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## THE WORLD CONSTITUTIVE PROCESS OF AUTHORITATIVE DECISION †

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THE frame of reference essential for discussion of the world constitutive process is the world social process. The fundamental point emerging from a survey of that process is that today the scientific observer is justified in referring to a "world community": the level of interaction among the inhabitants of the earth has reached a degree of intensity that includes both interdetermination and widespread explicit recognition of the facts of such interdetermination. To interact is to influence and be influenced, whether the influence is recognized or unrecognized. During the centuries when there were practically no contacts between middle and South America and the other inhabitants of the globe, the peoples of the world did not maintain a level of reciprocal influencing (recognized or otherwise) sufficient to justify an observer of global affairs to speak of a world community. Similarly, it would be inappropriate to refer to an inclusive context of interaction when the empires of

† The Editors wish to acknowledge with thanks the kind permission granted us to publish this article which will appear as a chapter in the first volume of a series of volumes on the subject *The Future of the International Legal Order*. The series is being edited by Professors Cyril E. Black and Richard A. Falk and the project is supported by a grant from The Ford Foundation and carried out under the auspices of the Center of International Studies of Princeton University. This article is presented here because of the Editors' belief that it outlines a conception of constitutional process relevant not only to the international community but to the national and lesser communities as well. Because of its length the article is printed in two installments. It will be concluded in the next issue (Volume 19, Number 4).

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Rome and China were flourishing. There were few acknowledged or unacknowledged connections between them. To identify a global community today, it may be noted, does not require that one find a transnational exchange of people or goods or reciprocally amiable perspectives. The interflow of such values is not the only index of interaction. Interaction occurs at the level of full subjective awareness when participants take one another into consideration; consideration may involve weighing the other as a potential enemy and remaining aloof from all trade, travel or combat.<sup>1</sup>

In any community, as the level of interaction among peoples approaches a critical intensity, it becomes apparent to key decision-makers in all affected groups that certain stable modes of dealing with the other can be more beneficial than allowing relative instability to continue. Stable practices may provide for minimum contact, a relationship exemplified by the "silent trading" arrangements among tribes who leave commodities for exchange at a definite location and achieve ratios of give-and-take without face-to-face association or discussion. It is perceived by all concerned that common interests are served, since all parties are better off in terms of net value gain than they would otherwise be. We can refer to such trading societies as comprising a community since they are territorially defined in reference to one another and share a set of reciprocal demands, expectations, identities and operational patterns.<sup>2</sup> Any deviation from emerging prescriptive norms arouses vigorous demands

<sup>1</sup>The word "community" has a notoriously broad reference. The meaning which we attribute to the term will be apparent in this article. At the expense of belaboring the point, it may be worth emphasizing that we employ "community" as an interpersonal concept, based on both the subjectivities and operations of participants; hence community or communities can exist at differing levels of intensity among an aggregate of participants. Many of the elements of community cited in definitions contributed by *e. g.* PARSONS, *THE SOCIAL SYSTEM* 91 (1951), MERCER, *THE AMERICAN COMMUNITY* 27 (1956) and others are possible indices for determining the existence or absence of the requisite subjectivities, but are not, in and of themselves, necessary components. In particular, specialization of function and institutionalization of power-decision processes are an indication of the complexity, rather than of the existence, of a community. While de Visscher's injunction about the necessity of assuming an international community (*THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 99 (Corbett translation, 1957)) is happily supported by the flow of events on the global scale, we feel that the tasks facing decision-makers and scholars are best performed when grounded on examination of the plenum of social reality rather than on Cartesian postulates.

<sup>2</sup>Interactive patterns within the contemporary global arena manifest wide variety in their degree of organization and complexity and do not exclude examples of "silent trading" even in situations where more explicit forms of collaboration could be negotiated. An example of current "silent trading" between major powers is the US-USSR exchange of moon photos. On May 26, 1966, the United States received the pictures taken on Luna 9. They were not part of an exchange agreement and were unsolicited. On June 1, 1966, the State Department subsequently disclosed, the pictures taken by the American Surveyor 1 were sent to more than one hundred nations, including the USSR: *N. Y. Times*, June 10, 1966, p. 8, col. 3.

to reinstate the relationship, perhaps by employing negative sanctions (penalties) against any norm violator. Where interactions are more abundant and varied, specialized institutional practices begin to appear. The latter are expected to provide a decision process capable of sustaining stable contact, or restoring severed relations.

The development, with global reach, of a network of practices specialized to decision is the distinctive problem with which we are presently concerned. A world constitutive process of authoritative decision includes the establishment of an authoritative decision process in the world community, and its subsequent maintenance, modification, or even termination. An examination of the world social process would indicate its dynamic character in the attempt of participants to optimize their preferred events or values. Hence the emergence of a measure of uniformity of expectation about the practices that are appropriately used in the world decision process is to be accounted for by operation of the postulate of maximization; according to this postulate, those who conform to, rather than flout, these practices expect, on the whole, to be better off by conformity than by deviation. The changing features of "world constitutional law" are to be understood by perceiving the intimacy of interplay between law and the entire social process of the world community.

It is pertinent to review, in this regard, a series of key conceptions. The inhabitants of the contemporary globe are, unquestionably, the members of a "group," not merely an "aggregate," since they share a sufficiently high frequency of perspectives and interaction. Enough evidence is readily available, despite the absence of appropriate intelligence agencies to describe frequencies, to support the assertion that transnational perceptions of interaction are numerous. No agreement exists among scholars about the minimum magnitudes essential to support the characterization of a "group." But the study of the content of the mass media of communication<sup>3</sup> and the data gathered in survey research amply sustain any reasonable conception. A group, as commonly understood, refers to participants sharing a high frequency of perspectives, but not necessarily having a territorial base. When a group is territorially based, it is appropriate to speak of it as a community. The obvious importance of territory as a base and scope value is expressed in this distinction be-

<sup>3</sup>Ennis, *The Social Structure of Communication Systems: A Theoretical Proposal*, 1961 *STUDIES IN PUBLIC COMMUNICATION* 130 has observed that audiences, though dispersed, assume many of the characteristics of a social group and may even manifest a fairly high degree of organization in their behavior. A hypothesis meriting investigation is the degree to which and the conditions under which transnational communications media—both diplomatic and ideological—"communitize" their audiences. It may be necessary to draft a radically new map of socio-political sub-communities of the world as the magnitude of transnational communications increases.

tween group and community. The interdetermination of peoples on a global scale and the pervasiveness of its perception justify the characterization of a "world community."

The world community is the scene of many effective decisions that involve more than one of the organized bodies-politic conventionally called nation-states. Specialized institutional practices cross boundaries; there are, for example, arrangements for sending and receiving negotiating agents and expectations have arisen about their treatment. These expectations include the assumption that if the decision-elite of one body-politic violates the usual freedom given to the agents of another, the elite of the latter will adopt deprivational measures against the offending state. Clearly it is a question of arrangements that are genuinely effective across particular boundaries, and that are sustained by sanctions of potential severity, sanctions of noncooperation or even of organized violence.

The example demonstrates a decision process going beyond effective power and including the characteristic features of authority: the prescriptive norm refers to the management of agents *and* it is assumed that sanctions are properly used if, in a contingent factual situation, the norm is disregarded. By authority is meant expectations of appropriateness in regard to the phases of effective decision processes. These expectations specifically relate to personnel appropriately endowed with decision-making power; the objectives they should pursue; the physical, temporal and institutional features of the situations in which lawful decisions are made; the values which may be used to sustain decision, and so forth. There can be no automatic assumption of identity between formal and actually controlling institutional structures and expectations of authority. Genuine expectations of authority are discerned by contextual examination of past decision as well as by the utilization of all the techniques of the social sciences for assessing the current subjectivities of individuals. In the optimum public order which we recommend, the expectations of *all* individuals equally comprise authority. In extant public order systems, full universality and democracy are rarely achieved. The expectations and demands of the effective elites of a polity may be the dominant element of authority in a particular community; a sizeable segment of the population may be in a state of folk culture with little or no notion of many phases of authoritative decision. An instrumental goal of a public order of human dignity is of course the equipping of all individuals for full participation in authoritative decision.

No decision process, whatever the size of the community, is wholly effective. The aggregate degree of effectiveness of an authority system must be sufficient to sustain expectations of future decision largely in conformity with demanded authority. The precise degree of effective-

ness or "control" required for "law"—whether in international or national arenas—cannot, thus, be stated absolutely; it is a function of context and will vary. An authoritative and controlling decision can be contrasted with decisions involving only effective power ("naked power") or "pretended power." We see "naked power" in action when a strong empire coerces a weak neighboring polity, and nothing happens. We identify "pretended power" when a superceded monarch vainly claims acceptance as the legitimate head of the body-politic from which he has been expelled.<sup>4</sup>

The larger decision process referred to above, despite its rudimentary character, is of immediate concern to us in the present context since it provides a constitutive example. We are referring to the circumstances in which the principal bodies-politic of the globe, acting in their role as participants in the world community, established the sending and receiving of agents as part of their authoritative decision process. The constitutive act was the stabilizing act. It consolidated perspectives and operations in an institutional practice that was employed as both authoritative and controlling in the power process of the world community.

An examination of the world community context corroborates the view that, within limits, a global system of public order has come into existence that comprises a constitutive process in which authoritative decision institutions have taken form and which utilizes these institutions to protect and extend itself and also to contribute to the shaping and sharing of values other than power. The constitutive process is authoritative power exercised to provide an institutional framework for decision and to allocate indispensable functions; the particular decisions which emerge from this process may be specialized to the shaping and sharing of wealth, enlightenment and all other values.

These distinctions are matters of relative emphasis, not exclusion; every use of authoritative power has some influence, however slight, on the predispositions and capabilities that are part of the decision process. Simultaneously, they affect other values; in fact, *all* values, in varying degrees. Respect, for example, is always at stake in every act of decision.

Over the centuries, the skeleton of shared practice that was originally little more than an exchange of intermediaries has broadened and grown into an encompassing system of bilateral, multilateral and administrative arrangements. A globally inclusive system of public order, though operative, is visibly incomplete, proving inadequate to the task of maintaining a minimum level of world public order. An inventory of the arena of

<sup>4</sup> For detailed discussion of power in its different manifestations, see LASSWELL & KAPLAN, *POWER AND SOCIETY* 75 ff. (1950).

world politics must, further, distinguish more than a single, universal structure and acknowledge multilateral or regional systems that may suddenly or gradually change their relationships to one another.

At a high level of abstraction, most of the elites of the world community are united in giving verbal deference to words that formulate a common set of goals for universal order. These objectives are compatible with the conception of human dignity, a goal that finds expression in the Charter of the United Nations, in multilateral agreements, such as the instruments that define the rights of man, and in the enormous volume of national enactments and proclamations.<sup>5</sup> Any hesitation that we have to use these statements of aspiration to justify the conception of an all-inclusive public order arises from the definitional requirement that a structure of legality must go beyond words to expectations that are substantially corroborated by deeds. An accepted body of prescriptive sentences is not enough; the linguistic patterns must be applied with relative frequency when the contingent circumstances to which they refer occur. Scholars and decision-makers do not, and need not, concur in setting the ratio of opportunity to application that must prevail if a given practice of decision is to be called "legal." The one essential point is that they not insist upon an impracticable degree of harmony in these matters, but rather develop a shared willingness to tolerate neither the extreme of words minus deeds, nor that of deeds minus legitimizing expectations.

More than words are involved in another and perhaps deeper sense than that which requires a specified frequency of conformity. It is meaningful to refer to authoritative decision as process, since the term process can easily be used to imply a context of interaction that has achieved a relatively high degree of stability, not chaos.<sup>6</sup> The constitutive process of the world community as a whole, and of its component territories, is the most rewarding frame of reference for international legal study and management, not only because different specific statements, perspectives and operations can be kept in contextual relationship to one another, but because the problem-solving tasks with which the legal school, adviser and decision-maker are faced can be most successfully managed in the "process" frame.

These most fundamental problem-solving tasks, no less indispensable to the decision-maker than to the scholar, can be summarized as follows:

1. Clarification of the goals of decision;
2. Description of the trends toward or away from the realization of these goals;

<sup>5</sup> See LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950); for a recent brief survey, see SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* (1964).

<sup>6</sup> For pertinent reflections on the concept of process in the physical and social sciences, see PERLO, *THE PROCESS OF COMMUNICATIONS* 23-28 (1960).

3. Analysis of the constellation of conditioning factors that appear to have affected past decision;
4. Projection of probable future developments, assuming no influence by the observer;
5. Formulation of particular objectives and strategies that contribute, at minimum net cost and risk, to the realization of preferred goals.

The process frame of reference can be utilized to provide a plan of inquiry that moves from the most comprehensive and abstract configuration to the most specific detail relevant to the problem-solving tasks. We have made use of the fundamental schema for characterizing the social process on the scale of the world community as a whole or of each component context of interaction: *Man* (actors, participants) acts to optimize *values* (preferred events) through *institutions* affecting *resources*. The value-institution categories employed in the present framework of analysis are eight: power, or the giving and receiving of support in votes and fights; enlightenment, or the gathering, processing and dissemination of information; wealth, or control of resources; well-being, or safety, health and comfort; skill, or opportunity to acquire and exercise capability in vocations, professions and the arts; affection or intimacy, friendship and loyalty; respect, or recognition, whether personal or ascriptive; rectitude, or participation in forming and applying norms of responsible conduct. Note that any actor in the social process may be indulged or deprived in value terms, and that the whole process of interaction is "double phased" according to the shaping and sharing of values, and the institutional practices relatively specialized to the pre-outcome, outcome and post-outcome phases of each value.

The previous pages have indicated how the institutions specialized to power have evolved in the world community; more specifically, how the confrontations among the participants in the social process of the world community and its sub-divisions have led to the rise of systems of public order whose domain approximates every degree of universality or parochialism, and of value scope and range. The power interactions that established authoritative arenas and formulated and allocated roles in decision are the constitutive processes with which we are most immediately concerned.

We have indicated that the observer-participant faced by the various problem-solving tasks, must position himself by clarifying the goals that he will postulate. Let it be explicit, in this connection, that we identify ourselves with the overriding goal of human dignity, which is the inclusive objective to which so much verbal, and even considerable behavioral, support is given in the modern world.



If the various tasks are to be performed in detail in reference to the past, present and future of the constitutive process in the world community, an analytic framework is needed to bring into view the principal features of decision. "Conventional" analysis in terms of government organs and doctrines, an effective technique for certain problems, is on the whole, inappropriate for the study of international decision. Conventional usage must yield to "functional" analysis if comprehensive and realistic orientation is to be achieved. No dependable relationship exists between a structure that is called "governmental" in a particular body politic and the facts of authority and control. Analysts of comparative government are well-aware of the truth of this observation for the understanding of the legal and political process at the national or sub-national level, since it is not unusual to discover, for example, that the authority formally provided in a written constitutional charter may be ignored, or totally redefined by unwritten practice. Similarly, when the international arena is examined, the presumed congruence of formal and actual authority of intergovernmental organizations may or may not be sustained by the concurrence of expectations necessary to justify a claim of actual constitutive authority. On a wide range of matters, the principal nation-states may—and do—continue to perceive one another as making the critical decisions, for which they accept, and reciprocally enforce, a substantial measure of responsibility.

Part of the functional approach recommended here is a conceptual technique for delineating the relevant aspects of any inter-personal interaction. Hence it is applied by first locating the decision—that is, choosing the phase at which a sequence of interactions appears to culminate. The culminating phase may be organized or unorganized; for example, it may be a formal agreement or a fight, a vote or a combination of unilateral assertion and passive acquiescence. The questions that are raised in phase analysis cover the outcome, pre-outcome and post-outcome dimensions of the whole sequence:

1. Who acted or participated in roles of varying significance in the process which culminated in the decision? (*Participants*)
2. What were the significant perspectives of the participants? With whom were they identified? What value demands were they pursuing, with what expectations? (*Perspectives*)
3. Where and under what conditions were the participants interacting? (*Situations*)
4. What effective means for the achievement of their objectives were at the disposal of the different participants? (*Basic Values*)

5. In what manner were these means or base values manipulated? (*Strategies*)
6. What was the immediate result—value allocation—of the process of interaction? (*Outcomes*)
7. What are the effects, of differing duration, of the process and outcome? (*Effects*)

Details pertinent to the performance of the requisite intellectual tasks will be adduced, for illustrative purposes only, for each phase. Furthermore, these seven aspects or “phases” of a decision process will be set in a wider context of conditions.

Since we are particularly concerned with the several outcomes that occur in the world arena, these decision outcomes are systematically examined to disclose the principal functions involved: *intelligence, promotion or recommendation, prescription, invocation, application, termination, appraisal*. In brief:

1. Intelligence is the obtaining, processing, and dissemination of information (including planning).
2. Promotion (or recommendation) is the advocacy of general policy.
3. Prescription is the crystallization of general policy in continuing community expectations.
4. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions.
5. Application is the final characterization of concrete circumstances according to prescriptions.
6. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect.
7. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and the responsibility therefor.

In the following pages we set out, in most cursory outline, a framework of inquiry about the world constitutive process of authoritative decision.

## I. PARTICIPANTS

All participants in world social process act in the constitutive process of authoritative decision.<sup>7</sup> Moreover, interdependence, one product of

<sup>7</sup>The discipline of international law, with its emphasis on inter-state relations, has been especially resistant to empirical examination of the actual participants in the world constitutive process of authoritative decision. As Lyman White described it more than a decade ago, the study of world affairs is “. . . in a

sustained high interaction, tends to restrict the unfettered employment of disparate bases of power, thus equalizing and democratizing participation. By a participant in constitutive process, as distinguished from the more general effective power process, we mean an individual or an entity which has at least minimum access to the process of authority in the sense that it can make claims or be subjected to claims. The traditional doctrinal position has been that only states are "subjects" of international law.<sup>8</sup> Yet there has always been a wide discrepancy between this verbal doctrine and practice. While organized arenas have tended to set up rigid requirements for participation, unorganized arenas have not.<sup>9</sup> Where effective elites failed the "entrance requirements," they achieved a representation by transferring privity to an entity with access or by themselves taking a different participatory form. This practice has received authoritative approval.<sup>10</sup>

Since 1945, the trend has clearly moved toward broader participation. Rapidly proliferating new territorial units have been granted recognition, with no systematic reference to their ability to assume a responsible role in the constitutive process. In a different dimension, the *Reparations* case has confirmed the capacity of international organizations to participate in a number of organized arenas.<sup>11</sup> The status of individuals restate of development similar to the study of political science in the United States some decades ago when students gave attention only to the formally constituted branches of the government, not recognizing as they do now the important role of political parties and 'pressure groups,' e. g. trade unions, chambers of commerce, churches." WHITE, INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS 3 (1951).

<sup>8</sup> For a general survey of the traditional views, see BRIGGS, THE LAW OF NATIONS 93-98 (2nd ed. 1952). For a contemporary treatment of the "subjectivity" of individuals and rather comprehensive references, see FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 232 ff. (1964). It has proven easier for lawyers to preach an extended "subjectivity" than to practice it. Thus, Whiteman, in DIGEST OF INTERNATIONAL LAW 1 (1963) includes "states and other entities" as subjects of international law. But the International Law Commission in attempting to apply a broader definition in the area of international agreements foundered. In 1962, it stated that treaties were agreements between ". . . states or other subjects of international law . . ." REPORT OF THE INTERNATIONAL LAW COMMISSION—1962, GAOR, 17th Session, Supplement 9 (A/5200) at p. 4. The difficulties inherent in restating traditional views in a manner comporting with current reality resulted in an atavism in later drafts. Thus, the 1965 version defines treaties as international agreements ". . . between states . . .": *idem*, GAOR, 20th Session, Supplement 9 (A/6009) at 6.

<sup>9</sup> See, e. g. Article 4 of the Charter, Article 34(1) of the Statute of the International Court of Justice. For discussion of the relation between institutionalization and participatory limitations, see III Arenas *infra*.

<sup>10</sup> This practice is clearly demonstrated in one phase of the Hungarian-Rumanian Land Dispute (Optants Case): 8 LNOJ 354 (1927); in the Anglo-Iranian Oil Co. dispute, see FORD, THE ANGLO-IRANIAN OIL DISPUTE OF 1951-52, 91 (1954) and ICJ Pleadings 66. Its most pervasive form is the practice of the diplomatic protection of nationals.

<sup>11</sup> Reparation for Injuries Suffered in the Service of the UN (Advisory Opinion) 1949 ICJ Reports 174.

mains equivocal, though with trends toward wider recognition.<sup>12</sup> On the one hand, a document of the authority of the United Nations Charter states that the organization is founded by the "peoples of the world" rather than by the states of the world.<sup>13</sup> Yet practice is reluctant to grant an unqualified access to individuals to participate in a number of key arenas. While individuals have a relatively free access to unorganized arenas, states have proved jealous of their formerly exclusive position and have sought, in a variety of ways, to restrict or to regulate individual initiative in the constitutive process.<sup>14</sup>

Among the major classes of participants, we enumerate:

### 1. Territorial Units

Control over territory, which continues to be a key resource for values, renders elites with territorial bases prime participants. This category includes the nation-state as well as different types of dependent territorial units. In certain cases, it may be convenient to include emerging state entities *i. e.* elites in the process of consolidating a nation-state unit.<sup>15</sup>

Nation-states are relatively heterogenous in structure when compared with one another or when examined internally. The flow of decision within each body politic is most intelligible in terms of the effective elite whose weight is expressed in the changing result. On analysis, the composition of the power elites of every nation-state can be shown to vary from the comparative stability of some small, though highly modernized, states to the revolutionary turbulence or misleading totalitarian calm of societies in transition.

The internal process of decision is affected by the complexities of a division of institutional practice that strikes a variable balance between territorial centralization and decentralization, and degrees of pluralization. The bureaucratic and coalitional nature of contemporary society

<sup>12</sup> For a comprehensive survey of trends in context, see JEFFERIES, *THE INDIVIDUAL AND INTERNATIONAL LAW* (Unpublished Dissertation, Yale Law School, 1954).

<sup>13</sup> Preamble, UN Charter, but note the conclusion of the preamble and the general reluctance of the Charter to specify procedures for individual participation.

<sup>14</sup> For an evaluation of American statutes and judicial decisions restricting participation by individuals in transnational power interactions, see Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?* 60 *AM. J. INT'L L.* 268 (1966).

<sup>15</sup> The point at which entity X becomes a "nation-state" is elusive: see EMERSON, *FROM EMPIRE TO NATION-STATE: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES* 89-188 (1960). Trends in authoritative decision exhibit their usual complementarity in this regard. The Paris Peace Conference appeared to give a quasi-state *locus standi* only to those elites representing "territorial groups" the Powers had already decided to recognize. Post-war trends have, generally, been more liberal.

and government permits the development of subloyalties and idiosyncratic value goals in different sectors of society and departments of government. The same process renders authoritative and effective decision-making a complex sequence of component decisions, at each phase of which different individuals or groups may enjoy a dominant position in the shaping of decision. Any elite group manifests some degree of responsiveness to the pressures of sub-elites who are seeking to maximize their values in the internal arena of the nation-state. In view of the impact of such factors as these, effective delineation of the compound entity known as the nation-state must "pierce the veil of statehood" in attempting to discern probable trends of decision on constitutive matters at home or abroad.

Coordinations between elites of different nation-states can have important constitutive consequences. We analyze such coordinations according to the level of interdependence and the duration of the link, noting the existence of blocs, alliances and alignments.

## 2. International Governmental Organizations

Participants in this category may be distinguished into organizations the scope of whose value programs is general or specific. In the former category are found the United Nations complex as well as a number of regional organizations. The specific-value category is comprised of the so-called functional organizations. International organizations may be either participants or arenas in the constitutive process. Moreover, a variety of constitutive decisions may relate to some phase of the organizational process. Some organizations are specifically concerned with the constitutive process, while others, concerned with specific public order features, have only a peripheral or indirect interest in constitutive decision.

Within organizations, attention must be paid to specific decisional entities. Thus, for example, the Secretariat, the Security Council, the General Assembly and the Economic and Social Council would require special attention. Furthermore, predictable voting alignments, insofar as they exist, must be noted.<sup>16</sup>

<sup>16</sup> For a survey of General Assembly voting alignments, see ALKER & RUSSETT, *WORLD POLITICS IN THE GENERAL ASSEMBLY* (1966); HOVET, *BLOC POLITICS IN THE UNITED NATIONS* (1960); Keohane, *Political Influence in the General Assembly*, 557 *INTERNATIONAL CONCILIATION* 11-13 (1966).

Quantitative analysis of UN voting patterns has proved and disproved the existence of blocs and alignments. It is pertinent to note that quantitative methods will be of heuristic and predictive value only if applied in a broad contextual framework. Until investigations have established that a few significant variables account for behavior—and we believe that this will not be proved—the isolation of a limited number of factors will only result in distortions. A vote out of context has no more significance than a case out of context.

Regional organizations may dominate the power process within their geographical area as well as act as composite participants in the comprehensive global process. Accordingly, regional organizations with scope value programs of varying generality or specificity require examination.

### 3. Political Parties

Political parties are ordinarily recognized as a nation-state rather than a transnational phenomenon. As global interaction intensifies and centrality of identifications increases, entities seeking formal power in arenas larger than the nation-state may be expected to increase concomitantly. A transnational party may project a transnational program *i. e.* one whose realization requires a coordinated acquisition of power in a number of states or in all states. It may have a solely national program but draw its inspiration, authority or orders from participants based in other states. It may refer to a conglomeration of like-minded parties in different states, each of whose programs are national, but who coordinate policies because of the belief that realization of the desired national public order demands certain regional or global conditions which can be achieved only by other parties operating in other states. It may, finally, refer to fraternal parties in different states, which do not formally coordinate national activities, but keep one another apprised of general policies and activities.

A political party is distinguished from a political order by the degree of power sharing in internal decision processes. Thus, a "party" manifests power sharing in significant degree, while an "order" manifests elite power monopoly as its fundamental characteristic. In the following discussion, the term party will be used to include both phenomena, since the question of the degree of internal power sharing of parties and orders will not be addressed; the distinction should, however, be kept in mind.

The leading example of a transnational party is the Communist party.<sup>17</sup> Schismatic divisions within world Communism have introduced marked changes in the formerly monolithic character of Communism.<sup>18</sup> The extent to which world Communism still constitutes an international system or order or the possible future conditions under which it will function as a system remains a matter for speculation.<sup>19</sup> A variety of other political parties operate transnationally, although they lack the ideological cohesion and organizational rigidity which once characterized interna-

<sup>17</sup> LABEDZ, *INTERNATIONAL COMMUNISM AFTER KHRUSHCHEV* (1965); see also the papers in DALLIN (ed.), *DIVERSITY IN INTERNATIONAL COMMUNISM: A DOCUMENTARY RECORD* (1963).

<sup>18</sup> See Starobin, *Communism in Western Europe*, 44 *FOREIGN AFFAIRS* 62 (1965).

<sup>19</sup> MODELSKI, *THE COMMUNIST INTERNATIONAL SYSTEM* (1961); CRANKSHAW, *THE NEW COLD WAR: MOSCOW V. PEKING* (1963).

tional Communism. Religious, ethnic and cultural bonds have proved to be an effective basis for transnational party collaboration. Common political goals have also served as an axis for transnational party collaboration. Acting on this basis, certain western political parties have undertaken to set up transnational organizational structures.<sup>20</sup>

In transnational parliamentary arenas, participants tend to group themselves in coordinations of varying stability, whose performance is not dissimilar from parties in national parliaments. Where, as in the Consultative Assembly of the Council of Europe, the actors are parliamentarians who have been conditioned to think in party terms, transnational party groupings and loyalties compete with national identifications.<sup>21</sup>

National parties frequently move into the international arena. Many opposition parties maintain shadow cabinets and "foreign offices." In nation-states with democratic public order systems, the allocation of representatives constituting national delegations to international organizations as well as to ad hoc conferences is often determined on party lines. Although the incumbent party may be expected to control the delegation, opposing parties are represented, as a strategy of both good government (continuity) and good politics (shared responsibility for foreign policy decisions). Frequently, the individuals in these delegations are highly conscious of their dual role as both national and party representatives.<sup>22</sup>

#### 4. Pressure Groups

We refer here to entities which attempt to influence authoritative decision in regard to specific matters, but do not project a total public order program. Whereas political parties seek to gain formal power within the body politic in which they function, pressure groups are interested in influencing decision without assuming formal political power.

The United Nations complex offers an abundance of examples of pressure groups operating directly in organized international decision proc-

<sup>20</sup> On the abundant literature of Christian Democracy, see FOGARTY, *CHRISTIAN DEMOCRACY IN WESTERN EUROPE 1820-1953* (1957) and generally the work of Altemeyer.

<sup>21</sup> ROBERTSON, *THE LAW OF INTERNATIONAL INSTITUTIONS IN EUROPE* 38 ff. (1961).

<sup>22</sup> Thus, both Democratic and Republican members of Congress are accorded representation on the United States' delegation to the General Assembly. Similar policies of balanced delegation composition are pursued by a number of other democratic parliamentary states. Both Churchill and Attlee were present at the first phase of Potsdam. This is a well-known and oft-commented upon phenomenon of the International Labor Organization and its unique Assembly structure. It has extended to other transnational parliamentary contexts, most noticeably those in which national delegations allocate special seats for labor representatives. See, for example, *N. Y. Times*, May 11, 1966, p. 9, col. 1, reporting the repudiation and disassociation from a speech delivered by J. B. Bierne, of the US labor movement by Secretary of Labor Wirtz and the US efforts to remove the unamended speech from the record.

esses. The constitutive documents of the Economic and Social Council confer a consultative status upon a large number of private, nongovernmental organizations.<sup>23</sup> The incidents of the status vary, the lowest allowing no more than presence at the Council's deliberations and the highest permitting the organizations to enter items on the provisional agenda. Consultative status approximates a semi-official if limited participatory role. Pressure groups operate nonofficially in the UN as well. A variety of commercial entities maintain agents and, in certain cases, lobbies, at the United Nations. These lobbies function much as do their national counterparts. In addition to fulfilling the usual intelligence, promoting and appraising roles associated with pressure groups, they also may fulfill a quasi-invocatory function. Although only member-states may introduce items on the agenda (with the exception of organizations of Consultative Status A in ECOSOC), an unofficial participant can have a matter placed on the agenda if he is able to obtain the sponsorship of a delegation member. In the future, it is not improbable that a significant number of agenda items will stem from the initiative of international pressure groups.

#### 5. Private Associations

By private association, we mean a nongovernmental organization formed for the purpose of pursuing scope values other than power.<sup>24</sup> A great many of these entities are "international" in membership, goals, and arena of activity. A significant number of private associations, however, are predominantly national, yet consciously aspire to affect the world value processes as part of their national program. Other private associations, with primarily national horizons, may have important indirect effect upon the global value and constitutive processes. The vast number of private associations operational in the constitutive process precludes a detailed description.<sup>25</sup> In the following pages, we illustrate by brief reference the leading participants and dominant trends within various values.

<sup>23</sup> As of December, 1962, 10 organizations were accorded status A, 124 status B and 198 status C. For a brief survey, see EVERYMAN'S UNITED NATIONS 16-17 (7th ed. 1964).

<sup>24</sup> Our reference, it may be noted, is broader than that of Article 71 of the Charter and ECOSOC's implementing definition of "any international organization which is not established by intergovernmental agreement." Interestingly, ECOSOC's practice has construed its own definition broadly.

<sup>25</sup> THE YEARBOOK OF INTERNATIONAL ORGANIZATIONS (10th ed. 1964-65) describes 1,718 nongovernmental organizations. White, *op. cit. supra* n. 16 amply describes the richness of participation of NGO's. The organizations treated in these collections view themselves as NGO's. If we choose as the criterion of definition, operative groups whose activities have transnational impacts, though they do not view themselves as "international," the number of NGO's would be considerably greater.



*Wealth*

The number of international cartels is set by White at over 1200, and he believes that during certain inter-war periods, they accounted for more than 42% of world trade.<sup>26</sup> However, the current extent of cartels or their functional equivalents is difficult to gauge.<sup>27</sup> Municipal legislation in several great trading states takes a stand against restrictive trade practices,<sup>28</sup> but certain activities, notably maritime and air transport, have been largely exempted. Application of anti-trust legislation by national courts and administrative agencies has been irregular. Furthermore, anti-trust policies in different cultures show marked divergencies.<sup>29</sup> It has been suggested that the "New Deal of International Trade" means economic policy framed by international organizations rather than by private cartels.<sup>30</sup> In fact, the stillbirth of the International Trade Organization and the erratic record of GATT suggests that much of transnational trade policy is formulated, through direct or indirect communication, by participants engaged in international wealth processes.

The evolution of international business enterprises in the world social process has been subjected to detailed description and analysis in the literature.<sup>31</sup> As was noted earlier, many of these corporations act indirectly, through political parties, or directly upon international decision through international pressure groups. The larger international corporations negotiate directly with nation-state representatives in a modern form of diplomacy: agreements with these corporate giants may surpass treaties in terms of values affected<sup>32</sup> and may be constitutive prescription.

A number of private associations are concerned with the sharing rather than with the shaping of wealth. Foremost among these types of association are the labor unions. Although certain national unions pursue foreign policy objectives directly, as well as through participation in na-

<sup>26</sup> White, *op. cit. supra* n. 16 at 41.

<sup>27</sup> See LADOR-LEDERER, *INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS AND ECONOMIC ENTITIES* 247 ff. (1963).

<sup>28</sup> See, e. g. Fugate, *Antitrust Law and International Trade* in PROEHL, *LEGAL PROBLEMS OF INTERNATIONAL TRADE* 387 (1959); Edwards, *Foreign Anti-Trust Laws in the 1960's*, in *LEGAL PROBLEMS IN INTERNATIONAL TRADE AND INVESTMENT* 57.

<sup>29</sup> For a survey, see FRIEDMANN, *ANTI-TRUST LAWS; A COMPARATIVE SYMPOSIUM* (1956); SAKANE, *ANTI-TRUST LEGISLATIONS OF THE WORLD* (1960).

<sup>30</sup> Lador-Lederer, *op. cit. supra* n. 27 at 273.

<sup>31</sup> See Borchard, *Relation of Bretton Woods Agreement to other Types of International Organization Supplement*, N.Y.U.L.REV. 99, 109-111 (1945); Timberg, *International Combines and National Sovereigns* 95 U.P.A.L.REV. 575 (1947); Timberg, *Corporate Fictions: Logical Social and International Implications*, 46 COLUM.L.REV. 533 (1946).

<sup>32</sup> JESSUP, *MODERN LAW OF NATIONS* 15-35 (1946).

tional decision processes, several composite participants are concerned predominantly with coordinating international efforts.

### *Enlightenment*

Private associations which seek enlightenment range over the entire spectrum of scientific and humanistic pursuits. International professional associations, concerned with exchanging information, collaborating in research and development and generally maintaining contact with members in other countries are too numerous to discuss. Organizations concerned with philosophic or scientific education have been playing an increasingly important role.<sup>33</sup> Some have acquired or applied for consultative status with ECOSOC. Many pursue policies which are forwarded by conventional lobbying techniques. There are currently two major international student associations, one communist, the other generally anti-communist, both of which pursue indoctrination programs at the national and international level. The enlightenment role of the press will be discussed below.<sup>34</sup>

Since the great "Peace Movement" of the 19th century,<sup>35</sup> popular concern with the problems of international relations, international organization and appropriate constitutive processes in the world arena has risen markedly. A mushrooming number of private associations have occupied themselves with these problems and many of them have filled important decision functions. The venerable *Institut de Droit International*, the International Law Association, the American Institute of International Law, the Academy of International Law as well as numerous national and regional bar associations all appraise and recommend policies for constitutive decision.

Private international peace congresses were a frequent phenomenon of the nineteenth century. In a number of instances, they succeeded in initiating significant constitutive prescription. Thus, the International Association for Labor Legislation, created in 1900, was successful in its agitation for conventions on labor standards and was, in many ways, the predecessor and partial inspiration for the International Labor Organization. The International Red Cross has performed a similar promotive function. In the contemporary world, rapid communication and a growing intensity of interaction have led to a proliferation of such participants. The Pugwash conferences and the London Conference of Sanc-

<sup>33</sup> White, *op. cit. supra* n. 16 at 95-132.

<sup>34</sup> See VII 2 *infra*: Intelligence.

<sup>35</sup> For a survey of the activities of the Peace Movement at the end of the past century, see DAVIS, *THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE* (1962).

tions against South Africa, to name but two examples, may signal an increasing trend of private groups participating in the constitutive process in the future.<sup>36</sup>

### *Skill*

Many private associations concerned with the skill value have been mentioned, in passing, in our discussion of wealth and enlightenment. A wide variety of associations have transnational activities and provide intelligence, recommendations and appraisals to constitutive decision-makers relative to prescription and application in matters in which they have expertise. The enlarged possibilities for communication offered by highly specialized but universal technical languages present opportunities for contact and collaboration. Association with a particular skill group may provide the basis for enduring transnational identifications.

The complexity of modern life has vaulted us into an age of specialists. Since many areas of concern to public order prove too arcane for the general decision-maker, a practice of employing the specialist has developed. Legislatures frequently draw upon panels of experts in particular fields;<sup>37</sup> courts call expert witnesses; arbitration panels are not infrequently composed of members of that skill group which is the subject of litigation.<sup>38</sup> In these decision roles, skill group members play a larger and larger role in the clarification and projection of constitutive policy.

### *Affection*

Instruments of group identification—cultural, racial, linguistic, religious, professional—have long served as bases for private associations of diverse objectives. Irredentist group activities have been a subject of both protection and regulation in international law.<sup>39</sup> Groups without territorial bases have struggled to form nation-states by invoking the broad policy of self-determination. The “quasi-state” quality of these

<sup>36</sup> It is interesting to note that while Pugwash has viewed governmental affiliation as contamination and has sought to avoid it militantly, the London Conference on Sanctions, which was initiated privately, sought from the beginning to transform itself into a quasi-governmental conference. The point appears to be that participants perceive application as dependent upon state power bases, but feel that appraisal can function effectively only if it is independent of states who are often the subject of examination.

<sup>37</sup> NEWMAN & SURREY, *LEGISLATION* 250 ff. (1955).

<sup>38</sup> See WHITE, *THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS* (1965).

<sup>39</sup> See Feinberg, *The Legal Validity of the Undertakings Concerning Minorities and the Clausula Rebus Sic Stantibus*, 5 *Scripta Hierosolymitana* 95 (1958); Lador-Lederer, *op. cit.* at 117-143; ROBINSON (et al.) *WERE THE MINORITY TREATIES A FAILURE* (1943).

“groundless” groups and the fact that they have concluded international constitutive agreements has been a steady challenge to the traditional doctrine of “sovereignty.”

Affection associations frequently operate on the national level, indirectly affecting the world constitutive process by shaping national policy. These groups may identify with particular ethnic, religious or linguistic groups outside of their own state, attempting either to form their policy or to be an agent of it.

Affection associations—the extended family and kinship groups—are rarely given the attention which they merit and which approximates their influence on the world constitutive process. We cannot overlook the persisting role of influential families, especially the dynastic families whose members have a heavy stake in the defense or restoration of arrangements favorable to monarchical or feudal systems.

### *Rectitude*

Some of the earliest nongovernmental international organizations have been religious associations. The Roman Catholic Church continues to be the organization with the most cohesive ideology and the most effective hierarchical structure.<sup>40</sup> The legal status of the Church has been controversial in the literature, with agreement only on the proposition that the Church is *sui generis*.<sup>41</sup> The Vatican maintains a diplomatic corps and has a recognized treaty-making authority. The leader of the Church is a recognized international figure with important decision-making functions in the world constitutive process.<sup>42</sup>

A variety of other church and church-affiliated organizations operate on the transnational level, but none approaches the organization or sustained efficiency of the Roman Catholic Church. Of particular importance in the shaping of national public order systems have been missionary societies and activities, Christian, Islamic and Buddhist. The expanding national self-consciousness of the developing nations, formerly the challenge and, indeed, *raison d'être* of much western missionary activity, will probably act to reduce the impact of missionary programs. The dominant flow of rectitude influence may follow an east-west rather than west-east course as in recent centuries.

<sup>40</sup> See Grubb & Booth, *The Church and International Relations*, 17 *YB OF WORLD AFFAIRS* 219 (1963).

<sup>41</sup> LAUTERPACHT-OPPENHEIM, *INTERNATIONAL LAW* 254 (8th ed. 1955).

<sup>42</sup> Pope Paul addressed the General Assembly in 1965; although there was little objection, it is interesting to speculate on the basis of the Pontiff's appearance: head of state, leader of a world religion, pressure group, “corporation” or *sui generis*? The case of the Church seems to indicate that a participant with the appropriate bases can gain access to arenas of authority whether or not it is classified as a State.

Within democratic nation-states, numerous national private associations, with primarily national programs of rectitude scope values, have found themselves increasingly concerned with global constitutive decisions. It is a commonplace that the American civil rights movement was affected and to a degree spurred by trends in African and Asian countries and that the movement has had a reciprocal effect on developments in those continents. Much of this reciprocal interaction has been indirect and unintended. However, many local reform movements, whose primary base of power is rectitude, have found it difficult to ignore the same "foreign" evils which they combat on the home front. Hence many of these groups are in the process of developing national and foreign programs.

### *Well-Being*

One radical innovation of the post-war period has been the growth of *official* concern for the well-being of all people throughout the globe. The broadening of official activity in this area is a logical extension of a variety of cultural currents antedating the war; the political doctrine of self-determination, the political-economic doctrines of social justice, and so on, were ultimately grounded in concern for an equitable sharing of values for all people. The concern for well-being, formerly a prerogative of private transnational associations, has thus been largely subrogated to official processes. The United Nations, UNESCO, WHO, FAO and the ILO, to cite only the most prominent, have become major participants concerned with the shaping and sharing of well-being.

Though massive in goal and operation, official activities have not preempted the field. The private associations which have been traditionally concerned with well-being have continued to supplement official efforts. Many new associations, of varying durability, have been formed in response to new challenges to the safety and health of all individuals or of a particular sub-group in given circumstances. In periods of intense crisis private associations devoted to well-being have proven particularly indispensable. The excessive demands on official processes in crisis tend to diminish their efforts on behalf of well-being; private associations specialized to this value then become the principal supervisors. The International Red Cross, in addition to its work in alleviating the suffering attendant upon natural disaster, continues to concern itself with refugee problems and the administration of prescriptions governing belligerency.<sup>43</sup> It examines perforce the degree of compliance with the laws of war and its findings—official or otherwise—may have a sanction potential. HIAS and the JDC continue to play roles in the resettlement of

<sup>43</sup> WERNER, *LA CROIX-ROUGE ET LES CONVENTIONS DE GENEVE* (1943); COURSIER, *LE CROIX-ROUGE INTERNATIONALE* (1959).

refugees and in prescribing and maintaining standards of well-being and minimal respect for displaced persons. A number of private associations, religious and secular, particularly concern themselves with the well-being of children as well as with the general level of education in poverty-stricken countries.<sup>44</sup>

### *Respect*

Parallel to the trend in well-being, there has been a great increase in official supervisory and enterprisory activities in processes specialized to respect. Detailed discussion of these activities is reserved for the *outcomes* phase, below. A useful index for gauging the upswing is the quantity of official and semi-official communications concerned with the respect of individuals: a cursory comparison of treaties, covenants, judicial decisions, diplomatic communications and scholarly works regarding rectitude in two twenty-year periods—pre-1919 and post-1945—indicates an enormous growth. Traditional international law was, of course, not oblivious to this value. A trend from Roman stoicism through the classical Spanish school has emphasized that fundamental to an appropriate international order is the recognition of the innate value of every human being.<sup>45</sup> It is significant in this regard that both the London Agreement and the Nuremberg Tribunal tended to characterize their guiding norms as declaratory of customary international law rather than as innovative prescription.<sup>46</sup> Despite prescriptive precedents, however, processes of application have, until recently, been unorganized and sporadic. With the exception of “humanitarian intervention,” the application of this value process has been left primarily in the hands of private rectitude-oriented associations. While the number of religiously based associations has not increased markedly, secular rectitude associations have multiplied many-fold as has the magnitude of their communications. The fact that many of these associations are primarily national in membership and goal has not impeded a flow of transnational activities and impacts.

#### 6. Individuals

Individuals participate as the ultimate actors for all the composite participants as well as in their own right. In describing past trends and in undertaking to predict future behavior, the observer must be cognizant

<sup>44</sup> White, *op. cit.* at 166 ff.

<sup>45</sup> For a survey of the trend, see NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1947).

<sup>46</sup> Indeed, the tribunal construed the London Charter as perfecting its jurisdiction, but went beyond this in contending that many of the war crimes were previously proscribed by international law. See BRIGGS, *THE LAW OF NATIONS 1020-1021* (2nd ed. 1952) for a catalogue of pertinent studies.

of a variety of characteristics of individual participants: culture, class, interest, personality and past exposure to crisis.<sup>47</sup>

The adamant stance of some observers in refusing to recognize the individual as a subject of international law is currently based on a pseudo-empirical survey of the practice of organized arenas. Since individuals do not have a *locus standi* before the organized arenas which are examined, individuals are not, it is concluded, subjects of international law. The concealed assumption is that the organized arenas surveyed exhaust authoritative patterns of constitutive interaction. A more comprehensive survey of the range of constitutive arenas indicates that individuals with effective bases of power have always had access to a wide variety of arenas. A renewed emphasis upon the individual since the end of the second World War has facilitated the access of more individuals to many organized constitutive arenas. Certain international tribunals, it may be noted, are open, as of right, to individuals.<sup>48</sup> Moreover, a variety of pressure groups and private associations, concerned with the welfare of individuals, put their base values at the disposal of private participants and further facilitate their participation in the global constitutive process.

The rapidity of communication in the contemporary world augments the potentialities for cross-boundary impact in the aggregate constitutive arena. This trend, if it continues, will further consolidate the arena. The transnational impact of an Onassis on the shaping and sharing of wealth hardly requires emphasis, since it occurs in a value process which has traditionally been susceptible to cross-cultural initiatives taken by individuals. Less conspicuous, perhaps, is the cross-cultural record as it relates to other value sectors. A comparison through time of the multi-value influence of Paul of Tarsus, Mohammed, Marx and Engels, Gandhi and Nehru on cultures other than their own, indicates that the interval required for an intense cross-cultural impact has progressively diminished to the point where a charismatic personality may expect to de-

<sup>47</sup> For discussion of many of these factors and for numerous references to UNESCO sponsored studies in this area, see Klineberg, *THE HUMAN DIMENSION IN INTERNATIONAL RELATIONS* (1965). For a comprehensive treatment of the many roles of the individual in international law, see JEFFERIES, *THE INDIVIDUAL AND INTERNATIONAL LAW* (unpublished dissertation, Yale Law School, 1954).

<sup>48</sup> In regard to *ad hoc* tribunals, reference may be had to international claims commissions. In regard to cogent tribunals, note the Central American Court of Justice (1907-1917) which permitted a *locus standi* to nationals of the signatory states. Non-adjudicative arenas, such as the Permanent Mandates Commission of the League of Nations, the Trusteeship Council, the Fourth Committee of the General Assembly, the Committee of 24 and the Committee on Apartheid of the United Nations, also accord access to individuals. A possible trend of preference for this form of invocation may be indicated by the European Convention on Human Rights of 1950 and the Committee against Racial Discrimination to be established by the Convention on the Elimination of All Forms of Racial Discrimination of 1965. For more treatment, see Jefferies, *op. cit. supra* n. 47.

velop a global constituency within his own lifetime. The full dimensions of this trend are difficult to gauge.<sup>49</sup> It is currently common to characterize the 19th century as the era of the nation-state and the 20th as the era of the international organization. Posterity may characterize our period as the reascent era of the individual.

## II. PERSPECTIVES (EXPLICIT AND IMPLICIT OBJECTIVES OF PARTICIPANTS)

The reference here is to the objectives for which participants in the effective power process establish and maintain the constitutive process. Objectives are subjective events of "purpose" or "aim," and they are best inferred from the utterances of significant decision-makers, supplemented and assessed according to their deeds. Strictly speaking, the objectives are "demands" that are interconnected with "identities" and "expectations." We define a demand as "preference" or "volition"; hence it is an evaluation of a potential or actual event. The maker of a demand is an individual acting in the name of his own ego-identity, or in the name of a larger self, such as a nation-state, with which his ego is identified. All matter of fact assumptions about past, present or future events are expectations. Obviously, they may refer to the self as value-indulged or deprived in reference to others. Since the optimizing of value outcomes is the goal of participation in the constitutive, as in all other processes, the perspectives seem to provide both direction and intensity to the conduct of participants of all categories.

Fundamentally, international law is a process by which the peoples of the world clarify and implement their common interests in the shaping and sharing of values. By an interest, we refer to a value demand formulated in the name of an identity and supported by expectations that the demand is advantageous:

. . . more than wishes are involved in interests. Besides preference and volition there are patterns of expectation about the degree of congruence between events and demands.<sup>50</sup>

It is possible to distinguish the expectation from the demand component of an interest and to consider the expectation in terms of validity, or high probability of descriptive truth (as determined by third-party observers).

<sup>49</sup> In this regard, the origins of the European community movement are extremely indicative of the potential role of the private individual. One man—Jean Monnet—had an enormous impact on the initiation of the community. See Yondorf, *Monnet and the Action Committee: The Formative Period of the European Communities* 19 INTERNATIONAL ORGANIZATION 885 (1965). Mention may also be made of the significant role played by Mr. Raphael Lemkin in promoting the Genocide Convention.

<sup>50</sup> McDougall, Lasswell & Vlasic, *LAW AND PUBLIC ORDER IN SPACE* 146 (1963).



Interests are also open to relevant analysis according to whose value position is at stake. The constitutive interests of effective global elites may be distinguished as *common interests*—interests whose fulfillment will benefit the entire community and which are held in common by most effective elites—and *special interests*—demands made only by certain effective elites, whose fulfillment will benefit only one segment of the community with a corresponding deprivation to the rest. Insofar as they relate to the allocation of constitutive competence, common interests are further classifiable as *exclusive* if they primarily affect a single participant and *inclusive* if they primarily affect more than one participant. Common inclusive interests relate to the requirements of both minimum and optimum world order, whereas common exclusive interests relate to the minimum order and the sphere of value allocation left to the determination of each participant.

Common inclusive and common exclusive interests can be employed as concepts for either description or evaluation. When used descriptively, they depict who is or claims to be authorized to share in certain constitutive or public order decisions and who, in fact, does. Evaluatively, the distinction permits the observer to clarify and recommend, by reference to his own postulated and recommended goals, under what conditions decisions should be unilateral or plurilateral. We employ this distinction in place of the traditional dichotomy between “national” and “international” interests. The recommended terminology emphasizes that “national” interests may frequently be common interests—inclusive or exclusive—a fact often obscured by the traditional dichotomy.<sup>51</sup>

### *Constitutive Policies*

To identify the constitutive process of the world community is to demonstrate the presence of at least minimum stability of expectation about the decision flow by which authoritative and controlling decision processes are established and maintained. Relative stability does not necessarily imply that all phases and sub-phases of the constitutive process, or all facets of global public order, have been fully crystallized. In common with all human affairs, constitutive expectations are perpetually in flux, even to the point of partial disintegration during periods of conspicuous failure to sustain minimum public order. As a means of specifying the contemporary policies supported by the operations of a constitutive process, it is convenient to deal successively with elite objectives that are exhibited in reference to the different phases of the decision process.

<sup>51</sup> McDougal and Reisman, *The Changing Structure of International Law: Unchanging Theory for Inquiry*, 65 *COLUM. L. REV.* 813-814 (1965).

### *Participants*

Constitutive policies regarding participation may be summarized in terms of democracy and responsibility. Hence, within each participant class, universal participation is sought and any exclusions, postponements or restrictions are made on the basis of either demonstrated or estimated inability or unwillingness to play a responsible role in the constitutive process. Trends in constitutive decision reflect the complementarities of this policy. While these complementarities are discernible in any competent review of the trend of decision in the constitutive process, it would be a mistake to suppose that they are applied at the same moment with equal emphasis. Since the end of World War II, and most emphatically since the early nineteen-fifties, many new states have been identified as authoritative participants even though questions relating to responsibility have been given minimum consideration. That many ex-colonial peoples are today represented abroad by leaders from their own cultural background is obviously true. However, this is often a very meager step toward democratic forms of public order since in not a few new states the inner process of decision is concentrated in the hands of a self-perpetuating few. It also augurs poorly for the capacity and determination of certain states to act responsibly in fulfilling their obligations to the common interest of all states in nurturing and sustaining at least minimum public order.<sup>52</sup>

### *Perspectives (Objectives)*

The articulated goals of the world constitutive process cover a range from minimum public order to many of the necessary components of an optimum public order system. That minimum public order is a responsibility of the world community as a whole is formulated in the United Nations Charter and in the complex of Human Rights treaties and declarations in reference to every value institution process. It is possible to distinguish among objectives according to the intensity with which they are demanded and expected to be realized. A clue to intensity is that such demands are given operational priority and apparently are deemed subject to change only in formally prescribed procedures.<sup>53</sup>

### *Arenas (Structures of Authority)*

In regard to arenas, constitutive policies may be summarized in terms of adequacy, with particular reference to economy and structural adapta-

<sup>52</sup> See Judge Jessup's proposal on inclusive recognition procedures in JESSUP, A MODERN LAW OF NATIONS 48-50 (1946).

<sup>53</sup> For a discussion of *jus cogens*, see Outcomes *infra*.

tion. The concern for adequacy has expressed itself in the formation of numerous arenas of widely varying composition and role, enabling participants, no matter what their formal relations, to collaborate in at least some decisions.<sup>54</sup> These diverse situations are not easy to describe in the tripartite categories so often used to analyze national systems.<sup>55</sup> Hence the advantage of utilizing a richer system of phase and outcome analysis such as we employ in this article. As a result, it is possible to choose the arena best adapted to a particular matter, as recommended by the principle of economy. Since not all interaction is best served by the same degree or kind of organization, the policy of structural adaptation has wisely provided a wide variety of constitutive arenas, to fit the diverse requirements of the many participants in world politics.

### *Base Values*

If the structures specialized to the tasks of the constitutive process are to obtain the desired impact they must have the necessary base values at their disposal. Major constitutive documents have created procedures for obtaining and centralizing the base values requisite to international organizations.<sup>56</sup> The degree to which practice conforms to goal varies according to context and arena. Even when the procedures originally prescribed have proved unworkable, novel improvisations have evolved<sup>57</sup> and have won acceptance by the International Court as authoritative.<sup>58</sup>

Perspectives of authority are the most economical base values available in any process of decision. Accordingly, the constitutive process has sought to inculcate community-wide identification as a base of authoritative decision.

### *Strategies*

Policies relating to the modalities by which the constitutive process and global public order are maintained are expressed in a preference

<sup>54</sup>In an arena in which formal relations themselves constitute a multi-impact policy decision, a multiplicity of interactive patterns can permit communication without undesired ancillary effects, which might follow formal relations. Thus, for example, intergovernmental relations between China and the U. S., the two Germanys, Israel and Jordan, etc. are possible. Moreover, since expected interactive patterns are "metacommunications," a variety of arenas can facilitate communication under different conditions.

<sup>55</sup>1 MONTESQUIEU, *THE SPIRIT OF THE LAWS* 179 ff. (Nugent translation, revised 1900): for further discussion, see Outcomes *infra*.

<sup>56</sup>See Charter Articles 17, 43, 44, 45, 48; Articles 43, 46 and 54 of the Charter of Bogota.

<sup>57</sup>For survey and analysis, see BOWETT (et al.), *UNITED NATIONS FORCES: A LEGAL STUDY OF UNITED NATIONS PRACTICE* (1964).

<sup>58</sup>See *Certain Expenses of the United Nations*, 1962 I.C.J. Reports 151 for application by the Court of the principle of effectiveness to such developments.

for persuasive rather than coercive strategies; when the employment of coercive strategies is unavoidable, the preference is for inclusivity in their exercise. The United Nations Charter provides for the use of force only by the organized community and solely to maintain minimum order.<sup>59</sup> When the organized community is incapable of functioning in this sphere, the lawfulness of unilaterally applied coercive strategies is determined by reference to community goals of minimum order.<sup>60</sup> Public policy protects the private employment of diplomatic and ideological strategies, subject to regulation by reference to inclusive prescriptions.<sup>61</sup>

### *Outcomes*

The outcomes that flow from the constitutive process are the decisions that delimit authoritative and controlling participation in the world arena. Fundamental policies guide the world community in restricting the role appropriate to action through inclusive community institutions. Since a basic preference is for initiatives to be taken as freely as possible throughout the world social process, disagreements unlikely to involve the use of coercion by the parties are left to "private" settlement until a community-wide decision-maker is invoked by at least one of the parties. The decision-maker then applies the prescriptions which, functionally characterized, belong to the "supervisory" code.

The "regulative" code prescribes limits beyond which private activities cannot go without provoking the decision-makers of the inclusive community to act to reinstate the previous limitations. The consequences of private deviations are expected to be sufficiently deprivational of common interests in the world community to require such measures.

The "enterprising" code extends the role of inclusive community institutions to the continuous administration of activities that, if left in other hands, are expected to be relatively deprivational.

All prescriptions include sanctioning arrangements which are the indulgences or deprivations managed for the purpose of obtaining conformity to the prescribed norm. It is usually assumed that potential targets of sanction are capable of adapting their policies to the costs and risks involved. However, it is well understood that some individuals do not reach the minimum level of capability and therefore require "correction." They come within the purview of the corrective code.

<sup>59</sup> See Article 2(4); that this is a contingent allocation of authority is demonstrated by a variety of other provisions in the Charter. See especially Articles 51 and 52 and the delegatory power of Article 44.

<sup>60</sup> See McDUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 143 ff. (1961).

<sup>61</sup> See *Strategies infra*.

Certain constitutive prescriptions are held with greater intensity than others. The prescriptions that are expected and demanded with greatest intensity are generally deemed to be terminable only by formal inclusive procedures. Norms of this category enjoy such doctrinal appellations as *jus cogens*, peremptory norms or principles of natural law. That such norms are, and ought to be recognized is affirmed with exceptional unanimity and vigor; yet there has been almost universal dispute as to their content.<sup>62</sup> There is however little doubt that certain fundamental constitutive norms are held with expectations of greatest intensity and are less susceptible than others to unilateral modification and termination, since they are supported by a wide allocation of control. There are, of course, fundamental norms whose continued vitality depends upon the behavior of a few superpowers or even, in certain circumstances, upon the behavior of one participant. In terms of aggregate expectations, however, these norms are fundamental because of their impact on the constitutive process and the general expectation that they will continue to be applied.<sup>63</sup>

### III. ARENAS

We refer here to the patterns, of whatever degree of stability, in which participants interact in the constitutive process. Arenas vary enormously in degree of organization, which depends on the pattern of authority and

<sup>62</sup> Article 37 of the Draft Law of Treaties of the International Law Commission states that a treaty is void if it conflicts with a peremptory norm of international law; Article 45 provides for termination of an extant treaty by emergence of a new peremptory norm. The Commission was, however, unable to agree on any specific peremptory norm: REPORT OF THE INTERNATIONAL LAW COMMISSION—1963, GAOR 18th Session Supplement 9 (A/5509) p. 11, 23. Schwarzenberger, *International jus cogens?* 43 TEXAS L.REV. (1965) argues that there are no peremptory norms and that the acceptance of such a doctrine is pernicious, in that it provides a new ground for defeating treaties. But this is to assume that treaties are denounced because of defective authority rather than defective control allocation. For a different view, see Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM.J.INT'L L. 55 (1966).

<sup>63</sup> A comprehensive survey of the global constitutive process would include a description of the *public order* goals of the process. Public order goals are related to the aggregate of protected features of the different value processes. Protected participatory features would, for example, include who is permitted to participate, what prescriptions are designed to maintain or restrict these participants, and so forth. Protected features with respect to perspectives would include prescriptions relating to demands for the production and distribution of values within each value process. These are generally treated under such rubrics as "International Business Law" (wealth process), International Protection of Human Rights (affection, skill enlightenment and respect) etc. Protected base value features would include the prescriptive complex relating to sharable resources (the seas, international rivers, air space, outer space) and nonsharable resources (national territory, internal waters, natural resources etc.). An example of a specific public order study may be found in McDUGAL & BURKE, *PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962).

control, and the degree of hierarchy or co-archy in the structure. The authoritative arenas of the world would be exceedingly visible if a unified globe had a single bureaucratic organization to give effect to the prescriptions of a world legislature, council or ruler. Controlling arenas, as usual, could be expected to display somewhat variable patterns of congruence with these official structures, preparing the way for subsequent changes in the formal chart. Today's world is more co-archic than hierarchic since the nation-states, which play such a conspicuous role, are formally equal, and interact directly with one another (a bilateral arena), or in combinations of varying size, duration and differentiation.

We first sketch the most important forms of arena found in the world as a whole, and then examine the practices that are employed to govern access by particular participants.

#### A. Establishment and Maintenance

An entirely systematic description of an arena would describe its role in reference to the performance of each of the seven outcome functions involved in constitutive decisions, including the several phases of pre-outcome, outcome and post-outcome processes. Considerations of brevity call for heroic simplifications, after the manner, though not the detail, of the traditional tripartite scheme for identifying the organs of government.<sup>64</sup> We refer to five institutional structures, which recur in both official and unofficial interaction and which, in their varying degrees of organization, exhaust international interaction patterns.

##### 1. Institutional Structures:

(i) Diplomatic: An "official" diplomatic arena is the pattern of interaction between nation-state elites or their representatives. An "unofficial" diplomatic arena is the interaction between nonofficial elites or elite representatives. A variety of customary constitutive prescriptions are directed at facilitating official inter-elite communications. Thus, the concept of state recognition may initiate formal diplomatic contact, make operative the inviolability of the diplomat, his familia and his habitat, and accord a confidential status to diplomatic communications. In the absence of formal relations, diplomatic contacts are maintained in unorganized situations.

(ii) Parliamentary-Diplomatic: Plurilateral elite contact, as in formal conferences, has until recently been a secondary trend. Its establishment requires a level of collaboration beyond that in the initiation of diplomatic

<sup>64</sup> See Note 55 *supra*. One can force transnational decision phenomena into Montesquieu's mold. The point, however, is the extent to which that framework aids in the performance of the intellectual tasks we seek to perform. The examination of decision functions (Outcomes, *infra*) will demonstrate that the relevant events are too complex for the traditional model.

contacts. Hence such arenas have lacked the spontaneity of formation which is characteristic of the diplomatic. Polycentric control contexts appear to favor parliamentary-diplomatic arenas.

(iii) Parliamentary: Parliamentary arenas<sup>65</sup> display a higher aggregate level of organization than do the two preceding arenas. Their decision dynamics are characterized by a doctrine of majority rule, continuity and a measure of publicity, the development of which requires a minimum of prior constitutive agreement, and is fostered by a control context of comparatively equal bases of power or a doctrine calling for equality.

(iv) Adjudicative: These arenas are characterized by third party decision as well as by a matrix of expectations calling for distinctive procedures and criteria of decision. Such an arena includes tribunals of all degrees of organization; in addition, there are relatively unorganized interaction situations. In either case a nonengaged party is the formally seized decision-maker. Stabilized expectations about the various phases of the process approach the point of mystique, a factor which, depending upon how it is exploited, works for or against a public order of human dignity. As a rule adjudicative arenas are secondary forms in the constitutive process, since they are usually created in connection with the administration of public order decisions.

(v) Executive Arenas: A relatively recent phenomenon in the constitutive process is the growth of transnational executive arenas to deal with the most important decision functions. Inclusive examples include international secretariats of both official and nonofficial participants. Earlier exclusive examples are the executives of nation-state and political party participants.

2. Geographical Range: The geographic range of constitutive arenas varies from those which encompass the entire earth-space arena to arenas which are limited to extremely small groups of actors. We distinguish universal, general, plural, regional, bilateral and single participant arenas of constitutive decision. The distinction is based on the scope of participation rather than on the scope of objective; depending upon the disposition of authority and control, single participant arenas may make constitutive decisions for the most comprehensive process.

<sup>65</sup> Rusk, *Parliamentary Diplomacy—Debate v. Negotiation*, 26 *World Affairs Interpreter* 121 (1955) and Jessup, *Parliamentary Diplomacy*, 89 *Hague Recueil*, 185 (1957) use the term "parliamentary-diplomacy" for contexts in which a representative must be both a negotiator and a parliamentarian. This dual requirement exists in any plurilateral context. We distinguish further between contexts in which the ritual of voting as well as a number of other significant factors has a decision impact (parliamentary context) and those in which it has none (the traditional "conference" or parliamentary-diplomatic setting).

(i) Universal: Universal participation typically takes place in an arena of minimal organization. The traditional example of universal participation, the plebiscite, is misleading in this respect. The maximum degree of organization required for plebiscites gives each individual a voice, but usually no real share in the power process. The closer an arena moves to universality, the more restricted its objectives become. As objectives broaden in scope and specificity, participation usually attenuates.<sup>66</sup>

(ii) General: General arenas comprise a majority of global elites and frequently project global programs. Less than global participation in these arenas may be attributed to a number of factors: the projected program may be unpopular with some participants or incompatible with their internal public order; active participants may bar other participants for a variety of reasons. Examples: the presence of the excluded participants might impede effective operation of the arena, the arena may have been constituted specifically to counter their influence, or they have been barred from the arena as an incident of authoritative sanctioning procedures.

(iii) Plurilateral: These arenas comprise a group of participants, without necessary reference to geographical propinquity or common regional origin. Such arenas are usually formed to deal with specific problems.

(iv) Regional: Regional arenas are those which are largely restricted to participants inhabiting inter-identified geographical regions. These arenas are formed to deal with common regional problems or regional defence requirements.

(v) Bilateral: Much of the world constitutive process transpires in bilateral arenas; two participants, equipped with adequate bases of power and acting within a context favorable to maximizing these bases, jointly reach decisions of constitutive importance. Bilateral arenas range over the entire spectrum of possible degrees of organization. When highly organized, bilateral arenas stabilize expectations in regard to every phase of interaction. In other, less continuous, bilateral arenas, a measure of organization is supplied by reference to general practices (*e. g.* diplomatic, parliamentary-diplomatic, and so on). Bilateral arenas of low organization may include random meetings or indirect communications inferable only from behavior.

<sup>66</sup> The relation is illustrated by UPU and ITU, both of which supervise areas of interaction close enough to make a merger feasible and economical. UPU, with limited objectives, has the broadest institutionalized participation. ITU, whose objectives are more extensive, has a more restricted membership. At the other end of the continuum, the highest degree of specificity will be found in interactions between only two participants.



(vi) Unilateral: The reference here is to patterns of interaction occurring within a single participant, the outcome of which is a world constitutive decision. The relevant arena is often a relatively powerful participant in the total arena of world affairs; nevertheless, circumstances may favor the parallel development of such arenas among smaller participants.

### 3. Duration (Temporal Features) :

Some patterns of interaction are relatively continuous; others are occasional or sporadic; still others are single occurrences, unlikely to recur. Although it is generally assumed that there is a direct correlation between repetition and ease of learning, it is not improbable that the stabilized prescriptions which constitute an organized arena are a combined function of numerous variables, of which repetition is but one. Some of the data compiled by Iklé suggests that the expectation of continuity is itself a conditioning, a self-fulfilling factor.<sup>67</sup> Strong expectations of continuity may increase demands to participate in an arena; expectations that an arena will soon become defunct or that it will be formally terminated usually intensifies the desire to avoid association with it.<sup>68</sup> The long-range advantages of participation in a constitutive arena may make short-range value renunciations quite palatable. Similarly, expectations of continuity in an arena may account for important nuances in intra-arenal behavior; it may, for example, seem impolitic to show open contempt for an arena whose durability potential is high.

4. Crisis: When interacting participants share high expectations of violence, we characterize their interaction as establishing a "military" arena. If the expectation of violence is low, the arena is "civil." Since the aggregate international constitutive process is composed of many sub-arenas, both military and civil arenas may coexist. Elites in WHO, for example, may launch a campaign to wipe out trachoma at a time when the Security Council is paralyzed by an expectation of impending doom.

Crises are situations in which values are perceived as at stake in highly significant degree. It is not to be assumed that all participants are joined in expected deprivation of key values. True, such a crisis as a possible nuclear war may be perceived by all participants as inclusive, global and deprivatory. In other crises, however, what may be viewed by one participant as imminent destruction may appear to another as providing an opportunity for a favorable reallocation of values. The emphatically subjective nature of crisis is nowhere better demonstrated than in current perspectives in regard to nuclear war. Allegedly such a war is not viewed

<sup>67</sup> IKLÉ, *HOW NATIONS NEGOTIATE* 34-42 (1964).

<sup>68</sup> *Id.* at 36-37.

as critical by the People's Republic of China;<sup>69</sup> what appears as a grave crisis to all other participants in the world constitutive process evidently seems to the Chinese elite as a contingency in which it would emerge with a maximized value position. A crisis may be initiated, sustained or extended by a participant who perceives it as an appropriate instrument of his special interest. Hitler's hideous application of *Macht* diplomacy, the Leninist doctrine of inevitable war, and the strategy of "confrontation" provide examples of this phenomenon.

Demagogues have appreciated the utility of crisis as a means of consolidating an internal power position. Yet the effects of crisis need not and have not always been inimical to public order interests. Genuine crises may act to integrate disparate participants in collaborative patterns of interaction which extend far beyond a crisis period. Thus, the prospect of continued deprivation in war of well-being, respect and rectitude—severe crises for participants in the world community whose personalities include demands for the enjoyment of these values by themselves and others—led to the formation of the International Red Cross, with discernible impacts on the constitutive process. A natural disaster generally excites unified international action for the alleviation of suffering, eliciting cooperation from individuals and groups who, though not themselves immediately threatened, none the less perceive the suffering of others as a personal value deprivation. Another type of disaster—namely, possible Soviet domination of the continent—precipitated elite and popular support for European integration.

Future crises may introduce major structural changes in the world constitutive process. Consider the following construct: a space ship, from a planet inhabited by beings whose technological development and hence military potential far exceeds ours, lands on the earth. Elites of the world perceive in the intrusion a danger to their overall value position. The crisis might lead to attempts by nation-state elites to make separate alliances with the foreign planet, thus integrating the foreigner in the earth's constitutive process without structural changes. On the other hand, it might lead to the formation of a world government to which effective control is transferred in order to balance the power of the intruder. Analysis indicates that the determining factor in reactions to a perceived crisis is the perspective of elites: appreciation of the nature of the crisis and the net gains and net losses from alternate courses of action. We note that the projection of over-population and hence undernourishment of the globe—a crisis of the dimensions of the space ship—has as yet failed to introduce major structural changes in the con-

<sup>69</sup> See CDSP 15:38 at 9. See CDSP 15:35 at 12.

stitutive process.<sup>70</sup> Either power elites fail to appreciate the crisis or they continue to assume that strategies short of structural change promise to yield the greatest net gain to their value position. We further note that the present constitutive structure of the globe in which coarchical elites are armed with nuclear weapons, and are free of effective hierarchical supervision or regulation, is widely denounced as a perpetual crisis endangering the future of man on earth; nevertheless, ameliorating structural changes have not been brought about. The effective elites of the globe presumably reject alternate courses of action on the assumption that net losses will be imposed upon their power position.

Recent studies of the effect of rising crisis upon national decision-making suggest that crisis mobilizes the internal and external adjustment mechanisms of nation-states, while simultaneously lowering the efficiency level of all decision functions. More particularly the significant impairment is in the capacity of elites to make rational decision.<sup>71</sup> No parallel study has been made of the effect of crisis on organized transnational arenas. However, the significant factors whose interrelations are decisive for the outcome of a crisis are not difficult to identify. Do the expectations of exposure to mounting common threat (or to a great affirmative opportunity) increase or decrease? Do changing common expectations strengthen or weaken the intensity with which a common identity is experienced and asserted? Do varying expectations and identifications affect positively or negatively the strength of demands to constitute a public order of power and other values?<sup>72</sup>

Some effects of crisis on important patterns of interaction are as follows: (i) Participants: Heightened crisis expectation maximizes the political power of specialists in violence. In view of their characteristic perspectives the inclusion of these elements can further increase crisis intensity; (ii) Objectives: Preservation of the value position of groups and individuals with whom identification is most intense becomes a paramount goal. Optimum order goals are supplanted by the most urgent

<sup>70</sup> See Bourgeois-Pichat, *Population Growth and Development*, 556 INT'L CONC. 5-12, 75 (1966).

<sup>71</sup> NORTH, HOLSTI (et al.), *CONTENT ANALYSIS: A HANDBOOK WITH APPLICATIONS FOR THE STUDY OF INTERNATIONAL CRISIS* 159 ff. (1963).

<sup>72</sup> Thus, crisis may have positive public order effects.

In the recent phase of the Indo-Pakistani *Kashmir Dispute*, the Security Council, under impending crisis, acted with a unity and impact which ordinarily proved unachievable. One cannot, of course, plot a future trend on one complex of events. However, the intensity with which assertions of the jurisdiction of the Security Council are made in periods of crisis provides an index of community perspectives—expectations and demands about jurisdictional authority. This index should, perhaps, be used to balance the over-cited British commentary on the U.N. Charter (A COMMENTARY ON THE CHARTER . . . 1945, Cmd. 6666, Misc. No. 9, 1945), according to which a clash between Big Powers is supra-United Nations.

minimum order considerations; (iii) Situations: organized arenas with authoritative mandates for the realization of objectives, tend to include the principal loci of crisis, and to mobilize and centralize the base values required to resolve it. Value patterns depending upon stability of expectation (*e. g.* wealth) are disrupted within the crisis area; (iv) Bases of Power: As a crisis spreads territorially and pluralistically, participants strive to augment base values of all kinds available for centralized power purposes; (v) Strategies: The intensity of demand to employ coercive strategies rises proportionately with crisis expectations.

It will be noted that the foregoing discussion of the establishment and maintenance of arenas has seemingly been largely restricted to interactive situations that involve participants who are conventionally identified as nation-states or intergovernmental organizations of a transnational character. Let it be explicit that the constitutive process can only be fully revealed if the necessary research is done to estimate the genuine power significance of the arenas or arena-like situations in which all categories of participants in the world political process are involved. These include, for instance, the arenas established by interactions among powerful individuals who operate transnationally. They also include, in addition to the structures of political parties and pressure associations, the situations in which transnational groups chiefly concerned with values other than power interact. Hence all the "markets" established transnationally among economic units, whether "governmental" or not, must be scrutinized to discover whether power expectations do in fact exist (as evidenced, for example, by effective informal policing of the market by its members). All situations specialized to enlightenment, skill and other values are relevant.

A. Access: The patterns of interaction of any group can be distinguished along two continua: a compulsory-voluntary continuum and a restricted-open continuum. Some arenas can effectively require participation (including compliance with decision-outcomes), while others must depend upon voluntary participation and compliance. Some arenas are open to all actors who wish to participate, while others impose restrictions in varying degree. The arenas of the constitutive process range along both continua and are not, as some students contend, solely voluntary or consensual.<sup>73</sup> Compulsoriness arises from a perception of con-

<sup>73</sup>The root problem in discussions of compulsory jurisdiction has been the exclusive emphasis on documents rather than both perspectives and practice. Consent, it may be added, is a highly ambiguous communication; hence the interpretation and application of consent communications requires a policy structure more specific than the principle of *pacta sunt servanda*. See, generally, LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 91, 243 (1958) and SCHECHTER, *INTERPRETATION OF AMBIGUOUS DOCUMENTS BY INTERNATIONAL ADMINISTRATIVE TRIBUNALS* 130 (1964).

trol and awareness of a disposition to employ it. Some organized arenas exercise direct control; others, indirect control. Certain arenas, without control bases of their own, may achieve a degree of compulsoriness by a conjuncture of circumstances in which nonmembers may force one participant into the arena.<sup>74</sup> When participants assume that they must submit to the pattern an arena of maximum compulsoriness is stabilized.

Restrictions as to access are generally a function of organized arenas. As a rule unorganized arenas are open to any participant with effective power.

The general trend has been from decentralized to centralized, from co-archical toward hierarchical constitutive situations. Although nation-states frequently assert their "sovereignty" as a counter-poise to the trend toward inclusivity, the growing interdependence of the global arena has reversed matters; whereas formerly the maximization of all values was to be found in freedom from encumbrance, it is increasingly appreciated that maximization of values can now develop only through organized and centralized and staffed decision-making structures.<sup>75</sup>

It has been argued, in certain quarters, that while collaborative activity may reach the point of organization in many value processes, it cannot be achieved in the global power process; in the latter, an uneasy state of coexistence is the most that can be expected. The fallacy of this view is demonstrated by the continual efforts of effective elites to establish and maintain organized power arenas. The current *Sturm und Drang* in these arenas may, therefore, be most appropriately interpreted not as an attempt to challenge the overall authority of the arena but rather as an effort to consolidate an internal power position. As indicated before, a comprehensive functional analysis of the constitutive arena as an inclusive aggregate would examine by proper empirical methods the interactive situation specialized to the shaping and sharing of every value.

In general, it can be said that the arenas of constitutive decision have become more differentiated. Since the growth of stable and refined

<sup>74</sup> In this respect, interdependence may become a factor for "compulsory jurisdiction"; peripheral participants, who will suffer consequential deprivations because of the conflict, will press the disputants into a highly organized arena specialized to decision by noncoercive means. Some examples of this phenomenon are the first phase of the Corfu Channel Case (Preliminary Objection, 1948 I.C.J. Reports 15) in which the Security Council sought to press the parties to the Court and the Honduras-Nicaragua Border War, in which the O.A.S. brought the parties to the Court. (Case Concerning the Arbitral Award Made by the King of Spain 23 XII 1906, 1960 I.C.J. Reports 192.) The concerted action of O.A.U. members was a major factor in bringing Algeria and Morocco to arbitration in their border war of 1963-64.

<sup>75</sup> For elaboration and documentation in processes other than power, see FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1965); JENKS, *LAW, FREEDOM AND WELFARE* 1-31 (1963).

practices at each phase of decision is a probable consequence of increasing and diversified interaction, differentiation will presumably increase in the future.

Numerous international constitutive documents express a policy of compulsory or cogentive jurisdiction over a variety of minimum order concerns. Trends register a movement toward increasing compulsoriness.

#### IV. BASE VALUES

Base values are any potential means of influencing decision outcomes.<sup>76</sup> Hence the values available as bases include the same categories of value that may be pursued as scope values (power, wealth and so on). On analysis, it is evident that each value is composed of two components, one a pattern of symbols, the other a resource pattern. The symbol component includes the predispositions to adopt particular perspectives toward a participant and to engage in various operations that involve him. The resources are the physical magnitudes that figure in the operations. While the bases of power can, and often are measured in absolute terms (size of a standing army, destructive power of its weapons, ship tonnage, facilities which can be called upon for logistical support and the like), it is ultimately the interpersonal or "operational" definition of bases which concerns us. Does a given participant perceive that values at his disposal are potential bases? Do other interacting participants perceive the relevant events in the same way or do they have a different or distorted view? The perspectives of any specified participant, as is obvious, may be singularly different from the more comprehensive view of the scientific observer.

The ultimately relational character of bases of power can be demonstrated by an examination of the value position of any single participant *vis-a-vis* others. Consider, for example, the *external* power at the disposal of a given nation-state in the arena of world politics. If the elite members of another state are favorably disposed toward the policy of giving support to the first state in pressing demands on a third state, the first state has a power as a base value at its disposal which, besides including a favorable predisposition, also includes the added voting or fighting potential of the "allies." If the other states oppose the policy of the first state, that state may have a deficient external power position, in which the predispositions of the others can be expected to be employed

<sup>76</sup> For illumination of the concept of base value, see ARENS AND LASSWELL, IN DEFENSE OF PUBLIC ORDER 14 (1961); *idem. Toward a General Theory of Sanctions* 49 IOWA L.REV. 233-34 (1964); McDougal, *The Impact of International Law upon National Law: A Policy Oriented Perspective*, 4 S.D.L.REV. 25, 50-51 (1959).

against rather than in favor of the first state. This state may, however, be capable of realizing its policy by depending solely upon the resources and symbols at its own disposal, especially if the context tends to multiply their effectiveness. Even here, however, the observer must be wary of a purportedly complete enumeration of values, since an element in the viability of these bases will, once again, be the extent to which other participants perceive and appreciate them. The point is equally demonstrable by reference to values other than power. For example, a nation's external wealth includes all the claims to the services of resources that other states are disposed to honor. External prestige includes dispositions to give status to the nation and its members, together with favorable acts and physical tokens of esteem.

The task of establishing a constitutive relationship among the participants in the world arena proceeds by consolidating the symbols and resources required to allocate power. The scientific observer can demonstrate the occurrence of a constitutive relationship when at least a minimum level of stability is attained in authority and control. As indicated before, the perspectives of authority include expectations regarding the appropriate and demanded manipulation of values in the allocation of power. The requisite perspectives of control are the predispositions to establish and maintain an effective power allocation in harmony with authority, coupled with a sufficiency of resources to do so. Constitutive power is lawful; it is neither naked nor pretended (control without authority; authority asserted without control).

The policies relevant to the acquisition and management of base values in the constitutive process are principally policies of proportionality to the domain, range and scope of decision. Since inclusive decisions seek to produce consequences of some considerable importance throughout the world community, it is obvious that the more inclusive the control of base values the more likely such decisions are to be implemented or enforced. The magnitudes involved must be measured according to the range and scope of the values to be affected. It is apparent from even the most cursory inspection that the risk remains high that the world constitutive process will not be able to mobilize base values adequate to all its inclusive objectives.

The situation is somewhat different in regard to the base values required to render exclusive competences effective. We call attention to the point that the only rational criterion available for an assignment of exclusive competence at the domestic (or less inclusive competence at the regional or general levels) is that the values at stake are highly localized in these domains, hence the common interest of the world community is in leaving determinations to be made by and for those directly con-

cerned.<sup>77</sup> Presumably, the elite of a nation-state is able and willing to draw upon all its assets as bases for rendering its exclusive jurisdiction fully effective. We favor common recognition of a "police power" within every component body politic as a means of maintaining minimum order, but predicate the lawfulness of its exercise upon conformity with comprehensive common interests. Matters of police power which are initially delegated to exclusive authority are arrogated to inclusive review and termination if they are abused.

The shifting apportionment of base values between inclusive and exclusive spheres of jurisdiction is a fundamental feature of the world constitutive process. The chief trend is toward the attenuation of exclusive competence (domestic jurisdiction) and a broadening of inclusive authority. The scope of the present chapter allows no more than a brief survey of the important milestones in this development. Article 15(8) of the Covenant of the League of Nations provided that should the relevant international agency find that the subject of a dispute, nominally within its jurisdiction, was "a matter which by international law is solely within the domestic jurisdiction of that party," the organized community was not to intervene in the settlement.<sup>78</sup> Though domestic jurisdiction was to be determined "by international law," matters found to be within domestic jurisdiction, no matter what their impact upon general community security, were beyond the ambit of League jurisdiction. Indeed, the Permanent Court of International Justice subsequently held that though domestic jurisdiction might change through time, it was insulated from inclusive action at any given moment, unless it had been "internationalized" voluntarily by treaty.<sup>79</sup>

This construction is hardly an expression of optimum policy. Although the argument that domestic jurisdiction is determined by reference to community expectations and hence can change through time represented a dynamic conception, this view was largely nullified by the requirement of explicit formal agreement to any modification. This defect was ameliorated at UNCIO. Early drafts of the Charter had called for a provision parallel to Article 15(8) of the Covenant.<sup>80</sup> At San

<sup>77</sup> See, e. g. Article 2(7). Articles 51 and 52 of the Charter accord a contingent security jurisdiction to less than universal groupings, but require a reporting to the Council and modalities of application consistent with the Purposes and Principles of the Charter. Should the activities diverge from prescribed norm, they would cease to be lawful and the United Nations could assert a primary jurisdiction.

<sup>78</sup> "If the dispute between the parties is claimed by one of them [disputant states], and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

<sup>79</sup> Tunis-Morocco Nationality Decrees, O.C.I.J., Series B, No. 4.

<sup>80</sup> GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 110-111 (1949).



Francisco, the entire concept of domestic jurisdiction was challenged as an erosion of the authority of the proposed organization.<sup>81</sup> The compromise proposal conceded the valid policies in a concept of domestic jurisdiction, yet asserted the primacy of the organized community to "pierce the veil" of domestic jurisdiction in the interests of minimum order. Article 2(7) maintained a *domaine réservé* but expressly rendered it inoperative if minimum order were threatened.<sup>82</sup>

In substantive matters of exclusive competence, the trend toward the attenuation of domestic jurisdiction is indeed dramatic. A perusal of the records of the United Nations as well as the practices of the complex of international organizations reveals that almost any matter has been treated as one of "international concern." In most cases, the inclusive examination of these matters has been countered by a claim of domestic jurisdiction.<sup>83</sup> The very fact that inclusive arenas considered and possibly recommended action in regard to "domestic matters" is indicative of the trend toward limiting that domain. It is true that action beyond a hortatory or mandatory communication was often not taken because of the inadequate resources at the disposal of the inclusive decisional arena. Thus, the problem has not been one of articulate policy; such policies, as will be seen, generally hold that adequate bases of power should be at the disposal of inclusive arenas. The problem has been a discrepancy between preferred and formulated policy and actual deeds. In the following pages, we briefly survey policies, trends and projections in allocations between inclusive and exclusive competence in regard to each base value.

### *Power*

Effective power continues to rest primarily in nation-state participants. Yet constitutive policy is rather unambiguous in its demand for inclusive control and application proportional to the basic task. Articles 43 and 45 of the Charter remain unimplemented,<sup>84</sup> but a variety of other devices

<sup>81</sup> *Id.* at 111.

<sup>82</sup> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

<sup>83</sup> For an evaluation of these claims, see HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

<sup>84</sup> These articles had envisaged a stable network of national military units which were to be on call for the Security Council. Their operation would, of course, have required a consensus among the permanent members. However, given such a consensus, the existence of a stand-by force would have added immeasurably to the confidence and impact of Council deliberations and decisions.

for investing inclusive authority with effective power have been developed. Similar trends toward implementation of this policy may be noted in regional defense organizations.<sup>85</sup> Recent developments in the Organization of American States indicate a like development in that area,<sup>86</sup> and it is not improbable that contemporary demands in Africa will result in the formation of an implementing arm of the OAU.<sup>87</sup>

Unquestionably there has been a great reluctance to cede power to inclusive processes, since global elites have thus far found it difficult to clarify their long-range common interests. The impeding conditions of mutual distrust and suspicion are subordinated only when a common threat is perceived; and when the crisis has passed nation-state elites tend to reassert their hegemony.<sup>88</sup>

There are indications that a changing constellation of conditioning factors is mobilizing permanent support for more inclusively effective power. Requirements of future security will presumably demand investments few nation-states can support unilaterally. Weapons are increasingly expensive and the proliferating sophistication of delivery systems is draining significance from the concept of defense. Hence security will of necessity become a more inclusive concern, requiring the durable collaboration of groups of nation-states. (Paradoxically, limited success in disarmament could well counteract this trend.)

### *Wealth*

Constitutive policy favors a disposition of wealth adequate to support authoritative processes of decision. Unfortunately, inclusive processes rarely have direct control over wealth resources and hence are dependent on the good will of nation-state elites for the financing of their activi-

<sup>85</sup> Some material on the extent of inclusive control may be found in BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 150, 155, 197-201 (1963) regarding NATO, SEATO, CENTO and the Warsaw Pact.

<sup>86</sup> There has been agreement in principle on the formation of an Inter-American Peace Keeping Force as the implementing agent of the Charter and the Pact. Whether or not this particular agreement materializes, it seems clear that some implementing form will be created.

<sup>87</sup> While the OAU only supports anti-colonialist rebel groups on the continent, it has discussed the possibility of joint forces against Southern Africa; such an instrument will probably be required to realize their express aims. See 554 *INT'L CONC.* 58-70 (1965).

<sup>88</sup> Thus, it has been noted that French interest in the proposed EDU waned as soon as *detente* with the European socialist states was on the horizon. Similarly, France's current position *vis-a-vis* NATO may be explained by the fact that French elites perceive no threat from those against whom NATO was formed. In a more general sense, weaker participants may view international organizations as a means of augmenting their power position, while stronger states view them as restrictions on their power. This may be an imperfect assessment of long-range interests; for a critique, see McDougal & Reisman, *The Changing Structure of International Law: Unchanging Theory for Inquiry*, 65 *COLUM.L.REV.* 810, 818 (1965).

ties.<sup>89</sup> Indeed, a recurring problem of international organizations has been to secure adequate finances permitting the operations necessary for minimum and maximum goals. The United Nations, for example, has no resource base of its own, and must turn to annual contributions of members to support its activities. Wealthy members thereby acquire a *de facto* veto power over activities of which they do not approve; a possible result is the total paralysis of the organization. In the recent *Expenses*<sup>90</sup> affair, the USSR and France demonstrated that they could undermine peacekeeping operations of which they did not approve. Although the crisis has not reached these dimensions in a number of functional organizations, the lack of an adequate wealth flow does restrict their operations and prevents the implementation of a variety of pressing programs.

There are a number of means by which authoritative organizations might secure the necessary wealth base. Sharable resources could be declared public international property, under the direction and at the disposal of international organizations. A low-keyed trend in this direction is suggested by the International Atomic Energy Agency. Another means would be the requirement that all national corporations operating transnationally secure an annual international license from the United Nations or from one of the economic agencies. This plan may prove to be palatable to corporate elites in capital-exporting countries, since when they venture abroad they frequently wish to shed their identifications with a rich country. This method would, furthermore, introduce a measure of international supervision to transnational processes which have become quite uncontrolled.<sup>91</sup> Changes in national tax legislation, permitting contributions to the United Nations to be deductible, or to constitute a national tax credit could serve as a short term means of securing wealth. Paper increases in "inclusive taxing power" represent a *petitio principii*. The problem is for authority to acquire a measure of control; the above solutions seek to accomplish the objective immediately by a larger application of authority.

Wealth malapportionment in inclusive processes is matched in exclusive ones. Owing to insufficient wealth bases many participants are incapable of adequately applying their exclusive competence. It is noteworthy that global policy is unequivocally committed to increasing the economic assets of all participants; a number of developmental programs are in the process of implementing this objective. However, relative growth rates indicate a continuing disparity. Nevertheless the relative

<sup>89</sup> Exceptions to this condition are the economic agencies, which hold member assets and the IAEA which has control over some nuclear material.

<sup>90</sup> Certain Expenses of the United Nations, 1962 I.C.J. Reports 151.

<sup>91</sup> See Barber, *Big, Bigger, Biggest: American Business Goes Global*, 154 NEW REPUBLIC 14 (April 30, 1966).

rate may be an inappropriate index, since the tempo of infrastructural development in the poorer countries is expected to be somewhat retarded at first. Once the internal level of value-institutional growth has reached the "take-off point," the disparity in relative rates can be expected to diminish.

### *Enlightenment*

A corollary of a public order of human dignity is wide sharing of enlightenment, both as a means of developing each individual to his maximum capacity and as a prerequisite of effective participation in global power processes. Constitutive policies expressly demand a free flow of enlightenment since informed opinion is expected to maximize rational behavior and to emphasize the advantages of common over special interests. The personnel engaged in inclusive processes is best informed about the world situation when it is widely recruited from capable people. Hence some of the most talented personnel of nation-states should be seconded to the staffs of international organizations; current trends, unfortunately, do not configure this goal.<sup>92</sup>

It might be supposed that the trends toward universalizing the civilization of science and technology, and especially toward instantaneous communication, would concentrate tremendous assets in the hands of inclusive decision-makers. That such results may in fact follow is no mystery to the elites of nation-states and especially of the larger powers. Hence they have adopted a set of counter measures designed to subordinate these innovations to the service of exclusive or even special interests.

The elites of closed societies in particular continue to regard controlled enlightenment as a positive base of power<sup>93</sup> and, conversely, unencumbered inquiry as a negative base. Not infrequently, the intensely conditioned responses and highly distorted perspectives of the rank and file,

<sup>92</sup> RUBINSTEIN, *THE SOVIETS IN INTERNATIONAL ORGANIZATIONS* 140 (1964). While secondment carried beyond a certain point can be deleterious to the international character of the civil service and can undermine its vital *esprit de corps*, it can, at the same time, give an international perspective to national officials, which may be carried back and applied when they resume their national posts. In view of the fact that so much international law is made by national officials, the most minimal transnational perspective will be a positive public order factor. A further consideration is the training which nationals of new states acquire in association with an international secretariat; this positive long-range result should be balanced against the relative inexperience which such seconded personnel bring to their international post. We do not ignore the fact that certain states have insisted upon secondment in order to restrict the internationalization of their citizens' perspectives. Exposure of even a year or two will, we believe, shape perspectives in a manner which is in the long-range interests of world public order. It should, of course, be obvious that secondment is an effective strategy only if there is, at the same time, a core of permanent international civil servants.

<sup>93</sup> See BARGHOORN, *SOVIET FOREIGN PROPAGANDA* 3-29 (1964) for a survey of doctrine and practice.

which have resulted from selective and controlled enlightenment, have limited the decision options of these same elites. There is evidence for example that a number of expropriations and national realignments were decisions taken against the wishes and perceived long-range interests of totalitarian leaders as a politically expedient response to the perseverating demands inculcated in the rank-and-file of the body-politic.<sup>94</sup> Although the development of a xenophobic manicheanism may serve the short range interests of a political leader or a political class, there is always a more extreme, more doctrinally pure position on which the opposition can insist. Under these circumstances, the politician who begins as a manipulator of restricted enlightenment will, in the end, be manipulated by it.

It is not difficult to propose base values and instruments of enlightenment that, if focussed in the inclusive decision process, would strengthen and maintain the power prerequisites of minimum or even optimum public order. If current news originating in such world-inclusive sources should reach the rank and file of the global community, penetrating whatever barriers are raised against it, many parochial perspectives could be eroded. Similarly, a world board of education and basic culture could be put in charge of primary instruction, intent on disseminating a common frame of reference to clarify and strengthen the common interests of the whole community of man. High frequencies of transnational exchange of personnel are also indicated means of shared enlightenment.

### *Respect*

Respect, as a base value of authoritative decision, is primarily negative in application, since decision-makers deprive nonconforming participants of approval and admiration. In order to be effective, the inclusive process must command a relative monopoly of respect and participants must share common views as to the specific components of the value.<sup>95</sup> The

<sup>94</sup>This construction is elaborated in EDWARDES, *ASIA IN THE BALANCE* (1962) in regard to Indonesian expropriations, but would appear applicable to many nationalizations in a number of countries. Certainly, expropriations have frequently proven counter-productive in short and long-term wealth terms. An anthropologist who has observed developing nations, compares expropriatory reactions as parallels to the Melanesian cargo cults. ". . . an increase in felt needs without any compensatory increase in expectations may cause frustrations leading to messianic or utopian movements . . . when such a gap between wants and expectations occurs among sophisticated people at the national level, the result may be 'utopian' expropriations of foreign and domestic capital." ERASMUS, *MAN TAKES CONTROL* 8-9 (1961).

<sup>95</sup>Thus, Lasswell and Arens write: ". . . one sign of tension in any society is an increase in the number of people who feel no shame when they flout lawfully prescribed rules and remain indifferent to the breach as committed by others . . . . If deprivations of respect are to operate formally and informally as sanctions of the public order system, it is evident that sanctioning measures must har-

fact that the target of a respect sanction in international affairs generally resists such an application might suggest that it perceives itself threatened. However, it is not easy to demonstrate that such sanctions are effective. For instance, it is not clear that the sanctioned elites undergo severe psychic tension precipitated by the deprivation, or that other participants view the sanctioned party as, somehow, deprived. It is not improbable that respect deprivations are selected as sanctions by transnational bodies because they are the simplest and, possibly, the only ones available. One observer has noted that the parliamentary syndrome is to believe that a vote is equivalent to action,<sup>96</sup> and this point must be weighed before concluding that the impact is severely deprivational.

It is evident that before respect can be a significant instrument of public order there must be community-wide perspectives regarding the particular practices that convey or deny it. Such homogeneity appears to depend on sufficiently intense levels of interaction to enable the participants to achieve a minimum level of familiarity and identification with one another. Before the rise of the territorial state, respect was accorded only to members of the family and tribe. As the world social process intensified and the state took form, common criteria of esteem began to emerge. In recent times, accelerating transnational interaction has been paced by a proliferation of universal normative standards of respect. If this trend continues, as is likely, respect will become a more effective base of constitutive decision.

### *Well-Being*

The revolution of rising expectations has generated universal demands for the creation and maintenance of conditions conducive to the physical and psychic well-being of every individual. In the deepest sense, these demands are expressed as insistence that minimum order be maintained which in the contemporary world is a *sine qua non* of existence. More sweepingly, these demands relate to the inclusive supervision of conditions which can assure a production and allocation of values which are in accord with human dignity. These demands provide a strong base for action by the organized community against elite acts contrary to minimum or optimum order. Much of the work in the human rights sector and the supervisory role of a number of United Nations and functional organizations rest ultimately on shared demands to guarantee fundamental safety, health and comfort to all human beings. Certainly such a de-

monize with the sentiments of the community . . .” ARENS AND LASSWELL, *op. cit. supra* no. 59, at 24-25.

<sup>96</sup> BAILEY, *THE SECRETARIAT OF THE UNITED NATIONS* (1962).

mand underlies much of the "Trusteeship" concept as well as much of the work of the International Labor Organization.<sup>97</sup>

Denials of well-being are inseparable from the use of military weapons in the application of sanctions. In fact the connection between severe coercion as a form of power is so intimate in so many circumstances that a special task of analysis is often required to underline the point that severe deprivations may rely only to a very limited extent on actual or threatened destruction of life. Thus, although economic sanctions may provide widespread bankruptcy and unemployment, this is usually a far cry from mass killing or starvation.

#### *Loyalty (Affection)*

In a world traditionally divided against itself the constitutive process is not able to mobilize mass loyalty throughout the length and breadth of the world community as a means of obtaining consent to allocations of power. However, it is obvious to every qualified student of the problem of minimum or maximum public order that one of the major long-range assets to be cultivated in the constitutive process is intense identification of individual egos with the inclusive self that comprises an authoritative and controlling world polity.

As a long-run factor in the social integration of the earth, we must not underestimate the intimate ties that cross national lines in intermarriage and international friendship. The shattering prospect of separation is not one of the least of the considerations that often exercises a deterring effect on conflicts at every level.

#### *Skill*

The significance of skill as a base value in the constitutive process has been greatly enhanced in recent times by the spread of intense demands for modernization, hence for the achievement of a self-sustaining level of value shaping and sharing according to sophisticated standards of practice in every value-institution sector. The hope of obtaining assistance in programs of development is a factor tending to bring about responsible behavior on the part of the most underdeveloped states; and the desire to obtain influence by inaugurating and continuing such programs is an inducement to giant powers to introduce some degree of stability into many international situations. The consequences of development are by no means uniformly positive, however, since conflicts are sometimes accentuated that limit the scope, range and domain of constitutive trends.

<sup>97</sup> Jenks, *op. cit. supra* n. 58 at 25-26.

Transnational operations are slowly improving their supply of administrative, diplomatic, informational and other forms of skill,<sup>98</sup> and if these tendencies continue, the prospect of disrupting ongoing services may come to be a sanction of increasing importance to the consolidation of constitutive power on an inclusive scale.

### *Rectitude*

In a homogenous community, rectitude demands provide one of the most effective and economical bases of power. There have been historical periods in which rectitude provided such a base in large areas of the globe.<sup>99</sup> Undoubtedly, the rise of the nation-state had as one of its principal effects the shattering of Europe's inclusive rectitude system. Although the Catholic Church continued as a transnational repository of rectitude norms, its impact was often neutralized and overridden by national churches and secular systems of ethics. In periods of crisis, rectitude predispositions were frequently "nationalized" and drafted into the service of the state, and the glorification of state power became a conspicuous ideological current in a state, such as Germany, whose bid for unity and industrialization had been delayed. Despite these schisms, it is clear that the rectitude system interrelated with international law was primarily "Christian" and "European" until as recently as 1945. In the post-war "nation-state explosion," many non-European cultures became active participants in the international arena. The presence of effective non-European and frequently anti-European systems of rectitude has undermined even the semblance of a universal system. The German *Macht* school and its contemporary successor—the identification of international morality with national interest—represent the nadir of global rectitude.

Even a glance at the history of human culture shows that the early systems of rectitude were part of the syndrome of parochialism. Rectitude norms were restricted to the service of the tribe, the extended family, and

<sup>98</sup> In the past year, Secretary-General Thant has remarked on several occasions that the UN could alleviate tensions by presenting an intelligence flow to a broad audience which would be more accurate than that emanating from national media. See, in this regard, his address to the World Council of the YMCA, reported in *NY Times*, Aug. 9, 1965.

<sup>99</sup> Nussbaum argues that religious sanctions in international law were ineffective by the time Vittoria and Suarez had formulated them: *Just War—A Legal Concept?* 42 *MICH.L.REV.* 453, 463 (1943) and Friedmann contends that Vattel's "law of conscience" was a denial of international law: *LEGAL THEORY* 34 (2nd ed. 1949); but Pound suggests that the law of conscience of a personal sovereign is clothed with a flesh absent from the dessicated concept of a state conscience: *Philosophic Theory and International Law*, 1 *BIBLIOTHECA VISSERIANA* 71, 76 (1923). See also CORBETT, *MORALS, LAW AND POWER IN INTERNATIONAL RELATIONS* 11, 14, 15 (1956), who suggests that rectitude demands operate, in varying degree, in all personalities and are a significant determinant in elite decision.



the nuclear family. As identifications broadened, great systems of religious faith and morals came into existence and sometimes were turned to the service of huge imperial states. We have commented on the nation-centered systems of modern history; we should likewise take account of the fact that universal conceptions of human dignity have won their way to at least verbal acceptance on a vast scale. Although moralistic overtones are always present in every sanction attempted as part of the constitutive process, it is not possible to show convincing evidence of the impact of such affirmations.

The separation of church and state in many polities allows religious leaders to pursue collaborative activities across state bounds without governmental interference. A possible outcome is a global system of *civic* rectitude that depends on clarity and relatively mild sanctions until world unity and stability bring about a firmer and more intensely supported body of norms.

(Concluded in Volume 19, Number 4)