

THE IRRELEVANCE OF INTERNATIONAL LAW: THE SCHISM BETWEEN INTERNATIONAL LAW AND INTERNATIONAL POLITICS*

FRANCIS A. BOYLE**

I. THE PROBLEM

A. *In General*

International political science became an independent sector of intellectual endeavor immediately following the Second World War. Thirty years have passed in the interim and it is time to examine a set of interconnected assumptions about international law underpinning the theoretical foundations of international political science. A major unarticulated premise of this discipline is that international law is essentially irrelevant to a proper understanding of the dynamics of international politics and therefore irrelevant to the progressive development of international political theory as a science. International political science repudiates both the descriptive validity and the prescriptive worth of international legal considerations for that sector of international relations dealing with matters of "vital national interest" or of "high international politics."

The foremost example of this phenomenon is the collection of essays written in honor of Professor Leo Gross of the Fletcher School of Law and Diplomacy, entitled *The Relevance of International Law*.¹ The reputed purpose of the book is to analyze the relevance of international law to the problems of war and peace, to the challenge Third World countries present to the stability of the international system, to the growth of international organizations, and to the consequent evolution of "world order." Yet a lead essay of the collection strives mightily to refute what is supposed to be its

* © 1980 by Francis A. Boyle.

** Assistant Professor of Law, University of Illinois at Urbana-Champaign. A.B., 1971, University of Chicago; J.D., 1976, Harvard Law School; A.M., 1978, Harvard University. This article is part of a dissertation entitled "Realism, Positivism, Functionalism and International Law" to be submitted for the degree of Doctor of Philosophy in Political Science at Harvard University.

1. THE RELEVANCE OF INTERNATIONAL LAW (K. Deutsch & S. Hoffmann eds. 1971).

main proposition — namely, that international law is relevant to international politics and international political science.²

Responsibility for this situation is attributed to the alleged fact that contemporary international affairs manifest a “revolutionary” and “heterogeneous” nature as opposed to a “moderate” and “homogeneous” nature due to the existence of a variety of political, economic, cultural, demographic, and scientific factors. Such factors include dissolution of the classical balance of power, worldwide revolutionary insurgency, destructive nuclear weapons systems, the relentless power of nationalistic fervor, division of the world into hostile ideological camps, uncurbed exponential population growth, and unremitting technological and industrial innovation.³ These elements interact synergistically to create an international political environment irremediably inhospitable to the application, growth, and well-being of international law. The irrelevance of international law will persist until the world returns to the conditions of relatively simple placidity that characterized its formative period. In other words, international law will not become relevant to international politics in the foreseeable or even distant future.⁴

Another variant on the same theme is that there subsists a *mélange* of inherently debilitating characteristics fundamental to legal education and training, to the processes of legal reasoning, to the practice of law, and to the legal profession. These debilitating characteristics seriously impede if not prevent a lawyer from ever becoming a decent let alone consummate statesman. To enumerate just a few:

1. the narrow-minded development of legal principles through the technique of analogical reasoning;
2. the piecemeal accumulation of such principles into a consequentially formalistic doctrine of little practical utility;

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

3. See also S. HOFFMANN, GULLIVER'S TROUBLES, OR THE SETTING OF AMERICAN FOREIGN POLICY 17-51 (1968) [hereinafter cited as FOREIGN POLICY]; Hoffmann, *International Systems and International Law*, in THE STATE OF WAR 88 (1965).

4. Even Hoffmann's brilliant analysis of American foreign policy in *Primacy or World Order* (1978) does not discuss the relevance of international law to the pursuit of the system of world order the author advocates. Subject to the same criticism is Morgenthau, *Emergent Problems of United States Foreign Policy*, in THE RELEVANCE OF INTERNATIONAL LAW 67 (K. Deutsch & S. Hoffmann eds. 1971), which was expanded into *A New Foreign Policy for the United States* (1969).

3. the disregard of crucial facts in search for the broad principle, or *vice versa*;
4. the rigidity of legal analysis and methodology;
5. the stubborn insistence upon rules, agreements, and expectations when circumstances have been materially altered so as to render them obsolete or useless;
6. the play-it-by-the-book attitude and innate conservatism this fosters;
7. the stifling of intuition, creativity, and initiative; and
8. a preference for manipulation of a given set of rules within an established game, instead of a preference for the creation of a new game with an entirely different set of rules.

These alleged constituents of the legal mind are postulated to be thoroughly inadequate to achieve success and may even be counterproductive when brought to bear upon international political problems. Solving international political problems require freedom and agility in thought and analysis, imagination, flexibility, a high tolerance for risk-taking, and adroitness at rule-making, rule-breaking, and game invention. In comparison to international political scientists, such qualities are lacking or at least are intolerably deficient in the international legal profession. In essence, this critique reduces itself to the dubious assumption that lawyers are not by nature opportunistic and unprincipled enough to function well in an international political arena where Machiavellian power politics and *raison d'état* are the order of the day.⁵

Henry Kissinger's exposition of this thesis has become standard textbook reading for introductory courses in international political science.⁶ It is apparent, however, that Kissinger spent only one year (1954-1955) as a special student at the Harvard Law School⁷ and never practiced law for a corporate law firm. From this perspective, the success of Dean Acheson as one of the great American Secretaries of State is an anomaly achieved in spite of, rather than because of, his professional origins. To an international lawyer, the reason for Acheson's superlative performance in foreign affairs is intuitively obvious. To quote Professor Harold Berman of the Harvard Law School: "Anyone who can become a senior partner at Covington & Burling must *a fortiori* be a superb realist."⁸

5. See generally G. KENNAN, AMERICAN DIPLOMACY 1900-1950 (1951).

6. Kissinger, *The Nature of Leadership*, in AMERICAN FOREIGN POLICY 27 (1969).

7. See HARVARD LAW SCHOOL, ALUMNI DIRECTORY 395 (1978).

8. Discussion with Professor Harold J. Berman, Harvard Law School, Cambridge, Mass. (September 1975). See also H. KISSINGER, WHITE HOUSE YEARS 22, 31, 58-62 (1979); Berman, *Law as an Instrument of Peace in U.S.—Soviet Relations*, 22 STAN. L. REV. 943

The logical conclusion to both of the aforementioned political science critiques of the relevance of international law is that whenever statesmen in good faith interject determinative considerations of international law into attempted solutions for the monumental problems of international politics, the probability that violence, war, defeat, death, and destruction will ensue is enormously increased. Strident adherence to international law is dangerous to the continued existence of mankind because the states of the world precariously survive in the primordial Hobbesian state of nature, where life is "solitary, poor, nasty, brutish, and short."⁹ Here there exist no law or justice, no conception of right or wrong, and no morality — only a struggle for survival in a state of war waged by every state against every state.¹⁰ The acquisition of power and aggrandizement at the expense of other states in a quest for unattainable absolute national security is the fundamental right, the fundamental law, and the fundamental fact of international politics.¹¹ Statesmen who obey the dictates of international law invite destruction at the hands of aggressors and thereby facilitate the destruction of third parties, which, in today's interdependent world, cannot realistically hope to remain neutral in a serious conflict between major powers.

B. *Qualification of the Problem*

In their affirmance of the irrelevance of international law, international political scientists do not intend to imply that considerations of international law play no important part in the conduct of international relations. They are astute enough to recognize that international law is pervasive in both its presence and its effect throughout the international system. It directly regulates or indirectly seeks to influence (whether successfully or not) the entire course of international relations, from seemingly the most insignificant of matters, all the way along the continuum of international political importance to the macrocosmic questions of war or peace and life or death for people, states, and civilizations.

Within this scheme of things, it is also undeniable that interna-

(1970); Comment, *Lawyer-Secretaries of Foreign Relations of the United States*, 3 AM. J. INT'L L. 942 (1909).

9. T. HOBBS, *LEVIATHAN* 100 (M. Oakeshott ed. 1962).

10. Hobbes asserted that international politics was one of three states of nature. The other two were the mythical state of nature and civil war. All three, however, were tantamount to a state of war. *Id.* at 101.

11. Compare with *id.* at 103-04.

tional organizations play a significant role. International organizations, from the smallest organization to the United Nations, are tangible manifestations of the effective operation of international law. International organizations come into existence, grow, prosper, and serve mankind, because their respective founding states sign multilateral treaties that become the constitutional documents for the organizations, and subsequent members accede to the principles of law enunciated therein. International organizations are the creative products of international law.

International political scientists are willing to concede these points. Indeed, a separate school of international political science has developed out of this concession — the so-called “functional-integrationist” approach to international relations. This approach is best exemplified by Ernst Haas’ definitive study of the International Labor Organization.¹²

The title of Haas’ work — *Beyond the Nation-State* — epitomizes the essence of the functional-integrationist position. Through the elaboration of a complicated international, supranational, and interpersonal network of political, economic, cultural, educational, and religious relationships, the international community will gradually, almost ineluctably, be drawn closer together to the point where international organizations will take over the most significant functions presently performed by governments of nation-states. Eventually the nation-state as known today will, to use Engels’ descriptive terminology, “wither away,” because it is superfluous to any type of metafunctional activity. It will be replaced as the fundamental unit of worldwide political organization by a centralized world government or reduced to the status of a semi-sovereign constituent unit in a federal or confederal world state analogous to the position occupied by the states of the American Union under the Constitution or the Articles of Confederation. Predictably, international law is destined to play a central role in this metamorphosis of an international community into a transnational or universal society.¹³

Forced by their functional-integrationist colleagues to concede the relevance of international law to measures requiring coopera-

12. See E. HAAS, *BEYOND THE NATION-STATE* (1964).

13. See I. CLAUDE, JR., *SWORDS INTO PLOWSHARES* (3d rev. ed. 1964); R. KEOHANE & J. NYE, *POWER AND INTERDEPENDENCE* (1977); H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* (2d ed. 1976); *TRANSNATIONAL RELATIONS AND WORLD POLITICS* (R. Keohane & J. Nye eds. 1971).

tion in international relations, international political scientists redirected their attack upon the relevance of international law by qualifying its application to concentrate solely upon matters of conflict among nations. Therefore, when international political scientists assert the irrelevance of international law, they are not concerned with the vast multitude of relatively inconsequential international relations it governs. Instead they refer to that portion of international relations which, they claim, escapes the effective control of international law and international organizations altogether — conflict over matters of “vital national interest.” Needless to say, this is a term of art whose essence, like beauty, resides within the eye of the beholder.¹⁴

Although the number of such conflicts might be few in comparison to the great bulk of international relations, they comprise those matters of “high international politics” concerning the very survival of nation-states, the international system, and the human race. International law considerations do not and should not intrude into such areas. If international law considerations do intrude into such areas, however, their intervention should be limited to the extent that they serve as a source for the manufacture of *ad hoc* or *ex post facto* justifications for decisions taken primarily on the basis of non-legal factors such as national interest, power, and economics.

In this view of international politics, international law is devoid of any intrinsic significance within the calculus of international political decisionmaking. International law might indeed be pertinent to, if not determinative of, the microcosmic elements of international relations. However, such relevance, when multiplied by the minimal importance of these matters, becomes inconsequential when compared to the irrelevance of international law to conflicts involving vital national interests. International law is therefore irrelevant to those matters which count the most, or more forcefully, to those matters which count for anything in international relations.

14. See, e.g., M. KAPLAN, SYSTEM AND PROCESS IN INTERNATIONAL POLITICS 151-65 (1957); Wolfers, *National Security as an Ambiguous Symbol*, in DISCORD AND COLLABORATION 147-65 (1962).

II. HISTORICAL BACKGROUND OF THE PROBLEM

A. "Legalism-Moralism"

This denial of international law's relevance to international politics is not characteristic of any one or more schools of international political science, but is endemic to most of the discipline. The genesis of international political science is attributable to an extreme negative reaction to a so-called "legalist-moralist" or "utopian" approach to international affairs, said to have influenced the conduct of international relations by the United States and the other Western democracies during the period between the First and Second World Wars. International political science originated with the "realist" or power politics oriented school of international relations. Its best exemplars are the writings of scholars such as Edward Hallett Carr,¹⁵ Hans Morgenthau,¹⁶ Georg Schwarzenberger,¹⁷ and the careers and publications of statesmen like Dean Acheson¹⁸ and George Kennan.¹⁹ The gist of the realist critique of the legalist-moralist or utopian approach to interwar diplomacy was as follows.

The Treaty of Versailles and especially its first part, the Covenant of the League of Nations,²⁰ were not the perfect incarnations of truth, justice, peace, and righteousness they were alleged to be by the statesmen of the Allied and Associated powers, particularly Woodrow Wilson. Instead, they were instrumentalities of power politics designed by the victorious nations of the First World War

15. See generally, e.g., E. CARR, *THE TWENTY YEARS' CRISIS, 1919-1939* (1939).

16. See generally H. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* (1951); H. MORGENTHAU, *POLITICS AMONG NATIONS* (1949) [hereinafter cited as MORGENTHAU (1949)]; H. MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLITICS* (1946); Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940) [hereinafter cited as Morgenthau (1940)]. See also H. MORGENTHAU, *TRUTH AND POWER* (1970); *PRINCIPLES AND PROBLEMS OF INTERNATIONAL POLITICS* (H. Morgenthau & K. Thompson eds. 1950) [hereinafter cited as Morgenthau & Thompson]; *TRUTH AND TRAGEDY* (K. Thompson & R. Myers eds. 1977).

17. See, e.g., G. SCHWARZENBERGER, *POWER POLITICS* (2d rev. ed. 1951); Schwarzenberger, *The Rule of Law and the Disintegration of the International Society*, 33 AM. J. INT'L L. 56 (1939).

18. See D. ACHESON, *POWER AND DIPLOMACY* (1958); D. ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* (1969).

19. See KENNAN, *supra* note 5; G. KENNAN, *MEMOIRS 1925-1950* (1967); G. KENNAN, *RUSSIA AND THE WEST UNDER LENIN AND STALIN* (1961); X, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566 (1947).

20. Treaty of Versailles, June 28, 1919, *reprinted in* 13 AM. J. INT'L L. 151 (Supp. 1919). See also Treaty of Peace between the United States and Germany, Aug. 25, 1921, 42 Stat. 1939, T.S. No. 658, 12 L.N.T.S. 192.

to secure and perpetuate, with the maximum possible degree of legal and institutional coercion, the favorable political, economic, and military *status quo* granted to them after the armistices ending the Great War. This treaty was imposed *vi et armis* in contravention of express promises given to induce surrender. If the peoples of the world believed anything else, they were sorely deluded by the ideological rhetoric deceptively manipulated by their leaders to fan the flames of patriotic fervor in order to hasten the prosecution of the war to its successful conclusion.

If the victors of Versailles intended to keep their ill-gotten gains, they had to be willing to employ military force against a revanchist Germany whenever the latter attempted to effectuate resistance to the terms of the so-called peace. The Western democracies, however, lacked the requisite will; instead of fighting to preserve their hegemony, they preferred to trust in their own illusions.

They put their faith into such meaningless pronouncements as Wilson's Fourteen Points,²¹ the Pact of Paris,²² and its corollary the Stimson Doctrine;²³ into the ineffectual organs of the League of Nations — the Council, the Assembly, and the Permanent Court of International Justice; into vapid and useless legalist-moralist doctrines like neutrality, disarmament, and arbitration; and into the codification of international law and the formulation of a definition of aggression. Finally, and perhaps most egregiously of all, they actually believed in the existence of a beneficent world public opinion that would will the world on its path towards peace.

These chimera were exploded when a powerful and resurgent Germany, under the leadership of a demonic yet brilliant tyrant, together with like-minded allies in Italy and Japan, challenged the *status quo* of Versailles with the might of their armies.²⁴ Inter-

21. Political realists generally date twentieth century utopianism from the delivery of President Woodrow Wilson's fabled Fourteen Points Address to a joint session of Congress on January 8, 1918. See, e.g., CARR, *supra* note 15, at 26-27; H. MORGENTHAU, POLITICS AMONG NATIONS 526-28 (5th ed. 1973) [hereinafter cited as MORGENTHAU (1973)]. But see generally I. CLAUDE, JR., POWER AND INTERNATIONAL RELATIONS 94-204 (1962) (Wilson was in fact a realist). For the text of the speech, see PRESIDENT WILSON'S STATE PAPERS AND ADDRESSES 464-72 (A. Shaw ed. 1918).

22. Treaty Providing for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

23. Reprinted in DEP'T OF STATE, PRESS RELEASES 41 (Jan. 7, 1932).

24. See generally W. SHIRER, THE RISE AND FALL OF THE THIRD REICH (1960); PEACE OR APPEASEMENT? 2-5 (F. Loewenheim ed. 1965) (notorious Hossbach memorandum). But see B. RUSSETT, NO CLEAR AND PRESENT DANGER (1972); A.J.P. TAYLOR, THE ORIGINS OF THE SECOND WORLD WAR (2d ed. 1961).

national law was a farcical joke to the Axis powers. The only way to stop them was through the exercise of that lone medium they understood and appreciated most — sheer, naked, brutal force, stripped of all pretensions to anything but outright conquest. Hence the need for their unconditional defeat and the demand for their unconditional surrender.

It was unfortunate for the lives of millions of people that the Allied enamor for international law meant they had to learn this lesson the hard way, after the mistakes of Manchuria, Ethiopia, the Rhineland, Spain, Austria, Czechoslovakia, and Poland. If Western statesmen had been attentive to the historical imperatives of power politics, and not fascinated by the seductive allurements of international law, the Second World War might never have happened — or else it would have occurred in the middle 1930s when the devastation would have been minor in comparison to that which it was in actuality. They could have fought the war on their own terms and at the time of their own choice, not those of their adversaries. The Western democracies had only themselves to blame for the Second World War.

Political realists delight in bandying about that famous quotation from George Santayana: “Those who cannot remember the past are condemned to repeat it.”²⁵ Faced with a Communist threat in the aftermath of the Second World War, they set out to ensure that the United States and other Western democracies did not, in their confrontation with the Soviet Union, repeat the same grievous errors they had allegedly committed in their confrontation with fascism — reliance upon the fictitious and fatuous strength of international law and international organizations. In the political milieu of the Cold War, the West must not repeat the same near fatal mistake it had made after termination of the First World War if it wished to avoid a suicidal Third World War.²⁶ Hence the justification for the necessity of the Truman Doctrine, the Marshall Plan, the policy of containment, the Berlin airlift, the intervention in Korea, and the creation of the North Atlantic Treaty Organization (NATO). These elements of postwar American foreign policy were quite properly founded upon pure calculations of national interest and power politics.

25. I G. SANTAYANA, *THE LIFE OF REASON* 284 (1905). *But see* E. MAY, “LESSONS” OF THE PAST (1973).

26. *See generally* H. HOLBORN, *THE POLITICAL COLLAPSE OF EUROPE 182-93* (1951).

B. Political Realism

The definitive exposition of a modern theory of political realism appears in Hans Morgenthau's *Politics Among Nations*.²⁷ This work set the discipline of international political science on its feet and has remained its greatest classic. The book is written with the power, brilliance, and analytical insight of an international lawyer who had been profoundly disillusioned by the experience of the Second World War.²⁸ Little sympathy remained for international law or international organizations, because they had been tragically repudiated by history.

At time of publication, *Politics Among Nations* read like a "declaration of war"²⁹ against the legalist-moralist approach to international relations. It railed against those who sought to interject into the analysis of international relations and the calculations of international political decisionmaking utopian or non-power elements in any fashion even reminiscent of a value judgment. Sheer physical survival in a Machiavellian world of power politics, totalitarianism, and nuclear weapons must thereafter become the litmus test for the validity of man's philosophical, moral, and legal presuppositions.

Obviously, Morgenthau did not write upon a *tabula rasa*. He was deeply influenced by Edward Hallet Carr's *The Twenty Years' Crisis, 1919-1939*.³⁰ Therein Carr appointed himself as founder of the anti-utopian school of international affairs. He argued that during the interwar period, the techniques of power politics had been neglected, and worse yet, condemned and repudiated in favor of a non-power oriented or anti-power-politics approach to international politics. Carr held this denigration of power politics responsible to a great extent for the predicament of the world in 1939. Although written from this realist perspective, the book did strive to achieve an uneasy synthesis of elements from both the utopian movement and its realist critique. Carr argued that even though the first and foremost duty of the statesman was to be pragmatic

27. See MORGENTHAU (1949), *supra* note 16.

28. Morgenthau has admitted that the Second World War played a decisive role in his transition from international lawyer to political realist. Discussion with Professor Hans J. Morgenthau, New York City (April 1972). See also Morgenthau (1940), *supra* note 16, at 260-61. For a philosophical explanation of political realism in terms of disillusioned liberalism, see J. SHKLAR, LEGALISM 123-43 (1964).

29. Discussion with Professor Stanley Hoffmann, Harvard University, Cambridge, Mass. (September 1973).

30. Discussion with Professor Hans J. Morgenthau, New York City (April 1973).

and expedient, he could be moral as well.³¹ Statesmen could have their proverbial cake and eat it too, so long as they followed Carr's recipe.

Morgenthau completely rejected any theoretical synthesis between power and non-power elements. Instead, he took up realist theory where Carr had left it a decade before and carried it to its logical and most extreme conclusions. For Morgenthau, international law, morality, ethics, ideology, and even knowledge itself were components in the power equation.³² There they were devoid of non-instrumental significance or prescriptive worth, subject to compulsory service as tools of power when deemed necessary for the vital interests of state. Morgenthau erected no barriers to the acquisitive nature of the nation-state beyond its own inherent limitations and those constraints imposed upon it by the international political milieu. In particular, he redirected the analysis of international relations toward a predominant consideration of the balance of power and power politics.³³

When reading any one of the five editions of *Politics Among Nations*,³⁴ spanning over a quarter of a century, one is struck by the methodically ruthless vitality of Morgenthau's attack upon the legalist-moralist approach to international relations. Both the substance and the spirit of the book distinctly remind the reader of Machiavelli's *The Prince*.³⁵ What Machiavelli did to the Christian ethos in politics, Morgenthau did to legalism-moralism in the study of international relations.

After Morgenthau's initial declaration of war, there ensued a pitched battle between the realists and their utopian adversaries. The former were assisted in this intellectual struggle by a Cold War that suddenly became "hot" in Korea in 1950. This seemed to demonstrate the validity of the realist analogy of the Communist threat to its fascist predecessor. The Korean War destroyed any residual enthusiasm on the part of international political scientists for international law and international organization.

By 1954, Morgenthau was able to declare that the battle had been won, and all that remained to be done was for the realists to

31. CARR, *supra* note 15, at 302.

32. See generally MORGENTHAU (1973), *supra* note 21, at 4-15.

33. *Id.*

34. The foreword to the first edition and the prefaces to the last four editions are found in *id.* at vii-xx.

35. See N. MACHIAVELLI, *THE PRINCE* (M. Musa trans. & ed. 1964).

consolidate their position.³⁶ The split between international legal studies and international political science was complete. In the estimation of international political scientists, the realists had thoroughly discredited a legalist approach to international politics. However, the process did not stop there.

C. *Subsequent Development of International Political Science*

Just as political realism represented an extreme negative reaction against international law, the subsequent intellectual history of international political science is a series of ideological chain reactions precipitated by the theories of the realist school, which were in turn precipitated by the legalist-moralist approach.³⁷ The realists were succeeded by advocates of a decisionmaking approach to international relations.³⁸ They attacked the realists for their failure to consider the microcosmic units and factors of analysis in international political decisionmaking common to all nation-states. This defect was said to have proceeded ineluctably from realism's almost exclusive preoccupation with the macrocosmic movements of the entire international system.

Next came the systems theorists, who strove to refocus the concentration of the discipline upon the broad systemic movements of international affairs through the utilization of an analytical methodology and terminology that was self-proclaimedly more rigorous,

36. H. MORGENTHAU, *Preface* to POLITICS AMONG NATIONS at vii (2d ed. rev. 1954).

37. For histories of international political science, see generally CONTEMPORARY THEORY IN INTERNATIONAL RELATIONS (S. Hoffmann ed. 1960); DIPLOMATIC INVESTIGATIONS (H. Butterfield & M. Wight eds. 1966); Morgenthau & Thompson, *supra* note 16; Deutsch, *Major Changes in Political Science 1952-1977*, 1978 PARTICIPATION 11 (Supp.) (the newsletter of the International Political Science Association). General surveys of the diverse schools of international political science can be found in CONTENDING APPROACHES TO INTERNATIONAL POLITICS (K. Knott & J. Rosenau eds. 1969); INTERNATIONAL POLITICS AND FOREIGN POLICY (rev. ed. J. Rosenau 1969); THE INTERNATIONAL SYSTEM (K. Knott & S. Verba eds. 1961).

38. See generally, e.g., FOREIGN POLICY DECISION-MAKING (R. Snyder, H. Bruck & B. Sapin eds. 1962); S. HUNTINGTON, THE COMMON DEFENSE 123-96 (1961); R. SNYDER, H. BRUCK & B. SAPIN, DECISION-MAKING AS AN APPROACH TO THE STUDY OF INTERNATIONAL POLITICS (Princeton U. Foreign Pol'y Analysis No. 3, 1954); H. WILENSKY, ORGANIZATIONAL INTELLIGENCE 75-93 (1967); Hilsman, *The Foreign-Policy Consensus: An Interim Research Report*, 3 J. CONFLICT RESOLUTION 361 (1959); Lindbloom, *The Science of "Muddling Through,"* 19 PUB. AD. REV. 79 (1959); Robinson & Snyder, *Decision-Making in International Politics*, in INTERNATIONAL BEHAVIOR 435 (H. Kelman ed. 1965). See also M. BROWN, FASHODA RECONSIDERED (1970) (application of the Snyder-Bruck-Sapin analytical framework to the French involvement in the Fashoda incident and the Dreyfus affair); G. PAIGE, THE KOREAN DECISION (1968) (application of the Snyder-Bruck-Sapin analytical framework to the United States intervention in Korea).

theoretical, value-free, and therefore more scientific and useful than that applied by the realists.³⁹ The systems theorists were in turn followed by the behavioralists, who once again broke down the units of analysis to the level of small decisionmaking groups and even focused on the human mind to examine their respective operational dynamics and impact upon the determination of foreign policy.⁴⁰

The game theorists employed a mathematically based methodology derived from pure economic theory to develop intricate and subtle decisionmaking solutions to well-defined problems — solutions with potential applicability to international politics.⁴¹ In a

39. See generally, e.g., R. ARON, PEACE AND WAR 19-157 (R. Howard & A. Fox trans. 1973); HAAS, *supra* note 12, at 51-85; FOREIGN POLICY, *supra* note 3, at 17-51; K. HOLSTI, INTERNATIONAL POLITICS: A FRAMEWORK FOR ANALYSIS 29-101 (3d ed. 1977); KAPLAN, *supra* note 14; R. OSGOOD & R. TUCKER, FORCE, ORDER, AND JUSTICE 169-79 (1967); R. ROSECRANCE, ACTION AND REACTION IN WORLD POLITICS (1963), reviewed in Liska, *Continuity and Change in International Systems*, 16 WORLD POL. 118 (1963); K. WALTZ, MAN, THE STATE AND WAR (1959); Alger, *Comparison of Intrnational and International Politics*, 57 AM. POL. SCI. REV. 406 (1963); Brecher, *International Relations and Asian Studies: The Subordinate State System of Southern Asia*, 15 WORLD POL. 213 (1963); Chi, *The Chinese Warlord System as an International System*, in NEW APPROACHES TO INTERNATIONAL RELATIONS 405 (M. Kaplan ed. 1968) (practical application of the Kaplan framework); Franke, *The Italian City-State System as an International System*, in NEW APPROACHES TO INTERNATIONAL RELATIONS 426 (M. Kaplan ed. 1968) (another practical application of the Kaplan framework); Hoffmann, *supra* note 3, at 88; Masters, *A Multi-Bloc Model of the International System*, 55 AM. POL. SCI. REV. 780 (1961); Masters, *World Politics as a Primitive Political System*, 16 WORLD POL. 595 (1964); Russett, *Delineating International Regions*, in QUANTITATIVE INTERNATIONAL POLITICS: INSIGHTS AND EVIDENCE 317 (J. Singer ed. 1968); Waltz, *The Stability of a Bipolar World*, 93 DAEDALUS 881 (1964); Zartman, *Africa as a Subordinate State System in International Relations*, 21 INT'L ORGANIZATION 545 (1967). See generally L. VON BERTALANFFY, GENERAL SYSTEM THEORY (1968); MODERN SYSTEMS RESEARCH FOR THE BEHAVIORAL SCIENTIST (W. Buckley ed. 1968).

40. See generally, e.g., J. DE RIVERA, THE PSYCHOLOGICAL DIMENSION OF FOREIGN POLICY (1968); A. GEORGE & J. GEORGE, WOODROW WILSON AND COLONEL HOUSE (1956); R. JERVIS, THE LOGIC OF IMAGES IN INTERNATIONAL RELATIONS (1970); R. JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS (1976); Allport, *The Role of Expectancy*, in WAR 177 (rev. ed. L. Bramson & G. Goethals 1968); Greenstein, *The Impact of Personality on Politics: An Attempt to Clear Away Underbrush*, 61 AM. POL. SCI. REV. 629 (1967); Jaros, Hirsch & Fleron, *The Malevolent Leader: Political Socialization in an American Sub-Culture*, 62 AM. POL. SCI. REV. 564 (1968); Jervis, *Hypotheses on Misperception*, 20 WORLD POL. 454 (1968); Kelman, *Social-Psychological Approaches to the Study of International Relations*, in INTERNATIONAL BEHAVIOR 565 (H. Kelman ed. 1965); May, *War, Peace, and Social Learning*, in WAR 151 (rev. ed. L. Bramson & G. Goethals 1968); Tolman, *Drives Toward War*, in WAR 159. See also R. BENEDICT, THE CHRYSANTHEMUM AND THE SWORD (1967); W. LANGER, THE MIND OF ADOLF HITLER (1972); Aronson, *The Theory of Cognitive Dissonance: A Current Perspective*, 4 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 1 (L. Berkowitz ed. 1969); Blumer, *Society as Symbolic Interaction*, in HUMAN BEHAVIOR AND SOCIAL PROCESSES 179 (A. Rose ed. 1962).

41. See generally, e.g., MATHEMATICAL APPROACHES TO POLITICS (H. Alker, K.

similar vein, strategic studies theorists explored the hypothetical dynamics of a future world war in order to extrapolate in reverse the essential elements of successful war-preventive or at least war-ameliorative foreign and domestic policies.⁴² Then there emerged the organizational theorists and those who proposed a "bureaucratic politics" approach to the interpretation of foreign policy decisionmaking and execution by governments.⁴³

There are now as many theories of international political science as there are international political scientists. It has become a truism to state that international political science is a field in search of a "paradigm."⁴⁴ Although the proponents of the respective theories differ among themselves in a plethora of ways, they share with the realists a general disavowal of the utility of international law to the study and practice of international politics. International political science as a discipline is realist by birth and continued persuasion because of its solemn affirmance of the irrelevance of international law to international politics.

III. DIRECTION FOR A SOLUTION

A. *International Legal Positivism*

Public international lawyers are not totally blameless for the development of this predicament. Some remain oblivious to what has happened, while others, aware of the problem, either do not know what to do about it, or do not believe anything should be

Deutsch & A. Stoetzel eds. 1973); H. ALKER, *MATHEMATICS & POLITICS* 130-52 (1965); K. DEUTSCH, *THE ANALYSIS OF INTERNATIONAL RELATIONS* 132-64 (2d ed. 1978); R. FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969); KAPLAN, *supra* note 14, at 167-241; W. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962); T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960); J. VON NEUMANN & O. MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1972).

42. See, e.g., H. KAHN, *ON ESCALATION* (rev. ed. 1968); H. KAHN, *ON THERMONUCLEAR WAR* (2d ed. 1961); H. KISSINGER, *THE NECESSITY FOR CHOICE* (1960); H. KISSINGER, *NUCLEAR WEAPONS AND FOREIGN POLICY* (1957); *PROBLEMS OF NATIONAL STRATEGY* (H. Kissinger ed. 1965); T. SCHELLING, *ARMS AND INFLUENCE* (1966); Wohlstetter, *The Delicate Balance of Terror*, 37 *FOREIGN AFF.* 211 (1959).

43. See generally, e.g., G. ALLISON, *ESSENCE OF DECISION* (1971); R. WOHLSTETTER, *PEARL HARBOR: WARNING AND DECISION* (1962); Allison & Halperin, *Bureaucratic Politics: A Paradigm and Some Policy Implications*, 24 *WORLD POL.* 40 (R. Tanter & R. Ullman eds. Supp. 1972); George, *The Case for Multiple Advocacy in Making Foreign Policy*, 66 *AM. POL. SCI. REV.* 751 (1972); Halperin, *Why Bureaucrats Play Games*, 2 *FOREIGN POL'Y* 70 (1971). See generally J. MARCH & H. SIMON, *ORGANIZATIONS* (1958); R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* (1960).

44. This term is employed in the sense described in T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

done: Let the political scientists hoist themselves with their own petard! Yet this informed group simultaneously bemoans the increasingly hard-nosed realist fashion in which American foreign policy has been conducted since the end of the Second World War. They are hopeful this policy approach reached its apotheosis in the unfortunate history of American participation in the Vietnam War, but they cannot be sure that this tendency stopped there.⁴⁵

Falling into profound despair over their collective failure to discover the magical solution that will allow them to return the mainstream of American foreign policy to its proper legalist course, public international lawyers have retreated into their personal bailiwick of a strict international legal positivist approach to international politics. Here, thank heavens, there is a paradigm. The standards of international legal positivism were established over seventy years ago by the great Lassa Oppenheim.⁴⁶ There is no need to abandon or modify this credo.

The purpose of scholarly life lies in the mechanistic determination of the legality or illegality of a proposed or completed course of conduct in accordance with the punctilious terms of public international law. Extraneous considerations — such as the relevance of this sacerdotal rite to international politics — must not taint the purity of the legal analysis. Illegality is treated as if it were a sin deserving of punishment and damnation. By implication, the international legal positivists hold the keys to eternal salvation in their annointed hands. Like Socrates and Christ, they preach that it is better to die good than to live evil. Unfortunately, the first alternative is a very real possibility for the entire human race in a nuclear age. No wonder international political scientists are exasperated by public international lawyers.

Even some of those few international lawyers who do become actively involved in the public debate over the great issues of American foreign policy and world affairs seem to be impelled like lemmings by a mysterious force that drives them into the deadly embrace of their philosophical adversaries where they disavow their heritage. There they try to out-do the realists by proving how tough they really can be. The international lawyer who converts to

45. See generally D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1972); W. SHAW-CROSS, *SIDESHOW* (1979). But see E. ROSTOW, *LAW, POWER, AND THE PURSUIT OF PEACE* 59-73 (1968).

46. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313 (1908).

political realism is the most vehement, articulate, knowledgeable, and effective advocate of the proposition that international law is irrelevant to international politics. Hans Morgenthau is the leading case in point.⁴⁷

Public international lawyers must appreciate the importance of re-establishing functional links with international political scientists. They must take upon themselves the burden of proving to the latter the relevance of international law to international politics. In return, international political scientists must be fair and open-minded enough to re-examine some of the most fundamental assumptions underlying their discipline. Otherwise both groups will continue to pursue those objectives they share in common — international peace, security, prosperity, human dignity, and social justice — in profound isolation from each other or, worse yet, the two groups will pursue their common objectives while working at cross-purposes to one another. They will rarely benefit from the wisdom, counsel, experience, and direct assistance of their opposite numbers. Both academic disciplines can only continue to suffer grievously from the prolongation of this unwarranted schism within the community of international scholarship. Conversely, the analysis of international politics can only be enhanced by a reintegration of international legal studies with international political science.

In what direction does a solution to this problem lie? Quite obviously, it is not in the further refinement of international legal positivism, even assuming this could be done. Nor must it lie in the proliferation of yet another pseudo-paradigmatic approach to international politics within the discipline of international political science. As Hans Morgenthau once said concerning a methodological seminar for international political scientists held at Princeton: “All these people constantly sharpening their tools — but when are they ever going to cut something?” The necessary tools are already at hand. It is time to select those which are appropriate and to use them.

47. Hans Morgenthau was trained as a lawyer in Germany, was admitted to the bar there and practiced law for three years. He then became an assistant to the law faculty at the University of Frankfurt (1931), acting President of the Labor Law Court in Frankfurt (1931-1933), and later professor of international law at the Institute for International and Economic Studies at Madrid, Spain (1935-1936). After arrival in the United States, he became, *inter alia*, assistant professor of law, history, and political science at the University of Kansas in Kansas City (1939-1943) and was admitted to the Missouri Bar. 2 WHO'S WHO IN AMERICA 2307 (40th ed. 1978-1979).

B. McDougal-Lasswell Jurisprudence

At first glance, a prime area for exploration might seem to lie in the perfection of the McDougal-Lasswell jurisprudence of international law and international relations.⁴⁸ This is because it originated out of a solid social science background and has so far represented the first and only full-scale theoretical attempt in either discipline to marry international legal studies with the social sciences. It would appear that McDougal-Lasswell jurisprudence could easily be reconciled with the principles and methodology of international political science — at least more easily reconcilable than international legal positivism.

Historically, however, this has not proven to be the case. Indeed a somewhat skeptical observer could readily conclude that international legal positivism, McDougal-Lasswell jurisprudence, and international political science have little in common with each other today except for the fact that all are concerned with topics of an international nature. McDougal-Lasswell jurisprudence has been and will remain unsuitable for the purpose of achieving the reunification of international legal studies and international political science. This is due to several fundamental reasons flowing from the philosophical premises underlying all three approaches to international relations.

The self-professed value orientation of McDougal-Lasswell jurisprudence⁴⁹ is unacceptable to both international political scientists and international legal positivists. Any theoretical bridge attempting to span the gap between two disciplines must rely for its support upon the paradigmatic requirements of each. McDougal-Lasswell jurisprudence fails to do so.

1. *International political science.* As far as the international political scientists are concerned, McDougal-Lasswell jurisprudence fails to differentiate the Machiavellian “is” from the Platonic “ought to be” of international politics and international law.⁵⁰ The

48. See McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

49. See, e.g., Lasswell, *Introduction to M. McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER* at xix, xix n.1 (1961).

50. See MACHIAVELLI, *supra* note 35, at 127:

But my intention being to write something useful for whoever understands it, it seemed to me more appropriate to pursue the effectual truth of the matter rather than its imagined one. And many have imagined republics and principalities that have never been seen or known to exist in reality; for there is such a gap between how one lives and how one should live that he who neglects what is being done for

establishment and preservation of this analytical distinction is axiomatic to modern political philosophy and, *a fortiori*, to international political science. Without it, McDougal-Lasswell jurisprudence cannot serve as the starting point for the development of what must at least purport to be a "scientific" theory of the relationship between law and politics in the international system.

2. *International legal positivism.* The international legal positivists raise a similar objection. McDougal-Lasswell jurisprudence appears to be nothing more than an atavistic return to concepts of natural law dressed up in the jargon of mid-twentieth century social science. Oppenheim and his colleagues struggled valiantly and successfully to extricate international legal studies from this morass. They set the discipline upon its proper and "scientific" course of international legal positivism. Their heirs must not allow the study of international law to be seduced by natural law in the guise of social science nonsense.

3. *John Locke.* Even if these interrelated objections to the value-orientation of McDougal-Lasswell jurisprudence could somehow be overcome, the universality of its value system would still remain seriously suspect. This is because McDougal-Lasswell jurisprudence is firmly rooted in the Western liberal tradition of natural right⁵¹ so eloquently and definitively stated by John Locke in his *Second Treatise on Government*.⁵² Indeed, the natural law structure of McDougal-Lasswell jurisprudence is the inexorable result of this natural right foundation.

In order to conceptualize his theory of rights, Locke postulated the existence of a natural man, possessed of natural rights and living in a state of nature where he is governed by natural laws. These laws are the product of human reason flowing from man's natural desire for self-preservation. Man creates civil society for the express purpose of better protecting and promoting his own existence. Yet civil society is only one step removed from the state of nature. Human nature remains essentially the same in both situations.

what should be done will learn his destruction rather than his preservation: for a man who wishes to profess goodness at all times must fall to ruin among so many who are not good. Whereby it is necessary for a prince who wishes to maintain his position to learn how not to be good, and to use it or not according to necessity.

51. See, e.g., McDougal, Lasswell & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. L. REV. 919, 938-43 (1975).

52. Locke, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 305, 327-44 (rev. ed. P. Laslett 1960).

Man is primarily concerned with the advancement of his own self-interest in each.

Within civil society man must be free to do whatever he wants so long as he does not infringe upon the right of his fellow man to do the same. It is the purpose of government to determine by law the limits of man's freedom of action *vis-à-vis* his fellow citizens in the event of conflict between them. But within these limited restrictions man must remain free to pursue his own self-interest as he sees fit. This is especially true in the economic sphere of activities. Ultimately, however, whether in the state of nature or in civil society, man owes no affirmative obligation toward his fellow men to improve their condition.

4. *Rousseau, Bentham, and Marx.* Not all Western liberal philosophers believe that human rights are or should be considered to be natural, imprescriptible, or inalienable. One theory, espoused by Jean-Jacques Rousseau and Jeremy Bentham, is that the enjoyment of rights is conditioned upon the performance of positive duties, not simply upon the mere abstention from negative harm. Rousseau explained the theory in terms of the concept of the "general will"; Bentham explained the theory by the principle of "utility." Yet the two theories are functionally similar when it comes to establishing the priority of social duty over human rights. There is no such thing as a natural man with natural rights in a state of nature ruled by natural law. Man is a social creature entirely dependent upon civil society for both his physical survival and his moral development. Human rights do not exist in the abstract but can only be considered within the context of political society.

It is the primary purpose of government to advance the common interest for the betterment of all. If necessary, an individual must be willing to forego to some extent the pursuit of his own self-interest for the good of others. Indeed, a citizen will best achieve the fulfilment of his own desires through the attainment of the common good. However, if a citizen is unwilling to act toward this end, the laws of civil society must *force him to be altruistic*. Human rights are thus a function of social duty. Failure to discharge the latter not only justifies but usually requires a deprivation in the exercise of the former.

The seminal source for this theory of human rights can be found in the writings of Rousseau and Bentham.⁵³ From there it

53. See J. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* (1823); J. ROUS-

percolated into Marxist philosophy. Marx adopted Benthamite utilitarian principles and put them to the service of one segment in the Rousseauian general will — the proletariat. Human rights are thus determined by calculations of utility designed to enhance the condition of the proletariat.⁵⁴

5. *Human rights versus capitalism.* Locke, on the one hand, and Rousseau, Bentham, and Marx, on the other, represent the philosophical archetypes for the debate over the proper relationship between fundamental human rights and the requirements of social and state obligation currently raging between First World countries (“capitalist” and “democratic”) and Third World countries (“developing” and “authoritarian”), which are supported by Second World countries (“communist” and “totalitarian”). The fundamental issue is whether human rights exist prior to and independent from the needs of civil society, especially in the area of economic development. Due to its philosophical presuppositions, McDougal-Lasswell jurisprudence has irreversibly chosen sides in this debate in favor of the Lockean position.⁵⁵ Locke’s exposition of one of the first fully articulated modern theories of human rights postulates a preeminent role for private property. The institution of private property was theorized to exist antecedent to and independent of civil society. Indeed civil society itself was established for the very purpose of protecting man’s “property.”⁵⁶ The significant fact is that Locke found it necessary to explain the rights to life and liberty in terms of and as variants to the concept of property. Use of the term property in this fashion represented a form of philosophical chattelization of the rights to life and liberty.⁵⁷

SEAU, *THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN OF INEQUALITY* (L. Crocker ed. 1967).

54. See KARL MARX: *EARLY WRITINGS* (T. Bottomore trans. & ed. 1964); K. MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* (2d ed. 1869); *BASIC WRITINGS ON POLITICS & PHILOSOPHY: MARX & ENGELS* (L. Feuer ed. 1959).

55. See MCDUGAL & FELICIANO, *supra* note 49, at 377-79 (Marxism is specifically rejected) M. MCDUGAL, H. LASSWELL, & L. CHEN, *HUMAN RIGHTS AND WORLD ORDER* 76-79 (1980). See generally Berman, *American and Soviet Perspectives on Human Rights*, 22 *WORLD VIEW* 15 (1979).

56. Locke defined “property” to include life, liberty, and estate. See Laslett, *Introduction* to J. LOCKE, *TWO TREATISES OF GOVERNMENT* 115-16 (rev. ed. P. Laslett 1960).

57. This interpretation is consistent with Locke’s labor theory of value. See Locke, *supra* note 52. The theory’s original proposition was that every man has property in his own person. By mixing the property of his own person with the elements of nature through his own labor, man can rightfully lay claim to the products resulting therefrom as his own possessions. Here, on a conceptual level, man himself is considered in terms of property.

Moreover, the right of estate was thereby rendered almost as fundamental a human right as were the rights to life and liberty. From a Marxist perspective, Locke is nothing more than an apologist for capitalism, and his theory of human rights is no more than an ideology to legitimate and perpetuate capitalist exploitation.⁵⁸ It is evident that McDougal-Lasswell jurisprudence postulates capitalism to be the preferred economic system for the realization of its conception of fundamental human rights.⁵⁹

6. *American foreign policy.* A similar line of analysis can account for the oft-repeated criticism of McDougal-Lasswell jurisprudence as it is applied to determine the propriety of specific instances of state conduct in international politics — namely, that it possesses an uncanny ability to justify in pseudo-legal terms, whatever course of behavior the United States government deems expedient to its national interest under particular historical conditions.⁶⁰ Because Lockeian liberal values serve as the starting point for the value-oriented analysis of McDougal-Lasswell jurisprudence, and because the United States government is founded upon Lockeian principles (for example, the Declaration of Independence and the Bill of Rights), it becomes a simple exercise in circular reasoning to legitimate whatever America does in its relations with other nations, simply because America does it.

Yet these values cannot serve as the basis for the formation of a system of world order encompassing countries, peoples, and civilizations espousing fundamentally different if not antithetical sets of values. Indeed, insistence upon the primacy of Lockeian liberal

58. Locke reduces man to a form of property. Locke's chattelization of the human being becomes the philosophical explanation for the exploitation of the proletariat by the bourgeoisie and the fundamental alienation of all human beings within capitalist society.

59. See McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387, 412 (1974); McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237, 252-53 (1969). Underlying McDougal-Lasswell jurisprudence on human rights is the assumption that it is legitimate to discriminate in terms of wealth for reasons relevant to merit or capability. This violates the fundamental canon of communism: "[F]rom each according to his ability, to each according to his needs!" K. MARX, *CRITIQUE OF THE GOTHA PROGRAMME* 10 (C. Dutt ed. 1938).

60. See, e.g., McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963). In McDougal & Feliciano, *supra* note 49, at 536, the doctrine of humanitarian intervention was branded "amorphous." Yet 15 years later, the Israeli raid at Entebbe was deemed to be "justified as a humanitarian intervention, a doctrine whose roots go back, at least, to Hugo Grotius." Letter from Myres S. McDougal and Michael Reisman to the New York Times Editor (July 9, 1976), *reprinted in* N.Y. Times, July 16, 1976, § A, at 20, col. 3.

values in international relations might only lead to conflict and world disorder. So even if international scholars set out to construct a value-oriented jurisprudence of international relations, McDougal-Lasswell jurisprudence should not be the *point d'appui*.

C. *The "International Crises and the Role of Law" Series*

1. *Descriptive statement.* The recently completed series of books entitled *International Crises and the Role of Law*,⁶¹ published under the auspices of the American Society of International Law, is a step in the proper direction toward re-establishing the relevance of international law to international politics. Yet it did not go far enough. In that series, the case studies performed the invaluable first task of assembling the historical data into a series of descriptive statements establishing the role that international law and international organizations played during the respective crises. This author would like to suggest the utility of engaging in at least four further stages of analysis.

2. *Theoretical proposition.* For each case study, an effort must be made to deduce from the historical descriptive statements a set of theoretical propositions about the role international law and international organizations played in relation to the crisis at hand. For example:

a. *Descriptive statement.* During the Cuban missile crisis, among the various alternative courses of conduct considered by the United States government (for example, invasion, surgical airstrike, blockade, "quarantine"), it chose to implement a "quarantine" of Cuba with the endorsement of the Organization of American States.

b. *Theoretical proposition.* During time of international crisis, a government will respond at the outset with that viable option it perceives to be the least violative of the international legal order.

This theoretical proposition gives rise to a host of interesting and important questions. Does it hold true for "totalitarian" governments as well as for "democratic" governments? What if the original "least violative" response fails? Does the approval of a

61. See G. ABI-SAAB, *THE UNITED NATIONS OPERATION IN THE CONGO 1960-1964* (1978); R. BOWIE, *SUEZ 1956* (1974); A. CHAYES, *THE CUBAN MISSILE CRISIS* (1974); T. EHRLICH, *CYPRUS 1958-1967* (1974); R. FISHER, *POINTS OF CHOICE* (1978), reviewed in Rubin, *Order and Chaos: The Role of International Law in Foreign Policy*, 77 MICH. L. REV. 336 (1979).

“least violative” but plausibly illegal response by an international organization adversely affect its ability to participate in the effective management of future international crises?

Such questions cannot be answered solely by reference to the Cuban missile crisis. The theoretical proposition can only serve as the starting point for further investigation of these issues in regard to other international crises. Without the derivation of such theoretical propositions, however, there is no meaningful way to connect the lessons of one case study with those of any other.

3. *Theoretical model.* If, but only if, a set of general principles concerning the role of international law in each particular crisis has been formulated, would it then be possible to enter upon the next stage of the analytical process. This third step would consist of synthesizing the theoretical propositions drawn from each case study into one theoretical model for the role of international law in time of international crisis. The usefulness of that model would be a function of the number, quality, and diversity of the individual case studies upon which it is based. However, the initial construction of a theoretical model would permit the generation of additional case studies undertaken in reference to it and thereby permit the further perfection of the model.

Although guided by a common purpose, the individual case studies comprising the *International Crises and the Role of Law* series do not share a mutual framework for analysis. Nor has this shortcoming been remedied by relating the conclusions of one study to those of another in a rigorous methodological fashion. The development of a theoretical model for the role of law in international crisis will solve both of these interrelated problems.

4. *Testing the model.* With the accumulation of interrelated case studies, the derivation of theoretical propositions therefrom, and their consequent addition to the theoretical model, researchers should eventually feel confident enough with the model to formulate and test some predictive hypotheses regarding the role of international law in time of international crisis. These predictive hypotheses could be verified by reference to future international crises or to past international crises that have yet to be researched. As Thomas Kuhn points out in his *Structure of Scientific Revolutions*,⁶² one of the best and most assured methodologies for proof of

62. KUHN, *supra* note 44.

the validity of a theoretical model is the formulation, testing, and verification of predictive hypotheses logically derived from it.⁶³

5. *Recommendations for change.* By further perfection of the model in this manner, it would finally be possible to suggest some tentative prescriptive statements about how historical conditions could be altered so as to optimize the role of international law in time of international crisis. Recommendations could be made concerning the promulgation of new international law, the improvement of international organizations, or the alteration of national or international decisionmaking procedures and institutions in order to better cope with international crisis. Here the speculations of academic theory enter the domain of political reality, and the general admonition of Hans Morgenthau to all theorists is applicable: "In the world of the intellectual, ideas meet with ideas, and anything goes that is presented cleverly and with assurance. In the political world, ideas meet with facts, which make mincemeat of the wrong ideas and throw the ideas into the ashcan of history."⁶⁴

Progress through each of these additional four stages depends upon the adequate fulfilment of the immediately preceding stage. Any attempt to move directly from stage one to stage five without proceeding through the intermediate stages would constitute an inadvisably venturesome enterprise. Crisis becomes too dangerous a phenomenon in a nuclear world for academic theorists to shoot from the hip on their pet theories.

Even then, the performance of this final task of formulating prescriptive statements assumes that international law does indeed have a positive role to play in the prevention, management, or resolution of international crises. This contention is denied by international political scientists who, for the most part, would assert the essential irrelevance of international law to international crises, because international crises involve conflicts of "vital national interest" and are the stuff of "high international politics." The interconnected assumptions underlying the respective positions of public international lawyers and international political scientists on this point need to be exposed, tested, proved, disproved, or improved by the facts of history itself. Rhetoric alone on either side will not suffice to do the job. *The International Crises and the Role*

63. *Id.* at 153-55.

64. Statement by Hans Morgenthau (July 1961) (copy on file with the *California Western International Law Journal*).

of Law series took the first invaluable step in that direction. It is in this direction that a solution to the problem of the "irrelevance of international law" lies. Hopefully, it is also by movement in this direction that the reintegration of international legal studies and international political science can occur.

IV. CONCLUSION

The most appropriate conclusion to this essay is a description of a presentation made by Hans Morgenthau before Stanley Hoffmann's Seminar on American Foreign Policy at the Center for International Affairs of Harvard University in May 1978.⁶⁵ Morgenthau's basic thesis was that in a world of nuclear weapons systems developed to the current level of technical expertise where the instantaneous destruction of mankind is imminently possible, power politics as a principle for the conduct of international relations has become fatally defective and could ultimately result in the destruction of the human race through a suicidal Third World War. Morgenthau delineated what he believed to be the only possible solution to this overarching dilemma of the international political system — formation of a world government. He did not go into specific details about the process of its creation from the present nation-state system, nor did he outline its preferred configuration. He did suggest, however, that the United Nations could serve as one possible basis for the gradual formation of a world government.⁶⁶

To be sure, this process would take a long time, and Morgenthau refused to give an estimate of its probable period of gestation. He did not even utter a prediction as to whether the creation of a world government was historically possible at this stage of human evolution. He simply stated that world government has become an historical imperative.

As a stage penultimate to and facilitative of a world government, the nations of the world, must, for the immediate future, participate in the creation of a plethora of functionally related international organizations in order to cope with the subjects of pri-

65. Although the talk was all too brief, its theoretical implications for international political science, international legal studies, and international politics were profound. What follows is a reconstruction of this lecture taken from this author's own notes.

66. He did not comment on the utility of the Clark-Sohn proposals. See G. CLARK & L. SOHN, *WORLD PEACE THROUGH WORLD LAW* (3d ed. 1966). See also L. SOHN, *CASES ON UNITED NATIONS LAW* (2d ed. 1967); L. SOHN, *THE UNITED NATIONS IN ACTION* (1968).

mary concern to international relations. The development of a large number of specialized international organizations could eventually lead, through a process of gradual integration, to the formation of a world government. Here Morgenthau joined the camp of his functional-integrationist colleagues, perhaps much to their surprise or chagrin.⁶⁷

International political scientists or public international lawyers

67. Needless to say, those in the audience familiar with his work were thunderstruck by what appeared to be a thoroughgoing repudiation of the fundamental principles he had successfully advocated on behalf of both himself and international political science for the past 30 years. In an attempt to make certain that this was his intention, this author asked him a series of three interrelated questions. Morgenthau's startling answers need no explanation. To paraphrase the content of the discussion:

- Q:* Since international organizations and world government now seem to be the key to the future of mankind, and since both are and will be the products of international law, does this not mean that international law and therefore international lawyers are relevant and indeed essential to the future of international relations?
- A:* Well of course international law must play an important role in the creation of international organizations and the formation of a world government. But I do not know if I would go so far as to include international lawyers within this category of what is essential.
- Q:* Then, with all due respect, I am somewhat perplexed and at a loss as to how I should understand what you are saying. You come here today and tell us that it is vital for the future of mankind to create a world government through the progressive development of international organizations which, you have admitted, requires a central role for international law. And I do not see how you can realistically exclude international lawyers from that process. *Have you not come full circle?*

You started out many years ago as a young man, trained in the law, teaching international law and publishing in the field. Then along came the Second World War, and you and a group of disenchanting international lawyers broke away from the discipline and established international political science as a separate and independent discipline, based upon essentially anti-legalist or legal-nihilist premises—those of power politics and what you called “political realism.” For thirty years you stridently argued this position against all comers, whether international lawyers or other international political scientists. Now you come here and tell us that you have changed your mind. That it is necessary for us all to turn to world government, international organizations, international law and, by implication, international lawyers simply in order to survive into the next century. Have you not returned to the point where you started over fifty years ago?

- A:* You are perfectly correct. But that just goes to show that you can learn something new in thirty years.
- Q:* In other words, you have come out precisely where Professor Louis Sohn of the Harvard Law School has been for the past thirty years?
- A:* Sohn and I might start from different principles, but we have arrived at the same conclusion.

Those familiar with the work of both men could not have been more surprised by Morgenthau's answers. In the study of international relations it had always been assumed that there existed a spectrum of viewpoints ranging from the extreme realism of a Hans Morgenthau, on the one side, to the extreme idealism of a Louis Sohn, on the other, and with everyone else falling on the line somewhere in between. Morgenthau had turned that line into a circle.

may agree or disagree with Morgenthau, but the significant fact is that the very founder of the school for the irrelevance of international law has changed his mind on the subject. We should all take note of this development and give Morgenthau's reversal of opinion serious consideration. Is international law relevant or irrelevant to international politics? Is there any justification for the continuance of the schism between international political science and international legal studies? These are weighty questions for all international political scientists and public international lawyers to ponder. The answers should be forthcoming if we can only bring ourselves to work together toward their solution. The time to start is now.⁶⁸

68. How this can be done will be demonstrated in a forthcoming article, *International Law in Time of Crisis*.