The Cooperative Defense of Europe

Covey T. Oliver
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I. THE PROBLEM

This paper is one of a series falling under the general topic, "Some Contemporary Problems in Foreign Affairs." Its objective is to describe and evaluate key developments arising out of the European defense effort, in so far as they bear upon or have influenced the nature of the legal order of life in Western Europe. The problem is to state the interactions between defense and supranational political organization in a European context. The tremendous amount of activity bearing upon this problem and the rapidity with which events have moved are in themselves justification for the selection of the topic and, incidentally, for the state of semi-"oneliness" of its assignee, bedeviled by time-lag and an almost indecent acceleration of tempo in 1952. It is perhaps noteworthy that the subject of this paper and the general topic on which it bears were selected by a group of international law professors as of possible general interest at a law professors' meeting. This may mean either that lawmen are widening the scope of their interest to "non-law" fields, where they will be modest, helpful co-workers with other professional specialists, or that once more they will

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*This article is the substance of an address delivered by the author at the International Law round table at the 1951 annual meeting of the Association of American Law Schools in Denver, Colorado, modified, however, to take into account a number of significant developments in the area it deals with since the date of its first presentation.

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1. This was the over-all topic of the round table referred to. Other papers in the series were Bishop, The Structure of Federal Power over Foreign Affairs, 36 Minn. L. Rev. 299 (1952); and Re, The Nationalization of Foreign-Owned Property, id. at 323.


3. At this writing no primary source giving the text of the draft of the European Army Treaty can be found in any of several libraries on the campus of a first-class university. Reliance on secondary materials has had to be greater than the author would have wished.
assume a Superman posture and in their fancy, but not in reality, take over the operation. My "pitch" will be toward the first possibility and against the second, and in the process there may be some tossing of jurisprudential crockery.

II. An Estimate of the Present Situation

In a nutshell my thesis is that today the big problems of cooperative defense and of European supra-national governmental institutions are precisely the same: organizational and chiefly political.

The stage of panic after Korea regarding Soviet intentions in Europe has passed. A new phase has begun. The wave of panic did many things. It changed the basic nature of the North Atlantic Pact from an alliance which would discourage an aggressor by making it clear that an attack on one would be an attack on all, to a mechanism for putting armies-in-being in the path of the potential aggressor. This shift, initiated by France, resulted in American proposals regarding the use of Western Germany's power which staggered the French and, eventually, led, as the resultant of vectors of conflicting appraisals, to the concept of the European Defense Community and to many an important development in connection with the negotiation of the "peace contract" between Western Germany and the Western world. The fear of imminent Soviet movements westward also shifted the emphasis of American aid to Europe heavily toward armaments and away from economic assistance.

The best evidence that the stage of panic has passed comes from the fact that our press no longer frightens us, as it did in the winter of 1950-51, with the spectre of 175 Soviet divisions or of the formidable East German "police" force. Instead the pundits tell

4. Although the treaty provided for mutual aid, both the Secretary of State and the Senate Foreign Relations Committee in 1949 emphasized that its chief function was to prevent any potential aggressor from taking a calculated risk that he could divide and conquer. See the Report of the Secretary, Dep't State Bull. 532-536 (April 24, 1949); Report of the Committee on Foreign Relations, Senate Executive Report No. 8, 81st Cong., 1st Sess. (June 6, 1949).

5. James Reston, New York Times (March 2, 1952) states that France, alarmed by the implications of Korea, on August 5 and August 17, 1950, took the diplomatic initiative which led to the step-up in American military aid to Europe and in the sending of additional American forces there. This development is to be contrasted with the popular assumption of the time that Europe was sanguine and only America had the wind up.

6. The metamorphosis of the Economic Cooperation Administration into the Mutual Security Administration and a shift to a ratio of about 5:1 in military to non-military assistance in the Mutual Security Act of 1951 (65 Stat. c. 479; Pub. L. No. 165, 82d Cong., 1st Sess.) set a trend which has continued.
us their highly placed sources say that NATO strength on the Hamburg-Trieste line exceeds the Russian, that supply lines have been re-oriented so as to run across France, roughly perpendicular to the front, rather than through the more vulnerable Hanseatic ports; that the U. S. Sixth Fleet, plus the entry of Greece and Turkey into NATO, virtually assure the Mediterranean. It is admitted that the North Sea approaches are less well protected, that Soviet submarines are a menace and that the air picture might be better. But, overall, the consensus seems to be that counter-power-in-being now exists on such a scale as to make extremely hazardous to the potential aggressor any move by him.\footnote{Testimony read for General of the Army Eisenhower in executive session and made public on national wire services about May 7, 1952, supports this at the highest professional level.}

It is significant, perhaps even curious, that public attitudes do not seem to have been appreciably affected for any of the NATO countries by this change in the power relationships in the area of immediate contact. A columnist here or there may mention the “embarrassment” of our Pentagon planners lest too much be made of this shift, but, by and large, leadership and the public in the NATO world still accept the policy that calls for a build-up of force in order to create that “situation of strength” which must, according to the currently accepted official hypothesis, exist before there may be the possibility of any effective negotiation with the Soviet Union.\footnote{Cf. Kennan, The Sources of Soviet Conduct, Foreign Affairs, XXV, No. 4, 566-82 (July, 1947). This thesis, elaborated more and more away from Mr. Kennan’s concept of the struggle as one of “over-all worth,” toward physical concepts of containment, has been stated as the Administration’s position many times.} This situation probably only proves that the NATO public is more sophisticated and tougher-minded than some commentators give it credit for being. It may realize that strength on the lines is only the first phase of military security.

However, the atmosphere in which the cooperative defense of Europe develops cannot be insulated from the important development described above. With the passing of panic it is to be expected that the pace along certain lines will be more deliberate, the planning more detailed, the bargaining sharper, and national political issues less easily sublimated. These shifts in attitude will inevitably reflect themselves in problems of organization and of politics; hence my thesis under this heading.

By way of carrying forward the presentation and at the same
time of making a semantic clarification, however, it should be noted
that in this sense "political" does not, if it ever should, exclude
"economic." The basic economic problem of European defense is
highly political, both nationally and internationally, for it is a
bucational problem. Between NATO countries it is the problem of
allocating defense costs on the basis of ability to pay. Within France
it is the question of effective and fair tax administration. As to
France internationally it may involve further examination of her Far
and Middle Eastern involvements. In Britain it is in part the ques-
tion of state-furnished welfare versus defense; it may in larger part
warn of more serious international trade problems just beginning to
be recognized for what they are. It may even reflect a species of iso-
lationism. On the other hand, it may be said that currently and over
the shorter range the economic aspects of the common defense effort
make fewer demands for our attention than do those which relate
to the operation of the machinery created to have, or actually
having, something to do with that effort. For instance, the Schuman
Plan will not have very significant, immediate economic conse-
quences. The multilateral treaty setting up the Coal and Steel Com-
unity provides for "preliminary" and "transitional" stages. That
during a period of production crisis, when every kilo of steel which
can be produced, efficiently or inefficiently, is needed, it is difficult
indeed to predict when the economic consequences, in the sense of
the rationalization of industry, etc., of the Schuman Plan will be-
gin. Its political consequences, however, which its originators never
belittled, are with us.

III. THE ISSUES OF ORGANIZATION

The European scene today seems as bewildering to the casual
follower of international activities as New Deal I "alphabet
soup" was to Al Smith. Certainly it must be painful to practical ad-
ministrators, as well as to lovers of the "true" [or good old-
fashioned, bilateral] diplomacy. It is amazing that a Europe
which, despite advice over some time from Americans, did not think
seriously of supra-national organization [except of the conqueror's
universalist state variety] until it received M. Briand's proposal
in 1930, should in so short a time since the last war have created
so many institutions which seem to be designed to go 'round like

9. Mr. Bevan and the Labor "left-wingers" have been so called.
10. The sort of thing Mr. Kennan sighs for. Cf. Kennan, American
Diplomacy 1900-1950, 72, 93-94 (1951).
pieces of government. The problem of coordinating the work of these various institutions is already difficult, sometimes nearly out of control, and may get worse before, if ever, it gets better. This, basically, is the problem of organization. It deserves closer attention.

To overstate the matter, let us consider the alternatives before a Frenchman holding a policy-making position in the Direction des Accords Techniques at the Quay d'Orsay. A matter comes up, say about coal movements by Rhine barges. We need not specify the precise question. With what institutions should he deal? Through diplomatic channels with the other national governments concerned? With the Economic Commission for Europe (an agency of the United Nations Economic and Social Council), with what is left of the Office of European Economic Cooperation (the European aspect of the administration of Marshall Plan Assistance), with the Zone Commander in Germany, with the Property or the Economic Section of the Allied High Commission, with the International Authority for the Ruhr, with the Coal and Steel Community, with the European Defense Community? Does the Council of Europe at Strasbourg figure in the resolution of his problem? If so, does it involve the Strasbourg Assembly or the Committee of Ministers? Perchance there may be an aspect which would concern the European Payments Union. Or, should the French element at SHAPE take the matter up? Or, does it go somewhere else in the NATO organization? When we add the possibility that the United Nations General Assembly might be meeting in Paris at the time and may have several more avenues open for use in connection with the particular problem, the time has come to draw the curtain on our hypothetical French friend, knowing that, although he may have had a bad quarter hour deciding, it can safely be assumed that out of the multitudes at hand he will settle upon the modality which seems best to serve the national interests of France.

In order to know where Europe is organizationally it will be necessary to examine the functions of several of the institutions

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12. How France, or any other country, decides what is really its national interest is, of course, another matter on which exponents of a current vogue fail to enlighten. Hans Morgenthau, George Kennan, *et al.* My contribution to a forthcoming *Festschrift* in honor of Hans Kelsen, to be published by the University of California Press, addresses itself in part to the teachings of this school.
mentioned in the preceding paragraph. The opportunity for a contribution along these lines here has been reduced, and with it the wordage of the paper, by the recent publication in another Review of a most excellent study of the institutions of Western European union.\textsuperscript{13}

The Council of Europe, meeting at Strasbourg, was the semi-official product of a private movement for European union, strongly supported in intellectual circles and by a nucleus of significant European political figures.\textsuperscript{14} It may be said to be the parliamentary approach to European organization. The Council is perhaps best described as a shadow plan for a European Parliament. It is a shadow plan because the Consultative Assembly, its lower house, is, as was the General Assembly of the United Nations prior to the adoption of the Uniting for Peace Resolution (and still is, in the strict wording of the Charter),\textsuperscript{15} a recommending and not an acting body. Moreover, as has been pointed out,\textsuperscript{16} popular election of delegates to the Consultative Assembly has not been achieved, with the result that the national parliamentarians who make up its membership represent very little more than themselves. The Assembly has been and continues to be the forum through which the further development of European government can be discussed, except that as things presently stand, the Assembly cannot debate military and defense matters.\textsuperscript{17}

The Council of Europe could, hence, be put off to one side, with further brief reference to the restrictive power which its upper house, the Committee of Ministers (foreign ministers of members), has as a result of its being the exclusive conduit through which the several European states can be put under a duty to consider nationally what the Assembly has recommended, were it not for the fact that the functions of the Council in connection with the Schuman Plan and the European Army Plan persist as a topic of current serious discussion. The Committee of Ministers has already rejected one Assembly proposal to convert the Council into a European Parliament of delegated powers. But in August 1951 the Com-

\textsuperscript{13} Loewenstein, The Union of Western Europe: Illusion and Reality—\textit{I. An Appraisal of the Methods}, 52 Col. L. Rev. 55 (1952).
\textsuperscript{14} Id. at 55-66.
\textsuperscript{16} Loewenstein, \textit{supra} note 13, at 68-69.
\textsuperscript{17} However, Mr. Winston Churchill proposed a unified European Army at the August, 1950, session of the Consultative Assembly, and his proposal was adopted. American Committee on United Europe News Letter 1 (Sept. 15, 1951) [Vol. I. No. 20].
mittee of Ministers made procedural changes looking to the possibility that the Schuman and European Army plans might come within the framework of the Council, even though some members of the Council (notably Britain and the Scandinavian countries) will not be participants in either plan. This was achieved by the device of permitting departure from the rule of unanimity in instances where it has been unanimously decided that a group of members less than all should consider action along particular lines. The move had three aspects: (1) it suggested a formula of which Britain might avail herself to stay in the Council; (2) it gave a partial Council considerably better chances of obligating the participating governments to consider Assembly recommendations; and (3) the possibilities for using the Council to coordinate the Schuman and European Army Plans were improved.

The development was built upon the Consultative Assembly at its December 1951 session, where proposals were adopted and referred to the Ministers providing for the redrafting of the Statute of the Council to provide it with an executive by making the High Authorities [executive branches] of the Schuman and European Army Plans a part of the Council machinery. In this way the Council would get delegated powers, for the High Authorities, as will be described below, have authority to act within the scope of the powers given to them by mutual consent of the participating countries, subject to removal if censured by the appropriate Assembly. Provision was made for keeping the liaison channel supplied by the Council open as between members of the Council participating in particular programs and those which are not.

This proposal brought about a British counter-proposal, made by Mr. Eden to the Committee of Ministers in March 1952. The Eden Plan is apparently aimed at preventing the Council from becoming so much an operator of plans in which Britain will not participate that it could not serve any longer as the channel for contact between Britain and the Continent on matters of mutual interest, such as defense and coal, iron and steel production. In response to Labor questioning in Commons, Mr. Eden has stated that his Plan differed from the Assembly proposal in that it did not work any change in the present advisory functions of the Council; it was designed "to associate the Council of Europe practically with the work of the Schuman Plan and the European Defense Community." The gist of the British proposal is thus modeled

18. The Times (March 25, 1952); News Chronicle (March 25, 1952).
upon the August 1951 action of the Ministers: the Council will function on a limited, six-power basis when it is providing the “institutional structure of the continental functional consolidations”; it will meet on a full, fifteen-power basis when it serves “as the organization for inter-governmental cooperation in Western Europe and for the promotion of European unity in the broad sense.”

The proposal, and the seemingly favorable response it has received, indicate that the Council of Europe, whose future appeared so bleak to a qualified observer writing only a few months ago, may have greater viability than had been thought. Certainly the circumstances and utterances surrounding the British proposal indicate (1) a view that duplication should be avoided and coordination achieved; (2) British desire to use the Council as the channel for defense cooperation with the continent, rather than relying entirely upon NATO; (3) the absence of any real impediment to giving the Council real powers in its six power aspect. The Strasbourg shadow government, hence, is sufficiently valuable to British interests that Britain does not wish to see it fogged out by frustration or to have it become even more shadowy, as it would if a continental Political Authority were established at another place. That the Council has this much value to its least ardent member may give it a new lease on life and increase remarkably its chances for evolving into a supra-national, continental government of limited powers, with which Britain would have peculiarly British ties, being, as it were, “of but not in” the resulting European power structure.

The other institutions listed in the case of the hypothetical bewildered Frenchman by and large differ from the Council of Europe in that they fall more easily under the rubric of “functionalism.” This has no particular significance to Americans, but to Europeans and Britons, affected by the growing pains of European union, “federalism” and “functionalism” are emotive words, loaded with semantic significance. So seriously are the philosophic differences taken that we find a French delegate at the December 1951 meeting of the Assembly at Strasbourg saying in support of the proposal for modification of the Statute, discussed above:

“The Federalists cannot object to it, because their ideals are being served. Nor can the others, because it is in fact a functional approach.”

19. Min. 103/2, British Information Services (March 24, 1952).
20. Loewenstein, supra note 13, at 78-79.
22. Loewenstein, supra note 13, at 56-57.
Essentially the idea of functionalism is that European union will be the end process of a number of power shifts, particularly in the economic field. In general, the British call themselves functionalists, but they might be termed "even more so" functionalists because they are chary of tossing their powers into the power-shifting machine and tend to doubt the desirability of any detailed, written charting of new power arrangements, at least in so far as Britain would be involved. The official French are the "less so" functionalists if, indeed, they are still so classifiable at all. That supposed marvel of functionalism, the Schuman Plan, became each day in French hands more and more a fulcrum to move Europe into a federal union. In the French version of the European Army Plan it was even more difficult to find that functionalist flavor paramount. Too sharp a focus along such lines here blurs the background behind the economic or military central image. Over the shorter haul, the great significance of the Schuman Plan will not be its economic effects, as we have seen above. Its political implications are really of greater immediate importance. Obviously the cessions of national sovereignty involved are the dramatic headliners, but the amount of government-like machinery set up to deal with the power shifted may be more important.

This is not the place for a detailed description of the civics of the European Coal and Steel Community. Suffice it to say that it has three branches of government: an executive (the High Authority), a bicameral legislature (the Assembly and the Council of Ministers), and a Court of Justice. The government is one of delegated powers with respect to economic activity in the production and distribution of the coal, iron and steel resources of the participating countries. On paper these states yield their sovereign powers over these commodities to the supra-national organization. Key institution in the organization is the High Authority, a plural executive chosen initially from a panel of qualified technicians by the participating countries and serving six-year terms, with elaborate provisions after the first six-year period for the transition of power to the Authority itself each year to fill one of the two positions vacated. The Authority is given the power to act directly on the basis of the authority yielded in the multilateral treaty creating the Community, subject to the following checks:

(1) Once a year the High Authority must report on its operations to the Assembly. By two-thirds vote the Assembly may bring
about the resignation of the Authority and may then replace it with another body of experts.

(2) The Council of Ministers, which was engrafted onto the original French proposal to meet fears of the Low Countries, consists of representatives of the member states. Its function is stated by André Philip as follows:

"Although it is not empowered in any sense to control the High Authority, those of the latter’s decisions which have, or may be expected to have, important repercussions on the general economy can only be taken with the concurrence of the Council. In times of crisis, of boom and slump, as generally with decisions affecting the economy of a country as a whole, the Council will have power to intervene. Thus, the allocation of raw materials in time of scarcity would involve the Council, and in such periods the High Authority would act officially as its partner, and in effect, probably as its agent. But the Council (unlike its counterpart at Strasbourg) cannot take decisions without the Authority’s consent. . . ."24 [Italics added.]

(3) The Court of Justice is an administrative court of the continental type. It is open for the claims of the member states, the Council, and private concerns, that the Authority has misinterpreted or misapplied, or failed to apply, the treaty. The Court can declare void a decision of the High Authority and make it pay damages. It can also compel the High Authority to act where the treaty creates the duty to act or the Court finds an abuse of power.

The Council appoints a Consultative Committee, equally representative of workers, consumers and producers, with which the High Authority may consult whenever it wishes and must do so when the treaty specifically requires it.

Writing in June, 1951 before the August and December, 1951, developments at Strasbourg previously outlined, M. Philip, after pointing out that the Schuman Plan Assembly is to be made up of 78 representatives, either directly elected or chosen by the Parliaments of the participating countries, adds:

"A protocol to the treaty provides that these representatives be chosen from among the delegates of these Parliaments represented in the Strasbourg Assembly, and that they should be called upon to make annual reports to the latter. If the Strasbourg Assembly could manage to revise its Statute and emerge from the ‘consultative’ to the ‘legislative’ stage, the Schuman Plan Assembly would probably become the Industrial Production Committee of the Strasbourg Assembly."25

25. Id. at 16.
The possibilities for fitting together various pieces of supra-national government through the instrumentality of the Council of Europe thus suggested have not been lost sight of by the Council, as we have seen.

There may be a point to a comparison between such a centralized, supra-national structure of specifically delegated powers and what we Americans usually think of as a federal government: The executive (the High Authority) would draw its specific, operational powers directly from the constitution (the multilateral treaty). The legislature would be a check on the executive, either by the removal process (Assembly) or the veto process under certain conditions (Council). The court would have the final word on what the constitution requires, prohibits or does not authorize. Mr. Eden's answer to the Laborite question must, then, have referred to the immunity Britain would have, because she is not subject to the High Authority, under his plan for giving the Council of Europe a dual role. If he meant to deny that the High Authority could bind participating countries if it becomes a part of the Council, coordination through the Strasbourg channel will simply be impossible and action will take place elsewhere, through another institution of which Britain might not be a member.

The European Army Plan, shaped in rough outline by the hammer of American insistence that Western Germany's military potential be effectively organized for defensive use on the somewhat malleable anvil of French fears about taking chances that Germany might once again become capable of independent military action, passed first inspection by the NATO countries at the Lisbon meeting in February 1952, was then machined at Paris by the six continental countries directly concerned, and is now up for sale to a number of national parliaments. The European Defense Community, as the European Army Plan is now called, will be established along lines very similar to those developed for the European Coal and Steel Community. Just as the Schuman Plan was the core idea of the latter, the Pleven Plan is of the European Defense

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26. At this writing, May 10, 1952, perhaps even at the hour, the Treaty is being signed at Paris. It is possible that details as to organization will be somewhat different from what is mentioned in this paper, which has been prepared on the basis of periodical, and interested group publications. The most useful single source has been The Economist 531-532 (March 1, 1952). The Economist pictures a power-structure in which the High Commission will be even more subject to the control of the Committee of Ministers than I have sketched in the main body of the article. This may reflect newer developments during the recent negotiations or a more bearish appraisal of the same developments my other sources had in mind.
Community. The Plevin Plan is obviously modeled after the Schuman Plan, with provision for almost identical institutions and for the use of the same Assembly personnel with, again, an opening for the Strasbourg Assembly to supply them. The general pattern for the pooling of particular resources (here manpower and industrial defense potential) and the cession of sovereignty to the High Authority is repeated. In the European Defense Community the plural executive would be, in effect, a European defense ministry for the participating countries. But the defense ministry would have some of the functions of other ministries, such as those of economics, budget, heavy industry and manpower as well for, in the words of Secretary Acheson: "The European Defense Community will include not only ground, naval and air forces but economic and political institutions." It seems clear, also, that the Defense Community will have closer ties with the NATO structure than will the Coal and Steel Community. The Final Communique of the Lisbon meeting of the North Atlantic Council declares on this point:

"... It also agreed on the principles which should govern the relationship between the proposed community and the North Atlantic Treaty Organization. The North Atlantic Council agreed to propose to its members and to the European Defense Community reciprocal security undertaking between the members of the two organizations. All these decisions were inspired by the conviction that the North Atlantic Treaty Organization and the European Defense Community have a common objective, to strengthen the defense of the Atlantic area, and that the development of the European Defense Community should be carried forward in this spirit. Therefore, the Council considered that the obligations and relationships between the communities should be based on the concept of two closely related organizations, one working, so far as this objective is concerned, within the framework of and reinforcing the other." It seems likely, also, that within the power structure of the

27. Acheson, Review of Accomplishments at Lisbon, 26 Dep't State Bull. 363, 365 (March 10, 1952) [No. 663].
28. Id. at 367.
29. See text infra, p. 817-818.
European Defense Community its Council of Ministers will loom larger more immediately even than the similar body for the European Coal and Steel Community, if for no other reason than that the questions which will face the Defense Community are graver, more immediate and therefore more apt to create greater reluctance to actual transfer of sovereignty. In fact, it was suggested in an interim report prepared in July 1951 by experts meeting under NATO auspices,\(^{30}\) that during a transitional period the institutions of the new Community should delegate responsibilities to national authorities, only assuming them directly when institutionally able to do so. It is known, moreover, that the Low Countries have been relatively reluctant in the past to the merger of national forces into a new, supra-national force, in contrast with the French, who have insisted upon the concept of loss of national identity for fear of the emergence of a German national force. The Low Countries have also been reluctant to agree to a common budget for the European Army.\(^{31}\) Strengthening the Council of Ministers, \textit{de jure} or \textit{de facto}, at the expense of the High Authority seems, on the basis of the Schuman Plan negotiations, the probable outcome of this conflict of national viewpoints; and by this same route, if not by some other, Germany may find satisfaction with respect to her claim that German participation must be on a basis of equality.

The outcome of the Lisbon session of the North Atlantic Council raises a rather difficult question as to the place of NATO in the structure of supra-national government. It was technically correct to say as of the time this paper was read\(^{32}\) that NATO was not a governmental structure\(^{33}\) and so should be sharply differentiated from the other institutions under examination. Such a statement would be based upon a legal analysis showing that NATO was created by a multilateral treaty for mutual defense as an instrumentality or specialized channel through which the contracting sovereignties could pursue their common interests in self-defense. It

\(^{30}\) American Committee on United Europe News Letter 3 (Sept. 15, 1951). Although it is difficult to be certain from the scanty information at hand, it would appear that NATO was something more than a catalyst in the preparation of this interim report. If true, this tends to confirm certain of my suggestions as to future relationships between the two institutions.

\(^{31}\) Sulzberger, New York Times (December 16, 1951).

\(^{32}\) Prior to the Lisbon meeting of the North Atlantic Council.

\(^{33}\) "Infrastructure," that piece of NATO gobbledegook, we may leave where Secretary Acheson did in his report on the Lisbon meeting: "One thing I can't explain to you is how these facilities [airfields, ports, headquarters and other supporting installations] came to be called by the name of 'infrastructure.' But despite this heavy handicap, good progress was made on this issue too." Dep't State Bull. 363, 365 (March 10, 1952) [No. 663].
could be called nothing more than the arranging part of a regional arrangement. As of this writing, however, it might not be entirely absurd to say that NATO really may be well along the evolutionary path toward de facto governmenthood, widening out from a central core of responsibility and power in the military field into broader areas of administration, both functionally and geographically. If there is anything to this, the functionalists, not the federalists, will have a victory to claim, and among the functionalists the British, with their dislike of government by written plan and their predilection for living by ways they have grown into, will have the greater cause for satisfaction. The facts which might support this hypothesis are:

(1) NATO is the official channel through which American, British and continental defensive strength will be mobilized and applied. NATO seems presently to meet the requirements of a Principle of Effectiveness, and this effectiveness is shown in some rather significant ways. A good example is the broad powers of investigation and recommendation given to the "Three Wise Men," as the Temporary Council Committee has been popularly called, to pry into the intimacies of each member country's economic and financial structure, for the purpose of fixing goals within overall capacity and to allocate burdens on the basis of ability to pay. Another is the recent appointment by the United States of a single individual to be both its chief dispenser of funds to Europe and its top representative on the new Permanent Council of NATO. Still another, important to technicians, at least, is the shift at the Lisbon session of considerably more responsibility over troop dispositions, equipment allocations, and rate of call-up to the Supreme Headquarters, Allied Powers in Europe (SHAPE), NATO's command structure. It may even be relevant in this connection that at Lisbon the United States agreed to some measure of group review of its own defense budget.

34. A term in Chapter VIII of the United Nations Charter which very much offends Professor Kelsen's sense of semantic precision, see Kelsen, Recent Trends in the Law of the United Nations 919 (1951), but which most diplomatists and any Frenchman would think a most useful term indeed!

35. With apologies to Professor Kelsen for a possible distortion of his concept, see Kelsen, General Theory of Law and State 121 (1945).

36. See Reston, New York Times (March 2, 1952) for an excellent survey of the growth of NATO from its inception through the Lisbon session.

37. Hoffman, New York Times (Feb. 23, 1952) reported: "The United States has agreed to submit its military budget to an annual review by the North Atlantic Treaty Organization, along with the military budgets of the other Atlantic powers. The purpose of this joint review is to agree on priori-
(2) At Lisbon NATO acquired a structure not dissimilar from that of the United Nations Secretariat, in contrast to its rather diffused, discontinuous organization prior to that time. In the words of the Final Communique:

"The Council also took action to adapt the Treaty Organization to the needs arising from the development of its activities from the planning to the operational stage. The North Atlantic Council, while continuing to hold periodic ministerial meetings, will henceforth function in permanent session through the appointment of permanent representatives. The Council decided to appoint a Secretary General, who will head a unified international secretariat designed to assist the Council in the fulfillment of the increasing responsibilities. All civilian activities of the organization will be concentrated in the geographical area where are situated other international agencies whose work is closely related to that of the Treaty Organization and with which close administrative connection is essential to efficiency. These are presently situated in the vicinity of Paris. When these changes become effective, the Council will assume the functions hitherto performed by the Council Deputies, the Defense Production Board, and the Financial and Economic Board." [Italics added.]

There is a tightening up here, a putting of the organization on a continuous, flow-chart basis that may mean something besides just greater efficiency. The new structure is potentially a very strong executive body. It will be interesting to see, for instance, whether it is the High Authority of this or that European "community" or the NATO Council, or its Secretary-General, which becomes the real "operator," not only with respect to the over-all of defense, but as to matters actually falling within the treaty-given jurisdiction of the European "communities."

(3) Despite Mr. Eden's conciliatory gesture toward the Council of Europe at Strasbourg, a usually competent, if trenchant, observer, The Economist, has said of the British position:

"... NATO is now the British Government's favorite organization, and its coming enlargement and translation to Paris were seized upon as an opportunity to give a coup de grace to OEEC, which was to be cut to ribbons...."

"... Most of the Europeans who have knowledge of inter-ties for defense expenditures so that first things can be done first." The same report states that the Temporary Council Committee, whose adopted report contained the provision for annual budgetary review, also recommended an annual review of requirement and production targets by the newly created continuing organization. The Final Communique contains language which would cover such agreements but does not specify them. See 26 Dep't State Bull. 369 (March 10, 1952) [No. 663].

38. Id. at 367-368.
national affairs, and almost all the Americans in Europe,\textsuperscript{39} believe that the British Foreign Office for reasons of its own has sworn a vendetta against all forms of European cooperation.\textsuperscript{40}

It remains to be seen whether The Economist's somewhat lurid vendetta theory will prove to be correct in its pessimistic prediction that no good regarding European organization, as distinguished, perhaps, from Atlantic organization or simply an unusually efficiently administered military alliance, will come from the recent proposal of the Foreign Secretary. Other observers, however, have seen NATO emerging, not merely to rival continental supra-national organizations, but the United Nations itself. Starting from an inarticulated premise that the United States foreign policy has used the United Nations Organization in an entirely instrumental way, moving away from it prior to Korea, shifting back to it for the Korean crisis, an observer at Lake Success\textsuperscript{41} reports that delegates there know that public opinion in the United States and in the other free countries concerned gives the primary role to NATO and discounts the new mechanics for undoing the veto provided in the Uniting for Peace Resolution.\textsuperscript{42}

The other European institutions mentioned in the case of the baffled Gaul require, really, very little discussion in the context of this study. They are, principally, power-aiding and not power-controlling devices. The Economic Commission for Europe is principally useful as a research center and for rather sporadic and no longer very significant economic contact between the Soviet orbit and the West. The OEEC may or may not come to have a function in connection with the new NATO structure, but if not absorbed it will shrink and become vestigial with the shift from economic to military aid. The "Peace Contract" with Germany, accelerated and further liberalized by the zeitgeist regarding the need of Germany, will certainly reduce to a minimum the authority of the Allied occupation, on both a zonal and a combined basis. An Anglo-American assist to the Schuman Plan\textsuperscript{43} and the "Peace Contract" together will kill off the International Authority for the Ruhr. The European Payments Union, as Loewenstein has said, "... is not a supra-

\textsuperscript{39} A ploy? See Potter, Lifesmanship, \textit{passim} (1950).
\textsuperscript{40} The Economist 79-80 (April 12, 1952).
\textsuperscript{43} Western Germany has been assured that with the coming into force of the Schuman Plan Treaty the International Authority for the Ruhr will be discontinued. 8th Quarterly Report of the U. S. High Commissioner for Germany 27 (July 1-September 30, 1951) ; Loewenstein, \textit{supra} note 13, at 93.
national organization with immediate enforcement powers." It is a "hot rod" clearing arrangement, with multi-speeds forward, reverse and sideways. Customs unions, such as Benelux, Francita, Finebel and Uniscan, are still on paper, despite much talk. Only Luxembourg and Belgium have such an arrangement working, and it is not quite a new thing.

In brief review, then, we see that the problem of organization has moved rather rapidly away from what seemed to be one of dealing with a confusingly large number of institutions, each with rather specific functions, creating, principally, difficulties as to analyzing particular problems in terms of the appropriate agency to handle it and of overall coordination. What has the problem moved towards? It is submitted that it has moved in the direction of concentrating supra-national functions, in so far as the continent is concerned, through the instrumentality of the Council of Europe, to which Britain will have a peculiarly British tie and the United States through NATO a single European institution with which to carry on co-defense operations. It is apt to be the Committees of Ministers, however, or their special deputies for the Council of Europe, rather than the technicians on the High Authorities, who will really possess the supra-national executive power. There is, however, the possibility that the vaster powers of a new-model NATO will prove too great for the emerging continental organization and that it will suffer one of the fates of institutions which never get, or lose, power: wither away, become a symbolic ghost of a popular ideal, or decline to the level of a mere instrument to be used when national interest dictates. If NATO itself gets the nod of History, the possibilities seem to be a new type Grand Alliance, the beginnings of a defacto Atlantic Government, or the first of a possible series of regional substitutes for, or managing agents of, the United Nations with regard to its fundamental, or peace-keeping, function.

IV. THE POLITICAL QUESTIONS

As we have seen, there is now substantial evidence that the or-

44. Id. at 84.
45. At its December, 1951, session the Consultative Assembly recommended to the Committee of Ministers that each of the member states be asked to appoint a minister to be specially responsible for European affairs, such ministers to meet at regular intervals and act as substitutes for the ministers of foreign affairs, so that the Committee of Ministers [of the Council of Europe] could become an organ for semi-permanent consultation, Europe Today and Tomorrow 24 (Dec-Jan. 1951-52). The French Government, by Decree of January 30, 1952, has created a new cabinet position of Minister of State for Council of Europe Affairs and an interdepartmental committee of the French Cabinet for his direction as to policy. Europe Today and Tomorrow 27 (Feb, 1952).
ganizational alternatives for the power-structure of cooperative defense have narrowed down, become clearer and, therefore, the more fundamental. Political problems have had a parallel evolution; so that today a number of issues regarding political attitudes and their bearing upon the situation may be disregarded as no longer of primary importance. The political issues have also become the more fateful as they have winnowed down. The major political problems which will be examined here are: (1) the problem of British aloofness from participation in continental supra-national organizations and (2) the problem of whether a reliable German orientation toward a cooperative role in the Western defense system can be developed and maintained.

It is perhaps a little provincial to cast the first problem in terms of British aloofness. It might just as unfairly be called the problem of French illusions about Western European federalism or the problem of American enthusiasm for the others to unite. But in truth it is the British reticence about joining in continental proposals for supra-national organization that has created the greater uncertainty, and therefore the greater difficulties, both in the immediate past and presently. It is, also, more the current, non-Soviet enigma wrapped in a mystery. As to France it is not hard to see the institutional logic behind the ideal: by creating a community stronger than the potentially dangerous member, that member may be put into a power situation where he cannot cause trouble... and, in time, he may even be reformed—Q.E.D. Nor do we have to puzzle about the American attitude. General Eisenhower's call for a "constitutional convention" by its very choice of words so clearly reveals one reason for it: Toynbee's "mimesis," if not some Founding-Father image. Moreover, the Principles of Good Administration and even the National Interest point the same way, most Americans seem to think.

But what are the British after? What do they really want? Is their attitude based, but secretly, upon the Balance of Power, that bastion of the old diplomacy? Are there enough "little Englanders" to carry a type of isolation to the point of insanity? Or is Britain out

46. As Western Germany approaches sovereignty, for instance, a number of the dissatisfactions of European countries not participating in the occupation have tended to disappear. Also, Western European countries occupied and damaged by Germany during the war have, on the whole, ceased to be concerned about reparations expectations dashed by shifts in American policy.

47. Does this also connote an American preference for the federalist Approach? Cf. text supra, p. 802.

to build herself up as the third force in NATO, giving nothing to
the United States when it comes to keeping national individuality?
Or is Britain dreaming of the Anglo-American coalition of World
War II? Is Atlantic Union her goal? Is it that those who stood alone
so steadfastly that terrible year not too long ago cannot have faith
in the continent when the chips are down and therefore must re-
main on the ready to hold out, but this time not alone? How valid
is the well-worn, "We are part of a world-wide Commonwealth." record? Do the Commonwealth countries really oppose closer ties
between the United Kingdom and the Continent? Would Canada,
for instance? Australia? New Zealand? If they do, what is the
difference to them whether Britain gets herself tied into European
affairs through NATO or through some other channel? 49 There is
little available upon which to select among these possibilities and
others previously mentioned. 50 We can only, at this time, note some
of the principal problems created by the uncertainty and pick out
trends.

On the whole France seems to have adjusted rather realistically
after her first and second waves 51 of disappointment regarding the
British position. The equanimity with which British non-participa-
tion in the Schuman Plan appears now to be accepted may be partial
proof of the estimate given above as to its probable economic effects
over the shorter haul and in the present crisis. The French now
appear to be willing to hope for the best from Britain-in-Europe
and to take what they can get, including, if possible, British guaran-
tees against the dangers of Germany-in-Europe. British aloofness
has observable effects, however, with respect to the attitudes of the
Low Countries on particular issues of European political unification.
To some degree it must be related to the absence of the NATO
Scandinavians from the European Defense Community. British
aloofness to continental goals for European organization is also,
of course, a very great factor in estimating the viability of the
planned institutions in relationship to NATO and will have its
effect, too, in the direction of the latter's evolution.

The German Problem, in its present phase, touches vitally
almost every other aspect of this inquiry. Western attitudes toward

49. Cf. The Commonwealth and NATO, The Economist 519 (March 1,
1952).
50. See text supra, p. 801-802.
51. The second wave, of course, came when after the Conservative
return to power in Britain no discernible re-orientation of British policy
toward supra-national European organization occurred, despite Mr. Church-
ill's leadership as a private citizen in the European Movement and at Stra-
bourg.
Germany, particularly the American, have shifted so dramatically as to give us, perhaps, History's classic case of events outgrowing agreements and also, to him who would trace them out, illuminating examples of the methods, "legal" and otherwise, by which states proceed, in such circumstances, to re-adjust. It is somewhat striking that in such a situation as this the only question which appears to have been treated extensively on the basis of legal doctrine is only secondarily related to basic problems: Did the German state survive the act of unconditional surrender?52 The basic assumptions upon which a Western reparations agreement was entered into were altered to the point of negating the principle that Germany should pay further reparations. But this was not achieved as the result of any argument as to the nature of the doctrine of rebus sic stantibus; it was required to get the Marshall Plan through the American Congress, and France and other Western European claimants had to accept it.53 Contrary to President Wilson's rather prim opposition to the resort by the United States in the conduct of its foreign affairs to any doctrine of substantial breach by the other party,54 the Western Powers, under American leadership, have based each of their moves (pacing, of course, Soviet moves in Eastern Germany), from Bizonal Fusion, through the formation of German economic agencies, the creation of the West German Republic, and the re-arming of Germans, upon a rather un-technical and not too precise version of such a doctrine.55 The Soviet Union has not bothered to justify here departures in this way; she just says the Western Powers are in breach, period. I am not moralizing. It is just to point out, at what seems an appropriate place in the analysis,

52. For the latest words on this legal issue which Kelsen first raised, see Wright, The Status of Germany and the Peace Proclamation, 46 Am. J. Int'l L. 299, passim (1952).
53. This is a subjective statement. As far as I know the involved history of the successive shifts in American policy regarding reparation from Germany and Japan remains to be written. As to Germany, see Clay, Decision in Germany 322-325 (1950). The point here is that these shifts were based entirely upon political and economic considerations, domestic and international, without any significant invocation of legal doctrine.
54. President Wilson to Secretary Lansing, May 8, 1917, 1918 For. Rel., Supp. 2, pp. 170-171: "I do not feel that Germany's playing fast and loose with the obligations of this treaty [Treaty of 1799 between the United States and Prussia], as of all others, affords for us who are proud to observe obligations and would like to set an example, a sufficient ground for repudiating our own promises under it." See also, V Hackworth's Digest of International Law 342-348 (1943).
55. It can hardly be said that suspension for prior breach, see Harvard Research in International Law, 29 Am. J. Int'l L. Supp. 653, 1089-1090 (1935) as distinguished from termination for prior breach, adequately covers irretrievable departures from the earlier Quadripartite Agreements on what Germany would be prohibited from doing.
that in the struggle for Germany technical doctrine has been relatively little used, even in an emotive or argumentative way, and the traditional international legal institutions not at all.

It is interesting to speculate at this point on the semantics of the term “peace contract,” used with official care to designate the settlement between the three Western Occupying Powers and Germany. Legally, what is the difference between a “peace contract” and a treaty of peace? Assuming for the question that the United Nations Declaration of January 1, 1942,\(^6\) prohibited a separate peace, what is gained by the semantic shift? It is suggested that the shift obscures nothing relevant to the East-West struggle and was not intended to; rather that it was chosen to adjust orthodox legal concepts to Germany’s continued division and the resultant need for keeping residual occupation powers under a drastically watered-down occupation statute. If this is correct, it is the hard facts that have created the new legal symbol, not the legal symbol that controls operations with respect to those facts.\(^5\) If the plan goes through, there will be legal problems, certainly. Courts will have to decide what kind of an international animal Germany is, and so on; but the law will follow after, it will not shape beforehand. Whether, as the ferment of internal German politics presses the Western Powers to more relaxations in Germany’s favor, anything will be made by Germans to the Powers’ embarrassment of the fact that ex-enemy Japan got a “treaty” instead of a mere “peace contract” is not too clear, although some of the demands now being heard for full German sovereignty seem to have this flavor.

The crucial doubt affecting the collective defense of Europe is as to the reliability of Western Germany as a member of the group. The problem has two aspects: (1) The orientation itself, will it stick? (2) Will Germany in such a context keep her place or run

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\(^6\) Paragraph (2) of the Declaration reads: “(2) Each Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.” Dept. of State publication 1732, Executive Agreement Series 236, 1; A Decade of American Foreign Policy, Sen. Doc. No. 123, 81st Cong., 1st Sess. 3 (1949).

It is legally arguable, on grounds of treaty interpretation, that “peace” here meant “cessation of fighting” and that the whole objective of the Declaration was to do what could be done to prevent some anti-axis country doing what the revolutionary Russian regime did in 1917—stop fighting Germans and make a “peace” while hostilities continued.

\(^5\) The emotive and dialectical use of legal symbolism is a fact of life. Mr. Kennan seems inexplicably blind (for a diplomatist), in his indictment of a “legalistic-moralistic” orientation of American foreign policy as the cause of our major foreign policy blunders of this century. He seems to take as actual shapers and limiters of our policy the concepts in which it is clothed for presentation! See Kennan, American Diplomacy 1900-1950, Ch. VI (1951).
the show; i.e., how good are the protective devices against Ger-
man domination of the emprise for her own national ends?

The first aspect of the problem presents the Unity Issue. De-
velopments since this paper was read have certainly proved the
prediction then made: the poker game for Germany is on for fair
and it is going to be tight poker, played close to the vest and with
no pot limits. The pattern of Soviet conduct in the face of the
Western acceptance, indeed insistence, on a return of Germans to
uniform and of Western German factories to defense-supporting
production, has run consistently along three avenues: (a) the actual
build-up of cat's-paw power in captive East Germany; (b) re-
peated warnings to the Western Occupying Powers, cast in diplo-
matese indicating extreme seriousness, such as that the Soviet
Union will not “tolerate” the re-arming of Western Germany;
and (c) the dangling of progressively more enticing unity carrots
before the noses of the West Germans. The latter development, in
turn, has led to the present stage of the game: both sides are for
German unity and a restoration of German sovereignty. They
differ on the techniques for getting there, and the West has not
offered Germany a completely free hand with respect to rearmament,
which the Soviets, drawing with customary casuistry on a Japanese
Peace Treaty they opposed, have. On the other hand, the Soviet
Union has not offered Germany a collective immunity from Com-
munist coups or the Eastern Territories.

And what do the West Germans do? Observers have seen in the
conduct of Chancellor Adenauer a rhythm with respect to Allied re-
strictions of resigned acceptance, then internal political opposition
to the restrictions from which the Chancellor is careful never to
completely isolate himself, followed by the deposit of the dilemma
on High Commission laps, and, finally, the return in triumph with
the relaxation thus won. This is not necessarily sinister or dan-
gerous. In fact, there are few indeed who doubt the genuineness of
the present West German Government's determination to throw in
with the West and become Good Europeans. It is cited simply
to show the pattern of Germany's re-acquisition of power and to
high-light that the same technique can be and is being used on a

58. The texts of the several Soviet notes to the West about West-
German re-armament during the past year are not available to me. I under-
stand there is some question whether "tolerate" is quite the proper transla-
tion of the Russian warning term. Commentators seem agreed, however,
that the terminology used usually indicates something more than mere dis-
pleasure.

59. The Reporter (May 13, 1952), gives a remarkable helpful picture
of the Adenauer cycle of battering down Tripartite restrictions on Germany.
broaden front. No German Government, obviously, can turn its back on possibilities for achieving German unity; and, too, differences between the Four Powers over the medium for supervising all-German elections cannot be used very effectively in internal German politics. Therefore, political needs in Western Germany have dictated the obvious German counter-position: unity without restoration of the Eastern Territories is illusory. Again, here it is the good fortune of the Germans that those who struggle for their favor, including the USSR, must be continually under compulsion to give them back the national power position they once had. The Soviets have an ace in this poker game. Only they can give back the Eastern Territories. The Soviets have made some plays that must have involved hard choices in the Kremlin, but they have not yet slipped their ace off the bottom of the deck. If pressed, will they do it, or will they find the cost too great and shift emphasis to avenues back to (a) or (b) above? If they do play it, will any Western German Government be able to refuse to pay the price to see the card. It will cost West Germans at least non-participation in the collective defense of Western Europe and at the most orientation Eastwards, with neutralization and a free hand lying in between.

Thus it is seen that the unity issue in Germany will affect profoundly the whole matter of the collective defense of Europe. The realities of German power also stand out. It is sobering and amazing that Germany, utterly defeated, divided, occupied, has still the same dangerous capacity for oscillating between East and West to her power advantage that she has shown so well too often before.

This observation brings us to the second aspect of the German Problem in relationship to the cooperative defense of Europe: If Germany does remain in the new western governmental machinery, will she keep the place in it which has been marked out for her? To the extent that the place is not as good as that of any other member state the answer has already been given in the consistent chorus from Germany for "equality." So far this chant has been confined principally to the use of German manpower in the defense effort. If other countries have national armies Germany should have them. This is the reason the Pleven Plan provides carefully that all forces of the member states will be automatically transferred to the Defense Community, except those in overseas territories, United Nations actions (Korea) and police-gendarmerie. There is still reluctance (though presumably not based upon the legal dubiousness of German membership under the Regional Arrange-
ments provisions of the United Nations Charter) to having Germany in the North Atlantic Treaty Community. Result: the European Defense Community is tied closely to NATO in the hope that "equality" sufficient to satisfy the Germans can thus be created. There are echoes from Germany that this is not enough. "Equality" is a pretty elastic concept. Germany's history has itself shown the grim truth of the late George Orwell's famous: "All animals are equal, but some are more equal than others."

Assuming that "equality" demands are satisfied in one way or another, how then can France and other invasion grounds of past German aggression be sure that certain German natural advantages will not tip too far the delicate balances of power written into the Schuman Plan and Army Plan treaties? We Americans know how hard it is to be modest about power. Can we expect that a sense of self-restraint, a denial of national advantages, will mark German conduct in the new structures, granting the most peaceful of intentions and the genuineness of a Westward orientation? How, within the Schuman Plan, will the precious uniqueness of Ruhr coking coal manifest itself? In the Army Plan will the ratio of French to German groupments hold, considering population factors and the drain of French manpower to Indo-China? It is a matter of observation that French leadership in the making of the proposals has taken into account these and other power-factors favorable to Germany and that the institutions on paper reflect certain mechanisms designed to counter-balance it. But that does

60. Under Article 107 of the Charter the use of force against an enemy state in World War II is an exception to the rule that force cannot be used except under United Nations auspices. Also, there is a question whether a state not a member of the United Nations may be a member of a "regional arrangement" authorized by Art. 51 (2) of the Charter. This raises a legal doubt as to whether a treaty which provides that an attack upon a non-member (of the United Nations) might properly be regarded by members as an attack upon them, squares with the Charter. See Kelsen, Recent Trends in the Law of the United Nations, Ch. 1 (1951). Italy, also an ex-enemy, is in NATO.

61. Animal Farm 112 (1946).

62. There is evidence from time to time that certain of our legislators still have not seen that there might be leadership advantages in such modesty, especially when the power concerned is that of the purse.

63. Apparently a newly coined technical term to replace "division," which probably connoted too much along the lines of German general officer organization to suit the French.

64. I have a historical hunch that the Schuman Plan idea may have begun within the French Government as a device to keep German power within bounds. After it became apparent to the French that Congressional sentiment would not permit the carrying out of the reparations approach to the control of German power, there was a period of time in 1948-49 when French officials were more than toying with the idea of approaching the problem through the concentrated voting of French minority stock holdings
not remove the power-factors from the picture. They will still be there to put stresses and strains on the carefully engineered structure.

How do we deal with such portentous realities? Are we to throw up our hands, recoil in horror, say that moral values and legal machinery are illusory and hence, bad things? Or must we, in full knowledge and unblinkingly, appraise the need for continuing the development of stronger values and broader-based institutions to cope with the problem? The answer to me seems obvious, but not to all.

VI. WHERE DO LAW AND THE LAWMEN FIT IN?

It seems to me that sometimes lawmen, both teachers and practitioners, more so than other professional people, such as economists, political scientists and administrators, are too quixotically immodest about their role in the power process we know as government. In part this is a good thing, for it shows that lawmen are not shut in by their professional ethos from the social action in German industrial enterprises. The inapplicability of the techniques of managerial control in such a politically-sensitive situation being rather obvious, might not the idea of supra-national, public control have taken its place? This is sheerest speculation.

In his Symbols of Government (1935), Thurman Arnold pokes not-too-gentle fun at the propensity of social technicians to recoil in horror from the sort of social chancre that, if it were physical, a physician, holding his nose, perhaps, would lance. The disparaging contrast is worth remembering every decade or so.

This is what Mr. Kennan is getting himself cited for, whether he really intended to go this far or not. Support can be found in the interpretations of weekly newsmagazines, newspapers, the house organ of the American foreign service, foreign affairs study groups, etc., too numerous to cite here, although in another connection I made a compilation. See, also, McDougal, Law and Power, 46 Am. J. Int'l L. 102 (1952).

Mr. Kennan is vague about his attitude toward the NATO-type structure. He leaves no doubts, however, about what his attitude toward the United Nations is, and if NATO is what he has in mind when he speaks of a "universal 'Article 51' pact," he dings NATO too. His utterance at this point in his American Diplomacy 1900-1950, 95 (1951) [after a five-chapter analysis of "blunders" in fifty years of American foreign policy, rather indifferently tied, if at all, when specifically presented, to the thesis of the quotation] might well be kept in mind as background for the final portion of this paper:

"As you have no doubt surmised, I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems. This approach runs like a red skein through our foreign policy of the last fifty years. It has in it something of the old emphasis on arbitrary treaties, something of the Hague Conferences and schemes for universal disarmament, something of the more ambitious American concepts of the role of international law, something of the League of Nations and the United Nations, something of the Kellogg Pact, something of the idea of a universal 'Article 51' pact, something of the belief in World Law and World Government."

I am not thinking of the medical profession at this point.

I am thinking somewhat of the medical profession at this point.
and passion of their times. But it sometimes results in lawmen being misunderstood, or actually disliked, by the very people with whom they should be working. Sometimes, too, it results in poor jobs being done, as when lawmen work their way into control of a particularly specialized power process and then proceed to act like mere lawyers, rather than putting certain broader aspects of their training, such as manipulative skill with concepts, an ear for relevance, and even the ability to make-noises-like-an-expert-without-actually-being-one, to work. Or, what is worse, they carry the latter skill too far.

Now, it does not seem to me that lawmen act immodestly because they are vain and puffed up, but rather because they frequently have very earnest but very exaggerated ideas of what lawmen's jobs are, and that observation leads us immediately to jurisprudence. Take the problems we have been examining. How much "law" is there in them? I leave the reader to answer this question for himself.

The most curious thing to me about an appraisal of what the various "schools" will say is that the most pro-law and the most anti-law groups agree that problems of the sort we have considered are not "law." Thus, certainly, Professor Kelsen would say the issues are entirely political until the new norms are set out, and then the law of European organization will be entirely a matter of grinding out the sub-norms from the more basic norms. Morgenthau and Kennan would say, I suppose, that the whole development is simply an operational phase of the pursuit of their national interests by the particular states concerned. They would deny the whole concept that new institutions were really created. Hence "law" in such a context would be an utter impossibility. To Morgenthau power, except in the narrow spectrum of power given to the judge in an adversary proceeding, is the antithesis of law. To Kennan law is not power but something, which like cloying morality, gets in the way of sound, professional exercise of power.

70. There are passages in Mr. Kennan's book which lead me to believe that he misunderstood certain of our "non-professional" [diplomat, that is] Secretaries who were lawmen. See, Kennan, American Diplomacy 1900-1950, 94 ["diplomacy by dilettantism"], 92 [nice words about Hay, Root, Hughes and Stimson... but, like Father... they understood very poorly] (1951).

71. In view of the impressive list of Professor Kelsen's writings relevant at this point, a single reference is a little inadequate; see, however, Kelsen, Science and Politics, Am. Pol. Sci. Rev. 641, passim (1951).

72. For a more detailed appraisal along these lines, see McDougal, Law and Power, 46 Am. J. Int'l L. 102-112 (1952).
Then, returning to writers with reputations in the jurisprudence of international law, we find Professor Dickinson\textsuperscript{73} earnestly pointing to the gap between the pretensions of completeness so often made for international law and the big holes it contains. Although hopeful of international organization, Professor Dickinson seems to be concerned primarily with bolder action on the part of international tribunals, too often content to decide there is no law and let the issue be so resolved, and, secondarily, with the creation of more detailed rules of positive law through treaties and codifications.

Professor Jessup, who points out something Mr. Kennan should have known,\textsuperscript{74} pins his faith squarely on the effective growth of international law through international organization.\textsuperscript{75}

There is undoubtedly a great deal to what Professor Northrop has recently said about the significance of the viewpoint associated with Professor McDougal:

"... McDougal's observation that not merely British legal positivism but also American legal realism leave one with a type of law which is incapable of meeting either the opportunities or the responsibilities of the contemporary world ... [is important]."

For me the trouble with the McDougal substitute for these inadequacies is that which troubled counsel before Lord Nottingham in the \textit{Duke of Norfolk's} case: "Where will you stop?" So far I have not seen in the writing of Professor McDougal even the self-limitation which Lord Nottingham imposed on himself in his answer to the question.\textsuperscript{77}

It is easy and satisfying to agree with Professor McDougal in his demolition of the Morgenthau-Kennan school.\textsuperscript{78} I have also planted charges. Granted that the power process should be broadly, not narrowly, conceived and that "law" should be regarded as a variable in the power process; conceded that the variable called "law" is a decision-making process; the question remains, and I have never seen Professor McDougal's answer to it: How much


\textsuperscript{74} That international law has its dialectical uses, such as at the green table.

\textsuperscript{75} Jessup, \textit{A Modern Law of Nations}, \textit{passim} (1946).


\textsuperscript{77} As Professor Leach tells the tale in one of his inimitable notes, \textit{Future Interests} 752 (2d ed. 1940), and probably elsewhere, his Lordship's answer was: "Whenever any visible inconvenience doth appear." This may not be quite the right answer to our problem.

of the decision-making process is sufficiently "law" to be the lawmen's job to do, either functioning internationally as a lawman, or as an instructor in a law school course? It seems to me this question must be answered for two reasons:

1. It bears directly on the concern I have expressed about lawmen biting off more than they can chew.

2. As Professor McDougal has said:

   "When one's use of 'law' and other words to describe significant variables in the world power process is either so ambiguous or so idiosyncratic as to confuse both himself and others about the operation of such variables, a community interest in greater clarity may reasonably be asserted."  

   By this quotation I do not mean to imply that Professor McDougal is confused. I am. And maybe Mr. Kennan and Mr. Morgenthau and our professional colleagues in other disciplines are also. Clarification is needed, and lawmen should not accept or be allowed a monopoly in undertaking it.

79. Id. at 109, n. 51.