAW*, Oceana Publications: Dobbs Ferry, N.Y., 1965. While numerous other commentaries have appeared since the publication of this book, most of the leading themes remain unchanged. The most striking opposition to the principle of peaceful coexistence among Western commentators is identified in the short essay of Professor Leon Lipson entitled "Peaceful Coexistence." (p. 27 et seq.). As to the claim of Professor Grigori Tunkin that the principle of peaceful coexistence lies "at the heart of international law," Professor Lipson concludes his analysis with the observation that

the Soviet Union insists "that the process of defining peaceful coexistence requires participation and consent of the Soviet Union; and, by implication, that any existing principle or norm of prior international law that has not been accepted by the Soviet Union as part of or consistent with peaceful coexistence in general statement or in particular application has to be rejected as being for that reason invalid." [at p. 36]. This perception appears to coincide with the arguments made by Professor Tunkin.

Professor George Ginsburgs, addressing the perceptions of Soviet authorities on the "wars of national liberation" [p. 66 et seq.] argues that without effective legal conditions on such wars, without adequate sharing among states in the global community as to when and under what conditions such wars should be recognized, and without legal controls on such wars, they are combined with a "just war" theory that impairs the principles of nonaggression. A just war approach, of course, automatically puts the government in power as an aggressor, a war-criminal, and within the "logic" of this perception not entitled to the protections of international law including the law of war.

Perhaps a most significant difference in the approach of the Western scholar and that of Professor Tunkin lies in the perception of law itself. Professor Tunkin is concerned with the challenge to international law and the Western tradition that is being mounted by the Soviet Union through its ideological instruments of strategic policy. The existing law under these perceptions will be restructured and replaced. The Western commentator argues, conversely, that there is a basis, in the value demands among peoples, that must be fulfilled, and that this is the direction toward which the legitimatizing processes of an evolving, emerging law are directed.

"Differences of ideologies have always existed," according to Professor Tunkin. "True this difference at present is profound. But when states agree on recognition of this or that norm as a norm of international law they do not agree on problems of ideology.... They do agree on rules of conduct." [From *COEXISTENCE AND INTERNATIONAL LAW*, LAW, 95 Acad. de Droit Int., Recueil des Cours (1958), at pp. 58-611.

While the perspectives of Professor Tunkin are conditioned and shaped by the Marxist-Leninist framework in which the outcome of the struggle between the capitalist and communist (or "socialist") systems is pre-ordained, and favors, exclusively, the communist perspectives, the perspectives of Professor McDougal are that states in the past and today are shaped within competitive power processes, affected, however, by values in addition to power (e.g., respect, enlightenment, wealth, well-being (including safety, health, character, comfort), rectitude, skill and affection, and that these values are identified by peoples everywhere in terms of the gathering perspective of human dignity. Clearly, "the power process of any particular nation-state operates within the context of the world power process and both affects and is affected by the larger context." [At p. 969, in McDougal, et al., *STUDIES IN WORLD PUBLIC ORDER*: New Haven and London: Yale Univ. Press, 1960]. While Professor Tunkin focuses very closely on power,

Professor McDougal argues that law finds its sources *inter alia* through the value demands of the values just mentioned. The broadening reach of policy and law, of social order and legal order is then:

In a world shrinking at an ever-accelerating rate because of relentlessly expanding, uniformity-imposing technology, both opportunity and need for the comparative study of law are unprecedented. In this contemporary world, people are increasingly demanding common values that transcend the boundaries of nation-states; they are increasingly interdependent in fact, irrespective of nation-state boundaries, for controlling the conditions which affect the securing of their values; and they are becoming ever more realistic in their consciousness of such interdependences, and hence widening their identifications to include in their demands more and more of their fellow men. [at pp. 947-948].

The differences between Professor McDougal and Professor Tunkin are, however, the subject of the paper itself. The shared, and mutual, strategy that we might identify with the shaping and emergence of international law, and with the nature of that law itself, is the outcome of the opposing claims and counterclaims among states. Under present conditions, the challenge and opposition are such that international law--to the extent it is shared between the West and the Soviet Union--is necessarily limited in its impact. Perhaps the main thrust of inter-state concern has fallen back upon their security, and perhaps the perceptions of security demand--for each or most of them--more freedom to act and less restraint upon how they act. But that, for this inquiry, will remain a surmise.

The distinctions of a major element in the policy approach of Professor McDougal--that relating to human rights--and the far lesser impact that human rights has upon Professor Tunkin can be found by comparing the massive treatment by Myres S. McDougal, Harold D. Lasswell, and Lung-Chu Chen, *HUMAN RIGHTS AND WORLD PUBLIC ORDER*. New Haven and London: Yale Univ. Press. 1980, with Professor Tunkin's observations that introduce the settlement of the competitive power processes as a condition precedent to proceeding with human rights on the international plane, and the primary significance accorded such rights to the domestic plane:

The further development of the international protection of human rights depends upon many circumstances, primarily upon improving the international situation, terminating the aggressive activities of imperialist powers, the arms race they have engendered, and the aggravation of international relations.

One proposition of cardinal importance should not be forgotten: securing human rights remains and will remain basically the domestic affair of states. Therefore, the principle field of struggle for human rights is the internal system of a state, and especially its socioeconomic system. [Grigori Tunkin, *THEORY OF INTERNATIONAL LAW*, Eng. Ed., p. 83].

The pervasive theme of a "correlation of forces" appears in Professor Tunkin's text, and also in its political counterpart. For example, Communist Party Secretary Khrushchev declared that through such a correlation of forces war could be prevented, i.e.,

People usually take only one aspect of the question; they consider only the economic basis of wars under imperialism. This is not enough. War is not merely an economic phenomenon. Whether there is to be a war or not depends, in large measure, on the correlation of class, political forces, the degree of organization and the awareness and resolve of the people. [In *CURRENT SOVIET POLICIES--II*, at p. 37, Frederick A. Praeger, New York, 1957].

The question of public order raised in this paper requires analysis in greater depth. Public order, constituted among states, involves a process akin to the establishment of constitutions. These within the Western democracies have led to the claims of sovereign rights in the peoples themselves, and through them the establishment of law that governs the public officials. The rights of the individuals--human rights--remain inviolate under all conditions. See generally, Charles H. McIlwain, *CONSTITUTIONALISM ANCIENT AND MODERN*, Cornell University Press: Ithaca, New York, 1947.

Professor Tunkin carries the application of the principle of peaceful coexistence to the full implications in pointing up the development of the socialist law, applicable to socialist states, in a socialist commonwealth, and identified as a "higher law." This application was made as early as 1968 with respect to the Czechoslovakian crisis and rebellion (pages 238, 438, 446):

International law, just as national law, inheres in a class society. But class society, as has been proved by the basic tenets of Marxism, represents merely a certain stage in the development of human society, which also had existed where there were no classes....

Mankind is approaching a new organization of society which

will not have law, and therefore, not international law. This, of course, does not mean that the society of the future will have no rules of conduct. A highly-organized human society as communist society will be, inevitably presupposes the existence of rules of conduct... The rules of conduct which will exist in communist society will by their nature be different from norms of law. The socialist principles of respect for state sovereignty, noninterference in internal affairs, and equality of states and peoples differ fundamentally from the corresponding principles of general international law; these socialist principles have another content: the rules of conduct themselves are changed partially as part of the content of the norms and, especially, the special aspect of the norm changes.... The social consequences of the operation of socialist international legal principles differ completely from the consequences of the operation of norms of general international law. The immediate reason for this is the qualitative distinctiveness of the special aspect of socialist principles from the principles of general international law and the difference in the social relations which are regulated by socialist principles, on one hand, and by principles of general international law on the other.

As a whole these are not general democratic principles but are completely different socialist international legal principles which relate to a new, higher type of international law--a socialist international law. they aim at strengthening and developing relations of the fraternal commonwealth of socialist countries, at ensuring the construction of socialism and communism, and at protecting the gains of socialism from the infringements of forces hostile to socialism.

This, of course, suggests that the law and the legal order while operative is to be shaped to provide certain protections--not only from the nonsocialist states but from all "nonsocialist conduct" that arises from within.

Professor Tunkin concludes this theme (at p. 446):

The theoretical unfoundedness of the concept equating principles of relations between countries of the socialist camp with principles of general international law is that

it does not take into account the specific features of relations between countries of the socialist camp. But the specific feature exists, and it must, since the question is one of relations between states of a new historical type, of relations between states of a new historical type, of relations between socialist states.

To assert that relations between socialist countries should be regulated only by principles of general international law is to deny the different class character of relations between the countries of socialism, to be derailed from party principle into the morass of bourgeois normativism.

Accordingly, the conclusion is that general international law and the need for the operation of a principle of peaceful coexistence, along with the principle of consent, will vanish as the class struggle comes to an end, terminating through the rise of socialist states. Those states are not governed by international law as such but by socialist commonwealth law--a "higher law." Moreover, this outcome is dictated by historical materialism, and the inevitability of social processes. In other parts of the text, not cited here, Professor Tunkin does indicate that the existing, general international law is in itself being modified by the infusion of the socialist principles bringing "new" law to bear.

For a recent work on the interaction of domestic and international law by a Soviet writer see V.G. Butkevich, *THE RELATIONSHIP BETWEEN DOMESTIC AND INTERNATIONAL LAW*, Kiev, 1981. According to Professor Hazard in 78 A.J.I.L. 249-50 (1984) the author seeks to restructure the interaction of domestic and international law with emphasis on "dialectical unity"--which, according to Hazard, "will bring into municipal law the socialist features now being expanded in international bodies." These pressures will--peacefully--lead to the transformation of the capitalist systems into communist systems. The text is described as a "closely reasoned program of action to spread socialist systems around the world," with intended impacts on influencing the "formulation of international law."

The political and action implications of the principles of peaceful coexistence are discussed at length by M.A. Suslov at the 20th Communist Party Congress. While peaceful measures were sought to transform global domestic orders into communism, and while the transformation was inevitable, the struggle must continue because "insofar as imperialism remains, the economic basis for the outbreak of wars also remains." While war can be deterred through the "balance of forces," the forms of transition from one social system to another "depend on the specific historical conditions, and whether the methods are more peaceful or more violent depends not so much on the working class as on the extent and forms of resistance of the exploiting classes which are being overthrown and which do not wish to part voluntarily with the vast property, political

power and other privileges they possess." [At pages 75, 76, CURRENT SOVIET POLICIES--II, DOCUMENTARY RECORD OF THE 20TH COMMUNIST PARTY CONGRESS. New York. Frederick Praeger. 1957.

FOOTNOTES

1. Grigori Tunkin, THEORY OF INTERNATIONAL LAW, Translated by William E. Butler. Harvard Univ. Press: Cambridge, Mass. 1974. All pages are cited in the text of paper in brackets to avoid repetitious footnoting.
2. Benjamin B. Ferencz, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (2 vols). Oceana Pub: Dobbs Ferry, New York, 1975. Contains documents extending to earliest attempts to define aggression in the 20th century.
3. REPORT OF THE PRESIDENT'S COMMISSION ON STRATEGIC FORCES, APRIL 1983. USGPO.
4. The Helsinki Accords are in AMERICAN FOREIGN RELATIONS 1975--A DOCUMENTARY RECORD, Edited by Richard P. Stebbins and Elain P. Adam, New York, 1977, pp. 283-360.
5. REPORT, cited in Note 3, at page 2.
6. See ENDNOTES, esp. paper by Professor Leon Lipson noted there.
7. Oliver Wendell Holmes, Jr., "The Path of the Law," 10 Harvard Law Review 457-458 (1897).
8. Myres S. McDougal, "The Future of International Law," 50 Miss. L.J. 259 (1980).
9. Harold D. Lasswell and Abraham Kaplan, POWER AND SOCIETY. Yale Univ. Press: New Haven, 1950, p. xiv.
10. Walter Lippmann, PUBLIC OPINION, Harcourt Brace & Co.: New York, 1922, p. 27.
11. Note 8, pp. 310-5.
12. Myres S. McDougal, Harold D. Lasswell, and Ivan A. Vlasic, LAW AND PUBLIC ORDER IN SPACE. Yale Univ. Press: New Haven, 1963, pp. 116-7.
13. Myres S. McDougal et al., STUDIES IN WORLD PUBLIC ORDER. Yale University Press: New Haven, 1960. pp. 54-55.
14. Leonid Brezhnev, Report to the 26th Congress of the Communist Party of the Soviet Union, at p. 8 in CURRENT SOVIET POLICIES VIII, Current Digest of Soviet Press: Columbus, Ohio, 1981. See also to the same effect Article 28, USSR CONSTITUTION, 1977.
15. Victor P. Karpov, "The Soviet Concept of Peaceful Coexistence and its Implications for International Law," at p. 14 et seq., in THE SOVIET IMPACT OF INTERNATIONAL LAW, cited in the ENDNOTE.
16. Myres S. McDougal, "Law and Power," at p. 104, III-3, in Leo Gross, ed., INTERNATIONAL

LAW IN THE TWENTIETH CENTURY, Appleton-Century, New York, 1969.

POSTSCRIPT

This inquiry has clarified the present realities of state behavior. Currently, states have failed to resolve their differences over when force or coercion may permissably be used, while the actual use of force and the regulation in favor of moderation has in practice been consistently abused. They have failed to adopt a shared basis for making such crucial decisions as these. They have, accordingly, adopted a shared strategy in which they continue, through a variety of strategies of their own, but always favoring military strategies, to assert claims and counter-claims with regard to each--opposing each other in competitive processes. Normative or "juristic" proposals to resolve this stalemate are fruitless and become polemical and ideological strategies, pursued for exclusive or unilateral advantage. While these prescribe what jurists or diplomats might be seeking as law, they have not been adopted in the practice of states to project that law. A future inquiry might now, fruitfully, examine the possibilities, potentials and limitations on law and legal processes to promote the operative uses of law, adopted and shared while aimed at effectiveness among states--and aimed at a shared and secure order. Failing this, states, notwithstanding the claims for law, will continue to face, as in the past, the uncertainties of hostile relations and the tensions those hostilities create. Communications limited to the military arena are notably the communications of threat, confrontation and power.