THE IMPACT OF INTERNATIONAL LAW UPON NATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE*

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Professor McDougal argues that traditional monistic and analytical approaches to international law have prevented a true appreciation of its essential nature. In Professor McDougal's view, international law is a dynamic, integrated, global process of authoritative decision, operating at many different community levels and through many different institutional devices, to resolve conflicts and affect policies and value processes in all the component communities of the world community. As such, he submits, international law can be made an effective instrument for broadening the perspectives and bases of power of national decision makers, thereby facilitating the wider and more secure achievement of those fundamental human desires and goals which transcend national boundaries.

The Fundamental Policy Issue

From a comprehensive global perspective, one may today observe that of the effective decisions which constitute the world power process, some are taken inclusively, in the sense that several or many or all states participate in the making of such decisions, and others are taken exclusively, with only a single state or a few states making relatively unilateral determination of issues.[1] Examining in more

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* The fourth annual presentation of the Charles Hall Dillon Lectures in Law and Government at the State University of South Dakota on November 14, 1958.

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The author is indebted to Mr. Eliezer Ereli, of the second year class of the Yale Law School, for assistance in the preparation of this article.

1. By "decisions" we refer to choices among alternatives attended by sanctions in the form of severe deprivations or high indulgences. So defined, decisions are outcomes of power processes.

By "inclusive" and "exclusive" we refer to a continuum in degrees of shared participation in a social process.

When we describe decisions as inclusive or exclusive, we thus refer, cryptically, to the number of participants who share the making of sanctioned choices. In more complete description, the words inclusive and exclusive may, however, be used to describe degrees of sharing in any and all the detailed phases of a power process, including access to authoritative arenas, control over base values, the management of strategies, determination of particular outcomes, and the allocation of competence over particular events in social processes.

The same words, inclusive and exclusive, may be used, further, to describe degrees of sharing in social processes other than power, such as with respect to wealth, enlightenment, well-being, and so on, and degrees of sharing may be indicated, similarly, with respect to all phases of such processes, including the number of participants, access to situations, control of base values, management of strategies, determination of outcomes, and effects. In stating the goals of a world public order of human dignity, which postulates a wide sharing of all values, some such description is indispensable, and we will use the words inclusive and exclusive, trusting to context to make our reference clear.

detail, one may observe, further, both that these effective decisions as a whole are affected by certain perspectives of authority or lawfulness, projected by various aspiring systems of world public order, which purport to allocate competence for decision between the general community of states and particular states, and that these perspectives of authority about appropriate allocation of competence, because of their impact upon decision, also importantly affect the whole world social process, including the production and distribution of values by and for all peoples.[2] What is at stake, in the problem to which we here address ourselves, may accordingly, be stated most generally as the common interest of all peoples of the world in achieving an international or world public order which maintains an appropriate creative balance between the inclusive, shared competence of the entire community of states and the exclusive, non-shared competence of particular states. Each state of the world, which genuinely projects a public order of human dignity, has an interest in the establishment and maintenance of an inclusive competence which will facilitate the prescription and application of rational, economically designed policies for such interactions among peoples as are primarily inclusive, that is, predominantly transnational, in their effects.[3] Each state has in fact, it may be elaborated, a double interest in such inclusive competence: first, in the maintenance of democratic access to participation in such competence, thus insuring that peoples in fact primarily affected by decisions have a voice in determining such effects; and secondly, in requiring wide assumption of responsibility for such competence, thus insuring that decisions inclusively taken from community perspectives, and necessary to the achievement of common policies, will actually be put into effect by, and when necessary within the territorial boun-

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By inclusive "policies" we will refer to the projection of shared demands with respect to any value. By inclusive or common "interests" we will refer both to such shared demands and to the pattern of expectations about conditions affecting possible realization of such demands.

2. The reference to the "general community of states" should not be taken to imply any particular degree of universality in international law. The traditional words are employed merely as a convenient way of referring to the larger groupings of states seeking common values.

The present sad status of universality, however defined, and detailed methods for appraising the impact upon values of the various contemporary contending systems of projected world public order are explored in McDougal and Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM J. INT'L L. 1 (1959).

3. This is of course a minimum goal of a public order of human dignity. Further goals must include making certain that policies inclusively prescribed actually do incorporate the values of human dignity in the specific relations projected between peoples and individuals. The difficulties inherent in securing such goals in a world arena exhibiting not a single public order, but a number of contending public orders, approximating the values of human dignity in many different degrees in their projected demands, will be noted in conclusion. A totalitarian order has little concern either for wide participation in the making of decisions or for insuring that inclusive policies actually do embody the values of human dignity.

daries of, particular states. Each state has, further, an interest that there be reserved to every state an exclusive competence to prescribe and apply policies, without external intervention, with respect to interactions among peoples which are primarily exclusive, that is predominantly local, in their effects. Each state has an interest in its own freedom, and, hence, because of contemporary interdependences, reciprocally an interest in the freedom of others—an interest in a deconcentration of power which will promote not only freedom from arbitrary decision but also freedom for initiative, experiment, diversity, and the effective adaptation of community policies to all the peculiarities of the most local contexts. The most general interest of all states and peoples, adhering to the values of human dignity, is accordingly in a world public order which achieves that balance between the inclusive competence of the general community of states and the exclusive competence of particular states which best promotes the greatest total production, at least cost, of their shared values.[4]

Traditional Theories

The traditional approach to clarification of the problem so posed has moved from the common conception of law, both national and international, as a "body of rules" and, hence, has been largely in terms of the interrelation or reciprocal impact of allegedly different bodies of rules.[5] Scholarly opinion for several decades has ranged from the view, at one extreme, that international law is not law at all but mere rules of international morality, through varying versions of dualism or pluralism, to a monistic conception, at the other extreme, that international law dictates the content of national law.[6] Brief and impressionistic illustration of some of the more influential of these views may serve to suggest the need for a very different mode of clarification.

The theory which concedes least competence to inclusive decision is of course that which denies that international law is law at all. Writing from the very limited perspectives about decision-makers, processes of authority, and sanctions which have come to characterize

4. A detailed indication of how this policy may be given operational meaning with respect to a particular problem is offered in McDougal and Burke, *Crisis in the Law of the Sea: Community Perspectives versus National Egoism*, 67 YALE L.J. 539 (1958).

5. For rich illustration of how the many divergent schools converge upon this central theme, see Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. YB. INT'L L. 66 (1936); Borchard, *The Relation between International Law and Municipal Law*, 27 VA. L. REV. 137 (1940).

6. The formalistic character of the latter position is most evident in the argument by Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952), that public international law dictates the content of the rules of private international law.

the analytical school of jurisprudence, John Austin achieved a well-known conclusion:

> "The so called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called, but rather 'positive moral rules which are laws improperly so called'."[7]

Most recently, Professor Edwin Patterson, author of a distinguished American text in lineage from Austin, has made inquiry for the "legal status" of international law and found none. Taking Hyde's definition that international law consists of "the principles and rules of conduct declaratory thereof which nations feel themselves bound to observe, and therefore commonly do observe, in their relations with each other," he summarizes:

> "International law, then, consists of norms of which the subjects (persons obligated) are states, and of which the objects (things regulated) are relations between states."[8]

The big difficulty in regarding international law as law, despite the generality of its norms and its purported prescription of official conduct, is however, Professor Patterson finds, the absence of appropriate sanctions. The one sanction which he considers, "war," he appraises not as appropriate sanction, but rather as the breakdown of law. This same Austinian conception may be seen to infuse most of the utterances of the contemporary neorealist writers about international relations who emphasize heavily the role of naked force and minimize the role of authority in the interactions of states.[9]

The dualist or pluralist theories, still perhaps the most popular of all theories, while not explicitly denying that international law is law and commonly conceding a wide scope to inclusive decision, exhibit as their most distinctive characteristic, an attempt to rigidify the fluid processes of world power interactions into two absolutely distinct and separate systems or public orders, the one of international law and the other of national law. Each system is, thus, alleged to have its own distinguishable subjects, distinguishable structures and processes of authority, and distinguishable substantive content. The subjects of international law are said to be states only (with occasional reluctant, contingent admission of international governmental organizations), while those of national law embrace individuals and the whole host of private associations. The sources of international law

7. 1 AUSTIN, JURISPRUDENCE 184 (5th ed. 1885).
8. PATTERSON, JURISPRUDENCE 174 (1953). The definition from Hyde appears in 1 HYDE, INTERNATIONAL LAW 1 (2d ed. 1945).
9. KENNAN, AMERICAN DIPLOMACY *1900-1950* 95 (1951).

are found only in the customary behavior of states and in agreements between them, while the sources of national law are located in the state's structure of centralized and specialized institutions. The substantive content of international law is said to be rules regulating relations between states, while that of national law is that of rules regulating the interrelations of individuals and private associations. Concise expression of this point of view is offered by the late, most authoritative Professor Lassa Oppenheim:

> "Neither can International Law *per se* create or invalidate Municipal Law, nor can Municipal Law *per se* create or invalidate International Law. International Law and Municipal Law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches—but separate branches—of the tree of law. Of course, it is possible for the Municipal Law of an individual State by custom or by statute to adopt rules of International Law as part of the law of the land, and then the respective rules of International Law become *ipso facto* rules of Municipal Law."[10]

With its allegedly clear distinction between international law and national law achieved, the next task of any particular dualist or pluralist theory is of course to reestablish some link or connection between the systems, in order both to account for the past effectiveness of international law and to insure some measure of future effectiveness. The books abound with elaborate theories of "coordination," "auto-limitation," "subordination," "adoption," "incorporation," "transformation," and so on, and in derivational exercises designed to demonstrate some mysterious "basis of obligation" in "natural law" or in the "common will" or "common consent" of states.[11] None of these exercises has been widely persuasive and there is a certain accuracy in the observation of one commentator that "the whole dualistic position" in measure denies "the juridical nature of international law by treating it as a kind of morality governing the relations between states and grounded only in their consent."[12]

The monist theories, in sharp contrast with the dualist or pluralist, find in the world arena a unitary legal system or public order, with international and national law having comparable, equivalent or identical subjects, sources, and substantive contents. Though differing

10. Introduction to PICCIOTTO, RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND THE UNITED STATES 10 (1915).

11. BRIGGS, THE LAW OF NATIONS (2d ed. 1952) offers, at page 60 *et seq.*, extensive bibliographical reference to expressions of these multiple theories.

12. STARKE, *Monism and Dualism in the Theory of International Law*, 17 BRIT. YB. INT'L L. 68, 73 (1936).

as to their reasons, whether "legal" or "scientific" or "political," monists commonly maintain the primacy or supremacy of international law in relation to national, and thus accord a very wide scope to inclusive decision. The distinguishing feature in the syntax of a monistic system is that it begins with a verbalization chosen as the "basic norm" (Grundnorm), such as *pacta sunt servanda* or the proposition that states ought to continue to behave in the way that they have customarily behaved, and by derivation from this basic norm establishes something called the "validity" of all lesser norms in a pyramid-like series of levels or stratas or hierarchies from top abstraction to lowest abstraction. The clearest, brief exposition of this theory, stating the supremacy of international law, is perhaps that of Professor Kunz:

> "The primacy of the Law of Nations means that the supraordination of the international juridical order to the municipal juridical orders of the single States, means that the 'sovereign States' are delegated partial juridical orders of the international juridical order, means that the pyramid of the law does not end with the basic norm of the juridical order of a given single state, but that at the top of the pyramid of law stands the international juridical order. . . ."[13]
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> "The peers in England are 'equal' because they were all in the same way *subordinated* to the King; all men are equal before God or before the law, because they are all *subordinated* in the same way to God or to the law; all States are 'equal,' because they are all *subordinated* in the same way to international law."[14]
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> "[*A*]*ll* the activity of the single States is regulated by the supraordinated law of Nations. The so-called 'domestic affairs' of the single States are not the affairs which are *not* regulated by international law, but the affairs which a State, *under international law,* has the exclusive competence to regulate as it pleases."[15]

Similar statements, with varying derivational elaborations, could be offered from many contemporary authors.

Inadequacy of Traditional Theories

It has perhaps already been sufficiently suggested that all these various theories reflect not so much accurate description of the realities of the world power process as the varying preferences of their formu-

13. KUNZ, *The "Vienna School" and International Law,* 11 N.Y.U.L.Q. REV. 370, 402 (1934).
14. *Id.* at 401.
15. *Id.* at 399.

lators about the relative roles of national and international policies. Underlying the differing formal definitions and syntactical derivations are differing perspectives about the institutions and values operative in the world arena and, especially, about the role of law in the more comprehensive social processes. The point has been most emphatically made by the master monist, Professor Kelsen:

> "The choice between the primacy of international law and the primacy of national law is, in the last analysis, the choice between two basic norms. . . . It may be that our choice, though not determined by the science of law, is guided by ethical or political preferences. A person whose political attitude is that of nationalism and imperialism may be inclined to accept as a hypothesis the basic norm of his own national law. A person whose sympathy is for internationalism and pacifism may be inclined to accept as a hypothesis the basic norm of international law and thus proceed from the primacy of international law. From the point of view of the science of law, it is irrelevant which hypothesis one chooses. But from the point of view of politics, the choice may be important since it is tied up with the ideology of sovereignty."[16]

The question we raise about all the traditional theories cuts much deeper, however, than a simple suggestion that the theories are but reflections of preferences for nationalism or internationalism. The point we would emphasize is that all the theories, by their focus upon normative-ambiguous rules and putative interrelations of such rules, rather than upon processes of authoritative decision in different community contexts and the interrelations of such processes, fail to offer an adequate framework of inquiry even for accurate description of the complex patterns of authority and control, including patterns of inclusive and exclusive decision, which in fact prevail in the world arena, much less for scientific investigation of the factors which account for such patterns or for determining the consequences of differing patterns upon shared values. It is possible that an organization of inquiry which focusses not upon rules and hierarchies of rules, but rather upon social and power processes of differing territorial compass, and the interpenetration of such processes by patterns in control and authority of many different types and intensities, might facilitate the more effective performance of relevant intellectual tasks, such as: the description of past patterns, accounting for the factors affecting patterns, projecting future patterns, appraising patterns in terms of shared values, and the invention and evaluation of alter-

16. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 446-47 (1952).

natives in principles and procedures.[17] It is this possibility that we now propose to examine.

World Social Process

The most obvious fact in a world arena exhibiting artificial satellites, intercontinental ballistic missiles, and nuclear warheads is clearly that of interaction on a global scale, in the sense of effects transcending all state or other man-made lines. Peoples on opposite sides of the globe who never confront each other nevertheless continuously affect each other in a process of inter-determination with respect to all values which for rough descriptive purposes may be termed a world social process.[18] The actors in this process are individual human beings; but individuals affiliate with many different groups and act through the form of, or play roles in, organizations of the greatest variety, including not only the nation-state but also international governmental organizations, political parties, pressure groups, and private associations of all kinds. The values sought by the individual and his groups in these interactions embrace the whole range of human preference and may be conveniently categorized in such terms as power, wealth, enlightenment, respect, well-being, skill, rectitude, affection, and so on. The accumulated values which the individual and his groups employ as bases of power to influence outcomes in particular interactions cover an equally broad range and may be similarly categorized. The practices engaged in by actors to effect outcomes range through a spectrum of modalities from maximum persuasion, at one extreme, to maximum coercion, at the other, and include all the varying instruments of policy commonly described as diplomatic, ideological, economic and military. The effects upon the distribution of values in fact achieved by actors in any particular interaction vary of course enormously in the range of their inclusivity or exclusivity and in the degree of intensity of their impact upon particular values. Effects may be confined to a small group of individuals or a locality or a small territorial community or may extend to a whole state or group of states or to a continent, a hemisphere, or the globe. Intensities may vary from the searing flash of a nuclear explosion to the murmur of prayer at evening in the solitary chapel. In the contem-

17. The intellectual tasks regarded as indispensable to policy oriented inquiry about law are indicated in Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203 (1943).

The conception of international law and national law as interpenetrating power processes is amplified in McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order,* 61 YALE L.J. 915 (1952).

18. Preliminary orientation in the world social process may be found in LASSWELL, THE WORLD REVOLUTION OF OUR TIME (1951).

porary world social process with its ever accelerating rate of technological change, and in which the notion of interdependence is already a commonplace, it can confidently be expected, moreover, that both the range and intensity of interactions with inclusive effects will expand at a similar, ever accelerating, rate.

World Power Process

Only slightly less obvious than contemporary interaction on a global scale, is the further fact that, as a part of the world social process, effective decisions are in fact made and implemented which are as inclusive in their effects as the embracing interactions. Individuals located on opposite sides of the globe, even in the absence of direct confrontation, may, once again, by threat or imposition of severe deprivations or by offering high indulgences, make and enforce choices, which affect the distribution of values among themselves and others in interactions which for rough description may be called a world power process.[19] Significant participants in this effective power process include not only the individual, acting as a total personality in all his roles, but also all his groups and associations, such as nation-states, international governmental organizations, political parties, pressure groups, and private associations primarily devoted to the securing of values other than power. Decisions are taken in arenas, or situations, which may be described as internal or external to particular participants and as civic or military, depending upon expectations about the relative importance of coercion or violence and peaceful procedures in determining outcomes. In any particular instance, participants may employ any or all values as bases of power for projecting policy; the sum of the bases of power so utilized through time may be conveniently categorized in terms of control over people, resources, and institutions. The practices, the strategies and tactics, by which participants engage each other range, again, between the polar extremes of agreement and comprehensive violence. The instruments of policy wielded in reciprocal and continuous process of defense and attack encompass all the diplomatic, ideological, economic, and military techniques, each involving its own distinctive means and effects, and such techniques are commonly combined and coordinated to achieve the greatest possible impact in projecting policy. The effects of interactions embrace all the varying degrees of effective control achieved by a participant, in relation to other participants, over par-

19. Expansion of this theme appears in McDougal, *International Law, Power and Policy: A Contemporary Conception,* 82 HAGUE RECUEIL, 137 (1953). See also, SCHWARZENBERGER, POWER POLITICS (2d ed 1951); MORGENTHAU, POLITICS AMONG NATIONS (2d ed. 1954).

ticular value changes.[20] In a world of ever accelerating interdependence in all value processes, it may also reasonably be expected that decisions with inclusive effects will similarly accelerate in range, frequency, and intensity of impact.

The Role of Authority: The Process of Authoritative Decision

The precise role which expectations about authority, commonly called "law," play in the effective power process of the world is, unfortunately, not so easily discernible as are the facts of interaction and of decision with inclusive effects. More detailed observation of the processes of effective decision may, however, suggest that perspectives of authority have a much more influential impact upon decision than is sometimes imagined: confronted with deprivation or threats of deprivation of values, participants in the world social process commonly appeal to authority transcending the state to restrain deprivation or restore values; the expectations of people around the globe do establish certain decision-makers who commonly respond to appeals and almost invariably seek to make reasoned decisions and to justify and explain their decisions by reference to common policy and shared interests; and the continuous process of power balancing in the world arena, with all its myriad potentialities in reciprocity and retaliation, in most instances affords sufficient sanction to secure a measurable conformity to decision. It does not seem too much, therefore, to generalize that the world process of effective power exhibits as one of its integral elements a highly specialized process of authoritative decision.[21]

The decision-makers established by common expectation as authorized to make community decisions from inclusive perspectives are located primarily in government, national and international, but it may bear emphasis that such decision-makers function at all levels and in numerous institutional contexts within both the nation-state and international governmental organizations. The situations or arenas in which authoritative decisions are taken include both those in which states interact with each other, as composite bodies politic, and insist upon a common responsibility to and for inclusive policies and those within the internal structures of states in which various national officials apply inclusively prescribed policies to the greatest variety of participants. The first type of arena, though it occurs in unorganized interactions at many different points of contact between officials of differing states as well as at all levels in the structures of international

20. This analysis of power processes is developed in LASSWELL & KAPLAN, POWER AND SOCIETY (1950).

21. Documentation may be found in the cases recorded in any of the traditional treatises upon international law. See HYDE, INTERNATIONAL LAW (2d Rev. ed. 1945).

government, we label "external." The second type, occurring only within the governmental structures of a single state, we label "internal." The bases of power at the disposal of authorized decision-makers to secure conformity to decision include the bases of all participants in the world arena who estimate that they can best maximize their own particular values by supporting common policies. The particular authoritative functions performed by decision-makers embrace not only the prescription and application of inclusive policies, but also the performance of an intelligence function for the guidance of rational decision; the informal recommendation of policies for formal prescription; the invocation of the application of community policy and power; and the appraisal and termination of policies.[22] In the performance of some of these latter functions, participants other than national or international officials, such as individuals, private associations, pressure groups, and political parties may, of course, play important roles. The aggregate effects of this specialized process of authoritative decision may be generalized as the formation and application of inclusive community policy for allocation of competence between the general community and particular states, with all the attendant detailed consequences in terms of relative control over particular values.[23]

The Problem Restated

From these broad outlines of world social and power processes, including that of authoritative decision-making, it may now be possible to project a more usable conception of international law. For purposes of policy-oriented inquiry, the most appropriate conception requires emphasis not upon rules alone or operations alone, but upon rules *and* operations, and, further, not upon authority alone or control alone, but upon authority *and* control. Rules taken alone cannot be made to serve adequately either to describe decisions, or to account for decisions, or to predict decisions, or to appraise the consequences of decision, much less to perform all these tasks at once. Focus upon operations only—when among the most important variables affecting decision are the perspectives of participants, including their demands for values, their identifications, and their expectations about past and

22. This categorization of policy functions is outlined in LASSWELL, THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS (Bureau of Governmental Research, University of Maryland 1956).

23. As has been suggested above we do not postulate any given degree of universalism in these processes. In a world arena exhibiting a number of contending systems of public order, each demanding completion on a global scale, the existence of rival "inclusive" processes and policies cannot be ignored. The proponent of a public order of human dignity can only seek, as we will suggest in conclusion, to promote the triumph of structures and functions of authority which best serve his fundamental goal values.

future events—is equally sterile. In comparable token, authority alone, when effective power is not at its disposal and expectations of decision in accordance with community prescription lack realism, is not law but sheer illusion. Effective control, on the other hand, when it asserts decision, in the sense of imposition or threat of severe deprivation, without regard for community expectations about how and what decision should be taken, is not law but naked power or unilateral coercion. The recommendation we make, from perspectives of human dignity and for efficiency of inquiry into varying patterns of authority and control, is, accordingly, that international law be regarded, not as mere rules, but as a whole *process* of authoritative decision in the world arena, a process in which authority and control are appropriately conjoined and which includes, along with an inherited body of flexible prescriptions explicity related to community policies, both a structure of established decision-makers and a whole arsenal of methods and techniques by which policy is projected and implemented.[24]

It is scarcely necessary, in order to complete the re-statement in policy-oriented terms of our general problem of the impact of international law upon national law, to offer a similarly extensive analysis of the social and power processes within any single state. Exactly comparable analysis could be offered of national social and power processes in terms of participants (government officials, parties, pressure groups, private associations, and individuals), situations of interaction (institutional structures, such as government), base values (control over people, resources, institutional arrangements), strategies and practices (varying instruments of policy and authority functions), and outcomes (effects upon values);[25] and an exactly comparable recommendation could be made, with at least no less persuasion, that national law, like international law, may be most usefully regarded, not as a mere body of rules, but as the whole of a specialized process of authoritative decision. The one point which perhaps requires explicit note is that the processes of authority within any single state do project to the attention of officials of other states certain officials with apparent competence, in terms of national authority, to perform multiple functions in the world arena. Such functions include not only engaging in all the modalities of the ordinary processes of persuasion and coercion between states and making claims against other states

24. The argument for this conception is made at some length in McDOUGAL, *The Policy Science Approach to International Legal Studies*, UNIVERSITY OF MICHIGAN LAW SCHOOL, INTERNATIONAL LAW AND THE UNITED NATIONS 43 (1955).

25. For details, see McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915 (1952).

before authorized decision-makers for the application of inclusive policies and for redress of alleged wrongs, but also, in what Professor Scelle has felicitously called *le dedoublement fonctionnel,* representing their state as authoritative decision-makers of the general community in prescribing and applying inclusive policies for all states.[26]

From the perspective of our recommended conception of law, both international and national, as a process of authoritative decision, the problem of the impact of international law upon national law may now be given a much sharper focus. The problem is not, as the Austinians think, one of determining a relationship between mere rules of international morality and exclusive sovereign command, or, as the dualists think, of achieving some kind of a logical explanation of how absolutely sovereign states can be subordinated to, or coordinated by, "binding" international rules, or, as the monists think, of demonstrating the common "validity" of a hierarchy of rules by syntactical derivations from the top of a rule pyramid downwards or from the bottom upwards. The problem is rather one of the reciprocal impact or interaction, in the world of operations as well as of words, of interpenetrating processes of international and national authority and control. The relevant hierarchies, if hierarchies are relevant, are not of rules but of entire social and power processes. The world power process as a whole may indeed perhaps be insightfully viewed as a complex hierarchy of power processes of varying degrees of comprehension (global, hemispheric, regional, national, local), with the more comprehensive affecting "inward" or "downward" the less comprehensive, and the latter in turn affecting "outward" or "upward" the former. The metaphor of "nesting" tables or cups might be apt if such tables and cups could be conceived as being in process of constant interaction and change. On the level of formal authority, there is in the power processes a thorough, continuing interpenetration of decision-makers, structures of interaction, and demanded policies, with the officials of international authority, for example, often acting in the arenas of national authority, and vice versa. On the level of effective power, of the factors which actually shape authoritative decision, it is a commonplace that individuals, private associations, parties and pressure groups bring their base values to bear upon all levels of authority, and with little respect for state boundaries. The important questions are: how, and with what access to decision by interested participants, are inclusive policies, purporting to express a common interest, actually prescribed in the world arena for regulating the practices of states; what balance between the inclusive com-

26. SCELLE, *Le Phénomène Juridique du Dédoublement Fonctionnel,* RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION: FESTSCHRIFT FÜR HANS WEHBERG, 324 (1956).

petence of the general community of states and the exclusive competence of particular states, in terms of control over interactions assigned to each, is in fact established by such prescription; in what degree, and by what practices, are inclusively prescribed policies effectively applied in action, in external and internal arenas, to regulate states both in their external strategies and in their internal policies; and, finally, how compatible are the aggregate effects achieved, by the impact of international upon national processes of authority, with shared values of human dignity?[27]

Inquiry pursuant to these questions could of course be organized in many different ways, with initial focus upon any of the most significant elements in either of the two relevant interpenetrating processes of authority. The most convenient mode of organization would appear, however, to be one which takes off from the differences indicated above between "external" and "internal" arenas. Participants, claims, decision-makers, and procedures commonly differ with these differing arenas and external arenas serve in a meaningful sense as higher "courts" to which appeal may be taken from decisions in internal arenas regarded as incompatible with inclusive policies.

In external arenas, as we have defined them, the claimants are most commonly states interacting with each other as composite bodies politic; the claims are for the prescription or application of inclusive policy reflecting common interest; the decision-makers include both the officials of the contending states and other states and international officials; and the procedures embrace the manifold informal and formal modalities made available by both international and national structures of authority.

In internal arenas, as we have defined them, the claimants may include officials of the state of the forum or of other states but they commonly include also individuals and private associations, as well as occasionally political parties and pressure groups; the claims are for the application either of inclusively prescribed policies or of opposing exclusive national policies to the interrelations of the claimants, whether within the territorial domain of the state of the forum or elsewhere; the decision-makers are those established by the internal structures of authority of a particular state; and the appropriate pro-

27. Confusion may be caused by the fact that it is inclusive policies, as reflected in the broad constitutional outlines of world public order, which seek to establish and delimit both inclusive and exclusive competence. Another sequence in asking the questions with which we are concerned may add to clarity: How does world public order establish and delimit inclusive and exclusive competence? How in detail is inclusive competence exercised in the prescription and application of policies in arenas external to particular states? How in detail is exclusive competence exercised by particular states in the application of inclusive policies and in the prescription and application of exclusive policies in their internal arenas?

cedures are similarly those established by the internal structures of that state. Claimants who regard decisions taken in these latter, internal arenas as unlawful because of conflict with inclusive policies, may, as indicated, by community expectation and practice secure their states to appeal for them to the external arenas of "last resort."

For indicating certain broad outlines in answer to the questions we have posed, we begin with external arenas and will proceed to internal arenas, offering finally a modicum of appraisal and recommendation.

I.

THE PRESCRIPTION AND APPLICATION OF INCLUSIVE POLICIES IN EXTERNAL ARENAS

Despite suggestions still sometimes ventured that the only international law is that law which a particular state may make effective within its own boundaries, it is not difficult to observe that inclusive policies, relating to all values and of the greatest importance for both common and particular interests, are today being continuously prescribed and applied in external arenas for the effective regulation of both the external strategies and internal policies of states.

The decision-makers external to a particular state who participate in the process by which inclusive policies are prescribed and applied to that state, include of course not only officials of international governmental organizations (considered comprehensively to embrace international courts, specially constituted arbitral tribunals, and various specialized agencies), but also the officials of all other states participant in the general community. Comprehensive reference would embrace as well as multitudinous individuals and private associations and other groups, operating across state lines, who both engage directly in some of the authority functions (such as intelligence, recommending, and invoking) and also bring varying amounts of effective pressure to bear upon authoritative decision-makers in the performance of all functions. It is sometimes suggested that because state officials, who on some occasions are claimants being subjected to authority, are on other occasions decision-makers authorized by the general community to participate in the prescription and application of inclusive policies, there are no "objective" decision-makers in external arenas. This suggestion would appear to ignore, however, both that the very fact that state officials must be alternately claimants and decision-makers requires a promise of reciprocity and clarification of common interest in all claims and decisions and that the officials of other states, as well as international officials, are always arrayed

en banc to reject idiosyncratic interpretations by particular states. It may perhaps be worth adding that, because of the emergence of many new states, the establishment of many new international governmental organizations, and the accelerating multiplication of private associations and groups of all kinds, participation in decision-making in external arenas exhibits a very definite trend toward greater democracy.

Authority Functions in External Arenas

The detailed practices or modalities by which decision-makers external to a particular state participate in the complex processes of bringing inclusive policies to bear upon that state, may perhaps be most conveniently described, as prior casual references have anticipated, in terms of certain specific authority functions, common to most governmental processes, under such labels as intelligence, recommending, prescribing, invoking, applying, appraising and terminating. By an intelligence function we refer to the practices in obtaining, processing, and disseminating information (about trends, conditions, policies, and estimates of future conduct) by which decision-makers prepare themselves for decision. Recommendation includes the promotion and advocacy of specific policy alternatives. Prescription refers to the projection or enactment of policy as authoritative community rule or expectation. Invocation means the provisional characterization of conduct according to the requirements of prescriptions, including demand for application in concrete instances. Application is the administering of prescriptions, the final characterization of conduct in terms of conformity with prescriptions, in concrete instances. Appraisal is the assessment of the success or failure of policy. Termination is the ending of prescriptions and of arrangements established under their authority.[28]

Even the most impressionistic reference to each of these functions may serve to suggest the very great variety in role and structure by which today all functions are performed in external arenas:

> The intelligence function is performed not only by state officials, in the traditional modes of diplomats and spies, and officials of international governmental organizations, with vast staffs and resources dedicated to the purpose, but also by wandering individuals, political parties, the private associations of business and religion, educators, scientists, operators of mass media of communication, and so on. The nuances in technique and structural interaction almost defy suggestion.
>
> The recommending function—so easily does intelligence move into promotion and advocacy—is performed by equally

28. LASSWELL, *op. cit. supra* note 22, offers more detail.

variegated officials, individuals and groups. This is indeed perhaps the principal function of the burgeoning host of new intergovernmental organizations and specialized agencies.

The function of formally prescribing policy as authoritative community expectation is, however, reserved to the officials of states and of international governmental organizations and agencies. State officials act by the traditional modes of agreement and "custom," the latter ambiguous word referring to the establishment of community expectations by derivations from past uniformities in conduct alleged to have occurred with perspectives of authority. The only international organizations commonly conceded explicit competence to create prescriptions remain international courts and arbitral bodies, but as the number of organizations and their intelligence and recommending activities increase, the thin line between recommendation, sustained by effective power, and prescription becomes continually thinner.

The invocation function in one arena or another is open to all participants. Only states and international governmental organizations may have access to the International Court of Justice, but individuals and private associations have access to specially constituted tribunals. Pressure groups are on occasion explicitly granted access to the structures of international governmental organizations.

The function of final application of community prescription in concrete instances of controversy is, again, one reserved to the officials of states and international governmental organizations. State officials act not only within the institutional structures of their own states, as will be described in detail below, but also in countless day-to-day and minute-to-minute interactions from foreign office to foreign office, and otherwise, with the officials of other states. Historically, international courts and specially constituted tribunals have been most obvious among the appliers of community policy, but constituent elements of the United Nations, such as the Security Council and the General Assembly, have begun to play at least as conspicuous a role.

The task of appraising the consequences of policy is of course a continuous activity of all participants. Occasionally, however, either specialized commissions or agencies or specialized structures within states on international governmental organizations are explicitly created for the more economic performance of this function.

The terminating function, especially important in external arenas because of the absence of fully competent legislative institutions is, finally, performed, both informally and formally, by various decision-makers. State officials act

> in this task, as in prescription, by both agreement and unilateral application of "customary" expectations, but guiding policies are different. International governmental organizations, and especially the United Nations, fortunately play an ever-increasing role in aiding transition from old policies to new.[29]

Interactions of States Regulated in External Arenas

The range of interactions between states with respect to which inclusively prescribed policies are projected by the process of decision, outlined above, for regulation of the external strategies and internal policies of particular states is enormous, extending practically to every aspect of the international and various national power processes which, taken together, constitute the world power process. The exact balance achieved with respect to any particular aspect of interaction or controversial problem between the inclusive competence of the general community and the exclusive competence of particular states is, of course, a function of many interdependent variables and differs from time to time and context to context. The varying allocations achieved with respect to all problems are commonly described in authoritative literature under the technical, dichotomous labels of "international concern" and "domestic jurisdiction" (a new-found equivalent of "sovereignty" and "independence"), the former label referring to matters conceded to inclusive community competence, and the latter to matters relegated to particular states for decision, apart from their explicit agreement to the contrary, according to their own conceptions of their peculiar national interests. In a decentralized world arena some such dichotomy, as the late Lawrence Preuss so effectively demonstrated, appears inescapable.[30] When authority is effectively distributed between a central community and various component communities, appropriate technical words are required to describe the distribution. It should be clear, however, that words at the level of abstraction of "international concern" and "domestic jurisdiction" are more labels for describing the consequences of decision than explanatory factors accounting for decision, and that such words do not refer to "irreducible spheres of rights" or to "impenetrable barriers" precluding a moving and variable line between inclusive and exclusive competence.[31] Like the Tenth Amendment in the United States Con-

29. The summary statements we offer of how the various policy functions are today performed may be documented by reference to the various systematic treatises upon international relations and international law. See, for example, the works of *Schwarzenberger, Morgenthau,* and *Hyde* referred to above.

30. Preuss, *Domestic Jurisdiction,* 74 HAGUE RECUEIL 555, 556, 568 (1949).

31. *Id.* at 568. See also McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action,* 59 YALE L.J. 60, 77 (1949).

stitution, the technical concept "domestic jurisdiction" merely states that matters which are not conceded to inclusive competence are reserved for exclusive. Like "delegated powers," the technical concept "international concern" merely states that matters which are not reserved to exclusive competence are delegated to inclusive.

For impressionistic indication of the broad range of interactions between states, control of which is commonly regarded as within inclusive competence and for which inclusive policies are prescribed and applied in consequential degrees, brief reference may be made to some of the more important policies with respect to each of the principal elements or phases in the inter-penetrating power processes: *participants, arenas, bases of power, practices,* and *effects.* It will be kept in mind as we summarize that an indication of the scope of inclusive competence is, by inverse statement, equally an indication of the residuary exclusive competence. We proceed phase by phase.

First, *participants.* Inclusive prescriptions even impose limits upon what territorially organized communities may be regarded as "states." Limits are imposed in terms of control over people, control over territory, and stability in governmental structures. Of the some two hundred territorial communities in the world, only about 90 are commonly regarded as meeting community requirements for states.[32] Dependent bodies politic and the internal subdivisions of states are severely restricted in their access to authority functions.

Once the general community, furthermore, recognizes a territorially organized community as a "state," it imposes similarly severe limits upon the extent to which the particular body politic can escape its international obligations by alleging changes in its legal status as a "state." The policies of maintaining stability in expectations about appropriate participants, and the needs of security in undertakings, are deemed important enough to warrant regulation by inclusive decision of changes in effective control and formal authority, irrespective of internal prescriptions.[33] Professor Borchard comprehensively summarizes:

> "A general government *de facto,* having completely taken place of the regularly constituted authorities in the state, binds the nation. So far as its international obligations are concerned, it represents the state. It succeeds to the debts of the regular government it has displaced, and transmits its own obligations to succeeding titular governments. Its loans and contracts bind the state, and the state

32. BRIGGS, *op. cit. supra* note 11, at 65; see also Briggs, *New Dimensions in International Law,* 46 AM. POL. SCI. REV. 677 (1952).

33. The reference is to the traditional doctrines and practices of state and governmental succession. See BRIGGS, *op. cit. supra* note 11, at 194 *et seq.*

> is responsible for the governmental acts of the *de facto* authorities . . . The legality or constitutional legitimacy of a *de facto* government is without importance internationally so far as the matter of representing the state is concerned . . . ."[34]

The 1923 Tinoco Arbitration between Costa-Rica and Great Britain[35] bears eloquent testimony to the same conclusion. Financial undertakings by the revolutionary Tinoco government, which held effective power for some thirty months under a new constitution, were repudiated by Costa-Rica on the ground that Tinoco's seizure of power did not conform to the prior constitution. Rejecting this contention, Taft, Arbitrator, held that inclusive, rather than exclusive prescriptions determine whether a *de facto* authority is recognized as a participant in external arenas. He reasoned:

> "To hold that a government which established itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true."[36]

Second, *access to arenas.* Though inclusive policy prescribes some limits upon states in recognizing other territorial communities as states, such as with respect to premature recognition of rebel groups, it still accords states a very large discretion, in primitive way, to determine whether they will "recognize" newly emerged bodies politic as equal participants in processes of authority, with reciprocal access to arenas in their national structures and all attendant benefits. Fortunately, however, the pressures of effective power processes ordinarily in time remedy the lack of legal duty and compel recognition, and a vast amount of inclusive policy prescribes the consequences, for many and various interactions, of recognition, failure of recognition, and withdrawal of recognition.[37]

Problems of membership, representation, and credentials in international organizations and tribunals are controlled largely by express agreement and customary international prescription is confined generally to principles of interpretation.[38] The jurisdictional doctrines of

34. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 206-7 (1915).
35. 18 AM. J. INT'L L. 147 (1924).
36. *Id.* at 154.
37. BRIGGS, *op. cit. supra* note 11, at 99.
38. 1 SOHN, CASES ON UNITED NATIONS LAW (2d ed. 1956).

private international law, including the doctrines of acts of states, as well as treaties of "friendship, commerce, and navigation," impose upon states a relatively high degree of duty to admit to their authoritative arenas both the private associations chartered by other states and the individual nationals of other states.[39]

Third, *bases of power*. We will deal with control over resources, control over people, and freedom in institutional arrangements.

In recent decades community prohibitions of unauthorized coercion have attempted to secure to state officials a relatively high degree of continuous control over their territorial base. Other important prescriptions have long governed the determination and administration of boundaries, especially sea boundaries. Still other policies, as old as the Romans, rewarding priority in time, effectiveness of control, and initiative in the exercise of peaceful activity are honored for stabilizing claims to new and unappropriated resources. Policies designed to promote the fullest, conserving and productive use are being continually projected in abundant measure for balancing inclusive and exclusive claims to sharable and strategic resources, such as the oceans,[40] international rivers, international waterways, polar regions, and air space, and are beginning to be explored for outer-space.[41]

Inclusive policies stabilize the claims of state officials to the control of people, as members of their communities, by the traditional doctrines of ius soli and ius sanguinis and by certain ancillary principles about naturalization and denaturalization, subsequent to birth. The recent *Nottebohm* case,[42] imposing upon states the requirement of a "genuine connection" between the individual and the state community for naturalization to command deference from other states, is a sufficiently dramatic example of the assertion of general community power to be worth special mention.

In the *Nottebohm* case, Liechtenstein claimed compensation from Guatemala upon the ground that the latter had violated international law in seizing property, as alleged enemy property, belonging to a citizen of Liechtenstein who had been domiciled in Guatemala. The Court refused to give effect to the bestowal by Liechtenstein of its nationality upon Nottebohm, stating that although "international law leaves it to each state to lay down rules governing the grant of its own nationality," still:

39. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY (1945-50).

40. McDougal and Burke, *Crisis in the Law of the Sea: Community Perspective versus National Egoism*, 67 YALE L.J. 539 (1958); McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955).

41. BRIGGS, *op. cit. supra* note 11, at 239, offers general citations. See also McDougal & Lipson, *Perspectives for a Law of Outer Space*, 52 AM. J. INT'L L. 407 (1958).

42. [1955] I.C.J. REP. 4.

> "[A] State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's *genuine connection* with the State which assumes the defence of its citizens by means of protection as against another State."[43]

The Court explained:

> "[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."[44]

Customary international law imposes few limits upon the controls which state officials may assert over their own nationals, but projects, in the form of rules about "the rights of aliens" or the "diplomatic protection of citizens abroad," substantial limitation upon what state officials may do to the nationals of other states.[45] It may be that developing perspectives of human rights will close this gap and make available to citizens protection comparable to that established for aliens.

The freedom of states to arrange and control their own internal institutions as bases of power has been subjected to little inclusive regulation.[46] The traditional principle has been, in the language of Thomas Jefferson, that "every (state) may govern itself according to whatever form it pleases, and change these forms at its own will."[47] The more recent formulation in the United Nations Declaration of the Rights and Duties of States is closely comparable:

> "Every State has the right . . . to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government."[48]

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43. *Id.* at 23 (Italics added).
44. *Ibid.*
45. BRIGGS, *op. cit. supra* note 11, at 601.
46. SOHN, *op. cit. supra* note 38, at 575.
47. 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 177-78 (1940).
48. Art. 1; Annex to U.N. Gen. Ass. Res. No. 375 (IV), U.N. Gen. Ass. Off. Rec. 4th Sess., Resolutions, p. 67 (1949).

For limiting this exclusive competence to control internal institutions, there is, however, a countervailing principle of inclusive policy that defects in a state's institutional structure may not be pleaded to avoid performance of international duty. The purport of this principle is establishment of a complementary responsibility for devising and maintaining internal institutional structures adequate for the implementation of policies inclusively prescribed. Thus, in the *Alabama* claims, the Arbitral Tribunal declared, with respect to Great Britain's failure to enact legislation necessary for carrying out a duty to prevent hostile use of neutral territory, that "the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed."[49] The principle had been carefully formulated in the contention of the United States:

> "It must be borne in mind, when considering the municipal laws of Great Britain, that, whether effective or deficient, they are but machinery to enable the Government to perform international duties which they recognize, or which may be incumbent upon it from its position in the family of nations. The obligation of a neutral State to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation; but it can neither create nor destroy it, for it is an obligation resulting directly from international law, which forbids the use of neutral territory for hostile purpose."[50]

Fourth, *practices*. We will deal with policies which focus about the two polar extremes of coercion and persuasion.

The knowledge is common today that after long centuries of development culminating in the recent formulations of the League of Nations, the Pact of Paris, the United Nations Charter, and the Nuremberg Charter, Verdict, and Principles, the general community of states has achieved a distinction between permissible and non-permissible coercion, with that coercion prohibited which creates in a target state reasonable expectation that it will be forced to use the military instrument in defense of its independence and territorial integrity.[51] The prohibited coercion embraces not merely the use of the military instrument to attack the values of the target state but the use of any and all instruments of policy, diplomatic, ideological,

49. 7 MOORE, DIGEST OF INTERNATIONAL LAW 1061 (1906).

50. PAPERS RELATING TO THE TREATY OF WASHINGTON, GENEVA ARBITRATION 47 (1872).

51. McDougal & Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771 (1958); *The Initiation of Coercion: A Multi-Temporal Analysis*, 52 AM. J. INT'L L. 241 (1958).

economic, and military, whether used singly or in combination, if the coercion which ensues is of the requisite intensity and magnitude. Permitted coercion is characterized triply as coercion in the ordinary interactions of states which does not rise to the requisite intensity; coercion which extends even to the use of military violence if it is response in self-defense to prohibited coercion by others; and coercion which is exercised in organized, general community police action. The technical distinctions between non-permissible and permissible coercion are taken in terms, on the one hand, of "aggression," "war of aggression," "breach to peace," "threat to the peace," etc., and, on the other hand, of "lawful interaction," "self-defense," and "police action." Elaborate community machinery, with a great variety of different decision-makers of differentiated function, has been established for the administration of these prescriptions, and it is a hope fervently shared in many quarters of the globe that such administration may be more effectively pursued.

It may be noted in addition that constitutional and statutory provisions internal to a state are no defense to charges of violating the law of war. The Nuremberg Charter and verdict reject both "acts of state" and "superior orders" as unqualified defenses.[52]

Many inclusive policies are designed to make easier the processes of persuasion and agreement. Perhaps the oldest and most uniformly observed of all doctrines protect diplomats and afford them facilities for negotiation. The law of treaties presents a vast body of principles of high rationality and common effectiveness, with respect to the formation, application, interpretation, and termination of agreements.[53] It is unfortunate, however, that customary international law contains no agreed requirement, even with the contemporary prohibition of aggression, that states must actually exchange agents and engage in peaceful interactions, though effective pressures again ordinarily achieve what authoritative doctrine does not. Similarly, inclusive prescriptions about the constitutional structures and competence which states must maintain for performance of a peaceable, responsible role in world social and power processes are most primitive in reach and content. Though the very definition of a state, for authoritative decisions, requires, as we have seen, a certain stability in governmental structures and a "full capacity to enter into relations with other states,"[54] no particular procedures or standards for procedures are

52. SOHN, *op. cit. supra* note 38, at 845.

53. BRIGGS, *op. cit. supra* note 11, at 836; Parry, *Some Recent Developments in the Making of Multipartite Treaties*, 36 TR. GROTIUS SOC. 147 (1952).

54. Art. 1 of the 1933 *Montevideo Convention on Rights and Duties of States*, U.S. T.S. No. 881.

stipulated. The problem becomes of the most urgent importance when a particular state seeks to avoid performance of an apparently validly concluded agreement upon the ground that its internal constitutional requirements were not in fact met. So important is this problem in our general inquiry that we reserve it for later, more detailed, technical treatment.

Fifth, and finally, *effects* upon jurisdiction. For regulation of the claims asserted by the various states to authoritative control over particular value changes, both within and beyond their territorial boundaries, the general community of states prescribes an elaborate set of flexible and complementary doctrines, designed both to allow any particular state substantially affected by events to assert its authority over such events and yet to achieve a compromise between conflicting claims in a public order which will permit the world's work to get on. One set of prescriptions, sometimes called the "bases" of jurisdiction—the principle of territoriality, the principle of nationality, the principle of universality, and other principles—authorizes states, which have secured a degree of effective control over persons or resources, to exercise their authority, under stipulated conditions of significant impact upon national values, to make and apply their law to certain particular events in which such persons or resources have been involved.[55] A second set of prescriptions requires states, despite the fact that they may have acquired effective control over the persons and resources involved, to yield that control in deference to the "acts of state" or "immunities" of other states and to permit such states to make and apply their law to the events in question.[56] Still other prescriptions seek to individualize and make applicable the policies embodied in both sets of prescriptions, both those expressing the primary assertions of authority and those requiring deference to others, in a way to take into account the special characteristics of the various spatial domains: land, the oceans, air space, and outer space.[57] The function of all these various prescriptions is not arbitrarily to dictate decision but rather to focus the attention of decision-makers upon all the significant features of a context in controversy and to assist in assessment of the varying relevance and importance of such features in determining degree of impact upon national values. The overriding policy infusing all prescriptions is that of creating a stability in the expectations of state officials that the aggregate flow of controversies

55. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953). WOLFF, PRIVATE INTERNATIONAL LAW (2d ed. 1950).

56. Comment, *"Act of State" Immunity*, 57 YALE L. J. 108 (1947-8); Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148 (1953-4).

57. COOPER, THE RIGHT TO FLY (1947); HIGGINS AND COLOMBOS, INTERNATIONAL LAW OF THE SEA (3d ed. 1954).

will be handled in the "agreed" ways and that they may, hence, make their power, wealth, and other value calculations with minimum disruption from arbitrary and unrestrained coercion and violence. The net effect is, in sum, that a state substantially affected by any particular event is authorized to make and apply law for that event, upon condition that it take into account the degree of involvement of the values of other states in the same or comparable events, and that the community of states as a whole achieves a measure of subordination to public order of other participants—individuals, private associations, pressure groups, and parties—in a relatively ordered exploitation of the world's resources, sharable and non-sharable.

Sanctions in External Arenas

It may perhaps require emphasis that, despite the absence from the world arena of a centralized executive organ, there are ample sanctions—if sanctions be defined as implementing techniques or available base values—at the disposal of the general community of states, assuming a willingness by states to employ sanctions, for securing that inclusive prescriptions are honored in actual conduct by a reasonable conformity. Exactly the same base values (power, wealth, respect, enlightenment, and so on) and exactly the same instruments of policy (diplomatic, ideological, economic, and military) may be used in support as in attack upon inclusive policy.[58] The history of state interactions reveals a constant flow of examples in which all these base values and all these instruments of policy have been employed, in many differing combinations, and in organized and unorganized modalities, for the enforcement of community prescription. The difficulty is that, on occasion, what has been missing is, not efficient procedures, but rather the appropriate predispositions of decision-makers, the general community consensus, necessary to sustain the application of sanctions. Decision-makers act, as we have seen, like other men, to maximize their values as individuals and as members of all the groups and associations, including the state, with which they identify. The important decision-makers of the world arena have, as indicated above, been able to clarify a long-term common interest in the enforcement of many inclusive prescriptions—such as with respect to the allocation of resources, the protection of diplomats, the making of agreements, the distribution of jurisdiction over particular events, and so on—and for sanctioning such prescriptions, have established an elaborate network of expectations about reciprocal claim

58. *Reports of the Collective Measures Committee, United Nation's General Assembly, Official Records, Sixth Session, Supplement No. 13* (A/1891) (1951) and *Seventh Session, Supplement No. 17* (A/2215) (1952); WILD, SANCTIONS AND TREATY ENFORCEMENT (1934).

and mutual tolerance, promise of reciprocity and threat of retaliation, which in the main secures a high degree of effective application. For other prescriptions, such as the community prohibition of unauthorized violence, common interest has not yet been clarified in comparable degree, effective elites are not yet fully convinced that in destroying others they will destroy themselves, and expectations of enforcement are accordingly low. The task of enhancing the effectiveness of inclusive prescriptions in the world arena remains, in measure, a task of enlightenment.

Limitations Upon the Effectiveness of Inclusive Policies

There are of course, despite the highly optimistic picture we have sketched above, important continuing limitations upon the effective capacity of the general community of states to subject dissentient members to its inclusive policies. Such limitations include, as a reflection or expression of the absence of centralized legislative, executive, and judicial organs: the characteristic insistence by states upon their own unilateral competence, apart from explicit agreement otherwise, to make their own exclusive interpretations both of customary international law and of any agreements to which they may have committed themselves; the reluctance and common refusal of international officials, judicial and other, to assume competence or jurisdiction with respect to interactions or controversies in the absence of a clear consent by states party to the interaction or controversy; and the still prevailing unwillingness of states to submit what they regard as important national interests in controversies to the determination or arbitrament of common organs or disinterested third-party decision-makers. Counterbalancing these very real limitations, there are, however, fortunately certain other important factors in contemporaneous community expectations about authority, including such items as: states other than the participant insisting upon its own unilateral competence to determine its obligations are not required to accept such determination as authentic interpretation of customary law or relevant agreement, but may make their own interpretations; international officials, when confronted with alleged conflicts between inclusive international prescription and exclusive national prescription, almost invariably give effect to the inclusive prescription; and an increasingly prevalent view seeks to clarify an authoritative community expectation that states may not impose any defects or inadequacies in their own constitutions or national laws against others as defenses to obligation under either customary international law or agreements apparently concluded in proper form. For balanced perspective, we may look briefly at both these continuing limitations and counter-balancing factors.

Auto-Interpretation

The special prerogative claimed by states to interpret their own obligation, and in a sense to act as judges of their own cause, has long been regarded as a conspicuous Achilles heel in international law. Thus, Professor Leo Gross has felicitously written:

> "It is generally recognized that the root of the unsatisfactory situation in international law and relations is the absence of an authority generally competent to declare what the law is at any given time, how it applies to a given situation or dispute, and what the appropriate sanction may be. In the absence of such an authority, and failing agreement between the states at variance on these points, each state has a right to interpret the law, the right of auto-interpretation, as it might be called."[59]

This does not mean, however, that any single state may authoritatively impose, despite any effective power simply to refuse to perform, its own unilateral interpretation upon other states. By the principle of equality of states, each state has the same license. As Arbitrator Nelson stated in the case of *The David J. Adams,* in holding that neither Canada nor the United States was necessarily bound by an interpretation rendered by the other:

> "The fundamental principle of the juridical equality of States is opposed to placing one State under the jurisdiction of another State. It is opposed to the subjection of one State to an interpretation of a Treaty asserted by another State. There is no reason why one more than the other should impose such a unilateral interpretation of a contract which is essentially bilateral."[60]

The more general principle is, further, quite commonly accepted, in clear exception to the doctrine of "acts of state," that states are not required to give effect to foreign laws or decisions which are considered to be contrary to international law.[61] Similarly, a unilateral determination by state officials of their rights and obligations in a particular context does not control an international decision-maker, obtaining jurisdiction, even in the same context. Thus, to German officials who urged an inherent right of self defense in their state as justification for invasion of Denmark and Norway, the Nuremberg Tribunal responded:

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59. Gross, *States as Organs of International Law and the Problem of Autointerpretation,* in LAW AND POLITICS IN THE WORLD COMMUNITY 76-7 (Lipsky ed. 1953).

60. 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 268 (1943); BRIGGS, *op. cit. supra* note 11, at 892.

61. Authorities are collected in BRIGGS, *op. cit. supra* note 11, at 405.

> "It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers, at the time of the conclusion of the Kellogg-Briand Pact, whether a preventive action was a necessity, and that in making her decision, her judgment was conclusive. But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[62]

Consent Required for Third Party Competence

The reluctance of international tribunals and organizations to assume competence over events in absence of the consent of participant states derives quite obviously from concern for both effectiveness and the will of the governed. Classic illustration of this reluctance is found in the decisions, in both contentious cases and advisory opinions, of the International Court of Justice and its predecessor. "There are," Sir Hersch Lauterpacht has written, "few rules of modern international law which are more widely acknowledged than the rule that the jurisdiction of international tribunals is derived from the will of the parties . . ."[63] Thus, in the famous *Eastern Carelia* case, when the Council of League of Nations asked the Permanent Court for its advisory opinion on the dispute between Finland and Russia about the status of Eastern Carelia, and Russia notified the Court of its refusal to take any part in the proceedings, the Court declined to give its opinion, emphasizing that no state could without its consent be compelled to submit to any form of specific settlement.[64] More recently in the case of *Monetary Gold Removed from Rome*,[65] concerning competing claims to certain gold seized in 1943 by the Germans and belonging at that time to Albania, when Italy, who had initiated the proceedings, challenged the Court's jurisdiction principally upon the ground that Albania was not a party, the Court upheld the objection, finding that the opposed claims raised issues which would require determination of the lawfulness, as between Italy and Albania, of an Albanian nationalization law. Opinion was offered that:

> "The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either ex-

62. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 208 (1947).
63. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 338 (1958).
64. P.C.I.J. SER. B., No. 5 (1923).
65. [1954] I.C.J. REP. 19.

> pressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the court's statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[66]

Similarly, in another recent case instituted by the United States against Russia, *Treatment in Hungary of Aircraft and Crew of the United States of America,* the Court, upon Russia's stating that it found unacceptable the United States' proposal to submit the dispute to the Court, simply ordered the case removed from the list.[67] In contrast, however, in *Interpretation of the Peace Treaties with Bulgaria, Hungary, and Rumania,*[68] the Court at least wavered in its consistency. In this case the Court rendered an Advisory Opinion requested by the United Nations' General Assembly even though the three named countries had not consented to the Court's jurisdiction. The Court endeavored to distinguish *Eastern Carelia,* but it has been suggested by a distinguished commentator that the bases offered for distinction are sufficiently tenuous to cast substantial doubt upon the continuing authority of the principle of consent.[69] More significant departure from the traditional principle of authority based upon consent may perhaps be noted in the United Nations Charter provision that "The organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."[70]

Competence Reluctantly Conceded

The reluctance of states by agreement to confer competence upon international officials or third-party decision-makers, may derive either from rational concern for short-term national interest in a modestly organized world arena or from less sharable demand for long-term privileged position. In an effort to preserve the largest possible domain for unilateral decision, state officials have commonly insisted upon distinguishing non-justiciable or "political" disputes and justiciable or "legal" disputes. This alleged distinction received

66. *Id.* at 32.
67. *Id.* at 103, 105.
68. [1950] I.C.J. REP. 65.
69. LAUTERPACHT, *op. cit. supra* note 63, at 354. See also Carlston, *Interpretation of Peace Treaties with Bulgaria, Hungary, and Rumania,* 44 AM. J. INT'L L. 728 (1950).
70. U.N. Charter, Article 2(6). See Morton, *International Agreements and Third States,* 15 GA. B. J. 417 (1953) for review of recent developments.
The significance of the advisory opinion of the International Court of Justice in Reparations for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. REP. 174, in recognizing the competence of the United Nations to impose obligations upon nonmembers is indicated in LAUTERPACHT, *op. cit. supra* note 63, at 311.

emphasis in Article 16 of the 1899 Hague Convention for Pacific Settlement, which made reference, in apparent effort to distinguish other questions, to "questions of a legal nature," including especially "the interpretation or application of international conventions," with respect to which "arbitration was recognized by the signatory Powers as an effective and equitable means of settling disputes not settled by diplomacy."[71] Some such dichotomy has been enshrined in almost every treaty of arbitration and adjudication since 1899, and was also incorporated in Article 36(2) of both the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice. This attempted distinction, as Judge Lauterpacht has so persuasively demonstrated, rests upon no identifiable variable or set of variables in either factual controversies or existing and possible processes of authoritative decision.[72] The distinction lies rather in the willingness or unwillingness of states to submit to inclusive decision: disputes that state officials are willing to have decided inclusively are characterized "legal" and justiciable; disputes that they are not willing so to submit are described as "political." Even controversies frequently regarded as justiciable have, further, at times been barred from the application of community prescription when the issues were thought to affect such expandable matters as vital interests, honor and independence. An historic model is found in Article 1 of the 1903 British-French arbitration treaty which reads:

> "Differences which may arise of a legal nature, or relating to interpretation of treaties existing between the two Contracting Parties . . . shall be referred to the Permanent Court of Arbitration . . . provided nevertheless, that they do not affect the vital interests, the independence, or the honor of the two States, and do not concern the interest of third Parties."[73]

Still other hardly less sweeping restrictions have excepted from arbitration any dispute which, in the opinion of either party "concerns questions affecting principles of its constitution," or touching "directly or indirectly" the territorial integrity of the parties.[74]

This traditional unwillingness of states to accept third-party

71. 2 SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 89 (1916).

72. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933) *Passim.*

73. 13 HERTSLET, TREATIES 492 (1869). For a great profusion of other examples see HABICHT, POST-WAR TREATIES OF PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES 992-93 (1931); Wilson, *Reservation Clauses in Agreements for Obligatory Arbitration,* 23 AM. J. INT'L L. 68 (1929).

74. See HABICHT, *op. cit. supra* note 73, at 994-96. See *e.g.,* the 1928 arbitration treaty with Sweden, *id.* at 858.

For further discussion of the general problem, see Waldock, *The Plea of Domestic Jurisdiction before International Tribunals,* 31 BRIT. YB. INT'L L. 96 (1954).

decision is excellently illustrated in the contemporary reservations in acceptances of the so-called compulsory jurisdiction of the International Court of Justice.[75] The British acceptance, for example, conceded jurisdiction only over disputes arising after adherence to the optional clause and only when arising from facts or situations subsequent to such acceptance.[76] This reservation stimulated other comparable acceptances and, ironically, a similar declaration by Iran was important to the Court's finding of lack of jurisdiction in the *Anglo-Iranian Oil Co. case,* brought by the United Kingdom against Iran.[77] The acceptance made by the United States has been described as creating obligation in "name only" and as tending to reduce "the acceptance of the Clause to the vanishing point of legal obligations."[78] Following the suggestions of Mr. John Foster Dulles, the well-known Connally reservation withheld from the Court jurisdiction in matters "essentially within the domestic jurisdiction" of the United States "as determined by the United States of America."[79] This reservation apparently stemmed from apprehension that without it "the Court might invade such fields as immigration, the tariff and the control of Panama Canal."[80] Other states including France followed the example of the United States,[81] but the experience of France indicates that the Connally reservation may not always serve national self-interest. In the *Case of Certain Norwegian Loans,* France asked the Court to take jurisdiction over a dispute with Norway concerning the payment of various Norwegian loans issued in France.[82] Although Norway had not attached a domestic jurisdiction-as-decided-by-Norway reservation, it relied upon the French Connally-type reservation in claiming that unilateral decision of the issue was within the competence of Norway. The Court, observing that its competency was

75. Contemporary unwillingness to accept obligation is indicated in the title of a recent survey, Waldock, *Decline of the Optional Clause,* 32 BRIT. YB. INT'L L. 244 (1955-56).

Some change in attitude appears in the address of Attorney General William P. Rogers to the International Law Association on September 2, 1958. Mr. Rogers called for a re-examination of the "domestic jurisdiction" reservation and urged its limitation in a way to give more support to the court. New York Times, September 3, 1958.

Certain hopeful developments are recounted in Lawson, *The Problem of the Compulsory Jurisdiction of the World Court,* 45 AM. J. INT'L L. 219 (1952).

76. For text see HABICHT, *op. cit. supra* note 73, at 881.

77. [1952] I.C.J. REP. 93.

78. 2 LAUTERPACHT'S OPPENHEIM, INTERNATIONAL LAW 62, 63 (7th ed. 1952).

79. DEPT. OF STATE BULLETIN 452 (1946). See also LISSITZYN, INTERNATIONAL COURT OF JUSTICE 64 (1951). For criticism of the reservations of the United States, see Preuss, *The International Court of Justice, The Senate and Matters of Domestic Jurisdiction,* 40 AM. J. INT'L L. 720 (1946). *But see* Wilcox, *The United States Accepts Compulsory Jurisdiction, id.* 699; Wright, *The International Court of Justice and the Interpretation of Multilateral Treaties,* 41 *id.* 445 (1947).

80. LISSITZYN, *op. cit. supra* note 79.

81. *Id.* at 65 n.47.

82. [1957] I.C.J. REP. 9.

restrictively based on the narrower of the two declarations of acceptance, held that Norway, equally with France, was entitled to except from compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its domestic jurisdiction. It specifically reserved the question, not raised by the parties, whether this type of reservation is "consistent with the undertaking of a legal obligation" and compatible with other provisions of the Court's Statute.[83]

That the unwillingness of national officials to concede competence to international tribunals shows little abatement is dramatically demonstrated by the *Interhandel* controversy between Switzerland and the United States.[84] The refusal of the United States to release the assets seized during the war of a corporation, nominally Swiss but allegedly controlled by a German concern, led to a charge that the United States had violated a 1948 American-Swiss Accord, on unblocking of "Swiss" assets in the United States, and to a request for arbitration pursuant to the 1931 treaty of pacific settlement between the two countries. The United States in rejecting Switzerland's request for arbitration, claimed that the issue of the character of the assets was in its determination as within its domestic jurisdiction. Although the 1931 treaty simply excepted from arbitration matters within the domestic jurisdiction of the respective parties, without stipulating unilateral competence to determine such matters, the United States has interpreted the phrase to mean that "decision on what questions are within the domestic jurisdiction is, under the Treaty, made unilaterally by each party for itself"[85] a position which has been described by Professor Briggs as an attempt to "extend retroactively the stultifying effect" of the Connally reservation.[86] Proponents of the State Department's interpretation rely upon older practice of unilateral determination,[87] but hardly meet Professor Briggs' further criticism that the refusal of the United States to submit to arbitration "ill accords with its professed advocacy of the rule of law in its international relations."[88] This criticism acquired sharper point when the United States resorted to the Connally reservation to escape the jurisdiction of the International Court of Justice to which Switzerland ultimately brought its case.[89]

83. *Id.* at 24.

84. The facts and contentions of the dispute are summarized in Briggs, *Toward the Rule of Law?* 51 AM. J. INT'L L. 517 (1957).

85. U.S. Memorandum, 36 DEPT. OF STATE BULLETIN, 350, 357 (1957).

86. See note 84 *supra*, at 529.

87. Jacoby, *Toward the Rule of Law?* 52 AM. J. INT'L L. 107 (1958).

88. See note 84 *supra* at 529.

89. [1957] I.C.J. REP. 105. The Swiss application asked the court to adjudge whether the United States is under obligation to restore the assets to Interhandel, and,

Counterbalancing Factors Favoring Effectiveness of Inclusive Policies

In modest counterbalance to these various factors limiting the effectiveness of inclusive policies, there may be observed the consistent willingness of international officials, when confronted with conflict between international and national prescriptions, to apply the international. Thus in its Advisory Opinion on the *Treatment of Polish Nationals in Danzig*, the Permanent Court, in determining that the treatment of Polish Nationals in Danzig was to be evaluated in terms of the requirements of the Treaty of Versailles and the Convention of Paris and not of the Constitution of Danzig, offered in explanation of its decision:

> "[W]hile on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals . . . must be settled on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig."[90]

Again, in the *Greco-Bulgarian "Communities"* case, when asked whether the demanded application of a treaty or a conflicting internal law should prevail, the Permanent Court answered that local law "would not prevail as against the convention" since "the provisions of municipal law cannot prevail over those of the treaty."[91] Other decisions of the Court offer comparable illustration.[92]

The principle that international law, rather than conflicting national law, will determine states' rights and duties in the external arena is equally well established in the jurisprudence of international

in the alternative, whether the dispute is one which is fit for submission to judicial settlement, arbitration or conciliation. *Id.* at 106. A request for provisional measures pending adjudication was rejected by the Court after declaration of the United States Government it did not intend to sell the assets for the time being. *Id.* at 112. Five judges, however, in three separate opinions, agreed in the result, but on the ground that the objection under the Connally reservation precluded the Court from considering the request for provisional measures. *Id.* at 113-20.

90. P.C.I.J., SER. A/B, No. 44 (1932), 24.

91. P.C.I.J., SER. B, No. 17 (1930), 32-35.

92. See the *Free Zones* case between France and Switzerland, *id.*, Ser. A, No. 24 (1930), 12 "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations"; *Case Concerning Certain German Interests in Polish Upper Silesia* (Merits), *id.* Ser. A, No. 7 (1926), 19 "from the standpoint of International Law and the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States . . ."; *Case Concerning the Factory at Chorzow* (Merits), *id.*, Ser. A, No. 17 (1928), 33, 34.

arbitral tribunals. "In thousands of decisions of international claims tribunals," Professor Briggs has written (making broad reference to cases upon matters as diverse as state succession, protection of aliens, diplomatic immunities, neutrality, and the use of the oceans), "allegations that a State had incurred international responsibility through denial of justice or kindred measures were tested by the standards of international law rather than by municipal law or constitutional provisions."[93] The principle is precisely put in the well known statement of Secretary Bayard, indicating the expectations of national officials:

> "[I]f a government court set up its own municipal law as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to the demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law and in either case that law furnishes the test of the nation's liability and not its own municipal law."[94]

Constitutional Limitations Increasingly Irrelevant

A factor perhaps even more propitious for the effectiveness of inclusive policies than the consistent willingness of international officials to prefer inclusive policies over exclusive, is the growing acceptance of the view that states may not in conformity with international law interpose defects and inadequacies in their own constitutions and practices against others as defenses to obligation under either customary international law or agreements apparently authoritatively concluded. Debate about this issue has centered largely upon the degree of international obligation imposed upon a state by an agreement, made by officials of apparent competence and within apparent authority by internal law, but later claimed to have been beyond such competence or authority or to require performance by other agencies of government which cannot constitutionally be com-

93. BRIGGS, *op. cit. supra* note 11, at 62; see also BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915); WHITEMAN, DAMAGES IN INTERNATIONAL LAW (1937-43).

94. 2 MOORE, DIGEST OF INTERNATIONAL LAW 235 (1906). See also the *Replies of Governments to the Questionnaire of the Preparatory Committee for the Hague Codification Conference,* which showed "unanimous acceptance of the idea that the responsibility of a State under international law for damage caused on its territory to the person or the property of foreigners is distinct from its responsibility under its own laws." 3 CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW, BASES OF DISCUSSION 16-19 (1929).

pelled.[95] Historic opinion has sought to distinguish between two different types of constitutional provisions, the one type of provision relating to the "making," "concluding" or "entering into" agreements and the other type relating to the "performance" of agreements. With respect to the latter type of provision, relating to performance, opinion has been for all practical purposes that internal inadequacies are no defense to international obligation upon agreements properly made. With respect to the former type of provision, relating to the making or formation of agreements, controversy has been bitter, with contending doctors in many varying arrays and shades of opinion,[96] but the principal views have been diametrically opposed: the one view being that the competence of state officials to make international agreements is determined only by national law and that any agreement in excess of competence of authority creates no international obligation, or at most only an obligation to pay damages; and the other view, that the competence of officials is established only by international law and that an agreement made by apparently competent officials and within apparent authority creates international obligation, irrespective of national law, constitutional or otherwise. This distinction between the making and performance of agreements is not, however, without its difficulties. The making of an international agreement is a most complex process within all the interacting bodies politic, including at least such steps as: the formulation of policies to guide negotiations, the actual conduct of negotiations, the approval of policies for the purpose of making international commitment, the approval of policies for authorizing internal application as the law of the land, and final utterance or "ratification" of the agreement as an external commitment of the whole body politic to others.[97] Quite obviously some of these steps, such as approval for internal application, shade imperceptibly into performance, and the apparently clear-cut distinctions between "making" and "performing" and between "competence" and "authority as to content" may on occasion become very fuzzy indeed. It is possible that the fundamental policies at stake, both inclusive and exclusive, and the practical pressures at work in the world arena may make the distinction largely irrelevant.

For clear and uncompromising statement of the generally agreed

95. Examples of constitutional restrictions on treaty-making power appear in *Harvard Research Draft Convention on the Law of Treaties,* 29 AM. J. INT'L L. (supp.) 992-94 (1935). A comprehensive, though dated, compilation is ARNOLD, TREATY-MAKING PROCEDURE (1933) which may be checked against PEASLEE, CONSTITUTIONS OF NATIONS, (2d ed. 1956).

96. Summary in *Harvard Research, supra* note 95, at 995-1002.

97. This point is developed in McDougal & Lans, *Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy, Part 1,* 54 YALE L.J. 181, 202 (1945).

principle that, once an agreement is validly concluded by constitutional criteria, a state may not escape performance of its international obligation because of alleged inadequacies in its structures and processes of authority, we may turn to the Harvard Research. The black letter reads:

> "Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligation under a treaty because of any provision or omissions of its municipal law, or because of any special features of its governmental organization or its constitutional system."[98]

Even more comprehensive in reach is the United Nations Declaration of the Rights and Duties of States, Article 13 of which reads:

> "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."[99]

In its Advisory Opinion on the *Exchange of Greek and Turkish Populations,* the Permanent Court stated as "self-evident" the principle that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."[100] In many decisions, referred to above in our discussion of the traditional preferring by international officials of inclusive prescription, the Court refused to accept the defense of conflict with internal constitutional, statutory or judicial prescriptions.[101] The same principle is illustrated in the day-to-day practice of states by the common refusal of the United States to accept pleas in defense to performance by other states that they are "federal" states, with allegedly independent central and provincial governments, and in the equally common refusal by other states to accept the same self-serving plea when proffered by the United States.[102] The fundamental explanatory factor which underlies this so wide acceptance of principle resides of course in general recognition of the necessities for implementing inclusive policies: it may safely be left to states to determine the methods, in internal processes of authority, by which they implement inclusive policies, so long as they measure up to the substance of obligation; it cannot safely be left to states, after having accepted benefits to interpose

98. See note 95 *supra,* at 1029.
99. See note 48 *supra.*
100. P.C.I.J. SER. B, No. 10 (1925), 20.
101. See notes 90-92 *supra* and accompanying list.
102. *Harvard Research,* see note 95 *supra,* at 1040-55.

their internal methods in authority to defeat the substance of common responsibility. The general community interest finds sanction, as often, in withheld benefits or threatened retaliations.

Some similar consensus of opinion, stimulated by recognition of the same or comparable necessities, appears to be in slow process of formation even with respect to constitutional provisions of the type said to relate to the making of agreements. The position that national law largely governs the competency of state officials and that a state is not bound, apart from a possible liability to pay damages, by an agreement concluded by an incompetent organ or agent was taken by the Harvard Research and by Sir Hersch Lauterpacht when he was rapporteur on Treaties for the United Nations International Law Commission.[103] The opposing view, that international law governs and that states are bound to full performance of agreements concluded by apparently competent organs and within apparent authority, is however, taken, and supported with cogent reasoning, by the present rapporteur of that commission, Sir Gerald Fitzmaurice,[104] and this position would appear to be much more in accord both with the more recent authoritative decision and with the relevant policies and inescapable pressures in the practice of states.

Both the type of problem and recent authoritative decision may be illustrated by reference to the famous *Eastern Greenland* case.[105] In this case the Norwegian Foreign Minister made an oral statement, in the course of agreement, to his Danish counterpart, that the Norwegian Government would not oppose a proposed extension of Danish sovereignty over Greenland. To a Norwegian contention that such oral promise, since relating to matter of "special importance" and not submitted to a Ministers' Council as constitutionally required for such matters, was not binding obligation, the Permanent Court answered:

> "The Court considers it beyond dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his government in regard to a question falling within his province is binding upon the country to which the Minister belongs."[106]

The Harvard Research suggests, in attempted distinguishing of the case, that, since the Court apparently thought the oral declaration was "within the province" of the Minister, the decision is of no authority

103. For the *Harvard Research Draft* see note 95 *supra* at 992. For Judge Lauterpacht's Report, see U.N. Doc. No. A/CN. 4/63, Art. 11 (1953).
104. Art. 10, U.N. Doc. No. A/CN. 4/115 (1958).
105. P.C.I.J., SER. A/B No. 53 (1933).
106. *Id.* at 71.

with respect to the problem of an incompetent agent.[107] This argument ignores that competency was directly in issue in the case. In any event, comparable attitudes on facts unquestionably raising the issue might be cited in other important cases.[108]

From the practice of states even more persuasive illustration of contemporary attitude may be adduced. In connection with the establishment of the St. Lawrence Seaway Project, opponents of the project contended that Canada could not safely rely upon the proposed participation of the United States by way of congressional-executive agreement, since such participation would not comply with the constitutional provision about the making of treaties. Opinions on the point were offered by both the Legal Adviser of the United States Department of State and the Legal Adviser of the Department of External Affairs of Canada. The first of these advisers, later to become a judge of the International Court of Justice, Judge Hackworth, stated:

> "Generally speaking . . . in international law the Head of the government is entitled to speak for the state, and if the President enters into an obligation with a foreign government, that foreign government is entitled to rely upon it. It is not under the obligation to enquire into our constitutional processes. It takes the word of the Head of State. If the obligation is violated, it is a violation of international law, pure and simple, whether the President exceeds his authority or not. He is supposed to act within his authority, but if he gets outside it, the other government is entitled to rely upon it."[109]

The second adviser (also later to become a judge of the International Court of Justice, Judge Read) was even more emphatic. His words were:

> "Notwithstanding the difficulty in pronouncing upon a question of this sort, closely related to the constitutional law of the United States, it is submitted:
>
> (a) That an Agreement based upon the legislative authority of Congress would give rise to a valid obligation, recognized by the Courts of the United States;

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107. See note 95 *supra*, at 1007.

108. See cases collected in HENDRY, TREATIES AND FEDERAL CONSTITUTIONS 153-54 (1955); MCNAIR, LAW OF TREATIES ch. 3 (1933). See also Hudson, *The Argentine Republic and the League of Nations*, 28 AM. J. INT'L L. 125, 132 (1934).

109. *Hearings before a Subcommittee of the Committee on Commerce on S. 1385, a Bill to Provide for the Improvement of the Great Lakes-St. Lawrence Basin in the Interest of National Defense*, 78th CONG. 2D SESS. 235 (1944).

(b) That it would not be possible for a Government of the United States, either in diplomatic negotiation or in the course of arbitration before an international tribunal, successfully to challenge the validity of such an Agreement as creating an obligation recognized in International Law and cognizable by international tribunals.

"In considering this problem, it is necessary to go behind the screen of legalism and to examine fundamental aspects of the problem. The strength of a St. Lawrence pact would not lie in legalistic concepts. It would lie in the fact that a state of affairs had been brought about which could only work on the basis of both countries loyally carrying out their undertakings."[110]

It was not of course necessary for the legal adviser representing Canada to emphasize the practical sanctions which would be at the disposal of his Government in the "state of affairs brought about" if the United States should later profess a constitutional defect in its undertaking.

The most important policy at stake in this issue from the perspective of the general community of states, would appear to be maintenance of a certain stability in the expectations states reasonably create in each other by their agreements. The expectations reasonably created would not appear to vary directly with nice discrimination about the obscure distinctions between constitutional provisions which relate to the making of agreements and those that relate to the performance of agreements. Exactly the same sanctions in reciprocity and retaliation are, furthermore, at the disposal of states who regard themselves as deprived by failure of performance, irrespective of such distinctions. The accelerating interdependence of social processes which gives even sharper bite to such sanctions, similarly, knows no such distinctions. There would, accordingly, appear to be wisdom deserving further acceptance, in the recent conclusions of Sir Gerald Fitzmaurice:

"For the purpose of this part of the present code, consent means consent on the international plane, and the reality of such consent is not impaired by the fact that, on the domestic plane, certain consents are lacking; or that there has otherwise been a failure by the State concerned, or its authorities, to observe the correct constitutional processes as required by the domestic law for the purpose of proceeding to signature, ratification, accession or other act of

110. Quoted in McDougal & Lans, *supra* note 97, at 325 n.84.

> participation in the treaty; or to keep within any limitations on the treaty-making power imposed by the domestic law or constitution."[111]

It remains of course a defect in world processes of authority that only the most minimal and indirect requirements are imposed upon states for maintaining effective agreement-making and performing procedures. The state which wishes to constitute itself a cripple—for example, by presenting itself as a "federal" state in external arenas—is still authorized in considerable measure to effect such incapacitation. Accepted policies do not require a state either to participate in processes of peaceful interaction with other states or to maintain effective institutions for such participation. When Lord Atkin, speaking for the Privy Council in the *Labor Conventions Case*,[112] holding that acceptance of the conventions by the Canadian national government still left performance to the discretion of the provinces, stated, "It must not be thought that the result of this decision is that Canada is incompetent to legislate in the performance of treaty obligations" and added, "In totality of legislative powers, Dominion and Provincial, she is fully equipped," he was addressing himself more to the heaven of juristic conceptions and fantasy than to the world of fact. The consequences for Canada have been comprehensively summarized by Professor Maxwell Cohen:

> ". . . [T]he inability of the Parliament of Canada to implement international agreements except where the subject matters of the obligations already are within its constitutional jurisdiction has a limiting effect on the international position of Canada *in fact* if not in external legal posture. Today in many matters of economic and social policy—prices, production, industrial standards, civil liberties, for example—parallel provincial legislation may be necessary to enable Canada to enforce municipally any international undertakings in these fields. The administrative and political cumbersomeness as well as the negotiating inconvenience of this position at once will be evident. Canada has already its 'Bricker Amendment' and it may require major constitutional re-appraisal to resolve this difficulty . . . ."[113]

Certainly it could not be in either the general community interest or even the shortest-term national interest of the United States for the United States to adopt a constitutional amendment which would commit it to an even sadder posture of incapacity, with fifty vetoes

111. Art. 10, U.N. Doc. No. A/CN. 4/115 (1958).
112. [1937] A.C. 326.
113. Cohen, *Some International Law Problems of Interest to Canada and to the Canadian Lawyers*, 33 CAN. B. REV. 389, 396 (1955).

over policies affecting national survival. Whatever its accuracy as a history of legal technicality, Mr. Justice Holmes' famous dictum in *Missouri v. Holland* that "it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found,"[114] assuredly expresses a most profound truth about the realities of the contemporary world power process. Though the niceties of accepted inclusive prescription may not yet require states to put forward competent agents to discharge common responsibility, the necessities of survival in an interdependent world may serve better.

II.

THE APPLICATION OF INCLUSIVE POLICIES IN INTERNAL ARENAS

From describing the prescription and application of inclusive polices in external arenas through the interactions of states as composite bodies politic and by the functioning of international governmental organizations, we now turn to the application of such inclusively prescribed policies by state officials in arenas established by the internal structures of authority of particular states. Such application is with respect to claims for the regulation of interactions, whether within or outside territorial boundaries, which involve either private individuals and groups, or state officials engaging in activities not regarded as committing the total policy of their states. Many inclusively prescribed policies, such as are frequently found in multilateral treaties projecting uniform practices about common problems, cannot of course be made effective without such internal application by states, and fortunately it may be observed, when the world scene is viewed as a whole, that there appears to be an increasing uniformity and effectiveness in the unilateral application of inclusively prescribed policies by state officials acting within the internal structures of their territorial bodies politic. It is by such internal application that the states both further their policies with respect to each other and, as a general community of states, attempt to subordinate that host of other participants in the world power process—individuals, political parties, pressure groups, and multitudinous private associations of varying base and scope values—to their common policies. Conversely, of course, it is by this internal application that such other participants achieve an added measure of protective access to processes of authority transcending state lines.

114. 252 U.S. 416, 433 (1920). See also McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 YALE L.J. 60, 90-106 (1949). Pertinent policy issues are raised and discussed in Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1955).

The suggestion is sometimes made that when policies, though externally prescribed, are applied internally by states, such policies cease to be international law and become merely national law. This type of suggestion, contrary to the familiar dictum of the bard of Avon that a rose by any other name smells just as sweet, is little more than a statement of preferred taste for one label rather than another. One advantage of an analysis in terms of interpenetrating power processes and distinguishable functions of prescribing and applying is in the indication of the irrelevance of such gustatory jurisprudence. The important facts are that the policies put into practice are, on the one hand, externally and inclusively *prescribed,* and, on the other hand, internally and effectively *applied,* whatever adjective is placed before the word "law" and wherever "supremacy" may be located.

The hard reality is of course, despite favorable trends toward effectiveness, that complete conformity to inclusive prescription by internal application is not achieved, and is probably not achievable. The perfectionist ideal of total effectiveness is obstructed by many limiting factors. The modalities in principle and procedure by which states make externally prescribed policy "authority" for internal decision-makers differ greatly in efficiency, and vary from customary law to agreements. The types of interactions with respect to which inclusive policies are projected may deeply affect the value positions of effective participants in internal power processes, who may thus impede acceptance and enforcement of authority. When externally prescribed policies and internal prescriptions conflict, some state officials may be moved by varying predispositions to employ artistry in interpretation in order to avoid application of inclusive policy; and state judicial officials may on occasion, for purposes of maintaining unity in foreign policy or of avoiding responsibility for decision, under the doctrine of "political questions" pass responsibility for internal applications to state executive officials. Fortunately for inclusive policy, state executive officials, responsible for the total policy of their body politic, do remain committed by effective processes of authority in external arenas, notwithstanding any limiting factors in their internal structures and process, and when thus, the judiciary of a state declines to apply international law internally, the executive of the state may recognize, or be compelled to recognize, the international obligation. For defalcations in internal arenas there is in effect authorized appeal to external arenas.

More detailed exploration of the interrelations of inclusive prescription and internal application may perhaps most economically proceed by making reference, first to the modalities by which states

establish the authority of inclusive policies for their internal decision-makers and to the types of interactions with respect to which internal application of inclusive policies is commonly demanded; then to certain factors more explicitly limiting the degree and effectiveness of internal application of inclusive policies; and finally to the practice of appeal for non-application or misapplication in internal arenas to external arenas.

We begin with the modalities in principle and procedure by which states establish inclusively prescribed policies as authority within their internal arenas, for application to claimants contending in such arenas, and will deal with both customary international law and agreements.

Internal Application of Customary International Law

First, customary international law. By internal application of customary international law we refer to the process of decision by which officials who are authorized to apply inclusive policies in internal arenas make reference, for purpose of finding out what such inclusive policies are, to certain past uniformities in behavior, such uniformities allegedly offering good evidence of community expectation because of their having occurred in accordance with perspectives of the participants that such behavior was required.[115] It is no new story, however, that both the past uniformities in behavior, the "material" element, and the subjectivities of "oughtness" the psychological element or *opinio juris,* commonly stipulated as indispensable prerequisites for authorizing a decision-maker to turn to "custom" as a source of policy, admit of many varying and flexible interpretations. The relevant uniformities in behavior may include acts not only of officials, national and international, at many different positions in structures of authority, but even of individuals and representatives of private associations. Such acts may obviously vary enormously in the amount of repetition they reveal and in the length of time through which such repetition occurs. The subjectivities of oughtness attending such uniformities in behavior may refer to many different systems of norms—past decisions, morality, natural law, religion—or may be non-existent or non-provable, or may in their beginning be positively unlawful if judged by past authoritative decisions. "Sometimes," as Professor Kopelmanas has well said, "it is merely the satisfactory and reasonable character of the custom which allows a decision whether a particular rule has or has not the character of a legal rule."[116] Simi-

115. BRIGGS, *op. cit. supra* note 11, at 24.

116. Kopelmanas, *Custom as a Means of the Creation of International Law,* 18 BRIT. YB. INT'L L. 127, 151 (1937).

larly, the factual or literary sources to which a national official, as an international official, may turn for information about both past behavior and subjectivities are multiple and various, including international agreements, diplomatic correspondence, resolutions of international organizations, a great variety of utterances by international and national officials, the opinions of text-writers, community myth about the requirements of good faith and equity, and so on.[117] In a process so open and fluid, it should be clear that one function of a doctrine of "custom" is to enable decision-makers within a state to respond easily and economically, without special procedures or proofs and without too apparent subordination to external pressures, to the requirements of shared and inclusively prescribed policies.

From the perspective of the world power and social processes, as we have sketched them above, there is indeed no need for a state to adopt any special principles or procedures for making customary international law authority within its boundaries. The influence of inclusively prescribed policies depends not so much upon internal arrangements as upon the impact of external variables in the world power process—including all potential reciprocities and threatened retaliations—which drive a decision-maker toward conformity or nonconformity. The dynamic factors, explanatory of decision, embrace both the internal decision-maker's conceptions of the source and content of authority and his estimate of the sanctions at the disposal of participants asserting the relevance of inclusive prescription. The insistent pressures of the world power process impose certain sources and content of authority, sustained by effective sanctions, upon internal decision-makers if they are to maximize the values of the national community with which they identify. The particular states do not so much have the option asserted by some traditional theories, of "adopting" the world power process, as the chance to make the most of it. For extraordinarily deep insight into this reality, reference may be made to the case of *Lauritzen v. Larsen*,[118] in which the Supreme Court of the United States, refusing to permit application of the Jones Act to claims by a Danish seaman injured upon a Danish ship in Havana harbor, interpreted congressional legislation restrictively so as not to conflict with customary international law relating to the law of the flag. Speaking for the Court, Mr. Justice Jackson said:

> "International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its

117. Article 38 of the Statute of the International Court of Justice.
118. 345 U.S. 571 (1953).

> own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transactions and the states of governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."[119]

Oblique recognition of this same reality pervades the common doctrine that, though the authority of the whole process of customary international law depends upon the general consensus of states, the authority of any particular rule does not require universal consent or even the prior consent of the state making application. It is not necessary, as Lauterpacht's Oppenheim puts the point, "to prove for every single rule of international law that every single member of the international community has consented to it."[120] The application of inclusive prescription to sovereign bodies is, however, made more palatable by the assumption, as Professor Silving points out, that "courts merely find what the obligations already accepted by the states in fact are." "The feeling prevails," she writes, "that in the case of a mere law finding the 'personal juristic situation' of the states is left intact so that, in essence, the states remain as free as before."[121]

It has of course been explicitly accepted doctrine in many states, almost since Grotius first added to divine law and natural law a secular source of authority in the consensus of states, that international law is a part of the law of the land to be interpreted and applied in appropriate cases, without special procedures or proofs, as other law is. The historic predispositions which gave impetus to this com-

119. *Id.* at 582.
120. 1 LAUTERPACHT'S OPPENHEIM, INTERNATIONAL LAW 18 (8th ed. 1955).
121. Silving, *"Customary Law": Continuity in Municipal and International Law,* 31 IOWA L. REV. 614, 631, n.54 (1946).

mon conclusion have been most eloquently stated by Professor Dickinson:

> "In the first place, it is to be emphasized that the doctrine of incorporation in its original significance was, for the English Courts, a perfectly natural deduction from the theories of national and international law which flourished in the 17th and 18th centuries. All law, national no less than international, was being tested by the standards of what was assumed to be a rational, universal, and immutable system. The English Courts were developing English national law in harmony, as it was assumed, with right reason and natural justice. It was even doubted whether the courts should respect an act of parliament which was repugnant to universal principles. International law was not only in harmony with right reason and natural justice, but was a veritable corpus juris naturalis in the treatises of the most influential publicists. In an age dominated by such ideas, nothing could have been more plausible than the conclusion that international law formed an integral part of the national law governing matters of international concern."[122]

With the ascendance many decades later of more "positivistic" legal philosophies, philosophies emphasizing past decisions as sources of authority, Professor Dickinson finds only the minor change that "the law of nations" becomes "a source" rather than an "integral part" of national law, with "the national law governing matters of international concern" being derived "in the absence of a controlling statute, executive decision, or judicial precedent from such relevant principles of the law of nations as can be shown to have received the nations implied or express consent."[123] From the perspective of law as a process of authoritative decision, rather than of rules, even this change is obviously a distinction without a difference: the source of authority is an integral element of the process of decision and, if inclusive policies are in fact internally applied, it matters little, as we have seen, which adjective, national or international, is prefixed to the word law. For a single illustration, from among the countless possibilities, of the important fact of internal application, we refer to the famous case of *The Paquete Habana*,[124] in which the Supreme Court held that small fishing boats were not by customary international law subject to confiscation as prize. Reviewing the many possible sources of international authority, Justice Gray said simply:

122. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239, 253 (1932).

123. *Id.* at 260. Lauterpacht, *Is International Law Part of the Law of England*, 25 TR. GROTIUS SOC. 51, 86 offers persuasive criticism of this distinction.

124. 175 U.S. 677 (1900).

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[125]

For more complete indication of the irrelevance of the traditional philosophies of monism and dualism with which we began our inquiry, it may be added that these contending philosophies, despite their varying emphasis upon international and national perspectives, appear to have had but little effect upon the actual trend in decision of consistent internal application of inclusive policy. Logically, the dualist doctrine, with its insistence that international law applies only to relations between states and cannot be directly applied to individuals and private associations, would appear to require that every particular rule of international law must be specifically "transformed" from its international origins into national law prior to any particular application.[126] State officials, however, continuously make application of inclusive policies in internal arenas without demanding or awaiting such prior approval and, as summarized by one distinguished commentator, who curiously still finds some meaning in the word "transformation," there would appear, save possibly for one disputed English decision, "no case" in which a court has "refused to give effect to a rule of customary international law because it had not been expressly incorporated into national law."[127] The doctrines of the monists, similarly, with their varying emphasis both upon the identity of international law and national law in sources of "validity" and entities governed and upon the supremacy of international law, would appear logically to require that international law be directly applied in internal arenas by state officials, without any prior general or specific acceptance by the state and perhaps even despite aberrant rejection by the state. Most monists, however, apparently contemplate some kind of state "incorporation" or "adoption" of externally prescribed policies[128] and rare are the suggestions, even unofficial, that a state may not in its own internal constitutional structures determine or change the modalities by which it performs its international obligations—including such obligations as require the internal application of inclusive policies. The fact is that such terms as "transformation," "incorporation" and "adoption" are but metaphors of ill-defined reference, deriving whatever meaning they have from the limiting con-

125. *Id.* at 700.
126. Morgenstern, *Judicial Practice and the Supremacy of International Law*, 27 BRIT. YB. INT'L L. 42, 50 (1950).
127. *Id.* at 52.
128. *Id.* at 60.

ception of law, international and national, as abstracted rules. When "transformation" of international law is made inherent in the very act of applying national law, the difference between "transformation" and all contrasting concepts becomes that of tweedledum and tweedledee. A conception of law as a process of authoritative decision has no difficulty in describing how policies prescribed in one arena, the external, may be applied in another, the internal.

As evidence of a perhaps increasing willingness of state officials to facilitate internal application of inclusively prescribed policies may be noted certain recent developments in the establishing of national structures of authority, with such structures modified to ease the pains of introjection. Since World War II, at least fourteen states, of widely scattered geographic range and of greater and lesser power, have formally declared in their constitutions the "binding effect" of international customary law, authorizing its internal application.[129] The language of acceptance ranges from Burma's highly generalized adherence to "the generally recognized principles of international law," through East Germany's recognition that "the generally recognized principles of international law are binding on the state authority and every citizen," to a culminating peak in West Germany's provision both that "general rules of international law shall form part of federal law" and that such rules "shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory."[130] This most significant trend in constitution making has received a sharp and illustrative summary by Professor Deener:

> "In the Near East, the Draft Constitution of Israel states, 'the generally recognized rules of international law shall form part of the municipal law of Israel.' The Constitution of South Korea declares that 'the generally recognized rules of international law shall be valid as a binding constituent part of the law of Korea.' The Japanese Constitution proclaims that the Constitution is the supreme law of the nation and that no public act contrary to its provisions shall have legal force or validity, and continues, 'The treaties concluded by Japan and established laws of nations shall be faithfully observed.' By its Constitution, the Philippines 'adopts the generally accepted principles of international law as part of the law of the Nation.' Four recent European constitutions contain incorporative clauses."[131]

The range and importance of the international customary policies

129. Deener, *International Law Provisions in Post-World War II Constitutions*, 36 CORNELL L.Q. 505, 523-26 (1951).
130. *Ibid.*
131. *Id.* at 525-26.

achieving, whatever the procedures, internal application, may be indicated by reference in topical terms to the subject matter of cases in constant flow through national courts. Comprehensive itemization would touch every important aspect of the world power process and might include, for brief illustration, such matters in dispute as the following:[132]

> claims about the consequences of the recognition and nonrecognition of states and private associations;
>
> claims by state officials and representatives of private associations for physical access to territory, and with or without special authorization, to engage in varying internal activities;
>
> claims by state officials and private individuals for access to courts and other arenas of authority;
>
> claims with respect to the validity and consequences of acquisition of territory and controversies about boundaries;
>
> claims with respect to use and exploitation of shareable and strategic resources, such as the oceans, international rivers, and airspace;
>
> claims with respect to nationality, the granting of asylum to aliens, the banishment of citizens, and the treatment or expulsion of aliens;
>
> claims with respect to diplomatic immunities and facilities;
>
> claims about the formation, application, and interpretation of agreements;
>
> claims about the legal consequences of the initiation, conduct, and termination of hostilities;
>
> claims with respect to varying modalities in coercion and deprivation;
>
> claims with respect to jurisdiction over particular events, both within and beyond boundaries; and
>
> claims with respect to state immunities, acts of state, and state succession.

Internal Application of International Agreements

Next, we turn to the principles and procedures by which states make policies inclusively prescribed by international agreement "authority" for application within their internal processes. The principal

132. See Dickinson, *The Law of Nations as Part of the National Law of the United States,* II, 101 U. PA. L. REV. 792 (1953) (American cases); Hyde, *The Supreme Court of the United States As an Expositor of International Law,* 18 BRIT. YB. INT'L L. 1 (1937) (same); Lauterpacht, *Is International Law a Part of the Law of England,* 25 TR. GROTIUS SOC. 51 (1940) (English cases); MACKENZIE & LIANG, CANADA AND THE LAW OF NATIONS (1938) (Canadian cases).

For amplification with respect to values other than power affected by customary international law, see McDougal and Lasswell, *supra* note 2.

concern of states is of course only for those agreements which they intend to have applied within their boundaries and whose performance, in fulfillment of international obligation, requires such internal application. Though almost any international agreement may on occasion be invoked in internal arenas, some agreements such as for pacific settlement of international disputes or for the guarantee of the security or neutralization of a state, may require for performance only the most modest degree of application in internal arenas. For making those agreements whose performance does require internal application the law of the land, state constitutions exhibit two modalities in procedure, which though differing in form appear in their allocation of effective competence to be substantial equivalents. The first modality is illustrated by constitutional provisions which stipulate that certain agreements, made in certain ways, under certain conditions, become the law of the land, and the second modality by constitutional requirements that certain agreements must have special legislative or parliamentary approval before becoming the law of the land.

The historic model of the first modality, dispensing with special parliamentary approval and making certain agreements automatically authoritative in internal processes, is of course Article VI(2) of the United States Constitution. This famous provision, applied in almost countless instances in all kinds of internal arenas, reads:

> "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Far from being so unique, as some contemporary protagonists of constitutional reform assert, this model has, further, been increasingly followed, as, for example, in Article 22 of the 1949 Argentine, Article 7 of the 1946 Korean, Article 133 of the 1917 Mexican, and Article 4 of the 1940 Paraguayan, Constitutions.[133] Similarly, Article 26 of the 1946 French Constitution reads:

> "Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to ensure ratification."

Beyond formal constitutional provision to this effect, several states

133. These constitutional provisions, as well as those hereinafter cited, are taken from PEASLEE, CONSTITUTIONS OF NATIONS (2d ed. 1956).

have even by customary decision achieved procedures roughly comparable to the American model, as for example, Cuba, the German Federal Republic and Switzerland.[134]

Within the United States, the greatest difficulty encountered in applying Article VI(2) has been in identifying the agreements in fact intended to become immediately operative in internal arenas without further legislative action. Most often this issue has been posed in terms of a highly artificial dichotomy between agreements described as "self-executing" and not "self-executing."[135] The fountain-head posing in these terms goes back to Chief Justice Marshall in *Foster v. Neilson*.[136] In passing upon bitterly contested claims to land titles, dependent upon alternative interpretations of the treaty with Spain for cession of Florida, the great Chief Justice said:

> "A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> "In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently to be regarded in Courts of Justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the Court."[137]

Most recently Professor Alona Evans has reformulated this famous distinction in a way to make the tautology more explicitly evident. Her words are:

> "A self-executing treaty is one which furnishes a rule for the executive branch of the Government, the courts, the States, and private individuals, either by operation of its

134. Dihigo, *Treaties as Law in the National Courts: Latin America,* 16 LA. L. REV. 734, 741 (1956); Preuss, *The Execution of Treaty Obligations—System of the United States and of Some Other Countries,* 45 PROC. AM. SOC'Y INT'L L. 82, 93-95 (1951).

It is not clear what changes have been effected under the new Constitution of 1958, adopted under the leadership of General DeGaulle. The language of the relevant articles, Art. 52-55, is highly cryptic and ambiguous. See New York Times, Sept. 5, 1958, p. 10.

135. The problem is encountered in other countries too. See Preuss, *On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties,* 51 MICH. L. REV. 1117 (1953).

136. 27 U.S. (2 Pet.) 253 (1829).

137. *Id.* at 314.

> own terms or because it can be implemented by the executive branch or the States without Congressional intervention. On the other hand, a non-self-executing treaty is one which requires implementation by Congress before it can be enforced as the supreme law of the land."[138]

When the precise issue before a decision-maker is whether some further legislative act is required, it obviously assists the resolution of this issue but little to proclaim that if the agreement is self-executing no further action is required, but that if it is non-self-executing, further action is required. The words self-executing and non-self-executing embrace neither intrinsic or historic meaning nor magic to resolve the issue. When draftsmen think of the problem, language can be used precise enough to make intention clear, as for example in the Genocide Convention which requires "necessary legislation to give effect to the provisions of the present convention." When draftsmen do not think of the problem, subsequent decision-makers are thrown back upon examination of all relevant indicia of intent in context.

Excellent illustration of this examination of the indicia of intent in context is offered by the famous *Sei Fujii* case,[139] which supplied the great impetus to the Bricker fantasy. The issue before the Supreme Court of California was whether the United Nations Charter, with its promises by the signatories in Articles 1, 55, and 56 "to promote" and "to take joint action in cooperation" for achievement of universal human rights was appropriate authority for invalidating the California alien land law. Taking into account all the circumstances attending the framing of the Charter, the precise language in terms of "promise" rather than "execution," the prior use of comparable language, and the use of other language in the Charter to achieve internal application for other purposes, the Court concluded against automatic internal application. It said:

> "The provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations."[140]

It was of course only irony, and not contradiction, that in subsequent portions of its opinion the court read the content of the human rights

138. Evans, *Some Aspects of the Problem of Self-Executing Treaties*, 45 PROC. AM. SOC'Y INT'L L. 66, 73-4 (1951).
139. Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).
140. *Id.* at 621-22.

provisions into the Fourteenth Amendment of the United States Constitution to invalidate the California law as a denial of equal protection. Decision by one justification can not be as sweet as another and rules must be kept clear and distinct whatever the processes and direction of decision!

In supposed, fundamental contrast to the constitutional provisions and practices stipulating automatic internal authority are the requirements in many states for a further legislative act, with respect to certain agreements, to authorize internal applications. This may be illustrated by reference to Great Britain, prime advocate of parliamentary supremacy, whose practice has been aptly summed up by Lord McNair:

> "Accordingly, if the Crown enters into a treaty which is likely to come into question in a Court of law or to require for its enforcement the assistance of a Court of law, and the application and enforcement of that treaty involves any modification of or addition to the rules of law administered by an English Court (which include the rules of international law as understood and ascertained by English Courts), the Crown must induce Parliament to pass the necessary legislation, for it is only Parliament that can change the law binding upon an English Court. This question can arise either upon a treaty which merely creates a particular obligation between the parties, or upon a treaty which purports to create new rules of international law binding upon a number of parties."[141]

Illustration of formal constitutional requirement of legislative approval for making certain international agreements the law of the land could be offered from many countries.[142]

It is suggested that the commonly made distinction between the United States and British models is more supposed than fundamental for reasons easily made obvious.[143] The fact that the United States Senate participates in the "making" of a treaty in the United States supplies from the very inception of international obligation a pre-existing legislative approval. The vote of the Senate performs the function of legislation as much when making a treaty as when enacting a statute, and in fact because of the requirement of a special two-thirds majority for approval, the United States Constitution im-

141. McNair, *The Method Whereby International Law Is Made to Prevail in Municipal Courts on an Issue of International Law,* 30 TR. GROTIUS SOC. 11, 19 (1945).

142. See, *e.g.,* Deener, *supra* note 129, at 528, n.146; Vanek, *Is International Law Part of the Law of Canada?* 8 U. OF TORONTO L.J. 251, 265 (1950).

143. The distinction outlined in BRIGGS, *op. cit. supra* note 11, at 86 is somewhat too facile.

poses a much more onerous requirement of legislation than that imposed in any other major state, including Britain. Conversely, in Britain, with its special parliamentary system, legislative and executive responsibility are so fused, that legislative approval of agreements made by the executive is seldom difficult to secure, and is in fact often secured in advance.

The most onerous constitutional requirements for making agreements the law of the land, are of course to be found in those federal states whose constitutions require, in addition to approval by a national legislature, approval by the legislatures of internal provinces. This would appear, as we have seen, to be the requirement in Canada, though scholars dispute as to what future decision there may be.[144] In contrast, the statesmanship of *Missouri v. Holland*[145] has thus far saved the United States from the same sad posture, but it is precisely such international incapacity that the proposed Bricker Amendment, whatever its version, would impose upon the United States.[146] It will be recalled that in one version of this proposal, the much-mooted "which" clause read:

> "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."[147]

The proponents of this clause—and some equivalent wording was invariably included in all the ill-born versions—never permitted doubt that it was intended to take power from the nation and to give to the internal states, in the form of individual veto, the competence to authorize or withhold internal application of certain agreements made by the nation.

The importance from inclusive perspectives, which take into account the common interests of states, of efficient national procedures for making international agreements internal authority may be demonstrated by reference both to the broad range in subject-matter of past international agreements and to the probably expanding range in future agreements. Professor Hendry has put the double point concisely, eloquently and briefly:

> "One has only to pursue Professor Hudson's comprehensive work to obtain a perspective of the multitude and variety of agreements, conventions, protocols, declarations, acts and regulations, and other multilateral instruments in-

144. Franck, *Bricker Amendment in Canada . . . a Rose-Coloured Optical Illusion*, 34 NEB. L. REV., 59 (1954-55).

145. 252 U.S. 416 (1920).

146. MacChesney, McDougal, Mathews, Oliver & Ribble, *The Treaty Power and the Constitution: The Case Against Amendment*, 40 A.B.A.J. 203 (1954).

147. *Id.* at 203.

> dicative of the volume of 'international legislation' now in force between the various countries of the world. Existing 'law-making' treaties deal, among other things, with hours of work, sanitation, slavery and white slavery, munitions, monetary arrangements, obscene publications, postal, telegraph and telephone communications, copyrights trade marks and patents, piracy, maritime law and navigation, submarine cables, customs and tariffs, the drug traffic.
>
> "Probably the most important source of future 'international legislation' will be the various international agencies established in recent years to achieve peace indirectly by solving economic, social and cutural problems which have been the cause of so much unrest and discontent. Already great strides have been taken by these agencies in health, labor, education, and other fields . . .
>
> "This brief outline of the scope of 'international legislation' and its major sources is meant to accentuate the importance of the national treaty process in the furtherance and acceptance of international principles and activities."[148]

Factors Limiting the Effectiveness of Internal Application of Inclusive Policies

From review of the principles and procedures established by states for facilitating the internal application of inclusive policies, we turn next to consideration of certain factors which may have a peculiarly limiting effect upon the internal application of international law, whether customary or projected by agreement. Such factors include, as indicated, constitutional provisions for allocation of competence among different internal decision-makers, idiosyncratic vagaries in interpretation, and avoidance of responsibility by invocation of a concept of "political questions."

Beginning with the constitutional provisions, it may be noted that national constitutions not infrequently require that certain internal decision-makers such as judges, give effect to internal prescriptions, constitutional or statutory, even though the body politic as a whole is committed otherwise in external arenas by inclusive policies. This dictate is made explicit, with respect to internal constitutional provisions, in Article 189 of the 1946 Constitution of Ecuador, which reads:

> "The Constitution is the supreme law of the republic. Therefore, any . . . public pacts or treaties which are in any way contradictory to it or which depart from its text have no validity."

148. HENDRY, TREATIES AND FEDERAL CONSTITUTIONS 2-3 (1955). The reference to *Hudson* is to his eight volumes of INTERNATIONAL LEGISLATION (1929-49).

The same result is not explicitly demanded by the United States Constitution but there is a high consensus among scholars that the Supreme Court should not, and probably would not, give internal effect to an agreement in contravention of constitutional provisions. Thus, in dictum, the Supreme Court has indicated that "It would not be contended that (the treaty power) extends so far as to authorize what the Constitution forbids."[149] From this dictum and others, the common opinion is that the Fifth Amendment limits, as Professor Corwin puts it, "not merely . . . congressional power, but the treaty-power as well, whenever it infringes upon private rights."[150] The other Bill of Rights provisions may be assumed similarly to limit the internal application of an international agreement otherwise validly concluded.[151]

Under constitutional doctrines of legislative supremacy, courts may even be required to give effect to ordinary internal statutes when in contravention of acknowledged inclusive policies. For illustration from Great Britain, reference may be made to the well-known case of *Mortensen v. Peters*.[152] In this case, Scotch officials acting under alleged authority of a Scotch statute seized Danish fishermen in international waters. When it was urged upon the High Court of the Judiciary of Scotland, that internal statute could not in violation of international law authorize the seizure of foreign nationals beyond the limits of the territorial sea, the Court responded:

> "In this Court we have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms."[153]

Within the United States it is almost immemorial precedent in the Supreme Court that as between conflicting international agreements and Congressional statutes, internal effectiveness will be given to that expression of authority which is latest in time. Thus, in *Whitney v.*

149. Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

150. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 17 (1944).

151. McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 YALE L.J. 60, 104 (1949).

Note the very broad statement by Mr. Justice Frankfurter, in the opinion of the Court, in Perez v. Brownell, 78 S. Ct. 568, 576 (1958).

152. 14 Scots L.T.R. 227 (1906); BRIGGS, *op. cit. supra* note 11, at 52.

153. BRIGGS, *op. cit. supra* note 11, at 54.

Robertson, holding that a most favored nation clause was superseded by Congressional legislation, the Court stated:

> "By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self-executing. If the country with which the Treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress."[154]

Limitation of the internal effectiveness of inclusive policy by idiosyncratic interpretation is unfortunately all too common. In discussing the *Interhandel* case we have already made reference to how the United States seeks to preserve its freedom of decision by insisting upon an interpretation of an arbitration agreement that would reserve to itself the exclusive competence to determine whether a matter is within its domestic jurisdiction.[155] Similarly, in *Mortensen v. Peters,* mentioned above, the Scotch Court, not content to rest its opinion upon simple legislative supremacy, maintained that the statute in question was not inconsistent with international law, a position the British executive department subsequently repudiated. Latin America, for further example, beset by controversies about its treatment of aliens, contends in relative uniqueness that an individual may by agreement forego the protection of his government—the so-called Calvo Doctrine[156]—and that equality of treatment of nationals and foreigners precludes international delinquency, while much of the rest of the world insists upon an inalienable standard of civilized society for foreigners, however nationals may be treated.[157] Still similarly, when arguments made on behalf of Soviet trading corporations both in tribunals in the USSR and abroad are taken together, the Soviet Government exhibits itself in the following inconsistency: When damages are sought from the Soviet trading corporation, or when a Soviet

154. 124 U.S. 190, 194 (1888).
155. See notes 84-89 *supra* and accompanying text.
156. See BRIGGS, *op. cit. supra* note 11, at 637-39.
157. United States (Roberts Claim) v. Mexico (1926), *id.* at 549.

government department has done something (regulation, withholding of license, etc.) on which the corporation relies as an excuse for nonperformance, the effort is made to dissociate the trading corporation from the Soviet government, either in order to deny the financial responsibility of the government or in order to invoke the defense of *force majeure*. On the other hand, when the Soviet trading corporation, pleading in foreign courts, desires that the court apply Soviet law to questions of the validity of a contract, the corporation contends that, regardless of other contracts, Soviet law must be applied in order to avoid infringement of the sovereignty of the Soviet state, of which the corporation somehow partakes.[158] Put most delicately by Professor Brierly, the general point is that "a national court can apply its own version of what the rule of international law is, and however objectively it may try to approach a question which raises an issue of international law, its views will inevitably be influenced by national factors."[159] In its broadest reach, this is but the principal difficulty of what Professor Gross calls auto-interpretation.[160]

For final illustration of limiting factors, we note that judges may also seek to escape responsibility for the internal application of inclusive policies by passing the issue of international commitment to the executive under the doctrine of political questions—a doctrine defined by Professor Dickinson as affirming that "courts may neither reconsider nor review the decision of a coordinate department of the Government made in the exercise of its constitutional authority."[161] Impelling predispositions of courts may include an awareness of the importance of the effects of decision upon foreign policy, a preference for unified foreign policy over maintenance of checks and balances between different branches of internal government, recognition of lack of knowledge and inability to secure knowledge of relevant facts, and so on. The range of issues which has in the United States, for example, been historically passed from courts to executive embrace again almost all interactions in power processes, such as: the status of participants in internal arenas—consequences of recognition of states and governments; extent of territory—either when claimed by the United States, or when the United States merely disputed the sovereignty of another state; control of people—treatment of aliens, including expulsion and exclusion; lawfulness of practices—existence or termination of a state of war, and the validity of agreements in such

158. Pisar, *Soviet Conflict of Laws in International Commercial Transactions*, 70 HARV. L. REV. 593, 654 (1957).
159. BRIERLY, LAW OF NATIONS 88 (5th ed. 1955).
160. See note 59 *supra* and accompanying text.
161. Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451 (1956).

issues as whether the foreign executive was competent to enter into an agreement, or whether the validity of the agreement continues with change in formal authority or violation by the other signatory; jurisdiction—retroactivity of recognition, rights and immunities of states—particularly public vessels and diplomatic status—and the so-called acts of state of another government alleged by it to have been within its own exclusive competence.[162]

Mitigation by Interpretation

In modest mitigation of all these limiting factors, it should perhaps be pointed out that courts will sometimes endeavor to construe internal legislation so as not to conflict with international law, customary or conventional. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," Chief Justice Marshall once insisted,[163] and this same principle was quite recently reaffirmed in *Lauritzen v. Larson,*[164] which construed the Jones Act purporting to embrace "all seamen" as inapplicable to foreign ships. This constructional preference is found also in other states, as indicated by Professor Morgenstern:

> "In order to prevent violations of international law in this connection courts have strained their powers to the utmost in refusing to recognize that a violation of international law was intended (by legislative organs) unless such intention was expressed in the most unequivocal terms."[165]

It may be recalled further that in the practice of some states—Brazil, Chile, Colombia, Germany, Guatemala, Italy, Panama, Uraguay, and Switzerland—even a later legislative enactment is construed not to invalidate the domestic application of treaties,[166] an attitude which found formal recognition in Article 28 of the 1946 French Constitution:

> "Since diplomatic treaties duly ratified and published have authority superior to that of French internal legislation, their provisions shall not be abrogated, modified, or suspended without previous formal denunciation through diplomatic channels."[167]

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162. For collection of cases in all categories mentioned above, see, *e.g., ibid.* at 453-92; POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936); FRANK, POLITICAL QUESTIONS IN SUPREME COURT AND SUPREME LAW (Cahn ed. 1954).

163. The Charming Betsy, 6 U.S. (2 Cranch) 65, 118 (1804).

164. 345 U.S. 571 (1953).

165. Morgenstern, *Judicial Practice and the Supremacy of International Law,* 27 BRIT. YB. INT'L L. 42, 91 (1950).

166. See BRIGGS, *op. cit. supra* note 11, at 889; Dihigo, *supra* note 134, at 749; Morgenstern, *supra* note 165 at 85.

167. The most relevant section of the new Constitution of 1958, Art. 44, reads: "Treaties or accords normally ratified or approved have, upon their publi-

The Appeal from Internal Arenas to External Arenas

The most important factor in promoting internal application of inclusive policies is, for our final major point, the well recognized practice among states of honoring appeal from non-application or misapplication in internal arenas to the processes of authority in external arenas. Even though judges may on occasion be required by their national constitutions to apply national rather than international policies, in cases before them, states that feel aggrieved may still insist upon performance or substitute performance in external arenas. Thus, after the judgment of the Court in *Mortensen v. Peters,* the British Government remitted the fine and amended the internal statute to prevent repetition of conflict with inclusive prescriptions.[168] The United States acted similarly in the famous McLeod affair, in which a member of the British expeditionary force from Canada, the force which put fire to the insurgent *Caroline* and set her adrift over Niagara Falls, was brought to trial in a New York court for killing a citizen in national waters. Although Great Britain argued that the expedition was governmental and authorized by self-defense, and insisted that the accused was not amenable to suit in the civil courts of the United States, the federal government did not succeed in stopping the prosecution in the state court, prior to acquittal. On British insistence that constitutional inability did not excuse the violation of international law, Congress passed in 1842 an act to authorize removal to federal courts, and release on *habeas corpus,* of persons accused of unlawful acts committed under the authority of a foreign state.[169] For more important and continuously recurrent illustration, Professor Borchard refers to the "innumerable precedents which have held states liable for their failure to perform international obligations, whether the delinquency arises out of statute or administrative act," and states:

> "Whenever a country by municipal statute or decree authorizes unlawful seizures from or arbitrarily discriminates against foreigners, under the criterion of international law and not merely municipal law, it incurs international responsibility and must repair the wrong in the most practicable manner possible."[170]

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cation, an authority superior to that of laws, under the condition, for each agreement or treaty, of its application by the other party."
See New York Times, Sept. 5, 1958, p. 10.

168. BRIGGS, *op. cit. supra* note 11, at 55-57.

169. For the account of the affair, see BEMIS, DIPLOMATIC HISTORY OF THE UNITED STATES 259-61 (rev. ed. 1942); Jenning, *The Caroline and McLeod Cases,* 32 AM. J. INT'L L. 82 (1938).

170. Borchard, *The Relation Between International Law and Municipal Law,* 27 VA. L. REV. 137, 145-46 (1940).

Indeed, even decisions by the United States Supreme Court sustaining seizure of foreign vessels either as prize or pursuant to a statute regulating fishing beyond territorial waters, have culminated in payment of heavy damages by the United States, either voluntarily by the executive, or pursuant to arbitration.[171] Thus, as stated by Secretary of State Bayard, in summing up the American practice:

> "It has been consistently maintained and also admitted by the Government of the United States that a government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties."[172]

In description of comparable British practice, Lord McNair writes:

> "We admit that, if by reason of any deficiency in our legal institutions our Courts fail to give effect to the rule of international law binding upon us, it is the duty of the executive part of our Government to make good that deficiency by making reparation to the injured State. We admit also that we cannot plead as an excuse for a breach of international obligations any defect in our own legal system."[173]

That these opinions represent a general consensus among states is indicated by Article 13 of the United Nations Declaration of Rights and Duties of States, quoted above, which stipulates clearly that states may not invoke in external arenas provisions in their own constitutions and laws as excuse for failure to perform international obligation.[174]

III.

THE COMMON INTEREST IN AN ECONOMIC BALANCE OF INCLUSIVE AND EXCLUSIVE COMPETENCE

From our inquiry above, it has become apparent that the interrelation of international law and national law is most realistically viewed, not in terms of the relative supremacy, other interrelation, or reception of rules, but rather in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass. The rules commonly referred to as international law and national law are but perspectives of authority—perspectives about who should decide what, with respect to whom, for the promotion of what policies, by what methods—which are constantly being created, terminated, and recreated by established decision-makers located at

171. *Id.* at 145.
172. U.S. FOR. REL. 753 (1887).
173. McNair, *supra* note 141, at 12.
174. U.N. Gen. Ass. Res. No. 375 (IV), U.N. Gen. Ass. Off. Rec., 4th Sess., Resolutions, p. 66 (1949).

many different positions in the structures of authority of both states and international governmental organizations. No elaborate theories of supremacy, coordination, subordination, adoption, incorporation, or transformation are needed to account for the impact of processes of authority external to particular states upon the processes internal to such states. Each particular state of the world, whatever the fundamental goals of its elites, is inescapably enmeshed in an effective global power process, constituted by patterns both of authority and of control, which encompasses and affects, and is in turn affected by, not merely the processes of the various particular states, but also hemispheric, continental, and oceanic processes, and even, in further emphasis of the porousness of state boundaries, the processes of the province, of the city, and of the humble village or township. The traditional focus upon inherited "rules" takes too little account of the factors which affect decision in the different power processes, of the consequences of decision for the different territorial communities and their component participants, and, hence, of the immense complexity of the continuous interactions by which the different power processes affect each other in variegated patterns of authority and control, crossing and recrossing state lines.

The principal point which we have sought to establish in the brief and impressionistic discussion above is that, in this global process of authoritative and controlling decision, particular states are most substantially affected by inclusive policies prescribed in arenas external to any particular state and applied in consequential conformity both in such external arenas and in the internal arenas of particular states. The major outlines of this impact of inclusive policies upon the external strategies and internal policies of particular states have been traced through a number of different patterns of authority and control, including:

(1) the establishment by decision-makers external to any particular state, through inclusive policies, of a broad and flexible, "constitutional" allocation of competence —reflected in the polar concepts of "international concern" and "domestic jurisdiction," their equivalents, and a multitude of detailed prescriptions on specific issues—for inclusive decision by the general community of states and exclusive decision by particular states;

(2) the exercise, in varying organized and unorganized structures of authority and through varying policy functions, by the general community of states of its competence so established for the prescription and application of inclusive policies which importantly affect

particular states in all their power and other value interactions;

(3) the practice of particular states, through varying constitutional principles and procedures and by varying officials, of applying within internal arenas and with a consequential degree of uniformity, the inclusive policies so prescribed by the general community for the regulation of participants in internal value processes; and

(4) the practice by particular states of honoring appeals for alleged misapplications of inclusive policies in their internal arenas to the external arenas of the general community.

More extended inquiry might have revealed, further, that particular states in exercise of the exclusive competence, allocated to them by inclusive constitutional policies, are influenced in high degree in their exclusive prescription and application of policies, for the regulation of their internal affairs, by the general limits sought to be imposed by externally prescribed inclusive policies, constitutional and otherwise.

This highly consequential impact of processes of authoritative decision external to particular states upon the internal processes of such states has of course, from a scientific perspective, been affected by all the variable and interacting component factors of the global power process in past world arenas.[175] Among the more significant factors in promoting the effectiveness of inclusive policies have, however, been the increasing frequency and intensity of contact and interactions among peoples, mentioned in our preliminary outlining of the world social process, which has been made possible by modern invention and technology; the rapid diffusion and unification of material culture consequent upon increased interaction; the rising unity of demand among peoples everywhere for wider participation in the production and sharing of all values; the increasing interdependences of all peoples for the attainment of their demanded production and sharing of values; the increasing recognition by peoples of their interdependence and common interests; and a growing understanding of the role that law, conceived as authority conjoined with control, can be made to play in the greater production and sharing of demanded values. The all-pervasive impact of international law upon national law in recent decades has thus been, more simply, but a function of the increasing demands by peoples everywhere for a world public order affording both a minimal security, in the sense of freedom from

175. These factors are characterized and described in some detail in McDougal and Feliciano, *supra* note 51, and McDougal and Burke, *supra* note 40.

violence and threats of violence, and expanding opportunity to pursue all values by peaceful, non-coercive procedures.

Turning for a moment from consideration of the past to projection of possible future developments, it is conceivable, though highly improbable, that the factors which have hitherto promoted the effectiveness of inclusive policies will lose their energies and give way to opposing factors and trends favoring exclusivity. Much more probable is the possibility that the factors tending toward inclusive decision will accelerate in the intensity of their compulsion. Even the advent of such new weaponry as artificial satellites, intercontinental ballistic missiles, and nuclear war-heads, though temporarily divisive, must ultimately accentuate the interdependence of all human beings even for mere survival. Increasing interdependence with respect to security, along with such other developments as burgeoning populations and improvements in the technology of production, transport, and communication, must inevitably bring increasing interdependence with respect to all other values, upon which security depends and which in turn affect security.[176] Along with such acceleration on a global, and perhaps universal, scale of the interdetermination of social and power processes, one can with confidence expect a concomitant intensification of demands for the stabilization, guidance, and regulation of such processes by inclusive authority and control.

For peoples genuinely dedicated to a world public order of human dignity the increasing compulsion of factors tending toward inclusive authority and control may, paradoxically, pose an especially difficult problem in the clarification of future policies. The difficulty arises from the fact that not all the aspiring world public orders exhibited by the contemporary world arena are equally dedicated, beyond rhetoric, to the values of human dignity. Among the strongest of these orders, aspiring to completion on a world scale, are indeed the totalitarian, which explicitly glorify the use of force for purposes of expansion, accepting no limits formulated in terms of conservation or self-defense, which postulate the monopolization rather than the sharing of many important values, and which preach a spurious universality or "coexistence" as a short-term tactic in a long-term strategy of poising adversaries for ultimate destruction.[177] Should the tides of victory in global struggle begin to run in favor of such totalitarian orders, the temptation may be strong for the adherents of human dignity to attempt to build new walls of isolation in the hope of fending

176. For development, see LASSWELL, *op. cit. supra* note 18.

177. Snyder and Bracht, *Coexistence and International Law*, 7 INT. AND COMP. L. Q. 54 (1958); Aaron and Reynolds, *Peaceful Coexistence and Peaceful Cooperation*, 4 POLITICAL STUDIES 281 (October, 1956).

off the impact of external decision. Any such temptation would appear in advance, however, to be most misguided. The adherents of human dignity cannot, any more than their totalitarian opponents, hope successfully to escape the continuously more ineluctable interdependences of global power and social processes. The adherents of human dignity, unlike their totalitarian adversaries, are, furthermore, committed by their fundamental postulates, as the number, range, and scope of inclusive decisions inevitably advance, to promotion of the widest possible participation in the making of such decisions by the people affected.

The most rational alternative open to peoples who genuinely project a world public order of human dignity would accordingly appear to be, not futilely to attempt to repel the advance of more inclusive decision, but rather to continue to seek that balance between the inclusive competence of the general community of states and the exclusive competence of particular states most economically designed to further their long-term basic goal values. Such a balance must, as we have seen, represent a moving line of compromise, varying with problems and contexts, between certain complementary, contraposed policies: all free peoples have a common interest in the establishment and maintenance of an inclusive competence adequate to secure common values[178] and designed both to protect democratic access by peoples to participation in decisions which affect them and to achieve an assumption of responsibility adequate to insure application of inclusive policies in arenas both external and internal to particular states; but such peoples have equally a common interest in the establishment and maintenance of an exclusive competence adequate to protect particular peoples from arbitrary external interference and oppression and to promote the greatest possible freedom for initiative, experiment, and diversity in the effective adaptation of policies to local contexts. The establishment and maintenance of interacting competences, operating in such delicate balance, depend quite obviously and fundamentally upon the quality of the processes, structures and functions, of authoritative decision made available by peoples. Hence, all free peoples, it may be concluded, continue to have the greatest common interest in improving such processes, structures and functions, including especially:

(1) techniques for securing more democratic and more effective inclusive *prescription* of policies for activities with predominantly inclusive effects;

178. That is, adequate to secure the prescription and application of policies which do in fact incorporate the values of human dignity in the relations projected and established between peoples and individuals.

(2) techniques for securing the more effective *application* of such inclusively prescribed policies in specific instances in arenas external to particular states;
(3) techniques for securing the more effective exclusive *application* of inclusively prescribed policies in specific instances in the internal arenas of particular states; and, finally,
(4) techniques for securing the more rational exclusive *prescription* and *application* within the internal processes of states of exclusive policies, both compatible with inclusively prescribed policies and expressing an appropriate local initiative, diversity, and experiment.

For some three hundred years of course, reflecting the humanitarian perspectives of Western Europe of this period, both international and national processes of authoritative decision have exhibited a slow but consistent trend toward the rationalization and improvement of techniques, structures and functions, for the purposes above indicated, and books upon international law today abound with suggestions for still further improvement. The most persuasive recommendations for the next, immediate steps in improvement may involve little more than further testing and extension of past insights and inventions. For improvement of the prescribing and applying functions in arenas external to particular states, there are, for example, a great range of plausible proposals for extending the intelligence and recommending functions of the United Nations and specialized agencies and for expanding the compulsory jurisdiction of international tribunals. For improving the exclusive application of inclusive policies in internal arenas, consideration might be given to a variety of proposals, such as: full acceptance of an inclusive prescription that states may not successfully invoke their own constitutional inadequacies, whether relating to the making or performance of agreements, as a defense to international obligation reasonably expected by others; the amendment of national constitutions to eliminate undemocratic, minority vetoes, whether by special minorities in central legislatures or by provincial groups in federal states, upon a states' comprehensive foreign affairs powers;[179] and, finally, ratification of a multi-lateral treaty incorporating, as apparently suggested by Judge Lauterpacht,[180] the substance of Article VI(2) of the United States Constitution, thus committing states not to change constitutional provisions requiring the internal application of international law. For increasing the efficacy

179. An excellent recent statement of the need may be found in HENDRY, *op. cit. supra* note 148.
180. *Survey of International Law*, Memorandum submitted by the Secretary-General, United Nations—General Assembly, International Law Commission (1948) 23.

of appeal from internal arenas to external arenas because of alleged misapplication of inclusive prescription, consideration might be given both to the creation of new tribunals or hierarchies of tribunals and to authorizing access to such tribunals by new participants, such as private individuals and associations. The range in type and detail of possible improvements in structure and function, at many different community levels, obviously approximate the infinite.

In inventing, evaluating, and choosing between possible alternatives for improvement, proponents of a world public order of human dignity might, for one final emphasis of a policy oriented perspective, well bear in mind the rational primacy of fundamental goal values over institutional modalities. There are many different kinds of world public order—involving many different interrelations of international and national law or of inclusive and exclusive decision—which might in the foreseeable future effectively serve the causes of human dignity, and no particular institutional modalities in authority structures and functions are uniquely indispensable. Scholars who make neat dichotomous distinctions between "world law" and "anarchy," or "world government" and "international organization," or "international organization" and "international law," or "universalism" and "regionalism," and so on,[181] and project these imaginary polar entities upon a troubled world, with insistent demands that mankind must choose between them, make but little contribution to rational action toward their proclaimed goals. The interrelations between the different processes of authoritative decision exhibited by the world arena must always be as protean as the multiple variables which in fact affect decision in the various processes. For genuine proponents of human dignity who would be effective, there can be no substitute—metaphysical absolute or procedural gimmick—for either continuous clarification of fundamental goal values in terms of the particular problems in particular contexts, or unremitting effort, by all instruments of policy, to create in effective decision-makers the world over the predispositions (demands, identification, and expectations) necessary to secure acceptance of such modalities and, hence, to move their projected world public order of human dignity further toward realization in fact.

181. Including, it may be added, factitious distinctions between "political factors" and "legal factors."