PEACE AND WAR: FACTUAL CONTINUUM WITH MULTIPLE LEGAL CONSEQUENCES

The literature of international law continues to reveal an increasing dissatisfaction with the traditional dichotomy of "peace" and "war" and its attendant allegedly sharp discrimination of relevant, but mutually exclusive, world prescriptions. Many recent writers have described and deplored the common ambiguous and confused use of the two basic terms, and some writers have sought, with varying degrees of clarity, to emphasize that the reference of the terms must be related to particular decision-makers and the purposes of such decision-makers.[1] Building upon this dissatisfaction, Professor Jessup has most recently recommended the recognition and elaboration of a new "state of intermediacy," "a third status intermediate between war and peace," as a mode of eliminating confusion in reference and irrationality in policy.[2]

The purpose of this editorial is to suggest that decisions about "war" and "peace" are perhaps even more complex than the contemporary literature yet explicitly recognizes and that a mode of analysis much more comprehensive and flexible than either dichotomy or trichotomy may be required if clarity and rationality are to be promoted. It is doubted whether a trichotomy which makes simultaneous reference both to facts of the greatest variety and to the responses which many different decision-makers make to these varying facts for many different purposes can, any more than a dichotomy of similar reference, do much to dispel ambiguity and irrationality.

The principal difficulty in our conventional analysis of "peace" and "war" resides, it is submitted, in this effort to make simultaneous reference to both "facts" and "legal consequences," to both the event to which decision-makers are responding and to their responses and prescriptive justifications for responses, by the invocation of a small number of absolutistic terms. This effort is, for example, most apparent in the often quoted and approved definition of war offered by Judge Moore. The passage reads:

[1] The most cited studies are Grob, The Relativity of War and Peace (1949), and Eagleton, "The Attempt to Define War," International Conciliation, No. 291 (1933). See also Wright, A Study of War (1942), Vol. 1, p. 10; Stone, Legal Controls of International Conflict (1954), p. 312; Schwarzenberger, "Ius Pacis ac Belli," this JOURNAL, Vol. 37 (1943), p. 460; McNair, "The Legal Meaning of War and the Relation of War to Reprisals," Grotius Society Transactions, Vol. 11 (1926), p. 29; Ronan, "English and American Courts and the Definition of War," this JOURNAL, Vol. 31 (1937), p. 642; Borchard, "War and Peace," this JOURNAL, Vol. 27 (1933), p. 114; Tucker, "The Interpretation of War under Present International Law," International Law Quarterly, Vol. 4 (1951), p. 11 (with an excellent statement of the indispensability of the distinction between permissible and non-permissible violence).

The thrust of the Grob study is admirable but its conceptualism is often muddy, including demands for "right" answers, and it seeks to relate definitions more to existing technical "rules" than to particular problems, particular decision-makers, and particular policies. See, for examples, pp. 188, 192, 200, 36, 176, 178.

[2] Jessup, "Should International Law Recognize an Intermediate Status Between Peace and War?", this JOURNAL, Vol. 48 (1954), p. 98, and "Intermediacy," Nordisk Tidsskrift for international Ret, Vol. 23 (1953), p. 16.

> Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case there may be said to be an act of war, but no state of war. The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights.[3]

Note the intermingled references to factual events and "legal condition" and the unquestioned assumption of a single meaning for all parties and purposes. Our contemporary books abound with equivalent definitions of war [4] and with comparable definitions of such subsidiary concepts as neutrality.[5] The question is by what framework of inquiry can such ambiguity, and its spawn of irrational decisions, be escaped or minimized in maximum degree.[6]

Search for an adequate framework of inquiry might, it is suggested, begin with some preliminary orientation with respect to the events to which decision-makers respond—that is, with respect to the facts of coercion across nation-state boundaries.[7] In highest-level abstraction these facts might perhaps be best described as a continuous process of attack and counter-attack in which the elites of one or more nation-states employ all instru-

[3] Moore, Digest of International Law, Vol. 7 (1906), p. 153.

[4] Thus Hyde, International Law (2d rev. ed., 1945), Vol. 3, p. 1686: "A state of war is a legal condition of affairs dealt with as such, and so described both by participants and non-participants."

Eagleton (above, note 1) offers a wide selection of such definitions of varying dates.

Wright early recognized the need for distinguishing war "in the material sense" from war "in the legal sense." "Changes in the Conception of War," this JOURNAL, Vol. 18 (1924), pp. 755, 762. He further emphasizes this need in his two-volume study, but he also makes frequent use of a definition which runs: "War is a legal condition which equally permits two or more hostile groups to carry on a conflict by armed force." Wright, A Study of War (1942), Vol. 2, p. 698. See also Vol. 1, p. 8.

Contrastingly, overemphasis upon the facts of coercion, and underemphasis upon the rôle of decision-makers, is apparent in Professor Borchard's occasionally quoted query: "Is it not a strange doctrine that would make the *existence* of war depend on recognition by anybody?" *Loc. cit.*, note 1, above. Quoted in Briggs, The Law of Nations (2d rev. ed., 1951), p. 975.

[5] Thus, Komarnicki, "The Place of Neutrality in the Modern System of International Law," Hague Academy of International Law, *Recueil des Cours* (1952), p. 401: "Neutrality is a legal status involving certain rights and duties." *Cf.* Stone (note 1, above), at p. 380.

[6] The mode of analysis here suggested reflects collaborative work with the writer's colleague, Professor Harold Lasswell, and with his students, Florentino P. Feliciano, William T. Burke, and Peter Stern.

[7] Coercion, as contrasted with persuasion, may be taken to refer to constraint imposed either by severe deprivations or by threats of such deprivations. Such ancillary concepts as force, violence, and conflict may be taken to refer, respectively, to coercion directed against the well-being of the target, to intense uses of force, and to aggregates of people in which the use of any form of coercion is intense.

ments of policy (diplomatic, ideological, economic and military), in alternative stages of acceleration and deceleration in degrees of intensity of coercion, against the bases of power (people, resources, institutions) of other target nation-states, and are themselves targets in return, for objectives which range from the inducing of the target nation-states' withdrawal, abstention, co-operation, or reconstruction in various forms to, at the extreme of coercion, their incorporation or destruction.[8] Each participant or practice in this process might in any given context be made subject to investigation in any detail necessary or possible: Just who are the initiating and counterattacking elites and what are their overt and covert objectives? Precisely by what practices in the use of diplomatic, ideological, and economic instruments, interrelated how in what acts and declarations, do they progress from less intensive measures of coercion to the most destructive use of the military instrument? Who are the combatants, who attack what people and resources, in what area, by what weapons, and with what degree of destruction? What measures are taken against people, resources, and institutions in territory occupied from the enemy or from non-participants or allies? What measures are taken against the activities and resources of hostile persons found within an elite's own territorial domain? What appeals are made to the officials in international organizations (universal or regional) to take action with respect to the coercive measures? What choices are made by elites in nation-states other than of the initial attackers and counterattackers, with respect to either participation in the conflict or continued or new relations with either or both of the contending groups? By what specific practices, with what acts and declarations, do the contending parties decelerate the violence of their interactions and resume relations in which coercion is less intense? Such questions are offered as suggestive merely of the general type of preliminary factual orientation recommended.

Having obtained such preliminary orientation in the events which constitute international coercion, an observer might next inquire generally how community intervention is organized to regulate such events: What decision-makers are authorized and maintained by what communities (world, regional, national), to make what decisions about what particular events, for what policy objectives, and by the application of what prescriptions and procedures? The decision-makers so authorized and maintained might be observed to include both international officials (judges of the International Court of Justice, arbitrators, members of the Security Council of the United Nations, etc.) and nation-state officials, including officials of nation-states both participant and non-participant in the coercion, and both civilian (legislative, executive, and judicial) and military (of relevant hierarchy in rank). For policy objectives relating to the maintenance of world public order, for the enforcement of a community-wide prohibition against unauthorized coercion, certain decision-makers might be observed in certain contexts to discriminate, in accordance with

[8] Appropriate modification of this statement might of course be made to take into account the internal conflicts commonly described as civil war.

their authorizations, between the different coercive measures that nation-state elites employ against each other, deciding that some measures are non-permissible but that others are permissible, and to justify their discrimination of such measures by application of a set of polar or complementary prescriptions, labeling the non-permissible coercion as "war" or "aggression" or "breach of the peace" or "threat to the peace" and the permissible coercion as "self-defense" or "collective self-defense" or "collective peace enforcement" or "collective police action." For policies relating to the promotion of universal or common responsibility for the maintenance of world public order or, alternatively, to the limitation of the area and intensity of coercion, other decision-makers might be observed to be making decisions about required participation or permissible non-participation in collective security measures or other coercive measures and, in the event of decision for permissible non-participation, about the interrelations of participants and non-participants in respect to the control of persons, goods, and resources, and to be justifying such decisions in terms of both conventional and customary prescriptions which dichotomize "war" and "no-war" or "neutrality," or "belligerency" and "non-belligerency." For determining the permissibility or non-permissibility of a great variety of controls over people and resources, with respect to both a participant nation-state's own nationals and enemy nationals, other decision-makers might be observed to be appraising the degrees of intensity of coercion in attack and counterattack and justifying decisions in terms of prescriptions which distinguish the "initiation" of "war" from the continuance of "peace." For promoting the minimum destruction of values in situations of conflict, contexts in which the prohibition of coercion has failed, still other decision-makers might be observed to be passing upon the legitimacy of combatants, of objects of attack, of areas of attack, of weapons and degrees of destruction, and of various controls over people and resources in areas occupied from an enemy, and to be justifying decisions by invocation of complementary prescriptions about "military necessity" and "humanitarianism" or "reprisals" and "proportionality of reprisals." For determining the continued legitimacy of a wide variety of controls over people and resources, with respect to both a participant nation-state's own nationals and enemy nationals, still other decision-makers might, for final example, be observed to be appraising a decelerating intensity of coercion and to be justifying decisions in terms of the "termination" or continuance of "war."

From the perspective of such orientation with respect to both the facts of international coercion and the responses made by authoritative decision-makers to such facts, an observer might reasonably conclude that the technical terms "peace" and "war," and all their subsidiary, dichotomous, and complementary prescriptions, insofar as they refer to the *facts* of coercion, embrace between their polar extremes a continuum [9] of coercive practices of infinitely varying modalities and degrees of intensity, and,

[9] Description in terms of a continuum is employed by both Schwarzenberger and Wright, cited above, note 1.

insofar as they refer to the *responses* of decision-makers, encompass a variety of decision and of justification for decision as various as the facts, the decision-makers, and the policies of decision-makers. Between the polar extremes of the lowest and highest degrees of coercion there is not one stage of intermediacy but countless stages, and in their employment of "war" and "peace" and other terms, decision-makers exhibit not two or three, but highly selective multiple, references.[10]

An organization of studies for more detailed inquiry into the facts and decisions about international coercion might appropriately take into account their variety. The mode of organization we recommend would begin by seeking to categorize the facts to which decision-makers respond in terms which facilitate both the identification and clarification of relevant community policies and the description and appraisal of trends in decision. The type of categorization proposed may perhaps be best indicated by pointing, in rough and merely suggestive terms, to certain broad areas, within which the particular events to which decision-makers respond could be refined with any precision necessary, such as the following:

1. The employment by nation-state elites of the military instrument in direct attack or the intensification of coercion by use of other instruments in such degree as to create reasonable expectations in target elites and others of imminent attack with the military instrument. The policy issue here is that of preventing or repressing unauthorized coercion and of maintaining the world public order.
2. Choices by elites with respect to participation or non-participation in coercive processes of high degree of intensity initiated by others. Policy issues here relate both to the application of "charter" commitments requiring participation in collective measures to prevent or repress unauthorized coercion and, where non-participation is permissible, to regulating the interactions of participants and non-participants in modes best designed both to promote world public order and to minimize the coercive destruction of values.
3. The initiation by elites of measures of highly intense coercion, as in categorization No. 1 above, in a context in which the reasonable expectations of target elites and others are that community efforts to prevent or quickly suppress the use of the military instrument will fail. The policy issue here is *when* various world prescriptions, designed both to protect security interests and to minimize the destruction of values, become applicable to the conduct of operations with the military instrument, to the exercise of many different controls over people and resources, of both national and non-national origin, and to interactions of participants and non-participants. Particular events may be both internal and external to the nation-state of the decision-maker and relevant prescriptions may include both world and national.
4. The conduct of hostilities by elites employing the military instrument against the bases of power of their enemies. Policy issues re-

[10] Some of the difficulties that others have found with states of intermediacy are recounted by Komarnicki, *loc. cit.* (note 5, above), Ch. II.

One can only marvel at the restraint of Stone, who writes ". . . it is likely that clarity will only be approached in this problem by recognizing that the question 'War or No War?' may have to be answered differently according to the purposes for which an answer is sought"; but concludes that "No such differentiation can be said as yet to have emerged in practice." *Op. cit.* (note 1, above), at pp. 312, 313.

quire determination, by a balancing in appropriate context of principles of military necessity against principles of humanity, of permissible combatants, permissible areas of operation, permissible objects of attack, and permissible weapons and degrees of destruction.

5. The exercise of various controls over people and resources by belligerent elites in territory occupied during the course of hostilities from the enemy. Policy issues require a balancing of the security and other military interests of the occupant against the human rights of the inhabitants. Military occupation after the cessation of hostilities raises very different policy issues and, hence, requires careful distinction.

6. The exercise by contending elites of a great variety of controls over enemy persons and resources located within their own territorial domain. The policy issues again contrapose military necessity and the minimum destruction of values.

7. The deceleration by elites of the degree of intensity of coercion, with concomitant effects ranging from relaxation of controls over persons and resources, both enemy and national, to the partial or total incorporation of enemy persons and resources. The broadest policy issue here is *when* the prescriptions appropriate to situations of conflict cease to be relevant and other prescriptions, better designed for securing a future world order, become applicable.

Such major areas of investigation could be expanded in number as the facts of coercion might make necessary and, within such major areas, subcategorization might be made in any degree required for the precise description of particular events. With some such organization of inquiry, it might be possible more adequately to perform with respect to the problems of international coercion certain intellectual tasks, indispensable to the dispelling of ambiguity in the formulation of issues and of irrationality in decision, which include: the clarification of fundamental community policies, the description of trends in decision and conditioning variables, the appraisal of decisions for conformity with clarified community policies, and the invention and recommendation of alternative prescriptions and procedures.[11]

In the contemporary posture of world affairs the urgent need for such inquiry is not likely to be exaggerated.

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IDENTITY OF STATES UNDER INTERNATIONAL LAW

These troubled times since 1914 have seen the coming into existence, transformation, extinction, and resurrection of many states. Whereas in many cases no difficulty has arisen in determining whether a certain state is a new state [1] or identical with a pre-existing state,[2] there are many

[11] Some amplification of what is intended by these "intellectual tasks" is offered in McDougal, "International Law, Power, and Policy," Hague Academy of International Law, *Recueil des Cours* (1953).

[1] Thus Poland, Czechoslovakia, the Baltic Republics, Finland, Iraq after the first World War, and Syria, Lebanon, Libya, Israel, Burma, Ceylon, Indonesia, Pakistan after the second World War.

[2] Thus the Turkish Republic and the Soviet Union, although the latter denied its identity with the Russian Empire.