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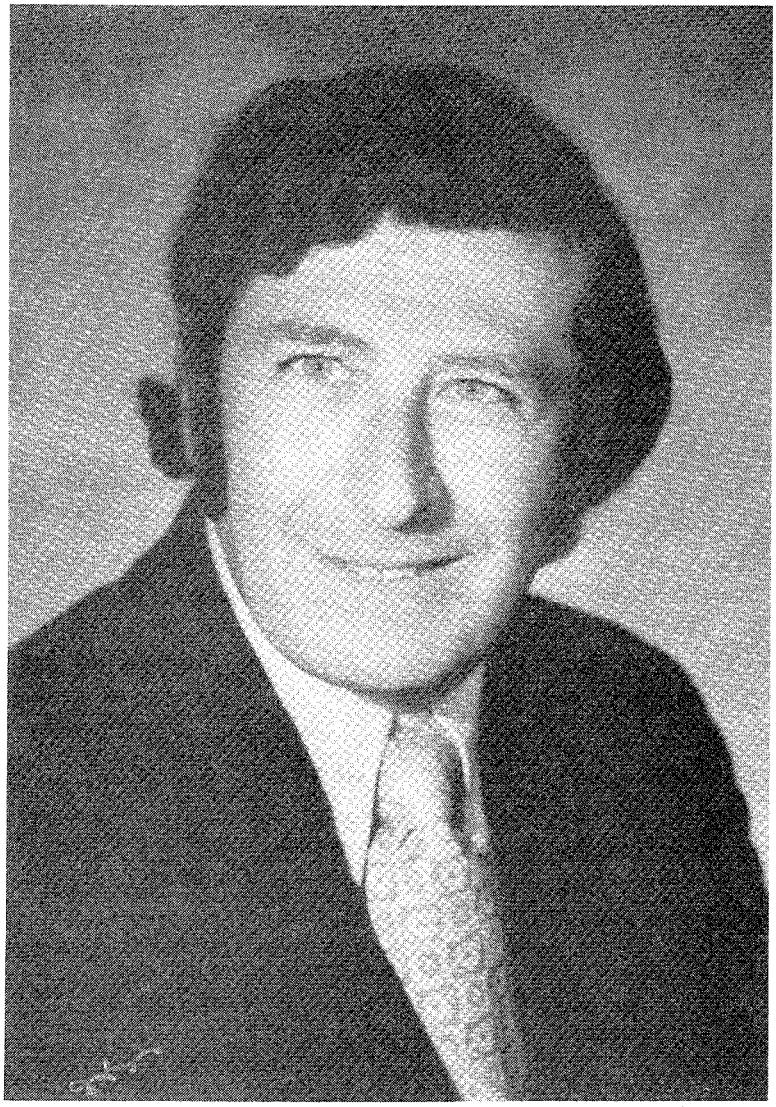

ELI JARMEL
1929-1975

The Staff of the DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY joins with the community of the College of Law in expressing sympathy to the family of the late Professor Eli Jarmel. Professor Jarmel's passing is a deep loss to all members of the legal profession. His excellence in scholarship, his ability to inspire those with whom he worked, and his dedication to the principle of providing legal assistance to all are examples toward which we must strive. To his memory we dedicate our efforts.

Denver Journal
OF INTERNATIONAL LAW AND POLICY

Foreword

The Board of Editors of the DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY is proud to present the first in a continuing series of mini-symposia, the "Middle East Consensus Project." A review of the recent literature on the Middle East reveals that much of this work suffers from one or more common pitfalls: a failure to eschew partisan advocacy, an inability to descend from the lofty heights of the academic world to the reality of the situation, or a lack of understanding of the peoples involved, to name but a few. It was hoped that by narrowing the scope of the inquiry somewhat, these problems might be avoided. In May 1975, a number of scholars familiar with the Middle East were invited to prepare a short article for this issue. Wherever possible, theoretical approaches were to be combined with more practical aspects, in order to make the contribution of the "academic community" something more than abstract theorizing.

In recent years, regional diplomacy has been most successful on an incremental basis. So, with this technique in mind, three areas of consideration were suggested: (1) principles: concepts of international law that can be applied as the normative framework upon which to establish a foundation for consensus; (2) facts: areas in which consensus already exists, whether perceived or not, which can be used as the first points of an agreement; and (3) directions: building upon accepted facts (political, military, economic, geographic) in areas where consensus may not now exist, but where development of future consensus would most likely occur.

Readers having comments regarding the above framework, or any of the papers appearing herein, are invited to submit them to the Editor-in-Chief for consideration for publication in a future issue. It should be noted that much of the material appearing in this issue was prepared prior to the September 1975 accord between Egypt and Israel, and thus may not incorporate it specifically.

The Board of Editors

The Arab-Israeli Confrontation: A Historian's Analysis

C. Ernest Dawn*

Insistence on non-negotiable positions by both sides has been the salient feature of the Arab-Israeli conflict. The essential point at issue remains today what it was in the beginning, the existence of a Jewish state in Palestine. On this question thus far, neither side has given any unambiguous indication of willingness to compromise. Such intransigence is paralleled by a military stalemate in which neither side has been able to force the other to accept a settlement. Finally, while the great powers have been deeply involved in the conflict from its inception, it has not been possible for the powers to impose a solution. These observations may seem obvious and commonplace, but in public discussion very frequently (and at crucial times) the policies of the governments have proceeded from their contraries. These misperceptions may not be the root cause of the Arab-Israeli impasse, but surely their correction is the first step in the search for a solution.

Belief that cause or solution of the Arab-Israeli conflict lies outside the two parties has been a major blinder. Zionists commonly thought that the source of their problems with the Arabs was Britain; Arabs have attributed the existence of Israel to the British or the Americans; Ernest Bevin, among many others, believed that the problem could have been solved by an American president who was willing to resist the Zionist conspiracy; it is commonly said that Israel was created by the United Nations. In fact, neither the United Nations nor the great powers have ever imposed, or been able to impose, their wills. The Partition Resolution of November 1947 was never implemented, and Israel became a state under traditional international custom. United Nations actions with respect to Israel and the Arab states, until very recently, have rarely touched basic political questions. No United Nations action that was not acceptable to both Arabs and Israelis has ever been implemented.

The inability of the United Nations or the great powers to impose a solution originates partly in rivalry between the two superpowers, but only partly. The United States and the Soviet Union have been

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in agreement at times, notably in 1947-49, but their agreement has not resulted in the imposition of any measures on either Arabs or Israelis. When the big two have been in agreement, both Arabs and Israelis have been able to muster enough support from other states to frustrate any outside action, whether through the United Nations or by individual states. The underlying reality is that both Arabs and Israelis have a long history of violent resistance to outside forces. In the 1920s and 30s, with international consent, the British and French imposed colonial rule on the Arabs, and the British used military force to secure the establishment of a Jewish community in Palestine. Since 1945, however, international conditions have made it difficult for the European powers to use military force in a major way. At the same time, both Arabs and Israelis have shown that they will give up their political goals only when forced into submission. Thus, the present stage in the Arab-Israeli conflict originated when the British, under violent attack from the Jews, unwilling to use force against the Arabs, and unable because of international conditions to use effective force against the Jews, withdrew and left succession to the Palestine mandate to be decided by war between the two communities. The British and the French attempted military action against the Arabs in 1956, but failed in the face of American and Soviet opposition. The Soviets, apparently, intended direct action against Israel during the 1973 war, but refrained when the United States showed opposition. The powers accordingly have had to limit themselves to providing assistance, financial and military, to the disputants. Both the Arab states and Israel have enjoyed such largess in sufficient degree that the basic balance between them has not been affected. And so the Arab-Israeli confrontation in essence has been left at the balance between the two sides.

It may be that the international constellation is changing to Israel's detriment. Certainly, the Arab states enjoy a comfortable majority in the United Nations. But it is most unlikely that General Assembly actions will have any more effect in the future than they have had in the past. It is easy to imagine the Security Council imposing sanctions on Israel save for the American veto, but the veto will be sufficient to prevent implementation. The European countries and Japan have recently become solidly pro-Arab, as France has been since 1967, but it is difficult to see how the new friends of the Arabs can have any more influence on the situation than France has had, which is no influence at all. Most of the states have limited capability of military intervention and it is doubtful if any have the will. Israel is, of course, thrown on the United States solely for military supply, and the NATO countries can be expected to deny the use of their facilities for an American resupply of Israel, but the United States can, if it wishes, make do without European cooperation.

The United States might change its policy, but it is doubtful that it can take action now which will have any immediate effect. Military action against Israel by the United States or by any other non-Arab state is almost inconceivable. American supply of Israel could be stopped while the Arabs continued to receive arms from abroad. In this situation, the pressures on the American government from pro-Israeli sources would be tremendous. If the government succeeded in withstanding the pressures, Israel could, and undoubtedly would, strike at the Arabs before the balance changed. If the Arabs should quickly destroy Israel in war, then the United States would be able to shed a few tears and make its peace with the Arabs. But such a decisive Arab victory is remote, and accordingly the American government would not likely be spared the pressures which the continuing Arab-Israeli confrontation generates.

This holds true for the situation with the greatest imaginable impact on American policy, i.e., an Arab-Israeli war with total Arab oil boycott. Leaving aside the extremely improbable case of an immediate and decisive Arab victory, the war would result in another localized victory for Israel or a stalemate, but in either event both sides would need immediate resupply if hostilities were to be continued. In this situation, the Soviet Union would continue to supply the Arabs, and the latter through a total oil boycott would attempt to prevent the United States from resupplying Israel. The oil boycott might cause economic collapse in Europe and Japan and would cause great dislocation in the United States, but it would not have immediate impact on the ability of the United States to resupply Israel or, in the worst imaginable case, to engage the Soviet Union; nor would it lead to an immediate Arab victory, for the Arabs would need time for resupply and the formation of new units.

In this scenario, the Israelis would fight a slow, defensive war until they were exhausted as the Arabs gradually rebuilt their forces. The United States and the European countries would be in agony. It is difficult to imagine an American government withholding supplies from Israel in this case. Indeed, even France might be driven to act. One of the reasons the French government has been able to act as it has since 1967 is precisely that the United States has been supplying Israel, just as the United States government was able to avoid supplying Israel with military supplies from 1948 to 1966 precisely because other countries, notably France, were providing them. In any event, the relative strength of the Arabs and the Israelis, not the policies of the powers, continues to be the dominant element.

In fact, the NATO and the Warsaw Pact powers are in nominal agreement on the Arab-Israeli conflict. Both have accepted Security Council Resolution 242. Thus far, however, Israel will not accept any

implementation of the resolution except one which provides for territorial acquisitions, agreed security arrangements, and Arab recognition of Israel. The Arabs, refusing to accept any one of the Israeli desiderata, have called instead for the immediate, complete, and unconditional withdrawal of Israel to the frontiers defined in the General Armistice Agreements of 1949. In the face of Arab and Israeli determination, the powers have not been able to secure the execution of a Security Council resolution which received the votes of all permanent members of the Council.

The great powers' effective intervention in the Arab-Israeli conflict has been limited to the provision of financial assistance and military supplies to Israel and the Arab states. Neither combatant has suffered any major deficiency, i.e., in the four wars the troops on both sides which could be deployed have had sufficient arms and supplies. The issue has been decided each time by the greater effectiveness of Israeli troops. Israel has had, and probably will continue to have, the capability of defending Israel. At the same time, Israel has not deen able to inflict a defeat on the Arabs which forces the latter to recognize Israel. Between the wars, the Arab states have been able to continue a state of belligerency and to rebuild their military forces. Every indication is that this balance will continue for some time. Outside intervention which imposes a solution on either side is also improbable. Thus, the Arab-Israeli confrontation will continue as before unless one or the other of the contestants changes its position on the basic issue.

Nominally, the Arab states and Israel are as far apart as ever on the basic issue—the existence of Israel. Recently, however, the Egyptian government has taken positions that may imply the abandonment of the old line. At the same time, Egypt still expresses fidelity to the Palestinian cause in terms which imply the traditional Arab attitude toward Israel. Indications of change are obvious, but their precise meaning remains uncertain.

Arabs speaking to Arabs until very recently were never ambiguous about Zionism and Israel. The Palestinian Arabs consistently asserted that the Palestine Mandate was illegal and that those Jews who settled in Palestine under the Mandate were unlawful trespassers. When the United Nations General Assembly was considering the Palestine case in 1947, the Palestinian Arab Higher Executive and the Arab governments rejected the UNSCOP minority recommendation of a federated state as well as the majority recommendation of partition. The official Arab demand was the immediate establishment of an Arab state in the whole of Palestine. In the Arab governments' proposal to UNSCOP, which was somewhat more moderate than the Higher Executive's position, only about one-third of the Jewish population was guaranteed citizenship in the proposed state:

only those Jews who had obtained Palestinian nationality were to become citizens of the new state; illegal Jewish immigrants (as defined by the Palestine government) were to be expelled, while the status of legal Jewish immigrants was to be determined by the future Palestinian government.

Officially, there has been no change in the Palestinian position since 1947. The Palestine National Charter as adopted by the Palestine National Council in 1964 (art. 7) provides "Jews of Palestinian origin will be considered Palestinians provided they wish to live peacefully and loyally in Palestine."[1] "Jews of Palestinian origin" must be interpreted in the light of the consistently held Palestinian position that Jewish immigration since the Balfour Declaration is illegal. Moreover, the provision was replaced in the Charter as amended in 1968 (art. 6), by "Jews who were normally resident in Palestine up to the beginning of the Zionist invasion are Palestinians."[2] The same session of the National Council also reiterated the Palestinian view of the mandate in a resolution which reads, "The Council affirms, moreover, that the aggression against the Arab nation, and the territories of that nation, began with the Zionist invasion of Palestine in 1917, and that, as a consequence, 'the elimination of the consequences of the aggression' must signify the elimination of all such consequences since the beginning of the Zionist invasion and not merely since the 1967 war."[3]

A change in Palestinian discussion of the future of Palestine occurred in 1969. The largest and most important resistance organization, Fateh, gained the leading position in the Palestine Liberation Organization, and the other guerilla groups were admitted. Under Fateh leadership, the Palestine National Council adopted two resolutions, on February 4 and September 6, which set the Palestinian goal as the establishment of "a free and democratic society in Palestine for all Palestinians, including Muslims, Christians, and Jews," as the creation of "a Palestinian democratic state . . . , free of all forms of religious and social discrimination."[4] The Zionist state, of course, would be eradicated. Fateh, the Popular Front for the Liberation of Palestine, and the Popular Democratic Front for the Liberation of Palestine began to include the new vision of Palestine in their publications and in the statements of their leaders. Nevertheless, the new slogan had to be handled gingerly.

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1. 44 ORIENTE MODERNO 527 (1964).

2. INSTITUTE FOR PALESTINE STUDIES, INTERNATIONAL DOCUMENTS ON PALESTINE 393 (1968).

3. *Id.* at 403.

4. *Id.* at 589, 779 (1969 ed.).

Of special delicacy was the question of which Jews in Palestine were to be considered Palestinians. Most statements issued since 1969 have passed over the question in silence. But each of the three organizations declared that all Jews living in Palestine who would renounce Zionism would be citizens of the new state. There is no reason to doubt the sincerity of the three organizations, but it is also certain that the new concept is still opposed by many. The Arab Higher Committee, a survival from the old days, denounced the idea of including the Jews in the future Palestine. An effort by the Popular Democratic Front for the Liberation of Palestine to obtain approval from the Palestine National Council resulted in the Council's referral of the question to the Executive Committee in June 1970. There it remains, and the Charter of 1968 stands.

Clearly, the new leadership of the PLO has been unable to win enthusiastic support for its conception of the Palestinian state. The PLO leadership does feel able to espouse the idea, even to portray it as official policy, as Yasir Arafat did when speaking to the United Nations General Assembly on November 13, 1974. Arafat also gave as official PLO policy the inclusion of "all Jews now living in Palestine who choose to live with us there in peace and without discrimination." Arafat was speaking to the Palestinian Arabs as well as the General Assembly. The Arabic newspaper which is perhaps the most widely read by Palestinians in Lebanon published the full text of Arafat's speech and devoted its report of the speech precisely to his description of the democratic state. It may be significant that the report of the speech did not include the passage concerning "all Jews now living in Palestine," but the passage was included in the text of the speech.

The new slogan of a democratic Palestine with equality for Jews has not been accompanied by any systematic thought about the problems. References to the democratic state are embedded in lengthy discourses composed of long denuciations of Zionism, imperialism, and the United States, and of fervent affirmations that the new Palestine will be Arab in culture and, ultimately, a part of the unified Arab state. The Palestinian Arabs who proclaim their brotherhood with the Palestinian Jews have shown no sign that they have taken cognizance of the problems and tragedies which have been the rule in the modern age in states in Europe, Asia, and Africa that have attempted state-building with populations rent by ethnic, religious, or communal divisions.

The PLO's program of a democratic Palestinian state thus offers a very fragile foundation for a peaceful permanent settlement of he Arab-Israeli conflict. The program requires the renunciation of the Zionist ideal and the merging of the Israeli Jews in an Arab national

state. Even so, the capacity of the present PLO leadership to give effect to the program is in doubt, since many Palestinians evidently remain faithful to the old view that the Jews are interlopers in Palestine. And even if the Palestinian Arabs and the Israelis should accept the principle, it is difficult to see how the two communities could make a better go of it than the numerous states which have failed to weld hostile minorities into harmonious wholes.

Reconciliation between Palestinian Arabs and Israeli Jews is obviously not at hand. Nevertheless, the PLO's adoption of the democratic state is one faint step toward possible ultimate reconciliation. It may be that in the long run reconciliation is impossible and that the conflict will continue until one side or the other achieves a decisive military victory. In any event, the confrontation will continue for some time.

Ultimately, the Palestinians are only one element in the Arab side of the conflict. Much depends on the policies of the Arab states. The official position of the Arab governments has never varied. Palestine is, in their view, an inalienable part of the Arab fatherland, and Israel is an intruder. The government of Egypt, in seeking "to liquidate the consequences of the aggression," as the attempt to restore the situation before the 1967 war is called, has embarked on a slightly different course. Egypt accepted Security Council Resolution 242 and set about achieving its implementation through the United Nations. Israel insisted on a formal peace treaty which included frontier changes and security arrangements. Egypt insisted on full Israeli withdrawal to the General Armistice Agreements (1949) frontiers and no major or unilateral demilitarization of Egyptian territory. In return, Egypt offered a declaration of non-belligerency, recognition of Israel, and, upon solution of the refugee problem, free passage through Suez and the Tiran Straits. The Egyptian offer was a radical departure without parallel in the past. But the ability of the Egyptian government to give effect to the policy was questionable. The offer was made to representatives of the United Nations and of foreign governments.

The Egyptians, however, spoke differently in Arabic. Presidents Nasser and Sadat might occasionally speak of "peace," "treaty," and "recognition of Israel" in interviews with American journalists, but the Arab public learned of them only through anti-Nasserist accounts originating in Tunis and Beirut. Egyptian statements in the Arabic media spoke only of securing complete Israeli withdrawal from all the occupied territories and of the restoration of the legitimate rights of the Palestinians.

Since the 1973 war, Egyptian statesmen have spoken to the Arabs in more detail concerning Resolution 242. Both President

Sadat and Foreign Minister Ismail Fahmi, in statements published in the Arabic press, have spoken of "peace," "signing a peace treaty with Israel," and "terminating the state of war" (so the English "belligerency" is rendered in Arabic).[5] It is difficult to interpret the statements as meaning anything other than recognition of and coexistence with Israel, and so Arab critics of Egypt have insisted. At the same time, Egypt makes the peace dependent upon the recovery of Palestinian rights which will be defined by the Palestinians alone. The Egyptian government proclaims that it will sign a peace treaty and live in peace with Israel, that Egypt has no wish to destroy Israel, and that there is no risk to Israel in withdrawal from the occupied territories. The Egyptian government also says that peace is dependent on the restoration of the legitimate rights of the Palestinian people, which only the Palestinians will define.

Egypt's concern for Palestinian as well as Egyptian rights indicates the degree to which Arab nationalist sentiment has become effective in Egyptian politics. It was not always so. Arabism originated in the lands to the east of Suez, and for long its goal was the unification of this territory into a national state. Arabs did not regard Egypt as Arab, and the Egyptians had begun to think of themselves as Egyptians long before Arabism challenged Ottomanism anywhere. For years, the Egyptian leaders ignored Arab nationalism.

Arab nationalism became effective in Egypt as a result of ties of sentiment and a calculation of Egypt's own special, non-Arab interest. Calculated special interest was the more important. Arabs and Egyptians shared a common Arabic and Islamic culture and the emotion of an injured self-view that arose from a common perception of themselves in relation to the modern West. Consequently, Islamic and Arab revivalism gradually spread in Egypt and became an element in internal politics by the late 1930s. But most of the Egyptian leadership had little sentimental attachment to Arabism and a great deal of reluctance to shoulder its burdens, notably those arising from the Palestinian cause. If Egypt had held back, the Arabs would have been unified by Hashimite Iraq and thus allied to Egypt's enemy, Britain. Egypt therefore committed itself to Arab nationalism in pursuit of the great Egyptian national goal, the expulsion of Britain from Egypt and the Sudan. As a result of the defeat in the Palestine War of 1948-49, the Egyptian leadership was embittered at the other Arab states, and the virtues of a return to the true Egyptian policy were freely debated. Egypt was willing to consider *de facto* peace with

5. For the major Egyptian statements since 1974, *see, e.g.*, Sadat to NEWSWEEK in al-Akhbar, Mar. 18, 1974; Sadat to TIME in al-Ahram, Jan. 22, 1975; Sadat to the Washington Post, in al-Ahram, Feb.18, 1975; Sadat to the Palestinian National Council, in al-Ahram, June 9, 1974; Fahmi, in al-Ahram, Dec. 14, 1974 and Feb. 19, 1975.

Israel in 1949-50 and to give its silent approval to a Jordanian-Israeli settlement as long as the settlement contained provisions that Egypt believed would contribute to the termination of the British presence in the Nile valley. When Jordan concluded a draft treaty which ignored Egypt's interest, Egypt used the Palestinian cause to frustrate the Jordanian-Israeli treaty. Therewith, any thought of leaving Arabism was abandoned.[6]

With Egypt's commitment to Arab nationalism, sentiment appears to have become more effective than considerations of traditional interest. The senior statesmen of the 1940s were perhaps the last of the traditional Egyptian nationalists. When they were turned out in 1952, their places were taken by military officers, bureaucrats, and opposition elements whose personal commitment to Arabism was much more intense. The military coup in July 1952 was followed immediately by a much greater emphasis on Arab Nationalism. In the bitter internal struggle which lasted until 1954, no contender for power could appear to be soft on Zionism. Under President Nasser, Egypt's leadership of Arab nationalism became a goal in itself, while the original connection with traditional Egyptian aspirations had ceased to have objective existence. Indeed, the war of 1967 originated in Nasser's reaction to a serious threat to Egypt's leadership of the Arabs, ten years after the British had been expelled completely from Egypt and the Sudan.

No firm forecast can be made concerning the degree to which an Egyptian government can pursue an Egyptian interest in the face of charges that it is betraying the Arab cause. Since 1967, the view that Egypt's interests and Arab nationalism are not always in harmony seems to have been winning adherents in Egypt. Since early 1974, Egyptian statesmen have spoken to Egyptians and Arabs about Egyptian policy in a way that for years had been unheard of. Nevertheless, more than once in the past, clamor over Palestine or Israel has led Egyptian governments into action that they believed unwise. Consequently, the Egyptian government still verbally conditions its acts on the restoration of the legitimate rights of the Palestinian people.

The outcome depends on how the Palestinians define their rights. This, in turn, is conditioned by who speaks for the Palestinians. So far as Egypt and the Arab countries officially are concerned, the Palestine Liberation Organization is the sole spokesman of the Palestinians. Thus, the goal of Egyptian and Arab policy is the PLO's

6. Dawn, *Pan-Arabism and the Failure of Israeli-Jordanian Peace Negotiations, 1950* in ISLAM AND ITS CULTURAL DIVERGENCE: ESSAYS IN HONOR OF GUSTAVE E. VON GRUNEBAUM 27 (G.L. Tikku ed. 1971).

stated goal— the dismantling of the Zionist state and the establishment of a democratic Palestinian state. The Egyptians leave the definition of the goal to the Palestinians, but the Egyptian government has not refrained from advising the Palestinians on the means. There is general agreement that the elimination of the Zionist state and apparatus is not achievable in a short time, but specific methods have been subject to continuous discussion and debate.

Egypt appears to have been suggesting that the restoration of the rights of the Palestinian people rests on the Palestinians, not Egypt. Since 1967, there has been an implicit shift in the relative duties of the Palestinians and the Arab states. The liberation of Palestine remains an Arab national duty, but, in contrast to 1957-66 when Egypt kept the Palestinians in check and emphasized the decisive role of the regular armies, since 1968, Egypt has assigned a major role to the Palestinian resistance. Egypt also seems to be shifting to the Palestinians final responsibility for the satisfaction of Palestinian claims. In response to Arab criticism of Egyptian policy, Egyptian statesmen have been saying that there is no conflict between Egypt's use of diplomacy to recover its occupied territories and the ultimate recovery of Palestinian rights. The Palestinians, the Egyptians say, are free to continue the struggle whatever the Arab states do. At the same time, Egypt insists that it alone has the right to choose the means of liberating Egyptian territory. Implicitly, the Egyptians retain the right to choose the means by which they will support the Palestinians.

The Egyptians may be implicitly advising the Palestinians to try diplomacy as well as the war of liberation. The PLO has in fact retreated from its original insistence on a single path to liberation. Despite the vehement denunciation of Resolution 242 and all attempts to base a solution upon it, the PLO finally, in January 1971, very cautiously acknowledged the Arab governments' right to use diplomacy as a legitimate means of "eliminating the consequences of the 1967 agression."[7] Of greater importance is Egypt's success in inducing the PLO to accept the establishment of a Palestinian state in a part of Palestine before its total liberation. When the idea was first suggested in late 1967, interestingly enough in the Cairo journal al-Musawwar,[8] Palestinian and Arab reaction was generally intensely hostile on the grounds that to do so would mean the acceptance of partition and of Israel. When some Palestinian leaders and organizations began to consider the idea in 1970, Fateh and, in February 1971, the Palestinian National Council, rejected the scheme. Finally, in

7. RECORD OF THE ARAB WORLD 282 (1971).

8. The debate in this journal has been republished in AHAMD BAHA AL-DIN, IQTIRAH DAWLAH FILASTIN (Proposal for a Palestinian State, 1968).

June 1974, the PLO, by resolution of the National Council, approved the establishment of a Palestinian government in a part of liberated Palestine, but only as a stage in the struggle to liberate the whole of Palestine. So the PLO, giving its approval to actions which it had for long denounced as betrayals of Arabism, has accepted Egyptian methods which fall short of total resistance and national struggle. Besides inducing the PLO to accept Egyptian methods, Egypt has given a few direct suggestions. President Sadat's recent statement "we know with certainty that neither party to the contest has the ability to impose a solution by force"[9] was directed at Israel, but it covers Egypt and the Palestinians as well. Finally, Egyptian spokesmen, including President Nasser, Muhammad Hasanayn Haykal, President Sadat, and, most recently, Foreign Minister Ismail Fahmi (December 13, 1974), have suggested that Palestinian rights are set forth in the 1947 Partition Resolution and the 1948 resolution on refugees, and that a permanent peace with Israel may be based on these resolutions.

Israeli and Arab aims remain miles apart. It is extremely unlikely that Egypt, Jordan, or Syria will cede by treaty any of the occupied territory to Israel. It may be possible, however, to devise security arrangements and a special regime for Jerusalem which will induce Israel to relinquish all the occupied territories. But even with the best of arrangements for military security and with complete satisfaction of all religious interests in Jerusalem, Israel will still insist on tangible signs of Arab respect for the existence and territorial integrity of Israel. This point remains the great obstacle. The Egyptian government has made final settlement dependent on satisfaction of Palestinians. The official Palestinian objective is the absorption of Israel in a Palestinian state. There would seem to be no room for negotiation and compromise.

Nevertheless, the situation is more promising than it has ever been, except perhaps in 1949-50. The Egyptian government is clearly willing to recognize Israel and to conclude a treaty. For all practical purposes, Egypt has told the Arabs that peace with Israel should be concluded on the basis of the 1947 Partition Resolution and the 1948 resolution concerning refugees. This is obviously unacceptable to Israel, but, unlike the PLO's position, it is negotiable, Israel undoubtedly will never agree to modification of the 1949 frontiers, but some agreement might be reached regarding the refugees, though even this will be extremely difficult. The chief obstacle will be the Palestinians. One can imagine Egypt signing a peace treaty with Israel as a part of a settlement which includes transforming the PLO into the govern-

9. *See* al-Ahram, Jan. 22, 1975.

ment of a Palestinian state in Gaza and the West Bank. The PLO has come to the stage that it will accept the charge, but not as a part of a peaceful settlement with Israel. One way out might be the transfer of the West Bank and Gaza to the PLO through the Geneva Conference or other international agency. At the same time, Egypt and Israel would sign a formal peace treaty. Israel would then be at peace with Egypt, and it would be left to Israel and the new Palestinian state to decide their future relations. In the initial stage, at least, the Palestinian government would be committed to a war of liberation and undoubtedly would strive to discharge its obligation.

Our scenario projects a series of steps, each of which is enormously difficult, and culminates in a solution which leaves Israel and the Palestinian state in nominal war with actual hostilities likely. Such an outcome is not likely to be viewed with favor in Israel. To achieve this settlement, Israel would give up Israeli-occupied territory in exchange for an Egyptian pledge of peace while the Palestinians continued the war. In view of past Arab-Israeli relations, Israelis cannot but think that at some time in the future the Egyptian governmen would once again take up the cause of the Palestinians. In short, from the Israeli point of view, there would be no essential change. But Israel has won no more than this by four military victories and is unlikely to win more through future military victories. Our projected outcome has one advantage over the past and present. Israel would have an opportunity to develop peaceful relations with Egypt, and perhaps other Arab countries. Under these conditions, Israel and the Palestinian state might learn to live with each other. It may be that the potential would not be realized, but it is nearly certain that if the confrontation continues no peaceful relations will ever develop. A happy outcome is uncertain, perhaps improbable, but the potential gain is enormous. An unhappy outcome, however, might be much more likely. The question is, how bad, from the Israeli point of view, would the worst case be? Can anyone argue after the 1973 war that thc Bar-Lev line was more advantageous to Israel than UNEF had been in 1967? It may be possible to provide a security system which would be adequate replacement for continued Israeli occupation.

If a peaceful settlement between the Arab states and Israel is achievable, it is achievable only in stages. The first stage must be the bringing of Israel and Egypt into an agreement over Israeli-occupied Egyptian territory. The crucial task will be the creation of security arrangements which will satisfy Israel sufficiently to permit Israeli withdrawal. It is difficult to imagine how this can be achieved except in steps extending over a period of experiment and testing. If the effort succeeds, however, it would then be possible to tackle the tremendous political problems which remain.

The new "interim peace agreement" between Egypt and Israel,[10] which was signed on September 4, 1975, after the foregoing part of this article was written, is a major step in our first stage, an agreement between Egypt and Israel with respect to Israeli-occupied Egyptian territory. It is not a complete settlement of this issue, and even less the final settlement of the political issues. The new agreement represents, as Foreign Minister Fahmi explained when negotiations were in the initial stage, a part of the process of military disengagement; the overall political settlement must come later, after total Israeli withdrawal from Arab territory and the restoration of Palestinian rights.[11] The new agreement's provision for the opening of the Suez Canal to Israeli non-military cargoes (Art. VII) and the pledge to refrain from the threat or use of force or military blockade (Art. II) might be interpreted as implying a formal peace treaty, but these provisions, like the purely technical military arrangements which are the only other provisions, are conditional. The agreement has a definite term. Although it is to "remain in force until superseded by a new agreement" (Art. IX), it provides for annual extension of the UNEF mandate (Art. V), which implies annual reconsideration, and it has been widely reported that there is a private understanding that the agreement will endure for three years. The agreement explicitly "is not a final peace agreement" (Art. VIII [1]), but a step toward that end (Arts. I, VIII). Implicitly, the agreement lapses if no progress is made in realizing its goal. The new agreement is thus even less a peace treaty than the General Armistice Agreement of 1949. What the new agreement creates is a security arrangement and a period of experiment and testing which will enable each side to judge the intentions of the other and the willingness or desire of its constituency to take a further step toward peace.

Nothing will be settled overnight. The Egyptian government, at least, has decided that peace with Israel is not unthinkable. At the same time, the Egyptian government has spoken with extreme caution and ambiguity lest it go farther than Arab nationalist sentiment in Egypt will tolerate. In the past, Egyptian governments have taken action against their better judgment when Palestinian Arabs have sounded the call. Leadership among the Palestinians has passed to those who will risk speaking to Arabs about a Palestine in which all Jews now in the land will live in equality, but the Palestinian leadership totally rejects a Jewish entity in Palestine and even its conception of the future Palestine is not assured of majority support. Recon-

10. The text of the agreement appears elsewhere in this issue, and is also found in the N.Y. Times, Sept. 2, 1975, at 16, col. 1.

11. *See* Fahmi's statement in al-Ahram, Feb. 19, 1975.

ciliation between Israelis and Palestinian Arabs can develop only over the long run, and until it is achieved no Arab government can feel secure in office.

Prospects for Peace in the Middle East

JOSEPH SZYLIOWICZ*

For the first time in many years hope exists that imaginative diplomacy can bring to an end the vicious cycle of war and more war that has afflicted Israelis and Arabs for so many tragic years. Yet, as I shall demonstrate below, that hope still remains only a hope; even though an important door to peace was opened with the conclusion of the recent Israeli-Egyptian agreement, the very considerable difficulties that had to be surmounted and the extensive promises that the United States had to make demonstrate only too clearly how difficult it will be to reach agreement on the tougher issues that lie ahead.

One important reason why peace is likely to be elusive is that although many Arabs might now be willing to seek a peaceful settlement of this tragic conflict, many others still regard Israel as an alien intrusion whose sovereign Jewish character must be eliminated. And such Arabs are not only in power in such states as Libya or in control of the Palestinian Liberation Organization, but they represent important elements within other countries including Egypt, which is generally regarded as one of the leading "moderates" in the region. Thus the road to peace is complicated by very different perceptions within the Arab world concerning the character, goals, and legitimacy of Israel, and this disunity extends to important groups within each state and to the ranks of the Palestinians as well. In short, even if one is optimistic concerning the intention and willingness of Arab leaders such as President Sadat to strive for a final settlement, pressures within and between the Arab states do not facilitate its achievement.

Further complicating the search for peace is a similar division within Israel. Here conflict revolves around different perceptions of the goals and intentions of the Arab states and important differences concerning the willingness to take risks to achieve peace are evident. Many view President Sadat as a leader who remains committed to the destruction of Israel but who is engaged in clever tactical maneuvering designed to enhance his position and, though once the government accepted the deal with Egypt arranged by Kissinger only a minority remained in opposition, more and more Israelis may be less and less willing to make the kinds of concessions that may be required to resolve the more difficult questions such as Jerusalem, the Golan Heights and the future of the Palestinians, that must inevitably be-

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come the foci of negotiations. The existence of such perceptions by the parties involved has for years complicated the search for peace in the Middle East and continues to do so at present.

However one views the extent to which Sadat and other Arab leaders may be genuinely interested in peace, there is widespread agreement that the October 1973 war represents a watershed in the bloody history of the region. The war forced a reappraisal of Israeli strategic doctrine, demonstrated that the new military technology would make another major conflict far more destructive than heretofore, and gave the Arabs a sense of accomplishment that may represent a necessary psychological precondition for peace. Above all, it forced the United States to accord a high priority to the region and Secretary of State Kissinger, spurred by concern for U.S. interests (including the flow of oil), moved astutely to exploit the new situation. He initiated an active round of diplomacy that culminated in an end to the embargo and in military disengagement agreements between Israel and Egypt in the Sinai and Israel and Syria in the Golan Heights. In September 1975 he achieved, after seven days of intensive "shuttle diplomacy," what he failed to accomplish six months earlier—a second interim agreement between Egypt and Israel. This accord, which is qualitatively different from the original disengagement agreements, represented an important development in the search for peace. This agreement extends the military truce that had prevailed into new areas, both geographically, as the Israelis made significant strategic concessions by withdrawing from the key Sinai passes and the important Abu Rudeis oil field and functionally, for the new accord is designed to prevent hostilities for at least three years and to lessen tensions in order to permit the development of the kind of climate that might lead to further agreements. Specifically the two parties agreed that the conflict should be resolved by peaceful rather than military means, that neither would use force or military blockades and that Egypt would permit civil cargoes to or from Israel to pass through the Suez Canal and would not blockade the Red Sea. The United States also entered into separate agreements with the two parties which were instrumental in making the accord possible. Among other things the United States pledged to assist Israel with extensive economic and military assistance, amounting to over $2 billion. Moreover, American civilian technicians are to man surveillance stations that would monitor the military aspects of the accord and thus act as a deterrent should either side attempt to alter the military status quo.

The difficulties in reaching agreement on essentially the simplest of the issues that must be resolved in the search for peace were immense. The Israelis felt that they were taking a significant gamble in ceding strategic territory for Egyptian promises, and Kissinger had

to press the Israeli government hard to get them to accept his optimistic view that an unique opportunity to achieve a settlement now existed, and Israel should therefore take a long term perspective and be willing to take some chances in order to make peace possible. That Israeli leaders remained unconvinced of Arab intentions and were not easily persuaded (despite their awareness of the costs of alienating the United States, Israel's indispensable ally) is attested to by the breakdown of the March 1975 negotiations and the kinds of commitments that they extracted from the United States in return for their concessions.

President Sadat also had to weigh difficult and complex considerations. Beset by serious internal problems including a weak economy, a rapidly growing population and marked social tensions, he desired the agreement so that he could concentrate on these issues and secure the American economic and technological assistance that is indispensable if Egypt is to escape from its socio-economic stagnation. This policy, however, was not universally applauded within the Arab world. On the one hand, such moderate-conservative, oil-rich states as Saudi Arabia and Kuwait strongly supported Sadat's attempt to reorient his country more towards the West and, one should add, so did Iran, a non-Arab state which is playing a subtle and important background role in the politics of the area. On the other hand, radical elements within Egypt and the Arab world viewed Sadat's policy as a betrayal of the Arab struggle. In addition, the press and radio of Libya, Iraq, and to a lesser extent, Syria, bitterly criticized the Egyptian decision.

One reason for the discord, besides the apparent rift that it creates within the Arab world, is that Sadat's decision forces other Arab parties to choose among very difficult options. Particularly affected were the Palestinians and Syria for the latter is clearly the next state to be involved in negotiations. It will be far more difficult, however, for the Syrians and Israelis to reach agreement because of the strategic importance of the Golan Heights to the two sides and the limited area involved. In sharp contrast to the pre-1967 situation when Syrian artillery harassed Israeli communities, it is the Israelis who now possess the potential to shell Damascus itself and to drive back any Syrian offensive before it enters Israel. Moreover, control of Mt. Hermon gives the Israelis a very strategic observation post. These are advantages that the Israelis are not likely to concede lightly, particulary since they tend to consider President Assad to be even more intransigent than Sadat. Further complicating the issue is the fact that the Israelis have established about twenty settlements in the area which, as government spokesmen have made clear on several occasions, will not be evacuated until a final settlement is reached.

Assad, too, is beset by conflicting pressures from within Syria and from the other Arab states. Though he has successfully enlarged the base of his support and maintained a stable regime since he came to power in 1970, Assad must maneuver carefully so as not to alienate important elements within Syria. Moreover, the Syrian Bath Party which he heads is engaged in a bitter ideological dispute with its counterpart in Iraq, each claiming to be the correct interpreter and exponent of Bathist ideology, and has consistently taken a tough line over any agreement with Israel. In its national congress of July 1975, for example, resolutions calling for the "liberation" of all Palestine were passed.

Given such an officially rigid stance, Assad did not welcome the Israeli-Egyptian agreement. Not wishing to be isolated he utilized various tactics to strengthen his position and to pressure Egypt, including reaching agreement with two actors, the PLO and King Hussein, who were bitter enemies. He established a "joint command" with the guerrillas and set up a "Supreme Command Council" with Jordan thus creating a framework within which to coordinate economic and military affairs. These dramatic developments represent a potential threat to Tel Aviv, for Syrian-Jordanian military cooperation (possibly supported by the Iraqis who, despite their feud with Syria, remain publicly strongly committed to the extreme Arab position concerning Israel) changes the strategic situation and strengthens Assad's hands in future negotiations. Assad also played an active role in the campaign to expel Israel from the United Nations, a move which further increased his bargaining position but which also brought him into conflict with President Sadat who, apparently in accordance with the terms of the interim agreement, successfully blunted this policy on several occasions.

Under these conditions it is not easy to foresee what will follow the Egyptian-Israeli accord on the northern front. It is unlikely that a comprehensive agreement could be worked out in the near future given the ideological differences, and the strategic importance of the Golan Heights. Assad could therefore choose to renew military hostilities in some way or accept minor changes along the existing cease fire lines. The military option is not likely to appear attractive, however, given the present state of relations with Iraq and King Hussein's unwillingness to take significant risks. Hence it is quite possible that Assad will accept (as Kissinger has been urging) some kind of rectifications with the understanding that serious talks over the future of the entire Golan Heights will be undertaken within a reasonable time.

Such a development would be highly favorable, for an an agreement would maintain the initiative towards peace and might lead to

a relaxation of tensions and the development of a more propitious climate for a broader understanding on the future of the Golan. When such an accord could be negotiated is not clear, for tensions will probably have to be reduced before the Israelis would be willing to make major concessions and time is clearly required for feelings of trust to develop. In this regard, too, the agreement with Egypt is pivotal—if stability and a relaxation of hostilities does occur then progress in talks between Syria and Israel will be facilitated. Such developments will not occur quickly, however. Merely to implement the military aspects of the Sinai accord will take about six months and further time will have to elapse before the deeply ingrained perceptions of each side can be modified. Moreover, the U.S. presidential elections are rapidly approaching and it is not likely that the United States would be prepared to engage in a new initiative involving major commitments before January, 1977.

Even if one takes a very optimistic view concerning the possibility of an agreement between Syria and Israel, one is still left with the sensitive question of the future of Jerusalem and the critical issue which is central to any long range solution—the future of the Palestinians. They too (within and without the PLO) are badly divided. One must remember that many live on the West Bank (which King Hussein has not abandoned despite the resolutions of the Rabat conference) and the Gaza strip. In these areas many diverse currents can be discerned ranging from support for King Hussein to pro-PLO feelings. Even if one considers the PLO to be representative of the Palestinians, however, the pattern is still one of division and discord. Essentially, the PLO is split between the "moderates" headed by Yasir Arafat and the "rejectionists" who oppose any concessions to Israel and who refuse to compromise in any way their goal of establishing that "democratic secular state" which so obviously represents a euphemism for the destruction of Israel.

Egypt's decision was a bitter blow to the PLO's leadership for it threatens the very bases of its claims and suggests that Egypt may be willing to make peace at the expense of the Palestinians. Equally troublesome is the dilemma that Sadat's action poses for them. If Arafat breaks with Egypt he risks alienating that important country as well as those elements in the Arab world, particularly the oil rich states of the Persian Gulf, who support President Sadat and his policies. If he does not break with Egypt he runs the great risk that his position and that of the moderates will be undermined by the "rejectionists."

What kind of response will be forthcoming as well as what kind of agreement can be worked out that involves the Palestinians is

therefore very difficult to foresee, though at the time that Yasir Arafat appeared before the United Nations General Assembly there were some tentative signs that moderates within the PLO might be willing to compromise their hitherto unyielding stand concerning Israel. Whether these did in fact signal the evolution of a new negotiating stance is unclear but the task of diplomacy is to explore such possibilities. Here, too, the positions taken by the other Arab states are critical and at present it appears that only Libya is uncompromisingly set against any agreements with Israel. Even such hitherto obdurate countries as Iraq, which may be turning more and more to questions of domestic development, and Syria, which runs a considerable risk of diplomatic isolation, may well choose to coordinate their policies more closely with Egypt and those other states that appear willing to reconcile their differences with Israel. If such a trend does exist within the Arab world, then the chances of an agreement involving the Palestinians are enormously enhanced, for the future of their cause depends to a large extent on the support of key Arab states.

What emerges from this analysis, therefore, is that powerful elements within the Arab world may be moving cautiously in the direction of a settlement with Israel on terms that may be mutually acceptable. Until now the "radicals" have always possessed the preponderance of political power and have been able to exert sufficient pressure on their more moderate brethren to block agreement, but developments in recent months do point in the direction of change in the Arab world. It would be naive, however, to overestimate the extent to which the kind of environment which is needed to let peace flourish has yet occurred. Even the most moderate elements among the Arabs and within Israel remain highly suspicious of each other's motives and intentions and it will not be easy to secure agreement, as I have stressed, on such difficult issues as the Golan Heights, Jerusalem, and the future of the Palestinians.

Nevertheless, the effort must be made and the momentum that has been achieved must be utilized to explore and exploit whatever potential for peace may now exist. Without this the gains to date will be dissipated quickly. If future gains are to be made, they will come about only after long, arduous negotiations between the parties. That, however, may well be highly desirable for any settlement can endure only if all those involved feel that they have struggled to hammer out an agreement which provides them with the greatest possible benefits and which represents accomodations that each can accept positively. Only at the end of such a process, a process which must include a general meeting of some sort at Geneva, can one envisage the Middle East as a region of peace whose inhabitants will be free to achieve the kind of future to which they all aspire.

Prospects for Settlement of the Israeli-Arab Conflict

NOAM CHOMSKY*

These remarks will be rather narrowly focussed. I will not consider questions of right and justice or the merits of conflicting claims, but will concentrate on the likely consequences of proposed policies and programs. Secondly, I will limit attention to only one of the many problems of the region, the Israeli-Arab conflict.

For some time, the United States government has been committed to an "incremental" approach that seeks to reduce the short-run likelihood of conflict between the major military powers: primarily, Israel and Egypt; secondarily, Israel and Syria. Within this framework, priority is assigned to separation-of-forces agreements and other measures to reduce tension. The approach has had some limited success and may lead to more far-reaching arrangements, despite the present stalemate, since it conforms to the immediate needs of the belligerent states and the United States. Nevertheless, I believe that this policy is short-sighted and fraught with danger. To see why this is so, let us consider the likely consequences of success in the current negotiating efforts.

Let us assume that arrangements are reached between Egypt and Israel that leave Israel in control of (1) the "inner territories," namely, the West Bank and the Gaza Strip; (2) areas in the Golan Heights and the Sinai to which Syria and Egypt, respectively, will surely not renounce their claims. For the tenure of this hypothesized agreement, there will be no military conflict. Let us assume further that the agreement contributes as intended to reduction of the short-run probability of war. What is likely to ensue? Specifically, how is the Government of Israel likely to act under these circumstances, with regard to the occupied territories (1) and (2)?

There are three kinds of evidence that bear on this question: statements by government officials and other political spokesmen; actions currently in progress and plans now formulated for implementation; the record of recent history. Evidence of these categories converges: there is every reason to suppose that Israel will continue its programs of development in the occupied territories, leading to integration and some form of annexation.

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The political leadership has been consistent and explicit on this score. The present government, like its predecessor, has repeatedly confirmed—not, to be sure, in official pronouncements, but in statements by high officials—that Israel will not retreat from (i) the Gaza Strip, (ii) the Golan Heights, (iii) Northeastern Sinai, (iv) Sharm el-Sheikh and an access to it, and (v) much of the West Bank, including a considerably expanded Jerusalem, the settlements of the Jordan valley, and unspecified other regions. Responding to Hussein's proposal for a Jordanian federation including the West Bank in March 1972, the Israeli Parliament declared that "(T)he Knesset has determined that the historic right of the Jewish people to the Land of Israel is beyond challenge;" the "Land of Israel" is understood as including the West Bank. The Jordan is regarded as Israel's "security border," implying at least Israeli military control over the West Bank, though some other form of "sovereignty" may be permitted, indeed, welcomed, since it will overcome what is called in Israel "the demographic problem," that is, the problem posed by the presence of Arabs within the Jewish State. The governing party recently announced that Northeastern Sinai bordering the Gaza Strip must remain "within the Israeli map," along with the Gaza Strip and the Golan Heights and the access to Sharm el-Sheikh.[1] These programs, which have wide popular support within Israel, preclude any long-term settlement with Egypt, Syria, or the Palestinians.

Furthermore, in all of the regions mentioned substantial and long-term development programs are in progress or in the planning stages. The budget for development in these regions has been expanded for the current fiscal year, indicating Israel's commitment to these projects despite its severe economic straits. By any reasonable measure, investment for development projects is higher in the occupied areas than within the "green line" (the pre-June 1967 borders). In the 1975-6 budget, it amounts to IL. 1.7 million per family.[2] These programs will, of course, create political barriers to any withdrawal, and it must be assumed are undertaken with this consequence in mind. These projects extend—more precisely, accelerate—the pre-October 1973 developments, which culminated in the August 1973 electoral program of the governing party, virtually a program for eventual annexation, and so understood both within Israel and in the Arab states.[3]

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1. *Cf.* David Lancashire, Associated Press, Boston Globe, June 20, 1975; N.Y. Times, June 20, 1975, at 9, col. 7; Yuval Elizur, Washington Post, June 21, 1975.

2. For some details, *see* Darin-Drabkin, *The Economic Aspects of Defense*, NEW OUTLOOK: MID. EAST MONTHLY 51 (Mar.-Apr. 1975).

3. For an informative review of this period, *see* A. KAPELIOUK, ISRAEL: LA FIN DES MYTHES (1975).

The intention to develop and slowly integrate the territories cited is clearly understood within Israel, as are the political consequences of such a decision. The leading Israeli newspaper, the independent Ha'aretz, comments editorially that:

> it is important for Israel to remember that the difference between Washington's and Moscow's attitudes concerning an overall agreement is small . . . . Although from Israel's viewpoint, the two super-powers' attitudes are exceedingly remote from hers in this matter . . . . Concerning the central issue of borders, Israel will need to conduct a political battle at Geneva, not just against the Arab countries and the Soviet Union but also against the United States.[4]

The problem is that both the Soviet Union and the United States are committed, formally at least, to a settlement along the lines of the various United Nations Resolutions, while Israel intends to maintain its control over the territories cited. Hence the "political battle" foreseen if the Geneva conference is ever convened.

Reduction of the probability of military conflict will, in the eyes of the Israeli leadership, restore the essential features of the situation prevailing prior to October 1973, when the risk of war was considered negligible. As their statements and actions clearly indicate, they will proceed with the programs of that period, now accelerated, with the intention of "building facts" in the occupied territories that they expect to retain.

The official position of the government of Israel is that there can be no Palestinian state, but only two states (Israel and Jordan-Palestine) within the former Palestine (plus whatever areas Israel intends to retain outside of this region; at the very least, the Golan Heights and Northeastern Sinai). The question arises: why should Israel so adamantly refuse to consider the possibility of a Palestinian state in the region from which it eventually withdraws? The grounds offered are "security," but it is difficult to take this argument very seriously. Suppose that Israel were to withdraw from a region sufficient for the establishment of a Palestinian state within the inner territories. On this hypothesis, consider two alternatives: (1) a Palestinian state is established within this region; (2) the region reverts to Jordanian rule. It is obvious that situation (2) is far more dangerous for Israel. A Jordan-Palestine incorporating some substantial part of the inner territories would pose a far greater military threat to Israel than a Palestinian state in this region, contained within the Israel-Jordan alliance and existing at the sufferance of its more powerful—and, it is to be expected, watchful and even hostile neighbors. Jordan-Palestine will have a measure of independence and military

4. HA'ARETZ, April 14, 1975. Lengthy excerpts appear in Israleft News Service, No. 61, May 4, 1975, P.O.B. 9013, Jerusalem.

power that a Palestinian state will never attain. Furthermore, as the most dynamic, educated and numerous element within the projected Jordan-Palestine, the Palestinians may be expected, sooner or later, to gain control over this state; it is striking that right-wing Israeli advocates of the "Jordanian solution" have often proposed exactly this. If, as assumed, Palestinian hostility is a serious and dangerous problem, solution (2) maximizes the threat. Thus Israel's advocacy of a Jordan-Palestine, as distinct from a Palestinian mini-state within the inner territories, seems paradoxical.

The paradox is resolved as soon as we recognize that a Palestinian state, however small, would have to be granted some region within the inner territories that would not remain under Israeli military occupation. But Israel has no intention of relinquishing military control over any such region. It is the hypothesis of the preceding paragraph that the Israeli leadership rejects. Its advocacy of (2) and rejection of (1) merely serves to demonstrate, once again, that Israel intends to retain control over the inner territories, along with the others mentioned earlier.

As noted, Israel might agree to have some part of the West Bank placed under local or Jordanian administration, while remaining under Israeli military control. In fact, explicit proposals of this character have been put forth. This is the essence of the "Allon plan," so far, the least expansionist program even discussed by anyone close to power. Furthermore, it seems that proposals to this effect have been made secretly to Jordan, but rejected.[5] More than this is not contemplated. For this reason, it is impossible for Israel to consider the possibility of a Palestinian state, even though it would hardly be more than a protectorate of Israel and its Jordanian ally. Note that Jordan may be expected to remain an ally (tacit, to be sure) of Israel, under the American aegis, if a Palestinian state is established in which Palestinian nationalist energies will be contained.

For similar reasons, Israel has refused to permit any political activity or organization within the occupied territories. In 1967, the military commander of the West Bank, General Haim Herzog, proposed to the Government that right-wing Palestinian groups be encouraged in these territories as a counter to the PLO. Even this request was refused, and government censorship prevented Herzog from making his suggestion public.[6] Under the present Rabin government, the repression in the West Bank has been significantly intensified. The immediate cause is that any relaxation leads to expression

5. *Cf.* General (Reserve) Mattityahu Peled, *The Imagination is Dwarfed by the Reality*, Ma'ariv, August 9, 1974.

6. *See* his statement in EMDA (December 1974).

of support for the PLO. But the real point is that no independent Palestinian voice can be tolerated in these regions, for the reasons already explained.

Let us now return to our initial hypothesis: that the incremental approach achieves some success. Under the assumed conditions, Israel will persist in its programs of development and integration, as just outlined. One consequence will be an increase in Palestinian terrorism, since there will be no alternative for the Palestinians short of national suicide. Israel will undoubtedly intensify its "retaliatory" actions in Lebanon. The repression within the occupied territories and the expulsion of Bedouins in Northeastern Sinai will continue. Hostility between Israel and the Arab States will persist as well. Whatever the private wishes of the leadership of the Arab States, they cannot openly accede to the destruction of Palestinian nationalism or the permanent occupation of territories of the Arab States. The arms race, already a crushing burden for Israel, will intensify, spurred by the insatiable need of the international arms producers (the United States far in the lead) to recycle petrodollars, and the perceived self-interest of the rulers of the oil-producing states. Israel cannot possibly match the resources of its potential enemies, but it can also not fall far behind in the competition. Israel's overwhelming military victory in 1967 significantly increased its security problems as well as its military budget. The problems will only grow under the conditions we are assuming. Even in the absence of war, the domestic consequences within Israel will be severe, both social and economic. The economic crisis will worsen. Emigration of the skilled and educated will probably continue, as in the past year, while immigration and investment will continue to decline. The Arab economic boycott may be expected to be far more effective with the shift of economic power to the oil producers. Similarly, Egypt will be unable to face its desperate social and economic crisis under the conditions of preparation for war, and internal disorder may erupt with unpredictable consequences.

Eventually, there will probably be a war, as virtually all analysts on all sides anticipate, at a level of armaments far higher than before. Until now, Israel's urban concentrations have been spared, though in Egypt in 1970 and Syria in 1973 civilian targets were subjected to heavy bombardment. In the next war, Israel is unlikely to remain immune in this regard. Given the level of armaments and the interests of the major powers in the nearby oil-producing regions, the war may escalate to a serious international conflict, which the local participants (not to speak of others) will be lucky to survive.

These are the likely consequences of success in the current "incremental" negotiations. The likely consequences of failure are simply that the process outlined will be accelerated. For these reasons, the current debate over who is to blame for the failure of Kissinger's "shuttle diplomacy" is an exercise in futility and irrelevance. Whether the negotiations succeed or fail hardly matters. The whole framework is a prescription for disaster.

While naturally one can only speculate about these matters—we are discussing politics, not physics—the preceding analysis seems to me rather plausible, and perhaps compelling. If so, the question naturally arises whether there is another framework, more favorable to the interests of the local parties and others concerned with the affairs of the region. There is, I think, a far better framework, one that offers some hope of a peaceful settlement. The alternative framework places emphasis on the fundamental political issue rather than the military confrontation. That is, priority will be assigned not to the military confrontation between Israel and Egypt (and secondarily, Israel and Syria), but to the conflict between Israeli Jews and Palestinian Arabs, the two national groups that claim national rights in a single territory. In terms of military power or social organization, there is no comparison, of course, between these two opponents. Nevertheless, their conflict is at the heart of the problem. As long as it is not resolved, other problems will not be put to rest. The conflict will simmer and threaten to erupt in a major conflagration. If their conflict is resolved, it is quite possible that other pieces of the puzzle will fall into place.

Prior to October 1973, various solutions might have been imagined for this local conflict. Now, there is really only one. Israel must relinquish the inner territories, with perhaps minor territorial adjustments, along the lines of the Rogers Plan and U.N. Resolution 242 of November 1967, as generally understood throughout the world. But these plans, which offered nothing to the Palestinians, were unjust at the time and entirely unfeasible now. The areas relinquished must be assigned to the control of the Palestinians, those who live there now and those in the Palestinian diaspora. There is very little doubt that their decision will be to form a Palestinian state and that this state will be organized by the PLO. The two states—Israel and Palestine—must reach agreement on a peace treaty within a regional settlement in which the other presently occupied areas will revert to Egypt and Syria, with demilitarized zones, perhaps an international peace-keeping force on both sides of the border (not only on the Arab side, as before 1967), serious efforts to reduce the level of armaments,

and moves toward cooperative regional arrangements. As for Jerusalem, the most reasonable suggestion would seem to be for it to serve as the joint capital, a unified open city.

The great powers have much incentive to try to reduce the likelihood of conflict and should therefore be able to find ways to work together to enhance such a solution. There is good reason to suppose that Egypt will welcome such a settlement, as it has indicated for several years. The same is true of the oil-producing states of the Arabian Peninsula, Jordan, and perhaps Syria. The Soviet Union has long advocated such a solution, and it is not inconsistent with official American policy, at least prior to 1970, when the Rogers Plan was tacitly abandoned in favor of support for *de facto* Israeli annexation of the occupied territories, as Kissinger took control of Middle East policy. The United States, however, has no commitment to this "Kissinger plan" of the pre-October 1973 period; it was predicated on the assumption that Israel's military hegemony was beyond challenge and that its economic and technical advantages would if anything increase. The plan will be abandoned if it is seen to conflict with the fundamental American interest: to ensure that the United States maintains its control over the distribution of Middle East oil. Israel fears that the superpowers may converge on such a program, as the editorial comment cited earlier indicates.[7]

For the Palestinians, such an outcome will be a bitter disappointment, but there is no realistic alternative for them. There are some indications—though no official statement—that they will reluctantly accept such a settlement.

A settlement along these lines seems feasible. It offers no guarantee of long-range peace and security for any of the parties concerned—and we must recall a point often overlooked: the Arab States surrounding Israel also have a security problem, and the "security problem" of the Palestinians is incomparably more severe than that of any of the other parties. There are no guarantees in this world. Talk of "iron-clad guarantees" is simply shorthand for refusal to negotiate. The great powers, whatever they may promise, will act in the perceived self-interest of dominant groups. The United Nations will be free to act insofar as the superpowers permit it to do so. International law will be interpreted by the great powers in ways conducive to their perceived interests, as when the United States invades South Vietnam or the Dominican Republic or when the Soviet Union invades Hungary or Czechoslovakia. Surely, no rational person will have illusions on this score.

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7. *Supra* note 4.

But the fact remains that a settlement of the sort outlined is in the interest of the superpowers, the surrounding Arab States, and even Israeli Jews and Palestinian Arabs, much as they may resist it. For the present, it seems that Israel's objections pose the primary barrier to any such settlement. Given its present policies Israel's long-term prospects for healthy existence or even survival are dim. Nevertheless, for the present Israel is the dominant military power in the region. Its refusal to come to terms with the Palestinians—and it must be emphasized that under present conditions, that means the PLO—will bar the way to any settlement and will lead, very possibly, to the grim outcome sketched earlier. Israel's only hope for decent survival lies in a political settlement with the Palestinians and its gradual integration into the region, in some evolving pattern of cooperation.

It is quite natural that Israeli Jews should fear their neighbors and trust only in their military strength. But they must come to understand that the basis for decent survival lies in accommodation, and that the risks that must be taken as they move towards such an accommodation are considerably smaller than the risks of continued military confrontation. Israel's military victory of 1967 will prove to have been a disaster for the Jewish community unless those groups within Israel that appreciate and understand these facts gain in influence and political power. Those who are concerned for the fate of Israel and its people should, in my opinion, lend such support as they can to such groups, and should refrain from strengthening those elements, now dominant, that are committed to occupation and military confrontation.

For Israel, it would be far better for a political settlement to arise from its own initiatives. Alternatively, it may simply be imposed by the great powers, a far less favorable outcome as far as Israel is concerned. It is particularly important to emphasize these points in the United States. American support for the most intransigent and expansionist elements within Israel contributed to the near disaster of 1973, and is likely to have still more bitter consequences in the future.

A Mideast Proposal*

M. CHERIF BASSIOUNI** AND
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I. THE NEED FOR INITIATIVE

Contrary to the opinions of many, a genuine peace in the Middle East between Israel and the Arab states has been possible for over a year. Yet, if this opportunity is missed, as now appears not unlikely, a similar one may not soon recur.

Although the prospects for war vary weekly and even daily, the secular trend toward war keeps rising. A new war would have horrendous consequences both for Israel and the Arab states. The impact of such a war on the economies of the parties concerned and the rest of the world, but particularly the western world, are potentially disastrous. Moreover, the risks of a catastrophic confrontation between the United States and the U.S.S.R. are implicit in the situation. War, therefore, should be in the classical phrase "unthinkable," but such an eventuality is nonetheless possible.

The reason may well be found in the oft-proclaimed fears, suspicions, and misconceptions under which the parties labor. After more than twenty years of hostility, Israel finds it difficult to believe that the Arab states are ready for a peace that recognizes its existence as a Jewish state. Moreover, the internal political situation in Israel makes it difficult for any cabinet to proclaim a policy that would appear "weak" in the face of apparent external menace. On the other hand, the Arab states have their own internal difficulties. Indeed, for these states the issue is not only one of regaining national territory lost in the 1967 war but also the future of Palestine and the Palestinians.

Another element that is making the problem more rather than less difficult lies in the nature of the diplomacy that is being pursued. The first-stage disengagements of 1973 played a useful role in lowering tensions in the area but would have been more effective if it had been directly related to the search for a comprehensive peace. Unfortunately, the difficulty with step-by-step negotiations is that the

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* This proposal was originally prepared for the Faculty Arms Control and Foreign Policy Seminar at the University of Chicago. The opinions expressed herein are those of the authors and do not represent the views of any government, though they may reflect certain official positions.

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stages are asymmetric. Israel gives up territory which it sees as useful for defense if the Arabs attack again. In return, it receives paper assurances that the Arab states can negate by a stroke of the pen. Israel, on the other hand, can retake the territory given up only by overt force. For their part, the Arab states are reluctant to provide the commitments that Israel wants, for the recognition of Israel as a state is their trump card for a return to the pre-1967 borders and a solution to the Palestinian question.

Thus, if one of the concerned states sees itself as giving up more of its bargaining advantages than does the other, it fears the future more, and even becomes increasingly reluctant to travel this road any further. On the other hand, the state that has gained asymmetric advantages will have greater difficulty in convincing its own constituents later on that it should make greater concessions that alone will produce further movement to a peace settlement, for it will already have gained much of what it wants at a far lower cost. In any event, it must be understood that although Israel can slice the Sinai and the Golan Heights in parcels to be bartered away, Egypt and Syria cannot parcel "peace" and "recognition." Thus, the parties do not have sufficient equivalent bartering chips to make that type of process work.

With the end of Secretary Kissinger's step-by-step diplomacy between Egypt and Israel, attention now begins to shift to the Geneva conference. When the mandates of the U.N. Peacekeeping Forces expire, Egypt and Syria may be compelled either to take military actions or make military preparations that are likely to lead the Israelis to strike preemptively. Under these conditions anything can intentionally or accidentally trigger war.

Although such a war would probably end quickly as did the others, events may not be controllable this time. A prolonged oil boycott may affect the United States and Western Europe to the point that current ill-advised proposals for military intervention become a political reality that carries with it the prospects of a war involving the major powers.

Obviously, therefore, it is critical to prepare the Geneva negotiations in such a way as to maximize their chances of success. Without such preparations it is likely, given the current arrangements for Geneva, that it will fail in its purpose.

Geneva will likely fail because, unless Israel, the Arab states, and the Palestinians know in advance that they agree on certain basic principles, the "game" at Geneva will involve efforts to place the blame for failure on the other parties while reassuring publics and elites at home and abroad that important perceived interests will be protected. With no assurance of success, the effects of the encounter

will bear upon regime and alliance interests that will assume greater importance than the peace Geneva is supposed to produce.

Therefore, it is essential to understand that Secretary of State Kissinger's failure was not a failure of mediation itself but a failure of mediation in step-by-step negotiations in which each step of the negotiations does not fit into an overall plan or at least an overall perception of the final product, as well as of basic asymmetries among the parties.

The real interests of the parties are not so far apart as they may at first appear. These interests are reinforced by both political and juridical considerations. The Arab states cannot make peace except on the condition of a return to the pre-1967 borders and a Palestinian settlement. The United States and the Soviet Union have a definite interest in reinforcing the political order that arose out of the settlements following World War II. Any violation of the principle of no territorial change by force would threaten this framework of world political order, the juridical system within which it is embodied, and other more specific and practical interests of the major powers (such as the existing boundaries of the East European states).

Israel, the existence of which is a product of the postwar settlements, also has an interest in the principle of no forcible change of territory. If Israel changes the pre-1967 borders by force, the Arabs could legitimate a forcible revision of any peace they sign with Israel. On the other hand, merely to return to the pre-1967 borders is obviously unacceptable to Israel even within the context of a peace treaty. The reasons that led Israel to shift in 1954 from their original second-strike strategy to a first-strike strategy are even stronger after the October 1973 War. Thus great power guarantees would not be considered significant to satisfy the security needs of either Israel or the Arab states. The use of United Nations forces would not be a primarily acceptable guarantee for Israel and would be in some ways objectionable to Egypt and Syria.

For these reasons also, it is essential that the road to Geneva be prepared in light of the interests of the parties and, in particular, of Israel, which must make territorial withdrawals and political concessions to the Palestinians if peace is to be achieved.

The first step, it is believed, is to reach agreement on certain basic principles, and then to allow all parties concerned to negotiate their specific claims within the framework of these principles. It is for these reasons that this proposal is made. Agreement on the basic principles of peace proposed herein might be negotiated among the parties privately prior to Geneva, or through the diplomacy of the United States and perhaps of the Soviet Union as well. It is essential that the parties communicate to each other their positions in such a

manner that discussions over the proposed Protocol on Principles of Peace are fruitful. Mowever, too great an effort to formulate "bargaining chip" positions on the Principles will likely be counterproductive.

The Principles formulated in the next section are designed to satisfy the minimal legitimate demands of the respective parties that are consistent with their reasonable concern for national security. The ensuing Commentary is illustrative of the application of these Principles in the Geneva negotiations.

The authors of this Protocol on Principles of Peace, concerned with the grave situation existing in the Middle East and its potentially disastrous consequences for all peoples in the area and for the world, and desirous of enhancing the opportunities for a just and lasting peace, hereby propose that this document be signed as an internationally binding agreement between Israel, Egypt, Syria, Jordan, and the Palestinian Liberation Organization on behalf of the Palestinian people, and that it be signed simultaneously by the respective parties in their capitals. The adoption of these Principles by the parties should precede their convening for a peace conference in Geneva and should constitute the framework of their negotiations for a just and lasting peace which can only begin to be attained by a permanent peace treaty.

II. PROTOCOL ON PRINCIPLES OF PEACE

The parties to this Protocol, desirous of insuring a just and lasting peace that is based on principles of international law, and concerned with the protection of the human rights of all peoples and persons in the area, hereby agree to the Principles enunciated herein as constituting the framework of their negotiations and agreements for a permanent peace between them.

1. The right of all peoples to live in peace, security, and dignity within a recognized state of their choice and under a form of government of their choice.

2. The right of the contracting parties to have secure and recognized boundaries not subject to forcible change and, consistent therewith, the recognition of the principle of non-acquisition of territory by use of force.

3. The restoration of the pre-1967 borders shall be effectuated. Concurrently boundary abutting conditions compatible with the reasonable defenses of the parties shall be established but only for as long as such needs realistically continue to exist. (See Article 9)

4. Self-reinforcing security conditions shall be established as a result of agreements stemming from the principles of Article 3 and shall be overseen by a joint commission under United Nations auspices. Such commission shall prepare annual reports on their implementation. On the basis of such experience these security conditions shall be reviewed by the parties periodically but at least every five years with a view that in good faith such conditions be terminated as soon as practicable.

5. The right of self-determination of the Palestinian people is hereby

expressly recognized, and, consistent therewith, the parties shall cooperate in the prompt establishment of a Palestinian state on the "West Bank" and "Gaza strip."

6. The future political relations between the State of Palestine and the State of Israel are a matter of concern for the peoples of these two states, including the possibility of a strictly peaceful evolution and transformation of their political ties or structures subject to the protection and preservation of the human rights of both communities and of their constituents.

7. The right of all the peoples from the region to return to their homes shall be recognized. That includes the return of Palestinians to Israel, and the return of those Jews who had lived in the Arab states to return thereto, subject to reasonable considerations of continued family ties, national security, and the integrity of national identity. To this end joint commissions, including a joint Israeli/Palestinian commission, shall be established to explore means of implementing this principle.

8. Where individuals in states of the region have been displaced from other states in the region and their property seized, confiscated, or sold at inadequate price, each state shall establish a commission to consider applications for adequate, just, and prompt compensation.

9. The boundary arrangements between Israel, Palestine, and Jordan shall include provisions for the peaceful passage of commerce and for civilian movement through Israel.

10. All parties shall have the right to free and innocent maritime passage in and through the Red Sea and the Suez Canal.

11. Maintenance of the substantial municipal unity of Jerusalem in a manner agreed upon by the parties and subject to the provisions of Article 2. The placement of the holy places in Jerusalem under guardianship acceptable to leaders of the faiths to which they belong and with international guarantees for free access to members of the respective faiths.

12. The parties shall cooperate in the preservation and restoration of the cultural heritage of the region.

13. After the previous principles have been implemented by incorporation in one or more treaties or agreements, good faith efforts shall be made to include, where feasible and consistent with national security and considerations of sovereignty, self-reinforcing procedures for conflict resolution such as, but not restricted to, resort to the International Court of Justice, arbitration, or mediation.

14. The Principles stated above shall be binding on the parties who sign below for six months from the date of signature except that the parties agree that if substantial and good faith efforts are being made to reach agreement, no fewer than two three-month extensions shall be granted.

III. COMMENTARY ON THE "BASIC PRINCIPLES OF PEACE" AND IMPLEMENTATION PROPOSALS

The authors are aware that the principles stated above, although important as an expression of intentions, may be insufficient to avoid dysfunctional bargaining at Geneva unless there is also prior understanding on some parameters of their implementation. The authors wish to emphasize that these comments are illustrative of some of the ideas that would help implement the Principles stated above and

that would help produce a viable peace treaty. (The numbers hereinafter refer to the Principles.)

1. As members of the United Nations, the parties to this agreement should assert their commitment to implement United Nations obligations concerning the human rights of individuals regardless of race, creed, or color. To that end the parties should consider signing, ratifying, or acceding to treaties for the international protection of human rights and devise means for their effective implementation. Additionally they may consider establishing in the Old City of Jerusalem a Regional Supreme Court of Human Rights. At least until such time as the contracting parties agree to extend its authority, it shall be limited to hearing, investigating, and publishing complaints concerning the infringement of human rights in any of the contracting states.

2. The contracting parties should recognize that they have a duty to refrain from any action that employs force, the threat of force, or harsh economic or political pressures or threats to accomplish their political goals. Israel and the Palestinian state should establish a joint commission with a secretariat that will hold regular meetings to discuss political and economic cooperation. Such meetings will provide a forum for the exchange of views and serve as means for exploring ideas between the parties.

3.&4. Because of vast differences in territory, population, and resources, defensive needs will be considerably different among the participating states. Thus, for instance, if the Sinai is demilitarized, the demilitarization of all of Israel would not be substantially equal. Moreover, even a proportional demilitarization might be inconsistent with Israel's defense needs. Thus, zonal demilitarization in Israel might be restricted to token areas for purposes of formal symmetry in exchange for substantial demilitarization of the Sinai. Such demilitarization includes offensive weaponry and heavy military equipment that may constitute a basis for offensive military action. It does not exclude reasonable police, border, and customs forces or early warning defensive systems and light weaponry. Since Israel and Egypt would bind themselves to such mutual restrictions, these arrangements would be in the category of arms control and limitations agreements such as the SALT agreements between the United States and the U.S.S.R. In that respect this region would lead in the progress toward world peace. All possible means of providing security should be explored at Geneva. These might include great power guarantees, great power forces, or United Nations forces under conditions in which they would be withdrawn only upon the consent of both sides or with adequate notice. The defect in UN forces is that, even if their mandate and the agreements specify that they cannot be withdrawn without the consent of all parties to the peace treaties, the

states providing the forces nonetheless may withdraw them, particularly if a resolution of the General Assembly advocates it. For this reason, UN forces, unless modified in some important ways, are unlikely to be acceptable to all the parties. Some self-reinforcing type of agreement likely will be necessary. One possible type of self-reinforcing agreement might be acceptable to all parties. This type of arrangement has a precedent in the successful Rhodes agreement of 1949, although it will be adapted to the circumstances of the present case with respect to numbers, dispositions, and weaponry. The Sinai would be substantially demilitarized and be reinforced by a "plate glass window." This proposed "plate glass window" would consist of relatively small and lightly armed joint Egyptian/Israeli patrols or inspection teams. Additionally or alternatively the area could be monitored by agreed forms of aerial observation including the use of satellites. The same could be applied to certain parts of Israel to insure symmetry between the conditions of implementation. The Golan Heights would be demilitarized because of its importance to Israeli defense. Demilitarization shall not exclude lightly armed customs and border guards or police to an extent not inconsistent with the objectives of this type of self-reinforcing system. To insure Israel against Syrian military occupation of the Heights, the following arrangements are proposed: Israeli troops (about 500-1,000 in number) would be stationed below the eastern base of the Heights and Israeli troops of an equivalent size would be stationed at the top of the Heights, which would be returned to Syrian civilian control. Roughly 1,000-2,000 equivalently armed Syrian troops would be stationed on the Israeli side of Lake Galilee (without interfering with Syrian and Israeli civilian control). These troops should be armed as lightly as possible, including, if this proves feasible upon examination, restrictions to hand guns and rifles. Arrangements would be made for relief of troops and for civilian police activities. Limits would be placed on Syrian and Israeli mobilization in the border area. Here also aerial observation can be very useful and can work to the mutual satisfaction of the parties. The West Bank area would be demilitarized—a status that does not exclude lightly armed police, customs, and border guards- — but its citizens may be trained in military units stationed in Jordanian territory. This agreement could be monitored by small joint Israeli/Palestinian patrols. For purpose of symmetry, token demilitarized areas in Israel could be monitored similarly. Although this Article makes legally possible the mutual renunciation of the security arrangements of Article 3 at the end of five years, it is perhaps too optimistic to believe that adequate confidence among the parties will have occurred that early even if no incidents occur. Even if this should be the case, early reconsideration will increase the probability of future renunciation and the transforma-

tion of formal peace into good relations. Article 3 does not rule out minor territorial adjustments freely agreed to by the parties.

5. Developments to date make clear that only the Palestinian Liberation Organization is competent to negotiate and to sign a peace settlement. However, recognition of the P.L.O. as the bargaining agent for the Palestinians at Geneva should not preclude the right of the Palestinians to choose their government in free and democratic elections. Furthermore, the other Arab states will provide sufficient developmental assistance to the Palestinian state to sustain its economic viability.

6.&7. Jointly, these two Articles mandate recognition of the sovereign independence of Israel and the Palestinian state; rule out external interference to change this state of affairs; but do not infringe on the right of the two states to explore, to the extent they so desire, peacefully and without resort to coercive or threatening measures, other possible future arrangements such as a federated state, a binational state, or a new amalgamated state as a successor to the existing states.

8. Possible models for the compensation provision may be found in the German war claims settlement, the World Bank model plan for the nationalization of foreign assets, and the U.S. Foreign Claims Settlement Commission.

9. For the Palestinian state this means reasonable and tax-free transit of goods and police personnel from the west bank area to Gaza and to a tax-free port in Israel on the Mediterranean.

10.&11. In many ways the Jerusalem issue is the most difficult one for a peace treaty to solve. And yet, if the parties can agree on the other terms, good faith should produce a solution here also. There is little doubt that Jerusalem can hardly be severed municipally even though certain parts could be detached from it without affecting that concept. However, to include the Old City of Jerusalem within Israel would violate Article 2. Thus, a single city administration might be combined with some (obviously not complete) decentralization of police and courts in the Old City. National offices of a Palestinian state might be placed there along with a small military guard. Its national tax laws might be applied to inhabitants of the Old City (although a commission would be needed to deal with anomalies in economic legislation). Moreover, no customs or passport controls should exist to impede travel within the City. Other alternatives might be considered such as turning over the Mount of Olives with the area up to the eastern walls of the Old City to the Palestinian state. The walled city could be placed under control of a commission of the major religions, although both Israel and the Palestinian state could pass national laws recognizing this status while claiming con-

current sovereignty over it but subject to certain municipal restrictions. The remainder of the City would be under Israeli control, although its inhabitants would have a choice of Israeli or Palestinian nationality.

13. It is obviously to the interests of all parties to provide for self-reinforcing methods of conflict resolution where disputes exist over interpretations of the Principles that do not involve vital questions of sovereign national security. However, this problem is both so complex and subtle that to consider it before the other means of implementing the Principles have been agreed upon would be counterproductive. The following examples are intended as possible illustrations of the complexity of the problem. Consider the possibility of Israeli restrictions on traffic to permit repairs or imposition of tariffs to compensate for the costs of providing transit or port facilities to the Palestinian state. In the first case, a quick arbitral method would guarantee the Palestinians against arbitrary Israeli restrictions that might damage important Palestinian economic interests. In the latter case, quickness would not be important. Funds could be placed in escrow and the matter decided by more formal procedures. On the other hand, consider a dispute over a characterization of the kinds of weapons deployed in the demilitarized zone. A "cooling off" period during which mediation occurs might be feasible, but such a matter may be close enough to sovereign considerations of national security that arbitration or adjudication, although not mediation, is likely to be ruled out. Some decisions concerning repatriation will come in this latter category. Some aspects of compensation may be subject to outside adjudication or arbitration. But at some point, the potential awards may threaten the economic viability or national security of a state. In these latter instances, only mediation may be possible. And, in some cases, even mediation during a "cooling off" period may be inconsistent with considerations of sovereign national security as, for instance, those acts of remilitarization for which the "plate glass window" principle was designed.

Agreement Between Egypt and Israel

The Government of the Arab Republic of Egypt and the Government of Israel have agreed that:

ARTICLE I

The conflict between them and in the Middle East shall not be resolved by military force but by peaceful means.

The Agreement concluded by the Parties 18 January,1974, within the framework of the Geneva Peace Conference, constituted a first step towards a just and durable peace according to the provisions of Security Council Resolution 338 of 22 October, 1973; and

They are determined to reach a final and just peace settlement by means of negotiations called for by Security Council Resolution 338, this Agreement being a significant step towards that end.

ARTICLE II

The Parties hereby undertake not to resort to the threat or use of force or military blockade against each other.

ARTICLE III

1. The Parties shall continue scrupulously to observe the ceasefire on land, sea and air and to refrain from all military or para-military actions against each other.
2. The Parties also confirm that the obligations contained in the Annex and, when concluded, the Protocol shall be an integral part of this Agreement.

ARTICLE IV

A. The military forces of the Parties shall be deployed in accordance with the following principles:

1. All Israeli forces shall be deployed east of the lines designated as Lines J and M on the attached map.
2. All Egyptian forces shall be deployed west of the line designated as Line E on the attached map.
3. The area between the lines designated on the attached map as Lines E and F and the area between the lines designated on the attached map as Lines J and K shall be limited in armament and forces.
4. The limitations on armament and forces in the areas described by paragraph (3) above shall be agreed as described in the attached Annex.
5. The zone between the lines designated on the attached map as Lines E and J, will be a buffer zone. In this zone the United Nations Emergency Force will continue to perform its functions as under the Egyptian-Israeli Agreement of 18 January, 1974.
6. In the area south from Line E and west from Line M, as defined in the attached map, there will be no military forces, as specified in the attached Annex.

B. The details concerning the new lines, the redeployment of the forces and its timing, the limitation on armaments and forces, aerial reconnaissance, the operation of the early warning and surveil-

lance installations and the use of the roads, the UN functions and other arrangements will all be in accordance with the provisions of the Annex and map which are an integral part of this Agreement and of the Protocol which is to result from negotiations pursuant to the Annex and which, when concluded, shall become an integral part of this Agreement.

ARTICLE V

The United Nations Emergency Force is essential and shall continue its functions and its mandate shall be extended annually.

ARTICLE VI

The Parties hereby establish a Joint Commission for the duration of this Agreement. It will function under the aegis of the Chief Coordinator of the United Nations Peacekeeping Missions in the Middle East in order to consider any problem arising from this Agreement and to assist the United Nations Emergency Force in the execution of its mandate. The Joint Commission shall function in accordance with procedures established in the Protocol.

ARTICLE VII

Non-military cargoes destined for or coming from Israel shall be permitted through the Suez Canal.

ARTICLE VIII

1. This Agreement is regarded by the Parties as a significant step toward a just and lasting peace. It is not a final peace agreement.
2. The Parties shall continue their efforts to negotiate a final peace agreement within the framework of the Geneva Peace Conference in accordance with Security Council Resolution 338.

ARTICLE IX

This Agreement shall enter into force upon signature of the Protocol and remain in force until superseded by a new agreement.

Annex to Egypt-Israel Agreement

Within 5 days after the signature of the Egypt-Israel Agreement, representatives of the two Parties shall meet in the Military Working Group of the Middle East Peace Conference at Geneva to begin preparation of a detailed Protocol for the implementation of the Agreement. The Working Group will complete the Protocol within 2 weeks. In order to facilitate preparation of the Protocol and implementation of the Agreement, and to assist in maintaining the scrupulous observance of the ceasefire and other elements of the Agreement, the two Parties have agreed on the following principles, which are an integral part of the Agreement, as guidelines for the Working Group.

1. DEFINITIONS OF LINES AND AREAS

The deployment lines, areas of limited forces and armaments, Buffer Zones, the area south from Line E and west from Line M, other

designated areas, road sections for common use and other features referred to in Article IV of the Agreement shall be as indicated on the attached map (1:100,000 - US Edition).

2. BUFFER ZONES

(a) Access to the Buffer Zones will be controlled by the UNEF, according to procedures to be worked out by the Working Group and UNEF.

(b) Aircraft of either Party will be permitted to fly freely up to the forward line of that Party. Reconnaissance aircraft of either Party may fly up to the middle line of the Buffer Zone between E and J on an agreed schedule.

(c) In the Buffer Zone, between Line E and J there will be established under Article IV of the Agreement an Early Warning System entrusted to United States civilian personnel as detailed in a separate proposal, which is a part of this Agreement.

(d) Authorized personnel shall have access to the Buffer Zone for transit to and from the Early Warning System; the manner in which this is carried out shall be worked out by the Working Group and UNEF.

3. AREA SOUTH OF LINE E AND WEST OF LINE M

(a) In this area, the United Nations Emergency Force will assure that there are no military or para-military forces of any kind, military fortifications and military installations; it will establish checkpoints and have the freedom of movement necessary to perform this function.

(b) Egyptian civilians and third country civilian oil field personnel shall have the right to enter, exit from, work, and live in the above indicated area, except for Buffer Zones 2A, 2B and the UN Posts. Egyptian civilian police shall be allowed in the area to perform normal civil police functions among the civilian population in such numbers and with such weapons and equipment as shall be provided for in the Protocol.

(c) Entry to and exit from the area, by land, by air or by sea, shall be only through UNEF checkpoints. UNEF shall also establish checkpoints along the road, the dividing line and at other points, with the precise locations and number to be included in the Protocol.

(d) Access to the airspace and the coastal area shall be limited to unarmed Egyptian civilian vessels and unarmed civilian helicopters and transport planes involved in the civilian activities of the area as agreed by the Working Group.

(e) Israel undertakes to leave intact all currently existing civilian installations and infrastructures.

(f) Procedures for use of the common sections of the coastal road along the Gulf of Suez shall be determined by the Working Group and detailed in the Protocol.

4. AERIAL SURVEILLANCE

There shall be a continuation of aerial reconnaissance missions by the United States over the areas covered by the Agreement (the area between lines F and K), following the same procedures already in practice. The missions will ordinarily be carried out at a frequency of one mission every 7-10 days, with either Party or UNEF empowered to request an earlier mission. The U.S. Government will make the mission results available expeditiously to Israel, Egypt and the Chief Coordinator of the UN Peacekeeping Mission in the Middle East.

5. LIMITATION OF FORCES AND ARMAMENTS

(a) Within the Areas of Limited Forces and Armaments (the areas between Lines J and K and Lines E and F) the major limitations shall be as follows:

(1) Eight (8) standard infantry battalions
(2) Seventy-five (75) tanks.
(3) Sixty (60) artillery pieces, including heavy mortars (i.e. with caliber larger than 120 mm), whose range shall not exceed twelve (12) km.
(4) The total number of personnel shall not exceed eight thousand (8,000).
(5) Both Parties agree not to station or locate in the area weapons which can reach the line of the other side.
(6) Both Parties agree that in the areas between Lines J and K, and between Line A (of the Disengagement Agreement on 18 January, 1974) and Line E, they will construct no new fortifications or installations for forces of a size greater than that agreed herein.

(b) The major limitations beyond the Areas of Limited Forces and Armament will be:

(1) Neither side will station nor locate any weapon in areas from which they can reach the other line.
(2) The Parties will not place anti-aircraft missiles within an area of ten (10) kilometres east of Line K and west of Line F, respectively.

(c) The UN Force will conduct inspections in order to ensure the maintenance of the agreed limitations within these areas.

6. PROCESS OF IMPLEMENTATION

The detailed implementation and timing of the redeployment of forces, turnover of oil fields, and other arrangements called for by the Agreement, Annex and Protocol shall be determined by the Working Group, which will agree on the stages of this process, including the phased movement of Egyptian troops to Line E and Israeli troops to Line J. The first phase will be the transfer of the oil fields and installations to Egypt. The process will begin within two weeks from the

signature of the Protocol with the introduction of the necessary technicians, and it will be completed no later than eight weeks after it begins. The details of the phasing will be worked out in the Military Working Group.

Implementation of the redeployment shall be completed within 5 months after signature of the Protocol.

Proposal

In connection with the Early Warning System referred to in Article IV of the Agreement between Egypt and Israel concluded on this date and as an integral part of that Agreement, (hereafter referred to as the Basic Agreement), the United States proposes the following:

1. The Early Warning System to be established in accordance with Article IV in the area shown on the attached map will be entrusted to the United States. It shall have the following elements:

a. There shall be two surveillance stations to provide strategic early warning, one operated by Egyptian and one operated by Israeli personnel. Their locations are shown on the map attached to the Basic Agreement. Each station shall be manned by not more than 250 technical and administrative personnel. They shall perform the functions of visual and electronic surveillance only within their stations.

b. In support of these stations, to provide tactical early warning and to verify access to them, three watch stations shall be established by the United States in the Mitla and Giddi Passes as will be shown on the agreed map. These stations shall be operated by U.S. civilian personnel. In support of these stations, there shall be established three unmanned electronic sensor fields at both ends of each Pass and in the general vicinity of each station and the roads leading to and from those stations.

2. The U.S. civilian personnel shall perform the following duties in connection with the operation and maintenance of these stations:

a. At the two surveillance stations described in paragraph 1 a. above, U.S. personnel will verify the nature of the operations of the stations and all movement into and out of each station and will immediately report any detected divergency from its authorized role of visual and electronic surveillance to the Parties to the Basic Agreement and to the UNEF.

b. At each watch station described in paragraph 1 b. above, the U.S. personnel will immediately report to the Parties to the Basic Agreement and to UNEF any movement of armed forces, other than the UNEF, into either Pass and any observed preparations for such movement.

c. The total number of U.S. civilian personnel assigned to functions under this Proposal shall not exceed 200. Only civilian personnel shall be assigned to functions under this Proposal.

3. No arms shall be maintained at the stations and other facilities covered by this Proposal, except for small arms required for their protection.

4. The U.S. personnel serving the Early Warning System shall be allowed to move freely within the area of the System.

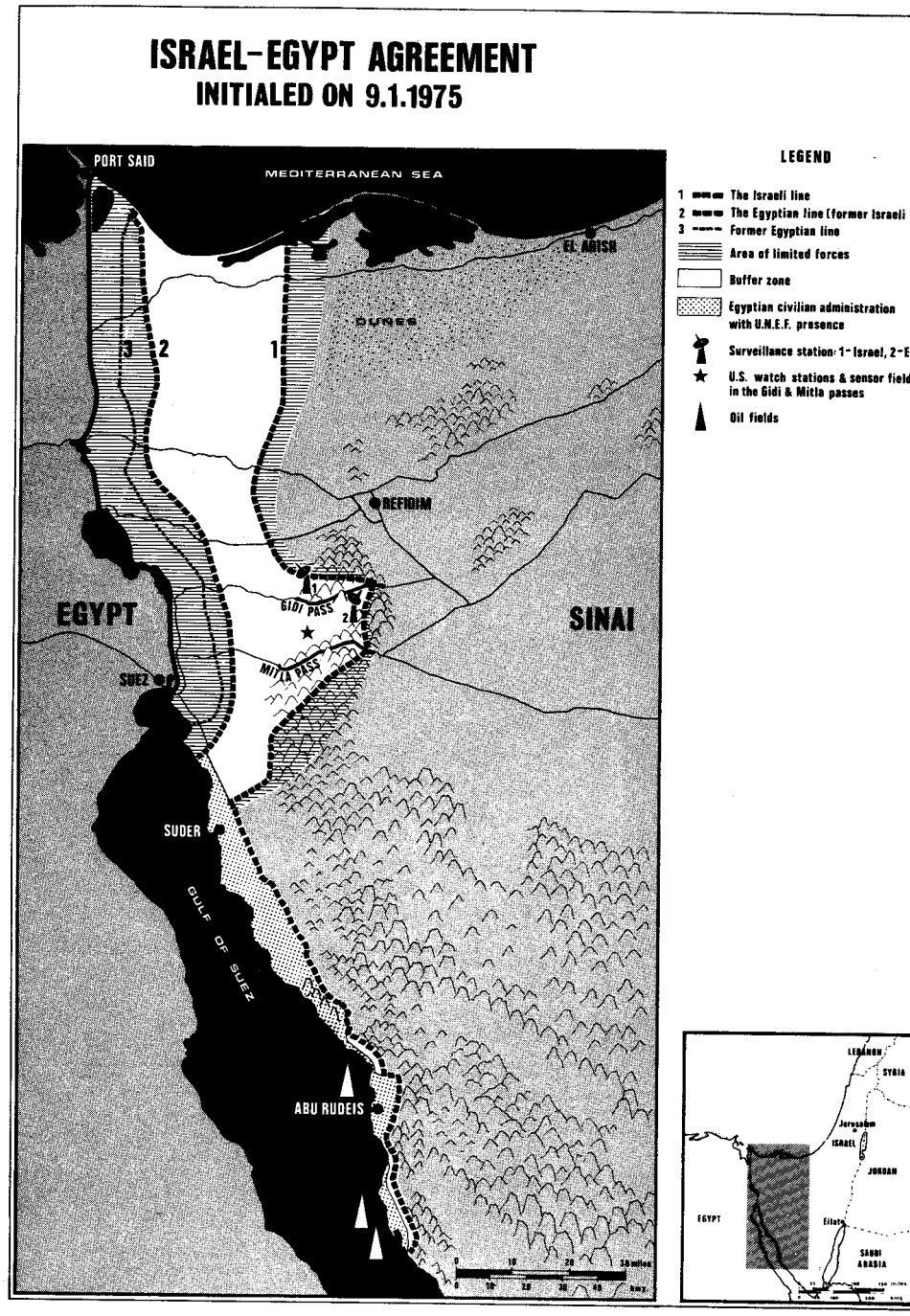
5. The United States and its personnel shall be entitled to have such support facilities as are reasonably necessary to perform their functions.

6. The U.S. personnel shall be immune from local criminal, civil, tax and customs jurisdiction and may be accorded any other specific privileges and immunities provided for in the UNEF agreement of 13 February, 1975.

7. The United States affirms that it will continue to perform the functions described above for the duration of the Basic Agreement.

8. Notwithstanding any other provision of this Proposal, the United States may withdraw its personnel only if it concludes that their safety is jeopardized or that continuation of their role is no longer necessary. In the latter case the Parties to the Basic Agreement will be informed in advance in order to give them the opportunity to make alternative arrangements. If both Parties to the Basic Agreement request the United States to conclude its role under this Proposal, the United States will consider such requests conclusive.

9. Technical problems including the location of the watch stations will be worked out through consultation with the United States.


ISRAEL-EGYPT AGREEMENT
INITIALED ON 9.1.1975
PORT SAID
MEDITERRANEAN SEA
EL ARISH
DUNES
3
2
1
REFIDIM
GIDI PASS
MITLA PASS
EGYPT
SINAI
SUEZ
SUDER
GULF OF SUEZ
ABU RUDEIS
LEGEND
1 The Israeli line
2 The Egyptian line (former Israeli li
3 Former Egyptian line
Area of limited forces
Buffer zone
Egyptian civilian administration with U.N.E.F. presence
Surveillance station: 1- Israel, 2- Eg
U.S. watch stations & sensor fields in the Gidi & Mitla passes
Oil fields
LEBANON
SYRIA
Jerusalem
ISRAEL
JORDAN
EGYPT
Eilat
SAUDI ARABIA

The Difficulty of Consensus

Ostensibly different approaches to the problems in the Middle East are illustrative in both the differences and similarities they reveal. Thus, at the outset, certain issues immediately present themselves for discussion. One of the unfortunate results of the seriousness of the problems in the region, which is apparent from the foregoing articles, is that prior to the presentation of any concrete solutions, it was necessary for the authors to establish a framework for analysis by re-examing some of the problems present.

Any treatment of Middle East problems and solutions must begin with an understanding of the peoples of the area. Not only must any solution come from the parties themselves, as pointed out by Professor Dawn, but an understanding of the situation can only come when viewed in terms of the cultures present. For instance, in spite of the talk of establishment of a "secular democratic" state in the region, a government patterned on a western democracy would not be possible. An examination of the governments in the region would reveal that Israel, despite its reliance on religion for many "governmental" functions, may be the most secular of the Middle East countries. Thus, attention should be turned to more basic problems.

The lack of contact between Arab and Jew has given rise to certain suspicions and fears. According to Professor Szyliowicz, the Arabs still regard the Jews as alien to the region. This lack of contact had resulted in an unwillingness to negotiate until the "other side" gave in first, as noted by Professor Dawn. But behind this facade of total intransigence, it was obvious that some issues were open to negotiation, while others were not. For example, the proposal of Professors Bassiouni and Kaplan outlines a scheme of internationalization for Jerusalem. Yet, the consistent position of the Israelis has been an absolute refusal to give up sovereignty over the city, citing their historic ties and violations of religious rights during Jordanian administration. This may be an example of a truly non-negotiable demand. On the other hand, there is no real value to the Sinai desert, and it would appear that further pull-backs there would not cause great difficulties. Even the Golan Heights might leave the category of non-negotiability if adequate international safeguards were provided.

Professor Dawn cogently stated that a settlement cannot be forced upon the parties by any country or international body. Thus, it seems quite difficult to conceive of a solution phrased in terms of international law or a United Nations resolution. Resolution 242[1] was

1. S.C. Res. 242, adopted Nov. 22, 1967.

accepted by both sides for a significant period of time, albeit with slightly different interpretations. But its acceptance was based only on its nature: each side could manipulate the language of the Resolution to suit its own purposes. Although U.N. resolutions can indeed form a basis for international law, in this instance, nothing of the sort happened.

More importantly, the first interim agreements after the 1973 War provided for a face-to-face meeting between Arabs and Israelis at a peace table. In addition to the issues settled by the agreement itself, its primary importance may lie in the fact that a common experience of reaching accords will continue to have a positive effect on the attitudes of the parties of the parties toward further settlements and negotiations.[2]

Strategic considerations, as viewed by Professors Szyliowicz and Chomsky, are of value in the short run only. The 1973 Yom Kippur War did prove to Israel that it cannot rely on military strength for its security, and it perhaps also showed the Arabs that a military move would not suffice to eliminate Israel from the region. Other commentators have approached the strategic problems from opposite directions. Nahum Goldman has suggested complete neutralization of Israel.[3] Robert Tucker, on the other hand, has suggested giving all of the parties in the region atomic weapons, which would, he argues, create a peaceful situation on the order of a "mini" Soviet-American detente.[4]

Neither neutralization nor nuclearization is the answer. The strategic foundation for the current situation was laid by the diplomacy of the United States in the aftermath of (and during) the 1973 War. The stage was set for settlement by the simultaneous resupplying of Israel, imposing a ceasefire, and forcing assistance to the surrounded Egyptian III Corps. This, according to Safran, sent a clear message to the Israelis — which was also understood by the Arabs — that military force was not the answer to the region's problems. Likewise, it signalled to the Arabs—and to the Israelis—that the United States was not interested in humiliation and defeat.[5]

With the stage set, gradual diplomatic moves were to be of some avail. No doubt the 25 years of fighting created a certain degree of willingness to find a solution; it only required the proper situation to initiate positive momentum. Indications now point to the growing

2. Safran, *Engagement in the Middle East*, 53 FOREIGN AFFAIRS 45, 48 (1974).

3. Goldman, *The Future of Israel*, 48 FOREIGN AFFAIRS 128 (1970).

4. Tucker, *Israel and the United States: From Dependence to Nuclear Weapons?*, 60 COMMENTARY 29 (Nov. 1975).

5. Safran, *supra* note 2, at 45, 59.

control of the "moderate" faction of the PLO. Profesor Chomsky suggests immediate creation of a Palestinian state. However, the official Israeli position has been that the government of Jordan represents the Palestinian Arabs. Why, then, the Israelis argue, should a new (and, in all probability, economically unsound) state be created? Nevertheless, if it is possible to create a state for the Palestinian Arabs, it would seem that the traditional moderating force of the responsibility of having one's own land to administer would become the overwhelming influence on the heretofore truculent PLO.

As noted above, military threats have not brought about a Mid-East peace. Therefore, political and economic measures must be examined further. Threats of political isolation were most effective on Syria after the 1973 War, and, as pointed out by Professor Dawn, similar pressures were applied after the 1948 War by the various Arab states. The present round of agreements is structured in such a way that they can actually serve to bring together diverse elements within the Arab world, and thus act as a positive incentive to peace. While the goal of pan-Arabism, as expressed by the Arab leaders, may be more apparent than real, any unifying effort will certainly be viewed with favor.

There is also a large area of non-political considerations that can be important in maintaining the impetus toward peace. For example, there seems to be a quiet agreement (after initial squabbles) as to the use by Israel and Jordan of the waters of the Jordan River. This is an element that transcends politics, for each side realized that ultimately its self-interest would be best served by cooperation and sharing. The relationship of the Israeli town of Eilat to the Jordanian city of Aqaba, may be viewed as another example of quiet consensus where self-interest was put ahead of ideology.

In spite of the emphasis given to political and strategic values, ultimately economic considerations will be given the primary importance. Thus, while it is true (as mentioned above) that no outside power can impose a settlement on the Middle East, economic threats or incentives may have a definite value in influencing a desired course of behavior. For example, while there is no lack of understanding as to the serious financial situation of the oil-poor countries in the Middle East, more attention should be given to the impetus provided by the economic situations in determining whether and when a war should be fought. President Sadat has indicated that one of the reasons he went to war in 1973 was to force Arab governments which had promised aid to Egypt (but had failed to deliver) to immediately send

6. Sadat to a meeting of diplomats, in Remba, *Why Egypt Needs Peace Now: The Economics of the Sinai Accord*, 58 NEW LEADER 9 (Sept. 29, 1975).

their pledges to Egypt in order to meet its international obligations. In Israel, similar charges were made regarding the Six Day War of 1967: the war was initiated to end an economic depression in Israel that the government could not otherwise control. Whether or not that theory is true, it does appear that a disincentive to further pull-backs in the Sinai or the Golan Heights is the exorbitant sums expended by Israel to construct fortifications along each new truce line. While the 1973 War should have proved a "Maginot Line" in the Middle East will be no more successful than its French progenitor, Israel feels that such a defensive bulwark is imperative, and weighs the value and cost of each pull-back accordingly.[7]

The rising cost of maintaining a standing army will force the Middle East countries to reach a decision. One alternative may be another all-out war, while they can still afford it. The 1973 stalemate should indicate the folly of this approach. A more feasible alternative is to turn to outside powers for military assistance, and devote all domestic resources to domestic problems. This poses chilling prospects indeed, since the major powers, if their perceived interests justify such a course, can easily supply the military needs of the parties at a bearable cost and, at the same time, have the benefit of field-testing of new equipment.

A more encouraging alternative envisions long-term involvement by major powers, but not in the military sphere. Both Egypt and Israel view the United States as a stabilizing influence in the region, since its imperialist tendencies seem to be much more moderate than those of the Soviet Union. While a true commitment to regional development as an alternative to war might require an undertaking on the part of the United States or other countries similar in scale to that of the Marshall Plan, this may be a necessary price to pay for peace.

Whatever course is adopted, it cannot be expected that the solution can be reached in one sitting. In spite of the caveats raised by Professor Chomsky, it appears that incrementalism is the only workable technique at this time. Gradual steps to establish an independent Palestine have already begun, to a limited extent, by local elections in the territories administered by Israel. The gradual phase-out of Israeli administrative control, to be followed by a phase-out of Israeli military control, could be used to create the state sought by the Palestinian Arabs.

The incremental approach, however, will only work if each step is perceived by all parties as a gain for themselves, and a step forward toward peace. In spite of the inequities in the bargaining "chips," the

7. Salpeter, *The High Cost of Non-War*, 58 NEW LEADER 6 (Oct. 13, 1975).

provision of a mutual recognition of Israel and a Palestinian state contained in the proposal of Professors Bassiouni and Kaplan would constitute a *quid pro quo* long sought-after by both parties, thus providing a firm foundation for a final settlement.

Notwithstanding the local tensions in the Middle East (*e.g.*, the civil war in Lebanon, or the Arab opinion regarding Israel's right to exist (*e.g.*, the Zionism resolution in the General Assembly), the current mood clearly favors progress toward permanent peace. The ideologies that were dominant in the 1960s and early 1970s are fading as countries realize that slogans and promises cannot solve their economic problems. The diplomats who work in the Middle East know how to distinguish between statements made for domestic consumption, which are often vicious, and the more significant private indicators of true policies. By concentrating on areas of agreement, and by seeking to solve the basic economic problems present, the "situation" in the Middle East can be normalized.

Theodore L. Banks

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8. Safran, *supra* note 2, at 45-46.

ARTICLES

Measuring the Growth and Decay of Transnational Norms Relevant to the Control of Violence: A Prospectus for Research

CHARLES W. KEGLEY, JR.*

I. INTRODUCTION

> Modern jurisprudence is open to the scientific study of every phase of law in society.[1]
>
> Law has . . . lost much of its old appeal to intellectually gifted and enterprising youth. Law as a science is widely distrusted or scorned, sometimes feared, by representatives of other scientific disciplines as some kind of secular priesthood.[2]

Despite occasional persuasive calls for the application of scientific methodology to the analysis of the nexus between international law and national behavior,[3] investigators operating from both the legal tradition and the scientific paradigm have demonstrated a marked reluctance to accept such research challenges. Many sociological and epistemological factors can be readily identified for this reluctance. Nevertheless, it may be submitted that the apparent antagonism and methodological differences separating scientific and legal analytical technique and scholarship are neither necessary nor constructive, and that indeed the two orientations share more in common with each other than members of either profession have been prone to acknowledge. For instance, both traditional international law and modern peace research share a common concern with the maintenance of systemic stability; both law and science strive for predictability; both law and science function to provide a consensus about the empirical nature of the international system; and both international legal theory and behavioral science assume that interstate behavior is governed by sufficient repetition and regularity to render the search for nomothetic knowledge about those general patterns of interstate practice to be a meaningful endeavor.[4] Moreover,

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1. Lasswell & Arens, *The Role of Sanction in Conflict Resolution,* 11 J. CONFLICT RESOLUTION 27 (1967).

2. Aubert, *Courts and Conflict Resolution,* 11 J. CONFLICT RESOLUTION 40, 50 (1967).

3. W. GOULD & M. BARKUN, INTERNATIONAL LAW AND THE SOCIAL SCIENCES (1970).

4. Thus, when a legal theorist such as Kelsen insists that "states ought to behave

when legal systems are interpreted as abstractions of social reality,[5] then the complementarity of law and behavioral science becomes apparent as cognizance is taken of the fact that both scientific theory and international law bear some relation to, and reflect, actual human conduct, or what states do in interaction.[6] Thus, because both perspectives must necessarily probe the empirical association of "norms of behavior" with "norms for behavior,"[7] it follows that a symbiotic relation between the two fields exists, in that knowledge produced by one contributes to the growth of knowledge in the other.

Given this presumed complementarity of science and law, it seems reasonable to this investigator to attempt to bridge the gap between the two fields by applying the methodology of the former to the study of the latter. That is, international legal norms may be regarded as amenable to systematic empirical observation by rigorous scientific procedure, so that transformations in the structure of the normative order of the international system may be monitored.

Such an ambitious and perhaps pretentious goal is motivated by a cluster of assumptions and convictions which may be briefly outlined here. A basic rationale for a study of this scope stems from the normative conviction that interstate aggression poses a sufficient threat to the survival of nations and mankind so as to render efforts to control it and reduce its incidence a problem which must command our immediate attention. The purpose of this study is not, however, to defend that value statement. Rather, we contend that the realization of that goal is contingent upon our prior ability to identify the causes of violence among nations and to delineate those factors which effectively serve to diminish its likelihood.[8] One such factor, of course, is the type of legal order operative in the international system. It may be contended, however, that we do not as yet possess adequate

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as they have customarily behaved," he is basing his theory on the scientific assumption that the behavior of nations is patterned rather than idiosyncratic and that it is possible in principle to derive generalizations about those behavioral propensities (i.e., customs) on the basis of empirical evidence.

5. Chroust, *Law: Reason, Legalism, and the Legal Process*, 74 ETHICS 1 (1963).

6. Barkun, *International Norms: An Interdisciplinary Approach*, 8 BACKGROUND 121 (1964).

7. Hoffman, *International Law and the Control of Force*, in THE RELEVANCE OF INTERNATIONAL LAW 34, 35 (K. Deutsch & S. Hoffman eds. 1971).

8. That is, if we wish to obtain the power to reduce the incidence and magnitude of international conflict, we must first construct explanatory models of why war between nations occurs; if we can develop an adequate theory of why particular conditions enhance the probability of the outbreak of war, it will inform us what variables to manipulate in order to reduce the likelihood of conflict. Such a theory must deal with the twin questions of (a) the extent to which legal norms modify national behavior and (b) which types of legal orders have historically been most efficacious in restraining the resort to violence in the international system.

knowledge about the linkage between international law on the one hand, and interstate conflict and systemic stability on the other.

A cursory review of the literature suggests that conventional wisdom has been permitted to suffice for rigorous inquiry, with the result that we possess an abundance of speculative insights concerning the problem, many of which are contradictory,[9] but we have precious few hypotheses which have been subjected to scientific verification to ascertain their plausibility. Consequently, the role of international law in interstate relations has a rich folklore,[10] but the extent of our empirical knowledge about that role remains limited. Thus, if we are to reduce the prospects for interstate aggression, we must first acquire knowledge about the relationship of legal norms to national behavior that is grounded on evidence rather than mere conjecture; we cannot control violence until we can uncover the normative conditions which facilitate or deter its occurence.

As a research strategy for acquiring such knowledge, it is further assumed that it is most fruitful to attempt to systematically *describe* the international legal order as it has evolved through time before one attempts to delineate the causes and consequences of variations in the structure of that order; description should precede explanation as well as prediction[11] because until we can adequately *map* the world legal system in its multifarious dimensions we are precluded from cogently accounting for it and anticipating its future characteristics. This tactic recommends an *inductive* approach to the systematic description of international norms which assumes that the normative system is open to *observation* and visual inspection. To assert that the international legal order is amenable to observation is to contend that that order constitutes a social datum which can be treated as "an objective political concept," a view which Field[12] forcefully argued many years ago but which remains controversial despite supporting arguments by international lawyers[13] and political scientists.[14]

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9. For instance, compare the view of those who see the contemporary legal order as serving to promote the perpetuation of the war/threat system with those who perceive that order as a conflict reduction mechanism.

10. Fried, *International Law—Neither Orphan nor Harlot, Neither Jailer nor Never-Never Land*, in THE RELEVANCE OF INTERNATIONAL LAW, *supra* note 7, at 124.

11. J.D. SINGER, QUANTITATIVE INTERNATIONAL POLITICS 1-2 (1968); Singer, *Modern International War: From Conjecture to Explanation*, in ESSAYS IN HONOR OF QUINCY WRIGHT 47 (A. Lepawsky ed. 1971); Rood & Kegley, *Explaining War and Conflict: A Review of Contemporary Studies*, 7 HISTORICAL METHODS NEWSLETTER 25 (1974).

12. Field, *Law as an Objective Political Concept*, 43 AM. POL. SCIENCE REV. 229 (1949).

13. M. MCDOUGAL & F. FELICIANO, LAW AND THE MINIMUM WORLD ORDER (1969); H. KELSEN, THE PRINCIPLES OF INTERNATIONAL LAW (1961).

14. L. PYE & S. VERBA, POLITICAL CULTURE AND POLITICAL DEVELOPMENT 512-60 (1965).

If indeed international legal norms are amenable to observation, then the legal concepts are in principle also *measurable*. Measurement is the *sine qua non* of scientific research. However, given the symbolic nature of legal norms, it is submitted that measurement of these rules should begin at the nominal level,[15] with the classification of the presence or absence of specific legal categories. And, finally, since in dealing with international norms we are necessarily measuring a systemic attribute (and therefore operating at the systems level of analysis[16]), we are consequently required to measure this characteristic of the system in a longitudinal, or diachronic, fashion since systemic features are only subject to variation across time.[17] These foregoing assumptions and convictions serve to rationalize and structure the research design characteristics that are proposed to study the growth and decay of transnational norms bearing on the control of interstate violence.

II. CONCEPTUALIZING TRANSNATIONAL NORMS

Devising an explicit definition of legal norms which permits codification of its content for a specific temporal span is a seemingly intractable task. Principles of international law are conventionally couched in a broad abstract manner, rendering them imprecise, nonexhaustive, contradictory and elastic;[18] moreover, the problem of definition of what rules exist is exacerbated by the simultaneous presence of diverse cultural and legal orders in the international system.[19] Consequently, efforts to authoritatively define the "sanctioned prescriptions for, or prohibitions against, others' behavior, belief or feeling"[20] operative in the international legal system at a particular point

15. Typology construction is conveniently considered to be the most appropriate first requisite in the scientific study of any phenomena, and is often conceived as a form of measurement itself. C. KEGLEY, JR., A GENERAL EMPIRICAL TYPOLOGY OF FOREIGN POLICY BEHAVIOR (1973); Kalleberg, *The Logic of Comparison*, 19 WORLD POLITICS 69, 73 (1966).

16. Singer, *The Level-of-Analysis Problem in International Relations*, in THE INTERNATIONAL SYSTEM: THEORETICAL ESSAYS 77 (K. Knorr & S. Verba eds. 1961).

17. Ray & Singer, *Aggregation and Inference: The Levels-of-Analysis Problem Revisited*, March 1973 (unpublished paper prepared for delivery at the Annual Meeting of the International Studies Association, New York).

18. R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 7-40 (1970); Falk, *The Adequacy of Contemporary Theories of International Law: Gaps in Legal Thinking*, 50 VA. L. REV. 231 (1964). As Nader and Metzger summarized this idea, within a single society several legal systems may be operating, "complementing, supplementing, or conflicting with each other." Nader & Metzger, *Conflict Resolution in Two Mexican Communities*, 65 AM. ANTHROPOLOGIST 584 (1963).

19. A. BOZEMAN, POLITICS AND CULTURE IN INTERNATIONAL HISTORY (1960); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

20. Morris, *A Typology of Norms*, 21 AM. SOCIOLOGICAL REV. 610 (1956).

in time appear nearly hopeless,[21] the contributions of some toward this goal notwithstanding.

Given the difficulties of devising a system for distinguishing legal from illegal forms of behavior, as well as our primary interest in the relation between normative ideas and action, it is advisable to construct a concept of norms which skirts the above problems and which lends itself more fruitfully to observation and measurement. This may be partially accomplished by jettisoning constitutive definitions of transnational norms which seek to demarcate what conduct the legal order prohibits for a functional definition which depicts norms according to the function(s) or task(s) they perform in the system. Here, if law is seen, in its ultimate essence, as crystallized public opinion, then one of the salient functions of transnational legal norms is the communication and articulation of prevailing *beliefs* regarding the nature of the international system and the appropriate behavior of members comprising it. That is, transnational legal norms serve the purposes of indicating what fundamental beliefs about required and appropriate behavior are operative and of inculcating an awareness among members of international society that there is community support for particular beliefs.[22]

In adopting this conception we thus adhere to the view expressed by Coplin that " . . . the primary function of international law is as a communication technique."[23] As Coplin elaborated,

> . . . the laws of a society help to express and develop a climate of opinion about the society, that is, a set of attitudes about the nature of the society . . . . Law reaches all members of the society . . . . Just as law, along with governmental institutions in democratic societies aids in developing and communicating a consensus on the nature of the state system . . . international law expresses a set of ideas about the nature of the international system generally held throughout the system. Through international law and international organizations, a basic set of ideas concerning the values and patterns of the international system is communicated to the members of the system. Moreover, as the international system develops to new forms in the rapidly changing contemporary environment, the law and its related institutions aid in developing agreement on the changing nature of international relations.[24]

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21. To dramatize the magnitude of the task of codifying legal norms in such a way as to organize, digest, collate, and eliminate obscure views and discrepancies, it is instructive to recall that Justinian is reported to have compiled CORPUS JURIS CIVILIS under ideal circumstances (i.e., conditions of systemic universality) only with an army of legal experts after prolonged inquiry, and at that time (527 A.D.) it was necessary to condense 2,000 books consisting of 3,000,000 lines to 150,000 lines. Rhyne, *Peace With Justice*, 28 VITAL SPEECHES OF THE DAY 462 (1962).

22. This conception follows closely Katz and Kahn's definition of norms as a statistical commonality of beliefs. D. KATZ & R. KAHN, THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS 2 (1966).

23. W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 169 (1966).

24. *Id.* at 168-71.

Seen in this light, transnational norms thus serve

> as authoritative (i.e., accepted as such by the community) modes of communicating or reflecting the ideals and purposes, the acceptable roles and actions, as well as the very processes of the societies. The legal system functions on the level of the individual's perceptions and attitudes by presenting to him an image of the social system — an image which has both factual and normative aspects and which contributes to social order by building a consensus on procedural as well as on substantive matters.[25]

This conception depicts transnational norms as indicators of the nature of the international system during particular temporal periods, rather than as a system of coercive norms with sanctions for their enforcement. The conception sees norms fostering the creation of an *image* held by members of the system regarding the global system of which they are a part,[26] rather than identifying clear limits to permissible behavior or operating as a restraint system. This functional definition of norms therefore perceives of norms as contributing to the development of an international political *culture.*[27] As an attitudinal variable, transnational norms define the international political culture or "climate of opinion" by specifying the beliefs which members of the system hold about the relations between nations. As Verba phrased it:

> The political culture of a society consists of the system of empirical beliefs, expressive symbols, and values which defines the situation in which political action takes place . . . . It refers not to what is happening in the world of politics, but what people believe about those happenings. And these beliefs can be of several kinds: they can be empirical beliefs about what the actual state of political life is; they can be beliefs as to the goals or values that ought to be pursued in political life; and these beliefs may have an important expressive or emotional dimension.[28]

It is this conception of transnational norms that is proposed for employment in the present study. It allows us to investigate the relationship between normative belief systems regarding violent behavior and the conduct of behavior without raising questions concerning the status and/or universality of particular legal stipulations. That is, when we treat norms as attitudinal characteristics of the international system, we can probe the statistical association between beliefs and behavior while concomitantly avoiding legalistic discussions about the legitimacy or illegitimacy of the beliefs themselves. The use of such norms, which hereafter will be termed "transnational rules" in order to attempt to circumvent the semantic confusion associated

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25. Coplin, *International Law and Assumptions About the State System,* 17 WORLD POLITICS 615 (1965).

26. Boulding, *National Images and International Systems,* in A MULTI-METHOD INTRODUCTION TO INTERNATIONAL POLITICS 366 (W. Coplin & C. Kegley, Jr. eds. 1971).

27. W. COPLIN, *supra* note 23, at 168-95.

28. L. PYE & S. VERBA, *supra* note 14, at 513, 516.

with the conventional meaning of the terms "law" and "norms,"[29] thus enables us to ultimately investigate our central empirical question, namely, the relation between the prevalence of various types of transnational rules or normative ideas and the level of systemic aggression in the system. Thus, this conceptual orientation permits investigation into the related generic questions of the structural determinants and consequences of transnational rules, of the temporal connection between rules and conduct (i.e., do rules of behavior become rules for behavior, or do international rules instead merely legitimate the status quo by condoning diplomatic practice), and of the relationship between the extent of behavioral conformity and normative identification (i.e., does the system, as Hoebel suggests,[30] perform according to the prescription, "What the most do, others should do?").

III. OPERATIONALIZING THE CONCEPT OF TRANSNATIONAL RULES

Durkheim is reported to have once contended that:

> Moral facts are facts like any others; they consist of rules of action which can be recognized by some distinctive characteristics; thus, it must be possible to observe them, to describe and classify them.[31]

Such reasoning, if valid, would appear to apply equally well to the measurement of the transnational rules or international beliefs comprising the international political culture. What is required for the operationalization of transnational rules is a definition specifying a technique for identifying the contents of transnational rules as well as a set of procedures by which source material which is publicly available could be systemically coded by replicable methods of observation and classification for the conversion of such source information into quantitative data.

When transnational rules are conceived as reflections of systemic images and global beliefs about the kinds of permissible foreign policy behavior of states, then evidence of those rules, and transformations in them, it is submitted, may be derived from what international jurists and publicists report about them in international legal texts. That is, authoritative classical legal texts may serve as a data *source* from which indicators and measures can be constructed of the attitudes which prevailed about the nature of international political behavior at the time they were written. While such treatises may not accurately reflect whatever body of law may have been operative at a given point in historical time in the international system, the observations and interpretations provided by these scholars provide an

29. Goldman, *International Norms and Governmental Behaviour*, 4 COOPERATION & CONFLICT 162 (1969).

30. E.A. HOEBEL, THE LAW OF PRIMITIVE MAN (1954).

31. M. OSSAWSKA, SOCIAL DETERMINANTS OF MORAL IDEAS 17 (1970).

index of the perceived rules which statesmen regarded as important in regulating the relations of nations. As such, then, if the descriptive information found in these legal texts are interpreted not as full, exact summaries of the law of nations, but rather as opinions about the system and its characteristic or standard operating rules, then the descriptions may serve as *evidence* of the transnational rules extant in particular temporal spans. These descriptive accounts and observations are amenable to quantification for systematic data collection.

The conversion of this source information into quantitative data is a complicated process. The operational instructions are described fully in the *Coder's Manual of the Transnational Rules Indicators Project*[32] which outlines the procedure by which the contents of textual material found in classic legal texts are screened and codified for 184 variables. Basically, the operational technique is that of thematic content analysis, an analytic and data generation procedure for systematically scanning documents and quantatively profiling their contents by replicable procedures of observation and classification. The technique has been described fully elsewhere.[33] When international legal texts are subjected to the technique, the authors are conceived as experts and their descriptions are treated as observations which, when coded, are thereby measured along specific dimensions. The coding rules articulated in the *Coder's Manual* delineate these operational rules by which various features of transnational rules are measured to generate data regarding the presence, absence, and intensity with which particular beliefs concerning appropriate interstate behavior were perceived to prevail at the time the scholar was expressing his opinions.

This approach to operationalization of the transnational rules concept raises a number of issues, most of which center on the problems of construct validity. An obvious distance necessarily pertains between concept and operational indicator. A number of considerations suggest that the operationalization is valid, on the face of it, however. In particular, the operationalization may be defended and rationalized in the following terms.

(1) There is a relatively close fit between transnational rules defined in terms of their communicative function, and the information provided by text-writers. The information and opinions exressed by textbook writers are not treated as descriptions of what the law is, but rather as quasi-authoritative statements of the assumptions

32. C. KEGLEY, JR., K. CHOI & G. RAYMOND, A CODER'S MANUAL FOR TRANSNATIONAL RULES INDICATORS PROJECT (TRIP) (1974).

33. B. BERELSON, CONTENT ANALYSIS IN COMMUNICATIONS RESEARCH (1952); H. LASSWELL, LANGUAGE OF POLITICS: STUDIES IN QUANTITATIVE SEMANTICS (1949); R. NORTH, CONTENT ANALYSIS (1963); I. POOL, TRENDS IN CONTENT ANALYSIS (1959).

policy-makers held about the nature and normative rules of the system in a particular period of history. From this perspective, we agree with Coplin that the writings of jurists may be seen

> . . . as an institutional device for communicating to the policy-makers of various states a consensus on the nature of the international system. It is a "quasi-authoritative" device because the norms of international law represent only an imperfect consensus of the community of states, a consensus which rarely commands complete acceptance but which usually expresses generally held ideas. Given the decentralized nature of law-creation and law-application in the international community, there is no official voice of the states as a collectivity. However, international law taken as a body of generally related norms is the closest thing to such a voice. Therefore, in spite of the degree of uncertainty about the authority of international law, it may still be meaningful to examine international law as a means for expressing the commonly held assumptions about the state system.[34]

We are, thus, not seeking to measure and quantify international law; rather, the concept and indicator relate to the opinions about the system made by those qualified by their experience and research to summarize the operating behavioral practices and rules of the system.

(2) Such a conceptual orientation is warranted because it avoids the "essentialist fallacy" of which logicians speak when they refer to attempts of people to seek "correct" or "true" definitions of concepts. That is, we are not trying to answer the question, "What is law?" It may be contended that is "an ill-conceived or a wrong-headed question in the first place,"[35] because:

> It becomes fairly plain that the attempt to define "law," like similar attempts to define "art" and "religion," should be abandoned at least if the traditional tight genus-specie kind of definition is attempted. "Law" simply has no genus. Hence, we may more profitably inquire into the *use* of such words as "law" and "ethics," and analyze these as concepts. So avoiding the error, derived in part from Aristotle of seeking a "correct" or "true" definition, on the fallacy of nouns and referents, namely, of assuming that there is an object (law) which must point to certain (unchangeable) objects, we use an open texture approach . . . . We should ask only how any given word has been used, is used, or, we may propose, ought to be used in a given context. We cease to ask what it "means" — as if it always and everywhere possessed a certain meaning.[36]

From this posture, then, the way in which legal scholars attempt to describe international conduct, rather than the meaning of law in a particular time frame, is what we seek to tap; such an approach avoids the dangers identified above.

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34. Coplin, *supra* note 25, at 618-19.

35. Kegley, *Observations on Legal vis-a-vis Moral Thought and Life*, 51 PERSONALIST 58 (1970).

36. *Id.* at 61-62.

(3) The use of textbook writers' opinions as a data source recommends itself because of the absence of an alternate source from which to extract information about the rules prevailing through time. Legal scholars comprise the only profession which have traditionally sought to monitor changes in the rules and conduct of interstate behavior. While, to be sure, diplomatic history provides some clues on this dimension of international relations[37] and the memoirs of policy-makers provide information about the "standing rules of procedure" they perceived to influence their behavior,[38] this information is not systematic and not readily amenable to comparative historical survey. Hence, international legal texts serve as the only source from which evidence about the norms regulating behavior may be extracted. Within international law itself, the statements of textbook writers are seen as serving to provide useful evidence of what legal norms are operative;[39] more importantly, for our purposes, these statements are seen as "helping to create the opinion by which the range of consensus is enlarged."[40] That is, international law regards the writings of textbooks as evidence of legal norms and as modifiers of opinion about the conduct of states. This fits with our desire to extract data about the psycho-cultural attributes[41] of the international system.

(4) It has been convincingly argued[42] that the role of scholars in the formation of law is diminishing and is "now close to nominal," and, moreover, that the credibility of textbook writers has declined as cognizance has been taken that "what international lawyers care to describe as international law is their own invention," that "the legal order was all the scholar saw about him, for it was an order of

37. M. KAPLAN, SYSTEM AND PROCESS IN INTERNATIONAL POLITICS (1957).

38. FOREIGN POLICY DECISION-MAKING (R. Snyder, H.W. Bruck & B. Sapin eds. 1962).

39. E.g., Article 38(1)(d) of the Statute of the International Court of Justice declares "the teachings of the most highly qualified publicists of the various nations" to be a subsidiary means for determining the rules of international law. In Justice Gray's opinion,

> . . . [W]here there is no treaty, and no controlling executive or legislative act, or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals . . . for trustworthy evidence of what the law really is. Paquette Habana, Lola, 175 U.S. 677, 700 (1900).

40. W. GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 143 (1957).

41. Singer, *supra* note 11, at 62-63.

42. Onuf, *Law-Making in the Global Community: A Working Paper*, May 10, 1974 (unpublished paper prepared for presentation at the conference on "Law-Making in the Global Community," Center of International Studies, Princeton University).

his own making, an artifactual order." Acknowledging this proclivity certainly undermines the function of textbook writers as *sources* of international law, but does not vitiate the use of legal texts for the purpose pursued here. Whether the descriptions provided by legal texts are artifactual is immaterial, for we are not interested in observing the actual content of the law (whatever that may be) but rather what people believe about the rules of the international system. The opinions expressed by these scholars, whether valid or not, continue to create and communicate attitudes about the nature of international society, and the images provided thus invariably continue to influence and modify the development of the actual law. Thus these *beliefs* remain important indicators of the international political culture, regardless of whether they accurately reflect the law itself.

(5) The operational rules for the most part are designed to enhance the validity of the indicators by employing a low level-of-measurement; that is, most variables are measured at the nominal or ordinal level on the conviction that that level is appropriate for concepts that are not open to interval measurement[43] such as norms. Thus, by asking such questions as whether a particular source discusses a particular transnational norm (coded yes-no at the nominal level) or the proportionate amount of attention given to that norm in the text (coded high to low at the ordinal level), our confidence in the validity of the measures is increased. We are more confident of data coded at this level because that is all data regarding rules are able to yield, in our opinion.

(6) To treat publicists as "expert observers" appears reasonable, on the face of it, because their writings are explicitly designed to describe the "character of the system" at the point in time at which they were writing. Moreover, for the famous scholars whose works have gone through many editions (e.g., Oppenheim/Lauterpacht went through eight editions from 1905 to 1955; Hall went through eight editions from 1880 to 1924; von Liszt made eleven revisions of his treatise; there are twenty-four editions of Martens' text), the commentaries of each edition have been revised to reflect perceived changes in the normative structure of the international system. Thus, in principle, changes in their treatments serve as instructive indicators of changes in the opinions statesmen held about the nature of he international political system, and the chronology provided permits us to monitor how the system of rules has changed over time. What publicists perceive the system permitting and prohibiting, therefore, may be monitored to trace and detect changes in the rules statesmen subscribe to.

43. H. BLALOCK, JR., SOCIAL STATISTICS 17, 40 (1960).

Whether one finds the above reasoning acceptable will most likely be a function of the analytic paradigm from which one is working[44] rather than the cogency, or lack thereof, of the argument. The rationale does, however, serve to explicitly identify what the author regards as an appropriate research strategy for dealing with an admittedly difficult research problem.

IV. RESEARCH UTILITY OF THE DATA SET

> For years the study of value change has been a central topic in intellectual, political and social history. Unfortunately, speculating about causes and consequences of value change is far easier than determining accurately the magnitude and direction of such change.[45]

While Namenwirth and Lasswell were speaking in reference to the study of American values, their statement is equally valid as a description of the study of changes in transnational rules. Impression and subjective belief about fluctuations in the normative structure of the international system have yet to be replaced by measurement and verifiable knowledge. The data generated here is designed to meet this perceived need. Like Namenwirth and Lasswell, the general question to which this proposed study is addressed is: What have been the long-range changes in the rules governing the international system, and what questions do the observed changes raise about the causes and consequences of legal rule change?

V. SOME SUGGESTIVE HYPOTHESES FOR INVESTIGATION

In pursuit of that general goal, and in conformity with the research strategy described above, the study proposed here will employ the TRIP data to confront with evidence some prevailing impressions regarding the extent to which particular transnational rules relevant to the control of violence have fluctuated over time in order to ascertain the plausibility of those impressions. That is, we will seek to empirically *describe* the evolution of transnational rules across time rather than attempt to devise explanations of observed fluctuations.[46]

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44. I.e., "traditionalists" will undoubtedly regard any effort to *measure* ideas about transnational rules as absurd, while "behavioralists" will be inclined to see any treatment of legal rules as unwarranted and a wasteful expenditure of research energy, in conformity with their general view that international law is irrelevant to the behavior of nations.

45. Namenwirth & Lasswell, *The Changing Language of American Values*, in 1 SAGE PROFESSIONAL PAPERS IN COMPARATIVE POLITICS 5 (1970).

46. Ultimately, the nexus between changes in systemic behavior and changes in the normative structure of the system may be addressed; such assessments would consider such things as the impact which the growing number of nation-states and international organizations exert on the nature of transnational norms, as well as the relationship between the salience of particular normative systems and the magnitude and frequency of war. An example of the latter type of inquiry would be an empirical test of Wight's hypothesis that "when diplomacy is violent and unscrupulous, interna-

This means that we will be conducting *time-series univariate* analysis in order (1) to describe, via trend line interpretation, variations in the performance of particular transnational rules, and (2) to measure transformations in the rule system of the international community.[47]

The literature on international law is fraught with impressionistic statements and often contradictory conventional wisdoms about the diachronic performance of particular rules which are amenable to testing and precise respecification with the TRIP data. While decisions as to which of these descriptive hypotheses should be included in the study have been postponed until a thorough review of the literature has been conducted, some examples for illustrative purposes include the following:

> *Hypothesis 1:* Since 1648, there has been a gradual limitation on the rights of states in conflict conferred by the sovereignty principle.
>
> *Hypothesis 2:* Since 1700, the central Grotian assumption of the solidarity, or potential solidarity, of the states comprising the international system has been replaced by a pluralist conception with respect to the enforcement of legal rules governing violence.[48]
>
> *Hypothesis 3:* Throughout the history of the contemporary international system (i.e., 1648-1975), the system has maintained that with respect to rules relating to the legitimacy of war, a distinction should be drawn between some wars, or acts of war, and others; some wars may be legitimate while others are not. To assert that this notion has prevailed across time in the system is to reject the hypothesis that during certain periods neither the pacifist perspective (that no war or act of war is legitimate) nor the militarist view (that any war or act of war is legitimate) has ever prevailed.[49]

A contending view to the above "invariant" hypotheses suggests:

> *Hypothesis 4:* Since 1919 prohibitions against the resort to force have increased; in 1919 the resort to war was not completely outlawed (it was outlawed only in case certain pre-established proceedings seeking peace proved useless); by 1925 (Locarno) the resort to war was prohibited; by 1928 (Kellogg-Briand Pact) war both as a tool of self-help to right international wrongs and as an act of national sovereignty to change existing rights was renounced; since World War II, a return to the distinc-

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tional law soars into the regions of natural law; when diplomacy acquires a certain habit of cooperation, international law crawls in the mud of legal positivism." Wight, *Why Is There No International Theory?*, in DIPLOMATIC INVESTIGATIONS 15, 29 (H. Butterfield & M. Wight eds. 1968). The analysis of such a theoretical question is possible with the data compiled by Singer and Small in the Correlates of War Project, which the present data is expressly designed to complement. J.D. SINGER & M. SMALL, THE WAGES OF WAR 1816-1965: A STATISTICAL HANDBOOK (1972).

47. Kegley & Hamilton, *Approaches to the Measurement of Transformation in the International System*, April 24, 1974 (unpublished paper prepared for presentation at the Annual Meeting of the Midwest Political Science Association, Chicago).

48. Bull, *The Grotian Concept of International Society*, in DIPLOMATIC INVESTIGATIONS 51, 52, *supra* note 46.

49. *Id.* at 53-54.

tion between kinds of war in determining legitimacy was manifest, but, in general, aggression continues to be regarded as illegal in and of itself; this contrasts with the view of Suarez in the classical system of the seventeenth century that aggressive war was something both moral and legal.[50]

Corollary 4.1: Since 1900 the traditional right of states to resort to war to defend not only their legal rights but also in order to destroy the legal rights of other states has been renounced.[51]

Hypothesis 5: The salience of the just war concept, in terms of the amount of attention publicists allocate to it in their discussions of international law, has steadily declined through history but has witnessed a modern resurgence with the advent of nuclear weapons.

Corollary 5.1: From circa 1850 to 1919, the just war concept is interpreted as dealing exclusively with the lawful conduct of war, whereas in the classical system just and unjust causes of war were distinguished.[52]

Corollary 5.2: Since the First World War the Grotian distinction between just and unjust causes of war has been written into positive international law.[53]

Hypothesis 6: In the classical international system, a state which is party to a belligerent relationship with another state but which is "seeking to uphold the law" is regarded as bound by no obligations, whereas the "unjust" belligerent is regarded to enjoy no rights; in the contemporary system (post-1900) the laws of war regarding belligerents are regarded as reciprocal—the rules of war apply equally to both parties in a conflict.[54]

Hypothesis 7: The laws of war governing the conduct of belligerents has gradually, but steadily, become less permissive (e.g., the laws of war no longer permit belligerents to kill all those in enemy territory including women and children, to destroy sacred enemy property, to kill captives and hostages, or to make slaves of prisoners of war; at one time, all these practices were permitted).[55]

Hypothesis 8: In the classical international system (circa 1648) the rules of war espoused collective security principles (i.e., if a war breaks out in which one party has a just cause, all other states have a right to join in the struggle); gradually, this rule was replaced by a balance of power conception which recognized the rights of neutrals to refrain from involvement in conflicts between other parties; by 1919, the system returned to the collective security principle, only to discard it again for the balance of power concept in 1945.

Corollary 8.1: Since 1919, the traditional right to remain neutral has been weakened.[57]

Hypothesis 9: Rebus sic stantibus rules regarding alliance commit-

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50. A.V.W. THOMAS & A.J. THOMAS, JR., THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 14-23 (1972).

51. Bull, *supra* note 48, at 69.

52. *Id.* at 55.

53. *Id.*

54. *Id.* at 57-58.

55. *Id.* at 58.

56. *Id.*; I. CLAUDE, JR., POWER AND INTERNATIONAL RELATIONS (1962); W. COPLIN, INTRODUCTION TO INTERNATIONAL POLITICS (1971).

57. Bull, *supra* note 48, at 62.

ments under conditions of war have gradually, since circa 1900, been replaced by *pacta sunt servanda* (treaties are binding) conceptions.

Hypothesis 10: The classical (circa 1648-1700) recognition of individual human beings as subjects of international law and members of international society in their own right gradually receded to the notion that only states are members, but has been resurrected in recent (post-1940) history.

Corollary 10.1: The classical right of the individual citizen to refuse to bear arms on behalf of his society for a war he believes to be unjust has virtually disappeared in the present century.[58]

Hypothesis 11: The 18th century was dominated by natural law thinking; the 19th, and particularly the latter half of the 19th century, was dominated by positivism; the 20th century has witnessed a modern resurgence of natural law orientations.[59]

Corollary 11.1: In periods where positivism was dominant, international law considered every state to have the right to make war as an attribute of sovereignty.[60]

Hypothesis 12: The classical concept of aggression (direct military operations by regular national forces under government control) has been gradually extended and expanded in scope so as to include rules dealing with new issue-areas and types of acts (e.g., economic pressures, threats, propaganda, etc.).[61]

Corollary 12.1: The classic prohibition against military interventory acts has been gradually relaxed by qualifications permitting new forms of interventory behavior.

These hypotheses are merely suggestive of the types of longitudinal descriptive statements which are amenable to testing with the TRIP data. As the hypotheses are verbally stated here, the need for greater precision through quantitative measurement becomes obvious. While we know, as Rosecrance[62] has recently posited, that different perspectives toward warfare have existed at various times since 1700, precision requires that these perspectives be identified (so we can ascertain their presence or absence on the basis of evidence rather than opinion) and charted. When changes in transnational rules are observed, they may be interpreted as evidence of the emergence of new "mapping" rules regarding international warfare and may, therefore, be taken as empirical manifestations of a transformation of the normative dimension of the structure of the international system.[63] That is, we may probe the data to discover if periodicities exist. It is to this end that this project is directed.

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58. *Id.* at 64.

59. M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW (1961); W. GOULD, *supra* note 40 at 72.

60. A.V.W. THOMAS, *supra* note 50, at 15-16.

61. *Id.* at 69-92.

62. R. ROSECRANCE, INTERNATIONAL RELATIONS: PEACE OR WAR? (1973).

63. Kegley & Hamilton, *supra* note 47.

The Role of Non-Governmental Organizations in the New United Nations Procedures for Human Rights Complaints

MAYA PRASAD*

I. INTRODUCTION

The United Nations and Non-Governmental Organizations

In 1945, when national delegations gathered at San Francisco to draft the Charter of the U.N., it was largely through the influence of a number of non-governmental organizations (NGOs) that the promotion of universal respect for and observance of human rights was given a pre-eminent place among the aims and purposes of the U.N.[1] In recognition of such efforts and because the U.N. was aware of the great potential of NGOs for contribution to its work, Article 71 of the Charter provided for the establishment of formal relations between the U.N. and NGOs.[2] Article 71 reads as follows:

> The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.[3]

The innovative principle established in Art. 71 opened a recognized channel through which an international point of view of "We the peoples" could be brought to bear on the formulation of economic, social, and human rights policies and programs of the U.N.[4] (The U.N., like the League of Nations, is an organization of sovereign member states, but "We the peoples" of the U.N., and not the governments are the proponents of the U.N. Charter.)

Implementation of Article 71

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1. L.C. WHITE, INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS 10 (1951); J. BLAUSTEIN, HUMAN RIGHTS—A CHALLENGE TO THE UNITED NATIONS AND OUR GENERATION 6-7 (1963). For "seven specific references to human rights" in the U.N. Charter, and a discussion of the contribution of NGOs in the inclusion of these provisions, *see* Humphrey, *The U.N. Charter and the Universal Declaration of Human Rights*, in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 41-46 (E. Luard, ed., 1967).

2. U.N. Doc. E/C.2/661 (1968).

3. U.N. CHARTER art. 71.

4. Campbell, *Do NGOs Have a Role?*, 11 INT'L. DEV. REV. 34 (1969).

In February 1946 the General Assembly, at its first session, called upon the Economic and Social Council (ECOSOC) to implement Article 72 "as soon as possible."[5] ECOSOC responded by adopting resolution 2/3 on June 21, 1946, which provided for temporary arrangements for consultation, including principles to govern the relationship, criteria for granting consultative status, and the rights and duties of NGOs in three different categories of consultative status. These provisions, with certain minor modifications, were later incorporated in ECOSOC resolution 288B(X) February 27, 1950.[6] ECOSOC resolution 1296 (XLIV) of May 23, 1968[7] superseded resolution 288B(X) of February 27, 1950 and is the current[8] legal document governing the NGOs' relationship with the Council and subsidiary organs of the Council. It recognizes in the preamble "that arrangements for consultation with non-governmental organizations provide an important means of furthering the purposes and principles of the United Nations," and reaffirms the statement contained in the ECOSOC resolution 288B(X) that the consultations "should be developed to the fullest practicable extent."[9]

Right of NGOs to Submit Written Statements

Paragraph 23 of the ECOSOC resolution 1296 (XLVI) grants to NGOs which have general and special consultative status (Categories I and II)[10] the right to submit written statements[11] on certain subjects,

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5. G.A. Res. 4, U.N. Doc. A/64 at 10 (1946).

6. ECOSOC Res. 288B, 10 U.N. ECOSOC, Supp. 1, at 24, U.N. Doc. E/1661 (1950). [hereinafter cited as ECOSOC Res. 288B].

7. ECOSOC Res. 1296, 44 U.N. ECOSOC, Supp. 1, at 21, U.N. Doc. E/4548 (1968). [hereinafter cited as ECOSOC Res. 1296]. ECOSOC resolution 1296 (XLIV) became effective on June 3, 1969, only after the completion of the modification of the related Rules of Procedure.

This resolution is a substantially detailed document in ten parts. Parts I and II deal with the principles to be applied in the establishment of consultative relations and the principles governing the nature of the consultative arrangements respectively. Part III sets up the three categories of consultative relations and provides the criteria for distinguishing between the various NGOs. Other parts of the resolution describe the rights and duties of the NGOs in different categories in relation to the Council, commission, and other subsidiary organs of the Council, International Conferences called by the Council, and the Secretariat (Parts IV, V, VI, VII, and X, respectively). Part VIII deals with the suspension and withdrawal of the consultative status and Part IX provides for a Council Committee on NGOs, the provisions regarding its composition and elections, its functions, and its special relationship with NGOs.

8. The resolution was amended by ECOSOC resolution 1391 (XLVI) of June 3, 1969. It amends the provisions regarding the election of the Council Committee on NGOs, and contains some minor editorial changes. ECOSOC Res. 1391, 46 U.N. ECOSOC, Supp. 1, at 19, U.N. Doc. E/4715 (1969).

9. ECOSOC Res. 288B, *supra* note 6.

10. Part III (paras. 15 through 19) of ECOSOC resolution 1296 establishes three categories of consultative status. In brief, they are: *Category I* (general consultative status)—organizations concerned with most of the activities of the Council; *Category*

and, with minor exceptions, requires the Secretary-General to circulate these statements to the members of the Council.

Paragraph 23 reads as follows:

> Written statements relevant to the work of the Council may be submitted by organizations in categories I and II on subjects in which these organizations have a special competence. Such statements shall be circulated by the Secretary-General of the United Nations to the members of the Council, except those statements which have become obsolete, for example, those dealing with matters already disposed of and those which had already been circulated in some other form.[12]

The organizations in the third category (the Roster) do not have a right to submit written statements but may be invited to do so by "the Secretary-General, in consultation with the President of the Council, or the Council or its Committee on Non-Governmental Organizations."[13]

Paragraph 24 of the resolution[14] lays down the conditions regard-

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II (special consultative status)—organizations concerned with only a few of the activities of the Council (NGOs primarily interested in the field of human rights are usually placed in this category); *The Roster*—organizations which may make occasional and useful contributions to the work of the Council or other U.N. bodies.

The differences between the categories are not very clearly defined, resulting in considerable leeway in the placement of individual organizations, including political considerations. *See* Campbell, *supra* note 4, at 36.

However, generally speaking, "regard shall be had to the nature and scope of its activities and to the assistance it may be expected to give to the Council or its subsidiary bodies in carrying out the functions set out in Chapters IX and X of the Charter of the United Nations" (para. 15).

11. The scope of consultation and the rights of NGOs vary and depend upon the category in which an organization is placed. The rights and duties of NGOs in different categories are laid down in various parts of the ECOSOC resolution 1296, *supra* note 7. Briefly, NGOs in any category "shall" receive provisional agenda of the Council, commissions, and other subsidiary organs of the Council, and may sit as observers at all of their public meetings. Organizations in Category I may even propose items to be placed on the provisional agenda of the Council or commissions (paras. 21 and 27). NGOs may also, under certain circumstances, present oral statements (paras. 25 and 31).

12. ECOSOC Res. 1296, *supra* note 7.

13. ECOSOC Res. 1296, *supra* note 7, at para. 24(f).

14. Paragraph 24 of the ECOSOC resolution 1296 reads as follows:

> 24. The following conditions shall be observed regarding the submission and circulation of such statements:
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> (a) The written statement shall be submitted in one of the official languages.
>
> (b) It shall be submitted in sufficient time for appropriate consultation to take place between the Secretary-General and the organization before circulation.
>
> (c) The organization shall give due consideration to any comments which the Secretary-General may make in the course of such consultation before transmitting the statement in final form.

ing the submission and circulation of such statements, and includes conditions regarding the language and length of the statement and time for submission.

Paragraphs 29 and 30 grant to NGOs the right to submit written statements and have them circulated to the members of the commissions and/or other subsidiary organs of the Council. With one minor exception, these statements are subject to the same conditions as in the case of the Council.[15]

The provisions regarding the submission of written statements in ECOSOC resolutions 288B(X) and 1296 (XLVI) are essentially the same. The latter resolution differs from its earlier counterpart in that it modifies the procedures for circulating the statements, refines the language of resolution 288B(X), and provides guidelines regarding the loss of consultative status by NGOs.[16]

(d) A written statement submitted by an organization in category I will be circulated in full if it does not exceed 2,000 words. Where a statement is in excess of 2,000 words, the organizations shall submit a summary which will be circulated or shall supply sufficient copies of the full text in the working languages for distribution. A statement will also be circulated in full, however, upon a specific request of the Council or its Committee on Non-Governmental Organizations.

(e) A written statement submitted by an organization in category II or on the Roster will be circulated in full if it does not exceed 500 words. Where a statement is in excess of 500 words, the organization shall submit a summary which will be circulated; such statements will be circulated in full, however, upon a specific request of the Council or its Committee on Non-Governmental Organizations.

(f) The Secretary-General, in consultation with the President of the Council, or the Council or its Committee on Non-Governmental Organizations, may invite organizations on the Roster to submit written statements. The provisions of sub-paragraphs (a), (b), (c) and (e) above shall apply to such statements.

(g) A written statement or summary, as the case may be, will be circulated by the Secretary-General in the working languages, and, upon the request of a member of the Council, in any of the official languages.

15. A written statement submitted by an organization in category II or on the Roster will be circulated in full if it does not exceed 1500 words as compared with only 500 words in the case of the Council. ECOSOC Res. 1296, *supra* note 7, at paras. 30(e), 30(f).

16. ECOSOC Res. 288B, *supra* note 6, provided for the circulation of the written statements to all the members of the United Nations, and it mentioned only "commission or sub-commission" and not "commissions or other subsidiary organs of the Council as mentioned in ECOSOC resolution 1296 of 1968. Also, ECOSOC resolution 288B(X) of February 27, 1950 had only nine parts as compared with ten parts in ECOSOC resolution 1296 of May 23, 1968, *supra* note 7. The additional part VIII of resolution 1296 (paras. 35 through 38) deals with the Suspension and Withdrawal of Consultative Status. There was no such provision in ECOSOC resolution 288B(X). *See also* Liskofsky, *The U.N. Reviews its NGO System*, in REPORTS ON THE FOREIGN SCENE (pamphlet published by the American Jewish Committee 1970).

ECOSOC Resolution 454 (XIV) of July 22, 1952

ECOSOC resolution 454[17] restricted the rights of NGOs to have written statements circulated directly to the members of the Council, Commissions or other subsidiary organs of the Council by making the statements containing complaints against governments alleging violations of human rights subject to the special procedure laid down in ECOSOC resolution 75(V) of August 5, 1947, as amended. ECOSOC resolution 75(V) was later replaced by ECOSOC resolution 728F (XXVIII) of July 30, 1959.[18] However, the basic principles and procedures were not changed, and it reaffirmed the statement made by the Commission on Human Rights (hereinafter referred to as the Commission) that it had "no power to take any action in regard to any complaints concerning human rights."[19]

The complaints received from NGOs in consultative status alleging violations of human rights in particular states, like other complaints against governments, were placed on a "confidential list" in accordance with the provisions of paragraph 2(b) of ECOSOC resolution 728F. The Commission continued to receive the confidential lists of communications in private session, which usually lasted for only a few minutes. Hardly anything was done about the complaints except the Commission's "taking note" of the list.[20]

General Assembly Resolution 2144 (XXI) of 1966

By the late sixties the political climate had changed,[21] and the General Assembly in its landmark resolution 2144 of October 26, 1966 invited "the Economic and Social Council and the Commission on Human Rights to give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights wherever they may occur" (para. 12).[22] ECO-

17. ECOSOC Res. 454, 14 U.N. ECOSOC, Supp. 1, at 60, U.N. Doc. E/2332 (1952).

18. ECOSOC Res. 728F, 28 U.N. ECOSOC, Supp. 1, at 19, U.N. Doc. E/3290 (1959).

19. This decision was immediately criticized by Professor Hersch Lauterpacht as amounting to "a denial of the effective right of petition and to an abdication of the crucial function of the United Nations in this respect," U.N. Doc. E/CN.4/89, at 16 (1948). Later, in 1950, Lauterpacht made a similar point when he said, "[T]here was no legal basis for that statement. These bodies, and in particular, the Commission on Human Rights, are not only entitled to take such action. By the terms of the Charter they are bound to do so." H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 230 (1950). The same view is expressed in a paper prepared by the Secretariat in 1949. U.N. Doc. E/CN.4/165 (1949).

20. Humphrey, *The Right of Petition in the United Nations*, 4 HUMAN RIGHTS J. 463, 470 (1971).

21. *Id.*

22. G.A. Res. 2144, 21 GAOR Supp. 16, at 46, U.N. Doc. A/6316, para. 12 (1966).

SOC responded by adopting resolution 1235 on June 6, 1967,[23] which *inter alia* approved a request by the Commission on Human Rights that the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (hereinafter referred to as the Sub-Commission) prepare a report containing information on violations of human rights and fundamental freedoms from *all available sources* and also bring to the attention of the Commission any situation which it has reasonable cause to believe reveals a consistent pattern of violations of human rights and fundamental freedoms in any country.[24] It was obvious that the Council and the Commission, on whose recommendation the Council had acted, no longer thought that the Commission had "no power to take any action in regard to any complaints concerning human rights."[25] This position is further supported by subsequent resolutions, notably ECOSOC resolution 1503 of May 27, 1970[26] and Sub-Commission resolution l (XXIV) of August 13, 1971.[27] These resolutions provide new and detailed procedures for dealing with human rights complaints, including those received from NGOs.

In view of the renewed emphasis on the importance of NGOs in the process of reporting alleged human rights violations, this paper will examine the present status of ECOSOC resolution 454 (XIV) of July 28, 1952, which restricted the rights of NGOs to submit written complaints of such alleged violations. It will also briefly describe the new procedures, with special emphasis on the rights and duties of the Commission and Sub-Commission regarding such complaints. Finally, it will examine the role of NGOs in the international protection of human rights by invoking the new U.N. procedures.

II. COMPLAINTS ALLEGING VIOLATIONS OF HUMAN RIGHTS

Complaints Alleging Violations of Human Rights and ECOSOC Resolution 454 (XIV)

Before the adoption of ECOSOC resolution 288B(X) of February 27, 1950, written statements received by the Secretary-General from NGOs in consultative status, including statements containing complaints against governments alleging violations of human rights,[28]

23. ECOSOC Res. 1235, 42 U.N. ECOSOC, Supp. 1, at 17, U.N. Doc. E/4393 (1967) [hereinafter cited as ECOSOC Res. 1235].

24. Commission on Human Rights Res. 8, 42 U.N. ECOSOC, Supp. 6, at 131, U.N. Doc. E/4322 (1967).

25. Humphrey, *supra* note 20, at 471.

26. ECOSOC Res. 1503, 48 U.N. ECOSOC, Supp. 1A, at 9, U.N. Doc. E/4832/Add. 1. para. 7(c) (1970) [hereinafter cited as ECOSOC Res. 1503].

27. Question of the Violation of Human Rights & Fundamental Freedoms (etc.), Sub-Commission Res. 1 (XXIV), Sub-Commission on Minorities, Report, U.N. Doc. E/CN.4/Sub. 2/323 (1971) [hereinafter cited as Sub-Commission Res. 1 (XXIV)].

28. There was hardly any doubt about the right of the NGOs to bring complaints

were circulated as United Nations documents in accordance with ECOSOC resolution 2/3 of June 21, 1946.[29] However, ECOSOC resolution 454 of July 28, 1952 laid down a special procedure for dealing with all "[c]ommunications from non-governmental organizations in consultative status containing complaints against governments" (title of ECOSOC resolution 454). It provided *inter alia* that all such statements which contain complaints of violations of human rights were to be handled in accordance with the special procedure laid down in ECOSOC resolution 75(V) of August 5, 1947, as amended,[30] later replaced by ECOSOC resolution 728F of July 30, 1959.

ECOSOC Resolution 728F (XXVIII) of July 30, 1959

Resolution 728F "requests the Secretary-General," among other things, to compile two lists of communications concerning human rights, including "communications from non-governmental organizations."[31] The first compilation is "a *non-confidential list* containing a brief indication of the substance of each communication, however addressed, which deals with the principles involved in the promotion of universal respect for, and observance of, human rights" [para. 2(a)]. The second compilation is "a *confidential list* containing a brief indication of other communications concerning human rights, however addressed" [para. 2(b)] (emphasis added). The resolution also requests the Secretary-General to distribute both lists to the members of the Commission on Human Rights before each session, but the confidential list only "in private meeting." The resolution also provides for "the members of the Commission, upon request, to consult the originals of the communications" on the non-confidential list [para. 2(c)]. The implication of this provision (and the practice at the U.N.) until ECOSOC resolution 1235 of June 6, 1967 was that members of the Commission were not entitled to consult the originals of the communications on the confidential list, which included the written statements received from NGOs in consultative status.[32]

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against governments, which was evident by the title of the ECOSOC resolution 454(XIV) of July 28, 1952, itself: *Communications from Non-Governmental Organizations in Consultative Status Containing Complaints Against Governments. See also* the statement of Mr. Kotschnig of the U.S. in the summary records of the 661st meeting of the ECOSOC. U.N. Doc. E/SR. 661, at 695 (1952).

29. U.N. Doc. E/C.2/332 (1952).

30. ECOSOC Res. 75, U.N. Doc. E/573, at 20 (1947); ECOSOC Res. 275B, 10 U.N. ECOSOC, Supp. 1, at 7, U.N. Doc. E/1661 (1950); ECOSOC Res. 116A, 6 U.N. ECOSOC, Supp. 1, at 16, U.N. Doc. E/749 (1948); ECOSOC Res. 192A, 8 U.N. ECOSOC, Supp. 1, at 7, U.N. Doc. E/1162/Rev.1 (1949).

31. See U.N. Doc. E/2270. Also, "communications" is "the term generally employed in all documents of the Economic and Social Council and its subsidiary bodies" to describe various written statements, including complaints. U.N. Doc. E/C.2/S.R. 118, at 9.

32. This, in effect, gave the right to the Secretary-General to withhold the com-

ECOSOC Resolution 1235 (XLII) of June 6, 1967 and the Right of the Commission and the Sub-Commission to Consult the Originals of All Complaints

The ECOSOC resolution 1235 of June 6, 1967, not only rejected the statement in Section 1 of ECOSOC resolution 728F that the Commission had "no power to take any action in regard to any complaints concerning human rights," but also approved the decision of the commission to give annual consideration to the item entitled "Question of the violation of human rights and fundamental freedoms" (para. 1). Also, paragraph 2 of the resolution authorized both the Commission and the Sub-Commission "to *examine* information relevant to gross violations of human rights and fundamental freedoms" contained in the communications listed by the Secretary-General pursuant to ECOSOC resolution 728F (XXVIII) of 30 July 1959 (emphasis added). It was clear that this examination required both the Commission and the Sub-Commission to see all communications concerning human rights in full, and "not merely the summaries contained the confidential lists,"[33] subject of course to the provisions of paragraph 2(b) of Council resolution 728F concerning the divulging of the identity of the authors of communications. In fact, subsequent to the adoption of resolution 1235, members of the Sub-Commission and the Commission did have access to copies of the originals of all complaints.[34] The packages of the copies of the

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plaints and exclude the members of the Commission from seeing the copies or the originals of the complaints against governments alleging violations of human rights.

However, it was not only illegal, it was unwise and unpractical, as well. Any person or group could mail a copy of the complaint to the members of the Commission, too. "All they needed was writing materials, a stamp, and in some countries, the courage to mail the letter." Humphrey, *supra* note 20, at 467.

33. Humphrey, *supra* note 20, at 471.

34. The Sub-Commission at the very first opportunity at its 20th session, held from September 25 through October 12, 1967 at Geneva, looked at the communications, discussed them, and adopted Resolution 3 (XX) of October 6, 1967 by which it unanimously drew the attention of the Commission to situations in the Republic of South Africa, South-West Africa, Southern Rhodesia, Angola, Mozambique, Guinea Bisseau, Greece, and Haiti; for details, see the Report of the Sub-Commission, U.N. Doc. E/CN.4/Sub.2/286, paras. 75-95. At its 21st session held from October 7-25, 1968, at Geneva, the Sub-Commission again adopted a resolution but simply drew the attention of the Commission to the Sub-Commission's discussion of the subject; see the Report of the Sub-Commission, U.N. Doc. E/CN.4/Sub. 2/294, paras. 61-70 and 95 (1968). It is clear that the members of the Sub-Commission had access to the originals of all complaints listed by the Secretary-General on either of the two lists prepared in accordance with ECOSOC resolution 728F. At its 22nd and 23rd sessions (August 15, 1969 to September 12, 1969, and August 10-28, 1970), the Sub-Commission did not consider the relevant Agenda items because they were involved with developing the new procedures and the rules of admissibility. *See* the Reports of the Sub-Commission for 22nd and 23rd sessions. U.N. Doc. E/CN.4/Sub. 2/305, para. 15 (1969), and E/CN.4/Sub. 2/316, para. 9 (1970). The Sub-Commission finally adopted resolution 1

originals included the complaints placed on the "confidential list" compiled in accordance with ECOSOC resolution 728F.

It follows that the Secretary-General did not have the power or responsibility to withhold any complaints alleging violation of human rights from the members of the Commission or the Sub-Commission. The Secretary-General, however, still compiled the two lists because the copies of the originals of the complaints on the "confidential list" were presented only in "private meeting," and were subject to the provisions concerning the divulging of the identity of the authors of the complaints [para. 2(b) of Council resolution 728F]. But it was the Sub-Commission and the Commission which had the authority to decide which information was relevant to gross violations of human rights and fundamental freedoms with a view toward ascertaining situations which reveal a consistent pattern of violations of human rights.

Thus, the members of both the Commission and the Sub-Commission had access to the originals of all the complaints alleging violations of human rights placed on either of the two lists—confidential or non-confidential. The originals included the written statements submitted by NGOs in consultative status containing complaints against governments alleging violations of human rights.

III. NEW U.N. PROCEDURES FOR HUMAN RIGHTS COMPLAINTS

ECOSOC Resolution 1503 (XLVIII) of May 27, 1970

ECOSOC resolution 1503 of May 27, 1970[35] provides more detailed procedures and new machinery to assist the Commission and the Sub-Commission to discharge their functions in relation to violations of human rights and fundamental freedoms. Paragraph 1 of the resolution provides as follows:

> *The Economic and Social Council,*
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> 1. Authorizes the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a working group consisting of not more than five of its members, with due regard to geographical distribution, to meet once a year in private meetings for a period not exceeding ten days immediately before the sessions of the Sub-Commission to consider all communications, including replies of Governments thereon, received by the Secretary-General under Council resolution 728F (XXVIII) of 30 July 1959 with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Govern-

(XXIV) at its 24th session held August 2-20, 1971. *See* Sub-Comm'n. Res. 1 (XXIV), *supra* note 27, at paras. 16-89. For the activities of the Sub-Commission at its 25th and 26th sessions held from August 14, 1972 to September 1, 1972, and August 20-31, 1973, *see infra* notes 48 and 51.

35. ECOSOC Res. 1503, *supra* note 26.

> ments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission.[36]

The Sub-Commission, in turn, is requested:

> to consider in private meetings . . . the communications brought before it in accordance with the decision of the majority of the members of the working group and any replies of Governments relating thereto and *other relevant information* with a view to determining whether to refer to the Commission on Human Rights particular situations which *appear to reveal* a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission (emphasis added).[37]

The Commission, after it has examined any situation ' referred to it by the Sub-Commission, determines (a) whether it requires a thorough study by the Commission and a report and recommendations thereon to the Council in accordance with paragraph 3 of Council resolution 1235 (XLII)(para.6(a)) or (b) whether it may be a subject of an investigation by an *ad hoc* committee to be appointed by the Commission (para. 6(b)).[38] Such an investigation, however, "shall be undertaken only with the express consent of the State concerned and shall be conducted in constant cooperation with that State and under conditions determined by agreement with it" (para. 6(b)).[39] In addition, the investigation cannot be undertaken unless all available means at the national level have been exhausted, and the situation is not related to a matter which is being dealt with under other procedures prescribed in the constituent instruments of, or conventions adopted by, the U.N. and the specialized agencies, or in regional conventions. The *ad hoc* committee's procedure "shall be confidential"[40] and "the committee shall strive for friendly solutions before, during, and even after the investigation."[41] The Committee is then required to report to the Commission with such observations and suggestions as it may deem appropriate.[42]

Sub-Commission Resolution 1 (XXIV) of August 13, 1971[43]

ECOSOC resolution 1503, however, did not become effective

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36. *Id.* at para. 1.

37. *Id.* at para. 5.

38. ECOSOC Res. 1235, *supra* note 23.

39. *Id.*

40. ECOSOC Res. 1503, *supra* note 26. This paragraph also provides for the composition of the *ad hoc* Committee, nature of its membership, and its rules of procedure.

41. *Id.* at para. 7(d).

42. *Id.* at para. 7(e).

43. For an in-depth analysis of the procedures provided by this resolution, *see* Cassese, *The Admissibility of Communications to the United Nations on Human Rights Violations*, 5 HUMAN RIGHTS J. 375 (1972). *See also* Guggenheim, *Key Provisions of the United Nations Rules Dealing with Human Rights Petitions*, 6 N.Y.U.J. INT'L.

immediately because paragraph 2 of the resolution stipulated that the Sub-Commission should, as the first stage in the implementation of the resolution, devise appropriate procedures for dealing with the question of admissibility of communications. Sub-Commission resolution 1 (XXIV)[44] of August 13, 1971 provides the "provisional procedures" (preamble of the resolution), which in fact are the rules of admissibility of communications. The Sub-Commission also appointed a working group of five of its members in accordance with rules laid down in Sub-Commission resolution 2 (XXIV) of August 16, 1971.[45]

The first meetings of the working group were held from July 31 to August 11, 1972, before the 25th session of the Sub-Commission held from August 14 to September 1, 1972.[46] The meetings were both "private and closed," and the working group communicated the results of its work to the Sub-Commission confidentially.[47] The working group again met from August 20 to August 31, 1972 at Geneva before

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L. & POL. 427 (1972).

44. Sub-Comm'n. Res. 1 (XXIV), *supra* note 27, at paras. 16-89.

45. Question of the Violation of Human Rights & Fundamental Freedoms (etc.), Sub-Comm'n. Res. 2 (XXIV), Sub-Comm'n on Minorities Report, U.N. Doc. E/CN.4/Sub. 2/323 (1971).

46. The working group met from July 31, 1972 to August 11, 1972, and considered over 2,000 communications. *See* para. 109 of the Report of the Sub-Commission, U.N. Doc. E/CN.4/Sub. 2/332 (1972). It submitted a confidential report to the Sub-Commission. The Sub-Commission, in turn, "discussed the report and certain communications drawn to its attention. . ." in closed session. *Id.* at para. 110. "The Sub-Commission unanimously adopted a resolution on the matter, which it decided to include in Chapter XIV of the present report as resolution 2 (XXV) ." *Id.* at para. 111. Paragraph 4 of the Sub-Commission resolution 2 (XXV), "[d]ecides that the Working Group shall consider at its next session those communications it was not able to examine at its last session, as well as communications received thereafter, and that it may *re-examine* the communications singled out in its report, in the light of replies of Governments, if any" (emphasis added). Some members of the Commission at their next session from February 26 to April 6, 1973, "expressed concern about the delay in dealing with communications under ECOSOC resolution 1503 (XLVIII). They felt that the Sub-Commission should take account of the urgency of some of the situations brought to its attention." *See* para. 265 of the Report of the Commission on Human Rights. U.N. Doc. E/CN.4/1127 (1973). However, no relief or redress was provided regarding any of the complaints during the first year of the implementation of the new procedures, and the consideration and examination of the complaints were postponed for next year. *See infra* note 69.

It may be noted here that despite the confidential discussion and report by the Sub-Commission, some of the facts from the proceedings were uncovered by the press. Teltsch, *U.N. Unit Said to Report Greeks Violate Human Rights,* N.Y. Times, September 21, 1971, at 18, col. 1. "At that point, to help ensure accuracy, the pleadings were made available to the press." *See* Newman, *The New U.N. Procedures for Human Rights Complaints: Reform, Status Quo, or Chambers of Horror?*, 34 ANNALES DE DROIT 141 (1974).

47. Newman, *supra* note 46, at 132; Teltsch, *supra* note 46.

the 26th session of the Sub-Commission held from September 3 to September 22, 1972, and the results of its work were again confidential.[48]

NGOs as a Source of Complaint Under the New Procedures

Paragraph 2(a) of the Sub-Commission resolution 1 of August 13, 1971 laid down the sources of admissible communications.[49] It reads as follows:

> Admissible communications may originate from a person or group of persons who, it can be reasonably presumed, are victims of the violations referred to in sub-paragraph (1)(b) above, any person or group of persons who have direct and reliable knowledge of those violations, or non-governmental organizations acting in good faith in accordance with recognized principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and having direct and reliable knowledge of such violations.[50]

Thus any non-governmental organization, whether in consultative status or not, can file a complaint alleging violations of human rights in particular states, and the working group will have access to the originals of all such complaints.

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48. The working group met from August 20, 1972 to August 31, 1972 at Geneva before the 26th session of the Sub-Commission held September 3-21, 1973. For the activities of the working group and the Sub-Commission, *see* U.N. Doc. E/CN.4/Sub. 2/ 343, paras. 82-89 (1973). "After considering over 7,000 communications received after its first session in 1972, including replies of Governments, and after implementing paragraph 4 of Sub-Commission resolution 2 (XXV), the Working Group submitted a confidential report (U.N. Doc. E/CN.4/Sub. 2/R-7 and Add. 1-8) to the Sub-Commission." *Id.* at para. 87.

The Sub-Commission considered this item in closed session (para. 82 and later adopted a confidential resolution on this matter.

The press again uncovered and reported that the Sub-Commission referred eight cases for consideration by the Commission. The Times (London), Sept. 21, 1973, at 7, col. 1; The Times (London), Sept. 24, 1973, at 7, col. 1.

The Commission, in turn, at the conclusion of five closed meetings on March 6, 1974, "decided to establish a five-member Working-Group to examine a set of confidential documents concerning alleged gross violations of human rights transmitted to the Commission last September by the Sub-Commission. The Group, which would meet one week before the next session of the Commission in February 1975, was asked to examine observations by Governments on those documents and any further report which the Sub-Commission might submit on the matter." *See New Group on Rights Violations*, 11 U.N. MO. CHRON. 22 (Apr. 1974); Report of the Comm'n, 56 U.N. ECOSOC, Supp. 5, at 34, U.N. Doc. E/CN.4/1154 (1974). *See also* Teltsch, *U.N. Rights Group is Under Attack—Charged with the Failure to Study Alleged Inhumane Acts in 8 Nations*, N.Y. Times, March 10, 1974, at 1, col. 1.

49. For an analysis of some of the phrases used in paragraph 2 of the Sub-Commission resolution 1 (XXIV), see Cassese, *supra* note 43, at 377.

50. Sub-Comm'n. Res. 1 (XXIV), *supra* note 27.

IV. SOME EFFECTS OF THE NEW U.N. PROCEDURES

ECOSOC Resolution 1503 did not Replace or Repeal the ECOSOC Resolution 1235.

A reading of the debates before the adoption of the Sub-Commission resolution 1 (XXIV) makes it clear that the working group is established to help the Sub-Commission in discharging its functions in relation to violations of human rights and fundamental freedoms, and "would in no way diminish the over-all powers of the Sub-Commission."[51] In particular, the Sub-Commission retained the right to over-ride the conclusions of the working group. It follows that the Commission also retained the right to over-ride the conclusions of the working group and/or of the Sub-Commission. The purpose of the working group is further clarified by the preamble of the Sub-Commission resolution 2 (XXI) of October 10, 1968, referred to in the preamble of the ECOSOC Resolution 1503. It reads, in part, as follows:

> *Considering* that not all the members of the Sub-Commission have necessary time to deal adequately with communications while the Sub-Commission is in session to determine which communications appear to reveal a consistent pattern of gross violations of human rights in accordance with the instructions of the Council and the Commission . . . .[52]

Also, the Sub-Commission merely has to find a *prima facie* case of particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission.[53] The Commission alone still has the responsibility and the authority to "study" or "investigate" any situations. Thus, the establishment of the working group and the new procedures laid down in ECOSOC resolution 1503 and Sub-Commission resolution 1 (XXIV) did not repeal, replace or supersede ECOSOC resolution 1235. In fact both the resolutions refer to the ECOSOC resolution 1235 and lean on it. The mandate granted to the Sub-Commission and the Commission in ECOSOC resolution 1235, particularly that in paragraphs 2 and 3, and as explained in Section II, remains intact.[54]

Sub-Commission, Commission, and ECOSOC May Take Direct Cognizance of the Complaints

It is clear that the Sub-Commission is authorized to appoint a

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51. See the summary records of the Sub-Commission, U.N. Doc. E/CN.4/Sub. 2/SR.615, at 39 (1971).

52. Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms, Sub-Comm'n Res. 2 (XXI), Sub-Comm'n on Minorities, Report, U.N. Doc. E/CN.4/976, at 34 (1968).

53. *Id.* at 41; ECOSOC Res. 1503, *supra* note 26, at paras. 1,5.

54. Humphrey, *supra* note 20, at 472.

working group merely to facilitate the work of the Sub-Commission. This working group is a subordinate body of the Sub-Commission. In fact, the working group consists of five of the members of the Sub-Commission itself. It therefore seems obvious that the Sub-Commission has the right to take direct cognizance of any complaints relevant to gross violations of human rights and fundamental freedoms listed by the Secretary-General in accordance with ECOSOC resolution 728F. It is also evident that the Sub-Commission not only has the authority to reject the conclusions of the working group, but may also reconsider any of the complaints listed in accordance with ECOSOC resolution 728F. In addition, the Sub-Commission has the authority, in fact ECOSOC requests the Sub-Commission, to consider any "other relevant information"[55] before referring any "situations" for consideration by the Commission[56] (para. 5 of ECOSOC resolution 1503).

In paragraph 1 of resolution 1235 the ECOSOC has enlarged the terms of reference of the Sub-Commission by concurring with the request for assistance addressed by the Commission to the Sub-Commission. The purpose of this provision is to assist the Commission in discharging its functions in relation to violations of human rights and fundamental freedoms. In the light of this fact, it is clear that the Commission also has the right to take direct cognizance of the complaints mentioned in the preceding paragraph.[57] Similarly, the Commission has the authority to reject the conclusions of the Sub-Commission and/or the working group, and reconsider any of the complaints listed in accordance with ECOSOC resolution 728F, regardless of whether such complaints were considered and referred to by the Sub-Commission and/or the working group.[58] In view of this

55. The Sub-Commission already gets all the information contained in the communications listed by the Secretary-General in both the lists prepared in accordance with ECOSOC resolution 728F and in the report prepared by the Sub-Commission from all available sources. *Supra* notes 24, 32. Thus, "other relevant information" referred to in para. 5 of ECOSOC resolution 1503 must be in addition to the information mentioned in the preceding sentence, including the information independently acquired by the members.

56. ECOSOC Res. 1503, *supra* note 26, at para. 5.

57. Paragraph 1 of ECOSOC resolution 1235 does not exclude or prohibit the Commission from reviewing the complaints itself, if and when the Commission deems it appropriate. This conclusion is further supported by paragraph 2 which authorizes both the Commission *and* the Sub-Commission to examine relevant information. The term used is "and" regarding the authority in para. 2, and not "or" or any other term. It is clear that the purpose of ECOSOC resolution 1235 is not to exclusively create a step-by-step procedure but to place the responsibility on, and grant the authority to, both the Commission and the Sub-Commission. ECOSOC Res. 1235, *supra* note 23.

58. The Commission, of course, is superior to the Sub-Commission, and nothing prohibits the Commission to reject any conclusions of the Sub-Commission. Also, the use of the term "and" in para. 2, as explained in footnote 57, provides clear authority

fact and paragraph 5 of ECOSOC resolution 1503, mentioned in the preceding paragraph, it seems obvious that the Commission may also consider any other information relevant to a consistent pattern of gross violations of human rights. This conclusion is further supported by the fact that it is only the Commission which has the responsibility and authority to "study" or "investigate" any situations and make recommendations to the ECOSOC.

The ECOSOC established the Commission under Article 68 of the U.N. Charter *to assist* the Council in carrying out its functions.[59] It is, therefore, reasonable to presume that the ECOSOC, which granted the above rights to the Sub-Commission and the Commission, simply delegated the authority for expediting the work of the Council, and did not exclude or prohibit itself in relation to the above rights. Thus the ECOSOC also has the right to take direct cognizance of the above-mentioned complaints. Similarly, the ECOSOC has the authority to reject the conclusions of the Commission and/or the Sub-Commission, reconsider any of the complaints listed in accordance with ECOSOC resolution 728F, regardless of whether such complaints were considered by any of the subordinate bodies. The ECOSOC may also consult the originals of any such complaints, and consider any other information relevant to a consistent pattern of gross violations of human rights.

Present Status of ECOSOC Resolution 454 (XIV) of 1952

ECOSOC resolution 454 (XIV) of July 28, 1952 has not been repealed, and all the communications received from NGOs in consultative status containing complaints against governments are still to be handled according to the procedure laid down in this resolution.[60] Thus the NGOs cannot require the Secretary-General to circulate human rights complaints against governments, unlike other written statements as provided for in paragraphs 23 and 29 of ECOSOC resolution 1296 of May 23, 1968.[61] However, ECOSOC resolution

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to the Commission to reconsider any complaints which have already been considered by the Sub-Commission.

It may be argued that the use of the phrase "*thus* made available to it" (emphasis added) in paragraph 3 of ECOSOC resolution 1235 limits the Commission to consider only the information made available by the Sub-Commission. I submit that this interpretation is incorrect. As mentioned above in note 57, paragraph 2 of ECOSOC resolution 1235 authorizes both the Commission *and* the Sub-Commission to examine information, and places the responsibility on both the bodies. The phrase "thus" in paragraph 3 does not in any way diminish the powers of the Commission.

59. 3 REPERTORY OF U.N. PRACTICE 488-90, 504-07 (1955). ECOSOC established the Commission by ESC resolution 1/5 at its first session, and defined its terms of reference by ESC resolution 2/9 at its 2nd session.

60. Letter to the author from G.N. Ceccatto, Human Rights Officer, U.N. Division of Human Rights, New York City, Nov. 21, 1973.

61. ECOSOC Res. 1296 *supra* note 7, at paras. 23, 29. A recent communication,

1503 provides that the Secretary-General must "furnish to the members of the Sub-Commission *every month* a list of communications prepared by him in accordance with Council resolution 728F (XXVIII) and a brief description of them, together with the text of any replies received from governments"[62] [para. 4(a) — emphasis added].

In the light of the above-mentioned rights of the Sub-Commission, the Commission, and the ECOSOC itself, ECOSOC resolution 454 regarding human rights complaints against governments received from NGOs appears to have been diluted and does not seem to have the same restrictive effect. Even if the NGOs have the right to require the Secretary-General to circulate those complaints, it will be meaningless and ineffective, unless the Sub-Commission, the Commission, and/or the ECOSOC care to take some action. And under the existing provisions, as noted above, these bodies do have the authority to take cognizance of the complaints and to take appropriate action.

V. SUMMARY AND CONCLUSIONS

Right of the U.N. to Consider Human Rights Complaints

In February 1947 the Commission on Human Rights abdicated one of the crucial functions of the United Nations by deciding that "it recognizes that it has no power to take any action in regard to any complaints concerning human rights . . . ."[63] However, ECOSOC resolution 1235 of June 6, 1967 provided a major breakthrough by reestablishing the authority and responsibility of the Commission, as envisioned in Article 68 of the U.N. Charter. The positions taken by the Secretariat in its paper E/CN.4/165 in 1949 and by Lauterpacht have also been vindicated.[64]

ECOSOC resolution 1235 was in response to the General Assembly resolution 2144 of October, 1966, which *inter alia* invited the ECOSOC and the Commission "to give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights wherever they may occur." The General Assembly resolution 2144 of October, 1966 not only departed significantly from the attitude and practice of the U.N. in relation to one of its purposes of promoting and encouraging respect for human

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U.N. Doc. E/NGO/14 of May 6, 1974, however, was circulated by the Secretary-General to the members of the ECOSOC. The document appears to be a complaint against a government, despite the assertion in the communication that "in no sense do we lodge a complaint against any government" (paragraph 13 of the communication).

62. ECOSOC Res. 1503 *supra* note 26, at para. 4(a).

63. U.N. Doc. E/CN.4/165 (1949).

64. Humphrey, *supra* note 20, at 471.

rights for all,[65] but also presented "far-reaching possibilities" for "assisting in the realization of human rights and fundamental freedoms for all."[66] The U.N. effort continued through ECOSOC resolution 1503 of May 27, 1970, and Sub-Commission resolution 1 of August 13, 1971, which provide more detailed procedures and new machinery to enable the Commission to discharge its functions in relation to violations of human rights.

Some Problems with the New Procedures

Although the U.N. has come a long way with respect to human rights protection, the present procedures leave much to be desired. First, the new procedures are concerned only with "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."[67] Second, the complaints can be filed only after the violations, and there are no provisions to deal with the threats of violations of human rights and/or to prevent them before they occur.[68]

Also, it is extremely cumbersome to establish "a consistent pattern of gross violations," especially by the victims of torture who are still under detention, not to mention the victims who have already been killed. In addition, the procedures are unduly lengthy and gross violations of human rights may continue while the complaints make their way from the working group to the ECOSOC.[69] Flagrant violations of human rights require provisions for more expeditious remedial measures. The need is particularly obvious in cases involving torture, threat to life, or other violations where irreparable damage may occur.

There has also been some criticism of the requirement for the *ad*

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65. U.N. CHARTER art. 1, para. 3.

66. U.N. CHARTER art. 1, para. 1(b).

67. ECOSOC Res. 1235, *supra* note 23, at para. 3.

68. However, if a particular "situation" presents an imminent threat to international peace and security, the ECOSOC and/or the Secretary-General may decide to refer the matter to the Security Council in accordance with Articles 65 and 99 of the Charter respectively. Also, the Security Council itself may take cognizance of the situation under Article 39 of the Charter and take appropriate action.

69. At its 30th session (held from February 4 to March 8, 1974), the Commission decided to send the Chilean authorities a telegram calling for the immediate cessation of human rights violations. The cable was sent on March 1, 1974. Particular concern was expressed for the protection of persons whose lives were reported to be in imminent danger. The Commission insisted that the Chilean citizens and foreigners in similar situations should not be prevented from leaving the country if they wished.

A reply from the Chilean authorities said that the persons mentioned in the cable were in good health and would remain under detention during the emergency. Afterward, all detained persons would be released and might leave the country if they wished, unless they were charged with common crimes. *See* 11 U.N. MO. CHRON. 21 (Apr. 1974); Report of the Comm'n, *supra* note 48, paras. 94-97.

hoc committee, in case of an "investigation," "to strive for friendly solutions before, during and even after the investigation."[70] Such an approach of "conciliation applied to human rights is somewhat self-contradictory in that it suggests that, despite their sacred and inviolable nature, human rights can be 'negotiated'."[71] Finally, even though the U.N. is a political organization of sovereign states, the provisions that the "investigation" by the *ad hoc* committee "shall be undertaken only with the express consent of the State concerned and shall be conducted in constant cooperation with that State and under conditions determined by agreement with it,"[72] seem to be self-defeating, and may rarely result in a genuine "investigation." A *prima facie* case of a consistent pattern of gross and reliably attested violations of human rights is not subject to any claims of domestic jurisdiction under paragraph 2(7) of the Charter or any other provisions.[73] The requirement of "consent" and "conditions determined by agreement" should be repealed.

Paragraph 8 of ECOSOC resolution 1503 provides that all actions by the Sub-Commission and the Commission "shall remain confidential until such time as the Commission may decide to make recommendations to the ECOSOC."[74] This requirement does not seem to

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70. ECOSOC Res. 1503, *supra* note 26, para. 7(d).

71. Vasak, *National, Regional and Universal Institutions for the Promotion and Protection of Human Rights*, HUMAN RIGHTS J. 165, 175 (1968).

72. ECOSOC Res. 1503, *supra* note 26, para. 5(b).

73. It has been argued that, in the absence of an international agreement by which a state agrees to respect specific human rights, the treatment a state accords its own nationals remains essentially within its domestic juridiction and outside U.N. competence. The Assembly, however, has not accepted this claim and has acted on the premise that it does have the competence to deal with such situations on the ground that Charter provisions dealing with human rights are being violated. L. GOODRICH, E. HAMBRO, & P. SIMMONS, CHARTER OF THE UNITED NATIONS 71 (1969). It is a very fortunate coincidence that at the very time when ECOSOC and its subsidiary organs completed the institutional arrangements for dealing with violations of human rights, the International Court of Justice stated unambiguously that human rights provisions do impose legal obligations on the parties to the Charter. *See* Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276, [1971] I.C.J. 1. *See also* Schwelb, *Interpretation of the Human Rights Clauses of the United Nations Charter by the International Court of Justice*, 55 PROC. INT'L L. ASSOC. 583 (1972); Fawcett, *Human Rights and Domestic Jurisdiction*, in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra* note 1, 286-303.

Also, see the statement by Mr. Cassese at the 24th session of the Sub-Commission held from August 2, 1971 through August 20, 1971: ". . . a communication dealt with a consistent pattern of gross violations of human rights, any possible objection by the State involved based on Article 2, paragraph 7 would not be justified, since it was definitely the practice of the United Nations to take the position that gross and systematic violations of human rights were not exclusively within the domestic Jurisdiction of States." U.N. Doc. E/CN.4/Sub.2/SR.620, at 89 (1971).

74. ECOSOC Res. 1503, *supra* note 26, at para. 3.

serve the purpose of the new procedures. It is against the concept of natural justice[75] and also against the established principles of due process in many countries. It is very unfair to the victims because it deprives them of the knowledge whether any action is being taken on their complaints and whether any relief is forthcoming. This provision may have the effect of discouraging the victims from seeking redress from the U.N. Would it not defeat the very purpose of the procedures? Would it not also damage the authority of, and the respect for, the United Nations regarding its responsibility for the maintenance of international peace and security in conformity with the principles of justice (see Art. 1, para. 1., of the Charter)? Paragraph 8 of ECOSOC resolution 1503 should also be repealed.

Function of the New Procedures

In any event, it is too early to say how effective the procedures will be. The new procedures may prove to be only a minor step in terms of providing an effective remedy; they have, however, certainly established the basic principle regarding the responsibility of the U.N. in the international protection of human rights. In addition, the new procedures do serve an important function of exerting a restraining influence on the conduct of states with respect to the violation of human rights of their citizens. A state, especially in case of a complaint, may not only face censure by the U.N., it may be exposed to condemnation by world public opinion. In fact, it is believed that the consideration of the complaints by the working group and the Sub-Commission in August, 1972 and August and September, 1973 did have the effect of at least lessening certain violations in some of the countries complained against.[76]

Special Role for NGOs

It is well known that states are reluctant to complain against others regarding violations of human rights for fear of having their own violations exposed,[77] and sometimes for fear of damaging bilateral relations.[78] Politically motivated complaints are usually unre-

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75. Newman, *supra* note 46, at 135.

76. It may be coincidental that one day before the working group was to meet on August 20, 1973, George Papadopoulos, who took the oath as the country's first president, promised an amnesty for some 300 political prisoners, including the man who tried to kill him in 1968. However, as a result, the working group did not consider the complaints against the government of Greece. N.Y. Times, August 20, 1973, at 1, col. 8.

77. For the dangers of state versus state complaints, see Hoffman, *Implementation of International Instruments on Human Rights*, 53 PROC. AMER. SOC'Y INT'L L. 235, 236 (1959). One of the recent exceptions has been the complaint by Norway, Sweden and Denmark against Greece before the European Commission of Human Rights in 1967.

78. Teltsch, *supra* note 46.

lated to the real violations.[79] Also, as noted earlier it is extremely difficult for an individual to get any relief by invoking the new procedures because they require a gross and consistent pattern of violations which an individual will find very difficult to establish, especially if the victim is still under detention or threat of life. Moreover, it would be highly desirable, sometimes extremely important and urgent (*e.g.*, in case of torture or possibility of death), to protect the individual before a violation takes place. Under these circumstances, it seems that the major responsibility for the international protection of human rights lies with the NGOs, particularly in invoking the new procedures in case of a consistent pattern of gross violations of human rights. NGOs seem to be in a better position to provide reliable attestation of a case, if any, of a consistent pattern of gross violations of human rights and fundamental freedoms.[80] NGOs can also alert the Sub-Commission regarding any threat of violations of human rights by filing a complaint, since the Secretary-General furnishes to the members of the Sub-Commission *every month* a list of complaints prepared by him in accordance with ECOSOC resolution 728F[81] [ECOSOC resolution 1503, para. 4(a)]. Perhaps through these procedures, future Biafras or Bangladeshes can be avoided.

Some Other Rights of NGOs

NGOs in consultative status, of course, can also make oral statements[82] during the sessions of the ECOSOC, the Commission, and other subsidiary organs of the Council. NGOs in category I can even propose items to be placed on the provisional agenda[83] of the ECOSOC and the Commission. Unfortunately, the right of the NGOs in Category I to place human rights items on the agenda of the ECOSOC or the Commission has almost never been utilized.[84] However,

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79. *See* the I.L.O. proceedings of Ghana v. Portugal and the retaliatory action Portugal v. Liberia discussed in E. LANDY, THIRTY YEARS OF I.L.O. EXPERIENCE, 175-76 (1966).

80. In addition, the NGOs in consultative status (especially those in Categories I and II) can always request the Secretary-General to bring a situation directly to the attention of the Security Council, ECOSOC, the Commission, or the Sub-Commission. The U.N. body in question may take direct cognizance of the complaint and take appropriate action, especially in cases involving torture, threat to life, or other such violations where irreparable damage may occur. NGOs may also bring to bear the weight of the world public opinion by publicizing the violations or threat of violation of human rights.

81. ECOSOC Res. 1503, *supra* note 26, at para. 4(a).

82. ECOSOC Res. 1296, *supra* note 7, at paras. 25, 31.

83. *Id.* at paras. 21, 27.

84. There are two cases on record of NGOs in consultative status having proposed human rights items to be placed on the agenda of ECOSOC. First, the American Federation of Labor proposed to the 6th session of the ECOSOC in November, 1947, a survey of forced labor and measures for its abolition, and the question of the infringement of trade union rights. This effort culminated, in 1957, in the adoption and

NGOs have spoken on various occasions at the sessions of the Commission and on a few occasions also at the sessions of the ECOSOC. In fact, several NGOs spoke out at the 29th session of the Commission and helped expose many violations of human rights in various states which, without this voice, would have gone completely unnoticed on the official records.[85]

It may be noted here that the formal provisions do not exhaust the role and opportunity of NGOs in the protection of human rights. Many universally respected representatives of NGOs are able to work behind the scenes and influence the thinking and action of various government representatives and experts through quiet persuasion. NGOs also frequently advance the cause of human rights by research and publications, and by educating the world public opinion.

Conclusion

In sum, much has been done in the second half of the 20th Century by the community of nations for the protection of human rights[86] and the contribution of NGOs has been beyond doubt impressive.[87] However, the present implementation measures are not enough and we have to continue to work very diligently in developing effective measures of implementation.[88] NGOs have a special responsibility

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subsequent entry into force of the Abolition of Forced Labor Convention. Second, The World Federation of Trade Unions proposed an item concerned with the infringement of trade union rights and guarantees for their exercise. These proposals eventually led not only to the adoption of two important international labor conventions on freedom of association, and on the right to organize and collective bargaining, but also to specific fact finding and conciliation machinery established by the I.L.O. in its own name as well as on behalf of the U.N. ECOSOC Res. 277, 10 U.N. ECOSOC, Supp. 1, at 9, U.N. Doc. E/1661 (1950).

85. Representatives of the Anti-Slavery Society, International Federation for the Rights of Man, and International Student Movement for the United Nations spoke at the 1232nd and 1233rd meetings of the Commission. U.N. Doc. E/CN.4/SR.1232 (1973); U.N. Doc. E/CN.4/SR. 1233 (1973). *See also* U.N. Doc. E/CN.4/1127, para. 231 (1973). Statements were also made by the observers of the All-Pakistan Women's Association and the All-India Women's Conference, concerning questions affecting human rights in the sub-continent. U.N. Doc. E/CN.4/SR. 1229 (1973).

86. Secretariat, Measures Taken Within the U.N. in the Field of Human Rights. U.N. Doc. A/C.32/5 (1967).

87. For a brief description of the contribution of NGOs, *see* Archer, *Action by Unofficial Organizations on Human Rights,* in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra* note 1, at 160-82. Also, see the statement of a former Chairman of the Commission: "There is. . .surely no other area of international affairs in which nongovernmental organizations have participated so actively and constructively." Quentin-Baxter, *International Protection of Human Rights,* in ESSAYS ON HUMAN RIGHTS, 132, 138 (K. Keith, ed. 1968).

88. For a discussion regarding many implementation proposals advanced in the Commission for a World Court of Human Rights, *see* V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY 187 (1970). A proposal for a High Commis-

and challenge to help expedite such development. At the same time, NGOs must continue to serve and represent the international conscience. In particular, NGOs must make the best possible use of the existing procedures and machinery.

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sioner for Human Rights has been before the General Assembly since the 1967 session in the form of an ECOSOC draft resolution. ECOSOC Res. 1237, 42 U.N. ECOSOC, Supp. 1, at 18, U.N. Doc. E/4393 (1967). For a discussion of the type of functions such a High Commissioner could perform, *see* R. CLARK, A UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (1971). *See also* MacDonald, *The United Nations High Commissioner for Human Rights*, 5 CAN. Y.B. INT'L L. 84 (1967).

Foreign Banking in the United States: Growth and Regulatory Issues

FRANCIS A. LEES*

INTRODUCTION

The decade of the 1960s witnessed a rapid development of overseas banking activities by American banks. Large U.S. banking institutions established overseas branch offices, acquired foreign subsidiary banks and finance companies, and participated more actively in global lending. By contrast the 1970s have brought a substantial inflow of foreign banks to the United States. Foreign banking institutions have established branch offices in several leading metropolitan centers across the United States, have established or acquired subsidiary commercial banks in a number of important states, and expanded their loan and investment banking services. In 1974 some 160 foreign banks held loan and investment assets in the United States aggregating over $40 billion.[1]

Why have foreign banks developed a heightened interest in operating from a U.S. base, and is this development likely to persist? How might the growing presence of foreign banks affect the role and functioning of credit markets in this country? Finally, does the accelerated influx of foreign banking institutions in this country necessitate a review and possible modernization of the manner in which banking is regulated in the United States?

This article seeks to find answers to the questions posed above. The problem of bank regulation is given special attention in view of the numerous regulatory proposals that have been made in Congress during the past three years.

GROWTH OF FOREIGN BANKING IN THE UNITED STATES

The "friendly invasion" of foreign banks into the United States has followed closely on the heels of growing involvement by American banks in international banking.[2] These two developments are interdependent, and have been supported by various factors in a subtle and indirect manner. These include the significant involvement of the United States in foreign trade, the importance of this country as a source of loanable funds, the special role of the dollar in international

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1. AMERICAN BANKER 188-89 (July 31, 1975); Address by George W. Mitchell, *New York As a World Financial Center*, Conference, June 10, 1974.

2. The term "friendly invasion" is borrowed from the title of an unpublished dissertation by R. CASSIDY, THE FRIENDLY INVASION—FOREIGN BANKS IN NEW YORK STATE (1968). For comparative data on the role of U.S. banks and banks of other countries in international banking see F. LEES, INTERNATIONAL BANKING & FINANCE 11-15 (1974).

finance, the size and efficiency of American banking institutions, and the highly developed securities markets in the United States.

The recent growth of foreign banking in the United States is part of a broad pattern which includes the internationalization of global business. The inflow of foreign banks is a concomitant aspect of the flow of foreign investment into the United States. In the period 1960-1974, foreign investment in this country expanded from $40 billion[3] to over $160 billion.[4] This investment took the form of securities investment in U.S. stocks and bonds, direct or business investment in manufacturing and distribution facilities, and short-term investment in liquid money market assets.[5]

All three forms of investment are intimately associated with the expanding role of foreign bank operations in the United States. Foreign business investments in U.S. manufacturing attract foreign banks interested in retaining corporate customers. For example, European banks have found it necessary to establish banking offices in the United States so as to service the financing requirements of American subsidiaries of home country firms, as well as to provide these firms with information and business contacts.[6]

Foreign investment in U.S. securities reflects the many advantages available to foreign investors in the efficient, low cost U.S. capital market. Here foreign banks provide non-U.S. investors with information on U.S. securities investments, manage investment portfolios on a multinational basis for non-U.S. customers, and operate U.S. securities affiliates which underwrite new securities issues and engage in many other securities market operations.[7] Short-term investment in the United States reflects the direct participation of foreign commercial banks in U.S. deposit and money market operations, and the advance of funds by parent foreign banks to their U.S. branches and agencies for loan and investment in the U.S. money market. In the relatively short period 1972-1974, foreign liquid claims in the United States increased from $82 billion to $112 billion.[8]

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3. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 855 (1963).

4. Author's estimate as extrapolated from other data.

5. The third category, short-term investment in liquid money market assets, accounted for the largest part of the growth in foreign investment in the United States. In 1974, foreign short-term investments in the United States represented $112 billion, or 70% of the total of $160 billion of foreign investment in the United States. 61 FED. RES. BULL. A63 (1975).

6. Klopstock, *Foreign Banks in the United States: Scope and Growth of Operations*, MONTHLY REVIEW of the Federal Reserve Bank of New York, 142-45 (June 1973).

7. Lees, *Foreign Investment in U.S. Banks*, 8 MERGERS AND ACQUISITIONS 4, 13-14 (1973).

8. 61 FED. RES. BULL. A63 (1975).

In addition to the need to service home country investments in the United States, foreign banks enjoy numerous other advantages from their expanded presence in the United States. These include opportunities for dollar sourcing, ability to achieve more rapid growth, and increased international portfolio diversification.

Despite persistent balance of payments deficits, the devaluations of 1971 and 1973, and renewed inflation in the United States, the dollar has been an attractive and sought-after currency by international bankers and businessmen. Therefore, many foreign banks have been prompted to establish U.S. banking offices to develop a base from which they can supply the dollar requirements of the bank. U.S. banking offices provide an excellent depository and clearing center for dollar operations of the parent bank. The New York office or affiliate of a foreign bank may be asked to extend overdrafts to other units of the parent institution. An important advantage of a dollar operating base is the ability to operate in the foreign exchange market after the head office in Europe has closed for the day. Access to the New York financial market permits the U.S. office of a foreign bank to invest dollar balances acquired either for its own account or for the account of the head office. Finally, a dollar based office can operate in either direction, as a source of liquidity when the parent bank is facing a credit squeeze at home, or as a lender of funds when the parent bank does not have more attractive alternative uses of funds.

Foreign banks operating in the United States have not confined their activities to wholesale banking. Many of these institutions have achieved significant deposit and loan growth via retail banking operations. A small number of U.S. based affiliates of foreign banks rank among the fifty largest banks in the United States. The attainment of additional growth through retail banking tends to complete the global competitive strategy adopted by large foreign banking institutions.

An important but often ignored motive for the overseas expansion of large banks is the desire to achieve international portfolio diversification.[9] Banks with offices located in several different countries may expect to achieve minimum risk in their loan portfolios (and deposit instability) to the extent that business conditions in the countries in which they operate are negatively correlated. Portfolio diversification is not efficient unless this negative correlation criterion is met.[10]

9. *See* Ragazzi, *Theories of the Determinants of Direct Foreign Investment*, International Monetary Fund STAFF PAPERS 476-80 (1973).

10. J. WESTON & B. SORGE, INTERNATIONAL MANAGERIAL FINANCE 358-66 (1972).

ORGANIZATIONAL AND LEGAL ASPECTS

Foreign banks employ a variety of organizational forms in their operations in the United States. These include the representative office, agency, branch, and corporate subsidiary. The representative office does not perform banking functions, but is able to facilitate banking activities. The most important activities of a representative office are to provide information about the parent bank, to function as an intermediary in providing information to American companies interested in offshore financing, and to serve as liaison concerning the activities of the parent bank.

The agency and branch forms are permitted in several states, with the approval of the state superintendent of banks.[11] A licensing requirement must be satisfied. The agency of a foreign bank appears to resemble a branch. However, agencies may not accept deposits. Agencies may accept credit balances, which are claims of customers that result from the clearing and settlement of foreign trade and other transactions. Branches are authorized to accept deposits, as well as conduct a general banking business.

Foreign-owned banking corporations generally operate in a manner similar to that of domestic banks. These subsidiaries may be eligible for Federal Reserve membership and may have deposit insurance provided by the Federal Deposit Insurance Corporation (FDIC). Several New York trust companies owned by foreign banks restrict their activities to corporate agency functions. However, the majority of banking subsidiaries in the United States conduct a general banking business.

Congress has remained silent on the matter of licensing and chartering foreign banks. At the present time there exists no federal statute written expressly to deal with the regulation or supervision of foreign banks operating in this country. Given the absence of federal banking legislation, foreign banks have turned to the various states to seek permission to carry on banking activities in the United States.

Only eight states permit the licensing and operation of foreign-owned banking offices in their jurisdictions. These states treat agencies, branches and subsidiaries of foreign banks as entities requiring distinct supervision.[12] In general, foreign banks may establish a representative office without the formality of obtaining a license.

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11. Zwick, *Foreign Banking in the United States*, in ECONOMIC POLICIES AND PRACTICES: PAPER 9, prepared for the Joint Economic Comm., 89th Cong., 2d Sess. 3-5 (1966).

12. At year end 1974, foreign banks were operating 72 agencies, 77 branches, and 62 banking subsidiaries in the United States. These banking offices were located in sixteen states, the District of Columbia and the U.S. Virgin Islands. AMERICAN BANKER 186 (July 31, 1975).

State chartered subsidiaries of foreign banks have been organized and supervised in a manner similar to domestic banks. Nonbank subsidiaries of foreign banks generally are treated according to the incorporation laws and business practice codes that apply. Three states (New York, California, and Massachusetts) appear to be the most permissive and allow any kind of foreign bank operation including agency, branch or banking subsidiary. California law requires that branches of foreign banks provide FDIC deposit insurance on domestic source deposits.[13] Present federal statutes do not provide for FDIC insurance on U.S. branches of foreign banks, and branch operations in California are not yet feasible.[14] Nevertheless, agencies in California are permitted to accept deposits from foreign sources. Due to the restriction on branch deposit operations, the state chartered subsidiary has been a popular means of representation for foreign banks in the United States.

New York amended its banking laws in 1960 to permit the establishment of branches by foreign banks. The agencies, branches, and subsidiary banking institutions in New York account for approximately three-fourths of the resources of foreign banks in the United States.

Several states prohibit foreign bank branches (Delaware and Texas), while others (Connecticut, Florida and Maryland) will not permit foreign bank representation in any form. In general, the remaining states have enacted no statutory provisions which refer to the establishment of foreign bank operations in their respective jurisdictions.

While foreign banks face a mixture of state laws and regulations, over 160 banking institutions from other countries have established direct representation in the United States. At midyear 1974, these foreign banks were operating over 140 representative offices, 62 agencies, 66 branches, and 30 banking subsidiaries in this country. The largest number of these banks and banking offices was located in New York. California ranked second only to New York in this respect. Illinois ranked third in importance. Other states hosting foreign bank agencies, branches, or bank subsidiaries included Colorado, Florida, Hawaii, Massachusetts, Oregon and Washington. In addition, several foreign banks operate securities affiliates and specialized finance companies in the United States.

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13. CALIFORNIA SUPERINTENDENT OF BANKS, REPORT ON FOREIGN BANKING MATTERS 23 (April 1974).

14. Similarly, federal law does not provide for FDIC insurance coverage on deposits in the overseas branches of American banks. *See* F. LEES, INTERNATIONAL BANKING & FINANCE 45 (1974).

ROLE PLAYED IN U.S. CREDIT MARKETS

The growing importance of foreign banks in the United States has injected new competition into the credit markets, has led to the more complete internationalization of our money market, and has posed serious questions and problems to bank regulatory agencies and lawmakers regarding the adequacy of the banking structure in the United States.

It is a widely accepted fact that foreign banks have become important participants in the U.S. credit markets. These institutions play an active role in bank loan syndicate placements where a medium-term corporate borrower may be serviced by a dozen or more banks, each taking a relatively small portion of the total credit. Bank participation in medium-term loan syndications parallels the arrangements that have developed in the Eurodollar market, and cross-competition is reflected in the closer alignment between Eurodollar lending rates (London Interbank Offer Rate—LIBO) and the U.S. prime rate. The importance of foreign bank participation in the U.S. loan markets is reflected by concern of Federal Reserve authorities over the extent to which inflows and outflows of funds facilitated by foreign banks operating in the United States neutralize monetary policy measures.[15]

The expansion of foreign banks in the United States has followed a pattern that threatens to upset the balance of power in the credit markets. Foreign banks have not conformed to two aspects of the American banking structure, namely the restrictions on interstate banking and the separation of investment banking from commercial banking.

Close to one-third of the foreign banks in the United States have been able to develop their representation on an interstate basis. This includes several large British, Canadian, and Japanese banks that simultaneously operate New York agencies and subsidiary banks, Chicago branches, and California agencies or subsidiary banks. The interstate operations of foreign banks have influenced the credit market structure in the United States in several ways. Interest rates in regional credit and banking markets have become more closely aligned. In response to this competitive thrust, large American banks have prepared themselves for interstate operations and sought legislative change that would permit them a wider geographic base of

15. G. Bell, in THE EURODOLLAR MARKET AND THE INTERNATIONAL FINANCIAL SYSTEM 103-104 (1973) notes that a tightening of monetary conditions in the United States followed by reduced lending to U.S. companies could be followed by these companies borrowing in the Eurodollar market. He further notes that arbitrage opportunities will exist for transfer of Eurodollar funds in New York within a matter of hours after the transaction has been consumated.

operations. Smaller American banks have reacted in a different manner and have supported state banking legislation that would restrict the expansion of foreign banks in their respective states. State legislatures have reacted in a variety of ways. New York will permit statewide branching in 1976, Pennsylvania is considering more liberal branching laws, and Texas has voted to strengthen an existing prohibition against foreign corporations operating banks.[16] We return to the question of interstate banking in a later section.

American banking structure has been shaped by the 1933 amendments to the federal banking laws. The Banking Act of June 16, 1933 makes it unlawful:

> For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to payment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor[17] . . . .

As a result, commercial banks in the United States restrict their underwriting activities to U.S. Treasury obligations and state and local government bonds, both categories being exempted from the prohibition cited above. The underwriting of corporate securities is entirely divorced from U.S. commercial banks.

The separation of commercial from investment banking in the United States contrasts sharply with the situation in other countries where banking institutions perform both functions. In Great Britain, well-established merchant banking firms accept deposits, carry on international banking activities, perform portfolio management functions, and underwrite venture capital projects. Similarly, in Germany and Switzerland the big banks conduct securities underwriting activities as an adjunct of their other banking operations. This permits these institutions to provide full services for their corporate customers needing long-term financing, and for their wealthy individual customers who require securities trading and portfolio management services.

Foreign banks with representation in the United States expect to provide the same full complement of services for their customers as they do at home. However, banking laws in the United States restrict foreign as well as domestic banks from engaging in securities trading and underwriting activities. As a result, several foreign banks have established non-bank securities affiliates in the United States

16. This was voted in the Texas Constitutional Convention, held in 1974.

17. Federal Reserve Act *as amended through* Nov. 5, 1966, 12 U.S.C. §378 (1945).

which are not subject to the prohibitions against bank underwriting activities contained in the Glass-Steagall Act of 1933.[18] In this way foreign banks can service home country corporations that wish to sell long-term securities to finance business investments in the United States. Also, securities trading operations of these same securities affiliates permit the retention of valuable customer relationships where access to the American securities markets is important. Several foreign bank-owned securities affiliates are members of the regional stock exchanges, but are not presently permitted membership on the major stock exchanges in the United States.[19] Several securities affiliates of foreign banks have representation in major cities in more than one state.

PRESENT REGULATORY FRAMEWORK

The existing regulatory treatment of foreign banks provides for state and federal jurisdiction in the same manner as applies to domestic banking corporations. Regulation of foreign banking has developed largely as a reaction to problems and visible needs. In general, the United States has not applied special legislative or supervisory authority over foreign banks operating in this country and only a few states authorize establishment of offices by foreign banks. New York and California license agencies and branches of foreign banks, while Illinois and Massachusetts permit branches of foreign banks. In addition, foreign banks have established state chartered banking affiliates in several states and have acquired ownership interests in several domestic banks.

Until the present time, the federal government has remained silent on the question of foreign banking operations. Federal law designed to deal with domestic banks becomes applicable to foreign banks in several important areas. This includes the Bank Holding Company Act (BHC Act) as amended in 1970, which places approximately two dozen foreign banks in bank holding company status. The BHC Act has provided an explicit statutory framework for the expansion of foreign banking operations in the United States and has extended uniform treatment to domestic and foreign banks alike.

New York

New York has assumed a major part of the responsibility for chartering, licensing and supervising foreign banks. Therefore, the laws, administrative procedures and experience gained there consti-

18. Several German and Swiss banks have confined their U.S. representation to the New York branch plus securities affiliate, thereby avoiding bank holding company status and Federal Reserve Board jurisdiction. *See* Lees, *Foreign Investment in U.S. Banks*, 8 MERGERS AND ACQUISITIONS 4, 7-9 (1973).

19. Lorie, *Public Policy for American Capital Markets*, in REPORT PREPARED FOR U.S. DEPARTMENT OF THE TREASURY 18 (Feb. 7, 1974).

tute the most significant body of regulatory control that presently applies to foreign banks in the United States. New York embraces over three-fourths of the foreign bank resources located in the United States and its banking laws have attended to this responsibility with scarcely any need for special statutes applicable to foreign banking institutions.[20]

In New York, chartering procedures and requirements for a foreign controlled bank, trust company or investment company are similar to those required for all domestic commercial banks. The Superintendent of Banks issues licenses for agencies and branches with approval of the Banking Board. State law requires that a foreign banking corporation that operates a branch office in New York must deposit specified assets with the Superintendent. A foreign bank may be licensed to maintain a branch in New York only if the laws of its country grant reciprocal privileges to New York chartered banks.

New York banking law establishes minimum requirements of capital stock in the formation of banks and trust companies, but the scope of operations of the proposed bank is also considered in establishing such minimum levels. A foreign bank wishing to obtain a branch or agency license must have assets of at least $1 million, but again these statutory minima are far exceeded in the application of supervisory authority. New York branches of foreign banks must maintain specified types of assets equal to at least 108 percent of liabilities payable at or through the New York branch.

In New York, all banks, trust companies and branches of foreign banks are subject to the same size restrictions on individual loans. A bank may lend unlimited amounts to the U.S. government, New York state, or other governmental entities. Loans secured by cash collateral or government securities are also exempt from lending restrictions. Loans to states other than New York or foreign nations are limited to 25 percent of the bank's capital and surplus. Similar limits apply to loans connected with the creation of banker's acceptances. Unsecured loans and loans to other categories of borrowers are limited to ten percent of the bank's capital and surplus. A separate limitation applies to loans on letters of credit (ten percent of capital and surplus if non-documentary and 25 percent if secured by documents).

New York banking law prohibits the acceptance of deposits by any business entities except banks, trust companies and New York branches of foreign banks. Agencies and investment companies of foreign banks are not permitted to accept deposits. They may, however, maintain credit balances.

20. An exception to this would be the legislation passed in 1969 permitting foreign banks to establish branch offices in New York. N.Y. BANK LAW § 201-a (McKinney 1971).

The Banking Department in New York enjoys a number of supervisory powers over banking institutions, including the power to conduct examinations and issue examination reports, authority to issue supervisory letters based on examinations, moral suasion, the power to require reports of conditions and the authority to review director's examinations. The examination report assures compliance with legislative policy and reflects management effectiveness. The typical examination report covers the examiner's comments relating to the condition of the banking institution, statement of assets and liabilities as found by the examiner, summary of examination highlights, information concerning the quality and diversification of the investment portfolio, a listing of assets criticized by the examiner, a review of the foreign exchange position and the examiner's comments on operating procedures and internal controls.

This writer is of the opinion that the New York State Banking Department is in a position to administer the banking laws and supervise foreign banks in a reasonably effective manner. While a rapid expansion has taken place in foreign banking operations in New York, there is no evidence of deterioration in quality standards.

Other States

California ranks second in importance in terms of the extent of foreign banking operations in the United States. California has adopted a liberal policy toward foreign banking activities and permits the establishment of state chartered subsidiaries, agencies and branches. California banking law has required that operation of a branch by a foreign bank be permitted only on condition that FDIC insurance coverage apply to deposits in that branch. California law permits an exception for foreign source deposits not protected by FDIC insurance. Federal law does not provide for FDIC insurance on deposits in American branches of foreign banks and this has precluded branch operations in California. However, California does permit branches to accept foreign source deposits without FDIC insurance.

Illinois ranks as the third most important state for foreign banks. Prior to 1973 foreign banks were able to establish state chartered subsidiaries and representative offices in Illinois. In that year the Foreign Office Banking Act was passed by the Illinois legislature, making it possible for foreign banks to establish a single branch office in the Chicago Loop Area. This Act brought forth considerable controversy inasmuch as Illinois is a unit banking state (no branching permitted).

Florida provides a contrast to California and Illinois, in that it has not adopted a liberal approach toward foreign bank operations. Florida is a unit banking state which provides significant opportuni-

ties for holding company expansion within the state. Only one bank, owned by a Canadian trust company, is controlled and operated by foreign shareholders. This acquisition took place in 1972 and was preceded by an amendment to the Florida banking laws which prohibited the acquisition of Florida trust companies by foreign holding companies and banks. However, this new statute did not take effect until shortly after the acquisition.

Federal

Domestic and foreign banks are subject to a uniform set of federal laws and supervisory regulations. The Congress has not enacted any special laws that pertain to foreign banking activities in the United States.

Three federal agencies enjoy supervisory powers over foreign banks. The Federal Reserve Board has jurisdiction over BHCs which include foreign banks that own and operate banking subsidiaries in the United States. In addition, the Federal Reserve enforces the provisions of the Glass-Steagall Act in cases of banks subject to its jurisdiction. The FDIC has supervisory jurisdiction over insured banks and all state chartered banking institutions owned by foreign banks have FDIC protection. This includes FDIC authority to conduct examinations. Finally, the Comptroller of the Currency enjoys regular supervisory authority over national banks including the power to examine and report on their condition and status.

TOWARD FEDERAL REGULATION

The growth and expansion of foreign banking have generated problems as well as benefits for the United States. These problems relate to 1) the need to strengthen monetary policy in light of the increased scope for inflows and outflows of credit funds, 2) the fear of developing inequities in regulatory treatment between domestic and foreign banks, and 3) the possible need for special regulatory treatment of foreign banking institutions in the United States. In the discussion which follows we examine these problem areas, view recent regulatory proposals in light of the problems faced, and point to basic issues that require resolution.

Governor Mitchell of the Federal Reserve Board has pointed out that international credit flows through foreign owned banking institutions are not subject to Federal Reserve jurisdiction.[21] In June 1973 the Federal Reserve Board requested foreign banks operating in the

21. Address by George W. Mitchell, *Bankers Association for Foreign Trade,* Annual Convention, Coronado, California, April 8, 1974. This is because non-member banks (state chartered subsidiaries of foreign banks) are not subject to Federal Reserve jurisdiction with respect to monetary policy controls and U.S. agencies and branches are not eligible for membership in the Federal Reserve System.

United States to conform voluntarily to marginal reserve requirements imposed on large certificates of deposit and net Eurodollar borrowings.[22] Large domestic banks are subject to such reserve requirements and the voluntary reserve requirement closed a monetary policy gap that had been of concern to the Federal Reserve. In addition, it tended to offset an advantage that foreign banks held in the area of reserve requirements on deposit liabilities. This advantage continues in part, since foreign bank branches and state chartered subsidiaries that are not members of the Federal Reserve enjoy lower cost reserve requirements. This is due to the fact that while most states have percentage reserve requirements that are close to those of the Federal Reserve, many states permit these reserves to be held in the form of interest-earning government securities. The Federal Reserve permits only cash assets to be counted in satisfying reserve requirements on deposit liabilities.[23]

It has been argued that foreign banks enjoy certain competitive advantages over domestic banks in this country. These advantages are derived from the ability of foreign banks to operate on an interstate basis, the investment banking operations of foreign banks in the United States, and their exemption from FDIC insurance requirements and insurance premium assessments.

From a practical standpoint foreign banks are not an important factor in the securities or investment banking industry in the United States. Several large Swiss and German banks simultaneously operate New York branches and securities affiliates. Where bank holding company jurisdiction applies, the Board of Governors has effectively sought to maintain the separation of investment from deposit banking. U.S. banks are not able to operate domestic securities affiliates in competition with foreign banks. However, they do operate such companies overseas via their Edge Act affiliates, which are permitted to own shares in such companies. It is also possible for U.S. banks to service the longer-term credit requirements of their domestic corporate customers by providing medium-term loans individually or in syndication with a group of commercial banks. Moreover, large com-

22. 61 FED. RES. BULL. A7 (1975). These reserve requirements apply to member banks of the Federal Reserve System. Non-member banks enjoy a cost of funds advantage since they are not subject to such reserve requirements. Moreover, foreign banks with offices in the United States derive a second advantage since they may have access to lower cost funds in money markets outside the United States.

23. It should be noted that domestic non-member banks enjoy this same advantage and that their resources are four times as large as those of foreign banks in the United States. On December 31, 1973, total assets of insured non-member banks were $170.8 billion. 61 FED. RES. BULL. A15 (1975). This compares with approximately $40 billion in resources of foreign banks as cited by Governor George W. Mitchell, *supra* note 1.

mercial banks render a number of investment banking services in the areas of financing and facilitating corporate mergers, providing stock purchase plans for customers, and managing investment portfolios of individual customers and pension funds.

The interstate representation of foreign banks in the United States poses genuine problems for government policy makers. On the one side are the complaints of domestic bankers, some of whom are not permitted to establish branch offices in their own states. On the other side is the desire of regulatory agencies to permit competitive pressures to develop in banking markets so as to erode any excess profits that might exist in narrowly defined geographic market sectors. It is difficult to criticize the competitive advantages enjoyed by a handful of foreign banks when these same banking institutions are introducing into banking market sectors competition that results in lower loan rates and higher deposit rates for depositors.[24]

Foreign banks operating state chartered bank affiliates have obtained federal deposit insurance protection for depositors. As a matter of practicality all but several hundred of the smallest banks in the United States have obtained deposit insurance coverage. Branches of foreign banks are not eligible for deposit insurance coverage, although this matter was given serious consideration after the demise of the Intra Bank in 1966. In that case the New York branch of the Lebanese bank was forced to close its doors when the parent institution went into bankruptcy.[25]

While it is alleged that branches of foreign banks in the United States enjoy a competitive advantage in not being required to obtain FDIC insurance protection, the cost burden on insured domestic banks is not significant. Moreover, a significant part of deposits housed in these branches is held by non-resident business firms conducting trading and manufacturing activities in the United States. Therefore, there may be no competitive factor involved in bidding for such deposits. In this connection, these foreign branches represent an extension of the parent bank and it seems questionable whether deposit insurance is necessary or even desirable for banking institutions that are appendages of larger parent organizations operating from a foreign currency base.

REGULATORY PROPOSALS

In 1973, legislative proposals were filed in the U.S. Congress that would affect foreign bank operations in the United States. In 1974,

24. CALIFORNIA SUPERINTENDENT OF BANKS, REPORT ON FOREIGN BANKING MATTERS 37-39 (April 1974).

25. For a complete account, *see* Taylor, *The Day They Shorted the Intra Bank*, 150 BANKERS MAGAZINE 9 (1965) and F. LEES, INTERNATIONAL BANKING & FINANCE 185-86 (1974).

the Board of Governors of the Federal Reserve System made public its own legislative proposal regarding regulation of foreign banks operating in the United States. Our discussion of these proposals focuses on the reasons for the proposed legislation and the issues surrounding proposed federal jurisdiction.

In 1973, the Patman bill, also known as the Foreign Bank Control Act, was filed in Congress.[26] Several considerations appear to have served as motivation for the Patman bill, including the advantages allegedly possessed by foreign banks over domestic banking institutions, the desire to strengthen monetary policy, and the desire to preserve competition in banking markets. The Patman bill provides for federal chartering of foreign owned banks to conduct an international banking business and state chartering of foreign owned banks to conduct a domestic banking business. There would be no alternative means available for the licensing of foreign banking operations except that described above.

Under the Patman proposal all foreign bank activities in the United States would be conducted through subsidiaries. A foreign bank would be limited to one domestic banking subsidiary whose operations would be confined to a single state. Foreign banks would be excluded from states which have laws that prohibit foreign banking. Individual foreign banks would be limited to five federally chartered international banking subsidiaries. These international banking subsidiaries would operate in more than one state as Edge Act affiliates do in representing domestic parent banks.

The Patman bill prohibits establishment of overseas branches and subsidiaries by foreign banks headquartered in the United States. Foreign owned banks would be required to adhere to reserve requirements of the Federal Reserve. However, foreign bank subsidiaries would not be eligible for membership in the Federal Reserve System.

The Patman bill has been considered somewhat restrictive in its treatment of foreign banks, and possibly harsh enough to generate a negative reaction outside the United States. The restrictive attitude toward foreign bank operations and failure to treat foreign banks on a par with domestic banks represent significant weaknesses in the proposal.

Discriminatory treatment in the Patman bill precludes foreign banks from obtaining national charters to conduct domestic operations in the United States, thus limiting foreign banks to only one domestic banking subsidiary, prohibiting mergers or consolidations of

26. H.R. 11440, 93d Cong., 1st Sess. (1973).

foreign bank subsidiaries with domestic banks, barring foreign bank subsidiaries from Federal Reserve membership, limiting foreign banks to five international banking subsidiaries (whereas there is no statutory limit on the number of Edge affiliates a member bank of the Federal Reserve may operate), and prohibiting international banking subsidiaries from establishing foreign branches or foreign equity investments.

The Federal Reserve proposal was submitted to Congress in 1973[27] and resubmitted early in 1975.[28] Included among the considerations mentioned by the Federal Reserve in transmitting this legislative proposal were the following: differences in state regulatory treatment of foreign banks (ranging from complete exclusion to liberal treatment), interstate banking by foreign banks, lack of restraint on non-banking activities, the fact that few foreign banks are members of the Federal Reserve System which excludes a growing sector of money and credit from monetary policy, and the fact that the Federal government can play only a limited role in foreign bank operations even though this may have important implications for U.S. foreign relations.[29]

According to Arthur Burns, Chairman of the Board of Governors of the Federal Reserve System, the Board's proposal would provide for a federal role in the licensing and chartering of foreign banking operations. Moreover, it would standardize the status of foreign banks on the basis of non-discriminatory national treatment aimed at providing foreign banks with the same opportunity to conduct banking operations in this country as is afforded domestic banks. The Comptroller of the Currency would issue licenses for all foreign banking facilities in the United States and would supervise foreign-owned national banks and federally insured branches of foreign banks. The Federal Reserve would exercise supervisory authority under the Federal Reserve Act and the Bank Holding Company Act. The FDIC would be required to submit proposals to extend deposit insurance to branches and agencies of foreign banks.

Under the Board proposal the BHC Act would be redefined to include branches and agencies of foreign banks, bringing virtually all foreign bank operations in the United States under the BHC Act. Equality of treatment would be provided by permitting foreign banks to seek U.S. representation via federal or state regulatory channels, thus making available the dual channels that domestic banks possess. Foreign ownership of national banks would be facilitated by

27. H.R. 11597, 93d Cong., 1st Sess. (1973).
28. H.R. 5617, 94th Cong., 1st Sess. (1975).
29. Federal Reserve Board Press Release (Dec. 3, 1974).

permitting up to one-third of the directors of a national bank to be foreigners.[30] In addition, the Comptroller would be empowered to license branches of foreign banks to conduct a banking business in any state on the same basis as a national bank. This would provide foreign banking institutions with a means of entering any of the state banking markets in the United States.

The section of the Federal Reserve Act pertaining to Edge Act corporations would be amended[31] to allow foreign banks to establish and own Edge Act subsidiaries. Under present law a majority of the shares of an Edge corporation must be owned or controlled by citizens of the United States and all of the directors of an Edge corporation must be citizens of the United States. The Federal Reserve proposal would give the Board of Governors authority to waive these provisions regarding share ownership and eligibility for directorship.

All branches, agencies and subsidiaries of parent foreign banks that possess worldwide assets exceeding $500 million would be required to become members of the Federal Reserve System. This would extend Federal Reserve requirements and other regulations to these banking units with respect to their operations in the United States. In return, these institutions would gain access to the discount and lending facilities of the Federal Reserve.

Subsidiary banks of foreign banking institutions are presently required by the BHC Act to carry FDIC insurance. The proposed legislation would extend this requirement to branches and agencies of foreign banks, assuring that depositors in virtually all banking institutions in the United States are covered by this insurance.

The Federal Reserve proposal would provide for a national policy toward foreign banks, in that a federal banking license would be required for all banking facilities of foreign banks, whether organized under state or federal law. This would include consultation with the Secretary of State, insuring that the broadest aspects of economic relations with the home government are related to the application for establishing U.S. operations.

The Federal Reserve proposal would limit future multi-state securities company and other non-banking company operations to the same extent as domestic banks. However, permanent grandfather status would be extended to existing non-conforming activities. Non-conforming banking facilities established after the grandfathering date would have to be divested within two years and non-conforming non-banking facilities would have to be divested within ten years.

30. At present all of the directors of a national bank must be U.S. citizens. 12 U.S.C. § 72 (1945).

31. 12 U.S.C. § § 611-631 (1957).

The Federal Reserve bill is regarded as moderate in approach and, when compared with the Patman bill, appears to be the more acceptable legislative approach. Foreign banks are placed on a competitive par with American banks and are permitted to operate in a relatively flexible manner. Existing activities are given grandfather protection in cases where they do not conform to statutory provisions.

The Federal Reserve bill appeared on the scene approximately eight months after the Patman bill was filed in Congress. The Patman bill was severely criticized by many U.S. bankers who feared that foreign governments might become less liberal in their treatment of U.S. banks. Moreover, this bill was criticized by foreign bankers who feared that their existing activities in the United States were threatened. The Patman bill was filed only a few months after the New York Superintendent of Banks had denied the request of Barclays Bank, Ltd. to acquire the Long Island Trust Company, Garden City, New York. This decision was interpreted by European bankers as a denial of reciprocity since American banking and business interests had grown to absorb a large share of the market in the United Kingdom, Germany and other countries in Europe.

The Federal Reserve bill had the effect of shifting the trend of discussion concerning regulation of foreign banking back to a middle ground and its timing was important in the general context of efforts by the government to make this country a more attractive focal point for foreign investment inflows. Very early in 1974, the U.S. government and various government agencies had removed all of the controls on private U.S. capital outflows, in part to make the U.S. financial markets better able to serve as a financial *entrepot* through which petro-dollar accumulations of the oil exporting nations could be recycled. The Federal Reserve recognized the important role that foreign banking institutions could play in directing petro-dollar investments through the U.S. financial markets. Moreover, the early 1970s had witnessed a heightened interest on the part of foreign business investors in establishing U.S. manufacturing and distributing facilities. In part, these investments have depended on the availability of foreign banking facilities in the United States.

THE CASE FOR OR AGAINST FEDERAL REGULATION

The case for or against federal regulation of foreign banks is a complex of interdependent issues and alternatives. Of necessity, there are trade-offs and a middle ground of views will be woven into any final legislative action that may be reached. Our purpose here is to review the reasons espoused for proposed legislation. These reasons fall into the following major categories: (1) to control capital flows; (2) to strengthen monetary policy; (3) to assure reciprocity; (4) to place domestic banks on par with foreign banks in the United States.

1. *Control Capital Flows*

Foreign banks in the United States can effect inward and outward capital flows that influence liquidity in the United States. As direct operating arms of their parent institutions, foreign banking offices in the United States include in their major activities lending to non-residents and accepting deposits from offshore areas. In addition, these U.S. located offices participate in foreign exchange transactions and manage money market investments of parent institutions. Inevitably these activities give rise to capital inflows and outflows. Large American banks similarly initiate substantial capital flows of this type. Other countries are far more exposed to international flows of liquid funds than the United States and remain able to apply appropriate restraint measures against capital flow influences on domestic liquidity.

2. *Strengthen Monetary Policy*

Foreign bank agencies and branches in the United States can operate without being subject to the same degree of reserve requirement restraint as domestic banks. International monetary flows through foreign banking institutions are not subject to Federal Reserve jurisdiction. However, foreign banks have complied with the Federal Reserve Board request that they adhere to voluntary controls on borrowed funds.[32] Application of reserve requirements by the Federal Reserve Board can be defended if foreign bank operations are sufficiently large to present a significant gap in coverage. It is possible that there may be a greater need to extend uniform reserve requirements to all domestic banks (including non-member banks) than to foreign banks operating in the United States. At year end 1974, assets of non-member banks were four times the amount of assets held by foreign banks in the United States.

3. *Assure Reciprocity*

It is held that reciprocity for U.S. banks operating overseas can be better obtained by federal, rather than state, regulation of foreign banks. The definition of reciprocity is an unsettled issue. Foreign banks hold that an interpretation based on permitting foreign banks to conduct business according to the rules that apply to domestic banks is overly restrictive. This is because bank regulation in the United States is more control-oriented than in other countries. American banks operating overseas enjoy greater flexibility than at home and obtain more advantages than foreign banks that have branches or subsidiaries in the United States. The reciprocity argument for regulation of foreign banking in this country rests on the tenuous position that denial of reciprocal treatment has been damaging to the

32. This applies principally to borrowing of funds from outside the United States.

overseas activities of U.S. banks. More important, it rests on the assumption that foreign governments that have practiced a closed-door policy could be induced to open the door to U.S. banking institutions. If anything, countries in this category (Canada, Australia) appear to be adopting even harder policies in this respect.

4. *Place Domestic Banks on Par With Foreign Banks in the United States*

It has been said that foreign banks operating in the United States enjoy certain advantages over domestic banks. Advantages include lower cost of operation, ability to engage in investment banking activities, and freedom to operate across state lines. The cost advantages relate to FDIC insurance assessments where branches of foreign banks are involved and lower effective costs of reserve requirements where branches and non-member state chartered subsidiaries are involved. New York branches of foreign banks must conform to the same percentage reserve requirements and loan limitations as state chartered banks. A 1969 amendment to the New York banking law requires that branches and agencies of foreign banks in New York maintain New York assets equivalent to 108 percent of liabilities. State chartered affiliates of foreign banks now have FDIC insurance and only branches of foreign banks enjoy a cost advantage in this area. An important cost advantage could occur in cases where state reserve requirements are lower than those of the Federal Reserve. This is not a significant factor in states such as New York and California where the major part of foreign banking resources is located.

Foreign banks are not important factors in the securities or investment banking areas in the United States. Quoting the Board,

> The securities affiliates of foreign banks are few in number and small in size with little competitive impact within the securities or banking industries. For the most part, these securities affiliates engage in brokerage activities for the foreign customers of the foreign bank and in corporate financial services such as advice on mergers and acquisitions.[33]

It is doubtful that the minor exceptions of foreign bank activity in investment banking are significant enough to justify special federal jurisdiction.

Interstate operations of foreign banks in the United States probably represent one of the most sensitive issues concerning unfair advantages. American banks are able to respond competitively via their Edge Act affiliates, which permit multi-state representation to conduct international banking activities. A number of large U.S. banks now operate Edge affiliates in several major cities across the nation. Some interstate representation by foreign banks involves a mix of

33. Federal Reserve Board Press Release 11 (Dec. 3, 1974).

retail-wholesale banking not fully associated with international finance. In these cases a competitive advantage accrues to the foreign bank. Whether this competitive advantage is significant or not is an open question.

Recent proposals by the New York Superintendent of Banks for reciprocal interstate banking privileges (with California and other states) offer a flexible solution. Moreover, this approach would involve minimum interference with state prerogatives over bank legislation. Federal regulators and Congressmen might look in this direction since it represents a liberalizing rather than a restrictive approach.[34] Regulatory approaches that place emphasis on liberalizing the treatment of domestic banks rather than reducing foreign bank activities to a low common denominator of American practice should be given priority.

CONCLUSION

Two contrasting legislative proposals have been under consideration for the past one-and-one-half years which would extend federal jurisdiction over the licensing and chartering of foreign banks. The Patman bill can be regarded as the more burdensome since it would restrict foreign banks to one domestic banking subsidiary and to five international banking subsidiaries in the United States. Federal Reserve membership would be required of foreign banks, but there would be no access to the Federal Reserve discount window. Foreign banks would be placed at a competitive disadvantage vis-a-vis domestic banks in several ways, including the limited number of bank subsidiaries they could control in the United States, exclusion from states that do not permit foreign banking, a prohibition against using national chartered banks for domestic operations in the United States, and a prohibition against foreign owned banks establishing overseas branches or making equity investments.

The more liberal Federal Reserve proposal would add a second avenue by which foreign banks could gain access to the United States, but leave intact the existing procedures by which the states charter and license foreign banks. All foreign banks with U.S. representation would become subject to the BHC Act. Moreover, greater flexibility would be provided for foreign ownership of national banks and for establishment of Edge Act affiliates by foreign owned banks.

The legislative proposals described above would significantly affect delicately balanced relationships between state and federal regulatory agencies, between large and small banks, between federal reserve and other federal regulatory authorities, and between foreign

34. Lees, *Which Route for Foreign Bank Regulation?*, 157 BANKERS MAGAZINE 53, 55-56 (1974).

and domestic banks in the United States. More important, they could affect the status of U.S. banks with heavy overseas investments in branches, subsidiaries and correspondent bank networks. At year end 1974, the U.S. overseas branch banking system held total reserves of $150 billion, three times the resources held by foreign banks in the United States.

The brief made in support of proposed legislation must be analyzed critically in order to determine how urgent the question of federal regulation really is. It can be argued quite easily that any strengthening achieved in monetary policy through the proposed legislation might represent only a marginal improvement. Similarly, the reciprocity argument does not appear to offer a sound basis for enactment of either of the two legislative proposals. Reciprocity is a difficult concept to pin down, and has a different meaning for U.S. and foreign bankers and regulators. Finally, the advantages that foreign banks are considered to enjoy in comparison with domestic banks are not significant. One could argue that these advantages may be of importance to the foreign banks, but not to the U.S. banks against which they compete. For example, there is no doubt in this writer's mind that the ability of foreign banks to offer securities services (underwriting and securities trading) to their regular customers on a global basis is a critical factor in their being able to retain such customers. However, the securities affiliates of foreign banks in New York do not as yet represent a real competitive threat to major U.S. banks.

If there is not a critical need for extending federal regulatory authority over foreign banks, what avenue of approach (if any) should be explored? The answer seems clear. Federal regulatory authorities should examine the possibilities of liberalizing the regulation of domestic banking institutions. Liberalizing the regulatory treatment of domestic banks would make it possible for them to respond competitively to the expansion of foreign banks in a more flexible manner, and in a way that could generate better services and improved efficiency for the user of banking services. Congress now possesses a unique opportunity. Foreign competitive pressures are generating changes that suggest the need for adaptation by domestic banking institutions. Congress can move in either of two directions or do nothing. The two directions that can be followed are (1) to restrict foreign banks more severely, and (2) to liberalize the regulation of domestic banks. Provided that an atmosphere of excessive competition is not engendered, Congress should choose the second of these options.

Toward an International Commodity Agreement on Petroleum

CARLOS LOUMIET*

I. INTRODUCTION

The possibility of an international commodity agreement on petroleum has been discussed by various authors in recent years.[1] This article examines the possibility of such an agreement, first, by briefly setting forth the reasons why both petroleum-exporting and petroleum-importing countries should cooperate in determining the future structure of the world petroleum industry; second, by surveying the principal provisions of five of the most recent international commodity agreements so as to determine what precedents exist which would be applicable to a hypothetical agreement on petroleum; and third, by suggesting the form that such an agreement might take.[2]

II. REASONS FOR COOPERATION BETWEEN EXPORTERS AND IMPORTERS

On October 16, 1973, the six largest petroleum-exporting countries on the Persian Gulf—Saudi Arabia, Iran, Qatar, Iraq, Abu Dhabi and Kuwait—announced a 17 percent increase in the price of their crude petroleum.[3] This step, which was a landmark in that it represented the first time that petroleum-exporting countries unilaterally raised the price of their product, was followed on December 24, 1973 by another price hike, effective January 1, 1974, which was substantially larger than the preceeding one.[4] The net effect of these

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1. *See, e.g.*, Amuzegar, *The Oil Story: Facts, Fiction, and Fair Play*, 51 FOREIGN AFFAIRS 676 (1973) [hereinafter cited as Amuzegar].

2. This article does not cover the history, or the economic pros and cons, of international commodity agreements, which have been amply discussed elsewhere. *See, e.g.*, J. ROWE, PRIMARY COMMODITIES IN INTERNATIONAL TRADE (1965) [hereinafter cited as ROWE]; W. HAVILAND, INTERNATIONAL COMMODITY AGREEMENTS (1963) [hereinafter cited as HAVILAND]; M. RADETZKI, INTERNATIONAL COMMODITY MARKET ARRANGEMENTS (1970); E. MASON, CONTROLLING WORLD TRADE (1946); Hager, *Commodity Agreements and the Developing Countries: A Collective Bargaining Approach*, 7 INT'L LAW. 309 (1973); H. JOHNSON, ECONOMIC POLICIES TOWARD LESS DEVELOPED COUNTRIES (1967); A. MACBEAN, EXPORT INSTABILITY AND ECONOMIC DEVELOPMENT (1966) [hereinafter cited as MACBEAN]; J. PINCUS, TRADE, AID AND DEVELOPMENT (1967); Pincus, *Commodity Agreements: Bonanza or Illusion?*, 2 COLUM. J. OF WORLD BUS. 41 (1967); INTERNATIONAL LABOR OFFICE, INTERGOVERNMENTAL COMMODITY AGREEMENTS (1943); L. BARANYAI & MILLS, INTERNATIONAL COMMODITY AGREEMENTS (1963); U.N. Doc. TD/97, vol. II (1968); U.N. Doc. TD/180, vol. II (1972); C. BLAU, INTERNATIONAL COMMODITY ARRANGEMENTS AND POLICIES (FAO Commodity Policy Study No. 16, 1964).

3. N.Y. Times, Oct. 17, 1973, at 16, col. 1.

4. N.Y. Times, Dec. 24, 1973, at 1, col. 8.

two price increases was to raise the price of Arabian Light Crude Oil for purposes of taxes and royalties to $11.65 a barrel, compared with a cost in 1970 of $1.80 a barrel.[5]

The six Persian Gulf states are members of the Organization of Petroleum Exporting Countries (OPEC),[6] along with Algeria, Indonesia, Ecuador, Libya, Nigeria, Venezuela and Gabon. The other members of OPEC soon followed the lead of the Persian Gulf countries and raised their petroleum prices accordingly;[7] since January 1974, members of OPEC have on three occasions either collectively or individually modified the effective price of the petroleum they export.[8]

The petroleum price increases of 1974 have had severe effects on the world economy: they have thrust several developed and many developing countries into virtually unmanageable balance-of-payments deficits;[9] they have placed a severe strain on international money markets;[10] and they have raised the spectre of a major world

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5. N.Y. Times, Dec. 25, 1973, at 31, col. 7.

6. OPEC was created in 1960 as an immediate response to a petroleum price cut imposed by the international oil companies. E. PENROSE, THE LARGE INTERNATIONAL FIRM IN DEVELOPING COUNTRIES: THE INTERNATIONAL PETROLEUM INDUSTRY 200 (1968). For a history and an analysis of this organization see Z. MIKDASHI, THE COMMUNITY OF OIL EXPORTING COUNTRIES (1972) [hereinafter cited as MIKDASHI].

7. Venezuela, for example, followed suit within days. N.Y. Times, Dec. 30, 1973, § 4, at 1, col. 1.

8. The general impact of these modifications has been to raise the effective price of petroleum. The four occasions referred to are (a) in June 1974, the member countries raised by two percent the royalty payments due from the oil companies. N.Y. Times, June 18, 1974, at 1, col. 3; (b) in September 1974, the tax due from the companies was raised another three-and-one-half percent. ECONOMIST, Sept. 21, 1974, at 101; (c) in November 1974, Saudi Arabia, the United Arab Emirates and Qatar reduced the "posted price" (discussed at note 146, *infra*) of their petroleum while off-setting the move by increasing oil company taxes. N.Y. Times, Nov. 11, 1974, at 1, col. 8; (d) finally, in December 1974, the OPEC members established a new level of government revenues about 38 cents a barrel above the level adopted in September. N.Y. Times, Dec. 14, 1974, at 1, col. 5.

9. The underdeveloped countries have been hardest hit: "There is a hard core of about forty seriously troubled nations mostly in tropical Africa, south Asia, and the Central-American-Caribbean area. For these nations the price increases are a blow that could mean increased poverty and famine unless extraordinary measures are taken to assist them." N.Y. Times, Sept. 29, 1974, § 3, at 3, col. 2.

10. While concern over the unmanageability of the vast amounts of money being transferred from the petroleum-importers to the exporters has decreased in recent months as a result of new figures indicating that the build-up of petrodollars in the exporting countries will be less than originally estimated after the sharp increase in the price of petroleum, Henry Wallich, a member of the United States Federal Reserve Board, may have best articulated the feelings of many economists when he said, while addressing a banking conference in Singapore in January 1975: "In recent months a feeling has gained ground, I believe, that under present conditions the problem may turn out to be manageable in a broad sense. Nobody, I believe, can be completely sure of this either way." N.Y. Times, Jan. 31, 1975, at 42, col. 6.

recession or depression.[11] Three factors explain these impacts. First, the present world economy is energy-dependent. Second, petroleum is the primary source of energy.[12] Third, the known and/or currently available reserves of petroleum are concentrated in a handful of countries, virtually all of which are members of OPEC.[13]

The events of 1974 mark the breakdown of a world system of petroleum production and distribution that dates back to the 19th century.[14] That system relied on the international oil companies, eight of whom controlled 80 percent of the world crude petroleum trade as recently as 1970,[15] to make most of the crucial decisions involved in the world petroleum process: how much petroleum should be produced, what constitutes a fair price for it, how should it be distributed to consumers. The breakdown of the system has been the result of, and has concomitantly accelerated, a decrease in significance of the role played by the international oil companies in the world petroleum process. As Walter Levy writes:

> Thus, the companies no longer possess any real leverage. About the only role that is, in effect, left to them in established producing areas is that of a contractor providing technical services, getting in return some

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11. *Id.*, Aug. 18, 1974, § 3, at 12, col. 1.

12. From 1960-70, petroleum increased its share of world energy consumption among the various primary fuels from 33 percent to 44 percent, surpassing coal as the major world fuel. OECD, OIL: THE PRESENT SITUATION AND FUTURE PROSPECTS 33 (1973) [hereinafter cited as OECD]. Prior to the abrupt price increases of late 1973 and early 1974, petroleum was expected to claim some 48 percent, or nearly twice as much as its closest competitor, coal, of the projected world energy consumption for 1980. *Id.*, at 14. World consumption of petroleum was expected to increase from its 1973 level of some 50 million barrels a day to some 80 million barrels a day. *Id.* While these projections may have to be revised downward as a result of the enormous price increases of the past year, the preeminence of petroleum among primary fuels in the next decade seems assured, largely because of the problems surrounding the development and use of alternative fuels. Thus, for example, within the United States serious questions have arisen as to the safety of nuclear energy, N.Y. Times, Nov. 10, 1974, § 3, at 1, col. 1; shale development has failed to catch fire as expected, *Id.*, Nov. 3, 1974, § 3, at 2, col. 5; and environmentalists have announced their opposition to the development of coal reserves in Western states. *Id.*, Jan. 5, 1975, § 3, part II, at 45, col. 4. For an analysis of the short-term possibilities for the various alternative energy sources in terms of United States self-sufficiency see the entire issue of TECHNOLOGY REVIEW, May 1974.

13. Levy, *World Oil Cooperation or International Chaos,* 52 FOREIGN AFFAIRS 690 (1974) [hereinafter cited as Levy].

14. The history of that system is set forth in E. PENROSE, THE LARGE INTERNATIONAL FIRM IN DEVELOPING COUNTRIES: THE INTERNATIONAL PETROLEUM INDUSTRY 53 (1968). The disintegration of the system, which had begun to become apparent by the mid-1960's, was due to various factors, the most prominent of which were: (1) increased competition in the international petroleum market as the result of the entrance of 20 to 30 smaller international oil firms and of the creation of state-owned oil companies; and (2) the birth and infancy of OPEC. MIKDASHI, *supra* note 6, at 46.

15. Levy, *supra* note 13, at 693.

> privileged access to oil—at costs and prices determined by the producing governments. The extent of even this "privilege" and the time over which it will be available are subject to unilateral cancellations at any moment, as were all preceding arrangements.[16]

The decline of the oil companies has created a void in the world petroleum process that must be filled by the petroleum-exporting and -importing nations. These nations may act unilaterally or cooperatively toward that end. Recent months, however, have witnessed a perceptible shift toward an accomodation between the exporting and importing nations, as evidenced by both groups' acquiescence to and participation in an international petroleum conference, held in September 1975.[17]

There are three principal reasons why it is in the exporting nations' interest to cooperate with the importing countries in determining the future structure of the world petroleum industry. First, while the remarkable cohesion demonstrated by the members of OPEC has permitted them to dominate the world petroleum market for the past two years, there is no certainty that either that cohesion or that dominance will persist, for the pressure on the cartel due to decreased world petroleum consumption that has already caused some divisions within the OPEC bloc,[18] could well increase in future years as a result of an effort by importing nations to reduce consumption and develop new energy sources.[19] It could thus be in the interest of the exporters to minimize the risk of eventually losing market control by sharing that control with the importers while the exporters are still in a position to drive a hard bargain.

Second, there are certain facets of the world petroleum industry in which the exporting nations have an interest—including regulation of international oil company behavior, access to import markets for refined petroleum products, and adoption of energy conservation

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16. *Id.*

17. For a report see TIME, Sept. 22, 1975, at 16.

18. The divisions have been in the form of price-shaving by individual OPEC members, which occurred with some frequency in the early months of 1975. *See, e.g.*, Wall St. Journal, Feb. 28, 1975, at 1, col. 3.

19. Importing nations have acted both individually and in concert to reduce petroleum consumption and develop new energy sources. Thus, in addition to measures adopted individually by countries such as France (N.Y. Times, Jan. 29, 1974, at 1, col. 7) and Italy (N.Y. Times, Feb. 4, 1975, at 3, col. 5), the major importers have agreed through the International Energy Agency to a plan aimed at reducing their petroleum consumption by two million barrels a day, N.Y. Times, Mar. 21, 1975, at 1, col. 5. In addition, the importers have agreed to increase energy investments and production. *Id.* And, of course, the past year has witnessed the discovery of major petroleum fields in Mexico, off Brazil, and in the Irish Sea, as well as the accelerated development of deposits in the North Sea and in Alaska. Yergin, *The Economic, Military, and Political Solution,* NEW YORK TIMES MAGAZINE, Feb. 16, 1975, at 10.

measures—which, since they do not lend themselves to unilateral determination by exporters or importers, are best approached cooperatively.

Third, it is in the exporters' interest to not antagonize or weaken the importing nations any further than is necessary, both because the two groups are inherently interdependent—the exporters need markets for their petroleum, capital and non-capital goods for their development, and stable economies to provide investment opportunities for the vast amounts of money that the exporters are amassing—and because the possibility of a military confrontation between exporters and importers remains a real possibility.[20]

The importing nations also have valid reasons for cooperation with the exporters. First, although the major importing countries have been busy over the past years designing a common strategy, there have been sharp disagreements as to what that policy should be.[21] Furthermore, even if the major importers were to succeed in presenting a common front, there is no certainty that they would obtain control of the world petroleum process from the exporters. Consequently, it is in the importers' interest to assure themselves a voice in the industry's future through cooperation with the exporters. Second, like the exporting countries, the importers have interests in various facets of the oil industry, such as the regulation of international oil company behavior and access to import markets for refined petroleum products, which can best be controlled through cooperation between exporters and importers. Finally, since the importers need the exporters' petroleum, they should avoid antagonizing the exporters any more than is absolutely necessary. Moreover, while the importers would "win" a military confrontation with the exporters, the victory, in terms of the psychological costs to the victors and the possibility of escalation of the confrontation into a nuclear holocaust, might well be Pyrrhic.

III. THE COMMODITY AGREEMENT AS A MODE OF COOPERATION

A. *Definition*

An international commodity agreement has been defined as "an association of the governments of more than two countries for the

20. The matter was of sufficient concern to OPEC members to warrant discussion at the meeting of OPEC Foreign Ministers and Ministers of Petroleum and Finance in Algiers in January 1975. N.Y. Times, Jan. 25, 1975, at 8, col. 4.

21. Among the disagreements are: (1) Norway, which expects to become an oil exporter in the near future, has refused to join the International Energy Agency created by the major importing nations. N.Y. Times, Nov. 13, 1973, at 9, col. 1. (2) France has also refused to join the International Energy Agency. The French are reluctant to take any steps that the exporters might perceive as hostile. N.Y. Times, Oct. 16, 1974, at 71, col. 6.

purpose of regulating the marketing of some primary product in the interest of exporters and importers."[22] Such an agreement has several outstanding characteristics. First, in that it seeks to supplement or replace the free market mechanism, such an agreement is "fundamentally [a] form of monopolistictic combination of the cartel type."[23] Second, the agreement is contracted to by governments, not "by private (or 'public commercial') enterprises."[24] Third, the agreement is multilateral, in that both importing and exporting countries participate.[25] Fourth, the agreement is in treaty form.[26] Fifth, the agreement only applies to international trade in primary products or primary commodities.[27] Finally, the agreement attempts to deal comprehensively with trade of a certain commodity, by creating an administrative structure to supervise the trade, establish a system of conflict resolution, and impose reciprocal obligations upon members, often including supply commitments.

B. *Structural Components of International Commodity Agreements*

1. *Types of Agreements*

There are three types of international commodity agreements: export quota agreements, buffer stock agreements, and multilateral contract agreements.

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22. HAVILAND, *supra* note 2, at 9.

23. ROWE, *supra* note 2, at 121.

24. Walker, *The International Law of Commodity Agreements*, 28 LAW & CONTEMP. PROB. 392 (1963).

25. While international commodity agreements have their genesis in agreements between exporters' groups, or between exporting countries, and while exporters' agreements have a long history in which they have governed a substantial part of world trade (*see* E. HEXNER, INTERNATIONAL CARTELS (1946)), the term "international commodity agreement" has since World War II come to denote agreements involving both exporting and importing countries.

26. That is, they conform to the definition of a "treaty" as found in art. 2 of the Vienna Convention on the Law of Treaties: "1. For the purposes of the present Convention: a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;. . . . " U.N. Doc. A/Conf. 39/27, May 23, 1969.

27. These terms are used interchangeably in this paper, as they appear to be throughout the field of commodity agreements. Art. 56 of the Havana Charter for an International Trade Organization, the seminal document for post-World War II commodity agreements, ROWE, *supra*, note 2, at 158-59, defines a primary commodity as: (1) "any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade;" or (2) "a group of commodities of which one is a primary commodity . . . which are so closely related, as regards conditions of production or utilization, to the other commodities in the group, that it is appropriate to deal with them in a single agreement." Not included in the definition of "international commodity agreements," however, are those agreements "relating solely to the conservation of fisheries resources, migratory birds, or wild animals." Art. 70(d) of the Havana Charter.

a. *Export Quota Agreements*

The oldest of the three types is the export quota agreement, such as the International Coffee Agreement of 1968,[28] the International Sugar Agreement of 1968,[29] and the International Cocoa Agreement of 1972.[30] Under this type of agreement, the overall quantity of exports allowed on the world market is fixed at a level which will satisfy demand at prices agreed upon by the members. Individual country export quotas are then established to conform to the desired overall quantity.[31]

There are several important considerations involved in the design and operation of export quota agreements. The first is that these agreements are based on projections of future world production and consumption, as well as the behavior of prices. Such projections are not always accurate. Accurate prediction is particularly difficult

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28. The International Coffee Agreement, 1968, *opened for signature* February 19, 1968, 19 U.S.T. 6333, T.I.A.S. No. 6584, 647 U.N.T.S. 3 [hereinafter cited as Coffee Agreement]. For the text of the Agreement, see *International Coffee Agreement*, 7 INT'L LEGAL MATERIALS 237 (1968).

29. The International Sugar Agreement of 1968, ___U.N.T.S.___ [hereinafter cited as Sugar Agreement]. For text of the Agreement see U.N. Doc. TD/Sugar, 7/12 (1968). While another agreement was concluded in 1973, the later agreement did not seek to control the world sugar trade, but merely to provide a forum for communication and for the gathering of information on the world sugar trade. As a result, no export limitations were placed on members, rendering the 1973 Agreement less useful for the purposes of analysis than the 1968 Agreement. Consequently only the 1968 Agreement will be discussed here. For the text of the 1973 Sugar Agreement, see U.N. Doc. TD/Sugar, 8/6 (1973).

30. The International Cocoa Agreement, 1972, *opened for signature* November 15, 1972, ___U.N.T.S.___ [hereinafter cited as Cocoa Agreement]. For the text of the Agreement see U.N. Doc. TD/Cocoa, 3/9 (1972). While the Cocoa Agreement is a hybrid agreement, combining both export quotas and a buffer stock, its primary reliance is on export quotas. *See* note 47, *infra*.

31. Faucett, *The Function of Law in International Commodity Agreements*, 44 BRIT. YR. BK. OF INT'L LAW 157, 172 (1970) [hereinafter cited as Faucett]. It should be noted that importing country members have, in the past, not been obliged under this type of agreement to purchase the commodity governed by the agreement at a fixed price; indeed, historically, and with the exception of the Sugar Agreement, importing countries have not been required to purchase any amount of the commodity at all, for export quota agreements do not establish a direct relationship between exporting members' exports and importing members' imports. However, the Sugar Agreement did contain some novel, albeit moderate, commitments on the part of certain importing nations to import a minimum amount of sugar annually. *See* Annex A of the Sugar Agreement, and U.N. Doc. TD/180, vol. II, at 20, para. 46 (1972).

Member countries may decide to exclude certain exports from the computation of a member's quota under the agreement. Thus, for example, the Coffee Agreement, in an effort to increase consumption of coffee in certain countries, excludes exports to those countries from compilation towards the exporting members' quotas. Art. 40 of the Coffee Agreement.

where production of the commodity will fluctuate, depending upon unpredictable variables, such as changes in weather.

Second, export quota agreements are ineffective unless a high proportion of world trade in that commodity is covered by the agreement; otherwise, control over market behavior is impossible. A corollary is that if there are important exporters or importers absent from the agreement, then trade in the commodity between members and non-members will have to be regulated if confrontation is to be avoided. Two alternative methods have been developed to limit trade between members and non-members. The first of these methods requires that members of the agreement not deal with non-members on terms that are "commercially more favorable" than those established in the agreement.[32] The second limits the quantity that a member may import from non-members to the amount the member imported from the non-member in a fixed, antecedent period.[33] In addition, in order to enforce these restrictions, as well as to provide the administering organization with accurate information as to flows of the commodity, export quota agreements have been devised to include an elaborate mechanism involving certificates of origin and re-export for all exports made by members.[34]

A third consideration is that the negotiation of export quotas is often an arduous process, as each exporting member desires a low total quantity while obtaining as large a quota for its own exports as possible.[35] The matter is further complicated by the disputability of the projections on which the quotas are based. Given the difficulties inherent in the process of allocating export quotas, it is not surprising that the quotas usually end up being determined on the basis of historical market shares.[36]

Fourth, the difficulties of agreeing on a price level are also great. While these difficulties are present regardless of what type of agreement is negotiated, they are particularly acute in the case of an

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32. *See, e.g.*, art. 55(1), (2) of the Cocoa Agreement.

33. *See, e.g.*, art. 45 of the Coffee Agreement, which states: (1) "To prevent non-member exporting countries from increasing their exports at the expense of Members, each Member shall limit its annual imports of coffee produced in non-member exporting countries to a quantity not in excess of the average annual imports of coffee from those countries during the calendar years 1960, 1961 and 1962." *See also* art. 54 of the Cocoa Agreement.

Given participation by all but one or two major importing or exporting countries, the optimum provision in terms of inducing these recalcitrant countries to join and thus facilitating the operation of the agreement would be one which forbade altogether member-non-member trade in the commodity governed.

34. *See, e.g.*, art. 43 of the Coffee Agreement.

35. MACBEAN, *supra* note 2, at 274.

36. *Id.*, at 273.

export quota agreement because this type of agreement provides flexibility as to price. Thus, an export quota agreement may be utilized to raise prices (by restricting supply at a level beneath demand), to lower prices (by raising supply above demand to the extent possible), or to stabilize prices (by placing supply and demand in equilibrium). While this price flexibility may induce discord among members, it is also the most attractive quality of export quota agreements, for it makes them powerful vehicles whether the objective of the agreement is price stability or price support.[37]

b. *Buffer Stock Agreements*

The second type of commodity scheme is the buffer stock agreement, such as the Fourth International Tin Agreement of 1970.[38] These agreements operate by creating an agency, endowed with a stock of the commodity and/or money, which is empowered to intervene to maintain the price of the commodity within a fixed range through purchases and sales in the world commodity market. When prices fall below the lower limit (or floor), the agency buys excess supplies of the commodity at a floor price established within the agreement. Assuming that the agency has sufficient funds, prices can be held at the floor by means of the agency's purchases. If the price rises above the upper limit (or ceiling), the agency sells the commodity which it holds in stock at the ceiling prices established in the agreement, and so long as the agency's stocks last, the price can be held at or below the ceiling.

Buffer stock agreements are the most widely advocated measures for stabilizing commodity markets,[39] largely because of three inherent advantages: (1) the buffer stock acts directly, and with immediate effect, on the commodity concerned;[40] the stock has an immediate market impact, thus allowing quick and precise adjustments; (2) the buffer stock agreement "avoids the difficult practical problems,

37. As used in this article, the term "price support" implies interference with the free market mechanism to raise the price of a commodity above the point representing long-term equilibrium between supply and demand and to maintain them at that level. In contrast, "price stability" represents an attempt to minimize periodic, short-term fluctuations in the price of a commodity without raising that price above the long-term equilibrium point.

38. The Fourth International Tin Agreement, 1970, *opened for signature* July 1, 1970, ____U.N.T.S.____ [hereinafter cited as Tin Agreement]. For the text of the Agreement see U.N. Doc. TD/TIN. 4/7/Rev. 1 (1970). While the Tin Agreement is a hybrid agreement, combining the use of both a buffer stock and export quotas, it relies primarily on the buffer stock.

39. MACBEAN, *supra* note 2, at 269.

40. U.N. Doc. TD/97, vol. II, at 25, para. 147 (1968). Whereas in many primary industries export quota schemes are not a viable alternative because quantitative control of output cannot cooperate with sufficient velocity to meet changes in demand. ROWE, *supra* note 2, at 189.

which arise in export quota schemes, of ensuring that all important importing and/or exporting countries participate and that they agree on the allocation of quotas;"[41] and (3) since a buffer stock agreement only requires an exporting member to commit a part of its production to the agreement, while leaving the member free to dispose of the remainder as it sees fit, this type of agreement may be politically less objectionable than an export quota agreement, which subjects the member's entire production to a form of international supervision.

Like export quota agreements, buffer stock agreements also have inherent limitations and disadvantages: (1) the management of a buffer stock is an extremely difficult task requiring a level of expertise that cannot always be attained;[42] (2) buffer stock agreements are not appropriate for several types of commodities, such as those which cannot be stored for some length of time, those which, because of some intrinsic characteristic, such as bulk, can only be stored at great expense,[43] and those marked by a lack of homogeneity, both as to grades (or types) of the commodity and/or as to the prices at which they are available on major world markets;[44] and (3) buffer stock agreements have as their primary objective price stability, not price support. These agreements do not seek to alter the long-term equilibrium of supply and demand, but rather attempt to smooth temporary price fluctuations.[45]

The 1960's and 1970's have witnessed the adoption of commodity agreements which combined the use of export quotas and buffer stocks.[46] In these agreements special attention is given to the respective roles of the two devices in achieving the desired objective.[47] The

41. U.N. Doc. TD/97, vol. II, at 25, para. 147 (1968). Thus, while it is desirable that as many exporting and importing countries as possible participate in the agreement, in that all importing and exporting countries, whether members or not, will benefit from the stability that the buffer stock agreement will bring to the world market, the refusal of a significant exporter or importer to participate may not impede the conclusion of the Agreement, but will only signify that members will have to shoulder proportionally greater obligations than would otherwise have been true.

42. ROWE, *supra* note 2, at 194.

43. *Id.*, at 191.

44. If there are numerous types (or grades) of a commodity, stocks may have to be kept for each. Not only may coordination of the different stocks prove difficult, but agreement might have to be reached separately for each type of commodity as to such questions as the guidelines for contribution to the stock by member countries and the price range which will govern the agreement. *Id.*

45. Only those agreements which, like export quota agreements, manipulate members' production and exports can successfully alter the long-term equilibrium between supply and demand. For a buffer stock to alter this equilibrium without controlling members' production its resources might well have to be enormous.

46. *I.e.*, the Tin Agreement and the Cocoa Agreement.

47. The Tin and Cocoa Agreements represent two different approaches in that the

advantage of combining the two methods lies in the increased flexibility that such a combination provides. Thus, the availability of a buffer stock to complement export quotas means that the projections as to world supply and demand upon which the quotas were based need not be as accurate as they would have to be in an agreement relying exclusively on export quotas. The buffer stock can purchase any excess supply, or dispose of its own resources in case of excess demand, in order to keep prices within the agreed range. Similarly, the presence of quota restrictions on member countries' exports means that the buffer stock's resources will not have to be as large as would otherwise have been true, for in times of excess supply or demand the organization can adjust members' exports, rather than intervening in the market through the stock.

c. *Multilateral Contract Agreements*

The third type of international commodity agreement is the multilateral contract agreement. Under this scheme importer nations agree to purchase all or a stated portion of their imports from exporter members, and the exporters agree to supply the quantities agreed upon within a stated price range. Thus, in a time of shortage the exporters may not raise prices above the maximum stipulated in the agreement, and in a time of surplus importers must purchase the predetermined amount at a price not less than the minimum written into the scheme. As long as world prices fluctuate within the established range, however, the price mechanism of the agreement does not come into play and sales and purchases are at market prices.

The multilateral contract agreement represents a major post-war innovation in the technique of international commodity agreements. This type of agreement was introduced in the 1949 Wheat Agreement and has continued to be used by successive wheat schemes,[48] although

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former of these relies primarily on the buffer stock, while only imposing export quota restrictions when supply exceeds a pre-determined point, (arts. 33, 34 of the Tin Agreement); the latter relies primarily on the export quotas while viewing the buffer stock as a supplementary vehicle for the stabilization of the market acting both through direct intervention in the market and as a buyer to which members may sell their excess production at reduced prices. Articles 37-40 of the Cocoa Agreement.

48. Most recently in the Wheat Trade Convention of 1967, 19 U.S.T. 5501, T.I.A.S. No. 6537 [hereinafter cited as the Wheat Trade Convention], which, together with the Food Aid Convention of 1967, 19 U.S.T. 5772, T.I.A.S. No. 6537, formed the International Grains Arrangement of 1967. For an analysis of this treaty see Note, *Commodity Price-Fixing: the International Grains Arrangement of 1967*, 23 STAN. L. REV. 306 (1971). Both of the conventions were re-enacted in 1971. Wheat Trade Convention of 1971, 22 U.S.T. 820, T.I.A.S. No. 7144, and Food Aid Convention of 1971, 22 U.S.T. 971, T.I.A.S. No. 7144. However, the Wheat Trade Convention of 1971, unlike its predecessor, contained no price provisions or related rights and obligations. Hence, the references made in this article will be to the Wheat Trade Convention of 1967.

it has not been adopted for other commodities. The probable reason for this omission is that unlike export quota and buffer stock schemes, the multilateral contract agreement is not designed to govern all of the world trade in a commodity, nor even all of the member countries' trade. Instead, the multilateral contract agreement represents a form of mutual insurance between exporter and importer members. Thus, neither production nor exports are controlled, and a free market remains where prices can evince long-term tendencies in supply and demand.[49]

2. *Common Aspects of the Agreements*

a. *Participation*

Commodity agreements go beyond the principle of equal representation for importers and exporters and open participation for a broad spectrum of countries.[50] In order to encourage universal participation, the agreements uniformly include a provision permitting accession by member governments of the United Nations or of its specialized agencies on terms to be established by the organization in conjunction with the petitioning government.[51] No appeal from these terms is provided.[52]

All of the agreements also permit the voluntary withdrawal of members, but there is less uniformity than is true of accession provi-

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49. MACBEAN, *supra* note 2, at 286.

50. The agreements all encompass a politically and economically diverse group of nations. The Cocoa Agreement, for example, includes the United States, the Soviet Union, New Hebrides, Sierra Leone, South Africa and Poland. *See* Annexes A, B, C, D of the Cocoa Agreement.

51. *See, e.g.*, art. 64 of the Sugar Agreement.

52. While the stipulation that conditions for accession be agreed upon by the Council and the acceding party would seem to imply equitable terms, this conclusion has been questioned: "A newly developing area, while always having the strength of a potential competitor which might undermine the basis of the scheme, will frequently be at an undue disadvantage in negotiation with the established interests entrenched in the control authority." INTERNATIONAL LABOR OFFICE, INTERGOVERNMENTAL COMMODITY AGREEMENTS xlvii (1943).

To avoid any inequity that might result from such a disadvantage, the observer recommends that "provisions for an appeal . . . to a more general international authority" as to accession terms be instituted. *Id.* However, this recommendation was made prior to the widespread inclusion of importers in commodity agreements, and the architects of subsequent commodity agreements may have felt that the presence of both importers and exporters in the agreement is sufficient to insure against any abuse of the petitioning party. Such an assumption, does not seem warranted, for the importing countries will not necessarily champion the cause of the developing area against the exporting interests entrenched in the agreement. As a result, the suggestion that acceding parties be permitted to appeal to some international authority remains valid.

sions. Thus, three of the agreements, Cocoa,[53] Coffee,[54] and Sugar,[55] permit withdrawal at the unilateral discretion of a member, provided that the member gives short advance notice. The two other agreements, Wheat and Tin, attempt to impose guidelines as to what constitute valid reasons for withdrawal. These agreements provide that a member may withdraw either for national security reasons[56] or when an amendment to the original agreement has been enacted which the withdrawing member believes will adversely affect its interests.[57] The Wheat Trade Convention also permits unilateral withdrawal when a given country, to the prejudice of the withdrawing member, has refused to join, or has withdrawn from, the Convention.[58] Finally, the Tin Agreement allows withdrawal, but only with the consent of the Council, in situations where the withdrawing members have been economically damaged by another participating country.[59]

The provisions allowing withdrawal at the unilateral discretion of the withdrawing member have been criticized as being conducive to instability of the agreements, and it has been suggested that such withdrawal should be subject to the review of "some international authority."[60] However, only the Tin[61] and Sugar[62] Agreements contain provisions calling for the participation of outside authorities in situations involving the threatened withdrawal of a member, and in neither case does the decision-making role of that authority approximate that suggested.

Commodity agreements show their greatest flexibility in terms of participation by nation-states. There are provisions for group membership and for changing a member's classification from an exporter to an importer, or vice-versa.

The Coffee and Wheat agreements provide for the participation

53. Art. 71 of the Cocoa Agreement.

54. Art. 66 of the Coffee Agreement.

55. Art. 67 of the Sugar Agreement. The Tin Agreement, in addition to permitting withdrawal under the situations discussed *infra*, permits unilateral discretionary withdrawal, but only if the withdrawing member provides notification one year in advance. Art. 52(ii).

56. Art. 41(7) of the Wheat Trade Convention. As for the Tin Agreement, permission to withdraw for national security reasons seems implicit in art. 41(a)(ii) of the Agreement.

57. Art. 41(5) of the Wheat Trade Convention and art. 51(f) of the Tin Agreement.

58. Art. 41(6) and (8) of the Wheat Trade Convention.

59. Art. 41(c) and (d) of the Tin Agreement.

60. INTERNATIONAL LABOR OFFICE, INTERNATIONAL COMMODITY AGREEMENTS 52 (1943).

61. Art. 41(c) and (d) of the Tin Agreement.

62. Art. 69 of the Sugar Agreement.

of member groups. The Coffee Agreement permits exporter members to join the agreement as a group provided that they meet certain criteria.[63] The Wheat Agreement allows the participation of the European Economic Community as both an importer and an exporter.[64]

The Tin Agreement also contains a provision permitting a participating country to change its category from an exporter to an importer, or vice-versa.[65] The provision leaves to the Council the decision as to the new terms which will govern the country's participation in the Agreement, stipulating only that (a) the terms be equitable, and (b) if the change is from exporting to importing status, the changing country retains its rights to a refund upon liquidation of the stock.[66]

The final aspect of participation in commodity agreements is representation of non-state entities. Two types of provisions are made for inter-governmental organizations. First, all of the agreements contain a standard clause empowering the organization responsible for the agreement to consult and cooperate with other intergovernmental organizations,[67] as well as generally permitting the participation by invitation of these organizations as observers at meetings of the Council.[68] Second, two of the agreements, Tin and Cocoa, permit membership in the agreement, with voting rights in special

63. The provision permitting exporter group membership prior to the entry into force of the Agreement is art. 5. The criteria to be met were: (1) The parties to the proposed group must declare their willingness "to accept responsibility for group obligations in an individual as well as a group capacity." Art. 5(1)(a). (2) The parties must "subsequently provide sufficient evidence to the Council that the group has the organization necessary to implement a common coffee policy, and that they have the means of complying, together with the other parties to the group, with their obligations under the agreement." Art. 5(1)(b). (3) The parties must demonstrate either that they have been recognized as a group in a previous international coffee agreement; or that they have a common or co-ordinated monetary and financial policy along with the organs necessary for the implementation of such a policy. Art. 51(c)(i) and (c)(ii)(a), (b).

If these criteria were met, the member group would be considered to constitute a single member of the agreement for the purpose of voting and other important matters arising under the Agreement. Art. 5(2), (3), (4). Finally, the Agreement permitted members of such groups to withdraw and become separate members. Art. 5(5). (*See also* art. 6, permitting the creation of member groups after the Agreement was in effect.)

64. Art. 10 of the Wheat Trade Convention makes the European Economic Community a member of the Agreement "with all the rights and obligations deriving therefrom."

65. Art. 5 of the Tin Agreement.

66. Art. 5(c)(i) and (ii). Here, as in the case of accession, a provision for appeal to an arbitrator or other international authority from the terms established by the Council seems advisable.

67. *See, e.g.*, art. 21 of the Coffee Agreement.

68. *Id.*

circumstances, for inter-governmental organizations "having responsibilities in respect of the negotiation" of international agreements.[69]

Commodity agreements provide infrequently for the participation of private organizations. As one might expect from a vehicle which is regarded as the domain of governments, no agreement accords membership to private organizations. Only the Cocoa[70] and Sugar[71] Agreements contain clauses specifically empowering the organization responsible for the agreement to "make whatever arrangements are appropriate" for maintaining effective contact with "international organizations of . . . producers, traders and manufacturers," and only the Cocoa Agreement specifically permits the presence by invitation of private entities as observers at meetings of the Council.[72]

b. *Members' Obligations*

Membership in international commodity agreements entails a number of obligations. The first obligation is the duty of member countries to restrict their transactions in the commodity outside of the agreement. The restrictions imposed by the agreement fall into one of three categories: (1) restrictions on the quantity of the commodity that a member may import from non-members;[73] (2) restrictions on the terms that members may offer to, or accept from, non-members;[74] or (3) restrictions on the amount or timing of a member's

69. Art. 50 of the Tin Agreement and art. 4 of the Cocoa Agreement. With respect to voting, art. 4(2) of the Cocoa Agreement states: "Such intergovernmental organizations shall not themselves have any votes, but in the case of a vote on matters within their competence, they shall be entitled to cast the votes of their member States and shall cast them collectively. In such cases the member States of such intergovernmental organizations shall not be entitled to exercise their individual voting rights."

The definition of intergovernmental organizations which may join the Agreement as organizations "having responsibilities in respect of the negotiation" of international agreements appears broad enough to encompass both members' groups (*supra*, notes 63 and 64) and international organizations such as the FAO. Since the Cocoa and Tin Agreements are the two most recent international commodity agreements concluded, their inclusion of a provision that goes beyond mere observer status for intergovernmental organizations, but also allows their membership, may indicate an increasing tendency in commodity agreements to recognize the vital role played in international affairs by such organizations.

70. Art. 13(3) of the Cocoa Agreement.

71. Art. 12(3) of the Sugar Agreement.

72. Art. 14(2) of the Cocoa Agreement. However, the language of art. 21 of the Coffee Agreement seems sufficiently broad as to also permit the invitation of private organizations as observers.

73. These restrictions operate by limiting members to the amount they imported from non-members in a fixed, antecedent period. See note 33, *supra*.

74. This type of restriction requires that the member not deal with non-members on terms that are "commercially more favorable" than those established within the commodity agreement. See note 32 *supra*.

exports of the commodity outside the agreement.[75]

Despite these restrictions, commodity agreements as a rule have encountered great difficulty in regulating transactions between members and non-members, in part because many of these outside transactions involve long-term bilateral agreements already in effect at the inception of the commodity agreement,[76] and in part because these transactions often represent "concessional sales"[77] which are difficult to challenge on moral terms, as well as laden with political significance.

Second, the agreements require members to furnish the organization with such information as the organization deems necessary for the effective operation of the agreements. While the information required depends on the type of agreement involved, it usually includes reports on production and consumption, sales, prices, exports, imports, stocks and taxation.[78]

Third, members are responsible for the financing of the organization. This obligation is met through contributions assessed in proportion to the number of votes which the member casts within the organization, which in turn reflects the significance of the member in the trade regulated by the agreement.[79] Fourth, members agree to be bound by decisions of the organization as to matters allocated to its discretion under the agreement.[80] Finally, members commit themselves to conducting their trade policies in a manner conducive to the attainment of the agreement's objectives.[81]

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75. While the two prior types of restrictions are found in export quota agreements, this form of restriction appears in buffer stock and multilateral contract agreements. Here the objective is not so much to limit the members' transactions in the commodity as to minimize any ill effect that those transactions might have on other exporter members. These restrictions consequently limit themselves to either requiring that the members consult with the organization or with other members before disposing of their stocks, or to obliging members to limit their disposal of stockpiles or their sales on non-commercial terms to those transactions which do not interfere with other members' rights. *See* art. 24 of the Wheat Trade Convention, and art. 40 of the Tin Agreement.

76. These bilateral agreements are generally exempted from the terms of the commodity agreements by a standard clause in the latter permitting members to observe prior obligations. *See, e.g.*, art. 54(8) of the Cocoa Agreement. However, the Sugar Agreement specifically lists those "special arrangements" which are exempted from the application of its terms. Arts. 34-39 of the Sugar Agreement.

77. The phrase "concessional sales" refers to donations and sales that are made below the prevailing market rates. L. BARANYAI & MILLS, INTERNATIONAL COMMODITY AGREEMENTS 107 (1963). The Wheat Trade Convention defines "concessional sales" as including "features introduced by the government of a country concerned which do not conform with usual commercial practices." Art. 3(2) of the Wheat Trade Convention.

78. *See, e.g.*, arts. 56(2) and (3) of the Cocoa Agreement.

79. *See, e.g.*, art. 24 of the Coffee Agreement.

80. *See, e.g.*, art. 12(4) of the Cocoa Agreement.

81. One trade policy that is specifically enumerated in art. 44 of the Cocoa Agree-

c. *Organization and Administration*

International commodity agreements provide for a three-tiered administration consisting of a Council, an Executive Committee (or Board) and a Secretariat.[82]

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ment and art. 30 of the Sugar Agreement involves the duty of exporting members under these export quota agreements to pursue such a course of action in their sales and exports so as to not artificially restrict the supplies of the commodity available to importing members below the quotas established in the agreement. In the case of the Cocoa Agreement, this assurance of supplies is combined with an obligation to, in times of scarcity, give preference to importing member countries over non-members. Art. 44 of the Cocoa Agreement.

Another trade policy that is often articulated is that of increasing consumption, and/or reducing trade obstacles to consumption, in importing countries. *See, e.g.*, art. 50 of the Cocoa Agreement. These "obstacles" presumably include "tariffs, quotas, import monopolies and other administrative rules and practices." Art. 47 of the Coffee Agreement. Yet despite the inclusion of provisions articulating this objective, very little has been accomplished in terms of reducing obstacles to trade through commodity agreements. U.N. Doc. TD/180, vol. II, at 20, para. 45 (1972). This lack of accomplishment seems attributable to the failure of commodity agreements to include specific guidelines for the reduction of protectionist barriers.

The Members' obligation to conduct their trade policies in a manner conducive to the attainment of the objectives of the agreement implies a duty for member governments to restrain private concerns within their jurisdiction from behaving in ways inconsistent with those objectives. This implied duty is the sole provision that is to be found in international commodity agreements with respect to the behavior of private entities such as multinational corporations; commodity agreements have thus far refrained from including measures to be jointly adopted by importing and exporting members to regulate the behavior of private entities whose activities span the jurisdiction of both importing and exporting nations.

Finally, it should be noted that the preponderance of the obligations in commodity agreements (with the exception of multilateral contract schemes, which apportion duties equally to importers and exporters) falls on the exporting countries. Thus, in export quota agreements it is the exporters who must restrict their exports, while importers remain free of any similarly burdensome responsibility. This disparity in obligations between exporting and importing countries may reflect the historical and political context in which the various types of agreements have developed. Thus, both export quota and buffer stock approaches were first utilized in the pre-World War II period in agreements whose primary function was to alleviate the catastrophic effects of the depression on commodity exports, while the multilateral contract scheme was first adopted in the post-war period, when the approved objective of commodity agreements was price stability, not price support. As a result, export quota and buffer stock agreements may continue to be viewed as schemes whose primary beneficiaries are exporters, while multilateral contract schemes are perceived as equally benefitting all parties concerned. It is therefore understandable that the tendency in export quota and buffer stock schemes would be to place a disproportionate amount of the responsibility on exporters while multilateral contract agreements would tend to allocate the duties more even-handedly.

82. The Wheat Trade Convention also called for the establishment of a Prices Review Committee whose primary function was to review the situation when either price stability or the price minimum was threatened and suggest action to be taken by participants to remedy the situation. Art. 8 of the Wheat Trade Convention.

The Council is the principal policy-making body of the agreement. It comprises representatives of all the members; in this respect it is analogous to the assemblies of the specialized international agencies.[83] Decisions of the Council are reached through voting by the members' representatives. Votes are distributed in the same fashion in all of the agreements: the importing and exporting countries are each given an equal number of votes, one thousand, to be distributed among each group;[84] a maximum may then be established of up to four hundred, or four hundred and fifty, votes for any member country,[85] the votes being distributed in proportion to the member's significance in the world trade of the commodity as reflected either by its exports or imports,[86] or by its production and consumption tonnage.[87]

Decisions by the Council are taken by a "distributed" simple majority — that is, a majority in each of the importing and exporting groups — except where the agreement requires a distributed two-thirds majority.[88] In the latter situation, the possibility arises that one or two members, having between them more than one-third of the total number of votes within the exporting or importing group will obstruct a measure favored by the remaining members. To avoid this possibility, both the Coffee and Cocoa Agreements adopted a mechanism under which, if a proposal is blocked by the votes of three or fewer exporting members, the proposal may be resubmitted within

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83. Faucett, *supra* note 31, at 168-69.

84. *See, e.g.*, art. 27 of the Wheat Trade Convention.

85. The Tin Agreement sets a maximum of 450 votes (art. 8); the Cocoa Agreement, 300 votes (art. 10); the Sugar Agreements, 200 votes (art. 9); and the Coffee Agreement, 400 votes (art. 12). The agreements usually also mandate a minimum of 5 votes for any member. *See, e.g.*, art. 12(2) of the Coffee Agreement.

86. As in the Coffee Agreement (art. 12) and the Cocoa Agreement (art. 10).

87. As in the Tin Agreement (art. 11). Both the Sugar Agreement (art. 9) and the Wheat Trade Convention (art. 27) leave the apportionment of votes to the Council. The system of apportioning votes within the agreement in accordance with the individual countries' significance in world trade of the commodity, known as "weighed voting" is a "method . . . formulated since the war in order to resolve disputes which are not too 'political' or 'important' to foreclose any method except diplomacy, but are important enough that nations prefer to avoid their decision by impartial judges or arbitrators." S. METZGER, THE LAW OF INTERNATIONAL TRADE 1212 (1966) [hereinafter cited as METZGER]. This method, which was first adopted in commodity agreements in the International Wheat Agreement of 1949 (*Id.*, at 1215) has the advantage over a one-nation, one-vote system of "allocat[ing] influence on the basis of relative investment." *Id.*, at 1223.

88. The agreements prescribe a two-thirds majority for a handful of decisions whose importance is deemed to merit special treatment. Thus, for example, the Wheat Trade Convention requires a two-thirds distributed majority for decisions granting relief from the obligations of the Convention (art. 21); for decisions to accept new members (art. 38(2)); and for decisions to delegate the Council's powers to the Executive Committee (art. 26(5)). But the agreements differ as to what decisions require a two-thirds vote.

forty-eight hours by a distributed simple majority vote. If the opposition has decreased to two members still holding more than one-third of the votes within a group, the proposal may be revived within twenty-four hours. If at that time the opposition has further diminished to one member, the proposal is considered adopted regardless of the size of the holdout's vote.[89]

In addition to the Council, the agreements typically provide for the creation of an Executive Committee, comprising representatives of both exporting and importing countries,[90] to which the Council may delegate its duties and powers, with some key exceptions.[91] In addition, the agreements call for the appointment by the Council of a Secretariat whose function is to administer the agreement in accordance with the policies established by the Council. [92] The Secretariat is to have international status and is to refrain from taking instructions from any person or authority except the Council.[93] Furthermore, members of the Secretariat may not possess any financial interests in the world trade of the commodity governed.[94]

The Council is given legal personality, and the capability "to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings."[95] As a result, one observer has likened the International Tin Council to "a public corporate body, having proprietary rights in the buffer stock, evidenced by the capacity to operate it by purchase and sale of tin, with the accompanying issue of tin warrants."[96]

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89. *See* art. 12 of the Cocoa Agreement and art. 14 of the Coffee Agreement. The importance of this mechanism lies in its preventing a single major member from exercising an effective veto power over all other members. Given the obstacles to abuse of any member by a majority which are inherent in the distributed majority system of voting, such a veto power is unnecessary and is likely to result in more harm than good.

90. *See, e.g.*, art. 15 of the Cocoa Agreement.

91. Art. 17 of the Cocoa Agreement, for example, lists the following exceptions: (a) redistribution of votes; (b) approval of the administrative budget and the assessment of contributions; (c) revision of minimum and maximum prices; (d) exemption or inclusion of fine cocoa in the members' quotas; (e) determination of annual export quotas; (f) restriction or suspension of purchases by the buffer stock; (g) action relating to the diversion of cocoa to non-traditional uses; (h) relief from obligations under the Agreement; (i) decision of disputes; (j) suspension of members' rights; (k) establishment of conditions for accession; (l) exclusion of a member; (m) extension or termination of the Cocoa Agreement; and (n) recommendation of amendments to members.

92. *See, e.g.*, art. 20 of the Cocoa Agreement.

93. *Id.*, para. 8.

94. *Id.*, para. 7.

95. Art. 21(1) of the Cocoa Agreement.

96. Faucett, *supra* note 31, at 173.

d. *The Council's Powers*

All of the agreements contain a broadly worded clause empowering the Council to "exercise all such powers and perform or arrange for the performance of all such functions as are necessary to carry out the express provisions of this Agreement."[97] These powers and functions fall within one of three categories: (1) the collection and distribution of information on the trade of commodities; (2) consultation on the policy to be followed by the agreement; and (3) supervision of the agreement, including the enforcement of participants' obligations under it.

Collection and Distribution of Information. This category comprises four distinct types of activities: (a) the collection of information from member countries;[98] (b) the collection of information from other sources, including the promotion of scientific and technical research in commodity production or other aspects of commodity trade;[99] (c) the maintenance of records; and (d) the issuance of periodic reports on conditions of world commodity production and trade. Through these activities the councils, which are allowed broad discretion by the agreements, become valuable centers of information on world trade.

Consultation on Policy. Here four activities deserve elaboration: settlement of disputes, amendment of the agreements, taxation, and giving economic aid to members.

The settlement of disputes is said to be regarded in international organizations in the monetary and trade fields as ". . . essentially a matter for negotiation by the interested parties, which may comprise all members of the organization, a process of what has been well called 'organized persuasion,' rather than arbitral or judicial decision."[100] Commodity agreements are no exception to this observation. The distinguishing feature of the settlement of disputes in these agreements is that the mode of settlement is internal,[101] a quality

97. *See, e.g.*, art. 7 of the Cocoa Agreement.

98. The obligation of member countries to provide the Council with such information as it deems necessary for its operations has already been noted; see text accompanying note 81, *supra*. While the discretion of the Council as to what information it may solicit is largely unchecked, two of the agreements do impose restrictions. Thus art. 41(a)(i) of the Tin Agreement excludes a member country from having to "furnish any information the disclosure of which it considers contrary to its essential security interests;" and art. 55(2) of the Coffee Agreement protects the anonymity of the entrepreneurs in the world coffee trade by stating that "no information shall be published which might serve to identify the operations of persons or companies producing, processing or marketing coffee."

99. *See, e.g.*, art. 57 of the Cocoa Agreement.

100. Faucett, *supra* note 31, at 176.

101. *Id.*, at 175.

which may be attributed to considering dispute-settlement as a part of the normal administration of the agreement by members.[102]

The agreements generally provide a two-step dispute-settlement mechanism. The first step involves consultation among the disputing members, in the course of which, with the consent of the parties, the organization may be empowered to appoint an independent panel "which shall use its good offices with a view to conciliating the parties."[103] If these efforts fail, the second step is invoked and the matter is submitted to a third-party decision-maker which, with but one exception,[104] is the Council. While the Council may then at the request of either a majority of the members or of members holding no less than one-third of the total votes, refer the matter temporarily to an advisory panel,[105] the dispute will ultimately be decided by a distributed majority vote.[106] No appeal is provided.

For amendments, international commodity agreements contain two types of provisions. The first empowers the Council periodically to review and modify a specific aspect of the agreement, such as export quotas[107] or the price range of the buffer stock.[108] The second

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102. METZGER, *supra* note 90, at 1223.

103. *See, e.g.*, art. 58 of the Coffee Agreement.

104. The exception arises in the Coffee Agreement where, if consultation fails, disputes between members as to whether exporters are guilty of "discriminatory treatment in favor of processed coffee as compared with green coffee," are referred to an arbitration panel whose determination is final. Art. 44 of the Coffee Agreement.

105. *See, e.g.*, art. 61 of the Cocoa Agreement.

106. *Id.*

107. *See, e.g.*, art. 31 of the Cocoa Agreement.

108. *See, e.g.*, art. 29 of the Cocoa Agreement. Only two of the agreements—the Cocoa and Tin agreements—specifically empower the Council to revise the price objectives of the agreement. Each of these agreements contains two provisions dealing with the revisions of prices by the Council. The first of these provisions (art. 29 of the Cocoa Agreement and art. 19 of the Tin Agreement) gives the Council broad discretionary powers to modify the price objectives of the agreement. The second (art. 42 of the Cocoa Agreement and art. 29 of the Tin Agreement) is more narrowly drawn in that it limits itself to calling for possible Council action to change prices in case of "changes in exchange rates."

Art. 27 of the Coffee Agreement also seems to imply a similar power in the Coffee Council to change prices. But neither the Wheat Trade Convention nor the Sugar Agreement makes provision for its Councils to modify prices on its own, and presumably any price changes that might arise in those agreements would take place via the process of proposal and ratification discussed in the text with respect to amendments of the second type. While this second process is more cumbersome than that of the Coffee, Cocoa, and Tin Agreements, neither approach is likely to be conducive to price flexibility, for in both cases all price modifications (even those in the case of change in exchange rates under the Cocoa and Tin Agreements, *supra*) must be approved by a majority of both exporter and importer members, one of which groups will inevitably be adversely affected by any price change that may be instituted. This lack of price flexibility would seem to reduce the value and stability of commodity agreements in times of world inflation.

represents a broad delegation of power to the Council to recommend amendments of the agreement to member countries. However, in these instances the amendments become effective only if a sufficient number of member countries individually ratify them.[109]

As to the power to tax, both the Cocoa and Coffee Agreements permit the Council to levy a tax on members' transactions for purposes stated within the agreement, although the method of taxation and the purposes for the tax differs in each case. The Cocoa Agreement authorizes the Council to collect a tax of no more than one U.S. cent per pound "either on first export by a member or on first import by a member" in order to finance the buffer stock.[110] The Coffee Agreement calls for a "Diversification Fund," financed by a tax levied on major exporters' transactions, whose purpose it is to channel funds paid by a member country back to that country for use in developmental, non-coffee-related projects approved by the Fund.[111]

In addition to the standard services[112] that Councils provide for members of the agreements, two of the agreements permit the Council to provide forms of economic aid to its members. Article 44 of the Sugar Agreement calls for the creation of a "Hardship Fund" to be administered by the Council "which shall be available at its discretion to meet special cases of hardship among developing members which have sugar available for export over and above their permitted level of exports under the Agreement."[113] More importantly, the Cocoa Agreement uses its buffer stock to purchase excess production

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109. Under art. 75(1) of the Cocoa Agreement, for example, amendments must be ratified by at least 75 percent of the exporting members holding at least 85 percent of the votes of exporting members, and a similar number of importing members, before they go into effect. The question arises as to why amendments enacted under this second type of provision must be individually ratified by the members, whereas amendments under the first type need only be adopted by the Council. The answer lies in that amendments under the first type are narrowly delineated, with specific guidelines often incorporated into the agreement itself, while amendments under the second type may theoretically cover any aspect of the agreement. As a result, members are reluctant to, in the latter situation, surrender the power of amendment to the Council, for fear of having further undefined obligations imposed on them.

110. Art. 38 of the Cocoa Agreement.

111. Art. 54 of the Coffee Agreement represents the highwater mark of direct international economic planning, and concomitantly of the surrender of traditionally sovereign prerogatives of a member state, in the commodity agreements. Its objective is to limit the production of coffee so as to bring supply into balance with world demand.

112. Such as the informational services which the Council provides, noted *supra*.

113. Since art. 44 does not provide a separate method for the financing of the "Hardship Fund," that fund is presumably regarded as part of the Organization's budget and is financed by contributions from each member "in the proportion which the number of its votes . . . bears to the total votes of all the Members." Art. 22(2).

from members at reduced rates, thus softening the effect on members' economies of the export quotas imposed by the agreement.[114]

Supervision. Supervision of members' obligations under the agreement requires empowering the Council to apply a variety of sanctions for violations of those obligations. Commodity agreements endow the Council with discretion to impose a series of sanctions, including forfeiture of rights in the liquidation of the buffer stock,[115] reduction of member's export quota,[116] the suspension of voting rights,[117] and exclusion from further participation in the agreement.[118] Sanctions are generally imposed by a distributed two-thirds majority vote of the Council[119] and no appeal mechanism is provided.

e. *Variations Within a Commodity, Processed Products, and Substitute Products*

Commodities which are the subject of agreements may comprise

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114. Arts. 37-40 of the Cocoa Agreement. Two observations as to the operation of this buffer stock are in order. First, the stock acts as a safety valve, absorbing the excess production of members at rates which, while lower than those on the world market (so as to minimize any encouragement to increased production that the availability of this outlet would create) provide some reimbursement, thereby lessening the pressure that the members might otherwise feel to abandon the Agreement. Second, the stock operates differently from the traditional buffer stock in that while both are authorized to sell their resources on the world market in defense of a maximum price, the traditional buffer stock defends the minimum price by purchasing at large on the world market, while the buffer stock in the Cocoa Agreement limits itself to buying directly from its members.

The effect of this limitation is to restrict the economic assistance which the Council provides to members of the Agreement, although both members and non-members theoretically benefit from the price conditions which the Agreement creates on the world market. This restriction to members of the economic assistance provided by the Council, which parallels a similar limitation in the Sugar Agreement's "Hardship Fund" (discussed in the text, *supra*), logically has the effect of acting as a further inducement for exporting countries to join the Agreement.

In terms of economic assistance, commodity agreements are not limited to provisions calling for aid from the Council to members, but may also implicitly encourage or explicitly provide for country-to-country assistance. The implicit encouragement most often takes the form of excluding, within limits, charitable donations of the commodity from the computation of a member's quota. *See, e.g.*, art. 43 of the Sugar Agreement. As to explicit provisions for country-to-country aid, the most striking is the Food Aid Convention of 1967 and 1971, *supra* note 48, which, as the flip-side of the Wheat Trade Convention in the International Grains Arrangement of 1967 and 1971, is dedicated exclusively to committing exporting countries to providing a fixed amount of aid, either in cash or in food, to developing countries. Consequently, the concept of aid is not alien to commodity agreements.

115. *See, e.g.*, arts. 23(b) and 32(a) of the Tin Agreement.

116. *See, e.g.*, art. 38 of the Coffee Agreement.

117. *See, e.g.*, art. 62 of the Cocoa Agreement.

118. *See, e.g.*, art. 72 of the Cocoa Agreement.

119. *See, e.g.*, arts. 59(7) and 67 of the Coffee Agreement.

different types of the same product. International commodity agreements recognize these differences and make allowances for them. For example, the Wheat Trade Convention provides price ranges for thirteen types of wheat and calls for price adjustments depending on the transportation costs between the country of origin and the country of destination.[120]

None of the multilateral contract or export quota agreements establishes quotas for particular types of a commodity, leaving to the members' discretion what types they will export or import. The Sugar[121] and Cocoa[122] Agreements, however, exclude certain variations of the commodity from the terms of the agreement, with the proviso that these variations may be brought under the regulation of the agreement should their trade increase to levels that threaten to disrupt the agrement. The Coffee Agreement, while not differentiating between the various types of coffee in assigning export members' original quotas, does empower the Council "to adopt a system for the adjustment of annual and quarterly quotas in relation to the movement of the prices of the principal types of coffee."[123]

In terms of processed products of a commodity, the export quota and multilateral contract agreements have two common characteristics. First, they provide that processed product exports of the commodity be included in determining a member's obligations under the agreement.[124] Second, none establishes prices for processed products, probably because of the difficulty of reaching agreement upon, and enforcing, a scheme of prices for the numerous processed products that may be made from a given commodity.[125]

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120. Art. 6 of the Wheat Trade Convention.

121. Art. 2(15)(a) and (b) of the Sugar Agreement.

122. Art. 33 of the Cocoa Agreement.

123. Art. 37(2) of the Coffee Agreement. This flexible provision permits the Council to react to variations in demand reflecting changes in consumer tastes by increasing or decreasing the supply of each type of coffee.

124. Art. 2(1)(cc) of the Wheat Trade Convention; art. 2 of the Cocoa Agreement; art. 2(15) of the Sugar Agreement; art. 2(1) of the Coffee Agreement.

125. The combination of these two characteristics raises the possibility that exporting members, in meeting their quota obligations under the agreements, will choose to export nothing but processed products, and that in order to do so they will institute various schemes (such as subsidies) to make these products more attractive to importers. Such a policy is disruptive of the agreement in two ways. First, it is likely to create tension between importers and exporters, both of which desire the increased employment and balance-of-payments advantages that accompany having the refining and processing of the raw materials done within their national boundaries. Second, the danger arises of price competition in processed products between the exporting members of the agreements.

All of the agreements confront these possibilities in the same way. First, the agreements contain a provision either denouncing the use of subsidies (*see, e.g.*, art.

Finally, the term "commodity" can encompass substitutes for the commodity concerned.[126] Commodity agreements, however, have done very little to regulate the development and use of substitute products, again probably because of the complexity of attempting to do so. Consequently, only the Cocoa[127] and Coffee[128] Agreements contain provisions calling for members to regulate the use of substitutes within their territories.

IV. TOWARD AN INTERNATIONAL PETROLEUM AGREEMENT

A. *The Desirability of an International Petroleum Agreement*

Given the desirability of cooperative action between petroleum-exporters and -importers, there are two reasons why that action should take the form of an international commodity agreement on petroleum.

First, of the different vehicles available for cooperative action between exporters and importers, only an international commodity agreement would permit the problems of the world petroleum industry to be viewed and dealt with as a comprehensive whole. This assertion can best be understood by analyzing the two alternative forms of cooperative action available—bilateral agreements, and multilateral agreements limited to select aspects of the industry.

Bilateral agreements between petroleum-exporters and -importers became popular in early 1974. Thus, in January 1974, France and Saudi Arabia announced the conclusion of an agreement under which Saudi Arabia will provide France with 800 million tons of oil over 20 years in return for "armaments, military aircraft, and other kinds of equipment."[129] Similar highly publicized agreements have been concluded between France and Iran,[130] and Iraq and Japan,[131] although in each of these cases the consideration provided by the importer has differed.

Since, theoretically, there are no limitations as to what areas of the world petroleum industry these agreements might cover, a network of bilateral agreements constitutes a plausible system leading to the resolution of the problem areas of the world petroleum industry and, consequently, to the stability of that industry. In addition, bilat-

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50 of the Sugar Agreement), or calling for prices of processed products to be consistent with the raw material prices established in the agreement (*see, e.g.*, art. 7 of the Wheat Trade Convention). Second, if a dispute arises, the dispute-settling procedure delineated in the text accompanying notes 101-06, *supra* is invoked.

126. See note 27, *supra*.

127. Art. 52 of the Cocoa Agreement.

128. Art. 52 of the Coffee Agreement.

129. PETROLEUM TIMES, Jan. 11, 1974, at 3.

130. N.Y. Times, June 28, 1974, at 1, col. 1.

131. N.Y. Times, Aug. 17, 1974, at 29, col. 6.

eral agreements possess certain intrinsic advantages over multilateral agreements: they may be readily adapted to the unique conditions of the individual participating countries, and they may be easier to negotiate than multilateral agreements. Nevertheless, a system of bilateral agreements would also have disadvantages. First, such a system would be likely to result in a patchwork arrangement for the world petroleum industry that might be both chaotic and destabilizing. Second, a bilateral agreement approach might well victimize the smaller importers, who have little to offer in return for the petroleum they need; these nations might find it either difficult to supply their needs or to do so only on usurious terms.

The second alternative would be a multilateral agreement (or a series of such agreements), on select facets of the industry. An example of such an agreement would be an international price agreement. This type of agreement, too, possesses inherent advantages and disadvantages when compared to the other alternatives. Thus, a multilateral agreement limited to select facets of the industry is preferable to a system of bilateral agreements in that the multilateral agreement would be more likely to provide a uniform approach to those facets of the industry, and less likely to exclude any interested parties. Similarly, a multilateral agreement limited to select facets of the industry might be easier to negotiate than the more comprehensive international commodity agreement. On the negative side, however, a multilateral agreement limited to select facets of the industry might, by failing to encompass other interrelated facets of the world petroleum industry, contain the seeds of its own destruction. As an example, an international price agreement that fails to stipulate an accepted system for adjusting supply to demand is likely to eventually collapse. This lack of comprehensiveness could of course be cured through the conclusion of a series of these agreements, each limited to a select number of issues.

This approach, too, has a major drawback: it may be more difficult to reach agreement separately on the various troublesome aspects of the industry than to do so by attacking them collectively. Thus, an international commodity agreement on petroleum provides the only alternative that would guarantee both universal participation and a concurrent assault on the various problem areas of the world petroleum industry.

Second, the conclusion of an international commodity agreement on petroleum would enhance the stature of commodity agreements as vehicles for the rational international supervision of world trade, both as a result of the petroleum agreement's mere existence, and as a result of new approaches to commodity agreements that the petroleum agreement could incorporate. This enhanced stature might then

facilitate the conclusion of similar agreements in other commodities, thereby assisting the exporters and importers of those other commodities to balance their needs and avoid severe confrontations or trade breakdowns.[132]

B. *Suggested Structural Components of an International Petroleum Agreement*

1. *Type of Agreement*

The first issue is identification of the type of agreement most suitable to petroleum trade. Of the three possibilities — buffer stock, multilateral contract, or export quota — the buffer stock may be dismissed because the objective of a petroleum agreement would be price support, not price stability,[133] and buffer stock agreements are only suited for the latter objective;[134] and because the costs of creating and operating a petroleum buffer stock would be astronomical.

Since the purpose of multilateral contract agreements is to provide a form of "mutual insurance" between exporters and importers by guaranteeing each a fixed volume of purchases and sales within a predetermined price range, while permitting a free market where prices can evince long-term tendencies in supply and demand, the applicability of this type of agreement to the world petroleum trade is questionable, since that part of the petroleum trade not covered by the agreement, rather than operating in a free market, would undoubtedly continue to be the object of attempted monopoly by the exporting countries. As a result, not only would the policy underlying the agreement not be realized, but the conflict and uncertainty that might arise in that part of the trade not covered by the agreement could well permeate the agreement and impede its operation.

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132. In the case of certain commodities, such as copper and perhaps bauxite, it might prevent possible abuse of consumers by staying the creation of exporters' cartels such as OPEC. N.Y. Times, Nov. 20, 1974, at 61, col. 1; *Id.*, Nov. 13, 1974, at 61, col. 1; *Id.*, Nov. 6, 1974, at 67, col. 2; *Id.*, Jan. 26, 1975, § 3, part II, at 47, col. 1. For an analysis of the attributes necessary in a mineral for an exporters' cartel to be effective see Varon & Takeuchi, *Developing Countries and Non-Fuel Minerals*, 52 FOREIGN AFFAIRS 497 (1974). For a debate on the probability of further commodity cartels, see Bergsten, *The New Era in World Commodity Markets*, 17 CHALLENGE, no. 4, at 34; and Mikesell, *More Commodity Cartels Ahead?*, 17 CHALLENGE, no. 5, at 24. In the case of other commodities, for which the OPEC model is not feasible, it might allow those developing countries whose economies are dependent on those commodities a fair and stable return on their exports, in accordance with principles set forth in the *Charter of Economic Rights and Duties of States*, U.N. Doc. A/C 2/L 1386 (1974) and reaffirmed both at the Dakar Conference of early 1975 by ministers representing 110 developing nations (N.Y. Times, Feb. 6, 1975, at 4, col. 4, and in the Lome Convention, N.Y. Times, Mar. 1, 1975, at col. 1).

133. This would be true even though the world petroleum price incorporated into the agreement might be lower than current prices.

134. As noted in text accompanying note 45, *supra*.

There remains then, the export quota type of agreement; it is this form of international commodity agreement that is best suited to the world petroleum trade. Not only would an export quota petroleum agreement permit the parties to pursue a price support objective by adjusting supply to demand, but petroleum is a product which lends itself to this type of agreement, as its production can be predicted due to its lack of susceptibility to variations in harvest or weather.[135]

The first obstacle to be surmounted in constructing a petroleum export quota agreement would be the divination of a generally acceptable formula for the allocation of export quotas among the exporting countries. This task, which was unsuccessfully undertaken in 1965-1966 and 1966-1967 by the member countries of OPEC,[136] may be difficult. There are, however, two factors that might bring success in a current attempt to regulate production through an international petroleum agreement, but were not available in the previous unsuccessful efforts by OPEC. The first is that importing countries, as members of the agreement, could exert a positive influence on recalcitrant exporters both in the negotiations and in the subsequent policing that would be necessary to enforce the agreement. The second is that various exporting countries — which since 1966 have grown increasingly alarmed at the possibility of depleting their petroleum reserves in the near future — are likely to be more receptive now than in the past to limitations on the amounts they export, provided they receive an acceptable price for their product. Nevertheless, unless the petroleum agreement encompassed a high proportion of the world petroleum trade, it would be necessary to impose limitations on the

135. Given the predictability with which petroleum production can be controlled, a combination export quota-buffer stock agreement would not be appropriate for three reasons. First, because, unlike the cocoa trade (see note 118, *supra*), there should be no need for a stock to absorb accidental excess production by member countries. Second, it would be inappropriate since a stock's intervention on the world petroleum market in order to compensate for inaccurate projections as to world demand would not be necessary, both because inaccuracies on the supply side will be minimal and because those inaccuracies that do arise can be dealt with by drawing on members' reserve stocks pending modification of export quotas. Third, because in view of the limited utility of a supplementary buffer stock, the monetary cost and additional administrative complications that it would bring would not be justified.

136. The 1965 and 1966 OPEC production programming plans rejected the historical market share formula generally adopted in export quota agreements (noted in text accompanying note 36, *supra*), but rather involved six factors which were weighed equally in computing a country's quota: area; petroleum reserves; population; average historical rate of petroleum production growth; percentage oil income in government revenue; and total expenditure and development. For an analysis of this unsuccessful attempt to regulate production see Chapter 5, "The Joint Regulation of Production," in MIKDASHI, *supra* note 6, at 111.

amount of trade[137] and on the conditions of trade[138] between members and non-members.[139]

There are several considerations that would go into the computation of the price structure for a petroleum commodity agreement. First, the negotiations would have to take into account the complex price structure that now governs the world crude petroleum trade, a structure that not only makes allowance for such factors as the quality of the petroleum involved and the proximity of an exporting country to major importer markets,[140] but which in many OPEC nations also comprises three separate price formulas, each applicable in different circumstances.[141] However, insofar as other commodity agreements have successfully managed to deal with similar price eccentricities,[142] the complexity of the world crude petroleum price structure should not prove a bar to an agreement. Second, while exporting and importing countries may differ as to what constitutes an equitable petroleum price, the variance may not be as large as one would initially expect, for many importing countries share an interest with the exporting nations in high petroleum prices. This interest stems, in the case of the developed importing countries, from the fact that high world petroleum prices justify those countries' costly attachment to,

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137. As has been true in past export quota agreements. See text accompanying note 33, *supra*.

138. As has been true in past export quota agreements. See text accompanying note 32, *supra*.

139. As was observed at note 33 *supra*, the ideal provision in terms of maximum inducement for countries to join the agreement would be one barring member-non-member transactions. However, such an extreme measure might not be politically feasible.

Regardless of what type of provision is enacted, it will be necessary to institute a mechanism similar to that of the Coffee and Cocoa Agreements (*supra*, note 34), calling for the certification of exports, if restrictions on member-non-member trade are to be enforced.

140. MIKDASHI, *supra* note 6, at 209.

141. The three formulas are, first, the posted price, which is in effect a legal fiction used by the petroleum-exporting countries to calculate tax and royalty payments due from the oil companies on petroleum which the companies produce and keep, N.Y. Times, Dec. 20, 1973, § 4, at 1, col. 1; second, the "buyback price," which applies to that petroleum which, while produced by the oil companies, belongs to the exporting nations as a result of participation agreements reached between the two parties, and which is bought back by the oil companies (Levy, *supra* note 14, at 691); and third, the open market price, applicable to that participation crude which is not bought back by the oil companies, as well as other petroleum sold by the exporter nations or the companies on the open market. It is this last price that has undergone the most severe fluctuations in the past year. *See, e.g.*, N.Y. Times, July 4, 1974, at 25, col. 2.

For an exhaustive analysis of the pricing of crude petroleum see T. RIFAI, THE PRICING OF CRUDE OIL (1974).

142. See text accompanying note 124, *supra*.

and development of, domestic energy sources such as coal;[143] and because there are important exporting interests within the developed nations that stand to benefit substantially as a result of the exporting countries' new wealth.[144] As to the developing importing countries, their lack of opposition to high petroleum prices, as manifested in their lack of public criticism of the OPEC price hikes of recent years, may be due to both a sense of identification with the petroleum exporters, many of whom have traditionally been regarded as members of the Third World bloc, and to a hope that the successful action taken by the petroleum exporters might somehow translate into higher prices for other commodities which they, the developing importing countries, export. Finally, mutual concessions in the negotiating process might lead to an acceptable compromise on pricing mechanisms.[145]

2. *Participation*

Participation in the agreement should be open to any country wishing to join.[146] In order to facilitate universal participation, the agreement should permit accession by an interested country. In addition, while the terms for accession should initially be negotiated by the Council and the petitioning party, dissatisfied petitioners should be permitted to submit the terms to arbitration.[147]

With respect to the unilateral withdrawal of members, the agreement should be as restrictive as possible. Ideally, this policy would translate into a requirement that the withdrawal of a member be subject to the approval of an independent international authority.[148]

The agreement should also contain a provision permitting member countries, if the situation warranted, to change their

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143. M. ADELMAN, THE WORLD PETROLEUM MARKET 250 (1972) [hereinafter cited as ADELMAN]. Particularly noteworthy in this regard is the floor price on petroleum proposed by United States Secretary of State Kissinger to make alternative forms of energy competitive and to encourage the development of high-cost petroleum fields. N.Y. Times, Feb. 4, 1975, at 1, col. 4, and at 3, col. 1. This proposal, which would facilitate price negotiations between exporters and importers by reducing the gap between the objective they each espouse (N.Y. Times, Feb. 5, 1975, at 7, col. 1), has now been accepted by other major petroleum importing countries. N.Y. Times, Mar. 21, 1975, at 1, col. 5.

144. ADELMAN, *supra* note 143, at 260.

145. Such as the price-escalator clause discussed in text accompanying notes 166-67, *infra*.

146. This should be true whether the country is an exporter or importer, as has been true of past commodity agreements. See text accompanying note 50, *supra*.

147. Such a provision is designed to prevent any possible abuse of petitioning countries with respect to the terms granted them by the nations which are already members of the agreement. See note 52, *supra*.

148. So as to reduce the instability that may result from permitting the discretionary withdrawal of members. See text accompanying note 60, *supra*.

classification from importer to exporter or vice-versa.[149] Such a provision would allow the continued participation of countries such as Great Britain and Norway which, while currently petroleum-importers, are expected to become exporters within a few years.

Group membership should be allowed, permitting members of OPEC and of the International Energy Agency to join, should they so choose, as a group.[150] Inter-governmental organizations with an interest in the negotiation of commodity agreements should also be accepted as members as they were in the Tin and Cocoa Agreements,[151] so as to recognize the vital role played by such organizations in international affairs. Finally, the international oil companies should be granted permanent observer status at all meetings of the new petroleum organization. Such status, which surpasses any status for private organizations granted by the commodity agreements analyzed earlier,[152] would represent an acknowledgement of the importance of the international oil companies in the world petroleum trade and of the valuable knowledge and experience that they possess and could bring to a cooperative effort to regulate the world petroleum trade.

3. *Members' Obligations*

The obligations of participating countries should include the following:[153] (1) members would be expected to finance the organization administering the agreement through their contributions, which would be apportioned in proportion to the number of votes to which the member is entitled in the agreement;[154] (2) members would provide the organization with such information as it deems necessary for its effective operation;[155] (3) members would be bound by all decisions reached through the decision-making process established within the agreement;[156] (4) exporting members would guarantee importing members a steady supply of petroleum;[157] (5) importing members

149. This is true of the Tin Agreement, see text accompanying note 65, *supra*.

150. Such group membership has been accepted in past commodity agreements. See text accompanying note 63, *supra*.

151. See text accompanying note 69, *supra*.

152. See text accompanying note 72, *supra*.

153. These do not include those other obligations incumbent in the type of agreement utilized, as noted in text accompanying notes, 136-145, *supra*.

154. This has been found in past agreements. See text accompanying note 79, *supra*.

155. This has been found in past agreements. See text accompanying note 78, *supra*.

156. This has been found in past agreements. See text accompanying note 80, *supra*.

157. Through their acquiescence to this provision, a *sine qua non* of importing country participation, the exporting countries would forego the future use of their "oil

would commit themselves to reducing protectionist barriers to trade in refined petroleum products;[158] and (6) should the participating

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weapon" and would accede to the depoliticization of this vital commodity. The provision might be patterned on art. 44 of the Cocoa Agreement and art. 30 of the Sugar Agreement, discussed in note 81, *supra*. It should be noted that the communique issued at the close of the March meeting of leaders of the OPEC countries affirmed the "readiness" of these countries, "to insure supplies that will meet the essential requirements of the economies of developed countries provided that the consuming countries do not use artificial barriers to distort the normal operation of the laws of demand and supply." N.Y. Times, Mar. 7, 1975, at 12, col. 2.

158. The issue of access to import-markets for refined products, while not as publicized as other issues within the petroleum industry, is one that should be confronted by any petroleum agreement concluded, for if left disregarded it might eventually disrupt any amicable structure imposed on the world petroleum industry.

Since World War II there has been a steady trend towards locating petroleum refineries near consuming areas rather than near sources of petroleum production. Thus, while in 1939 some 70 percent of the world refining capacity outside North America and the Communist countries was near the petroleum fields, by 1965 this figure had dropped to 16 percent. E. PENROSE, THE LARGE INTERNATIONAL FIRM IN DEVELOPING COUNTRIES: THE INTERNATIONAL PETROLEUM INDUSTRY 82 (1968). The reazons for this trend were: (1) the rapid increase in demand for a variety of refined products, which made the construction of refineries in consumer countries economic; (2) the development of large tankers, which favored the shipment of crude petroleum rather than the more costly shipment of refined products in smaller tankers; (3) the desire of importing countries to lessen foreign exchange costs by importing the less expensive crude instead of refined products; (4) the fact that from a strategic point of view the import of crude petroleum is somewhat more secure than the import of refined products; (5) the economic advantages for the refining industry of processing a package of crudes of different types with complementary characteristics close to the market, compared to refining at crude oil production centers where generally less intake flexibility is available; and (6) the importer country's desire for the profits available in the refining activity. OECD, *supra* note 12, at 93, and at 73.

To spur the construction of refineries within their domain, importing country governments have often imposed import duties on finished petroleum products. *Id.*, at 93. These duties, which are both far more common and higher than similar duties on crude petroleum (U.N. Doc. TD/97, vol. II, at 30, para. 222, 223 (1968)), have the effect of discouraging world trade in refined petroleum products. As a result:

> The share of refined products in total petroleum trade has been declining. In 1965, refined products represented about eight percent of the total net petroleum imports of Western Europe, compared with 13 percent in 1960 and 31 percent in 1950. This drop was more pronounced in the case of EEC countries. In fact, this group of countries has recently become a net exporter of refined products.

Id. at 93. There are indications that the petroleum-exporting countries, anxious to industrialize their economies and provide domestic employment, as well as apprehensive lest their lack of control over the petroleum refining process reduce their control over this valuable resource, will in the future increasingly insist on the right to export refined petroleum products as well as crude petroleum. OECD, *supra* note 12, at 102; N.Y. Times, Jan. 26, 1975, § 3, part II, at 46, col. 4, and § 3, part IV, at 88, col. 1; *Id.*, Feb. 22, 1975, at 33, col. 1. The importing countries and oil companies will be reluctant to permit this for the same reasons that originally led them to move the refining capacity from the exporting areas to the importing areas. Nevertheless, an accomoda-

countries find it advisable, the agreement could contain specific guidelines either governing the rate of growth of petroleum consumption by, and/or establishing import quotas for, importing countries.[159]

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tion does seem possible, if only because the opposition of the importing countries is likely to be tempered by two problems surrounding the expansion of refinery capacity within their jurisdiction: "environmental pollution, and the increasing difficulty in finding suitable sites for the refinery capacity expansion required to meet future growth." OECD, *supra* note 12, at 102.

Past commodity agreements have included provisions calling for the reduction of protectionist barriers to trade, but these provisions have been ineffective. *See* note 81, *supra*. This ineffectiveness has stemmed from the failure of those provisions to articulate specifically the importer's duty to reduce barriers to trade, and this mistake should be avoided in any international petroleum agreement concluded. As one source writes:

> Any assurances as to access to markets or as to the reduction of trade barriers in respect of commodities covered by, or proposed to be made subject to, international commodity agreements might appropriately be incorporated in those agreements. While an attempt to include provisions regarding the terms of access to the markets of protectionist developed countries may make the conclusion or re-negotiation of such agreements more difficult than would otherwise be the case, the objective of increased access may well be regarded as sufficiently important to warrant such attempts. Moreover, international commodity agreements would seem to provide a very suitable multilateral instrument for the incorporation of undertakings as to access and if possible, partially compensating undertakings by developing and other exporting countries. U.N. Doc. TD/97, vol. II, at 82, para. 81 (1968).

A necessary concomitant of importing country reductions of trade barriers would be a provision modeled on art. 44 of the Coffee Agreement (*supra*, note 104) to prevent exporting country discriminatory treatment in favor of processed products. *See also* note 125, *supra*.

159. While arts. 57(d) and (f) of the Havana Charter listed "the equitable distribution of a primary commodity in short supply" and the protection of "the natural resources of the world . . . from unnecessary exhaustion" as two of the accepted objectives for international commodity agreements, the agreements drafted since World War II have, for lack of necessity, paid little attention to those objectives. Perhaps it is time, now that we are entering an era of apparent scarcity in various raw materials to revive these objectives and utilize commodity agreements for the allocation of commodities in short supply.

Whether petroleum is one of these commodities or not is a difficult question to answer. Thus, while estimated world petroleum reserves range up to 2,000 billion barrels (NATIONAL ACADEMY OF SCIENCES, RESOURCES AND MAN 194 (1969)), sufficient to last—at current rates of consumption, 18 billion barrels a year—for over 100 years, proven world petroleum reserves are about 600 billion barrels, or only enough to last about 30 years. N.Y. Times, Oct. 27, 1974, § 4, at 2, col. 1. Furthermore both figures as to how long the estimated and proven reserves will last assume that consumption will continue at present levels, rather than increasing steadily as has been true in the last decade. *See* note 12, *supra*.

Given the tenuous nature of estimates as to possible world petroleum reserves, and the lack of certainty as to whether alternative sources of energy capable of replacing petroleum will be developed within the next 30 years, member countries of an international petroleum agreement might decide to limit the rates of growth of world petro-

In addition, the agreement might include provisions governing select aspects of the relationship between the international oil companies and member countries, and/or establishing a permanent forum within the context of the agreement for the exchange of information between the petroleum-exporting and -importing countries as to the operation of the companies.[160]

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leum consumption by incorporating specific guidelines into the agreement. Should that be the case, those guidelines must take into account the striking disparities between petroleum consumption in the developed and developing countries, and the fact that the latter group of countries will need proportionately larger amounts of energy if they are to advance their retarded economic development.

Even if it is deemed that there is no impending world shortage of petroleum, exporting countries may insist on the limitation of developed country consumption of petroleum. The reason for this insistence is simple: some two-thirds of the world's proven petroleum reserves are located in the OPEC countries, and certain of these countries may be reluctant to permit the continued "wasteful" consumption of their most valuable resource by the developed importing countries. (For overtones of this attitude, see Amuzegar, *supra* note 1, at 676, and the communique issued by OPEC after the March meeting of leaders of OPEC nations, N.Y. Times, Mar. 7, 1975, at 12, col. 2). Of course, if petroleum prices remain high, the exporting countries may be persuaded to abandon any efforts in this direction, both because of the value that they would obtain for their petroleum and because of the reduced world consumption of petroleum that high prices would imply.

Should a reduction in petroleum consumption be deemed desirable, it could be achieved through one of two methods, or through a combination of the two: (a) by incorporation into the agreement of specific guidelines as to acceptable rates of growth for petroleum consumption in particular countries or groups of countries; and (b) by establishing import quotas. The appropriateness of each of these methods would depend on whether the reason for its (their) application was exclusively a concern that the exporting countries' reserves would be exhausted (in which case the imposition of import quotas should suffice); or, rather a concern with the possible over-all depletion of world petroleum reserves (in which case it would be desirable to implement a more widespread system for limiting global petroleum consumption applicable, albeit with variations, to all countries).

160. While the past few years have witnessed a precipitous decline in the role played by international oil companies in the world petroleum industry, these companies will continue to play an important part in the future development of that industry. Levy, *supra* note 13, at 694.

Given the continued significance of the oil companies, any attempt to stabilize the world petroleum industry must delineate the niche that the companies will occupy in that industry, at least to the point of eliminating the major sources of friction that may arise between exporting and importing countries as a result of the companies' operations.

The future role of the oil companies cannot be determined unilaterally by the importing or the exporting countries. Indeed, the oil companies are the very prototype of the multinational corporations about which a recent U.N. report stated:

> Since the tensions and conflicts that arise from the operations of multinational corporations are international in character, programmes which are limited to one side or to only some of the parties concerned are unlikely to be adequate. In fact, some of the programmes, though desirable from the point of view of the initiator, may generate a series of reac-

4. *Organization and Administration*

The organizational structure of the proposed international petroleum agreement could be patterned on that of past commodity agreements, a structure that has historically been acceptable to participating nations.[161]

5. *The Council's Powers*

The international petroleum agreement's Council should be empowered to, first, collect and distribute information on the world petroleum industry and on related energy matters.[162] In this respect the Council should act to coordinate the efforts of both exporting and importing countries to develop alternative sources, thus avoiding unnecessary duplication of effort; and it should suggest means whereby the enormous revenues being absorbed by the petroleum-exporting countries may be channeled into the campaign to develop new energy resources for the future.[163]

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tions which are not entirely predictable.

Thus, efforts to raise the bargaining power of one side may induce the other to take similar action. This is especially the case in the longer-run, as has been frequently illustrated in the field of raw materials, where substitutes may be developed and sellers'monopolies may nurture buyers' monopsonies.

Moreover, it is not always possible to ensure even that a one-sided measure will benefit the side it was designed to protect. The success of certain host countries in obtaining larger revenues from multi-national corporations may be accompanied by price increases which would shift the burden to consumers, including many developing countries, rather than result in a reduction of the corporation's profits.

International measures are clearly necessary to achieve a balanced and more equitable solution. Those which appear to be ripe for immediate consideration are briefly assessed below.

U.N. Report on Multinational Corporations in World Development (Chapter IV, "Towards a Programme of Action"), U.N. Doc. ST/ECA/190 (1973); also found in 12 INT'L LEGAL MATERIALS 1109 (1973).

Among the "ripe" international measures which the report goes on to recommend is the establishment of a forum for discussion and the harmonization of national policies, particularly in the area of taxation. Both of these measures could be incorporated into an international petroleum agreement, along with other provisions to govern future agreements between the companies and host countries, as well as guarantees that such agreements would not be unilaterally modified.

The incorporation of such provisions in an international petroleum agreement would mark a radical departure from past commodity agreements which, as is noted in note 81, *supra,* have left the control of corporations to the unilateral discretion of member countries, and would establish a precedent for future commodity schemes.

161. For a discussion of that structure see II (B) (3), *supra.*

162. This is true of the Councils in previous commodity agreements. See text accompanying note 97, *supra.*

163. The huge amounts of capital that will be necessary just to meet projected increases in petroleum demand for the 1970's are documented in OECD, *supra* note

Second, while disputes that cannot be settled by the disputants should be referred to the Council, decisions made by the Council should be appealable to a third-party arbitrator outside of the agreement.[164]

Third, in terms of amendment, the Council should be endowed with powers similar to those of Councils in past agreements,[165] with one exception: rather than leaving the amendment of petroleum prices exclusively to the discretion of the Council, the agreement should contain an escalator clause linking petroleum prices to an index of world inflation,[166] as well as a provision for the automatic adjustment of prices in case of a revaluation of the currency in which the prices are articulated.[167]

Fourth, the Council should be empowered to levy a tax on member's petroleum transactions,[168] and to apply the proceeds of this tax

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12, at 18, 157. Jahangir Amuzegar has suggested that surplus petrodollars could be invested to provide this capital. Amuzegar, *supra* note 1, at 688.

164. This is unlike what has hitherto been true. See text accompanying note 100, *supra*. ". . . The interpretation of treaties is essentially a judicial process, and, in any case, the neutral and presumably unprejudiced judge or arbitrator, more than any other organ or agency of the interested parties, is likely to arrive at a fair and unbiased interpretation." HARVARD RESEARCH, THE LAW OF TREATIES 973 (1938).

165. See text accompanying note 106, *supra*.

166. The inclusion of such an escalator clause in an international commodity agreement would be unprecedented, and would mark a great advance for exporting countries over the systems for price adjustment previously used. *See* note 106, *supra*. The escalator clause, first advocated by Iran, would guarantee the exporting countries a stable real level of revenues notwithstanding continued inflation in the industrialized importing countries by linking the world price of petroleum to an index of some twenty or thirty other basic commodities and manufactured products needed by OPEC members. *See* N.Y. Times, Nov. 11, 1974, at 18, col. 1. Such a system, endorsed by the communique issued by OPEC leaders after their March meeting, would make the petroleum commodity agreement a viable mechanism even in times of world inflation.

167. This clause would go beyond art. 42 of the Cocoa Agreement and art. 29 of the Tin Agreement (discussed in note 107, *supra*) by making the adjustment automatic, rather than leaving it to the Council's discretion. Such a clause would not be entirely unprecedented in the field of petroleum agreements, for a December 1971 agreement between the international oil companies and the member countries of OPEC called for a "real price" for petroleum based on "stable dollars" free from exchange fluctuations. Amuzegar, *supra* note 1, at 683.

168. The concept of an international tax on petroleum was first advocated by Boris Swerling, who wrote in 1962:

> Conceivably the U.N. might be empowered to impose an international tax per barrel of petroleum produced. Why petroleum? A tax on any one commodity is necessarily open to objections, but petroleum is peculiarly well suited to provide a broad tax base. It is now the most important single commodity on the internationally-traded list; consumption of energy in general and petroleum in particular is closely correlated with level of industrial activity; and practically no country is entirely dissociated from it, either as producer or as consumer . . . . Because the

to one of three purposes (or any combination thereof): (1) to provide long-term, low-interest loans to importing countries unable to meet their petroleum import bills;[169] (2) to promote the development of new energy resources; and (3) to provide developmental loans for member countries.[170]

6. *Variations within a Commodity, Processed Products, and Substitute Products*

An international petroleum agreement, like the current world

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physical quantities involved are so enormous, the per-unit tax rate would be quite nominal, and the marginal choice between alternative fuels very little affected. A vigorous growth trend is built in, so that rising availability of international funds would be provided for in the future . . . . In modern tax systems, the contribution of commodity levies is trivial as compared with direct taxation of personal and business income, but any international fiscal system must begin on a more primitive level.

However the incidence of the tax might be shared as between producer and consumer, the principle would be established that this key raw material makes a special contribution to the international community and, similarly that the international community has a clear interest in the rational management of petroleum resources. At this stage the proposal may appear to be of strictly academic interest. But the organizational basis of the world petroleum industry is in a state of flux. One can be sure only that past arrangements are a poor guide to the needs of the future.

Swerling, *Current Issues in Commodity Policy*, ESSAYS IN INTERNATIONAL FINANCE 16-17 (1962).

While past commodity agreements have permitted their Council to levy a tax (see text accompanying note 109, *supra*), the tax has been on members' commodity transactions as opposed to the tax on commodity production proposed by Mr. Swerling. The difference is significant, for while the former tax may hardly touch a major petroleum-consuming country which is virtually self-sufficient, the latter tax would affect it substantially. That past agreements have relied on a tax on commodity transactions, rather than on the more inclusive tax on production, probably reflects both a reluctance on the part of member countries to subject any more of their activities than was absolutely necessary to the supervision of an international authority and the misconception that that commodity activity which does not cross national boundaries does not constitute part of a commodity's world trade.

Regardless of which option is selected, however, the tax should be designed so as to fall on those countries that have excess revenues available which could be used for the purposes suggested in the text. It may thus be necessary to provide a rebate system for those petroleum-producing or petroleum-exporting countries which, because of factors such as their large populations and corresponding developmental needs, do not have surplus liquid funds.

169. The use of the tax for this purpose would supplement the efforts now in progress to help these countries, such as the "oil facility" established within the International Monetary Fund. N.Y. Times, May 7, 1974, at 63, col. 8.

170. While past commodity agreements have had no direct analogue to the aid suggested here, both the Diversification Fund of the Coffee Agreement (mentioned in note 110, *supra*) and the Hardship Fund of the Sugar Agreement (see text accompanying note 112, *supra*) contain similar overtones.

petroleum pricing system, would have to establish different crude petroleum prices depending upon the quality of the crude and the distance from the point of origin to major consumer markets. Like past commodity agreements,[171] the petroleum agreement should leave the type of crude petroleum to be exported to the exporting country's discretion, with power for the Council to modify members' quotas should demand for a particular type of crude outstrip supply.

The agreement should not seek to establish prices for refined petroleum products, because of the enormous complexity of such an effort; but it should rather provide that the prices of these products should be consistent with those of crude petroleum, with an arbitration provision for any disputes that may arise.[172] In addition, processed product exports should be included in a member's quota.[173]

The agreement should not attempt to cover alternative forms of energy, for while a comprehensive world energy policy would encompass those forms, conclusion of an agreement dedicated to petroleum alone would in itself represent a formidable task. Any efforts to coordinate developments in the various alternative forms of energy should be left to the discretion of the Council, at least pending the succesful conclusion and temporary operation of an international petroleum agreement.

V. CONCLUSION

An international petroleum agreement can be drafted which would meet the needs of participating countries. For the exporting countries, such an agreement would mean a stable price and income from their petroleum, access to importing country markets for their refined products, and possibly, a reduction in the world consumption of their petroleum. For the importing countries, the agreement would mean a guaranteed supply of petroleum at stable prices, and possibly, increased economic aid to those countries unable to meet their petroleum import bill. For both sides, the agreement would represent the coordination of efforts to develop alternative energy sources, the harmonization of governmental measures governing the behavior of the international oil companies, and enhanced stability of the world petroleum market.

While such an agreement would derive its inspiration and many of its provisions from past commodity agreements, it would also incorporate innovative approaches to the regulation of an international commodity market. These approaches might then be adopted in sub-

171. See text accompanying note 120, *supra*.

172. This provision could be patterned on art. 44 of the Coffee Agreement, discussed in note 103, *supra*.

173. They have been in past agreements. See text accompanying note 123 *supra*.

sequent agreements for other commodities, and thereby serve to inject new life into the commodity agreement as a vehicle for the international supervision of world trade.

Various new approaches, including the provisions that lower the trade barriers of importing countries and the proposed measures limiting the growth in the world consumption of petroleum, would represent a shift in the international petroleum agreement toward a more equalized allocation of duties and away from the traditional, imbalanced distribution of obligations among importing and exporting members. This shift would reflect a different perspective toward the international petroleum agreement than appears to have been true of past commodity agreements, a perspective recognizing that both the importing and exporting countries, not just the latter, stand to benefit substantially from the conclusion and operation of a commodity agreement.

FACULTY COMMENT

International Law and Rawls' Theory of Justice

ANTHONY D'AMATO*

Few books have achieved the status of classics as quickly as A THEORY OF JUSTICE by Professor John Rawls.[1] Published in 1971 the work has been acclaimed as a monumental contribution to political theory and philosophy in a torrent of favorable reviews. For this reason alone, what Rawls has to say about international law in his book—despite the brevity of his comments on that subject—should be of great interest to international lawyers. But, more importantly, the complexity of present-day international law stands in an uneasy relation to the scheme of justice propounded by Rawls, indicating that Rawls' conception may either already be dated or may be too simplistic. Indeed, it may not be from want of interest or familiarity with international law that Rawls deals with that subject so briefly in his long work, but rather that the problems now facing international lawyers may pose a conceptual threat to some of the fundamental bases upon which Rawls builds his entire theoretical edifice.

Rawls' work will be analyzed often in the months and years to come, and thus the present essay is merely an early attempt to contribute to the dialogue. No pretension of definitiveness is made here; quite the contrary, I want to reserve a full option to revise my opinions based upon further study of Rawls and of the commentaries engendered by his book.

I.

The most fundamental problem suggested by an international perspective upon Rawls' work is his choice of a "society" as the unit for assessing justice. He starts by defining society as "a more or less self-governing association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them."[2] It is a "closed system iso-

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1. Harvard University Press, Cambridge, MA 02138 (1971); L.C. 73-168432 [hereinafter cited as RAWLS].

2. RAWLS at 4.

lated from other societies,"[3] at least for the purpose of most of the analysis of the book. Later on, in specifying the "circumstances of justice," Rawls adds to this conception of society the idea that it involves "many individuals coexist[ing] together at the same time on a definite geographical territory."[4] These, then, are the characteristics of society. Rawls endeavors to show what constitutes a "just society," and he terms his entire study an essay in social justice.[5]

No one can object if a moral philosopher chooses to study the problem of justice solely within a particular unit, such as a "society," just as no one can criticize a study of justice within a "family." But it is legitimate to criticize a study that purports to speak of larger aggregations while focusing upon a small unit. Rawls tends to extend his discussion beyond social units to an international or world basis in two ways. First, at one point in his book he directly analogizes a nation to a person, and says that ethics among persons may be directly extended to the ethical foundations of international law.[6] Second, in an indirect way Rawls conveys the impression that his theories concern mankind in general; this is accomplished by talking about universal traits of persons (moral sentiments, for the purposes of Rawls' study) and by dealing with societies abstractly rather than as particular societies in today's world. Indeed, Rawls believes that ethical theories cannot be particularistic:

> [I]t must be possible to formulate [ethical principles] without the use of what would be intuitively recognized as proper names, or rigged definite descriptions. . . . [P]rinciples are to be universal in application. They must hold for everyone in virtue of their being moral persons.[7]

Let us postpone for the moment the direct comparison Rawls makes between nations and individuals, and examine the claim that his theories apply to moral persons in general.

The basic question thus becomes: how can a universal system of justice be worked out for persons if we refuse to examine issues that transcend national boundaries? Or, in other words, can Rawls defend his limitation of inquiry to given societies rather than all (international) societies? This abstract question can best be handled by some concrete examples. For instance, Rawls considers one principle of social justice to be the "difference principle," that is, social and economic inequalities are permissible if and only if the arrangements generating them work out better for the most disadvantaged person

3. *Id.* at 8.
4. *Id.* at 126.
5. *Id.* at 8-9.
6. *Id.* at 377-82.
7. *Id.* at 131-32.

(the "worst-off" position) than would any more equal structure.[8] Such a principle would clearly imply, among other things, that a new tax law should be passed which takes from the rich and gives (via what one might call a "negative income tax") to the poor, and this money transfer should occur unremittingly up to the point that any further taking-from-the-rich would reduce the capitalist's production incentive to the point where the poor would be worse off due to the drop-off of capital investment. Now this principle, to be sure, may be difficult to interpret in practice. How can we tell, for example, when a disincentive to invest further actually sets in? Would we wait for rich persons to quit their corporate jobs and make public statements that they are not any longer able to keep enough after taxes to make it desirable for them to put in another day's work? And how about corporations pondering long-term capital investments or research and development programs? Nevertheless, difficulties of interpretation aside, the ethical principle asserted by Rawls is that a person can get richer only if he is helping everyone else to become richer as well, via the fruits of his labor or his business acumen. A person does not have an ethical claim to get richer at society's expense. Yet, even if this principle is operationalized within a society, can it apply across societies? Should there be enormous taxes upon the incomes of rich persons in industrialized societies so that the money can be paid over to masses that are near starvation in India, China, and other populous and developing nations? Should there be an "excess profits" tax levied upon individuals and corporations for this purpose? To some extent, of course, the "have-not" nations are making this claim today; it takes the form of demands upon limited United Nations resources and capital, explanations for expropriation of foreign-owned industries, justifications for exploiting oceanic resources, and so forth. The "relative deprivation" sensed by disadvantaged nations is itself put forward as a justification for international measures designed to reduce the disparity of wealth between rich and poor nations. Rawls' book would probably provide an ethical basis for such claims, assuming that his scheme can transcend social boundaries.

But can the logical leap across such boundaries be justified? There are two important factors, I believe, that argue against it: one on the "supply" and one on the "demand" side of the picture. On the supply side, we have a world that is not infinitely rich in resources. We cannot talk of a "cowboy economy" internationally; rather, basic minerals, food, and resources are limited and the supplies are being

8. *Id.* at 75-83. "[T]he higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society." *Id.* at 75.

used up. In Rawls' hypothetical society, resources are sufficiently abundant to make it possible for the best-situated person to argue that further incentives paid to him will result in increased exploitation of natural resources so that the poor will also benefit from them.[9] But if there are only limited resources, then further exploitation by the rich can only be at the expense of the have-nots. For example, the United States could not, under this formulation, argue that its consumption of thirty percent of the world's energy is needed to raise the standard of living of the masses in India. Thus, Rawls' difference principle would boil down to a straight tax, taking from the rich and giving to the poor, with little room, if any, for the argument that the tax should stop at a point above that of total equality for everyone so that incentives can be maintained. Thus, we arrive at the conclusion that either all economic disparities in the world should be eliminated (as an ethical proposition), or that there are counter-arguments that Rawls has omitted which change the ethical calculus.

One counter-argument comes from the "demand" side of the picture, mentioned previously. Advantaged nations tend to be less populous than disadvantaged nations. For one thing, they tend to hold down the birth rate voluntarily. Secondly, the very fact of a lower population increases per capita wealth and perhaps is implicit in the concept of an advantaged nation. Now, should a populous disadvantaged nation have an ethical claim to the wealth of a less populous advantaged nation? Or might the latter reply that its own population control undertaken to provide a "better life" for all its citizens should not be undercut by claims from a nation that has not similarly restrained itself? Rawls discusses the population problem only briefly, and from the standpoint of classical utilitarianism and not his own theory of justice.[10] But what is at stake for Rawls' own theory is conceptually fundamental. We might say that a rich nation is "rich" in terms of material wealth but not "rich" in terms of the number of persons in it.

In other words, a nation may become rich in part by limiting its population. A smaller family size not only increases per capita wealth, but also frees the time of individuals to innovate and make large capital improvements in society without having to feed and take

9. Rawls uses the condition of "moderate scarcity," which means that "[n]atural and other resources are not so abundant that schemes of cooperation become superfluous, nor are conditions so harsh that fruitful ventures must inevitably break down." *Id.* at 127.

10. He states that the classic principle is inferior to that of the average utility principle in that the former, in maximizing satisfactions over the whole of society, can allow for an indefinitely increasing population so that the sum of utilities added by the greater number of persons makes up for the decline in per capita shares of wealth. *Id.* at 162-63.

care of the family. On the other hand, of course, a population that is too small lacks the labor force to develop large industry and large-scale farming. Thus, by limiting population I mean limiting it up to a point. A rich nation thus trades off its potential for population increase for material things. We have often heard the expression "He may be a rich man, but he has no children, and therefore he's really very poor." Similarly, a family in the United States that has two children may be "poorer" in a very real way compared to a family in India that has ten children. But then, why should the Indian family have a claim against the U.S. family for a portion of the latter's material wealth?

I think this question goes unanswered in Rawls' theory because Rawls focuses upon the individual man's claim to being a morally ethical person. He takes the individual as given, without considering the dynamics of the fact that individuals can be produced in the same sense that food is produced. In stating that every man should be equal, Rawls overlooks the fact that some men have lots of children while others do not. By granting their children immediate equality in his ethical theory, Rawls overlooks the trade-offs stemming from the probability that the man who had fewer children probably acquired more material wealth. The latter's greater wealth "cost" him something, namely, fewer children. Thus it would be unjust to take from him his wealth which he may have acquired at the cost of a smaller family and hand it over to the man who produced a larger family. At least, it would be unjust from the point of view of a comprehensive ethical theory such as Rawls' which would seem to require such a result. I am not saying that there may not be some claims that are not entirely just on the part of the masses in disadvantaged societies. But the justness of these claims would have to be evaluated in far greater detail than Rawls' ethical theory seems to permit. The result may very well be that a certain amount of "excess profits" tax, perhaps labelled "foreign aid," should be paid to disadvantaged nations; but if this amount falls short of making everyone in the world equally wealthy, the shortfall should not be viewed as an ethical compromise, as Rawls' theory perhaps would require.

A second counter-argument to the levelling tendency in Rawls' theory points back to the "supply" side of the picture: the earth's resources are finite and non-infinitely renewable. Now suppose that Rawls' "difference principle" applies between advantaged nation A and disadvantaged nation D. Nation A would then be constrained by the principles of justice to pay foreign aid to nation D until such time as A loses its capital-formation incentives due to the heavy nature of the "tax" that comprises this foreign aid. So, let us establish a maximum for the tax; say, forty percent of all income. If this forty percent is five billion dollars per year, then A would pay to D five billion

dollars annually. But what would D do with the money? If D used the money for capital-formation, then in the course of time we might expect the people of D to approach in personal wealth per capita the people of A (assuming that there is no runaway population growth in D, as per the preceding argument). But why would D necessarily have the incentive to save and invest the money paid over by A? Human nature being what it is, D might simply decide upon a program of hedonistic consumption, spending for short-run pleasure five billion dollars per year, secure in the knowledge that next year another five billion dollars will be received from the hard-working people of A. In other words, while the forty percent tax on A might not wipe out the incentive to invest and produce within A, the payment of that forty percent tax might wipe out any incentive to invest and produce within D. As a result, a reckless consumption program may be set up, cutting into the earth's stock of nonrenewable resources, to the detriment of all nations. D would proceed (in theory) on its merry way, knowing that only by spending all of the five billion dollars per year the people of D will remain technically "poor" and thus will ensure, under Rawls' theory, continuing annual receipts of this amount of foreign aid. Clearly, from a global perspective, this result is unjust. It is unjust since it puts a premium upon short-run consumption of natural resources. It is unjust because it induces the people of D to spend, losing the virtue (if there is one) of thrift and saving. And it is unjust to the people of A to take away forty percent of what they earn by their labor so as to increase consumption in another country.

If we were dealing with a single society, the above consequences of Rawls' theory might not apply. The institutions of a given society might, for instance, restrict population growth, or put disincentives upon large families. Also, laws might be passed that the recipients of welfare must make an effort to find jobs or to save a portion of their welfare payments or at least to refrain from a Veblenian kind of conspicuous consumption. But once we look at international society, we have the separate sovereignties (such as A and D) where rules like this cannot necessarily obtain (even if they would be some inherent part of Rawls' theory of a single society—and his book does not make this clear by a long shot).

Rawls bases his theory of justice on the social contract model as shaped by Kant, Locke, Rousseau, and, to a certain extent, Hobbes. This is a relatively old political theory; it certainly antedates utilitarianism, Rawls' chief theoretical protagonist. Social contract theorists probably were justified in looking at a single society before the days when mass media and rapid travel made the world seem small. But I tend to think that Rawls' book, no matter how up-to-date it sounds in the invocation of recent economic theory, is somewhat anachronistic in that the vast problem of world justice that now confronts us is

treated as largely irrelevant. Of course, as I said before, and the point is worth repeating, one cannot fault Rawls for choosing to deal only with the problem of justice within a given society. But it is necessary for us to contextualize Rawls' work, to realize that a "solution" to the problem of justice in a given society is not extendable by simple extrapolation to the problem of world justice.

II.

Only at two brief and widely separated points in his book does Rawls deal with the issue of justice transcending the self-contained national communities which form the subject matter of his theory of social justice,[11] and there only to say that the question entails the derivation of principles of justice for the law of nations. The law of nations is explicitly considered in only one section of the book in the context of a discussion of conscientious refusal.[12] A conscientious objector to a war which he considers illegal under international law would cite the injustice of his nation's war policy. Thus Rawls finds it important to examine the moral basis of the law of nations.

Rawls derives the ethical foundations of international law by the use of his "social contract" technique which forms the basis of his entire work. The social contract theory briefly involves a hypothetical situation of men coming together in what Rawls calls the "original position" to decide upon basic constitutional rules for their society. The men in the original position operate under a "veil of ignorance:" they do not know how their decisions will affect their own particular case because they do not know their own particular circumstances.[13] Thus they will choose principles that minimize their potential losses under the constitution (using the maximum concept of the theory of games[14]). In particular, they will not choose the utilitarian principle, since the maximization of the sum of advantages in a society can be at the expense of a minority of the population (for example, if a minority slave population would greatly increase the happiness of the majority, then classical utilitarian theory would appear to countenance slavery[15]). Since no one, in the original position, knows what his subsequent personality or social status will be, he will not vote for a principle that allows a chance that he will be among the greatly disadvantaged class. It follows deductively (according to Rawls) that the men in the original position will first of all choose "equal liberty" for all:

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11. *Id.* at 8, 457.

12. *Id.* at 377-82.

13. *Id.* at 136-37.

14. *Id.* at 152-54.

15. *Id.* at 158-59. Rawls acknowledges that classical utilitarians have attempted to refine their theories so that this particular result does not obtain. The reader must judge at what point utilitarianism is vitiated by such refinements.

> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.[16]

The other major principle that the men in the original position will choose recognizes that there will be social and economic inequalities in society (otherwise there would be no incentive to save, invest, and produce, but mitigates the inequalities by requiring that they be arranged so that they: (a) are attached to offices open to all under conditions of fair equality of opportunity[17] and (b) accrue to the greatest benefit of the least advantaged (the "difference principle" discussed earlier).[18]

When he turns to the question of conscientious refusal and international law, Rawls simply extends the above interpretation of the original position to apply to representatives of the different nations. The representatives know nothing about the particular circumstances of their own nations, such as power, strength, geographical position, population, or other factors. Thus the original position is "fair between nations; it nullifies the contingencies and biases of historical fate," according to Rawls.[19] Not surprisingly, then, the nations, representatives would choose the principle of equality as the most important ethical basis of international law. Rawls briefly lists the consequences of the principle of equality:

> (1) self-determination, without the intervention of foreign powers;
> (2) the right of self-defense against attack, including the right to form defensive alliances to protect this right;
> (3) the rule that treaties are to be honored, provided they are consistent with the other principles governing the relations of states;
> (4) principles regulating the means that a nation may use to wage war.[20]

Rawls does not elaborate on these consequences, giving the impression that they speak for themselves and are relatively unambiguous. However, international law, particularly with respect to recent international developments, raises complexities that in my opinion not only make it difficult to apply the above concepts, but also render them, in some cases, internally inconsistent. Take the matter of self-determination. The difficult problem is, self-determination over what particular area? Nation A may claim that it is having an internal civil war over the question of its national boundaries, but group B, the rebels, may claim that B is a nation that is being invaded by A. Often, A characterizes the conflict as between one section of the country and another (North and South Korea, North and South Viet-

16. *Id.* at 302.
17. *Id.* at 83-89.
18. *Id.* at 75-83; *see also, supra* note 8.
19. *Id.* at 378.
20. *Id.* at 378-79.

nam, East and West Pakistan). But B will characterize the war as one between two separate nations ("Bangladesh").

Other nations will respond variously to these claims, supporting one characterization or the other. Thus, we really have a threshold question, under the Rawls analysis, as to what is a "nation" that may claim self-determination. Who is to be a "representative" of a "nation?" Does East Germany have a right to have a representative in the Rawlsian "original position?" If we cannot decide this in an *a priori* fashion, then there appears to be an inconsistency in the "self" part of the phrase "self-determination." At least when Rawls is dealing with people, he distinguishes one person from another, and says that all are entitled to equal liberty. But when nations are considered, it is sometimes very hard to distinguish one nation from another when the very issue is whether a distinction should be made, or whether it is simply another "civil war."

Another dilemma, short of the civil war situation, arises when a nation decides to intervene in the internal affairs of another nation for the purpose of preserving the liberty or lives of an oppressed minority group within that nation. (Present-day examples may include the situation of the Black-Africans in Namibia or the Palestinians in Israel.) The nation involved will cite the principle of equality, the concept of sovereignty and self-determination, the principle against intervention, and related rights stemming from what Rawls calls the original position. They will also deny that the minority group is oppressed. Rawls would appear to support the non-interventionists, and indeed there is nothing in his book that would indicate his recognition of an exception to the non-intervention consequence of the principle of equality of nations. Yet, interestingly, without realizing the potential contradiction, Rawls at another point writes of a justification of military conscription:

> Conscription is permissible only if it is demanded for the defense of liberty itself, including here not only the liberties of the citizens of the society in question, but also those of persons in other societies as well.[21]

In other words, Rawls recognizes that persons may be justly conscripted to fight in a war that is in defense of the liberties of persons in another society. Yet is not that precisely the justification of the Vietnam War that was used to support conscription in the United States? Were not Americans being drafted to preserve the liberty of certain South Vietnamese citizens who were resisting the Communist movement for the unification of Vietnam. (I do not think that anyone can claim that there were *no* South Vietnamese whose liberty was directly threatened and who welcomed our support; the only issue

21. *Id.* at 380.

that divides those who supported and those who opposed the Vietnam War was the number of these South Vietnamese citizens and perhaps their representativeness.)

Judging from the authorities he cites, Rawls seems to side with those who resisted the draft for the Vietnam War. However, his own admission that one may be legally and justly drafted to fight to preserve the liberties of persons in another country seems to undercut his own position. Much more significantly, it undercuts his theory about the equality of states in the original position giving rise to the principle of non-intervention.

Could Rawls dispense with the principle of non-intervention? I do not think that would help resolve the dilemma just stated, since the dilemma goes to the heart of the theory that nations can start out in an "original position" the same way that persons can. For in devising a theory of justice, any philosopher has to decide what it is that is basic to his theory. Rawls seems to have made the decision throughout most of his book (even if it is unclear or missing in the particular section I am now criticizing concerning the law of nations) that what is basic is the equal liberty of persons. Equal liberty is so important that it may be viewed not as a derivation from the "original position" but as a characterization of it. Although Rawls does not want to make this kind of concession, arguably equal liberty of persons forms the basis of his description of how persons in the original position come to agreements with each other. (If they were not already equal, then some would be able to push through principles that would favor themselves at the expense of others, a possibility that Rawls does not and cannot acknowledge.) In any event, whatever one decides on the priority of equal liberty or the original position, it is clear that the equal liberty of persons is at the cornerstone of the edifice constructed by Rawls.

Now, taking the principle of the equal liberty of persons, one might ask whether an analogous principle of the equal liberty of nations could be in conflict with the equal liberty of persons. Rawls assumes that no conflict can arise. But clearly, in his own example of permissible conscription, a conflict does arise. In order to protect the equal liberty of persons in nation B, nation A must violate the equal liberty of nation B and intervene in B's internal affairs. If nation A did not do this, then the persons in nation B would be deprived (by their own government) of their equal liberty. Nor could Rawls escape this dilemma by arguing that, therefore, B is simply an unjust society, for if it is unjust, the issue of its internal unequal liberty is not relevant to Rawls' book. For then the question would simply reappear on another plane; namely *should* just and unjust nations be given equal liberty in the original position? If they should,

then as a consequence some persons will be deprived of equal liberty (those persons in unjust nations). And thus Rawls' own theory will result, at the outset, in a deprivation of some persons' equal liberty, under the banner of equality of abstract concepts (nations). I doubt whether Rawls would welcome such a consequence of his theory of justice; it certainly seems to be utilitarianism writ large (that is, the equal liberty of persons in some societies, and the equal liberty of societies themselves, outweigh the unequal liberties of other persons in unjust societies).

If we look to the other consequences of Rawls' concept of the equality of nations, we may find similar disabilities. Are all treaties to be kept? What about "unequal" treaties—those imposed by the larger power upon the smaller? Does this deprive the citizens of the smaller power of their just share or equal liberties, all in the name of a concept that sanctifies treaties? What is self-defense? The "self" in "self-defense" may be as ambiguous as the "self" in "self-determination." And so on. Instead of continuing along this line, let us step back and take a larger look at the implications of this discussion.

III.

In the first place, one might conclude that Rawls has not been persuasive in analogizing nations to individuals in the original position, and therefore if we want individual justice we may have to forego the concept of equality of nations. However, if this is true, it will not be because Rawls has proved it, since he tried to show something quite different. A much different theory would have to be advanced for this proposition, with greater explicit concern for international legal principles. To some extent, principles have been urged in recent years that can be characterized as treating nations unequally. The Clark and Sohn proposal for weighted voting in the United Nations, taking into account the population of nations and some related factors that are not evenly distributed, was an attempt to adjust voting principles to what Clark and Sohn viewed as the facts of international life.[22] From a functionalist standpoint, some nations are represented on more international organizations than other nations; perhaps this is a recognition of inequality. Professor McDougal and his associates have at times argued for a view of international law that would treat some nations as non-participants or outlaws; this too indicates inequality.[23]

22. G. CLARK & L. SOHN, WORLD PEACE THROUGH WORLD LAW (2d ed. 1960).

23. I have discussed this more fully in A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 218-20 (1971).

However, nations probably will never accept a principle of less than one-nation-one-vote. Why should they, as nations? I would like to see international law viewed as a creation of nation-states that is functionally adapted to solving a number of the problems that arise in inter-state dealings, particularly problems of jurisdiction. But international law certainly does not solve all problems. It has limited usefulness, within its own sphere.

Thus, secondly, we should ask whether one ought to revise the principle of equality of nations in order to comport with the thrust of Rawls' arguments concerning social justice. I would contend that such a revision would only serve to discredit international law in the areas where it now serves us well. I cannot see that international law would retain much moral force if nations were treated differentially under it. In the sense of providing moral force to legal institutions, I would agree with Rawls' characterization of the principle of equal liberty as the cornerstone of justice.

A third possibility is to retain equality of nations, but to incorporate into the fabric of international law other principles that more fully realize the equality of man. This is the hard approach, but it is one which, I believe, is slowly working itself out in practice even if it is not articulated too often. The Genocide Convention[24] has gradually come to be recognized as this sort of breakthrough. In it, nations voluntarily agreed that some kinds of treatment of their own nationals within their own boundaries were not internationally acceptable. Now, one might say that the principle of equality of nations was acknowledged in that the signatories were free to ratify or not to ratify the Genocide Convention. Thus, if they voluntarily agreed to compromise the general principle of self-determination, then the resulting consequence of a potential intervention in domestic affairs (authorized, at least theoretically, by the Convention) was at least self-willed.

But this kind of analysis is not wholly satisfactory from an ethical standpoint. Analogously, suppose someone of his own free will sold his person into slavery; his slavery "contract" would nevertheless be unenforceable in most legal regimes. So too, if nations voluntarily compromise their initial equality, it might be argued that such a compromise is unenforceable (for example, a nation that someday actually commits genocide will undoubtedly argue to the world that it renounces the Genocide Convention and regards it as an unwarranted present intrusion upon national sovereignty. Therefore, we have to search for deeper principles than "national equality." A more detailed theory of justice as applied to nations would attempt to

24. 78 U.N.T.S. 277 (1948).

articulate principles and priority rules that would account, say, for both the legal equality of states and the legality of intervention to save minority groups that are threatened with actions that would contravene the Genocide Convention.

More generally, all international law affects, to some extent, the domestic jurisdiction of a state. Consider, as the easiest example, whether a national traveling abroad carries with him a protective shield of domestic law or whether he is subject to the law of the foreign country. Any court award against a nation intrudes upon its domestic affairs; if it has to pay money damages, the money has to come out of the domestic treasury. What constitutes "foreign relations" is thus a relative question, and it may be an expanding concept depending upon what states do and how they articulate what they do.[25] Thus, in one sense, the equality of nations has always been subject to the strictures, qualifications, and confinements of international law. More recently, the enterprise is exploding with the emerging human rights laws. I would argue that we cannot begin to assess the ethics of the law of nations without first becoming familiar with the content of international law in both its present and its emerging form. Perhaps in our lifetimes we shall not see the emergence of a complete theory of international justice. But at least we should recognize the importance of such a venture.

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25. I have expanded on this in D'AMATO, *supra* note 23 at 79-81.

Book Notes

Foreign Legal Systems

DENG, F., TRADITION AND MODERNIZATION: A CHALLENGE FOR LAW AMONG THE DINKA OF THE SUDAN; Yale University Press, 92A Yale Station, New Haven, CT 06520 (1971); ISBN 0-300-01407-4; $22.50; xlv, 401 p.; glossary, index. Foreword by H.D. Lasswell.

This ambitious study examines the legal and social systems and processes of the Dinka, a culturally uniform people of the Republic of the Sudan, as they struggle to modernize their nation. The conflicts between tradition and modernity, and between different tribal and social groups, emphasize and uncover the culture-shaping role of law and the concomitant role of culture in forging a modern legal system and harmonious nation. Dr. Deng is himself a Dinka, and an officer with the United Nations Division of Human Rights.

DIX, R. H., COLOMBIA: THE POLITICAL DIMENSIONS OF CHANGE; Yale University Press, *supra* (1967); $4.95 (paper); ISBN 0-300-00426-5 (cloth), 0-300-01169-5 (paper), LC 67-24495; xiv, 452 p.; footnotes, tables, maps, bibliography, index. Yale Studies in Political Science, No. 20.

In this analysis of the response of traditional Colombian political institutions to the forces of modernization, the author poses an analytical framework for examining political change and details the Colombian experience within that structure.

HAZARD, J. & WAGNER, W. (editors), LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION; American Association for the Comparative Study of Law, Inc. (1974); available from Etablissements Emile Bruylant, S.A., Rue de la Regence, 67, 1000 Brussels, Belgium; $52.00; LC 74-11811; 697 p.; footnotes.

The papers in this volume were presented at the 9th International Congress of Comparative Law in 1974, and examine some of the significant questions in the application of law to modern phenomena and needs. The encyclopedic scope and comparative analysis touch many of the important legal developments of our time.

HO, P. & TSOU, T. (editors), CHINA IN CRISIS, Volume I, Books One and Two; The University of Chicago Press, 5801 Ellis Avenue, Chicago, IL 60637 (1968, 1970 paperback); $7.40 per set; ISBN (Book One) 0-226-34518-1 (clothbound), 0-226-34521-1 (paperback), (Book Two) 226-34520-3 (clothbound), 226-34523-8 (paperback); LC 68-20981; footnotes, index, list of tables and of figures, table of contributors. Foreword by C.U. Daly.

This book contains papers presented at the inaugural conference of the Center for Policy Study at The University of Chicago. It is a

comprehensive effort to relate China's heritage to its modern political system and examine the nature and extent of change in modern China. It should be of particular interest to scholars interested in the interplay of history and tradition in the development of the Chinese political system.

LAW AND POPULATION PROGRAMME, LAW AND POPULATION IN THE PHILIPPINES; The Fletcher School of Law and Diplomacy, Tufts University, Medford, MA 02155; LC 74-31866; v, 151 p.; footnotes, tables, documents. Book Series No. 9. Preface by Luke T. Lee.

This is a set of five articles on the interrelationship of law, human rights and population problems. Although the primary emphasis is on the Philippines, the materials readily lend themselves to a more global setting, as overpopulation is truly a world wide problem. Among the topics discussed are birth control, family planning, economic influences on family size, and the effect of laws on fertility.

Foreign Policy

CONNELL-SMITH, G., THE UNITED STATES AND LATIN AMERICA; Halsted Press, 605 Third Ave., New York, NY 10016 (1974); $16.75; ISBN 0-470-16856-0; xviii, 302 p.; footnotes, index.

In this historical review of inter-American relations from the formulation of the Monroe Doctrine through the post-Cuban Revolution era, the author has divided the time span from 1823 until the late 1960's into seven separate periods. His analysis is in depth, and has been researched fully. The footnotes lend a heavy emphasis to other works in the area.

As an historical analysis and "source locator" on the topics reviewed, the value is high. However, there is very little actual emphasis on the international legal aspects of the 140-year relationship analysed.

JONES, P. (editor), THE INTERNATIONAL YEARBOOK OF FOREIGN POLICY ANALYSIS, VOLUME 1; A Halsted Press Book, John Wiley & Sons, Inc., 605 Third Ave., New York, NY 10016 (1974); $17.95; ISBN 0-470-44792-3, LC 74-10599; 213 p.; endnotes, index.

This volume is the first of a planned annual survey of the foreign policies of the major actors in the international system. The United States, the Soviet Union, the People's Republic of China, and the European Communities will be dealt with on a regular basis, while other states and regions will be covered periodically. In this first volume, South America, India, Australia, and race relations in Africa are featured. Among the contributors to this volume are Hannes Adomeit, Michael Yahuda, Peter Calvert, James Mayall, and the late Wayne Wilcox.

MAYNE, R. (editor), THE NEW ATLANTIC CHALLENGE; Halsted Press, John Wiley & Sons, Inc., 605 Third Ave., New York, NY 10016 (British Atlantic Committee 1975); $17.95; ISBN 0-470-58035-6, LC 74-20105; 376 p.; list of contributors, list of abbreviations, index. Papers and comments presented at the Europe/America Conference held in Amsterdam on 26-28 March, 1973.

In an effort to reassess the relationship between America and Europe, forty-five international figures from both sides of the Atlantic document a symposium of conflicting views and emphases based on the Amsterdam conference. "The new Atlantic challenge is to rethink our more facile assumptions, to see what links us and where we differ, to test again the validity of Kennedy-era slogans, to rebuild more complicated models of what we can reasonably want." Contributions are grouped into four sections: an introduction to the problems, economic issues in an interdependent world, processes of change in the field of security, and new perspectives in foreign policy.

HAHN, L., WHITE FLAGS OF SURRENDER; Robert B. Luce, Inc., distributed by David McKay Co., Inc., 750 Third Ave., New York, NY 10017 (1974); $9.95; ISBN 0-88331-062-7, LC 73-9055; 354p.

This is the story of the life of an "average" person during the rise to power of the Nazi government in Germany. Based on the diary kept by Ms. Hahn throughout the war years, WHITE FLAGS describes the Nazi government's gradual rise to a position of complete control and the ensuing transformation of the citizens' lives.

MOSKOWITZ, M., INTERNATIONAL CONCERN WITH HUMAN RIGHTS; A.W. Sijthoff International Publishing, Leiden, Holland; or Oceana Publications Inc., Dobbs Ferry, NY (1974); ISBN 0-379-0086-5 (Oceana); ISBN 90-286-0314 X (Sijthoff); ix, 239 p.; chapter endnotes, index.

Moskowitz provides a systematic and in-depth treatment of an argument for the development of an international concern with human rights as a means for the regulation and disciplining of the international society. Platitudes on the global protection of human rights as a means to a world government give way, in this book, to a plea for the recognition of the rights of every individual as a means for common survival.

SERENY, G., INTO THAT DARKNESS: FROM MERCY KILLING TO MASS MURDER; McGraw-Hill Book Co., 1221 Avenue of the Americas, New York, NY 10020 (1974); $9.95; ISBN 0-07-056290-3, LC 74-2317; 380 p.; footnotes, bibliography, maps, photographs, index.

The author provides an additional tool to aid our understanding of the Holocaust through her documentation of seventy hours of conversation with Franz Stangl, former Kommandant of the Nazi exter-

mination camp at Treblinka. Although she does, at times, succumb to the temptation to "go easy" on Stangl for his part in the slaughter, new facts are uncovered, such as the Vatican's pre-knowledge of euthenasia, and their active help with the "Vatican Escape Route," which enabled Stangl and other war criminals to elude justice for many years.

TROOBOFF, P. (editor), LAW AND RESPONSIBILITY IN WARFARE, THE VIETNAM EXPERIENCE; The University of North Carolina Press, Chapel Hill, NC 27514 (1975); $13.95; ISBN 0-8078-1239-0; LC 74-22431; xiv, 280 p.; tables, index of persons, endnotes, index. Foreword by A. Goldberg.

Papers and discussions from a special meeting of the American Society of International Law in Oct., 1971 are divided into three parts: methods and means of warfare; weapons of warfare; and individual responsibility in warfare. Various articles examine both the legal and policy aspects of the weaponry and tactics used by the United States in the Vietnam war.

International Business and Taxation

BUSINESS ATLAS OF WESTERN EUROPE; a Gower Press publication (1974); distributed in United States by UNIPUB, Box 433, Murray Station, New York, NY 10016; $20.00; 144 p.; list of official and private sources of information.

Rapid growth of international trade, the formation of many multinational concerns, and the emergence of Europe as one major market through expansion of the European Economic Community (EEC) call for economic information on the whole of Europe. This attractive, clearly designed Atlas provides essential comparative information in easy-to-follow color maps, graphs, and charts. The four sections of this publication cover: basic market information; major industries of Europe; the European consumer; and the national economies of the EEC countries.

EMPLOYEE BENEFITS IN EUROPE: AN INTERNATIONAL SURVEY OF STATE AND PRIVATE SCHEMES IN 16 COUNTRIES; a Gower Press publication (1975); distributed in United States by UNIPUB, *supra*; $47.00; 260 p.

This wide-ranging survey provides direct access to complex employee benefit information, country by country, summarizing clearly and factually the availability and cost of each benefit. Part One provides a profile of the international benefit scene; Part Two analyzes social security systems and the supplementary private plans that are available in the European Economic Community.

EUROPEAN CHEMICAL INDUSTRIES, 1974-75; a Gower Press publication (1974); distributed in United States by UNIPUB, *supra*; $60.00; 488 p.; illustrations, maps, charts, tables.

Up-to-date market and business information on the chemical industries of Western Europe are presented in this book in three sections: a review of the international scene; country-by-country surveys; and a detailed analysis of the top 100 European chemical companies.

FEINSCHREIBER, R., TAX INCENTIVES FOR U.S. EXPORTS; Oceana Publications, Inc., Dobbs Ferry, NY (1975); $22.50; ISBN 0-379-00235-3; 385 p.; appendices, index.

This book explores the two substantial tax benefits provided by the United States government for exports, the Western Hemisphere Trade Corporation (WHTC) and the Domestic International Sales Corporation (DISC). This publication is not a technical treatise and, therefore, is an invaluable aid for independent exporters or for business people who are performing marketing or financial functions for their companies. In addition, the bibliography lists publications for further, more technical research; the appendices provide relevant legislative rulings and applicable portions of the Internal Revenue Code and Federal Tax Regulations.

FELLNER, W., CLARKSON, K., & MOORE, J., CORRECTING TAXES FOR INFLATION; American Enterprise Institute for Public Policy Research, Washington, DC (1975); $2.50; ISBN 0-8447-3174-9, LC 75-18713; 47 p.; footnotes, tables. Domestic Affairs Study No. 34.

The Tax Reduction Act of 1975 was partially motivated by efforts to correct for inflation-caused overtaxation. However, as the authors seek to demonstrate, the resultant structure may be more confusing and entangled than prior law. Furthermore, the legislation may not have successfully met inflationary distortions. Without suggesting specific reform measures, the study does identify the relationships between inflation and taxation, perhaps permitting more cogent legislation to be formulated in the future.

INDUSTRIAL DEVELOPMENT IN EUROPE; a Gower Press publication (1974); distributed in United States by UNIPUB, Box 433, Murray Hill Station, New York, NY 10016; $22.50; 327p.; illustrations, maps, graphs, tables.

The regions of Europe present a patchwork of incentives and deterrents to new industrial development, e.g., financial incentives versus political instability, available manpower versus lack of market proximity. This detailed analytical survey reviews these numerous "new location factors," country by country, region by region.

THE JAPAN-U.S. ASSEMBLY: PROCEEDINGS OF A CONFERENCE ON JAPAN-U.S. ECONOMIC POLICY; American Enterprise Institute for Public Policy Research, 1150 17th Street, N.W., Washington, DC 20036 (1975); $4.00; 154 p.; footnotes, tables, graphs. Introductions by Paul W. McCracken and Miyohei Shinohara.

Focusing on the world oil problem, the international monetary system, and the recent inflationary phenomena common to the developed nations of the world, this collection of essays, stemming from the proceedings of an April, 1974, conference on Japanese-American economic relations, examines the transnational influences and the character of the economic relationships between America and Japan. The essays embrace a multitude of topics ranging from energy problems, the current state of and prospects for the American and Japanese economies, the new inflation, and the possibility of greater cooperation between the United States and Japan in their international economic relations. It is emphasized throughout this collection that the resolution of problems facing the world economy will be strongly influenced by whether economic relationships between Japan and the United States remain on a firm and orderly basis.

JAPANESE MARKETS REVIEW, 1974-75; A Gower Press publication (1974); distributed in United States by UNIPUB, Box 433, Murray Hill Station, New York, NY 10016; $60.00; 401 p.; illustrations, key company directory, maps, charts, tables.

Japanese economic development affects the economics—internal and external—of every trading nation in the world. This 1974-75 REVIEW charts the growth of the industrial sectors and companies that have achieved this economic development and examines opportunities for corporations and overseas investors to penetrate this major marketplace. Labor, trade, energy, transportation, the balance of payments and many other topics are covered on both national and international levels.

KITNER, E., & JOELSON, M., AN INTERNATIONAL ANTITRUST PRIMER; Macmillan Publishing Co., 866 Third Ave., New York, NY 10022 (1974); $12.95; ISBN 0-02-364380-3, LC 74-84; xiv, 391 p.; bibliography, index, appendices. Fifth volume in a series by Kitner on antitrust and trade regulation.

Described as "A Businessman's Guide to the International Aspects of United States Antitrust Law and to Key Foreign Antitrust Laws," this volume should serve the businessman and attorney as a useful tool, alerting them to problems which arise in international transactions. While dealing mainly with American law, the book does examine certain aspects of foreign law, especially that of Japan, West Germany and the EEC. The appendices include copies of U.S. regulations and some relevant sections of the Treaty of Rome. The selected bibliography should assist in solving problems not answered by the book.

QUIGLEY, J., THE SOVIET FOREIGN TRADE MONOPOLY; Ohio State University Press, 2070 Neil Ave., Columbus OH 43210 (1974); $15.00;

ISBN 0-8142-0198-9; ix, 256p.; footnotes, bibliography, appendices, index.

A single government agency—The Ministry of Foreign Trade of the U.S.S.R.—and its evolution are analysed in this work. The first three chapters deal in depth with the development of the idea and the system. Building on this base of the theory behind the Soviet trade system, the author continues with an analysis of the functioning of the agency and a conclusion regarding its workings and effectiveness. For those who are interested in the functions of the Soviet ministry or who anticipate dealings with it, this volume provides a valuable starting point.

SHRAND, D. & KEETON, A., COMPANY LAW AND COMPANY TAXATION IN SOUTH AFRICA; Legal & Financial Publishing Company, P.O. Box 3461, Cape Town, South Africa (1974); R.21,00 (includes postage to U.S.); annual updating service, R.1,75 per annum; ISBN 0-86994-017-1; xiii, 525 p.; appendices, index.

This one volume general reference provides comprehensive coverage of both taxation and company law of the Republic of South Africa, with special emphasis on the procedural aspects and practical application of the provisions of the Companies Act of 1973. A summary of the recent case law concerning company and tax law is also provided.

SUMMARY: AN EVALUATION OF THE OPTIONS OF THE U.S. GOVERNMENT IN ITS RELATIONSHIP TO U.S. FIRMS IN INTERNATIONAL PETROLEUM AFFAIRS; Federal Energy Administration (1975); Available through the Superintendant of Documents, U.S. Government Printing Office, Washington, DC 20402; GPO 886-201, USGPO 1975-620-354/1804; 122 p.; Summary of the 850 p. report AN EVALUATION OF THE OPTIONS OF THE U.S. GOVERNMENT IN ITS RELATIONSHIP TO U.S. FIRMS IN INTERNATIONAL PETROLEUM AFFAIRS.

This summary condenses the report prepared for the Federal Energy Administration by Mossaman, Waters, Krueger, Marsh and Riordan of Los Angeles (the Krueger report). It examines the historical antecedants of the present international petroleum system, the current United States energy policy, and the objectives of that policy. The summary also outlines and discusses five purely unilateral options and four bilateral/multilateral options suggested for the United States government to follow in this field; it concludes by stating that no single policy may be effective, and that a combination may be needed.

SWIDROWSKI, J., EXCHANGE AND TRADE CONTROLS: PRINCIPLES AND PROCEDURES OF INTERNATIONAL TRANSACTIONS AND SETTLEMENTS; a Gower Press publication (1975); distributed in United States by UNI-

PUB, Box 433, Murray Hill Station, New York, NY 10016; $32.50; 342 p.; illustrations, index.

This book describes and analyzes the national exchange and trade controls used to regulate transactions and settlements between countries. Specific examples of regulations and practices in countries throughout the world result in a clear understanding of the way the controls work and of the policies that give rise to these controls. Dr. Swidrowski identifies three broad categories of control: the movements of currency for payments; imports and exports; and non-trade transactions such as investments, loans and services.

International Economic Relations

MIKESELL, R. & FURTH, J., FOREIGN DOLLAR BALANCES AND THE INTERNATIONAL ROLE OF THE DOLLAR; National Bureau of Economic Research, New York (1974); available from Columbia University Press, 562 W. 113th St., New York, NY 10025; ISBN 0-87014-262-3; LC 73-8544; xiv, 125 p.; footnotes, glossary, appendix, tables, index. Studies in International Economic Relations, No. 8.

The role of the dollar in the international setting is explored by the authors through an analysis of statistics relative to foreign dollar holdings, the role of multinational banks, and the factors determining the demand for U.S. dollars, Eurodollars and other currencies. The problems of international monetary reform and the implications of the development of the Eurocurrency and Eurobond markets are analyzed in terms of the international role of the dollar and the U.S. balance of payments.

SOURCES OF EUROPEAN ECONOMIC INFORMATION; a Gower Press publication (1974); distributed in United States by UNIPUB, Box 433, Murray Hill Station, New York, NY 10016; $30.00; 343 p.; bibliographical data, descriptive summaries, tables of publications and issuing bodies.

This easily used guide covers 1000 key sources of published economic information in sixteen Western European countries and enables the reader to pinpoint a requirement for specific economic information in a particular country and identify the publications available.

International Law

FULDA, C. & SCHWARTZ, W., REGULATION OF INTERNATIONAL TRADE AND INVESTMENT: CASES AND MATERIALS; The Foundation Press, Inc., 170 Old Country Rd., Mineola, NY 11501 (1970); $14.50; xliv, 796 p.; table of cases, table of abbreviations, table of authorities, index. University Casebook Series.

This textbook is designed for use in a three hour course. According to the authors, two dimensions are critical: the tension between

the free market economy versus the need for government intervention; and the design of transactional organizations. To meet these objectives, they divide the book into two main parts. The first deals with goods and commodities and the law that affects these transactions. The second focuses on direct investment which may create tension in host countries as a result of conflicts over jurisdiction, taxation and the reconciliation of national economic policy with international objectives.

KAHN, E. (editor), SELECT SOUTH AFRICAN LEGAL PROBLEMS; Juta & Co., Ltd., Capetown, South Africa (1974); R.7,50; ISBN 0-7021-0501-5; 147 p.; reprinted from THE SOUTH AFRICAN LAW JOURNAL.

This set of essays was published in honor of the memory of R.G. McKerron, the South African law professor who died in 1973. Some of the contributions include: *The Principle of Unanimous Consent* by R.C. Beuthin, *Legal Reasoning in Rome and Today* by A.M. Lonore, and *Latent Defects in Sales of Unascertained Goods* by D. Zeffertt.

LEECH, N., OLIVER, C. & SWEENEY, J., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS, AND DOCUMENTARY SUPPLEMENT; The Foundation Press, Inc., Mineola, NY 11501 (1973); Casebook, $20.00, Supplement, $2.50; LC 73-83968; Casebook, lxxxiii, 1327 p.; footnotes, bibliography, tables, index. Supplement: vii, 302 p.; footnotes, tables. University Casebook Series.

These cases and materials are designed primarily for use in a core course in international law. The authors cover both public and private aspects of international law, international systems, jurisdiction, the individual in international systems, and the use of force.

International Organizations

FALK, R., A STUDY OF FUTURE WORLDS; The Free Press, Macmillan Publishing Co., Inc., 866 Third Ave., New York, NY 10022 (1975); $15.00 (hardbound), $6.95 (paperback); ISBN 0-02-910060-7 (hardbound), 0-02-910080-1 (paperback), LC 74-10139; xxxiii, 506 p.; page reference marks, chapter endnotes, illustrations, tables, list of abbreviations, index. "Preferred Worlds for the 1990's" Series (a program of the World Order Models Project).

Princeton international affairs professor Richard A. Falk promulgates in this work the U.S. contribution to the World Order Models Project, a transnational research enterprise dedicated to serious thought on global reform. Grappling with fundamental issues affecting the future of world order, this study transcends the limitations of an analysis through independent nation-states to propose a reformed and integrated world polity. Falk's central guidance system would allow a wide dispersion of authority and power, in contrast to the structural framework of a "world government solution" which would necessitate a shift in authority to general-purpose global actors. Areas

of concern include: value preferences; current trends and patterns in world society; design of a new world order; feasible transitional strategies; selected aspects of the world economy; and America's stake in global reform.

KEESING'S REPORT, THE EUROPEAN COMMUNITIES: ESTABLISHMENT AND GROWTH; Charles Scribner's Sons, 597 Fifth Ave., New York, NY 10017 (1975); $7.95 (clothbound), $2.95 (paperback); ISBN 0-684-13926-6 (cloth), 0-684-13929-4 (paper); xiii, 208p.; appendices, index.

This research report is based on information contained in Keesing's Contemporary Archives. It traces the creation of Coal and Steel Community, The Common Market and European Atomic Energy Commission to its present structure and usefulness as a unifying force in Europe.

KOTHARI, R., FOOTSTEPS INTO THE FUTURE: DIAGNOSIS OF THE PRESENT WORLD AND A DESIGN FOR AN ALTERNATIVE; The Free Press, Macmillan Publishing Co., Inc., 866 Third Ave., New York, NY 10022, (1974); $8.95 (hardbound), $3.95 (paperback); ISBN 0-02-917570-4 (hardbound), 0-02-917580-1 (paperback); LC 74-31357, xxiii, 173 p.; footnotes, chapter references, appendix, index. "Preferred Worlds for the 1990's" Series.

India's version of a preferred future world order attacks the worldwide technological and organizational setting which promotes division, domination, injustice, and violence. The restructuring of world politics into twenty-five political units which would establish conditions of autonomy at the individual, national, and world level is seen by Kothari as a cure to the growing dualism between dominant and dependent states. Rejecting a concept of balance of power, the author stresses the need for recognition of equality for all nations and emphasizes the recognition of that need as a prerequisite to solution of problems of the "Third World."

MENDLOVITZ, S. (editor), ON THE CREATION OF A JUST WORLD ORDER: PREFERRED WORLDS FOR THE 1990's; The Free Press, *supra* (1975); $9.95; ISBN 0-02-920900-5, LC 74-28937; xviii, 302 p.; tables, index. "Preferred Worlds for the 1990's" Series.

Eight international scholars, representing groups in the Institute for World Order, have capsulized within this collection of essays their distinct versions of a preferred future world order achievable within the next twenty years. A number of other works in the series offer more detailed attempts to realize the world order values of peace, economic well-being, social justice, ecological stability, and postive identity as a cure to alienation. The contributors have articulated creative thinking, valuable to the student of contemporary political and social systems, on the real possibilities of reform toward "what

ought to be" the structure of governance for our emerging global community.

SCOTT, G., THE RISE AND FALL OF THE LEAGUE OF NATIONS; Macmillan Publishing Company, Inc., 866 Third Ave., New York, NY 10022 (1974); $9.95; LC 73-20179; 432 p.; index, appendix (Covenant of the League of Nations).

Mr. Scott's work is an examination of the political pressures and diplomatic struggles that brought about the demise of the League of Nations. Based on the theory that the very idealism that brought about the creation of the League made its end inevitable, the book explores in some detail the personalities involved and the role of these men in the failure of the League.

Because the book draws heavily on new research and personal interviews with many of the persons who played major roles in the life of the League, it makes a substantial contribution to historical analysis of diplomacy and international organizations.

International Politics and Government

GOODWIN, G. & LINKLATER, A. (editors), NEW DIMENSIONS OF WORLD POLITICS; A Halsted Press Book, John Wiley & Sons, 605 Third Ave., New York, NY 10016 (1975); $11.00; ISBN 0-470-31510-5, LC 74-32333; 127 p.; endnotes.

This volume represents the fruit of a lecture series at the London School of Economics in 1974. All six lectures are thoughtful and thought-provoking. Especially well-done are the contributions of Inis Claude, *The Problem of Evaluating War,* and Richard Rosecrance, *International Interdependence.* The other distinguished contributors are Joseph Nye, George Modelski, Ernst Haas, and Bruce Russett.

HARKABI, Y., PALESTINIANS AND ISRAEL; Israel Universities Press, Keter Publishing House Jerusalem Ltd., P.O. Box 7145, Jerusalem, Israel (1974); distributed in the U.S. by Halsted Press, 605 Third Avenue, New York, NY 10016, $9.95; ISBN 0-470-35211-6, LC 74-23800; x, 285 p.

This volume represents a collection of seventeen articles authored by Professor Harkabi between 1969 and 1974, dealing with the Middle East conflict. Some of the articles included are: *The Palestinians in the Arab-Israeli Conflict, The Meaning of "a Democratic Palestinian State," Resolutions of the Eighth Palestinian National Council, Obstacles in the Way of a Settlement,* and *Israel in the Face of the Present Arab Policy.*

LENCZOWSKI, G. (editor), POLITICAL ELITES IN THE MIDDLE EAST; American Enterprise Institute for Public Policy Research, 1150 17th Street, N.W., Washington, DC 20036 (1975); $3.50 (paper), $9.50

(cloth); ISBN 0-8447-3163-3 (paper), 0-8447-3164-1 (cloth); LC 75-10898; footnotes, index.

Nine experts on the Middle East examine the origins, history, composition, structure, and policies of the four leading Arab states, Israel, and the two major non-Arab states. Included are *Some Reflections on the Study of Elites* by G. Lenczowski, *Patterns of Elite Politics in Turkey* by F. Frey, *Aspects of the Political Elite in Syria* by G. Torrey, and *The Political Elite and National Leadership in Israel* by E. Guttman and J. Landau.

MEE, C.L. JR., MEETING AT POTSDAM; M. Evans & Co., 216 E. 49th St., New York, NY 10017 (1975); $10.95; ISBN 0-87131-167-4, LC 74-23997; xiv, 370 p.; note on sources, bibliography, index, appendices (Potsdam Proclamation, Potsdam Declaration).

Mee has produced a highly readable history of the Potsdam Conference, long ignored by historians. The author's portraits of Truman, Churchill, and Stalin add considerably to the reconstruction of the sessions of the Conference itself. Mee contends that discord and division in Europe were the inevitable result of the Conference, as each of the Three Powers went into the Conference pursuing its perception of its own national interest, at the expense of both its victorious allies and its vanquished enemies—and, in the long-run, at the price of lasting peace in Europe.

NICOLAEVSKY, B.J., POWER AND THE SOVIET ELITE: "THE LETTER OF AN OLD BOLSHEVIK" AND OTHER ESSAYS; Ann Arbor Paperbacks, The University of Michigan Press, Ann Arbor, MI (1975); $4.95; Stock #AA 196; ISBN 0-472-06196-8 (paperback), 0-472-06196-4 (cloth-bound); xxi, 275 p.; footnotes. Introduction by G.F. Kennan.

Often, collections of essays drown the reader in unconsolidated musing without a coherent structure. This well-edited series of Nicolaevsky's essays, however, sketches a clear picture of the Stalin era as viewed by a Menshevik revolutionary who survived it. Coupled with Kennan's introduction, the essays give new insights into a much analyzed political period in Soviet history and the man who guided it.

World Energy

JACOBY, N., MULTINATIONAL OIL: A STUDY IN INDUSTRIAL DYNAMICS; Macmillan Publishing Co., Inc., 866 Third Ave., New York, NY 10022 (1974); ISBN 0-02-915990-3 (hardcover), 0-02-915980-6 (paperback), LC 74-22381; xxvi, 325 p.; charts, graphs, tables, index.

Professor Jacoby presents an in-depth analysis and critique of the foreign oil industry—its history, economic structure and behavioral patterns; the role of various governments and corporations; and the dynamics of competition. He offers suggestions for coping with

the energy problems of the 1970's and makes predictions based on his careful studies. Example: OPEC "*will cut the price of oil* because it is in its economic interest to do so."

MITCHELL, E. (editor), DIALOGUE ON WORLD OIL: PROCEEDINGS OF A CONFERENCE ON WORLD OIL; available in paper and cloth editions from American Enterprise Institute for Public Policy Research, 1150 Seventeenth St., N.W., Wash., DC (1974); ISBN 0-8447-2059-3 (paper), ISBN 0-8447-2060-7 (cloth), LC 74-29419; 105 p.; introduction, list of conference participants. Forward by Melvin R. Laird.

These proceedings of a world conference on oil drew renowned participants from many different fields. Although the book reaches no definite conclusions about the world energy crisis, it does provide the reader with different perspectives, giving him an idea of what the world oil crisis is all about.

NATIONAL BUREAU REPORT, and SUPPLEMENT; National Bureau of Economic Research, Inc., 261 Madison Ave., New York, NY 10016; 316 p.; distributed without charge to Bureau contributors, subscribers, and others interested in the field of economic research. Supplements are issued from time to time.

The February 1975 REPORT and SUPPLEMENT focus on the new realities of energy use and availability. Among the topics covered are the economic aspects and impacts of air and water pollution, resource use, and the tools being developed for attacking these problems. John R. Meyer's supplementary text, *Transportation Solutions to the Energy "Crisis,"* proposes several measures to decrease our consumption of petroleum products. Regular features of the REPORT include recent publications, reprints and working papers, and financial statements of the Bureau.

SHWADRAN, B., THE MIDDLE EAST, OIL AND THE GREAT POWERS; Israel Universities Press, Keter Publishing House Ltd., P.O. Box 7145, Jerusalem, Israel; IUP Cat. No. 25087; (3d ed. 1973); distributed in United States by Halsted Press, 605 Third Avenue, New York, NY 10016; $20.00; ISBN 0-470-79000-8, LC 73-10181; xviii, 630 p.; footnotes, bibliography, tables, maps, index.

"Oil and the Middle East" was the subject of the first edition of this volume, published in 1955; this latest edition covers developments through 1973. Dr. Shwadran analyzes each of the major producing countries individually, tracing the history of their oil production from the first foreign concessions to their activities as part of OPEC. The roles of the non-producing countries and the great powers are also presented, along with a look to possible future developments.

World Peace

LISKE, C. AND RUNDQUIST, B., THE POLITICS OF WEAPONS PROCUREMENT: THE ROLE OF CONGRESS; University of Denver, Denver, CO 80210 (1974); available from the Managing Editor, Social Science Foundation, University of Denver, Denver, CO 80210; 100 p.; endnotes, tables. Volume 12, Number 1 of the Monograph Series in World Affairs of The Social Science Foundation and Graduate School of International Studies of the University of Denver.

Weapons procurement has always provided lively debate in Congress, as its members strive for allocations which will benefit home districts and some modicum of national defense. This short work traces the procurement process of two weapons systems through interviews with the Congressional actors and other sources. The conclusions attempt to place this process in the total context of domestic and foreign policy.

PRANGER, R. & TAHTINEN, D., NUCLEAR THREAT IN THE MIDDLE EAST; American Enterprise Institute for Public Policy Research, 1150 Seventeenth St., N.W., Wash., DC 20036 (1975); $3.00; ISBN 0-8447-3172-2, LC 75-16306; 57 p.; footnotes. Foreign Affairs Study No. 23.

The position of the authors is that, in the absence of peace in the Middle East, the military preparedness of Israel and the Arab states will continue to move to ever higher levels of technical sophistication, eventually including nuclear arms. The authors confront a number of uncomfortable questions, including the possibility of nuclear war, the current existence of nuclear weapons, and the possible scenarios for the use of nuclear and chemical-biological weapons in the Middle East.

Miscellaneous

BECKER, G. & LANDES, W. (editors), ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT; National Bureau of Economic Research, Inc., 261 Madison Avenue, New York, NY 10016; distributed by Columbia University Press, 562 W. 113 St., New York, NY 10025; $12.50 (paperback $5.00); ISBN 0-87014-263-1 (clothbound), 0-87014-288-7 (paperback), LC 73-88507; xvii, 268 p.; footnotes, chapter references, index.

This systematic study of enforcement as an economic problem includes a number of essays reprinted from various journals: *Crime and Punishment: An Economic Approach,* Gary S. Becker; *The Optimum Enforcement of Laws,* George J. Stigler; *Participation in Illegitimate Activities: An Economic Analysis,* Issac Ehrlich; *The Bail System: An Economic Approach,* William M. Landes; *An Economic Analysis of the Courts,* William M. Landes; and *The Behavior of Administrative Agencies,* Richard A. Posner.

JUSTER, F. T., EDUCATION, INCOME, AND HUMAN BEHAVIOR; A Report Prepared for the Carnegie Commission on Higher Education and

the National Bureau of Economic Research; McGraw-Hill Book Company, New York, NY (1975); $17.50; ISBN 0-07-010068-3; 438 p.; appendices. With chapters by A. Beaton, I. Ehrlich, G. Ghez, J. Hause, A. Leibowitz, R. Michael, J. Mincer, S. Rosen, L. Solmon, P. Taubman, T. Wales and P. Wachtel.

This volume of essays is a study of the way higher education influences marriage patterns, family size, consumption, savings, and social and political attitudes. By providing a close look at the assumption that higher education is both profitable and worthwhile for Americans, Juster fills the need for a study of qualitative and quantitative judgments about the nature and extent of higher education's influence on behavior.

MORGAN, W. R. (editor), 24 DRAMATIC CASES OF THE INTERNATIONAL ACADEMY OF TRIAL LAWYERS; Exposition Press, 900 South Oyster Bay Road, Hicksville, NY 11801 (1975); $10.00; ISBN 0-682-48142-4 (clothbound), ISBN 0-682-48143-2 (paperback), LC 74-21445; 224 p.; footnotes, appendix.

First hand accounts of the most memorable cases of a number of members of the International Academy of Trial Lawyers are set down in this book, the first of a series covering their trial experiences, judgments and "shop talk."

MOSS, M. (editor), THE MEASUREMENT OF ECONOMIC AND SOCIAL PERFORMANCE; National Bureau of Economic Research, New York, NY (1973); distributed in the United States by Columbia University Press, New York, NY; ISBN 0-87014-259-3, LC 72-97766; 605 p.; footnotes, graphs, tables, index. Volume 38 of Studies in Income and Wealth.

At present the system of national accounts measuring GNP is the standard device used throughout the world. The papers in this volume, presented at a conference at Princeton in November, 1971, propose alternatives which may give governments more accurate information and guidance concerning the social welfare of the population. Contributors include Wassily Leontif, Simon Kuznets and others.

SAFIRE, W., BEFORE THE FALL: AN INSIDE VIEW OF THE PRE-WATERGATE WHITE HOUSE; Doubleday and Company, Inc., Garden City, NY (1975); $12.50; ISBN 0-385-08595-8, LC 74-17771; ix, 704 p.; plates, index.

This anecdotal history, by former President Nixon's senior speech writer, provides new insights into The Man, from his political "retirement" in 1963 through the pre-Watergate period of 1973. While not directly involved with international law or policy, this memoir helps lend a flavor to the atmosphere in which many important international decisions were made.

WOODRUFF, W., AMERICA'S IMPACT ON THE WORLD; Halsted Press, A division of John Wiley & Sons, Inc., 605 Third Avenue, New York, NY 10016 (1975); $12.95; ISBN 0-470-95963-0; 296 p.; bibliography, tables, index.

This companion to Woodruff's IMPACT OF WESTERN MAN, which dealt with Europe's impact in the world, provides a synthesis of America's impact on the world during the past two hundred years. The primary focus of this well researched work is on the economic consequences of America's rise to world power status. As the author is not American, his comments are often critical and thought-provoking.

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