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LAW AND MINIMUM WORLD PUBLIC ORDER: ARMED CONFLICT IN LARGER CONTEXT

Myres S. McDougal*

From what I have heard, and recently read, I gather that there is a movement to bring together the law of war and the law of human rights. This article will be directed toward the possible integration of these two, once allegedly different, dimensions of inherited experience. I propose to try to put the problems of humanitarian law into a larger context which includes other urgent, contemporary problems.

My first thought is that it is a mistake to separate humanitarian law from other parts of the law of war and from international law and even law, more generally. There was a very famous professor of constitutional law at Harvard, Thomas Reed Powell, who used to say: "If you think you can think about something to which something is attached without thinking about the thing to which it is attached, then you have a good legal mind." It is this high skill that is in some measure being applied to the new humanitarian law.

Let me begin with a few brief words about international law in general and how it is made. It seems to me most fruitful to work with a conception of international law, as of the law of any community, in terms of a process of authoritative decision by which the members of the community seek to clarify and secure their common interests. By a community, I mean any group characterized by interdependences, that exhibits interdetermination. In any community manifesting interdependences, there is always a process of effective power in the sense that some decisions are made and enforced irrespective of whether or not people like them.

These effective power decisions are of two different kinds: decisions that are made by naked power or sheer convenience, and decisions that are made from perspectives of authority. The latter are made by the people who are expected to make them, in accord-

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ance with basic community policies, i.e., through a genuine effort to clarify community policy, to ascertain and secure common interests. They are made in structures of authority and by established procedures, not in smoke-filled rooms. The people who make them have enough bases in effective power to put them into operation in a consequential number of instances. These latter decisions we call law. These are the authoritative decisions in the community.¹

These authoritative decisions also are of two different kinds. There are the decisions that establish this process of authoritative decision. These may be called constitutive decisions, decisions that say who the established decision-makers are and what the basic community policies are, decisions that create structures of authority, allocate bases of power, and specify the procedures that must be followed for a legal decision to emerge. The decisions that come out of this constitutive process may be described as public order decisions. They regulate every value process in the community, how wealth is shaped and shared, how health is protected, how education is fostered and shared, and so on through all the categories of values that a community may cherish.

Both of these types of decision processes also occur on a global scale. There is a process of constitutive decision in which international law is made and applied and, in measure, an established world public order. There is a world wealth process in which claims to wealth get some protection, a world health process, and so on. One may talk of the protection that nation states, or international governmental organizations, or private associations, or individual human beings, get as a part of this global public order.

International law is made by a continuing and comprehensive process of communication which includes all the sources mentioned in Article 38 of the Statute of the International Court of Justice² and much more. The Statute of the International Court of Justice includes conventions, custom, general principles of law, national decisions, and other items, even the opinions of publicists. But this is not a homogenous categorization, nor is it a comprehensive itemization. It makes no reference, for example, to the communications coming out of international governmental organizations. It makes no reference to the vast machinery of the United Nations, to the importance of the resolutions of the General Assembly, or of the Security Council.

1. See generally, Lasswell & McDougal, *Criteria for a Theory about Law*, 44 S. CAL. L. REV. 362 (1971); McDougal & Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 103 (R. Macdonald & D. Johnston eds. 1983).

2. Statute of the International Court of Justice, art. 38, 59 Stat. 1031, T.S. No. 993, 15 U.N.C.I.O. Docs. 355 (1945).

The operating lawyer who sets out to establish what international law is characteristically follows a certain pattern. He begins with multilateral agreements, commonly available (as in the law of war) in abundant variety, and then goes to decisions or utterances from an international court or an international arbitration, to prescriptions coming out of the General Assembly that purport to say what international law is, and even to utterances from delegates or from the secretariat. Ultimately, he moves to the national level, the general principles of law, comparative constitutional law, national constitutions, national statutes, national court decisions, and eventually to the text writers. The communications he examines are in huge and continuous flow.

The most appropriate dichotomy is that between law-making in the most deliberate method and law-making in the least deliberate. The most deliberate method is that of multilateral agreement, while the least deliberate depends upon the influences people draw from habitual behavior, sometimes called custom. The traditional, but inadequate, statement of the requirements for customary law is that continuing uniformities in behavior must be accompanied by subjectivities (*opinio juris*) that they are required by law. The word custom is also commonly applied to the outcome of this whole process of communication, whatever its form or source. Behavior which at one time is regarded by everybody as unlawful, if repeated through a period of time, becomes regarded as lawful. There is no way that one can find out whether there is *opinio juris* without observing and evaluating the uniformities in the behavior of people. One has to observe both the flow of behavior and the flow of words and only then can one make a realistic conclusion as to whether there is law and what it is.

The question which should be asked is not what has been the past customary law and what is the new treaty (protocol) law, and does the former confirm or aid in interpreting the latter? The relevant question is: what is the law? Are these new protocols law or will they be law? It is the projection into the future that is important. Not all multilateral agreements, however deliberate and however much in accord or not in accord with customary law, make law. Many of them are illusions.

In order to make a realistic finding of law, an observer must be able to identify several very specific components: (1) a policy content, (2) expectations of authority, and (3) expectations of control. The policy content of the new protocols, despite many ambiguities, are as susceptible to clarification as is the policy content of most multilateral agreements. These protocols have been projected through the established institutions and procedures of the global constitutive process of authoritative decision; the agreements have been made in the way that agreements are expected to be made and

in a genuine effort to clarify common interest. The expectations of authority attendant upon the protocols would appear clear. It is the expectations about control, however, about whether the protocols are to be put into practice, or are to be allowed to become myth and illusion, which cause difficulty.

Beyond the expectations of control, one must also be able ultimately to find or create the facts of control, or else the expectations of control will prove to be illusions. This is a quarrel that I have with some friends who insist upon the present unlawfulness of atomic weapons. To say that the use of these weapons is unlawful, one has to establish not only the policy that the use of these weapons should be unlawful, but that this policy is established by authority and carries expectations of control. This requires the predispositions and institutions of control on a comprehensive scale.

One way of making a policy into law is for influential people to assert in a very loud voice that it is law. This approach does not always work and I am not sure that it will work for the protocols. International law, like other law, is not made in any one way or from any one source. It is not made by agreements only; nor by organizational resolutions only; nor by practice only. It is not, most assuredly, made by text writers saying that a policy is the law. International law is made by the cumulation of all relevant communications. That is why we will have to wait to see in what degree these new protocols become law.

With regard to the application of international law, the great bulk of application is still from state official to state official. Although thousands of arbitrations on matters other than military do occur, most applications of the international law of war continue to come from nation-state officials. The point that needs emphasis is that, if one examines the principles comprising what is called international law, whether relating to the humanitarian law or to any other problem, these principles always come in complementary form and multiple policy reference.

In humanitarian law, one has the reference, on the one hand, to military necessity and, on the other, to humanitarianism. It matters little whether these complementarities are written into the prescriptions or brought to bear in the application. For, when combined with the ambiguities and incompleteness in the formulation of prescriptions, they give applicators a very broad discretion. The act of applying is thus a highly creative act: an intervention in the present to affect the future.

Some critical questions now require our attention: how will these protocols be applied as law in the future? What are the factors that will affect that application? How under continuously

changing conditions can we establish and maintain institutions that will improve application in the common interest?

With this background on the making and applying of international law, we must consider the factual problem to which humanitarian law is addressed. It seems a mistake to talk and debate about the virtues and validities of the rules in the protocols, about whether, in the abstract, they are law or not law. The factual problems inherent in all the law of war derive from a global process of coercion, a component of the global process of effective power, a process that goes on all the time with varying degrees of intensity. One may describe this process of coercion, as Feliciano and I did,³ in terms of the participants, their objectives, the situations of coercion, the bases of power, the strategies they use and the outcomes in coercion achieved. There exists law about every feature of this process, in all its intensities, from the times that are called peace to the times that are called war. In fact we live in a continuum of intensities and this dichotomy of war and peace is no longer descriptive.

The very first problem facing any community, whether global or regional or local, is the minimization of unauthorized coercion and violence. From a policy perspective, the very essence of the notion of law is uniformity in decision. The law is not arbitrary, nor is it arbitrary coercion. Without this minimum order, this preclusion of unauthorized violence and coercion, there is no chance to achieve an optimum order to promote the greater production and wider sharing of the basic values that a community cherishes.

To make sense out of humanitarian law, we need to examine a more fundamental set of policies than the ones ordinarily announced in the literature. If we take seriously this policy of minimization of unauthorized coercion, the concept of minimization has to be broken down into a number of sub-headings. These topics might include: the long-term prevention of unauthorized coercion, the short-term deterrence of intense coercion, the restoration of situations once violence breaks out, the short-term rehabilitation of victims, and the longer term reconstruction of communities.

Our principal concern at this conference is the legal regulation of armed conflict, which requires location in the whole sequence of problems involved in the law of war. Feliciano and I sought to specify and organize these problems in terms that would facilitate performance of all the intellectual tasks that lawyers must perform.⁴ The first problem is that of prohibiting the use of coercion and violence against other communities. The United Nations Charter provides that violence, and the threat of violence, are not to be used

3. See M. McDougal & F. Feliciano, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE REGULATION OF INTERNATIONAL COERCION* (1961).

4. *Id.*

against the territorial integrity or political independence of other states.⁵ Other articles preserve the historic, and indispensable, right of self-defense.⁶ The distinction requires a careful, contextual evaluation.

A second problem is participation. In a world community which imposes or assumes a duty of collective responsibility, and in a context of contending world public orders, there is not likely to be much room for neutrals. A comparable problem does, however, arise with respect to assistance to governments or rebels, as in the Vietnam War. For 300 years it was thought proper and perfectly lawful for states to go to the aid of established governments, but not lawful to go to the aid of rebels. This ancient prescription is apparently in the process of change. Contemporary conditions do, therefore, raise many difficult problems about permissible participation in violence.

A third, and most immediately relevant, set of problems is concerned with the conduct of hostilities. This includes all the difficult sub-problems of permissible combatants, permissible areas of operation, permissible weapons, permissible victims, and permissible intensities in coercion. Another set of problems includes the intricate issues raised by belligerent occupation. There is, further, a distinctive problem of captured enemy personnel,⁷ and other problems about the permissible treatment of enemy personnel and enemy property caught within national boundaries, at the outbreak of violence. Most importantly, there is the problem of legal principles and procedures for facilitating the termination of violence and coercion.

I wish to stress that the problems involved in regulating the conduct of hostilities are intimately related to, and dependent upon, the policies that relate to all these other problems. We cannot achieve the deep goals relating to human dignity that we have in mind in humanitarian law unless at the same time we consider all of these other problems as well.

Historically, the law of war has worked on three different policy levels. The first effort is to prevent war and to minimize resort to unauthorized coercion. States are authorized to use violence only when it is imminently necessary to defend their territorial integrity or political independence, or to achieve certain humanitarian or collective security purposes.⁸

The second level relates to the conduct of hostilities. When violence cannot be precluded, it is required that, within the limits of

5. U.N. CHARTER art. 2, para. 4.

6. See, e.g., U.N. CHARTER arts. 51 & 52.

7. See generally B. HINGORANI, PRISONERS OF WAR (1982).

8. See M. McDUGAL & F. FELICIANO, *supra* note 3, 121-260.

military necessity, the military instrument be employed with as much humanity as possible.⁹

A third level relates to reprisals. When one party violates the law about the conduct of hostilities, then the other party is authorized also to violate that law in ways that are necessary and proportionate to cause the first party to resume lawful behavior.¹⁰ Through successive retreats, authoritative decision does its best to approximate humanity. A clear recognition of the interrelations of these policies and problems might make efforts toward improvement more realistic and, hence, more effective.

Let us now relate all of these problems to another contemporary strand in the development of international law. This approach may enable us to clarify fundamental policies in greater detail. The new strand relates to contemporary developments in human rights law. It is not easy to understand all that is at stake in human rights. When Professors Lasswell, Chen, and I first began to write a book on the subject,¹¹ we had the problem of defining what we were talking about. I looked in many previous books and found that human rights were defined as the rights that law will protect—a very inadequate definition, since a legal community might be totalitarian and woefully wanting in protection.

Another definition came from natural law, which proclaims that individuals have certain inherent rights derived from various meta-empirical sources, such as religion or metaphysics. In contemporary culture this approach is not very persuasive as it offers very little guidance in the management of particular empirical problems. Still another definition came from the historical school of jurisprudence, which asserts that human rights are whatever the people demand. Unhappily, again, people may be living in a totalitarian community, and have no opportunity to acquire the predisposition to demand.

The outlines of a more viable conception of human rights came to me while reading some very technical books upon the European Convention on Human Rights.¹² This Convention has a lovely provision against discrimination upon grounds of "sex, race, color, language, religion, political or other opinion, national minority, property, or other status." About the only important ground omitted is old age. The technical books, however, insisted that this right

9. *Id.* Ch. 6.

10. *Id.*

11. M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980).

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, in COUNCIL OF EUROPE, *EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS* (9th ed. 1974).

to non-discrimination was limited to the specific rights set forth elsewhere in the Convention, and those specific rights were far from comprehensive.¹³ For some reason, wholly distinct from the omission of old age as a ground of complaint, this highly technical position made me angry. For, if a person is entitled to be protected against differentiation for reasons irrelevant to capabilities, why not with regard to any value that an enlightened member of the community might cherish? Professor Harold Lasswell has defined the value of respect in terms of reciprocal deference between human beings.¹⁴ It occurred to me that the fullest respect that one human being can accord another is to respect his freedom of choice, his autonomy, with regard to participation in any and all of a community's value processes.

The most viable conception of the respect value as an indispensable component of human rights, would thus be reciprocal deference for freedom of choice about participation in every other value process that a community affords. In a contemporary community exhibiting inescapable interdependences among all values, such a conception would alone appear to be rational. Any value that an individual can achieve is a function of his wealth, enlightenment, skill, health, and so on. From this perspective, the appropriate designative reference of "human rights" must be, not merely to legally protected rights, nor to demanded rights, but to a preferred shaping and sharing (including the greatest production and widest distribution) of all cherished values.

When we give human rights this broad reference, as realistically we must, it becomes obvious that the fundamental policies about human rights are the same fundamental policies that underlie all law. The most basic policy in any community that aspires to law is that of achieving a certain uniformity in decision, a minimum order that controls unauthorized coercion. Aspiration toward a more optimum order must include the greater production and wider sharing of all community values. The distinctive function of the law of war, as differentiated from any other law, is to clarify and secure this minimum order and optimum order during times of the most intense application of coercion.

From this broad definition of the general problem, we may now be able to focus in more detail upon the particular policies of the humanitarian law that relate to the conduct of hostilities or combat operations. When I first read the two new protocols,¹⁵ the thought

13. See generally J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1969); F. VALLAT, *AN INTRODUCTION TO THE STUDY OF HUMAN RIGHTS* (1972).

14. See Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

15. Protocol I Additional to the Geneva Convention Relating to the Protection of

that came to me was that their proponents were trying to reintroduce the concept of chivalry. In the wars of the future, if any observers remain, it may not be possible to distinguish between combatants and non-combatants. Upon reflection, however, I remembered that many smaller wars were in process, even now, in which the protocols might be applied to serve the cause of human dignity.

The method by which humanitarian law has historically sought, and still seeks, to distinguish lawfulness from unlawfulness in the conduct of hostilities has been through a balancing or accommodation of military necessity and considerations of humanity. The Achilles heel in this method is the open-endedness of "military necessity." Military necessity for what? For taking a position or for overwhelming an enemy or for winning a war? If military necessity is related to overwhelming an enemy or winning a war, little role will be left for considerations of humanity. The classic treatises upon the law of war do in fact achieve little, by doctrinal formulation, to preserve a role for humanity.

It would of course be naive to hope to dispense with military necessity, since the concept derives from the present nation-state organization of the world. The nation-state is a territorial organization that came into being about 400 years ago to increase the security of the individual human being at a time of great violence and instability.¹⁶ It was, and is, an organization with power as its principal goal, the power of a particular people in a specified territorial area. In an unorganized, chaotic world, people in a specified territorial area cannot maintain their own security without the aid of this concept of military necessity.

In an effort to impose some limit upon the concept of military necessity, Feliciano and I suggested recourse to the basic policies underlying the distinction between self-defense and aggression.¹⁷ Under this distinction a state may employ the military instrument in such measure as is necessary and proportionate to repel attacks directed against its "territorial integrity" or "political independence." We suggest that, by relating any specific exercise of violence to the permissible objectives of defense of minimum public order, it might be possible to anchor the search for clarification of military necessity and stop the infinite regress in the exercise of violence. Military necessity might then be said to be limited to the exercise of violence which is indispensably necessary (proportionate

Victims of International Armed Conflicts, U.N. Doc. A/32/144, Annex I 1977, *reprinted in* 16 I.L.M. 1391 (1977); Protocol II Additional to the Geneva Convention Relative to the Protection of International Armed Conflicts, U.N. Doc. A/32/144, Annex II (1977), *reprinted in* 16 I.L.M. 1442 (1977).

16. See J. STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* (1970).

17. See M. MCDUGAL & F. FELICIANO, *supra* note 3, Ch. 3.

and relevant) to promptly repelling and terminating highly intense coercion against "territorial integrity" and "political independence."

This is not to suggest that aggressors be denied the benefits of the law of war, or that their every act of violence be treated as a war crime. It is urged only that the standard applied be the same restrictive one appropriate to permissible self-defense. It may be recalled that Quincy Wright took the view, shortly after the United Nations Charter became effective, that aggressive states should not have the benefits of the laws of war. It was not long, however, before most observers saw a common interest for all humankind in applying the laws of war in any kind of major conflict or massive destruction. This same policy should apply to wars of so-called liberation. There is a common interest in having the laws of war applied in any process of intense coercion or violence.

To give meaning to the policy complementary to military necessity, that of "humanity," we must consider the immense development of human rights law since 1945. A growing number of writers have noted how well established human rights law is today, and have observed the need to integrate that law with a new "humanitarian" law of war. Professors Lasswell, Chen, and I took the position that we have today a global bill of rights which is fully comparable to that in our mature national communities.¹⁸ A bill of rights refers to the most intensely demanded policies in a community. Its policies are prescribed in a specialized way and are made applicable to everybody. Provision is made for their invocation against all violators, and they can be terminated only in the same way they are made.

It is said all over the world today that the Universal Declaration of Human Rights,¹⁹ despite its origin in aspiration only, has become customary international law. More precisely, it is not the Universal Declaration alone, but the Universal Declaration in the whole global flow of communication—the United Nations Charter, the two basic covenants, the ancillary covenants, the regional covenants, the national constitutions, national legislation and decisions, writing of publicists and so on—that have created a global bill of human rights. It is this vast body of newly established law, not simply preference or pious aspirations, that can now be drawn upon to fill in the outlines of what is meant by humanity.

I have already made reference to the problem of prohibiting unauthorized violence. The aggressor is the state which first puts another state upon notice, upon reasonable belief, that it must use

18. See M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 11, Ch. 4.

19. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

the military instrument to protect its political independence or territorial integrity. The state so put upon notice is entitled to claim the benefits of self-defense. This may be ambiguous, but no more so than many other legal prescriptions. It is true that one has to make a close, careful, contextual examination of every particular instance to find out who is aggressor and who is self-defender. Such contextual examination is, however, required in almost any legal problem of any importance. The trouble with a prescription that there shall be no aggressive use of the nuclear weapon is that it assumes that one knows who is the aggressor. There is, unhappily, no way of finding out who the aggressor is without this very careful examination. An added difficulty is that we have no authoritative body to make such a determination. With the veto in the United Nations Security Council, the world affords no effective institutions.

It is common knowledge that over the centuries, humankind has enjoyed no great success either in precluding the outbreak of violence or in regulating the conduct of hostilities to secure conformity to humane criteria. Even in recent decades we have been much more successful in achieving prescriptions in accord with the requirements of human dignity than in securing their application in practice. Any of us who read the papers or listen to the radio know that not all contemporary wars are fought in accordance with the two new protocols²⁰ or the '49 conventions²¹ or the older laws of war. Within the last two hundred years the protection during times of relative peace of individual human rights has increased greatly in many parts of the world; yet the values we cherish as essential to human dignity are even today poorly protected on a global scale, and sometimes even in our own country. The task remains of increasing such protection throughout the cycle of peace and war.

Turning to the factors that condition our failure, we are confronted with all the features of the contemporary global process of effective power. In a world organized primarily through the territorial community of the nation-state, an entity designed to preserve and increase its own power at the expense of all other such entities, the world arena is inescapably a military arena. The dangers inherent in a comprehensive military arena are, further, immeasurably increased by a developing weapons technology and made immediate by technologies of communications and transportation. All these developments are perhaps making the nation-state as obsolete as gun-powder once made the walled city. What we have today is a global organization, or disorganization, not so much of 200 nation-

20. Protocols Additional to the Geneva Convention, *supra* note 15.

21. Geneva Conventions for the Protection of War Victims, 6 U.S.T. 3114, T.I.A.S. 3362; 6 U.S.T. 3217, T.I.A.S. 3363; 6 U.S.T. 3316, T.I.A.S. 3364; 6 U.S.T. 3516, T.I.A.S. 3365 (1949).

states, as of two contending ideological public orders, one totalitarian and the other hopefully aspiring toward freedom, each trying to eliminate the other. Certainly we can observe at least two immense giants, armed with the new weapons and spurred on by a danger of proliferation, circling the globe with satellites, airplanes, and submarines and spying upon each other's every move, in expectation of instant retaliation. The outcome is a tremendous insecurity for every person on the globe.

The one heartening condition is the increasing recognition by the peoples of the world, despite their divisions into East and West and North and South, of their inescapable interdependences, not merely in the shaping and sharing of all cherished values, but even in simple survival. One of the most potent political forces of global reach today is the rising common demand of peoples, wherever situated, for greater participation in the shaping and sharing of all values and for the establishment and maintenance of institutions which will afford them security in the enjoyment of such values.

If we attempt to project future developments, we are confronted by all the changing features of the global community process, including that of effective power. We cannot indulge in simple-minded extrapolations of past trends, since, through the inventiveness of man, conditions are always changing. The new access to space, by way of the shuttle and other inventions still to come, may be expected to change vastly not only future life, but future war, in as yet unimaginable ways. It may be reasonable, however, to anticipate a continuing aggravation of the struggle between contending ideological world public orders until one or the other gets the upper hand, or they merge into each other. We can hope that the increasing recognition of the peoples of the world of their interdependences and rational employment of the new technology, will create in the larger earth-space community a new global community rather than a theatre for suicidal combat.

The alternatives for those who seek a more safe, abundant, and free world public order all focus upon communication and persuasion. Theoretically, one might change any and every feature of the global constitutive process of authoritative decision, the process by which international or transnational law is made and applied, in the effort to improve the protection of individual human rights throughout the continuum of war and peace. Practically, any change must require the consent, even the active initiative, of all holders of effective power. This consent and initiative can scarcely be obtained without tremendous programs in communication and education. The peoples of the world need to be educated to a deeper understanding of the problems involved and of the potentialities of law for the solution of such problems. They need to be educated to a more realistic understanding of their interdependences

with regard to all values, even survival, and to the imperative necessity for wider and wider identifications with their fellow human beings.

In our book on human rights my colleagues and I noted²² that “the contemporary image of man as capable of respecting himself and others, and of constructively participating in the shaping and sharing of all human dignity values, is the culmination of many different trends in thought, secular as well as religious, with origins extending far back into antiquity and coming down through the centuries with vast cultural and geographic reach.” It is our opportunity to preserve and extend this image and its realization in fact.

22. M. MCDUGAL, H. LASSWELL & L. CHEN, *supra* note 11, at 376.