Towards Peaceful Settlement of International Disputes

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INTRODUCTION

The current chaos of the world community demonstrates the failure of the international legal system to accomodate the conflicting interests of States. There persists a wide gap between the reality and the adequate in international law and organization. This inadequacy, of course, reflects the diverse and divisive qualities of international society. We observe a wide variety of States, with multitudinous characteristics, portraying a spectrum of commitment to the basic policies of peaceful settlement, having resort to different resources, and manifesting contradictory expectations about the legitimacy of the use of force.[1]

Recognition of this diversity is not to deny the rapid developments of legal expectations in recent decades. Trends of national claim and international decision can be located for all areas of transnational interaction. These are manifested in the wide web of custom, treaties and national decision, and increasingly in organized arenas like the United Nations.

To establish peaceful patterns of inter-nation practice remains, therefore, the peremptory pursuit for a civilized world system. Rapid technological advances and the consequential increasing interaction and inter-dependence of all peoples only accentuate the requisite intellectual tasks. Specifically, what policies are to be preferred in the common interest of the world community? What have been the developments toward these policies, and how are they explained? Finally, how can the current reality be controlled and future events manipulated toward the preferred policies?

In response to these questions, this paper surveys some of the recent developments and current problems in the peaceful resolution of international conflicts and the prospects for the implantation of an international rule of law.

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* This essay is based on a paper submitted and address given to the Bangkok World Conference on World Peace Through Law, 8 September 1969.

1 Readers may recognize some of the ideas, terminology and analytical system of Professors McDougal and Lasswell of Yale Law School which are employed without specific acknowledgment but with general gratitude.

FUNDAMENTAL POLICIES

The most basic policy, despite its high abstraction, is to achieve the status of peace in the world community. It follows that States must establish patterns of behaviour for the mutual accommodation of conflicting interests. It follows that national use of force or the threat of force must be controlled, and that such force should be appraised by broader community policies. It follows that the commitment of all States, other participants and peoples, to improvement of their value position by peaceful rather than coercive means is essential. Finally, the common interest of all mankind in avoiding armed conflict and sharing in the fruits of peaceful co-operation must be accepted.

But a policy of "law and order" must not be to the exclusion of the policy of "law and justice". For international order should not be, indeed cannot be, at the expense of the intrinsic demands of human dignity. The rightful aspirations and demands for an adequate share in all worth-while values cannot be appeased. Instead, a goal of the greater production and sharing of all values must be accepted, therein included political power, economic benefit, personal welfare, the dignity of respect, the development of skills and education, and the freedoms of religion, association and affection.

These two policies lead to the third. An international order capable of fostering peace and developing the values of human dignity must be nurtured; an order which can sufficiently deal with changing demands and conflicting interests, within which the infrastructure of a world legal system caters to the common interests rather than to the interests of the powerful or the anarchist or the law-breaker; wherein legal prescriptions can be not only developed but applied and therefore respected, but respected and therefore applied. For in an ordered society demands for stability and change must be made compatible. To concede that this development of a civil and structural international society is, to invite the assessment of Friederick[2], "mankind's most difficult problem" is not to negate the validity and urgency of the objective.

SOME CONDITIONING FACTORS

1. A world community and common interests

Peaceful resolution of conflicting national interests is likely to be directly proportional to the degree of integration of a community and to the participants' consequent perceptions of common interests. A material factor of peaceful settlement of international disputes, therefore, is the fact and the sentiment of a community. Can we talk of an international "community"? Certainly transnational events are increasing dramatically, aided by new communications, transportation and technology, and exemplified in interacting economics, levels of trade, movement of peoples, military postures, diplomatic exchanges, information dissemination and the activities of international organizations

2 Friedrich, *Inevitable Peace* (1948), p. 61.

and groups, both governmental and non-governmental. These interactions and the accompanying perspectives are sufficiently intense, claim some,[3] to evidence the emergence of a world community. Different definition and appraisal give alternative views. In his recent book Starke,[4] for example, proceeds from the distinction of *Gesellschaft* and *Gemeinschaft* to talk of the "absence of an international community, in the sense that the relationships between nation-States conduce to union".

Detracting from a stronger world community identity is the persistent "syndrome of parochialism"[5]; the identification at the national level of "them" and "us" which is vigorously supported by predispositional and environmental factors. Attitudes are moulded by culture, which sets parameters and indicates values. Concepts of class, depending on the control (or lack) of values, articulate the haves and have-nots and sustain superiority manifestations. Compounding factors are perceptions of real interests, demands and expectations which may be exclusive of those of other participants, as well as personality attributes.

Equally divisive are environmental conditions. Thus the distribution of resources, such as the adequacy of food or the surplus of people or the need for oil, influence international posture. Likewise the military strength of States satisfies demands for parity, respect and security. And of great significance is the distribution of views on any question, such as the need for respect of law, the importance of peaceful resolution of disputes, the adequacy of international institutions or the availability of community sanctioning.

These predispositional and environmental factors of the world system frequently are encompassed by the concept of nationalism. The destructive impact of national perspective and interest on the development of an international rule of law is evidenced daily. Often propelled by domestic political considerations, the pursuit and protection of the immediate national interest spans both the more peaceful modalities, e.g. trade embargoes and tariff walls, and the more coercive forms, e.g. the use and threat of armed force. Consistently, patriotism demands personal sacrifice for the national group, and elites manipulate emotional symbols to this end. So do these traits of nationalism assault the preferred policies of peace and the common enjoyment of all values.

Yet to these divisive qualities there is the complementary ethos of international law, that of common interest.[6] To concede that nations aim to maximise all values is not to assess their commitment to inter-

3 See McDougal, Lasswell and Reisman, "The World Constitutive Process of Authoritative Decision" (1967), 19 *Journal of Legal Education* 253, 403, at pp. 253-6.

4 Starke, *The Science of Peace* (1968), pp. 67-8.

5 Lasswell, "Introduction to McDougal and Feliciano", *Law and Minimum World Public Order* (1961), p. xxvi.

6 Cf. Rosalyn Higgins' felicitous estimate that the function of international law is "to seek to establish what is the common interest and to base itself upon it". Higgins, *Conflict of Interests* (1965), p. 7.

national law and institutions. The present, though varying, commitment of States to the existing decentralized world outer system, resulting in authoritative rules and competent institutions, demonstrates an appraisal by them of net value gain. Informal sanctions of mutual tolerance, benefit and retaliation, buttress this realization of common interest and edge participants towards the postulated peace policies. A fundamental task of the peace researcher, therefore, must be the identification and demonstration of this common interest and its coincidence with the national interest. Topical and traumatic examples are in the interest of all men in avoiding nuclear war, the equally hazardous threats of pollution of the environment and ecological imbalance. There is a similar common interest in the support of community organizations, or in the necessary national commitment to both customary rules and agreements.

2. Contending systems of world order

Cold war situations, whether described in the old terms of bi-polarity, or, in the more fashionable phrase of multi-polarity, add a further dimension to current prospects of peaceful resolution of disputes. Indeed, within the communist-capitalist ideological battle, and the two antagonistic views of social order, the spokesmen for each system exhort the justness and legitimacy of their cause, encouraging followers to self-devotion for one group against the other. In the choice of policies, such as the commitment to world order and peaceful settlement of disputes, the political element governs. As the evangelicalism of the cause waxes, so too does the easy justification of hostile propaganda, the encouragement of defections, unfriendly actions, and the incitement and instigation of forceful change. The tussle between antagonists demands the mobilization of all means; ideological (including psychological warfare, the aggravations of emotions, appeal to symbols and irrationality), diplomatic (including an ongoing battle in organized and unorganized arenas), economic (increasing "ours" and decreasing "theirs") and military (the deterrent system, military alliances and arms races).

This tension, mistrust and struggle obviously impacts and colours all national decisions. Of the stunting effect of competition for political hegemony De Visscher accurately indicates:—[7]

> "They produce a general insecurity which is in the highest degree prejudicial to the establishment of regular practices and to continuity in the application of law. They impede the development of general conventions by reducing the number of participants or multiplying reservations incompatible with their object; they promote unilateral denunciation. They restrict commercial channels to the point of strangulation, subjecting them to the artificial directives of economic nationalism. Even international organisation itself deteriorates profoundly in spirit through the substitution of political objectives for goals of general interest. The risk is particularly great for international collective action . . ."

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7 De Visscher, *Theory and Reality in Public International Law* (Corbett Trans. 1968) pp. 86-7.

If deemed desirable by the super-powers potential peace-settlement mechanisms quickly clog up. And this may apply, not only to disputes between themselves, but also to disputes between, or even within, smaller States. Furthermore, when sucked into the domain of the cold war small States may sacrifice their effective independent will to that of their mentor, becoming further entangled by inflammatory escalation and national delusion. Meanwhile the substantial exclusion of Communist China from community decision processes, and the limited acceptance of that country of the existing system, detract from the desired universality of commitment to peaceful settlement and proliferate cold war influences.

3. States

A final conditioning factor of the contemporary world system is the dominant power position of the nation-State. While joined by others, the State remains the primary international participant. In the creation of legal expectations State commitment is determinative. Likewise, the most disruptive international disputes consist of conflicting State claims. As the main repositories of power, States control territory, resources, people and institutions. States largely control the use of force, diplomacy, propaganda and economics, and it is the State that exercises jurisdiction. While the international system includes other participants, namely territorial units not States, universal and comprehensive international organizations, functional and regional institutions, private groups and the individual, these all depend on the effect of State decision and commitment for their international personality and qualities, including access to international arenas of decision.

THE FRAMEWORK OF PEACEFUL SETTLEMENT

In the quest by States to maximize their total value position, their interests at times conflict. A strategy for the development of an international rule of law must focus, then, on the range of disputes and the avoidance of tensions, and must develop the means for peaceful, rather than coercive, settlement of disputes consistent with the basic policies of peace. Yet how can this be attained in the decentralized, State-dominated, undernourished international system?

1. Participants

In the search for peaceful settlement, all international participants are engaged. Most obviously States, by their national officials, constantly decide and appraise their commitment. At the same time international organizations and their officials are variously involved, while non-governmental groups and individuals, despite frequent denial of access to formal processes, actively interact, recommend and appraise.

In the process of settlement of disputes, ongoing decisions of participants depend on governing perspectives, such as the sort of world order preferred and envisaged. In particular, how do States view their

value demands and their relation to peace and human dignity? And what priority is the use of violence to gain national objectives accorded? Further, is the governing identification one of the group and nation, or that of a world community? Finally, what are the expectations about past, present and future events? In the necessary trek toward world peace, for example, past failures obviously condition national decision-makers. And while there is talk of future community institutions, there is the fearful expectation that they may be at the expense of the values of human dignity or adequate participation in decision. Because of the limited immediate benefit of proposed organized community co-operation, States feel that they have little to lose by non-co-operation. In fact the expectation persists that more can be gained by retaining the largest amount of unilateral State competence on the assumption that, then, a State's elite can control its own decisions.

2. Objectives of peaceful settlement

The fundamental policies of peace have been articulated in general terms of the maintenance of the status of peace, the greater shaping and sharing of all values, and the establishment of adequate community machinery. These goals can be further elaborated, in functional terms, according to the circumstances.[8]

(a) Prevention of breaches of the peace

The maintenance of the status of peace, so that the conflicting interests of States are resolved by peaceful means, is the first of the five peace objectives. Effort is required, therefore, to appreciate the predispositional and environmental conditions which exacerbate the likelihood of disruption, in order to employ the available bases of power and strategies to counter them. Another aspect gaining increased attention is the need for early isolation of tension-producing situations, so that manipulative techniques can be employed to offset escalatory tendencies. The crucial question of appraisal, then, as for all these objectives, is how committed are all participants, and in particular national decision-makers, to non-coercive methods of settlement? Further, how can this commitment be increased?

(b) Deterrence

The objective of deterrence is "upon precluding acts of nonconformity by underlining the cost of deviation".[9] By a rational evaluation of costs involved in non-peaceful settlement, States do refrain from regular use of force. Amongst the larger powers, and between the nuclear leaders, credible expectations of retaliation have hinged on such rational evaluation within the expectations of nuclear

8 The following division of objectives is adopted from Arens and Lasswell, *In Defence of Public Order* (1961), pp. 199-203. For a more detailed multifactoral inquiry, see McDougal and Feliciano, *Law and Minimum World Public Order,* (1961).

9 Arens and Lasswell, *In Defence of Public Order* (1961), p. 201.

deterrence. Because of the decentralized nature of the world order system, this threat of impending cost is normally found in the unilateral State decision of retaliation, albeit within the concept of permissible self-defence, and perhaps involving other States by alliance or understanding. The threat of retaliation may take on less direct forms. A common focus of attention for peace searchers lies in community-organized threat and response to law-breakers and peace-disturbers. While perhaps slowly developing, such machinery takes on idealistic qualities in light of present conditions.

(c) Restoration

When the objectives of peaceful settlement and deterrence fail, so that tension leads to active conflict, the objective of restoration becomes ascendant. The commitment to de-escalate forceful encounters must be nurtured amongst all participants, including the direct parties, third-party States, and competent international organizations and officials. Unfortunately present State practice is too often to further generate, or to aid and abet, the use of force once initiated. Even when the bases of power of combatants is limited in fact or by agreement, inflamed domestic emotion, escalatory steps, inflated hopes or demoniac fears render the task of the most talented peace-maker nigh impossible. Thus international machinery, while at times suggesting specific remedies has not displayed the ingredients necessary to intervene and restore peace.

d) Rehabilitation

To permit the re-entry of States into ordinary peaceful processes of the community, the disruptive impact of the use of force dictates the objective of the restoration of destroyed values. The disorganized nature of the world community does not encourage the process of rehabilitation, yet its value is indicated by the guided post-war recovery of West Germany, Japan and Western Europe, plus the disastrous lessons of the retribution against Germany after World War I.

(e) Reconstruction

Reconstruction and prevention overlap; while prevention aims to encourage peaceful resolution of disputes and to prevent breaches of the peace, thus assuming the continuing condition of peace, reconstruction objectives focus on reform of basic elements of the world order system. Past upheavals have stimulated new efforts at reconstruction of the world order, in particular the formulation of the League of Nations and the United Nations. Similarly, there was basic modification of the violator States after World War II. But generally there is no preponderant power necessary for such traumatic imposition of internal systems, and an organized community with adequate structures of authority and control to implement reconstruction itself awaits such reconstruction.

Plans for fundamental re-organization of the world system, such as the elimination of the State's dominant role and the transference of authority to community machinery, would be classified as reconstruction. In light of present conditions, however, such plans are distant ideals without appeal to the larger States and without persuading means of implementation.

3. Base values and peace

In the world system the efforts for fulfilment of the above objectives will depend on the values available to all participants; values such as power (to influence decision-making), wealth (to contribute to economic costs), skill (in the performance of necessary mechanical and technical tasks), intelligence (in the form of basic and reliable information on which to base sound decision), respect (so that an opinion or decision, once formed, will carry some authority), rectitude (appreciation of the rightness of the cause in moral terms) and affection (feeling of identity, sympathy, empathy). Peaceful settlement of all and any dispute, then, will depend on appropriate manipulation and control by participants of these values. Again the pre-eminence of the State emerges; its control of values is expansive, and includes control over people, resources and institutions. The consummation of peace objectives, whether by decentralized or centralized means, will depend on the advice, consent and support of the controlling States. How committed, then, are States to these objectives? It remains to note, too, that just as these base values are available to the attainment of peace objectives, they are equally available to participants who decide to act inconsistently with them.

4. Strategies

The means by which base values can be manipulated for peace objectives are multifarious. All participants, including international institutions and decision-makers, variously engage in the use of diplomatic, ideological, economic and military instruments. Similarly, States pursue national objectives within the limitations imposed by international law.

(*a*) *Diplomatic*

Communication between elites, predicated on mutual benefit of participants, contributes vitally to the achievement of peaceful settlement of disputes as indicated by the high authority of international law on diplomatic intercourse. New organized arenas of multi-national diplomacy, such as the United Nations, are developing, and the suitability of diplomacy for impartial international activity is observable, if not exploited.

Diplomacy contributes to all peace objectives. Thus, for example, for the prevention objective, common interest and inducement can be demonstrated for peaceful settlement, leading to acts of mediation, conciliation, or third-party settlement. Deterrence clearly depends on creditable communication of intentions and costs. Diplomatic efforts do not cease when hostilities commence, often the converse, leading

to positive efforts at rehabilitation. In reconstruction, too, significant steps depend on diplomatic achievement and the reaching of State agreement on constitutive change although only after world catastrophe, and not before, have State dispositions been spurred to intense reconstructive activity.

(*b*) *Ideological strategy*

The communication of information to masses aimed to influence their demands, identifications and expectations by both national and international media is commonplace, with highly publicized organized arenas now available to State representatives. And, despite verbal commitments to the freedom of information flow, State elites tend to manipulate information distribution for their own ends. Meanwhile, international law is undeveloped, leaving States relatively free to engage in hostile acts of propaganda.

The potential of the ideological strategy for the promotion of peaceful settlement remains unexplored. One may consider, however, the potent possibilities of preventing the use of force by fostering acceptance of world order symbols. Intensity of demands for peaceful settlement are subject to change, as are demands for the specific peace objectives, opening the way to State co-operation with international organizations, transfers of State competence to community machinery, and submission of disputes to third-party adjudication. Identifications, too, can be transferred from the nation to the community. Finally, existing expectations are subject to symbol strategies—consider, for example, the passive acceptance of the use of force as an "inevitable" part of State relations. In deterrence, propaganda affects internal and external support for the violator of peace, while in restoration the art of psychological warfare and the appeal to the "hearts and minds" of masses is highly skilled. Similarly, in rehabilitation and reconstruction, symbols are used to bring shifts in perspectives compatible with peaceful prospects.

(*c*) *Economic strategy*

State control of financial resources involves substantial transnational impact, providing a potentially valuable strategy for attainment of peace objectives. And despite this importance, justifying classification as a separate strategy in the maximization of State and community interests, international law barely restricts State competence to act contrary to common interests or community policies.

Although the full sanctioning effect of the economic strategy is yet to be harnessed coherently to the peace objectives, trends of State and international activity are appearing. We see interest in State and community aid to underdeveloped areas, sometimes tied to international institutional arrangements, appeasing the threat of forceful resolution of vast economic differences. For the objective of deterrence, also, there is emerging the practice of threatened and operative unilateral and community-authorized economic deprivations as a stimulus to peaceful resolution. Finally in the creation of new community struc-

tures of decision, the economic infrastructure is demonstrably basic to all peace objectives.

(d) Military force

The use of armed force appears to be the exact opposite of peaceful resolution of disputes and the attainment of world order. The situation in context may be more complicated. For, like all values and strategies, military force can be used for or against the policies of peace. Despite the increasing authority of the prohibition of the use of force by States in pursuit of national objectives, "war as an instrument of national policy still endures".[10] True it is that States retain a near monopoly of armed force, openly building and planning unhindered by international law. The question raised here, however, relates to a particular relationship; that of the use of force and peaceful settlement. How can force be manipulated to propel peaceful settlement of disputes? For in the felicitous words of Brierly:—[11]

> "There is no such phenomenon in human society as 'the rule of law' in the literal sense of the term; force rules always, and the question on which the difference between good government and bad depends is always whether force is behind the law or elsewhere."

Without policy, force is neutral; it can be employed for or against community order, and as a sanction, both unilateral and community organized, to actual or threatened breaches of the peace.

The developing expectations limiting national use of force, with the dichotomy between permissible and impermissible uses of the military instrument, reflect the basic policies of the need for peaceful settlement of disputes. Yet ambiguity shrouds the concepts, and unilateral application of broad norms according to national interests cut into their efficacy. Finally, the failure of an organized community to control forceful adventures detracts from developments restricting State competence.

Thus, in the policy of peaceful settlement, military force currently is a two-edged sword. On the one side, certain national force and the threat of force is the antithesis of peaceful settlement, and thus prohibited. On the other side, however, force is variously available to stimulate peace. Developing commitment to peaceful resolution reflects the policy of prevention. In deterrence the costs of departing from peaceful modalities of change are demonstrated, for example, by navy manoeuvres and shows of force. In restoration, likewise, military force is a component to compel withdrawal or to cease hostilities. Rehabilitation and reconstruction, too, while preferably based on persuasion rather than force, contain elements of forceful strategy. In particular, the identifiable trend toward community-controlled use of force amounts to a fundamental reconstruction of power relationships. And disarmament, a concomitant of the same preferred policy, would be classified as both reconstruction and prevention.

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10 Carlston, "World Order and International Law" (1967), 20 *Journal of Legal Education*, 127, at p. 144.

11 Brierly, *The Outlook for International Law* (1944), pp. 73-4.

STRUCTURES OF AUTHORITY FOR DISPUTE SETTLEMENT

In this survey of peaceful settlement of disputes, emphasis is laid upon the conditions basic to rational creation and implementation of particular structures of authority. These conditions are the undernourished orphan of inquiry, in contrast to the multitude of suggested world order systems, which too often focus on unrealistic ends and resort to legal techniques little more than functional equivalents and containing considerable conceptual ambiguity. While schemes calling for a world constitution, a world legislative body, a comprehensive world judiciary, or a world police force and total disarmament are interesting speculations, current conditions render them distant ideals. Indeed, these schemes sometimes detract from more immediate tasks, especially those related to the manipulation of contemporary conditions and the consequent commitment of States. Nevertheless, peaceful settlement of disputes is dependent on the existence of adequate decision-making structures. It remains, therefore, to inquire: what structures presently exist, what is the commitment to their utilization, and how can this commitment be increased?

1. Decision-making in a decentralized world community

In the current decentralized world system, lacking organized community structures of authority and decision, States retain prime place in the processes of decision. This means that States, while generally acknowledging the binding quality of international law, are themselves primarily involved in the determination of what the rules are and how they apply to specific facts. Inbuilt reciprocities, retaliations and mutual tolerances of the international system, however, do circumscribe State decision, and common interest in the maintenance of peace and the resultant authority of rules of international law contribute considerably to accommodation of conflicting State claims. By claim and counterclaim, protest and acquiescence, conflicts of interest are often settled and legal expectations created, applied or modified. Certainly, also, claims can be settled and criteria established by express consent in treaties, themselves in turn subject to conflicting interests and claims.

It is thus the exception rather than the rule that a dispute will be referred to or resolved by organized community structures. Instead, States have developed a wide range of devices by which accommodation is reached. At times excluded as a modality of settlement, national courts, and other national institutions, may resolve transnational conflicts, a function highlighted where international law is given national effect and courts are prepared to engage in such involvement. Diplomatic intercourse, however, is the normal and highly developed pattern of State practice, with communication, protest, persuasion and acquiescence a daily function. Between friends differences of interest are often made compatible or tensions kept at a minimum. Between non-friends diplomatic channels may still temper the differences and confine disputes to non-escalatory proportions.

Good offices, mediation, and conciliation techniques, by which

third parties are involved in the diplomatic tangle, may clarify fact and law and promote peaceful settlement. Yet a constructive response by the disputants is contingent on conditions other than the goodwill of the intervening third State.

2. Community structures: The international court of justice and arbitral tribunals

(a) Structure

The I.C.J., established as an organ of the United Nations with its Statute providing the constitutive framework, offers to States an organized judicial process of the highest international authority. Yet business has not been brisk, and the contribution of the Court to peaceful settlement of disputes, as distinct from its contribution in developing international law, remains relatively small. Its non-use, however, is not an indictment of the Court; it is rather another reflexion of underlying conditions and commitment of States. These limits are real and definite. As Katz recently said:—[12]

> "The elemental limits cannot be changed by a constitutional or statutory modification. They can be extended or contracted, if at all, only by alterations in political and legal concepts that would entail changes in the basic pattern of values, beliefs, and habits rooted in the culture and psychology of a people."

In many ways, therefore, the Court may be assessed as structurally adequate. An attempt to represent all legal systems is made, though perhaps not to the satisfaction of certain States. The tendency toward longevity of the Court adds to its potential authority. The judges are highly respected. Nevertheless, the hope that structural changes might stimulate greater utilization and consequent contribution of the Court to the settlement of international disputes prompts a range of suggested changes.[13] Regular suggestions include; regional divisions of the I.C.J., circuit sittings, a World Criminal Court and a World Court of Human Rights. Clearly, each of these proposals deserves attention on its own merits, and an appraisal for efficacy and means of implementation in the light of current conditions.

Arbitration similarly proffers to disputant States the prospect of third-party settlement. Expectations as to the formation, operation, criteria, etc. of arbitral tribunals is highly developed, including the structural aspects of the Permanent Court of Arbitration. Yet, compared to a Court, States retain control over the choice of the arbitrator and the criteria, a flexibility gained at the expense of the need for agreement of the parties for third-party decision.

(b) Access

The Statute of the I.C.J. restricts access in contentious cases to States. Arbitrations are usually, though not necessarily, so restricted. As noted, however, States are no longer the sole participant of the

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12 Katz, *The Relevance of International Adjudication* (1968), p. 34.

13 See, e.g., Jenks, *The Prospects of International Adjudication* (1964), pp. 148-9.

international system. Peaceful settlement of disputes, it can be posited, would be aided by greater access by all participants to structures of authority. Consider for instance, Jenks' plea[14] that:—

> "Among the more urgent procedural innovations which are required is provision for international organizations of States and governments to become parties to cases before the International Court of Justice."

The European Court of Justice, allowing action by organs against States and granting access to any legal person, hints at potentialities. And the European Court of Human Rights, while denying the individual direct access, allows an individual versus the State claim. The provocative nature of such access, and the incursion into unilateral State competence, might be lessened with changed expectations of the nature of such litigation. Thus certain areas, such as human rights, may prove more subject to individual access, while procedures such as preliminary submission to a commission could render the disputes more justicable.

(*c*) *Jurisdiction*

Deeply embedded in present expectations is the principle of consent; without State consent there can be no third-party adjudication. Yet an international rule of law eventually must depend on compulsory reference of disputes to community decision-making. As Starke says:—[15]

> "The compulsory adjudication of disputes between nations by a permanent international tribunal has remained, and must continue to remain, a fundamental of any proposed system of peace-preservation."

Recent State practice gives little cause for optimism. Specifically, acceptance of compulsory jurisdiction under the optional clause is stunted, mostly excluding the new States and Communist regimes, and then with abortive reservations of State discretion. Accordingly, there is little international pressure for such submission. Nor is the example of larger powers efficacious.[16] Current conditions of the world system again underlie the impasse:—

> "But fundamentally the problem of compulsory jurisdiction is political and psychological; legal and technical ingenuity can find a solution, and generally a variety of possible solutions, for all the technical and procedural elements of the problem; but the heart of the matter lies elsewhere. The essence of the question is confidence. How can we contribute to creating a world of cataclysmic change and acute mutual distrust, the wider and fuller confidence necessary to the further progress of international adjudication?"[17]

Symptomatic of the current stalemate is the idea that certain conflicting interests are not susceptible to third-party adjudication; over large slices of interstate disputes, branded "political questions", States prefer to retain control. And this is so despite the fact that "there

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14 Ibid., p. 4.

15 Starke, *The Science of Peace* (1968), p. 47.

16 See Bleicher, "International Court of Justice Jurisdiction: Some New Considerations and a Proposed American Declaration" (1967), 61 *Columbia Journal of Transnational Law.*

17 Jenks, *The Prospects of International Adjudication* (1964), p. 3.

is clearly no question that can be classed *a priori* in a category labelled political"[18] and not legally resolvable.

Spotty progress in compulsory jurisdiction includes jurisdiction conferred under conventions, such as the European Convention for Peaceful Settlement of Disputes, and some treaties with the newer States. Most international and regional organizations impose no such demand, although some recent multilateral treaties do. There is also the possibility of reference by the U.N. upon an organ being seized of a dispute, such as was exercised by the Security Council under Article 36 (3) of the Charter in the *Corfu Channel Case*.[19] A realistic appraisal, therefore, concludes that it is by such piecemeal acceptance, outside the jurisdictional clause and perhaps formalized in a General Act for Judicial Settlement, that constructive development lies.[20]

Advisory opinions, a further possibility of I.C.J. jurisdiction, while subject to the consensual need of a request from an appropriate body, may contribute to the settlement of disputes, notwithstanding the "non-binding" nature of the opinion. Developments here include an increase in organs able to request an opinion, the increased *de facto* access for disputes between international organizations and States or even individuals, and the use of non-unanimous requests. While open to greater use, especially in politically oriented questions, it can be argued that advisory opinions have already been "employed in a role inconsistent both with the intended consensual basis of the Court's jurisdiction and with the proper function of a judicial tribunal".[21]

Commitments to arbitration, finally, if widespread, are organized only in bi-lateral agreements without comprehensive application. Consideration by the States of the U.N. Model Rules on Arbitral Procedure (1953) again showed that they were not prepared to accept a general arbitral agreement.

(*d*) *Law-creation and law-application*

Recent political, economic and social changes, reflected in divergent demands and expectations relating to international rules, have shattered the previous certainty and universality of international law, risking reduction of authoritative community prescriptions to the slimmest proportions. The consensual nature of customary norms, in particular, when combined with the positivistic demand for demonstrable universal acceptance, renders objective articulation of custom difficult. Decisions of the I.C.J. have weighted the balance against

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18 De Visscher, *Theory and Reality in Public International Law* (Corbett Trans. 1968), p. 73.

19 1949 I.C.J. Reports 5.

20 Sohn, "Step-by-Step Acceptance of the Jurisdiction of the International Court of Justice" (1964), *Proceedings, American Society of International Law*, p. 131.

21 Greig, "The Advisory Jurisdiction of the International Court and the Settlement of Disputes Between States" (1966), 15 *International and Comparative Law Quarterly*, p. 325.

proof of custom,[22] reinforcing State competence when a prohibitive rule is not clearly proved. "In almost every case, the complainant is seeking to formulate a rule that suggests that matters of mutual concern should be subject to joint regulation, not unilateral decision. Yet the state of international law doctrine, and the Court's jurisprudence, tends to leave the dispute where it was by declining to curb unilateral action."[23]

In addition the uncertainty of international norms and their level of generality is greater than that tolerated by an integrated and developed legal system, increasing the scope for anomalous unilateral State decision. International decisions, instead of being adequately predictable, tend to be "a game of chance".[24] And adjudication is even more unsuitable when the legislative impact of a State's action is involved; where the claim is not to apply current law but to create new expectations more compatible with new interests, without commitment to or application of old rules. There may also be the fear that adjudication will prematurely crystallize customary expectations. A further compounding factor is the often inadequate appreciation of the customary process of norm creation.[25]

Without greater certainty of legal rules and their application, it is difficult to foster respect for international law and peaceful settlement of disputes. The rationale and potential of the International Law Commission, accordingly, lies in the legislative impact of treaties and the modality of codification. While some would argue against codification because of the compromising prescription and the risk of premature articulation of common interest, the dramatic need for making international law clearer and more systematic, more reflective of current demands, and covering areas previously left to State competence, vindicates efforts of codification.

(*e*) *Enforcement*

The enforcement of third-party decisions represents a slice of the larger problem of the enforcement of international law. The absence of organized processes of enforcement, and the consequent limited expectation of enforcement based on unilateral decision, detracts from an international rule of law. It has even been suggested that for certain areas, as States have different views of compliance, talk of compliance may be of minimal use.[26]

The enforcement of adjudicatory decisions, however, has special features. While non-compliance has been minimal, this generalization

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22 Recently re-enunciated in the *North Sea Continental Shelf Cases* (1969), I.C.J. Reports.

23 Kaplan and Katzenbach, *The Political Foundations of International Law* (1961), p. 280.

24 Stone, *Quest for Survival: The Role of Law and Foreign Policy* (1961), p. 4.

25 For a creative functional appraisal see Raman, "The Role of the International Court of Justice in the Development of Customary Law" (1965), *Proceedings, American Society of International Law*, p. 169.

26 Sohn, "Realistic Compliance Goals" (1964), *Proceedings, American Society of International Law* 24, at p. 25.

is deceptively simplistic. First, it reflects the non-acceptability of adjudication on important conflicts of interest; for the problems of compliance vary with the scope of the decision. Secondly, as perceived by Jenks,[27] there is a large element of ineffectiveness of decisions, compounded with non-compliance with advisory opinions and frustrations by later developments. Finally, it is because of the voluntary and consensual nature of adjudication that there is rarely a serious problem; according to the principle of good faith, the decision carries the obligation to comply. Nevertheless, the difficulties of enforcement are proportional to the currency of third-party decision. Schachter correctly observes that:—[28]

> "Should there be a wider acceptance of compulsory jurisdiction ... the chances of non-performance would almost certainly increase; for it is evident that a State would not then be as prepared to accept an adverse decision as where it had agreed to the submission of a particular dispute."

Non-compliance is of real import; it may well increase frustrations and tensions and the risk of breach of the peace. It also corrupts expectations as to the usefulness of adjudication.

Yet the enforcement sanctions should not be under-estimated, comprising combinations of the strategies of peace and offering a wide range of instrumental techniques.[29] Specific possibilities include procedural techniques such as express prior commitment to compliance, diplomatic and economic pressure, attachment of property, enforcement through national courts, limited self-help and armed force and utilization of community organizations. Most of these devices display potential for implementation and development. Enforcement under Article 94 (2) of the U.N. Charter, for instance, awaits application, while the competence and activation of the Security Council and the General Assembly, even to the point of use of force to the end of compliance, likewise await delineation.

3. Community structures: The United Nations

(*a*) *The United Nations and peace objectives*

From the letter, ethos and *raison d'etre* of the U.N., the fundamental policy objectives of world order gain their authority. From Article 2 (4) and other references come the prohibition of force and the imperative of peaceful settlement of disputes. Secondly, recognizing the relation between disorder and the lack of development of values, an equally important goal is the development of all people and values. Finally, the Charter offers present and potential community structures of authority, with the possibility of peaceful and forceful U.N. response to situations of tension and breaches of the peace, proffering a range of peaceful strategies and aiming to stimulate the development of

27 Jenks, *The Prospects of International Adjudication* (1964), p. 664.

28 Schachter, *The Enforcement of International Judicial and Arbitral Decisions* (1960), 54 A.J.I.L. 1, at p. 5.

29 For a brief insight survey see Falk, " On Identifying and Solving the Problem of Compliance with International Law" (1964), *Proceedings, American Society of International Law* 1, pp. 6-9.

international law. Calling for deeper analysis, then, is its failure to foster arbitral and judicial settlement. A recent appraisal finds that the United Nations has not "significantly developed" the mechanisms of settling disputes.[30] Clearly, this lack of development of the U.N. according to the more optimistic hopes of its founders and men of good-will depends on attitudes of its component States and thus to the full range of predispositional and environmental factors. Only with more enthusiastic support of member States will the U.N. constitute more than an arena of policy expression and organized diplomatic interchange so that it can fruitfully approach the problems of dispute settlement, the containment of existing violence, the reduction of arms and the consummation of rising expectations for value shaping and sharing. For the operation of the U.N. in the fields of peaceful settlement, the enforcement of international law and the containment of law-breakers, it has been said accurately, "depends both on the existence of a generally acceptable state of law and political affairs and on the overwhelming weight of the community behind that police power".[31]

(b) Conflict resolution within the United Nations

The Security Council is intended as the primary U.N. organ for the conservation of peace and settlement of disputes between States. By Article 33 of the Charter, the obligation is imposed upon States to solve their differences by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". And the Security Council is entitled to require disputants to comply with this obligation, by other means if necessary. The breadth of Security Council competence is stressed by Article 34, whereby disputes and situations producing international tension can be considered. Article 35 permits access to the Security Council of States not represented on the organ, including States not parties to the U.N. Charter. And by Articles 36 and 38 there is power to recommend appropriate procedure and terms of settlement. At the same time, in the event of a threat to or breach of the peace, or acts of aggression, the Security Council is granted wide powers to prescribe responsive action by Articles 39-42 and thus to restore the status of peace. And the authority conferred is not limited to recommendation.

These broad powers, however, are restricted in practice because of the need for consensus of the big powers contained in the veto provision of Article 27 (2). Only to the extent of agreement of the permanent members can the principles and procedures of the Security Council to prescribe and apply policy in concrete circumstances be activated. Designed to safeguard the interests of the big powers, the veto is effective to this end; probable inaction of the organ is the

30 Arangio-Ruiz, "Development of Peaceful Settlement and Peaceful Change in the United Nations System" (1965), *Proceedings, American Society of International Law* 124, at p. 128.

31 Russell, *The United Nations and United States Security Policy* (1968), p. 63.

price of large power support. Certainly the veto has had destructive impact, overcoming the preference for community decision rather than unilateral State act. Yet as De Visscher says:—[32]

> "Criticism errs when it treats the veto as the decisive factor in the paralysis that has overcome the Security Council ... The veto is only an instrument; the real cause lies in the state of basic political relations among the great powers."

The General Assembly is granted powers coexisting with, but subject to, those of the Security Council, and trends indicate that it can be utilized for the ends of peaceful settlement even though legally restricted to decisions of recommendation. By Article 10 the General Assembly may discuss and make recommendations upon all Charter questions, and by Article 11 it may consider and recommend upon the "general principles" of the maintenance of the peace and security, and disarmament. Finally, by Article 14 there is the power to "recommend measures for the peaceful settlement of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations". In practice the weak General Assembly powers have shown potential for development; stimulated by the stultifying Security Council veto, authority has tended to shift from the Security Council to the plenary organ, partly under the impetus of the Uniting for Peace Resolution of 1950, partly because of its more representative nature, and with some legitimacy added by the Certain Expenses Advisory Opinion.[33] The danger of a quasi-democratic body not reflective of effective power relationships results.

In terms of competence and procedure, therefore, the Security Council and the General Assembly are endowed adequately (if not fully) for the settlement of disputes between States. When linked with appropriate constitutional development, consensual commitment of States to policies of peaceful settlement and expectations as to the propriety of organized community decision, the U.N. is not prevented from swift development. Already, to varying extent, the organs are engaging in the development of legal rules, and by specific entreaty and developed practice engaging in policy formulation, information collection, appraisal, and the functions of prescription and application. Continuing is the debate, often within the reservation and symbol of Article 2 (7) of the Charter, on the appropriate equilibrium between unilateral State decision on the one side and collective community competence on the other. Despite changing commitment to U.N. involvement in dispute settlement unfortunately a joint interest of States to retain their competence and not to foster community decision-making may be detected.

The record shows instances of fact-finding, conciliation and negotiation, recommendation and dispute settlement. The first decade saw the Greek question, the birth of Indonesia and Israel, and Kashmir. Yet the efforts at institutionalization by the creation of new structures,

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32 De Visscher, *Theory and Reality in International Law* (Corbett Trans. 1968), pp. 111-12.

33 (1962), I.C.J. Reports 151.

resources, and criteria for a more active peace-settlement role, especially by the Security Council and the Secretariat, collapsed in the organizational and spiritual anarchy of that time. The second decade was one of *ad hoc* devices, exploring the constitutive powers of the organs and the energies of the Secretariat. Contributing to developing expectations were Hammarskjold's negotiations with Communist China, the intense activities concerning Suez, the Congo, Cyprus, Kashmir, West Irian, and an assortment of multilateral diplomacy and exhortation. Unfortunately, however, current crises, some of direct world-wide impact, only too clearly demonstrate the continuing weaknesses in practice of the existing community decision-making structures.

(c) United Nations use of force

The outlawry of force, it is generally agreed, is an increasingly authoritative norm of the international system. Even though the use of armed force is initially a unilateral State act, its legitimacy is no longer free from community appraisal. National use of force, the antipathy of the fundamental policy of a world rule of law is not, however, displaced by community control and use of force. To what extent has the United Nations developed a capacity to participate forcefully in such peace-keeping objectives as deterrence and restoration? This issue, it is submitted, is fundamental to the development of an organized world community co-operating for common interests within the rule of law.

Even a cursory glance at United Nations activities, and the attitude of constituent members, shows a stolid inaction not likely to contribute to realistic expectations of adequate progress. Specifically it seems that States, even assuming a commitment to the policies of peace, and who are thus prepared to appraise disturbances of the peace as aggression and contrary to common interests, are not prepared to commit either troops or resources to community control. It has been said:—[34]

> "States do not ordinarily welcome external invitations to use their armed forces to serve purposes other than their own vital interests which they believe to be under an immediate and serious threat."

Further, the current inability of the U.N. to deal with breaches of the peace certainly does not contribute to realistic expectations that community response to force is feasible.

Chapter 7 of the Charter, dealing with enforcement action, promotes the Security Council functions of preservation, deterrence and restoration of the peace by the use of force. In addition, measures involving the use of force, but not entailing the use of force against a particular State, and categorized as peace-keeping, are a constitutional possibility for both the Security Council and the General Assembly.

Consummation of the role of the U.N. depended, in addition to the support of the permanent members of the Security Council, on the

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34 Katz, *The Relevance of International Adjudication* (1968), p. 126.

implementation of Article 43 of the Charter on fostering of suitable forces. Yet the disagreement of Russia and the United Nations, fuelled by the cold war, defeated early hopes. Experience of organization was gained, and expectations as to competence of the respective organs developed, by the community action in Korea, and the assorted peace-keeping activities such as Suez, the Congo and Cyprus. Yet organization of forces remains *ad hoc,* for few States have followed the Uniting for Peace recommendation calling for the maintenance of national forces for United Nations activities. Since 1962, however, both Soviet and United States disarmament proposals have been tied with varying specificity to the development of community forces. By 1966 United States policy was committed to a permanent U.N. force. Yet there has been little recent development or clarification in the areas of authorization, organization, administration and financing.

CONCLUSION

Progress towards a world rule of law, therein included the peaceful settlement of disputes between States, has been painfully slow. Verbal commitment to the concept has increased, but often there is a wide gap between promise and performance. That the problem has confronted mankind for so long, that the search for solutions has consumed so much energy, that current developments are hard-won and slight, all indicate the huge complexity of the quest.

The current and continuing chaos reflects the array of conditioning factors. First, there are the raw facts such as the degree of State interaction, the identification of people with the group rather than the whole, and the varying perception of common interest. Secondly, there is the intense political-ideological competition of blocs and groups which eats into the infrastructure of legal expectations. Thirdly, there is the State-dominated international system. For all these factors, and their environmental and predispositional inputs, scientific investigation and appreciation is at most fragmentary. Greater understanding of man's personality is essential. How else can we hope for the control of man's destructiveness and the international use of force? Evidently resort must be had to the policy and behavioural sciences, to foster manipulative modifications of human responses in context.

For peace to displace conflict there is need for all participants of the world community to pursue the fundamental policies of peace and the objectives of peaceful settlement. Further, this must be done with adequate base values and resorting to appropriate strategies. In this process the preference should be for organized community decision rather than for unilateral State decision. Thus, for interactions having a substantial transnational impact international law must be developed and State competence accordingly diminished. At the same time it must be demonstrated that States have more to gain than to lose by peaceful resolution of disputes. This calls, then, for the expectation that only community-sanctioned use of force is justified and that the

development of community structures is in the national as well as the international interest.

The search for adequate community structures of decision for dispute settlement emerges as the creative task. But, as pointed out, the hurdles of implementation stultify. These hurdles are surmountable only by the growth of appropriate predispositions among an effective majority of States toward the establishment of structures of decision and compliance with authority. Already conflicting interests are pragmatically accommodated in the common interest by the devices of diplomacy. Meanwhile, third-party structures of decision are evolving spasmodically, although usually they are deprived of their full potential either by hostile conditions or by such symptoms of disorder as limited access, restricted jurisdiction, limitations of law-creation and application, and enforcement. The preference for community over national decision is only, therefore, minimally consummated. The U.N., similarly, while providing a suitable arena for the development, application and enforcement of the policies of peace, and recommended as proffering man's best hope for a co-operative world community, is denied a larger role by the insistence of States on their retention of unilateral competence. Consequently, only with the development of national policies compatible with commitment to peaceful settlement will the U.N. and other community structures of decision overcome the present frustration.