The Struggle for a World Legal Order: An Overview of an Adversary Process

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Peaceful relations and adjustments of disagreements, commerce and the betterment of mankind will be destroyed at once if a major armed conflict among the larger states occurs. This was the outcome of World War II which was in turn a more intensive thrust of violence and coercion than World War I. When coupled with the nuclear weapons now at our disposal, this trend of increasing devastation indicates that a future major conflict will unleash a far greater and more lasting destruction of values than any of the conflicts of the past.

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1. Arnold Toynbee quotes the Tao tê Ching which states, in declaring that Man’s technological and organizational achievements are a snare:

   The more “sharp weapons” there are,
   The more benighted will the whole land grow.
   The more cunning craftsmen there are,
   The more pernicious contrivances will be invented.
   The more laws are promulgated,
   The more thieves and bandits there will be.


   Toynbee finds these passages have “their counterpart in the Gospel according to St. Matthew: ‘Consider the lilies of the field, how they grow. They toil not, neither do they spin; and yet I say unto you that even Solomon in all his glory was not arrayed like one of these.’” Id. at 19, quoting Matt. 6:28-29.

2. World War II introduced the destructive force of nuclear weapons. The total...
The tensions that unquestionably lead to these struggles are ideological in nature. The claims and demands of peoples everywhere display expectations that they can and must have a life of greater human dignity. The current ideological conflicts encompass and affect the entire process of production, since the production and marketing of goods and services affect the well-being, wealth and prestige of all peoples. Hence, participation in the production process is participation in the decisions of government and the social economy as well.\(^3\)

The struggle for a world legal order, the focus of this article, is part of the larger struggle for a world social process and is of concern to all because no state can escape its consequences. It is a struggle for command and control over the fundamental decisions of public affairs in a world public order. The struggle extends to a decision and policy-making process, distinguishable between various social orders with respect to who participates in the decision-making and who actually decides what questions and issues. The nature of the struggle between states with differing ideologies and fundamental attitudes was described by Dr. Henry Kissinger as follows: "Whenever there exists a power which considers the international order or the manner of legitimizing it oppressive, relations between it and other powers will be revolutionary. In such cases, it is not the adjustment of differences within a given system which will be

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\(^3\) Myres McDougal and Florentino Feliciano introduce their distinguished study into the law of war with the following:

The importance today to every human being of community control of international coercion need no pedant's footnotes to bestow upon it a sense of reality. The increasingly rapid multiplication and diffusion of weapons capable of shattering the globe, the most recent successful orbiting of artificial satellites and launching of guided and ballistic missiles of intercontinental reach, the continued, if decelerated, hostile polarization of power in the world arena, the ever more precarious equilibrium between the polar opponents, the high and still rising levels in tension and expectations of comprehensive violence — all these and many other aspects of the contemporary world arena magnify with chilling insistence, even for the willful blind, the urgent need for rational inquiry into the potentialities and limitations of our inherited principles and procedures for controlling violence between peoples and for the invention and establishment of more effective alternatives in principles and procedures.

at issue, but the system itself." In short, unless the western liberal democracies and Japan systematically establish the capabilities to support and protect their system aimed at advancing human values and human dignity against adversary systems that seek to overthrow them, they will lose their heritage.

THE STRATEGIES IN THE STRUGGLE FOR A WORLD LEGAL ORDER

The legal order and the legal process are not the exclusive

4. H. Kissinger, A World Restored 2 (1973) [hereinafter cited as H. Kissinger]. It is regrettable that the seriousness or gravity of this struggle is not widely recognized, owing in part to the propensity of Western democracies to view crises as the only matters of importance, or matters calling for "real" decisions. Of more importance, it leaves the decisions, planning, preparation, and conditioning of people with respect to these issues to a handful of "elites" or "experts." In contrast, the communist or "socialist" states present us with a "command economy," even in peacetime. D. Apter, The Politics of Modernization (1965) refers to these as "mobilization systems" and Lowenthal, Development vs. Utopia in Communist Policy, in Change in Communist Systems 33 (C. Johnson ed. 1970) refers to them as "dictatorships of development." See also Lasswell, The Garrison State, 46 Am. J. Soc. 445 (1941). All of these terms clearly encompass the view that the communist states are driven largely toward goals, oriented toward security, and the massive buildup of the economy essential to that security.

Kissinger also indicates that those ages which in retrospect seem most peaceful were least in search of peace. Those whose quest for it seems unending appear least able to achieve tranquillity. Whenever peace — conceived as the avoidance of war — has been the primary objective of a power or a group of powers, the international system has been at the mercy of the most ruthless member of the international community. Whenever the international order has acknowledged that certain principles could not be compromised even for the sake of peace, stability based on an equilibrium of forces was at least conceivable.

H. Kissinger, supra note 4, at 1.

5. Saul Cohen declares:

Political relations among states are influenced by an area’s strategic value. These relations in turn affect this value. We can view the strategic importance of parts of the earth’s surface in terms of three dimensions: space, time, and national vantage points. The term space includes natural resources or location with respect to the lines of movement that carry these resources. But the endowments of areas change, in time, with technological innovation. Moreover, what is considered strategically important to one state may be unimportant to another...

Finally, an area’s strategic significance cannot be assessed in terms of the needs of a single power core. Two parties, and frequently more, will be involved. Thus, Mainland China, the United States, the U.S.S.R., Japan, and Australia are all directly concerned with Korea and Southeast Asia. While Eastern Europe is of primary concern to the U.S.S.R. and to Maritime Europe, as is North Africa to Maritime Europe, the fate of these regions is of secondary importance to other power cores of varying sizes and strength.

province of lawyers or experts, particularly with respect to the development of international law. A major reason for this is that the fundamental source of international law arises out of the practices of states. The practice of a state is the outcome of the entire decision-making process within the state. It reflects the policies and goals of both the citizens and their leaders. A state whose citizens instruct their legislature to withdraw from areas of influence or demand that their military capabilities be unilaterally reduced, for whatever reason, will engage in a practice through the exercise of its foreign policy that will eschew claims or demands with respect to other states. Strong internal claims for isolationist foreign policy, for example, will cause a state to withdraw its demands on other states to establish a world order. Such a policy will promote claims of exclusivity, sovereignty, independence or autonomy. While these policies are not the sole thrust of a state’s practice, to the extent they are established and become effective, they will affect what that state decides, how it decides and the weight of its decisions as a member of a world community of states.

A strategic instrument of long established importance in each state's foreign policy has been the military forces. When in an appropriate state of readiness, the military forces enable a state to exercise its political will and establish its policies or shape the policies of other states. Admiral Gorshkov of the U.S.S.R. revealed his country's recognition of the weight to be given military strategy:

Many examples from history attest to the fact that under feudalism, as well as under capitalism, problems of foreign policy have always been decided on the basis of the military strength of the "negotiating" sides, and the potential military strength of one State or another, created in accordance with its economic resources and taking into account its political orientation, frequently made it possible for it to implement an advantageous policy to the detriment of other States not possessing commensurate military strength. The development of armed forces is very directly tied in with the history of socio-economic systems and the methods of material production inherent in them.6

6. S. GORSHKOV, SEA POWER OF THE STATE iv (1976). Admiral Gorshkov emphasizes that the most important group of strategies are those of "political" consequence. He declares:
The development of international law is a development of restraints which states are willing to share during their "peacetime" struggle toward shaping a world social and legal order. Admiral Gorshkov indicated his awareness of this process and its significance during times other than armed conflict. He also demonstrated his awareness of the subordination of the military instrumentality or strategy — as well as its separate and reinforcing importance — in the process of seeking the goals of the U.S.S.R. He indicated clearly that the "political" element controls at every point.

This interrelationship of politics and war is readily apparent from one writer's analysis of Karl von Clausewitz's treatise, On War:

Clausewitz only rarely employed the concept "power" (Macht), and then essentially for comparing the power of belligerents (Machtverhältnisse). (It applied to military potential.) The relation of forces, in effect, governs the various manners of conducting war. Ordinarily, it is the superior side that attacks because defense is the strongest form of war. The erosion of strength intrinsic in the attack permits the defender first to resist, then to counterattack. Clausewitz attributes a particular importance to number. He assumes that an approximate qualitative equality exists among European armies; thus the conquest of territory, to the extent that it raises new troops, increases the power of the state as well as the effectiveness of the army. But Clausewitz, we must not forget, understood the lesson of the French Revolution: the participation of the people in war, in resistance, and their eventual bearing of arms assume a harmony between those

Marxism considers the geographical medium, of which the World Ocean is a most important element, to be among the main factors influencing the development of human society. . . . Military operations at sea, as well as on land, are subordinate to the general, constantly functioning laws, and they cannot be conducted in isolation from the goals of that policy of which the war is an extension. V.I. Lenin pointed out that "Policy is a tough process, while war is merely a tool, and not the reverse. Consequently, the only recourse is to subordinate the military point of view to the political." Therefore, it is interesting under present day conditions to follow from an historical point of view the dialectical relationship between the development of naval forces and the goals of that policy of the States which they were designed to serve. . . . The development of armed forces is very directly tied in with the history of socio-economic systems and the methods of material production inherent in them. Their rise or fall has been determined by the process of development or disintegration of one social system or another.

Id. at ii-iii (footnote omitted).
who govern and those who are no longer subjects, but citizens. He does not, then, conceive of war as a simple tool for the enlargement of territory, having as an end in itself the reinforcement of the military instrument. It is true that the subordination of the military commander to the statesman, when the two roles are not combined, is of major pragmatic significance: only the chief of state can consider relationships on a global scale, the political risks (intervention of other states) of a certain strategy or military victory; but pragmatic considerations do not exhaust the content of the primacy of politics.7

7. Aron, Reason, Passion, and Power in the Thought of Clausewitz, 39 Soc. Res. 599, 612-13 (1972) [hereinafter cited as Aron]. Joshua suggests that the “peacetime” struggle embodies the same overall thrust and dynamism as that displayed in war, with the same process turned to differing modalities. This occurs through marshalling “forces” — presumably all those that bear on decision and policy — to shape future policy. She declares: “According to the Soviets, detente — or peaceful coexistence — has become possible because the West has been forced to recognize the changing correlation of forces [i.e., a Soviet term denoting world balance of power in all its aspects — political, military, economic, etc.] and is therefore accommodating to rising Soviet Power.” Joshua, Detente in Soviet Strategy (September 2, 1975) (Dep’t of Def.). Presumably the U.S., without using the term, is also engaged in this “power process.” See H. Lasswell & A. Kaplan, Power and Society (1950). See generally A. George, D. Hall & W. Simons, The Limits of Coercive Diplomacy (1971); A. George & R. Smoke, Deterrence in American Foreign Policy (1974); and E. Luttwak, The Political Uses of Sea Power (1974).

Daniel O’Connell emphasizes that in using military forces, without armed hostilities, to project a major policy, the essence is superior force, with the threat first underkeyed, but, with the capabilities and the will to escalate, in order to secure the desired policy outcome. D. O’Connell, The Influence of Law on Sea Power 53-69 (1976) (reviewing the Cuban missile crisis). Vasilii Sokolovskiy indicates the importance of nuclear weapons to ensuring a “quick” victory, hence assuring the movement of the “classes” toward their goals of peaceful socialism. According to Sokolovskiy, [m]ilitary strategy is a system of scientific knowledge dealing with the laws of war as an armed conflict in the name of definite class interests.

Military strategy under conditions of modern war becomes the strategy of deep nuclear rocket strikes in conjunction with the operations of all services of the armed forces in order to effect a simultaneous defeat and destruction of the economic potential and armed forces throughout the enemy territory, thus accomplishing the war aims within a short time period.

Under conditions of nuclear rocket war, the strategic principle of the economy of forces appears in a new light. [emphasis in original]. It is apparent that when the very outcome of the war depends largely on the number and the effectiveness of the application of effort at the very beginning of the war, it is hardly reasonable to count on using the potential capabilities of a country and to reserve a large part of the forces for conducting military operations during later periods of the war. [emphasis added].

V. Sokolovskiy, Soviet Military Strategy 11-12 (3d ed. 1975). Sokolovskiy’s text is replete with references to aggression, aggressive and hostile postures of the West, the “imperialist” as the source of the unjust war, the rightness of the cause of the
To understand the practices of states as they pertain to the establishment of their policies and therefore toward the law which they seek to share with other states, it is necessary to examine the various strategic instruments which states have at their disposal. First, however, the military instrument and the strategy it affords must be closely examined.

Under current conditions what are the possibilities and limits in the use of the military instrument as a strategy to establish a nation's policy? As already noted, the world arena exhibits claims among the competing states, or blocs of states, for command and control over the world order itself — over the decisions pertaining to that order, including those with respect to a world legal order. The broader perspectives of the thrust of this competition or struggle are less visible than are other perspectives that tend to mask its importance. Unquestionably, with greater interdependence and mobility among states, and with increased means for communication, there is a strong impetus for cooperative effort, common goals, common policies and common means for implementing these policies. In this process there is a marked shift, or more correctly, an expected shift from a heavy reliance on the use of military strategies toward the use of other strategies which can shape and influence the policies of adversary states. It is in this shift that great opportunities exist for the western liberal democracies to establish and maintain the momentum toward their objectives.

Therefore, if the process toward western goals of human values and toward greater promotion of human dignity is to proceed, a realistic appraisal of the military strategy is required. Undoubtedly military conquest alone is neither a necessary nor sufficient instrument to achieve command and control over the decision and value orienting process. But the military capability and the will to exercise and use it, are essential.

“proletariat,” and the legitimacy of the wars of national liberation against colonial powers. For a member of a “peace-loving” socialist State, the language used seems dangerously out of place. Id. at 5-46.

8. Myres McDougal explains these policies as follows:

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. McDougal, The Impact of International Law Upon National Law: A Policy-Oriented Perspective, 4 S.D. L. Rev. 25 (1959) (footnote omitted).
If that capability is secured, a state can use more effectively the other strategies at its disposal.

If a state's military capability is insecure or suspect, all other strategies are in jeopardy as long as its adversaries develop their military capabilities and maintain them in readiness. Moreover, a state's alliances that are largely dependent upon military capabilities and military strategy become tenuous and unreliable. As the military capability of the U.S. and the U.S.S.R. is now configured, the nuclear weapons afford only a blanket of deterrence. Beneath this blanket exists the possibility that armed conflicts would be used to further a nation's policy. However, as long as such conflicts remain conventional and limited, it is unlikely that there is a reasonable basis to expect that they may remain manageable or that the objectives of the states involved could be realized. Therefore, it is only as long as the state's military technology is promoted to keep pace with that of potential adversaries that the nuclear deterrent itself will remain effective.

The effectiveness of limitations upon the use of nuclear weapons in armed conflict is, of course, a speculative matter and is proposed here simply for analysis in terms of the manageability of conflict. All commentators are agreed that the management or outcome of a nuclear conflict, particularly between major adversaries, cannot be determined by the precedent of previous armed conflicts. It is possible that the capabilities and the institutions devised to manage and conduct affairs as complex as a major armed conflict will fall short of what is required to protect the fundamental values of the nation-states

9. The nuclear deterrent has both legal and technical elements. Both require, however, on their own terms and criteria, that the mass destruction force capabilities, weaponry, delivery systems and verification be maintained in balance on a continuous basis, because this is the basis of a balanced security. Owing to asymmetries this is not a one-for-one balance. And the assessment of the balance is therefore a complex but not impossible process. Because the technologies are multidimensional in nature, ranging across peacetime and military applications, and, in any event the technologies are not verifiable, each state in the balance has no choice but to maintain its own research and development efforts at a high level — in the interests of its economy and military capability. The U.S. and U.S.S.R. signed an agreement declaring, "both sides will be guided by the recognition of each other's equal security interests and by the recognition that efforts to obtain unilateral advantage, directly or indirectly, would be inconsistent with the strengthening of peaceful relations" between them. Limitation of Strategic Offensive Arms, June 21, 1973 United States-Union of Soviet Socialist Republics, 24 U.S.T. 1472, T.I.A.S. No. 7653. The notion of equality, of course, has its counterpart in international law and in the United Nations Charter.
involved, or even of the world community. Bearing in mind that the armed conflict is an extension of a state's decision making process, this means that the entire decision making process for maintaining authority and control in a nuclear conflict could be destroyed.

The limited use of nuclear weapons in a limited conflict offer perhaps a less formidable challenge to the above premises. It is difficult, however, to conceive of a limited conflict between major adversaries. It is also difficult to conceive of a limited use of weapons in such a conflict that will not escalate to the use of nuclear and other mass destruction weapons. Furthermore, it is difficult to conceive that the outcome would not be a major worldwide conflict without limitation as to the weapon used. Again, regarding the armed conflict as a decision matrix, it is unclear whether the decisions and policies of states with fundamentally differing ideologies in such a conflict would lead to resolution of differences among themselves by limiting an armed conflict once it has begun.10

Because the perspectives and limitations of military conquest and the use of military strategies in an actual conflict are fully recognized by major states today, the strategies upon which they must concentrate necessarily shift in their search for command and control over the decision process of a world public order. It bears emphasis that such other strategies become effective in current practice only while an equal balance in military capabilities and the will to use them as deterrents are maintained.

The use of military and nonmilitary strategies (i.e., economic, diplomatic and ideological strategies) is the use of a

10. Studies of the decision, policy and organizational features with respect to efficient or effective management of armed conflict are relatively rare. According to Harvey DeWeerd, when the United States entered into the First World War it lacked the organizational base to carry on that war, and, unquestionably this weakness was not exploited because of the way in which that conflict developed and the sea protection the U.S. enjoyed. H. DeWEERD, PRESIDENT WILSON FIGHTS HIS WAR 9 (1968). The conclusion to that war as embodied in the Versailles Treaty and the League of Nations revealed that the Allies were unable to benefit with respect to moving a world social and legal order constructively ahead — their wars were not “an instrument of national policy,” but of uncertainty. DeWeerd summarizes President Wilson's part in this process as follows: “Against the advice of his friends and advisers, Wilson stubbornly refused to compromise with his adversaries in the Senate over reservations to the peace treaty. In the end he destroyed the fruits of victory, which were won at such a great cost in lives and suffering.” Id. at 252.
variety of policy instruments directed toward securing a policy base or implementing a particular policy. Used consistently, together they may reinforce a nation's overall foreign policy — even operating synergistically. Used improperly or without common purpose, they provide opportunities for the adversary.

Law, particularly international law, is a future oriented policy and therefore its development draws upon such strategies. It reflects the fact that "certain past uniformities in decision will, and should, be observed in the future," owing to the "crystallization of perspectives among peoples, and especially among their effective decision makers." The adversary process among states reveals the competition among them that is operating through their practice and therefore through the strategies employed with that practice to establish a favored policy. The law shared by these adversary law making entities is the law that comes out of this process of competing claims and demands.

A nation's practice in its relations with other states clearly has law making effects. It is exercised through state decisions and action, and operates through a variety of strategies deliberately pursued as a means toward desired goals. When these strategies are made to operate toward a nation's purposes and goals they reinforce one another and are then revealed as that nation's "foreign policy." The effectiveness of the strategies employed is measured by the overall results of that policy.

The results are reflected in that foreign policy because they indicate how states decide certain vital matters, how they participate in making those decisions in the world arena and how effectively they influence and shape the policies of other states. Moreover, these results indicate who may claim to be a major "power" in a decision making process over which a state has, appropriate to its power, a fair share of command and control.

Without the ability to apply military, economic, diplomatic and ideological strategies effectively, the United States and its allies would be gravely weakened in their quest for a world legal order compatible with their values and principles. They would be unable to promote or protect them. Therefore, under the nuclear deterrent and during the balancing out of military cap-

abilities and strategies (i.e., the use of such capabilities as a deterrent), these states must actively promote their influence through the other strategies.

Although policies aimed at arms control and disarmament offer to some the hope of stemming the costs or the need for a nuclear deterrence cover established by the balance of equal security in nuclear weapons and their use, there are limits to the realistic expectations of such policies. Genuine disarmament supports and requires an operative world order, but it neither creates such an order nor does away with the tensions that create insecurity.

An effective and shared policy of arms control among adversary nations calls for reliance and mutual trust among them. This requires major shifts in the adversary ideologies to accommodate fundamentally differing attitudes regarding the major states’ expectations of a world order or a shared world order. Until those conditions are reached, states are compelled to track and pace one another with respect to their weapons systems and weapons technology, monitor or police one another’s actions to ensure appropriate verification of compliance with their arms control agreements and establish a process of challenge and response with regard to alleged violations. Arms control efforts therefrom weave in and out among the foreign policies of each nation and are directed to the security interests as each sees them.12

12. In analyzing Clausewitz’s classic, ON WAR, Raymond Aron declares:
Those who have never read Clausewitz, or who have only read him in extracts, cite with regularity the following: war is a continuation of politics by other means. The exact text of the first book reads “continuation of political commerce or relations (Verkehr) by other means.” But this part of the sentence is less important than that which precedes it: “war is a real political instrument” — this expresses more clearly the essential idea of the subordination of the military means to the political end. Now this idea is opposed to militaristic philosophy — the state in the service of the army, it authorizes an interpretation which appears to me to express at least one of Clausewitz’s intentions: even in time of war, politics, i.e., the intelligence of the personified state, must retain its sovereignty.


With respect to human rights in the “international sense,” and its relationship to the international order, Karl Birnbaum states:

What does seem essential in this context [the Belgrade meetings on the Helsinki Accords] is to convey to the governments of the Warsaw Pact countries that Western support for human rights movements in the East does not reflect an aspiration to upset the political and social systems in these states. The goal
Therefore, assuming that the U.S. maintains its military capabilities in full readiness and exercises its military strategies where appropriate, the U.S. is in a position where it has definite advantages with respect to promoting its economic strategies. These strategies can be promoted to prove that western economies and the marketing systems for the distribution and allocation of goods developed in the west serve the values of their peoples and peoples everywhere.  

must be to make it clear that Western advocacy of respect for human rights is motivated in part by a concern for the predicament of individuals flowing from an appreciation of the intrinsic value of each human being; but it also derives from the conviction that deference to the aspirations of human rights movements is the best guarantee that accumulated problems will not one day explode, with incalculable risks for peace in Europe and throughout the world.


Richard Lowenthal refers to the need for security among the communist elites as follows:

The ruling bureaucracy will tend to be rational and legal in its methods so long as it does not feel threatened in its privileged position by pressures from below; but once such pressures make themselves felt, it will be quick to proclaim that the fatherland is in danger, and to tamper with legal guarantees in the name of a national emergency.


13. P.T. Bauer and B.S. Yamey indicate the difficulty with establishing such an order, and the remote chance that it will benefit the lesser developed states. Bauer & Yamey, Against the New Economic Order, 63 COMMENTARY 25 (1977) [hereinafter cited as Bauer & Yamey]. The Declaration on such an “order” was adopted in May 1974, in the United Nations General Assembly without a vote, but subjected to “reservations” by a number of states, including the U.S. and Britain. REPORT ON THE SIXTH SPECIAL SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, CMND. No. 6031 (1975); REPORT ON THE SEVENTH SPECIAL SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY CMND. No. 6308 (1975). Bauer and Yamey, expressing a conservative view, state,

[t]he declaration is in essence the latest stage in the advocacy of large-scale aid from the West to the less-developed world. What is new is the more explicit link between the alleged responsibility of the West for the poverty of the less-developed world and the duty of the West to “correct inequalities and redress existing injustices.

Bauer & Yamey, supra note 13, at 25. This quotation indicates quite clearly two fundamental elements: (a) that the communist world is not responsible and the duty does not extend to them; and (b) the criteria is not in terms of economic principles and determinants, but in terms of the “legal” criteria of “justice.”

The thrust of the “radical element” is suggested in the citation of an unnamed civil servant in a Third World country who declared: “We shall produce any statistic that we think will help us to get as much money out of the United States as we possibly
these objectives means strengthening western economies and establishing a cooperative effort among like-minded economies to strengthen the system they share. The economy must serve the fundamental goals of human dignity by establishing access and opportunity to their peoples to share in the material resources and in producing them. Furthermore, there must be a concerted effort to oppose the action or conduct of the so-called socialist or communist states whose policies seek in every way to put the western economies in jeopardy while draining them of their technology and experience.

The talents, and therefore the power, that underlie the western economic systems have yet to be unleashed. Under present demands for a "new international economic order"
But see Treaty on Stationing of Soviet Troops, October 18, 1968, Union of Soviet Socialist Republics-Czechoslovakia. In this treaty the U.S.S.R. justified having its troops in Czechoslovakia "for the purposes of ensuring the security of the countries of the socialist commonwealth against the increasing revanchist aspirations of the Western German Militarist forces." Id. at art. 1. The U.S.S.R. also declared that the "temporary presence of these troops did not violate the sovereignty of Czechoslovakia. Id. at art. 2. The treaty was, of course, signed and ratified by the appropriate representatives of both countries.

Karl Birnbaum examined the Russian invasion of Czechoslovakia and concluded, the Soviet Party leadership has insisted on retaining in major documents regulating Soviet-East European relations the key concept of "socialist [or proletarian] internationalism," a modification of the "limited sovereignty" principle invoked to justify the invasion of Czechoslovakia in 1968. In addition, Moscow has attempted to equate the observance of the rules of proletarian internationalism with a stance of fundamental solidarity with the U.S.S.R., thereby underlining the claim that the Soviet Party should remain the ultimate arbiter of the collective interests of the Warsaw Pact Countries.

Birnbaum, Human Rights and East-West Relations, 55 FOREIGN AFF. 783, 788 (1977) (footnotes omitted). With respect to the "differences" or distinctions by various publicists of wars of national liberation, self-determination, and the socialist commonwealth, a Pravda article justifying intervention in Czechoslovakia declared:

The antisocialist elements in Czechoslovakia actually covered up the demand for so-called neutrality and Czechoslovakia's withdrawal from the socialist community with talk about the right of nations to self-determination.

However, the implementation of such "self-determination," in other words, Czechoslovakia's detachment from the socialist community, would have come into conflict with its own vital interests and would have been detrimental to the other socialist states.

... Laws and legal norms are subjected to the laws of the class struggle, the laws of social development. These laws are clearly formulated in Marxist-Leninist teaching, in the documents jointly adopted by the Communist and Workers' Parties.

Formally juridical reasoning must not overshadow a class approach to the matter. One who does it, thus losing the only correct class criterion in assessing legal norms, begins to measure events with a yardstick of bourgeois law.

Pravda, September 25, 1968, reprinted in N.Y. Times, September 27, 1968, § 1, at 3, col. 1. For documentation of objections by communist parties of various countries see SUBCOMM. ON NAT'L SECURITY AND INTL OPERATIONS, U.S. SENATE COMM. ON GOV'T OPERATIONS, 91ST CONG. 1ST SESS., CZECHOSLOVAKIA AND THE BREZHNEV DOCTRINE (Comm. Print 1969). Some believe that the same reasoning would be applied to the "principle" of "detente" by Soviet interpreters. See, e.g., Joshua, Detente in Soviet Strategy (September 2, 1975) (Dep't of Def.).

Hans Kelsen declares:

The true meaning of a legal norm is usually supposed to be the one which corresponds to the will of the legislator. But it is more than doubtful whether there exists at all such a thing as the "will of the legislator," especially where the law is the result of a complex procedure in which many individuals participate. ... The fact that the legal norms as formulated in words having frequently more than one meaning is the reason why every legal instrument has its own life, more or less independent of the wishes and expectations of its begetters.

they are put on the defensive. The main thrust of the demands of a large number of other states is to oppose the western system and its fundamental values and to revolutionize or replace it with a new, more legitimate and just system of production that employs cartels, quotas and price fixing. These other states claim that this system of socializing the world economy is just, and the struggle against the western economies is the peace time equivalent of the just war.

In addition to the economic strategies, the western states, which for these purposes include Japan, must attend more firmly to the diplomatic strategies available to them in negotiations, diplomatic conferences and the United Nations forum. The diplomatic strategies include the activities of the delegates or representatives of the U.S., as well as those of ambassadors and of officials acting out of the executive or even the legislative branch of government. These strategies are aimed at reinforcing the actions of allies and at protesting conduct of other states that is inconsistent with what the U.S. claims is lawful. Furthermore, these diplomatic strategies enter into the conferences with allies and the joint efforts at policy within the North Atlantic Treaty Organization and the Organization of American States, as well as within a variety of special organizations. With respect to its allies the U.S. must act jointly to strengthen its positions, primarily to ensure that the fundamental principles and process which encompass the policies of the west are shared in the west and asserted against adversary states with a view toward influencing and reshaping their foreign policies.

In order to ensure the promotion and protection of the human values that underlie these policies, the west must show itself to be firmly committed to the principles of international

14. According to P.T. Bauer and B.S. Yamey, the “[f]our widely supported components of the NIEO are staples of international conferences.” Bauer & Yamey, supra note 13, at 29. Their analysis points out that each of these is subject to serious objection. The components are commodity agreements, debt cancellation, official or enforced transfers of technology, and multinationalization of aid. Of particular interest, and more immediate to the concern of states, is the translation of these proposals into the demands, and therefore the resistance, of the same bloc of states, in the Law of the Sea Conferences. The fundamental debate which centers on almost identical issues, is addressed to the deep seabeds and how they will be exploited, who will benefit, and, in particular, who will decide about the entire allocating process. We can anticipate the same set of demands will be extended into the future claims for treaties in outer space. Each of them use the now fashionable “principle” that these demands follow from the right of all peoples — “the common heritage of mankind.”
law that deny credence to distorted applications of western values under the guise of "peaceful coexistence," "detente" and the doctrinal assertions in the Brezhnev doctrine of a "socialist commonwealth of States." Protecting western principles requires resistance to attempts by communist states to take over and apply against their own values the liberal principles of the west. A fundamental objective of diplomatic strategies must be the promotion of the fundamental values prized in the west.

Finally, the ideological strategies of communist states place a great strain on western resources because they create illusory expectations that lead to tensions and destabilization. Communist bloc states have in large measure succeeded in imposing, through communist doctrine, a widely held belief on the part of many that their doctrine contains and advances "justice" and basic human rights. That doctrine purports to establish human rights in terms of anticipated outcomes in the productive performance of communist societies. To the uninitiated it suggests wide participation in the governmental process. However, with respect to participation by the "peoples" of the world in their own affairs, as set out in the United Nations Charter, the actual practices of states in the world legal

15. The "socialist commonwealth of States" — as doctrine — has been introduced as a new and fundamental principle of international law under the Brezhnev "doctrine." See Legal Aspects of the Invasion and Occupation of Czechoslovakia, Dep't State Bull., at 394-401 (October 14, 1968).

16. The diplomatic strategies of states and their "practice" interact. In regard to the high seas and this interaction, Professor McDougal's observations are enlightening:

Throughout the centuries of its development, one may observe the regime of the high seas as not a static body of absolute rules but rather a living, growing, customary law, grounded in the claims, practices, and sanctioning expectations of nation-states, and changing as the demands and expectations of decision-makers are changed by the exigencies of new social and economic interests, by the imperatives of an ever-developing technology and by other continually evolving conditions in the world arena. From the perspective of realistic description, the public order of the high seas is not a mere body of rules, but a whole decision-making process, including both a structure of authorized decision-makers and a body of highly flexible, inherited prescriptions: it is a continuous process of interaction in which the decision-makers of individual nation-states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding nation-state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them.

order suggest a greater concern with the interaction of states themselves. This in turn suggests that the fundamental elements flowing between the states should be expressed in terms of the power factor. States are said to be engaged in power politics, and their law is cynically assessed as that which speaks to or is backed by power. In this process, the expectations of peoples for greater human dignity is submerged.

This prevailing set of beliefs reinforces those who wish to promote a power process, and denies to the peoples of the world a concern or participation in the process affirming the values which they prize. The essential process among states, which is in part what the struggle for the world social and legal order is all about, is more than a process directed to the allocation of authority, structures, institutions and procedures among decision and policy entities. Like the process that led to the development of the United States Constitution, there must be a concern not only with the creation and partition of power, but also with the necessary restraints upon government, its abuse and the measures to deal with that abuse. The checks and balances found in the wisdom of James Madison offer some hints on managing the power process:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. . . .

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and ar-
range the several offices in such a manner as that each may be a check on the other.\textsuperscript{17}

These precepts find their way naturally and readily into the affairs of states and their conduct with one another. The same officials are frequently engaged in dual functions establishing the external, national policies of their own nations, as well as seeking to establish the constitutive policies and law that will operate to regulate the conduct between nations. The reality of conflict, as Rolf Dahrendorf has indicated,\textsuperscript{18} is clear enough so that we must not unrealistically seek for conflict settlement in the sense of finality, but for conflict regulation, in the sense of management. The balancing of power\textsuperscript{19} through the checks and

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\textsuperscript{17} A. HAMILTON, J. MADISON & J. JAY, THE FEDERALIST OR THE NEW CONSTITUTION 347-48 (1945). Madison favored as part of the scheme of checks and balances a "pluralism":

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. . . . Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

. . . It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority — that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.

\textit{Id.} at 349-50.

\textsuperscript{18} R. DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY (1959).

\textsuperscript{19} Technological change with impacts upon military advancement or modernization and with peaceful applications must be established, according to Moore, under social controls.

Nearly all of current technical innovation is deliberate. This means, concretely, that technological change is organized and institutionalized. The "pure" knowledge that is expanded and the useful knowledge that is applied are almost entirely a function of the amount and type of support given to some fields and projects, and thus not to others. There is nothing in abstract or applicable knowledge itself that would account for its expansion or use without human intervention.

W. MOORE, TECHNOLOGY AND SOCIAL CHANGE 24 (1972). Moore presumably would like to have technological "impact" statements comparable to those for the environment or arms control:

The assembly of teams of experts to engage in technological assessment is thus itself an interesting bit of social technology. . . . Other instruments of social control are available, most notably the legislative, administrative, and even judicial processes afforded by law. These still tend to be remedial rather than

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balances described by Madison calls for more imaginative diplomatic and ideological strategies because the balance must be maintained against any use of nuclear weaponry.

Therefore, with the strategic instruments to serve western policies in view, the United States must pursue as a fundamental purpose to be relentlessly asserted, the human values we seek to claim and promote. In the use of these strategies we must unquestionably "keep our powder dry," for man exists in a dangerous world, and must have the certainty of a sound military instrument to promote and implement within the west and among the western nations and Japan the world social and legal process which will secure our goals.

**Conclusion**

The struggle for a world order and a world legal order is part of the dialectics of confrontation, competition and tension in the world arena today. These crises, too often obscured by the charades of peaceful intercourse, afford us great opportunities to draw from the real dialectic process the outcomes favorable to the west. In the process of constituting a future world order, the military instrument is in part foreclosed under penalty of great and cataclysmic destruction to world society. The growing size of weapons systems and their means for delivery, coupled with dynamic advances in military technology, compel us to recognize and deal with this policy issue within the balancing process of deterrence, and compel us to make it work until disarmament can effectively be obtained.

Particular emphasis must be given to the practices of states and the strategies they have at their disposal. The United States is committed in its maritime practice, for example, to claim free use of the seas. It is similarly committed to project its military forces abroad as a means to support its foreign policies and as an adjunct to those policies. The practices associated with each of the strategies must be used and must reinforce one another. The agreements entered into and diplomatic positions taken must reach toward favored objectives. The economic strategies must be supported and promoted by western

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preventive. The ultimate control of technology, including harmful applications of what we could do, rests on complex political processes for registering and compromising human purposes.

_Id._ at 25.
diplomacy and law. If the western states can benefit from their own economies, so also can those states which are emerging on the world scene and seeking tried and effective paths toward economic development. The ideological struggle must be toward the unfolding of a rising expectation among peoples everywhere that prized principles will guide the west's tactics, strategies and goals.

Failure in these efforts, or even in making appropriate attempts, might lead to weakness which would encourage adversaries to resort to adventurism or even to using military strategies which appear relatively risk-free. This orientation could be fatal to all concerned since the decision to enter into armed conflict among the great powers today is in large measure based only on the irrational or the absurd. Failure to maintain technology — research and development (including testing) — however, might lead to a serious imbalance, making a threat of superior force so credible that no armed conflict would occur. Failure on our part to persist in our purpose to the extent of stopping short of an armed conflict would lead to an erosion of prized values. If this is allowed to occur, the values and the social and legal order will fall short of the declared commitments of the western states, and in a realistic sense, the west would deserve to lose them. The choices here are not unlimited, and the assertion of policy, the shaping of appropriate strate-

20. P.T. Bauer and B.S. Yamey declare:

Income and wealth are normally earned, that is produced, and not taken or extracted from others. Economic contacts with the West, which usually have benefited the West, [i.e., from their colonies] have at the same time enabled people in Third World countries to improve their productivity by giving them access to markets, by making available to them a wide variety of goods, ideas, and information, and by supplying relatively scarce complementary resources such as enterprise, capital, and specific skills. Without these contacts the Third World would have remained much poorer than it now is.

The world comprises a very large number of societies and groups which have emerged in varying degrees from a base of material poverty. In all cases, in the Third World as in the east, the principal determinants of economic achievement and performance have been human aptitudes, motivations, aspirations, mores, mode of thought, social institutions, and political arrangements. It is these which have either fostered or hindered the willingness to work, save, take risks, and perceive and pursue economic opportunities.

Bauer & Yamey, supra note 13, at 28-29. John Rawls includes in the subject matter to be assessed under a theory of justice, "major institutions" including "the principal economic and social arrangements," J. RAWLS, A THEORY OF JUSTICE 7 (1971).
gies, the implementation of policy and the firmness of our resolve will determine our future decisions and action.\(^\text{21}\)

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21. Richard Lowenthal compares the nationalist movements and communist movements toward modernization and their challenge to the west:

For the nationalists, conflicts with Western imperialists are part of an uncompleted struggle for final emancipation from the remnants of colonial rule, particularly from Western economic privileges, to be continued as long as Western resistance to those limited objectives makes it necessary; for the Communists, these conflicts are part of a world-wide struggle that can end only with the total demise of the capitalist order. Hence the Communist outlook, as distinct from that of the nationalists, implies a basic unremitting hostility to the Western powers which, though it need not lead to a major war, excludes the possibility of substantial Western aid and requires a long-term, high-priority effort in the field of armaments and the basic industries on which their production depends. The combined result of excluding substantial Western aid and giving long-term priority to arms production and basic industries is that a Communist regime will normally have to demand from its subjects heavier and more lasting sacrifices than a nationalist one in order to obtain the same degree of success in development.


Richard Pipes takes the view that the U.S.S.R. not only believes it can undertake a nuclear war but that it can win it. Pipes, *Why the Soviet Union Thinks it Could Fight and Win a Nuclear War*, 64 *Commentary* 21 (1977). He argues that the U.S. appears to be committed to a "strategy" (and he discounts this commitment as a "strategy" in any event) of "mutual deterrence." This strategy is traced to a mixture of U.S. attitudes toward war in general, its refusal to accept seriously the position of Clausewitz that "[w]ar is nothing but a continuation of political intercourse, with a mixture of other means," and the attempt to get off cheaply by assuming that a low cost investment in nuclear deterrence is sufficient to maintain "mutual deterrence." In Pipes' view the possibility of a destabilizing element in the deterrence balance may be great enough to shift the security policy needs from a deterrence posture to a war-fighting, war-surviving and war-winning posture, thereby opposing the posture which the U.S.S.R. has assumed. He also argues that the U.S.S.R., in effect, encourages the doctrine of "mutual deterrence," because like the Potemkin village, applied to doctrine, it will veil their own position, enhancing its strength. Id.

Leon Gouré, Foy Kohler and Mose Harvey argue that the U.S.S.R. view is not "against nuclear war." Citing a major Soviet authority, Karabanov, they note, the mutual suicide and no-victory line is now relatively rare in the Soviet Union. The weight of opinion, and especially as voiced by military authorities, is that while nuclear was "can cause substantial detriment to the development of world civilization, inhibiting the advance of the revolutionary process," and that it would result in the death of many millions of people and the destruction of some countries, "there is profound erroneousness and harm in the disorienting claims of bourgeois ideologies that there will be no victor in a thermonuclear world war."


On Clausewitz, see P. Paret, *Clausewitz and the State* (1976). Limited wars seemingly have little persuasion for Clausewitz or U.S.S.R. strategy, even with the
advent of nuclear weapons. This, at least, would appear to be the outcome of Sokolovskiy's arguments. V. Sokolovskiy, Soviet Military Strategy (3d ed. 1975). This position was also taken by the Executive Secretary on U.S. Objectives and Programs for National Security in the Report to the National Security Council. The report stated: “The design, [of rulers of the U.S.S.R.] therefore, calls for the complete subversion or forcible destruction of the machinery of government and structure of society in the countries of the non-Soviet world and their replacement by an apparatus and structure subservient to and controlled from the Kremlin.” NSC-68, XXVII Naval War C. Rev. 51, 54 (1975). The entire matter is subject to controversy. See J. Collins, Grand Strategy 70 (1973).