

International Law as a Basis for Conducting American Foreign Policy: 1979-1982*

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I. Introduction

A. *The End of Power Politics*

In a lecture delivered in May, 1978, Hans Morgenthau, one of the founders of a modern theory of power in international relations, declared that power politics must be replaced as the intellectual basis for the conduct of American foreign policy.¹ With nuclear weapons that make possible the destruction of mankind, power politics has become fatally dangerous as a basis for foreign policymaking. Ultimately it will lead to a suicidal Third World War. According to Morgenthau, the only alternative to this scenario is the formation of a world government. For the immediate future, however, and as part of the process leading to the foundation of a world government, states must actively participate in the creation of functionally oriented international organizations able to cope with primary concerns in international relations. Through a process of gradual integration, the development of a larger number of specialized international organizations could eventually lead to the formation of a world government. International law must play an important role during this transition. Here Morgenthau joined the camp of the "functional-integrationist" school of international political science.

Most scholars familiar with Morgenthau's work have been startled by what appeared to be a repudiation of the principles of international relations that he and, under his influence, the vast majority of American international political scientists had advocated for the past thirty-

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1. See Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193, 217-19 (1980).

five years. The utility of power politics is still proclaimed by Morgenthau's numerous disciples, the foremost of whom is Henry Kissinger,² mentor to Alexander Haig. When they proclaim the need for a "geopolitical" approach to foreign affairs, one premised on a "grand theory" or "strategic design," they expound a theory of power politics. Their conception consists of a refined Machiavellianism qualified by the reality of nuclear weapons amassed by both superpowers.

A chief tenet of this "political realist" school of power politics is that international law and organizations are "irrelevant" to conflict between states over matters of "vital national interest." Nations survive precariously in a Hobbesian state of nature where life is "solitary, poor, nasty, brutish and short."³ No law or justice exists, no conception of right or wrong, no morality, only a struggle for survival in a ceaseless war that engages every state. The pursuit of power at the expense of other states is thus the fundamental right, the fundamental law, and the fundamental fact of international politics. Statesmen who disobey this "iron law"⁴ of power politics and proclaim the need for more international law and more international organizations invite destruction at the hands of aggressors and facilitate the destruction of third parties. In today's interdependent world, states cannot realistically hope to remain neutral in an all-out confrontation between major powers. For exponents of "political realism," physical survival must be the test for the validity of man's philosophical, moral, and legal presuppositions. From their perspective, international law is irrelevant in the conduct of international relations and will not become relevant to international politics in the foreseeable or even distant future.

According to this "realist" school, nothing essential has changed since Thucydides first articulated the cardinal principles of power politics some 2500 years ago in the Melian Dialogue.⁵ Thucydides argued that in situations of unequal power distribution between states at war, considerations of justice are irrelevant, for without life itself such an

2. See Kissinger, *Hans Morgenthau*, NEW REPUBLIC, Aug. 2 & 9, 1980, at 12.

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

4. See H. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 144 (1951).

5. "For ourselves, we shall not trouble you with specious pretences—either of how we have a right to our empire because we overthrew the Medes, or are now attacking you because of wrong that you have done us—and make a long speech which would not be believed; and in return we hope that you, instead of thinking to influence us by saying that you did not join the Lacedaemonians, although their colonists, or that you have done us no wrong, will aim at what is feasible, holding in view the real sentiments of us both *since you know as well as we do that right, as the world goes is only in question between equals in power, while the strong do what they can and the weak suffer what they must.*" THE COMPLETE WRITINGS OF THUCYDIDES: THE PELOPONNESIAN WAR 331 (Modern Library ed. 1951) (emphasis added).

intangible and transcendent value is meaningless. Nevertheless, one implication of his argument is that in a non-belligerent situation, where the possession by the major international actors of a rough equivalence of military power creates a "balance of power," considerations of justice do and should come into play. In peacetime the balance of power could therefore support and sustain a system of international law with effective organizations for the peaceful settlement of disputes. Conversely, the use of power politics by states during peacetime will only lead to war.

Compared with Machiavelli's *The Prince*,⁶ Thucydides' *The Peloponnesian War* propounds a relatively moderate theory of power politics. The differences in intensity are attributable to the authors' contradictory attitudes toward the concept of the "balance of power" and the ability of man to change historical conditions.⁷ Thucydides believed that man must resign and accommodate himself to the inevitability of the balance of power system in order to survive. Machiavelli argued that the prince must destroy the balance of power in order to achieve historical glory even if he should perish in the process.

In *The Prince*, Machiavelli called for the destruction of the *status quo* in Renaissance Italy that had assumed the form of a rough "balance of power" between competing political units that kept the peninsula in a condition of internecine warfare.⁸ He wanted to replace Italy's internal balance of power system with what contemporary international political scientists would call a "directive [i.e., authoritarian] hierarchical system."⁹ Modern theorists of power politics understand, however, that the probability of "total warfare" in the nuclear age forbids the pursuit of Machiavellian power politics to the logical conclusion of world hegemony. Restraint is the alternative to thermonuclear war. Instead of preaching the Machiavellian destruction of the international balance of power, modern "realists" assert the fundamental importance of maintaining the balance of power for the preservation of world peace. The implementation of Machiavellianism in a government's conduct of foreign affairs must therefore be only within the confines and for the express purpose of "upholding" or "restoring" the balance of power

6. Stanley Hoffmann's distinction between a "moderate" and a "revolutionary" international political system becomes relevant. Each finds its respective philosophical counterpart in the theories of power politics propounded by Thucydides and Machiavelli. Hoffmann, *International Systems and International Law*, in *THE STATE OF WAR* 88 (1965). See also Boyle, *The Law of Power Politics*, 1980 U. ILL. L.F. 901-30 [hereinafter cited as *Power Politics*].

7. Boyle, *Power Politics*, *supra* note 6, at 912-13, 923-24.

8. N. MACHIAVELLI, *THE PRINCE* 217-25 (M. Musa trans. 1964).

9. M. KAPLAN, *SYSTEM AND PROCESS IN INTERNATIONAL POLITICS* 48 (1957).

itself.¹⁰

The principal defect in modern "realist" theory is the supposition that Machiavellianism can actually be subordinated to the preservation of the balance of power. In fact, this handmaiden of foreign policy decision-making will inevitably become its master. By its very nature, Machiavellian power politics requires the employment of violence against adversaries in order to achieve objectives. This dictate traps governments into a cycle of force and counter-force from which the only escape is nuclear destruction. Machiavellianism's presumed need for states to engage in the threat and use of force creates an insoluble set of problems for the conduct of foreign affairs in regard to both immediate and long-range issues and general international conditions confronting foreign policymakers.

From a long-term perspective, power politics tends to undermine the balance of power system. It demands the constant threat and use of force by states in their mutual relations. As a theory of international affairs, power politics prescribes the purposeful institution of hostilities between major actors, and even a systemic war itself, in order to "uphold" or "restore" the balance of power.¹¹ Machiavellian power politics and war are essentially inseparable. The theory is merely a philosophical justification and a psychological rationalization for a foreign policy based on permanent and universal war of aggression.¹²

Of course modern theorists of power reject the inevitability of war. They postulate the existence of some sort of "invisible hand" that will miraculously maintain the balance of power system by ensuring that recourse to violence will somehow fall short of global war. The assumption that rational self-interest will ultimately prevail naively relies on the alleged ability of governments to control their international political environment and the use of nuclear weapons. Today's foreign policymakers must comprehend the Thucydidean impersonal forces of history that limit man's ability to determine his own fate. Otherwise humankind will succumb to a combination of its technological perfections and Machiavellian predilections.

In the short-term perspective, Machiavellian power politics offers no substantive prescriptions for the conduct of foreign affairs. Despite its claim to be a "grand theory" of international relations, power politics merely recommends *ad hoc* calculations of national interest and power aggrandizement at the expense of other states in order to win the sup-

10. See Boyle, *Power Politics*, *supra* note 6, at 956-66.

11. See M. KAPLAN, *supra* note 9, at 22-36 (six rules for the balance of power system).

12. See Boyle, *Power Politics*, *supra* note 6, at 928-29.

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posed “zero sum game”¹³ of international relations. Power politics provides no indication of how these decisions should be integrated into a unified, coherent, and consistent policy, except for the vacuous injunction that the “balance” must be “preserved” at all costs. Power politics is vague and insubstantial, and must therefore be rejected as a theory for the conduct of foreign policy. Yet the reality of power must never be ignored in the formulation of a constructive alternative.

B. *The Alternative of International Law*

One alternative to power politics can be found in the principles of international law. For the purposes of this analysis, law must not simply be interpreted in the Hobbesian positivist sense as the making, breaking, and enforcement of rules.¹⁴ A system of international law is more properly understood as creating a framework of rules that permits and enhances the quality of interaction among its participants.¹⁵ Analyzed in accordance with the Aristotelian doctrine of the mean, the principles of international law possess an intrinsic core of rationality that creates a workable path between human nature and social convention critical to continued survival.¹⁶ International law articulates rules that actors in the international system have found to be indispensable for international life. What is essential to international life becomes enshrined in the rules of international law. Therefore, the requirements of international law should substantially, albeit imperfectly, coincide with the dictates of vital national interests, and *vice versa*. Even in times of severe international crises, adherence to the rules of international law is usually in a state’s best interest. States ordinarily do not adopt useless, impractical, or dangerous rules to regulate their relations. The principles of international law are created by states for the express purpose of serving and advancing their respective national interests.

These considerations apply especially to the conduct of American foreign policy. Adherence to the rules of international law is consistent with the national security interests of the United States, whether considered expansively in terms of furthering world public order or paro-

13. In a zero sum game, any player’s gains are exactly balanced by the losses of others. 6 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 62-69 (1968).

14. See Boyle, *Power Politics*, *supra* note 6, at 931-49.

15. See generally L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 B.Y.U. L. REV. 89.

16. See THE NICOMACHEAN ETHICS OF ARISTOTLE, Book V, at 106-36 (W. Ross trans. 1954) [hereinafter cited as ARISTOTLE].

chially in terms of satisfying selfish goals. The classic Machiavellian dichotomy between the "is" and the "ought to be" does not hold true for American foreign policy.¹⁷ The expedient and the just coincide and reinforce each other. This situation exists because the United States is the outstanding example of a *status quo* power. Consequently, American national interests include respect for international law by the United States and other governments. Such conformity encourages the peaceful preservation of the political, economic, and military *status quo* heavily weighted to America's advantage. Phenomenologically, law is the instrument *par excellence* for the peaceful preservation and transformation of any political or economic *status quo*. By its very nature, the international legal order represents an attempt by advantaged international actors to legitimate and consolidate existing and proposed power relations. To the degree a state enjoys the benefits of the existing configuration of international relations, the greater should be its commitment to upholding international law and the creation of effective organizations for the peaceful settlement of disputes.

For example, in time of international crisis, the government of a *status quo* state such as the United States should not rely on international legal principles such as retaliation, retorsion, reprisal, military intervention, counter-intervention, humanitarian intervention, self-help, etc. These principles of customary international law are relics of nineteenth century "gunboat diplomacy" used by the world's imperial powers against militarily inferior international actors and coveted colonial territories. They are now almost universally discredited.¹⁸ Nevertheless, in the late twentieth century, the great powers stubbornly insist on the validity of some of these principles. Yet, because of the fundamental transformation in the nature of the international system that has occurred since the mid-nineteenth century, these *status quo* states should be working most assiduously for the complete extinction of such retrogressive principles from the recognized corpus of public international law and the established patterns of international behavior. When major *status quo* powers threaten or use force for reasons not explicitly sanctioned by contemporary standards of international law, formally accepted by all states in the world community, they undermine the integrity of the very international legal order that they constructed to protect their vital national interests. Consequently, those states that currently benefit the most from the existing arrangement of interna-

17. N. MACHIAVELLI, *supra* note 8, at 127.

18. Judgment in the Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. 4, 34-35.

tional relations should not unwittingly lose them by resorting to, or encouraging, illegitimate violence and coercion.

In contemporary international relations, the only legitimate justifications and procedures for the use of violence and coercion by one state against another are those set forth in the United Nations Charter. The Charter alone contains those rules that represent the almost unanimous view of the international community. Therefore, in times of international crisis, a major *status quo* power such as the United States must in good faith use transnational force in strict accordance with the conditions prescribed by the United Nations Charter. These include the right of individual and collective self-defense as defined by Article 51; Chapter 7 "enforcement action" by the U.N. Security Council; Chapter 8 "enforcement action" by the appropriate regional organizations acting with the authorization of the Security Council as required by Article 53; and the so-called "peacekeeping operations" organized under the jurisdiction of the Security Council pursuant to Chapter 6, or under the auspices of the U.N. General Assembly in accordance with the Uniting for Peace Resolution,¹⁹ or by the relevant regional organizations in conformity with their proper constitutional procedures and subject to the overall supervision of the U.N. Security Council as specified in Chapter 8 and Articles 24 and 25.

For a leading *status quo* power such as the United States to threaten or use force on the basis of alleged justifications derived from antiquated and oppressive principles of customary international law is dangerous. The customs derive from practices of a colonialist era of international relations. Adherence to them generates political, economic, and military opposition from both the intended victim and all those states that share a history of repeated victimization under the guise of what might be called an international law of imperialistic intervention, occupation, and exploitation. Such a neo-imperialist policy by the United States may cause political isolation, and the opposition of allied *status quo* states sympathizing with such victims. American allies may have realized the need to eliminate the last vestiges of their own imperial behavior from the contemporary system of international relations. It therefore lies within the vital national interest of a leading *status quo* power such as the United States to adopt and adhere to a well nigh irrefutable presumption against any threat or use of force that does not squarely fit within the few justifications and procedures for transnational violence and coercion set forth in the United Nations

19. G.A. Res. 377, 5 U.N. GAOR Supp. (No. 20) at 10, U.N. Doc. A/1775 (1950).

Charter. Thus, rather than relying on doctrinal relics of the colonial past, or inventing novel international legal artifices such as Kennedy's "quarantine" of Cuba, American foreign policymakers must restore the Charter as the fundamental premise for both the management of international crises and the overall conduct of international affairs.

C. *The Asymmetries of International Law and Politics*

America's continued invocation of outmoded and dangerous principles of customary international law purporting to justify the international use of force and coercion demonstrates a subliminal attachment to legal propositions that may facilitate routine international relations. Two such propositions prove especially dangerous in the management of crises: (1) the rules of international law should operate symmetrically for equal and independent sovereign states in their mutual relations; (2) the normal condition of strict reciprocity in legal obligations between equal and independent sovereign states generally counsels derogation from a fundamental norm of international law by the government of one state in the event of a prior violation directly affecting it by another sovereign. Admittedly, it is an elementary principle of international law that all states must be treated as equal and independent. Though this precept departs from the political, military, and economic inequalities of international life, recognition of the sovereign equality of states is essential to the preservation of world peace. It impedes the strong from preying on the weak and thus forestalls a cataclysmic struggle among the strong over the division and conquest of the weak.

Nevertheless, although all states are equal under international law, they do not at all benefit equally from the rules of international law. The major *status quo* powers obtain comparatively greater benefits from the current international legal order because, in the aftermath of the Second World War, they possessed the political, military, and economic power requisite to promulgate and impose rules designed to operate to their advantage. Thus, the international legal order is an inherently asymmetrical system. It functions to the proportionate advantage of states to the degree they benefit from the existing political, military, and economic *status quo*.

A violation of an international legal rule by a minor state against a leading *status quo* power should not be treated by the latter as a sufficient condition for the use of transnational violence and coercion (e.g., retaliation, retorsion, reprisal, intervention, self-help, etc.) in order to protect, assert, or enforce its alleged rights. If the victim of the viola-

tion enjoys a greater relative advantage than the violator in the maintenance of the international legal order, the government of the victim state must consider the long-term detrimental effects that its arguably unjustifiable response will inflict on the stability of the international system. As a general proposition, I submit that the damage to both its own national security interests and to the international legal, political, and economic *status quo* resulting from a counterviolation of international law by a leading *status quo* power almost invariably far outweighs any harm to either that might arise from the original violation of international law by a minor state together with the supposed harm that might occur from the victim's not unilaterally prosecuting its rights through transnational violence and coercion. In this sense, then, a leading *status quo* power would be wise to follow Socrates' advice that it is better to suffer injustice than it is to inflict injustice²⁰ in the event of an offense perpetrated against it by a minor state. This conclusion recommends that major *status quo* states rely exclusively on the rules, techniques, and institutions afforded by the contemporary international legal order for the peaceful settlement of disputes with minor states.

This recommendation is further strengthened by the observation that the international legal order simultaneously consists of elements and processes of both distributive justice and "rectificatory" justice as defined by Aristotle.²¹ It is unfair, hypocritical, and ultimately self-defeating for a major *status quo* state in conflict with a minor adversary to insist on its alleged right to "rectificatory" justice by means of retaliation, retorsion, reprisal, intervention, or self-help when the distributive elements and processes of the international system are already overwhelmingly apportioned and operating to the former's distinct advantage. In a system of unequally distributed power, it becomes foolish for policymakers in a major *status quo* state to insist on fulfilling the principles of "rectificatory" justice in regard to their country, while at the same time they ignore the claims of a distributive (and rectificatory) nature advanced by a minor adversary. As will be demonstrated below, exclusive reliance on a "rectificatory" approach to international law and organizations by the United States government throughout the Iranian hostage crisis produced a series of disasters for American foreign policy, undermined the integrity of the international legal order, and set back the cause of world peace.

Of course this line of analysis should not lead a major *status quo*

20. PLATO, GORGIAS 53 (Penguin ed. 1960).

21. See ARISTOTLE, *supra* note 16.

power such as the United States to tolerate behavior violative of elementary norms of international law directed against it or any other state by another major power such as the Soviet Union. Such fundamentally disruptive conduct by a major actor must be resisted by all states acting in accordance with the rules, institutions, and techniques of the international legal order. If used intelligently this integrated collection of remedies should prove sufficiently flexible and effective to accomplish the task of defeating threats to international peace and security. It would be a serious mistake, however, for a leading *status quo* state such as the United States to respond to an alleged Machiavellian assault on the *status quo* by an adversary such as the Soviet Union through the counter-practice of Machiavellian power politics either against the latter or against some minor third state aligned with it (e.g., Cuba). The United States has a far greater stake than either the Soviet Union or any of its allies in maintaining the integrity of the international legal order to preserve a *status quo* still substantially weighted to America's favor. So long as there persists a rough equivalence of military power between the two nuclear superpowers and their respective alliance systems, the counter-practice of power politics by the United States and allied major *status quo* states weakens and may eventually destroy the effectiveness of the entire system of international law and organizations that they established after the Second World War for the express purpose of preserving a favorable *status quo*. The use by leading *status quo* powers of Machiavellian power politics will either eliminate or substantially decrease the advantages afforded to them by reliance on the strength of the contemporary international legal order. Even Machiavelli observed that the two principal foundations of all states must consist of good laws and good armed forces.²² For the *status quo* state today, the wisdom of the fox is just as important as the strength of the lion.²³

It is beyond the scope of this essay to elaborate a comprehensive manner in which American policymakers can use international law and organizations to conduct foreign affairs on a day-to-day basis. One useful step, however, would be to apply the foregoing considerations to analysis of the crises over Iran, Afghanistan, Cuba, and the SALT II Treaty that marked the latter half of President Carter's administration. This examination will illustrate several "points of choice"²⁴ where a greater degree of sensitivity to the requirements of international law

22. N. MACHIAVELLI, *supra* note 8, at 99. *See also id.* at 145 (fighting by means of law).

23. *Cf.* ARISTOTLE, *supra* note 16, at 145-49.

24. *See generally* R. FISHER, POINTS OF CHOICE (1978).

and a more heightened awareness of the potential of international organizations for the peaceful settlement of disputes either could have avoided these crises or could have substantially contributed to their more effective management and successful termination.

Many legal and political analysts have drawn the wrong "lessons" from these crises for the conduct of American foreign policy by the Reagan administration. In foreign affairs, President Carter certainly did not manifest the wisdom of the fox, and Machiavelli might have classified him in that third category of princes who are "useless" because they neither understand things on their own nor perceive what their advisers understand.²⁵ Yet the Reagan administration has improperly concluded that the antidote to the shortcomings of the previous administration is exclusive reliance on display of the lion's strength in international relations. If this viewpoint prevails, a different but no less dangerous set of international crises seems destined to afflict United States foreign policy. Like the Iranian crisis, they will probably be products of American, not foreign, manufacture. Conversely, if correct "lessons" from these previous crises are drawn, they can provide a workable guide for sorting out the current disarray in foreign affairs that has plagued the Reagan administration. This essay will develop an analytical framework for these crises on the basis of international law that eschews the intellectual defects of both administrations. Though the principles of international law cannot serve as a panacea for all the problems of international relations, they indicate one way out of the morass of Machiavellian power politics that has engulfed American foreign policymaking for over a generation.

II. The Definitional Context of the Iranian Crisis²⁶

The Iranian hostage crisis did not begin with the seizure of the United States diplomats in Teheran on November 4, 1979. Instead, it was precipitated by President Carter's decision to admit the deposed Shah of Iran into the United States for medical treatment readily available elsewhere,²⁷ contrary to the views of his advisers and intelligence

25. See N. MACHIAVELLI, *supra* note 8, at 195.

26. For an explanation of the *definitional* role of international law and organizations for the purpose of crisis management decision-making see Boyle, *International Law in Time of Crisis: From the Entebbe Raid to the Hostages Convention*, 75 NW. U. L. REV. 769, 778-86 (1980) [hereinafter cited as *Entebbe*].

27. See Bloom, *The Pahlavi Problem: A Superficial Diagnosis Brought the Shah into the United States*, 207 SCIENCE 282 (1980); N.Y. Times, May 13, 1981, at 1, col. 2. See also N.Y. Times, Jan. 27, 1981, at B10, col. 1; *id.*, Mar. 21, 1980, at 26, col. 1; *id.*, May 26, 1981, at C2, col. 5.

services.²⁸ The President was fully aware that seizure of the Embassy and the detention of its personnel would be a likely result.²⁹ His explanation that he had relied on Iranian Prime Minister Mehdi Bazargan's prior assurance of protection for the Embassy is unconvincing. It was obvious that Bazargan exerted little control over the Iranian government, then under the domination of the Revolutionary Council led by Ayatollah Ruhollah Khomeini, let alone over the various revolutionary factions in Teheran. Bazargan was a figurehead and his government powerless in light of Khomeini's prominence. Indeed, on February 14, 1979, the U.S. Embassy in Teheran had been seized by elements of the Communist Tudeh Party and of the People's Fedayeen. After a three hour *melee*, the seizure ended with the arrival of forces loyal to Khomeini requested by Ambassador William Sullivan.³⁰ President Carter should never have expected a similar fortunate outcome when, some eight months later, he decided to admit the Shah into the United States.

From this perspective, the public debate concerning the means whereby this country should deter future instances of "international terrorism" is misdirected. No amount of deterrence can prevent a severe crisis in relations with another country when the President of the United States willfully provokes the crisis. The most effective deterrent to future hostage-taking crises like Iran lies in decisive American electoral results such as the overwhelming rejection of President Carter by the American people on November 4, 1980. The Reagan administration's announced intention to replace President Carter's emphasis on "human rights" with a war against "international terrorism" (e.g., renewed military and economic assistance for the repressive regimes in Argentina, Guatemala, and Chile, or "destabilization" of Colonel Qaddafi in Libya) as the keystone of its foreign policy must therefore be re-examined and repudiated.

"Terrorism" is a vacuous and amorphous concept lacking an accepted international legal meaning, let alone an objective political referent. The standard cliché that one man's "terrorist" is another man's "freedom fighter" is not just a clever obfuscation of values. It indicates that the international community has yet to agree on a legal or political definition of "terrorism."³¹ This pejorative and inflam-

28. See N.Y. Times, July 21, 1979, at 23, col. 4; *id.*, Nov. 18, 1979, at A1, col. 4; *id.*, Jan. 21, 1981, at A6, col. 1.

29. See *id.*, Nov. 18, 1979, at A1, col. 4.

30. N.Y. Times, Feb. 16, 1979, at A10, col. 2.

31. For example, the U.N. *Ad Hoc* Committee on International Terrorism could not agree on a definition of "terrorism." Report of the *Ad Hoc* Committee on International

matory term has been used to characterize acts of violence ranging from common crime to wars of national liberation legitimized by appropriate international organizations. Invoking a war against "international terrorism" may constitute effective governmental propaganda to manipulate public opinion in support of a foreign policy based on other considerations such as Machiavellian power politics.³² It cannot serve as a basis for a coherent and consistent global foreign policy.

A. *The Myth of Intelligence Failure*

Blaming events in Southwest Asia on alleged U.S. intelligence failures is likewise misconceived. Despite President Carter's criticism of C.I.A. Director Stansfield Turner,³³ there never really was a failure by U.S. intelligence agencies to predict the ouster of the Shah.³⁴ The Carter administration created the fiction of "intelligence failure" in order to avoid assuming political responsibility for failing to act more vigorously to prevent the Shah's downfall. That decision could and should have been publicly defended on its merits alone without resort to such a subterfuge. Consequently, there is no need to "unleash" the C.I.A.³⁵ from those restrictions on its operations drawn up following the revelation of a gross pattern of foreign and domestic abuses by the Rockefeller Commission Report³⁶ and the Church Committee investigations.³⁷

Terrorism, 34 U.N. GAOR Supp. (No. 37) at 1, 11, para. 34, U.N. Doc. A/34/37 (1979). Nevertheless, the United Nations General Assembly adopted the recommendations of the *Ad Hoc* Committee on International Terrorism in G.A. Res. 34/145 (1980), 34 U.N. GAOR Supp. (No. 37) at 1, U.N. Doc. A/RES/34/145 (1980). Reasons for the inconclusive result of the U.N. *Ad Hoc* Committee on International Terrorism are explained in Boyle, *Entebbe*, *supra* note 26, at 826-28.

32. See, e.g., *Terrorism: Dubious Evidence*, ECONOMIST, May 9, 1981, at 28 (C.I.A.'s redefinition of "terrorism"); *C.I.A.*, ECONOMIST, July 4, 1981, at 26; N.Y. Times, Oct. 18, 1981, at 9, col. 1.

33. See N.Y. Times, Nov. 23, 1978, at A1, col. 4.

34. See Ledeen & Lewis, *Carter and the Fall of the Shah: The Inside Story*, WASH. Q., Spring, 1980, at 3. Cf. Wall St. J., Feb. 9, 1979, at 40, col. 1 (Israel's Mossad anticipated fall of Shah since 1977).

35. See N.Y. Times, Mar. 10, 1981, at 1, col. 1; *id.*, Aug. 25, 1981, at A16, col. 3; *id.*, Oct. 6, 1981, at 1, col. 1.

36. See, e.g., REPORT TO THE PRESIDENT BY THE COMMISSION ON C.I.A. ACTIVITIES WITHIN THE UNITED STATES 101 (illegal mail intercepts), 130 (Operation CHAOS), 152 (infiltration of domestic organizations), 172 (Watergate abuses), 226 (drug-testing) (June, 1975).

37. 1-6 FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, 94th Cong., 2d Sess. (1976). See, e.g., 1 *id.* at 141 (covert action), 189-203 (use of academic institutions, media, religious groups), 385 (covert drug testing); 2 *id.* at 10-13 (covert action and illegal or improper means).

The myth of "intelligence failure" should not be allowed to serve as a pretext for the imposition of additional obstacles in the way of private citizens or the press to investigate

The claim of intelligence failure must not be allowed to justify the renaissance of covert interventions abroad (e.g., abrogation of the Clark Amendment³⁸ prohibiting covert intervention in Angola) undertaken in express violation of international law.³⁹ Such activities not only work to the detriment of the international legal rights and human dignity of alien peoples, but undermine the civil liberties of American citizens at home and abroad.⁴⁰ They subvert the foundations of American constitutional government. From this perspective, the new Executive Order on United States Intelligence Activities signed by President Reagan on December 4, 1981,⁴¹ which revoked President Carter's Executive Order 12036 on the same subject,⁴² represents an unfortunate retrograde step. Because of its susceptibility to abuse, the President's discretionary control over the Central Intelligence Agency should finally be codified by congressional enactment of a formal legislative charter for all U.S. intelligence agencies.⁴³

and expose C.I.A. malfeasance (e.g., the C.I.A.'s complete exemption from the Freedom of Information Act, *see* N.Y. Times, Oct. 5, 1981, at B12, col. 1, or the Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421 (1982)), or to free the C.I.A. and the F.B.I. to engage in practices of dubious constitutionality within the United States on the grounds that they allegedly concern foreign intelligence activities or the war against "international terrorism."

38. Clark Amendment to the International Security Assistance and Arms Export Control Act of 1976, P.L. No. 94-329 (1976), 90 Stat. 729, 757 (codified at 22 U.S.C. § 2293 (1976)), *as modified in* International Security and Development Cooperation Act of 1980, P.L. 96-533, 94 Stat. 3131, 3141.

39. *See, e.g.*, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1966); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971).

40. In this regard, another unfortunate consequence of the Iranian hostage crisis was the decision of the Supreme Court in *Haig v. Agee*, 453 U.S. 280 (1981), upholding the authority of the Secretary of State to revoke Agee's passport, thus establishing precedent for the executive branch further to infringe on the constitutional right of U.S. citizens to engage in international travel. *See* Farber, *National Security, the Right to Travel, and the Court*, 1981 SUP. CT. REV. 263.

41. *See* Exec. Order No. 12333, 46 Fed. Reg. 59941 (1981).

42. *See* Exec. Order No. 12036, 43 Fed. Reg. 3673 (1978). *See also* Note, *The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance*, 78 MICH. L. REV. 1116 (1980).

43. Similar criticism applies to President Carter's decision to expel from the country those Iranian students found to be in violation of their visa requirements. *See* Requirements for Maintenance of Status for Nonimmigrant Students from Iran, 8 C.F.R. § 214.5 (1980). Unfortunately, the President seems to possess the appropriate combination of statutory and constitutional authorization necessary to effectuate this unfair and discriminatory policy on his own accord. *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). This decision aimed to satisfy American public insistence that the government do something to express outrage at the injustices perpetrated in Teheran by the students' cohorts. N.Y. Times, Nov. 9, 1979, at A12, col. 2; *id.*, Nov. 10, 1979, at A6, col. 4. Attempts to justify President Carter's decision by arguing that deportation created a safety valve for the relief of public pressure to use military force against Iran should fail. The Carter adminis-

B. *U.S. Intervention Abroad*

Because the promise of a congressional investigation of the Iranian hostage crisis remains unfulfilled, all the facts surrounding President Carter's decision to admit the Shah into the United States are not yet public. The official explanation was that somehow "we owed it to him" because he had proved himself a valued and faithful ally.⁴⁴ This rationale ignored a consistent pattern of gross violations by the Shah's secret police organization (SAVAK)⁴⁵ of those fundamental human rights recognized by the Universal Declaration of Human Rights.⁴⁶ On the level of national interest, President Carter's rationale overlooked the Shah's role as a proponent of higher oil prices within the Organization of Petroleum Exporting Countries (OPEC). Enormous oil revenues enabled the Shah to construct a military establishment far beyond Iran's legitimate security needs. This was accomplished in part for the purpose of intimidating Persian Gulf countries through threats of force, covert intervention, and outright aggression,⁴⁷ all in violation of Article 2(4) of the U.N. Charter.⁴⁸ In this endeavor the Shah was encouraged by the Nixon Doctrine,⁴⁹ whereby regional surrogates were intended to help the United States "police" its spheres of influence throughout the world. The Shah was to be America's "policeman" in the Persian Gulf.

tration allowed, if it did not encourage, American public opinion to work itself into a furor over the incident. As a matter of sound constitutional policy the United States government should never carry out a large-scale deprivation of civil liberties in the belief that this will permit the achievement of foreign policy objectives. In the case of the Iranian students, vicarious retribution inflicted upon a selected group of innocent aliens undermined the exercise of civil liberties by all Americans. Especially in times of international crises, the exercise of civil liberties by citizens and aliens alike is essential to restrain governmental misconduct. Legislation should be enacted prohibiting the President from selecting out a group of aliens peacefully residing in this country for purposes of political persecution or manipulation. Just as the United States has come to regret the internment of Japanese-Americans during the Second World War, we may hope for eventual repentance of this action.

44. N.Y. Times, Jan. 21, 1981, at A6, col. 1.

45. See Falk, *Iran After the Shah: Balance Sheet on Revolution*, 232 NATION 39 (1981); N.Y. Times, Dec. 31, 1978, § 1, at 3, col. 4. The C.I.A. collaborated with SAVAK. See P. SALINGER, AMERICA HELD HOSTAGE 116-17 (1981); Kaplan & Halliday, *The Savak-C.I.A. Connection*, 230 NATION 229 (1980).

46. G.A. Res. 217, U.N. Doc. A/810, at 71, 71 (1948). The Universal Declaration of Human Rights was affirmed, ironically enough, in the 1968 Proclamation of Teheran. See Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF.32/41, at 3 (1968).

47. See, e.g., A. SAIKAL, THE RISE AND FALL OF THE SHAH 154-61, 178 (1980) (takeover of Abu Musa, Greater and Lesser Tumb).

48. U.N. CHARTER art. 2, para. 4. ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

49. R. NIXON, THE MEMOIRS OF RICHARD NIXON 394-97 (1978).

The "indebtedness" argument was especially puzzling. The President had decided not to intervene to buttress the Shah against the domestic revolution that led to his downfall in January, 1979. That decision was correct, despite its domestic unpopularity, because it comported with the general principle of international law prohibiting foreign intervention in the domestic affairs of another state.⁵⁰ The Iranian people possessed the exclusive right to determine how their government should be constituted without overt or covert interference by the United States. This elementary principle of equal rights and self-determination of peoples⁵¹ took precedence over any U.S. national security interest in the flow of oil from the Persian Gulf. Indeed, it was the long history of American support of the Shah that paved the way for the Iranian revolution in the first place. By contrast, the decision not to intervene overtly in Iran during the events of 1978-1979 may have averted greater catastrophes. The United States must learn from this tragic experience that it is both just and expedient not to assist a repressive regime to conduct an all-out struggle against its own people. Here the basic rule of international law dictating non-intervention in the domestic affairs of another country tells the United States what is in its best interest anyway.

The appropriate lesson to be derived from the Iranian episode for application to U.S. "friends" around the world (e.g., El Salvador, Guatemala, Saudi Arabia, the Philippines, South Korea, South Africa) is that the American government should refrain from intervention in the domestic affairs of another state in order to prop up a regime that has forfeited the support of its own people. On the other hand, the United States must make clear that it is prepared to assist another state, at its request, in case of aggression by a third state, in accordance with the terms of the right of collective self-defense defined in Article 51 of the United Nations Charter.⁵² Yet, because it was tied down by the self-generated Iranian hostage crisis, the United States was unable to forestall the Soviet invasion of Afghanistan at the end of 1979, a blatant

50. *See supra* note 39. *Cf.* U.N. CHARTER art. 2, para. 7.

51. *See* U.N. CHARTER art. 1, para. 2.

52. U.N. CHARTER art. 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

case of aggression. This same rule would counsel provision of military assistance by the United States government to the people of Afghanistan in their struggle against the Soviet invasion.⁵³ Such help would vindicate Article 51 and could facilitate a negotiated settlement of the dispute under the auspices of the United Nations by convincing the Soviets that they cannot win the war in Afghanistan at acceptable cost.

C. *The Case for Iran*

In light of this historical background, the hypothetical legal arguments in defense of the Iranian seizure and detention of the American diplomatic personnel in Teheran certainly deserve serious consideration. The decision to admit the Shah demonstrated insensitivity by the Carter administration to the concerns and fears of the Iranian people. Once before they had ousted the Shah, only to see him restored with the assistance of the C.I.A.⁵⁴ With the Shah actually in the United States, it reasonably appeared to them that a repetition of this scenario was possible. Indeed, on the eve of the Shah's departure from Iran, Zbigniew Brzezinski, President Carter's national security adviser, had asked the U.S. Ambassador in Teheran about the feasibility of a *coup* by the Iranian military to prevent Ayatollah Khomeini from coming to power.⁵⁵ Presumably his request was made with the full knowledge and approval of President Carter. The mission of General Huyser to Teheran has been reported to have been part of the same unsuccessful plan.⁵⁶ It is undeniable that the U.S. Embassy in Teheran was engaged in extensive intelligence activities, that U.S. intelligence agents were stationed there under cover as diplomatic personnel,⁵⁷ and that the Embassy served as a primary source for channelling intelligence information back to the United States. The Iranian apprehension of an American-sponsored *coup d'état* was undoubtedly reasonable and sincere.

In light of these facts a plausible argument could be made that the seizure and detention of the American diplomats was a legitimate exer-

53. See Bernstein, *Arms for Afghanistan*, NEW REPUBLIC, July 18, 1981, at 8-10.

54. See generally K. ROOSEVELT, COUNTERCOUP (1979).

55. Sullivan, *Dateline Iran: The Road Not Taken*, FOREIGN POL'Y, Fall, 1980, at 175, 186.

56. *Id.*, at 183; N.Y. Times, Apr. 20, 1980, at 1, col. 3. See also Wash. Post, Aug. 26, 1981, at B18, col. 3 (C.I.A. clandestine operation to bring down Khomeini).

57. D. MCMANUS, FREE AT LAST 241 (1980); P. SALINGER, *supra* note 45, at 237; N.Y. Times, Dec. 2, 1979, at A18, col. 1; *id.*, Jan. 21, 1981, at A6, col. 1. See generally Bassiouni, *Protection of Diplomats under Islamic Law*, 74 AM. J. INT'L L. 609 (1980); Perera, *On Diplomatic Immunity*, MIDDLE EAST, July, 1980, at 15. See also Mottahedeh, *Iran's Foreign Devils*, FOREIGN POL'Y, Spring, 1980, at 19.

cise of Iran's right of individual self-defense under Article 51 of the U.N. Charter, which, under the circumstances, took precedence over Iran's obligations under Charter Articles 2(3),⁵⁸ 2(4), and 33⁵⁹ as well as over the 1961 Vienna Convention on Diplomatic Relations,⁶⁰ and the 1963 Vienna Convention on Consular Relations,⁶¹ *inter alia*. The seizure arguably fits the doctrine of anticipatory self-defense enunciated by U.S. Secretary of State Daniel Webster in the famous case of *The Caroline*. This test requires "the necessity of that self-defense [to be] instant, overwhelming, and leaving no choice of means and no moment for deliberation."⁶² From this perspective the diplomats were seized and detained to forestall another *coup d'état* sponsored by the United States government acting in explicit violation of international law.⁶³

Accordingly, the demand by the Iranian government for the extradition of the Shah in return for the release of the hostages was justifiable. From Teheran's perspective, there was no other effective recourse to defend Iran from a second pro-Shah *coup* launched with the assistance of the American government.⁶⁴ Of course, under U.S. domestic law, the Carter administration could not have extradited the Shah to Iran because there was no extradition treaty in effect between the two countries.⁶⁵ Nevertheless, it can be argued that by analogy to Article 146 of

58. U.N. CHARTER art. 2, para. 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.").

59. U.N. CHARTER art. 33, para. 1 ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.").

60. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

61. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

62. *The Caroline in 2* J. MOORE, DIGEST OF INTERNATIONAL LAW 409, 412 (1906); W. BISHOP, INTERNATIONAL LAW 776-79 (2d ed. 1962). This author does not approve of recognizing the doctrine of anticipatory self-defense under the U.N. Charter.

63. Cf. International Law Commission, Draft Article 34 on State Responsibility, reprinted in Schwebel, *The Thirty-Second Session of the International Law Commission*, 74 AM. J. INT'L L. 961, 963 (1980) ("The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations.").

64. See P. SALINGER, *supra* note 45, at 48, 130.

65. According to 18 U.S.C. § 3181 (1976), an extradition treaty is required between the U.S. and a foreign nation to enable the extradition of a person who has committed a crime. Such an extradition treaty does not exist between the U.S. and Iran. 18 U.S.C. § 3184 (1976). The United States Supreme Court has held that both domestic and international law preclude the President or his agents from surrendering any person to a foreign government in the absence of an extradition treaty. *Valentine v. United States*, 299 U.S. 5, 10 (1936).

the Fourth Geneva Convention of 1949, the United States government had an affirmative obligation either to bring the Shah before its own courts, or else to hand him over for trial to another High Contracting Party (e.g., Iran) for the commission of "grave breaches" as defined by Article 147 (e.g., willful killing, torture or inhumane treatment, or willfully causing great suffering or serious injury to bodily health) during the course of an Article 3 non-international armed conflict.⁶⁶ Yet the United States Congress has failed to enact the legislation necessary to implement Article 146 of the Fourth Geneva Convention. Therefore, the Shah and others who are alleged to have committed "grave breaches" currently cannot be extradited or tried before U.S. courts. The Iranian government could plausibly argue that the United States was derelict in its legal duties under Article 146 by not having previously enacted such implementing legislation. Consequently, the United States could not plead the infirmity of its domestic law to excuse the violation of international law arising from its refusal either to extradite or to try the Shah.⁶⁷ Moreover, the Carter administration's favorable response to the Shah's request willfully placed the United States government in violation of international law, because it was obvious at the time of the admission of the Shah that neither alternative was possible under U.S. domestic law.

The United States has no national security interest in granting political asylum to deposed dictators who have committed "grave breaches" of the Fourth Geneva Convention and engaged in a consistent pattern of gross violations of fundamental human rights. A rudimentary knowledge of international human rights law and international humanitarian law governing armed conflict would have clearly indicated that the Carter administration should not have admitted the Shah into this country except to prosecute him or return him to Iran. The outbreak of the Iranian hostage crisis over the admission of the Shah indicates clearly that Congress must pass the necessary implementing legislation required under the appropriate provisions of the Fourth Geneva Convention and, in addition, that the United States should ratify the Genocide Convention and Congress should enact its necessary implementing legislation as soon as possible.⁶⁸ This elementary statutory framework would officially put on notice current and deposed dictators who are

66. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, arts. 3, 146, 147, 6 U.S.T. 3516, 3518, 3616, 3618.

67. See Vienna Convention on the Law of Treaties, art. 27, U.N. Doc. A/CONF. 39/27, at 289, 292 (1969), reprinted in 8 INT'L LEGAL MATS. 679, 690 (1969).

68. Franck, *The Iran Crisis . . . If We Had Ratified the Genocide Convention*, INT'L PRAC. NOTEBOOK, Jan., 1980, at 12.

gross human rights violators that they risk criminal prosecution or extradition to their homelands if they travel to the United States. Such a publicly stated American policy should deter their requests for admission, and thus forestall international complications like the Iranian hostage crisis. This approach would also enable the United States to maintain normal diplomatic relations with successor governments.

The above arguments are not intended to excuse or condone the Iranian seizure and detention of U.S. diplomats, but only to point out that there was a plausible legal argument on the Iranian side that should have been taken into account by the Carter administration. At a minimum the Iranian people *felt* they possessed legitimate fears of, and substantial grievances against the United States that motivated the Embassy seizure. Thus, the Carter administration should have dealt with these Iranian perceptions as part of the definitional framework of the crisis. At the outset the administration should have publicly acknowledged that the Iranian people had presented a series of grave complaints against the United States under international law and that the American government was prepared to submit the entire dispute *immediately* to the U.N. Security Council or a mutually acceptable international tribunal. Such acknowledgement would have injected an element of fluidity into the crisis that could have facilitated a negotiated solution.

D. *President Carter's Self-Righteousness*

The Carter administration never recognized the validity of the Iranian position. It manipulated the symbolic meaning of the crisis as part of a strategy to convince domestic and international public opinion that the United States was completely in the right and Iran completely in the wrong. The realities of political life do not lend themselves to such dogmatic assertions and foreign policy recommendations should not be based on them. For crisis managers to believe otherwise is simply an exercise in self-delusion.

For example, the Carter administration insisted that the hostage-takers be called "terrorists"⁶⁹ instead of university "students" (which they were)⁷⁰ or even "militants,"⁷¹ a more neutral term used by the Ameri-

69. See, e.g., N.Y. Times, Nov. 12, 1979, at A1, col. 5; *id.*, Nov. 13, 1979, at A10, col. 5; *id.*, Nov. 16, 1979, at A16, col. 1; *id.*, Nov. 19, 1979, at A13, col. 1; Wash. Post, Dec. 22, 1979, at A16, col. 1.

70. See, e.g., N.Y. Times, Nov. 5, 1979, at A1, col. 6; *id.*, Nov. 16, 1979, at A1, col. 5; *id.*, Nov. 19, 1979, at A1, col. 6; Wash. Post, Nov. 13, 1979, at A1, col. 5.

71. See, e.g., N.Y. Times, Dec. 5, 1979, at A1, col. 5; *id.*, Dec. 16, 1979, at A1, col. 3; Wash. Post, Nov. 15, 1979, at A1, col. 3; *id.*, Nov. 18, 1979, at A1, col. 4. Cf. N.Y. Times,

can news media. This characterization was intended to produce revulsion among the American people and to build public support for the administration's handling of the crisis. The hostage-takers, the administration suggested, were just like P.L.O./Baader-Meinhoff/Red Brigade "terrorists" who indiscriminately kill innocent men, women, and children for political purposes. The administration depicted the Iranian "terrorists" as part of the monolithic bloc known as "international terrorism"—a conspiracy directed against the vital national interests of the United States and the entire "Free World." This tactic produced a self-fulfilling prophecy. The United States could not accede to Iranian requests because it could not be seen catering to the demands of "international terrorism." One does not make concessions to "terrorists" because concessions simply encourage more "terrorism." Indeed, one does not even negotiate with "terrorists"—one kills them. This characterization of the crisis locked the Carter administration into a difficult negotiating position and rendered the ultimate costs of negotiation much higher than otherwise would have been the case. By attempting to manipulate the crisis to its own advantage in this fashion, the Carter administration lost control over its development.

Even today, the Reagan administration's persistent characterization of the Iranian hostage-taking as an act of "international terrorism" impedes the formulation of a rational policy towards Iran that can protect America's legitimate national security interests in a manner consistent with the requirements of international law. Apparently this perception has led the Reagan administration to foment a campaign to destabilize the Khomeini government by sponsoring paramilitary raids launched from Turkey into Iran by various Iranian opposition groups. This development represents a retrograde step for both American national security interests in the Persian Gulf and the international legal order.

The delusion of self-righteousness influenced the Carter administration's opposition to an early suggestion by then Acting Foreign Minister Abolhassan Bani-Sadr to bring the crisis before the U.N. Security Council.⁷² The U.S. rationale was that the Iranians had committed an act of terrorism beyond the bounds of international law and diplomatic practice and therefore were not entitled to air any complaints against the United States in an international forum until the hostages were

Nov. 7, 1979, at A1, col. 6 ("militant Islamic students"); *id.*, Nov. 19, 1979, at A1, col. 6 ("militant students"); Wash. Post, Nov. 13, 1979, at A1, col. 1 ("militant Iranian students").

72. See N.Y. Times, Nov. 14, 1979, at A1, col. 6; *id.*, Nov. 16, 1979, at A16, col. 1; Wash. Post, Nov. 15, 1979, at A1, col. 5.

freed.⁷³ The Carter administration should have accepted the Bani-Sadr proposal with alacrity.⁷⁴ Even if it did not terminate the crisis, acceptance would have strengthened the authority of Bani-Sadr (who, at the time, was genuinely committed to a negotiated settlement of the crisis)⁷⁵ within the struggle for power in Iran. Failure of the Bani-Sadr initiative contributed to his ouster as Acting Foreign Minister⁷⁶ and his departure from the center of the political stage until his election as President in January, 1980.⁷⁷ The absence of Bani-Sadr's moderating influence as Foreign Minister during this crucial phase of the crisis perhaps contributed to a hardening of positions.

E. *Alternatives of International Law*

In its description of the events surrounding the crisis, the Carter administration purposefully truncated the beginning of the sequence to present the dispute with Iran in a manner most favorable to the position of the United States. In an effort to defuse the crisis, it should have admitted its legal and political responsibility for starting the crisis.

The Carter administration was correct finally in bringing the matter to the attention of the Security Council,⁷⁸ and in going to the International Court of Justice to secure provisional measures⁷⁹ and a final

73. N.Y. Times, Nov. 14, 1979, at A1, col. 6; *id.*, Nov. 16, 1979, at A16, col. 1; *id.*, Nov. 29, 1979, at A20, col. 1; Wash. Post, Nov. 15, 1979, at A1, col. 5; *id.*, Nov. 18, 1979, at A11, col. 1.

74. Secret negotiations may have been in the offing in mid-November, 1979, between Secretary of State Vance and Bani-Sadr, when the then Acting Iranian Foreign Minister was to have visited the U.N. to present the Iranian position. Vance had made several secret trips with regard to the release of the hostages during this period. N.Y. Times, Jan. 16, 1980, at A14, col. 1 (interview with Cyrus Vance).

75. See P. SALINGER, *supra* note 45, at 43, 104, 107.

76. Bani-Sadr was dismissed as Acting Foreign Minister on Nov. 28, 1979, having been appointed to that post on Nov. 10, 1979 following the collapse of the Bazargan Government. He retained his post as Minister of Economic and Financial Affairs. Sadegh Ghotbzadeh, Director of State Television, replaced Bani-Sadr as Foreign Minister. N.Y. Times, Nov. 29, 1979, at A1, col. 3; *id.* at A18, col. 5.

77. See N.Y. Times, Jan. 26, 1980, at A9, col. 1.

78. United Nations Security Council Resolution 457, U.N. Doc. S/13677 (Dec. 4, 1979), reprinted in 18 INT'L LEGAL MATS. 1644 (1979), called on the government of Iran immediately to release all personnel of the U.S. Embassy being held hostage in Teheran and requested the U.N. Secretary-General to lend his good offices for its implementation. Iran's failure to abide by Resolution 457 (1979) precipitated the passage of Security Council Resolution 461, U.N. Doc. S/13711/Rev. 1 (Dec. 31, 1979), reprinted in 19 INT'L LEGAL MATS. 250 (1980), which reaffirmed Resolution 457 and deplored the continued detention of the hostages. It again called on Iran to release immediately all persons of United States nationality being held hostage in Iran and reiterated the earlier request to the Secretary-General to lend his good offices with a view toward achieving the objectives called for therein.

79. See Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran) (Interim Protection), 1979 I.C.J. 7, reprinted in 74 AM. J. INT'L L. 258 (1980).

judgment against Iran.⁸⁰ The Council and the Court decisions contributed significantly to the crisis resolution by authoritatively defining the legal obligation of Iran to release the hostages to the satisfaction of the entire international community. At the same time, however, these decisions induced the Carter administration to adopt a “rectificatory” approach to the Iranian hostage crisis and to act as a plaintiff vindicated on all counts of its complaint.

Though crisis managers must always take international law into account, in the nuclear age their immediate objective must be to resolve the crisis, even, if necessary, by sacrificing unassailable legal arguments in their government’s favor. This is the fundamental distinction between a legalistic and “rectificatory” attitude toward crisis management and an approach that draws creatively upon the potential of international law and organizations as tools for the peaceful settlement of international disputes. Self-righteousness and fear of adverse electoral consequences led the Carter administration to neglect an elementary principle of crisis management: placing one’s self in the shoes of the adversary as part of an effort to find the basis for compromise, then taking the first steps in that direction.⁸¹

The Carter administration’s primary concern should not have been to compel Iran to obey the decisions of the World Court and the Security Council, but rather to convince the Iranian students that release of the hostages could be accomplished in a manner consistent with their principles. Under the circumstances, the most prudent course for the United States would have been to gradually de-escalate the crisis by announcing a series of unilateral concessions on principle to Iran, without asking for, or even expecting, immediate reciprocal gestures.⁸² To support this effort, the Carter administration should have publicly taken the position that the crisis was not a mortal confrontation between two nations, but only an unfortunate incident beyond the control of the Iranian government that could be settled peacefully by mutual good faith efforts. Accordingly, it should have stated its formal legal position that, due to the revolutionary conditions in Iran, the United States would not hold the Iranian government legally responsible for the hostage-taking by the students. The incident should have been

80. See *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran) (Merits)*, 1980 I.C.J. 3, reprinted in *DEPT ST. BULL.*, July, 1980, at 43.

81. See R. FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1970); Fisher, *Helping the Iranians Change Their Minds*, *N.Y. Times*, Nov. 10, 1979, at 23, col. 1.

82. Cf. C. OSGOOD, *AN ALTERNATIVE TO WAR OR SURRENDER* 86-134 (1962) (strategy for gradual reduction in tension—GRIT).

characterized as an act of mob violence that, under generally recognized principles of international law, did not engage state responsibility.⁸³ Even if the Iranian government had felt compelled to repudiate this interpretation of the event and formally to associate itself with the students, as it later did, the Carter administration should have persisted in this position. The Iranian government's assumption of responsibility for the hostage-taking became a valuable political asset to those revolutionary factions seeking a confrontation with the United States to bolster their internal power position.

The Carter administration carelessly played into their hands. With some patience and fortitude, American treatment of the hostage-taking as an act of mob violence might have led to a gradual de-escalation of the crisis by providing those Iranian leaders who favored release of the hostages some room to maneuver against their adversaries. An international crisis can sometimes be successfully transformed into a non-crisis if the party possessing overwhelming political, military, and economic power resolutely sets out to do so. Unfortunately, the Carter administration's mismanagement of the Iranian hostage crisis exemplifies the validity of the converse of this proposition.

As another element of a concerted effort to defuse the crisis, President Carter should have announced his sponsorship of the formation of a congressional committee to investigate the history of C.I.A. activities in Iran, especially the Agency's role in the 1953 restoration of the Shah. He should have further undertaken speedily to publish all executive branch documentation relevant to the investigation as well as the committee's final report.⁸⁴ President Carter also should have proposed the immediate creation of an impartial international commission mutually acceptable to Iran and the United States possessing the necessary competence to investigate and adjudicate the claims of each government. Such a commission would have circumvented the Iranian objection to the jurisdiction of the International Court of Justice. American consent to the creation of an international commission should have been given without the incapacitating condition subsequently proposed by the Carter administration, that the hostages be freed *before* the commission issue its final report. President Carter should have stated his intention to apologize for any violations of international law which the commission found to have been committed by the United States government and his readiness to recommend that Congress pay reparations to Iran

83. See, e.g., Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26 (1907).

84. Cf. Wash. Post, Sept. 19, 1980, at A1, col. 2 (report ordered by President Carter).

for such violations in an amount to be determined by the commission. If necessary to the success of this plan, the Carter administration should have intimated its willingness to disclaim any right of setoff from Iranian assets for damages arising as a result of violations of international law connected with the seizure and detention of the hostages. Even if the cumulative effect of all these actions would not have obtained the release of the hostages, the administration could have represented that it had scrupulously fulfilled even the most exacting requirements of international law concerning the peaceful settlement of international disputes with a minor state.

F. *The Administration's Honor*

An obstacle to a speedy negotiated solution to the crisis proved to be the Carter administration's insistence that the "honor" of the United States precluded the American apology demanded by Iran.⁸⁵ The "honor" of the United States was never at stake in the Iranian hostage crisis; rather only the "honor" of the Carter administration and its ability to get re-elected was threatened.⁸⁶ The administration manipulated the crisis to its electoral advantage throughout the 1980 presidential campaign. Exploiting popular loyalty to the President in a time of crisis, President Carter overcame Senator Edward Kennedy's substantial lead in the polls, and clinched the Democratic nomination by May, 1980.⁸⁷ With the nomination secured, President Carter's campaign cynically downplayed the significance of the crisis throughout the summer of 1980 so that Ronald Reagan would not be tempted to use it as evidence of the President's incompetence in foreign affairs.⁸⁸ The crisis did not revive as a major campaign issue until just before the November 4 election, when the Iranian parliament finally announced its conditions for the release of the hostages.⁸⁹ Once President Carter had lost the election, the crisis was successfully resolved, delayed only by American banks negotiating with Iran the price of freedom for the

85. N.Y. Times, Nov. 29, 1979, at A18, col. 5; Wash. Post, Nov. 28, 1979, at A1, col. 3.

86. For an analysis of Thucydides' classic argument *against* foreign policy decision-makers taking "honor" into consideration, see Boyle, *Power Politics*, *supra* note 6, at 910-12.

87. See Radway, *The Curse of Free Elections*, FOREIGN POL'Y, Fall, 1980, at 61, 67-69. Compare N.Y. Times, Apr. 2, 1980, at A8, col. 5 (President Carter's pre-Wisconsin primary press conference) with H. KISSINGER, WHITE HOUSE YEARS 1399-1400 (1979) ("peace is at hand" speech).

88. N.Y. Times, May 1, 1980, at A1, col. 6. See Reston, *Puzzles Along the Potomac*, *id.*, May 2, 1980, at A27, col. 1; Smith, *Why the President Released 54th Hostage*, *id.* at B6, col. 1; Wicker, *The Candor Gap*, *id.* at A27, col. 5.

89. N.Y. Times, Nov. 3, 1980, at A1, col. 6.

hostages.⁹⁰

To its credit the Carter administration did not resort to a military blockade or invasion of Iran and did attempt to pursue a peaceful resolution of the crisis at the outset. Yet the Carter administration insinuated that the use of military force remained open as a viable option under unspecified circumstances,⁹¹ and this threat undercut the significance of its peaceful overtures. If President Carter had intended to pursue a negotiated settlement, it was counterproductive to engage in any hint, threat, or use of force, or to take any retaliatory measures against Iran. Nevertheless, he undertook several such actions, including ordering two U.S. naval task forces with assault troops to the Indian Ocean and Arabian Sea,⁹² freezing Iranian governmental assets in order to protect the interests of U.S. banks while the Shah remained at liberty to secrete his assets abroad,⁹³ deporting Iranian students,⁹⁴ seeking economic sanctions against Iran at the U.N. Security Council⁹⁵ and failing because of a Soviet veto in the aftermath of the Afghanistan invasion,⁹⁶ and imposing economic sanctions unilaterally⁹⁷ and in conjunction with U.S. allies.⁹⁸ The administration's severance of diplomatic relations with Iran was also unwise.⁹⁹ This step complicated the hostage release negotiations.¹⁰⁰ Without these measures the Carter administration could have preserved the effectiveness of a peaceful approach to the crisis settlement. As was often the case, however, the President's foreign policy represented an unworkable compromise of power politics and international law. President Carter's mutually inconsistent approaches stalemated negotiations with Iran.

90. P. SALINGER, *supra* note 45, at 287.

91. N.Y. Times, Nov. 29, 1979, at A1, col. 6.

92. J. Collins, *6 U.S.-Soviet Military Balance: Far East, Middle East Assessments*, CONG. RESEARCH SERV. REP. NO. 80-166 S, at 71 (July 1980).

93. Iranian Assets Control Regulations, Exec. Orders Nos. 12276-84, 46 Fed. Reg. 7913 *et seq.*, repealing Exec. Order 12211, 3 C.F.R. 253 (1980) & Exec. Order 12170 3 C.F.R. 457 (1979).

94. N.Y. Times, Nov. 11, 1979, at 1, col. 4; *id.*, Nov. 13, 1979, at A8, col. 5.

95. N.Y. Times, Dec. 22, 1979, at 1, col. 6; *U.S. Asks Security Council to Impose Sanctions Against Iran*, DEP'T ST. BULL., Feb., 1980, at 67.

96. N.Y. Times, Jan. 14, 1980, at A1, col. 5; *Soviets Veto Sanctions Against Iran*, DEP'T ST. BULL., Mar., 1980, at 60.

97. *Additional Sanctions Against Iran*, DEP'T ST. BULL., June, 1980, at 43; Constable, *U.S. Measures to Isolate Iran*, DEP'T ST. BULL., July, 1980, at 71.

98. N.Y. Times, Apr. 28, 1980, at A1, col. 4; *Iran Chronology, May 1980*, DEP'T ST. BULL., July, 1980, at 72. *But see How Iran Is Getting the Goods Through the Barriers*, MIDDLE EAST, Oct., 1980, at 72. *See generally* Reisman, *The Legal Effect of Vetoed Resolutions*, 74 AM. J. INT'L L. 904 (1980).

99. *See* Nash, *Contemporary Practice of the United States Relating to International Law: Termination of Relations*, 74 AM. J. INT'L L. 657 (1980).

100. *See generally* Cutler, *Negotiating the Iranian Settlement*, 67 A.B.A. J. 996 (1981).

To overcome this predicament, President Carter should have given explicit pledges before the U.N. Security Council repudiating the threat or use of force to resolve the hostage crisis under any circumstances, and promising that the United States would never again intervene in Iran's domestic affairs. Such pledges would have been consistent with the moral values on which the United States was founded. Indeed, they would have amounted to a formal reiteration of American obligations under the United Nations Charter and general principles of international law. A pledge of nonintervention might also have defused Soviet fears that the United States intended to take military action against the Khomeini government, planning to replace it with another pro-American, anti-Russian regime as the U.S. had done in 1953.¹⁰¹ Those fears may arguably have prompted the Russians to invade Afghanistan to secure a firm military foothold that would offset the anticipated geopolitical reversal of the advantageous consequences flowing from the anti-Shah revolution. Prompt, forthright, and credible U.S. pledges not to use force or covert intervention during the crisis, supported by abstaining from building up military forces in Southwest Asia, could have undercut the position of those in the Kremlin who might have been arguing for an Afghanistan invasion on this basis.

G. *The Rescue Mission Fiasco*

One outstanding example of an ill-advised use of force was the American hostage rescue operation of April, 1980. The mission was misguided in conception, planning, and execution. It fortunately aborted before resulting in an even greater catastrophe:¹⁰² the deaths of most of the hostages, substantial casualties among the rescuers and Iranians, hostilities between the United States and Iran, permanent embitterment of their mutual relations, and further opportunities for Soviet penetration and destabilization of Iran. The argument that a "successful" rescue operation would at least decisively terminate the crisis one way or another and thus restore some semblance of normality to the situation overlooks the fact that the United States provoked and mismanaged the crisis. In one stroke President Carter destroyed all the initiatives for peaceful settlement being pursued by Secretary of State Vance and sidetracked the negotiations until the fall of 1980. It was understandable, therefore, that Vance decided to resign in advance of

101. See P. SALINGER, *supra* note 45, at 105.

102. Compare Reisman, *Humanitarian Intervention*, 230 NATION at 612 (1980), with Crown & Fried, *A Legal Disaster*, *id.* at 613. The Special Operations Review Group, *Rescue Mission Report* (Aug., 1980) (the Holloway Commission Report), was a whitewash.

the operation,¹⁰³ that American allies retreated from imposing economic sanctions despite prior agreement,¹⁰⁴ and that the U.S. earned the enmity of the Islamic world.¹⁰⁵ The rescue operation demolished the principled nature and appeal of the American position that had been carefully constructed by Vance and his Legal Adviser on the solid foundation of international law. From this point on the Carter administration could no longer convincingly argue in its bid for world support that the U.S. was completely in the right and Iran was completely in the wrong. Until all the facts surrounding the raid are disclosed, tentative conclusions as to its legality under international law are completely unwarranted. Until the United States discharges its burden of proof the mission remains presumptively illegal.

Secretary Vance was the only one of the President's top advisers who opposed the rescue operation and he was not even present when the decision to intervene was made.¹⁰⁶ His deputy, Warren Christopher, attended the decisive meeting while Vance was on vacation.¹⁰⁷ Christopher was previously unaware of the rescue mission plan, and assumed that Vance had already given his consent to a matter of such fundamental importance. On his return to Washington, Vance was confronted with the impossible task of reversing a decision that had already been unanimously endorsed by the President and his advisers.¹⁰⁸ The psychological phenomenon of cognitive dissonance undoubtedly and predictably led to the defeat of Vance's arguments against the wisdom of the raid when the crisis management team reconvened.¹⁰⁹

The absence of Vance, the lone dissenter, may well have been more than just a coincidence. Vance was apparently excluded from the decisive meeting to avoid a direct and heated confrontation with President Carter and the administration's other top crisis managers, who had al-

103. N.Y. Times, Apr. 28, 1980, at A1, col. 6; Shaplen, *Profiles (David Newsom—pt. 2)*, NEW YORKER, June 9, 1980, 48, at 48-50. See generally *id.* (pts. 1 & 3), NEW YORKER, June 2, 1980, 43 & *id.*, June 16, 1980, 44.

104. Compare N.Y. Times, Apr. 23, 1980, at A1, col. 3 (E.E.C. ministers vote to impose sanctions just before rescue operation) with *id.*, Apr. 28, 1980, at A1, col. 4 (E.E.C. irritation over raid) and *id.*, May 17, 1980, at 6, col. 5 (Britain, France, West Germany intend to back off) and *id.*, May 19, 1980, at A1, col. 1 (at Naples conference, E.E.C. bans exports to Iran pursuant to contracts signed after Nov. 4, 1979, leaving virtually all major European contracts with Iran unaffected) and *id.*, May 23, 1980, at A5, col. 1 (Britain adopts sanctions only with respect to new contracts).

105. *Id.*, May 22, 1980, at A20, col. 1.

106. Shaplen, *Profiles (David Newsom—pt. 2)*, NEW YORKER, June 9, 1980, 48, at 48-50.

107. *Id.*

108. *Id.*

109. See, e.g., Aronson, *The Theory of Cognitive Dissonance: A Current Perspective*, 4 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 1 (L. Berkowitz ed. 1969).

ready made up their minds in favor of a raid. Arguably, the decision to launch the raid might not have been made, despite their personal preferences, if Vance had been afforded the opportunity to offer his arguments against the raid at the decisive meeting and, if necessary, had threatened to resign if the raid was ultimately sanctioned. A threat by Vance to resign made *before* the decision to launch the raid could have exerted a more profound impact upon the decision-making process than his implicit threat to resign if the decision already taken was not subsequently reversed. In the aftermath of Vance's resignation, President Carter skillfully selected Senator Edmund Muskie to succeed Vance, thus avoiding a proposed full-scale investigation of the rescue mission by the Senate during the course of its confirmation hearings. The Senators treated one of their own number with customary senatorial courtesy that did not permit intensive questioning.

This episode indicates that the standard crisis management procedures of the U.S. government had completely broken down. Such a breakdown illustrates a basic deficiency in the way considerations of international law and involvement with international organizations are presented to key American foreign policymakers. The task of rendering legal opinions to them is within the organizational prerogative of the Secretary of State, who is assisted by the Legal Adviser and his staff.¹¹⁰ The Attorney General is not routinely included in international crisis management teams. Therefore, the Secretary of State must consider and balance both the political and the legal aspects of the situation before he makes his final recommendation to the crisis team. This practice risks subordination, or at least diminution, of legal considerations to the political dimension of the crisis. Worse yet, legal arguments are likely to be manufactured as *ad hoc* or *ex post facto* justifications for decisions taken on the basis of power politics in violation of international law. The Legal Adviser is not bureaucratically situated to insist on respect for international law during a crisis.

One promising initiative to correct this defect would be to require by statute that the Attorney General sit as a permanent member of the National Security Council and any subsidiary bodies established for the purpose of crisis management.¹¹¹ This reform would permit the Attorney General, drawing on the expertise of international lawyers in both the Justice and the State Departments, to interject considerations of international law directly into the crisis management process. The

110. See Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962).

111. See 50 U.S.C. § 402 (1976).

Justice Department would have a voice and a vote equal to, and independent of, the Defense and State Departments and the Central Intelligence Agency. The legal aspects of the crisis would not risk dilution by the foreign policy dimension in a stage prior to their presentation before the determinative body. Of course, once the legal aspects are presented they will have to compete with ideas drawn from other perspectives. Significantly, however, legal ideas would be presented on a direct, equal, and independent basis. With the presence of the Attorney General, international law would gain an advocate to compete for influence over the formulation of American foreign policy with those leaders advocating reliance on Machiavellian power politics.¹¹²

III. Superpower Politics

Perhaps the most persuasive explanation for the admission of the Shah into the United States was the reported threat by Henry Kissinger to oppose ratification of the SALT II Treaty if President Carter did not acquiesce.¹¹³ Starting in the late 1950s the Shah had funnelled much of Iran's oil money through the Chase Manhattan Bank,¹¹⁴ whose chairman was David Rockefeller, and Kissinger had been a Rockefeller family protege throughout his public career.¹¹⁵ During the Nixon and Ford administrations Kissinger was the architect of *détente*,¹¹⁶ the centerpiece of which was the Strategic Arms Limitation Talks (SALT). A substantial portion of SALT II had been negotiated under his personal direction.¹¹⁷

By late summer, 1979, however, Kissinger seemed primarily concerned with positioning himself for reappointment as Secretary of State in a new Republican administration. Except for John Anderson, the major Republican presidential candidates opposed ratification of SALT II. It was apparent that Kissinger would not be reappointed if he publicly and unequivocally supported SALT II. Consequently, Kissinger's testimony on the Treaty before the Senate Committee on Foreign Relations¹¹⁸ became an exercise in dissimulation and obfuscation

112. Cf. Boyle, *Entebbe*, *supra* note 26, at 787-89 (Israeli practice).

113. See, e.g., *Washington Wire*, Wall St. J., Nov. 23, 1979, at 1, col. 5. See also Lewis, *Mr. Kissinger's Role*, N.Y. Times, Nov. 26, 1979, at A21, col. 1.

114. See N.Y. Times, Nov. 25, 1979, at A19, col. 1, at col. 3. See generally *id.*, Jan. 10, 1979, at A3, col. 3.

115. N.Y. Times, May 27, 1979, § 3, at 1, col. 1; *id.* at 11, col. 3.

116. See generally H. KISSINGER, *supra* note 87, at 132, 949, 964, 966, 1117, 1143, 1255-57.

117. 3 *The SALT II Treaty: Hearings Before the Committee on Foreign Relations*, 96th Cong., 1st Sess. 151 (1979) (statement of Senator Frank Church).

118. *Id.* at 151-233.

over a matter concerning the vital national security interests of the United States. At the hearings, Kissinger conditioned tepid support of SALT II on, *inter alia*, a significant arms buildup and the Senate's imposition of debilitating restrictions¹¹⁹ on the ability of the President to engage in strategic arms negotiations. Kissinger's qualified support for SALT II was so evanescent as to be meaningless. His testimony proved so innocuous that it could not have seriously jeopardized his reappointment prospects. He might have deserved some credit for resisting the temptation to repudiate SALT II entirely¹²⁰ if he had not apparently bargained his continued non-opposition for admission of the Shah. That decision set in motion a chain of events that may have prompted the Soviet invasion of Afghanistan and the tabling of SALT II. Kissinger's statements on Salt II and the Iranian hostage crisis have been so opportunistic and unprincipled that the American people should disregard in the future his advice on the conduct of foreign policy.

A. *The Soviet Brigade in Cuba*

Kissinger's position on SALT II was crucial because the Treaty hung by a thread in the Senate over President Carter's self-induced difficulties concerning the Soviet "combat brigade" stationed in Cuba. As pressure mounted on the President to redress the ostensible Soviet military threat to Latin America and the Caribbean, he declared that the *status quo* in Cuba was "unacceptable."¹²¹ This statement implied that the Soviets must either remove their combat troops from Cuba, or else eliminate their allegedly offensive military capabilities. When the Soviets refused to budge, the President accepted the "unacceptable." These events proved calamitous for SALT II's chances in the Senate. Senator Frank Church, then Chairman of the Senate Foreign Relations Committee, and a key figure in the SALT ratification process, had formally "linked" its ratification to the achievement of a change in the Cuban *status quo*. President Carter bears significant responsibility for Church's position even though the President publicly opposed this instance of "linkage."¹²²

119. *Id.* at 159.

120. Kissinger later criticized SALT II openly, and argued that without strong U.S. defense programs, the SALT process could perpetuate inequality between the U.S. and the U.S.S.R. See AVIATION WEEK & SPACE TECH., Nov. 3, 1980, at 28.

121. See, e.g., Wash. Post, Sept. 8, 1979, at A8, col. 1 (Carter speech). See generally U.S. DEPT OF STATE, BUREAU OF PUBLIC AFFAIRS, BACKGROUND ON THE QUESTION OF SOVIET TROOPS IN CUBA, CURRENT POLICY No. 93 (1979); N.Y. Times, Sept. 6, 1979, at A8, col. 1.

122. When intelligence sources confirmed that Soviet combat troops were stationed in Cuba, President Carter was about to begin a vacation on the Mississippi River. N.Y. Times, Aug. 19, at 26, col. 1. Secretary Vance directed the State Department to reveal the informa-

"Linkage" was a concept pioneered by Kissinger during the Nixon and Ford administrations.¹²³ The theory stemmed in part from his failure to see that strategic arms agreements between the two nuclear superpowers should transcend any Machiavellian maneuvers of geopolitics. "Linkage" is a tool of power politics, not of international law. Predictably, therefore, linking SALT II and the Soviet combat brigade in Cuba proved disastrous.

President Carter's mismanagement of what should have been a Cuban non-crisis provided critics with additional evidence of his lack of skill in foreign affairs. Before speaking about Soviet troops in Cuba while SALT II teetered in the balance, he should have waited for further intelligence information. When it arrived, it confirmed that such troops had been stationed in Cuba with the full knowledge of previous American administrations¹²⁴ as part of the Kennedy-Khrushchev agreement that terminated the Cuban missile crisis of October, 1962. The heart of this arrangement involved Soviet removal of medium and intermediate range ballistic missiles and jet bombers from Cuba in return for an American pledge not to invade that country overtly or covertly.¹²⁵ Soviet conventional troops remained in Cuba in order to secure the pledge.¹²⁶ They served as a "trip-wire" against American invasion, making it probable that any outright assault on Cuba would escalate into a direct superpower confrontation.

From the Soviet perspective, it was President Carter who strove to reverse the *status quo* in Cuba by renegeing on the Kennedy-Khrushchev agreement. It reasonably appeared to the Soviets that the U.S. government was using the threat of SALT II's non-ratification as a

tion to Church, apparently intending that Church have the privilege of first making the intelligence public. *Id.*, Aug. 31, 1979, at A2, col. 3; *id.*, Sept. 1, 1979, at 1, col. 6. This would give Church an opportunity to appear to be a hard-liner on defense matters at the start of a difficult re-election campaign against vigorous conservative opposition inspired in part by his liberal image on foreign affairs. *Id.*, Sept. 10, 1979, at A1, col. 6. Presumably a tough stand on the Soviet troops in Cuba would permit Church to take the soft stand of supporting SALT II, which he favored. The strategy failed, however. Church called for vigorous counteractive measures by the Carter administration, and backed up his demands with the "linkage" to SALT II. At the request of Senator Church, the Senate Foreign Relations Committee adopted a declaration that SALT II would not be ratified until the President had assured the Senate that the Soviet troops in Cuba "are not engaged in a combat role." *Id.*, Nov. 3, 1979, at 10, col. 3. Out of deference to Church, the White House agreed publicly to the "linkage." All this posturing was to no avail, however, for Church, like President Carter, was defeated in his bid for re-election in November, 1980. *See also id.*, Sept. 13, 1979, at A16, col. 4.

123. H. KISSINGER, *supra* note 87, at 129-30.

124. Bundy, *The Brigade's My Fault*, N.Y. Times, Oct. 23, 1979, at 23, col. 2.

125. A. CHAYES, T. EHRLICH & A. LOWENFELD, 2 INTERNATIONAL LEGAL PROCESS 1120-49 (1969).

126. Weiss, *Taking Salami Slices in Cuba*, Wall St. J., Sept. 19, 1979, at 20, col. 4.

Machiavellian club to force them into granting unjustified and humiliating concessions on Cuba. Hence the Soviets understandably refused to capitulate to Carter's demands, and he had to content himself with face-saving counter-measures tantamount to acceptance of the previously "unacceptable" *status quo*.¹²⁷ Irreparable damage, however, had already been inflicted on SALT II. This experience may have induced any optimists in the Soviet leadership to doubt the sincerity of President Carter's commitment to SALT II and *détente*. Kremlin pessimists may have concluded that President Carter was somehow trying to trick them out of the mutual benefits realized by the SALT II Treaty.

B. *The China Card*

President Carter had already substantially retarded the progress of the strategic arms limitation talks on two prior occasions. Shortly after his inauguration, he unilaterally called for large nuclear weapons cuts by both superpowers, much to Soviet astonishment.¹²⁸ Such cuts would have redounded to the distinct disadvantage of the Soviets because of their preponderant reliance on land-based intercontinental ballistic missiles (ICBMs), in contrast to America's "triad" of strategic nuclear forces more evenly dispersed among ICBMs, submarine launched ballistic missiles (SLBMs), and strategic nuclear bombers. The Carter initiative effectively amounted to renunciation of the 1974 Vladivostok agreement¹²⁹ concluded between President Ford and Soviet leader Brezhnev on the basic principles for future SALT negotiations. The Vance mission to Moscow with President Carter's suggestions in March, 1977, was therefore doomed to failure.¹³⁰ The administration withdrew the proposals and returned to the Vladivostok consensus, but the negotiations were sidetracked for several months.¹³¹ The unfortunate experience in this matter may indicate that the best course of action for the Reagan administration would be to announce its support for U.S. ratification of SALT II or some cosmetic substitute *before* America proceeds any further with the Strategic Arms Reduction Talks (START) with the Soviet Union, and then work diligently to secure the

127. See DEP'T ST. BULL., Nov., 1979, at 7.

128. N.Y. Times, Jan. 25, 1977, at 1, col. 6.

129. See Joint Statement on Strategic Offensive Arms Issued at Vladivostok Nov. 24, reprinted in DEP'T ST. BULL., Dec., 1974, at 879. See also Joint Communiqué Signed at Vladivostok Nov. 24, reprinted in *id.*

130. N.Y. Times, Mar. 31, 1977, at A1, col. 6.

131. News Conference held by Secretary of State Cyrus Vance at Geneva on May 21, 1977, reprinted in DEP'T ST. BULL., June, 1977, at 628; Joint Communiqué, reprinted in *id.* at 633.

advice and consent of the Senate. Future progress must be based on the consolidation of past gains.

President Carter's second mistake related to SALT II was the inopportune decision announced in December, 1978, to accord full diplomatic recognition to the People's Republic of China (P.R.C.).¹³² This act represented the culmination of Kissinger's strategy of establishing a three-way balance of power among the United States, the Soviet Union, and mainland China. By instituting a political relationship with the P.R.C., Kissinger sought to generate a new source of leverage over the Soviet Union that could be exploited on numerous issues: e.g., the Viet Nam War, *détente*, and SALT. It was a textbook example of the practical application of a Machiavellian theory of power politics on a global scale in the nuclear age. But President Carter's decision to "play the China card" created at this time another serious setback for the SALT negotiations with the Soviets. It was not until mid-June, 1979, six months after the recognition of the P.R.C., that SALT II was finally signed in Vienna,¹³³ a time perilously close to the beginning of the 1980 presidential campaign. This hiatus meant that SALT II would become hostage to the vicissitudes of American electoral politics and could not be evaluated on its merits alone. To phrase this proposition more precisely, the ratification of SALT II was ultimately recommended on its merits alone by the Senate Committee on Foreign Relations, subject to certain declarations, understandings, and reservations, but was not ratified for political reasons that were extraneous to the Treaty's intrinsic value as an arms control measure.¹³⁴

Another consequence of the diplomatic recognition of China was the subsequent visit of Deng Xiaoping to the United States in late January, 1979. Deng used this opportunity to make threats against Vietnam,¹³⁵ which had invaded and conquered Cambodia. Deng successfully manipulated his visit so that China's punitive invasion of Vietnam some two weeks later after Deng's return home appeared to have tacit American support.¹³⁶ Ironically, Deng shrewdly played his "American card" against the Soviet Union in order to forestall Soviet military retaliation against China for the invasion of their Vietnamese ally. From

132. See *East Asia: U.S. Normalizes Relations with the People's Republic of China*, *id.*, Jan., 1979, at 25.

133. U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, SALT II AGREEMENT, SELECTED DOCUMENTS NO. 12A (June 18, 1979).

134. See REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS ON THE SALT II TREATY, EXEC. REP. NO. 96-14, 96th Cong., 1st Sess. (1979).

135. See N.Y. Times, Feb. 1, 1979, at A16, col. 4.

136. See *id.*, Feb. 18, 1979, 1, at 1, col. 6.

the Soviet perspective, the Carter administration had become an accomplice to Chinese aggression. The Kremlin leadership must have debated whether further to advance a long-term Soviet strategy for containing the newly belligerent China by the invasion and occupation of Afghanistan. Perhaps as a precautionary measure, the Soviets substantially increased their supply of military equipment to the Marxist Afghanistan government in March, 1979.¹³⁷ China seemed to be moving toward a formal military alignment with the United States. Indeed, on April 19, 1979, Deng Xiaoping offered to co-operate with the United States in establishing electronic intelligence gathering stations on Chinese territory. These stations would monitor Soviet missile test sites previously observed from stations in Iran that were shut down after the Shah's ouster.¹³⁸

C. *Afghanistan and SALT II*

As it turned out, the SALT II process accelerated the pace of the nuclear arms race. Part of the price President Carter chose to pay for approval of SALT II by his Joint Chiefs of Staff was the decision, announced in September, 1979,¹³⁹ to deploy a land-based MX missile system in a racetrack basing mode.¹⁴⁰ With its ten multiple independently targetable reentry vehicles (MIRVs), the land-based MX threatened to destabilize the strategic nuclear balance between the two superpowers. It purported to provide the United States with an offensive first-strike capability against fixed Soviet ICBMs, which constitute about 72% of Soviet strategic nuclear forces.¹⁴¹ Because of this imbalance in comparison to the American triad, the land-based MX will create a vulnerability problem for the Soviets that is far more serious and threatening than the so-called "window of vulnerability" alleged to be facing U.S. ICBMs for the rest of this decade.¹⁴² The Soviets will be forced to re-

137. See Garrity, *The Soviet Military Stake in Afghanistan: 1956-79*, J. ROYAL UNITED SERV. INST., Sept., 1980, at 31, reprinted in DEPARTMENT OF THE AIR FORCE, CURRENT NEWS, SPECIAL EDITION, Feb. 26, 1981, No. 676, at 6.

138. See N.Y. Times, June 18, 1981, at A1, col. 2; *id.*, July 2, 1981, at 6, col. 1; *Spying on Russia With China's Help*, U.S. NEWS & WORLD REP., June 29, 1981, at 10; Wash. Post, June 18, 1981, at A34, col. 1; *id.*, June 19, 1981, at A10, col. 3.

139. *MX Missile System*, DEP'T ST. BULL., Nov., 1979, at 25.

140. This author approves of the Reagan administration's decision to abandon the "dragstrip" MX basing mode. See Boyle, *Should SALT II Be Ratified?*, INT'L PRAC. NOTEBOOK, January, 1981, at 12; Boyle, *Comment*, 74 AM. SOC'Y INT'L L. PROC. 218 (1980). See also Feld & Tsipis, *Land-based Intercontinental Ballistic Missiles*, SCI. AM., Nov., 1979, at 51.

141. See Chayes, *Response*, 74 AM. SOC'Y INT'L L. PROC. 219 (1980); Gray, *The MX ICBM and Nuclear Strategy*, 14 INT'L DEF. REV. 855 (1981).

142. Committee on the Present Danger, *Is America Becoming Number 2?* (Oct. 5, 1978). See generally Barnett, *The Search for National Security*, NEW YORKER, Apr. 27, 1981, at 50.

spond by deploying a mobile light ICBM system of their own in order to counter the U.S. MX threat. Mutual deployment of such ICBM systems by both superpowers, as permitted by SALT II, will complete the first stage in the post-SALT II nuclear arms race.

The MX decision quickly followed the signature of SALT II. It destroyed whatever good will, trust, and momentum for the future had been generated there, and poisoned the atmosphere for the proposed SALT III negotiations concerning theater nuclear forces (TNF) in Europe. Furthermore, in mid-December, 1979, NATO announced its decision to deploy 108 Pershing 2 missiles and 464 ground-launched cruise missiles in Europe allegedly to counter Soviet SS-20s.¹⁴³ Alternatively, the deployment of fast and accurate American Pershing 2s in Europe could also provide the United States with a seemingly effective first-strike capability against strategic ICBM silos located within the Soviet Union itself. From the Politburo's perspective, this decision, purportedly concerning only modernization of theater nuclear weapons, substantially undermined the value of the SALT II limitations on American strategic nuclear weapons systems.

Whatever the merits of this Euro-missile trade-off, the timing and multitude of decisions on major nuclear weapons systems coupled with the Soviet troops in Cuba incident and the proposed trip of Secretary of Defense Brown to China, undercut the credibility of the U.S. government with the Soviet Union in regard to arms control and *détente*. With SALT II apparently dead, the MX missile alive, new theater nuclear weapons on the way for NATO, an American military *rapprochement* with the P.R.C., and intimations that the U.S. might invade Iran and replace Khomeini in response to the hostage crisis, the Soviets were given every incentive to violate the so-called "code of *détente*"¹⁴⁴ by the invasion of Afghanistan. The Soviet invasion of Afghanistan led President Carter to withdraw SALT II from consideration by the Senate, and the centerpiece of his administration's foreign policy toward the Soviet Union collapsed.

I do not subscribe to the thesis that the Soviet invasion of Afghanistan was a defensive maneuver designed to prevent the spread of Islamic fundamentalism from Khomeini's Iran into Soviet Central Asia by shoring up a client regime in Afghanistan.¹⁴⁵ Nor do I believe that

143. N.Y. Times, Dec. 13, 1979, at A1, col. 6. See, e.g., Lewis, *Intermediate Range Nuclear Weapons*, SCI. AM., Dec., 1980, at 63-73.

144. Agreement on Basic Principles of Relations, U.S.-U.S.S.R., May 29, 1972, reprinted in 11 INT'L LEGAL MATS. 756 (1972).

145. See, e.g., N.Y. Times, Jan. 8, 1981, at A4, col. 4.

the Soviet march into Afghanistan was just another step along the road of some master plan for world conquest. As is characteristic of both superpowers, the Soviets exploited an opportunity created by the ineptitude of American policymakers who lost control of international political conditions. If there had been no "racetrack" MX decision, no Soviet brigade crisis, no new theater nuclear weapons announced for Europe, no threatening U.S. military relationship with China, no Iranian hostage crisis and buildup of U.S. military forces in the Arabian Gulf and Indian Ocean, if SALT II had been ratified and preparations were underway for the SALT III negotiations, if *détente* was still alive and flourishing—or even if all these disturbing events had not been occurring concurrently—there is a good chance the Soviets would have refrained from an invasion and instead have contented themselves with maintaining previous levels of military support provided to the Marxist government in Afghanistan.

The key analytical question, therefore, is not *why* the Soviets invaded Afghanistan. From their perspective, there were several sound strategic reasons for doing so. Rather, the inquiry should be why the Soviets invaded Afghanistan *when* they did at the end of December, 1979. I submit that the correct answer lies in the Carter administration's mismanagement of this series of severe international crises. These predicaments resulted in part because of its insensitivity to the requirements of international law and to the potential usefulness of international organizations for the peaceful settlement of disputes.¹⁴⁶

This argument is not intended to excuse or condone the Soviet invasion of Afghanistan, but simply to illuminate some of the motivations that may have induced such drastic Soviet action. There is no point in debating the "real" motivations behind the Afghanistan invasion because most probably they will never be known. Whatever they might have been, this aggression has created a new geopolitical *status quo* in Southwest Asia that must be dealt with on its own terms by the United States government. The Soviet threat to Iran and Pakistan is incontestably real, and beyond them lie the Persian Gulf mini-states, Saudi Arabia, and the Indian subcontinent. Yet throughout the Iranian crisis the Carter administration lost sight of the true U.S. national security interests at stake in this region: to keep the Soviet Union at a safe distance from the Persian Gulf oil lifeline to Western Europe and Japan. In-

146. See, e.g., Rubin, *Guarding the Gulf*, Christian Sci. Monitor, Mar. 7, 1980, at 23, col. 1; Rubin, *The Hostages: International Law to the Rescue?*, *id.*, Jan. 9, 1981, at 22, col. 4; Falk, *Comments on International Law and the United States' Response to the Iranian Revolution*, 33 RUTGERS L. REV. 399 (1981).

stead, for domestic political purposes, it chose counterproductively to concentrate on the hostage situation.

Several elements of the Carter administration's reaction to the Afghanistan invasion are best explained by its desire to be re-elected: the predictably porous grain embargo,¹⁴⁷ curtailment of Soviet fishing rights,¹⁴⁸ suspension of Soviet contracts and a freeze on sophisticated technology transfers,¹⁴⁹ boycott of the Moscow Olympic Games,¹⁵⁰ an ineffective draft registration,¹⁵¹ the \$400 million in "peanuts" for Pakistan,¹⁵² Brzezinski's near fatal visit to the Khyber Pass,¹⁵³ Mohammed Ali's embarrassing pep talks in African capitals,¹⁵⁴ and Clark Clifford's war scare.¹⁵⁵ This assortment of uncoordinated half-measures amounted to tough-talking, but not a foreign policy. It accomplished little more than electoral grandstanding. Each action was a one-shot affair incapable of exerting a compelling military, political, or economic impact upon the Soviet Union. Together they were based on the erroneous belief that the Soviet government would disgorge a significant geopolitical gain because of inconsequential economic and moral pressures brought to bear by a group of diplomatic amateurs fighting for their electoral lives. None was effectively designed to redress the geopolitical situation produced by the Afghanistan invasion. The Carter administration was too preoccupied pursuing its "honor" in Iran to focus the necessary attention and resources on the really serious crisis in Afghanistan.

President Carter claimed to deal directly with the Afghanistan invasion when he announced his Doctrine for the Persian Gulf. By this statement, he committed the United States government to use military force to prevent "any outside force [i.e., the Soviet Union] to gain control of the Persian Gulf region."¹⁵⁶ Even if supported by a credible

147. See, e.g., Wall St. J., Mar. 11, 1980, at 39, col. 1; *id.*, June 2, 1980, at 34, col. 6; *id.*, July 14, 1980, at 24, col. 6 (embargo was a failure).

148. *Soviet Invasion of Afghanistan*, DEP'T ST. BULL., Jan., 1980, at A(Special) (President's Address).

149. *Id.*

150. *Id.*

151. See Presidential Proclamation No. 4771, 3 C.F.R. 82 (1981).

152. N.Y. Times, Mar. 22, 1980, at 2, col. 3.

153. See N.Y. Times, Feb. 4, 1980, at A6, col. 4.

154. N.Y. Times, Jan. 26, 1980, at 3, col. 1; *id.*, Feb. 4, 1980, at A10, col. 1; *id.*, Feb. 5, 1980, at A14, col. 1; *id.*, Feb. 9, 1980, at 3, col. 4.

155. *Id.*, Feb. 3, 1980, at 13, col. 1.

156. *State of the Union Address*, DEP'T ST. BULL., Feb., 1980, at A(Special), at B. ("An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force."). See Wolfe, *The Many Doc-*

Rapid Deployment Force (R.D.F.),¹⁵⁷ the Carter Doctrine is a dangerous bluff with great potential for nuclear confrontation and escalation. A Pentagon report has concluded that the United States alone cannot successfully defend Iranian oil fields from Soviet invasion unless, perhaps, by resort to the first-use of tactical nuclear weapons.¹⁵⁸ Their deployment in a conventional conflict could easily escalate into strategic nuclear warfare between the two superpowers. Similarly, intimations by the Reagan administration of its readiness to counter a Soviet thrust into Iran with an invasion of Cuba risk the same result.¹⁵⁹

Neither the R.D.F. in the Gulf nor the Soviet "combat brigade" in Cuba are designed to be effective against the overwhelming superiority of conventional forces deployed by the other superpower near its heartland. But in the Machiavellian calculus of power politics, American R.D.F. troops are deemed expendable because only the prospect of their certain death can deter by serving as a nuclear trip-wire.¹⁶⁰ Yet just because the Soviets have adopted this imprudent approach to protect Cuba is no reason for the United States to construct a similar trip-wire for the Persian Gulf. Cuba and the Persian Gulf are not analogous. The requirements for successful deterrence in these respective regions are so fundamentally dissimilar that they require different foreign policies by the two superpowers.

In the near future the primary threat of organized disruption to Gulf oil production emanates from opposition movements indigenous to the region. Such disruptions are beyond the capacity of the R.D.F. to counteract. At the same time, the United States government must not be tempted to enter into *de facto* alliances with feudal or reactionary regimes in order to guarantee their continued survival against internal adversaries in return for stable supplies of expensive oil. As demonstrated by the Iranian revolution, even a radical successor regime will recognize the need to sell oil to Western Europe, Japan, and the United States for the hard currency necessary to finance basic imports and to pay for economic development programs. Because the Carter Doctrine can neither deter the Soviets, nor prevent revolutionary change in the

trines of Carter, 231 NATION 1 (1980). *But cf.* Goldman, *Is There a Russian Energy Crisis?*, ATLANTIC, Sept., 1980, at 55 (No.1).

157. See Koehl & Glick, *The Rapid Deployment Farce*, AMERICAN SPECTATOR, Jan., 1981, at 18-21; Bates, *The Rapid Deployment Force: Fact or Fiction*, J. ROYAL UNITED SERV. INST., June, 1981, at 23; Record, *The RDF: Is the Pentagon Kidding?*, WASH. Q., Summer, 1981, at 41.

158. N.Y. Times, Feb. 2, 1980, at 1, col. 1.

159. See, e.g., Wash. Post, July 17, 1981, at A1, col. 2.

160. See Anderson, *R.D.F. Predicted to Have High Casualty Rate*, Wash. Post, Aug. 7, 1981, at C15, col. 4; *id.*, Oct. 28, 1980, at 1, col. 1.

Gulf, the Reagan administration should consign it to Trotsky's "dustbin" of history. Nevertheless, somewhat paradoxically, the Reagan administration has embraced this ill-conceived, rhetorical flourish by a former opponent, uttered during the heat of an unsuccessful election campaign,¹⁶¹ as the cornerstone of its policy towards the Persian Gulf. Now the Reagan Corollary has improvidently extended the Carter Doctrine to ordain U.S. opposition to internally-based interference with the free flow of Saudi Arabian oil.¹⁶²

Likewise, it was unwise for the Carter administration and, later, the Reagan administration, to offer economic and military assistance to the governments of President Siad Barre in Somalia and of King Hassan II in Morocco for the purpose of securing U.S. access rights to these countries incident to intervention by the R.D.F. in the Persian Gulf region. President Barre uses American support to continue his covert war against Ethiopia in the Ogaden, thus perpetuating the presence of Cuban troops and Soviet advisers in the Horn of Africa. King Hassan employs American weapons to consolidate his unjustified hold over the Western Sahara, thus further destabilizing relations in Northern Africa between Morocco, Mauritania, Algeria, Tunisia, and Libya. Both of these policies expressly violate some of the most fundamental norms of the contemporary international legal order concerning the prohibition on transnational violence, the inviolability of international borders, the right to self-determination, and the peaceful settlement of international disputes. The United States should, therefore, dissociate itself from either regime for any purpose other than using its influence to facilitate negotiated solutions to the Saharan and Ogaden conflicts under the auspices of the Organization of African Unity and the United Nations.

IV. Persian Gulf Security

Nuclear war over events in the Gulf was more likely than is generally believed. The report by columnist Jack Anderson that the Carter administration was contemplating for electoral purposes an invasion of Iran in the fall of 1980 coincided with a substantial increase in U.S. forces stationed in the Indian Ocean and Arabian Gulf.¹⁶³ Anderson's allegations warrant a full-scale congressional investigation. This is un-

161. See Newsom, *America Engulfed*, FOREIGN POL'Y, Summer, 1981, at 17.

162. See N.Y. Times, Oct. 2, 1981, at 1, col. 6; Safire, *The Reagan Corollary*, *id.*, Oct. 4, 1981, § E, at 21, col. 5.

163. Champaign-Urbana News Gazette, Aug. 18, 1980, at A4, col. 4; *id.*, Aug. 19, 1980, at A4, col. 6; *id.*, Aug. 20, 1980, at A4, col. 4; *id.*, Aug. 21, 1980, at A4, col. 1; *id.*, Aug. 22, 1980, at A4, col. 4; Wash. Post, Sept. 22, 1980, at D13, col. 3; Wash. Star, Sept. 21, 1980, at 6; Wash. Post, Oct. 23, 1981, at B17.

likely, however, by a Congress willing to accept the Reagan administration's tendentious assertions that the War Powers Act does not restrict the deployment of U.S. military advisers in El Salvador and of combat troops in Lebanon.¹⁶⁴ There are also several indications from the public record¹⁶⁵ that the Carter administration tacitly condoned, if not actively encouraged, the Iraqi invasion of Iran in September, 1980, because of the shortsighted belief that the pressures of belligerency might expedite release of the hostages. Presumably the Iraqi army could render Iranian oil fields inoperable, and, unlike American marines, do so without provoking the Soviet Union to exercise its alleged right of intervention under Articles 5 and 6 of the 1921 Russo-Persian Treaty of Friendship.¹⁶⁶ These Articles were unilaterally abrogated by Iran on November 5, 1979, the day after the American diplomats were seized in Teheran.¹⁶⁷ At the time, the Soviet government protested the Iranian abrogation and, in the aftermath of the Anderson articles ten months later, raised the specter of counterintervention to ward off an American invasion.

American efforts to punish, isolate, and weaken the Khomeini regime because of the hostage crisis paved the way for Iraq to invade Iran in September, 1980.¹⁶⁸ The American policy of neutrality towards the Iran-Iraq war, first announced by the Carter administration, misrepresented fact if not the law.¹⁶⁹ A substantial body of opinion believes that the American government has consistently "tilted" in favor of Iraq despite its public proclamation of neutrality.¹⁷⁰ Even if the United States

164. U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, GIST: U.S. ASSISTANCE TO EL SALVADOR (May, 1981). See generally U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, COMMUNIST INTERFERENCE IN EL SALVADOR, SPECIAL REPORT No. 80 (Feb. 23, 1981).

165. *Whose Interest?*, ECONOMIST, Sept. 27, 1980, at 42; Mansur (pseud.), *The Military Balance in the Persian Gulf: Who Will Guard the Gulf States from Their Guardians?*, ARMED FORCES J. INT'L, Nov. 1980, at 44; *Dangerous Game*, 231 NATION 395 (1980) (editorial) (U.S. AWACS in Saudi Arabia reportedly supply Iraq with military intelligence); *Who Will Police These Shores?*, MIDDLE EAST, Oct., 1980, at 26, col. 1, at col. 3; N.Y. Times, Oct. 29, 1981, at 10, col. 1.

166. Treaty of Friendship, Feb. 26, 1921, R.S.F.S.R.-Persia, 9 L.N.T.S. 383.

167. See Reisman, *Termination of the USSR's Treaty Right of Intervention in Iran*, 74 AM. J. INT'L L. 144, 145 (1980). See also Hirschfeld, *Moscow and Khomeini: Soviet-Iranian Relations in Historical Perspective*, ORBIS, Summer, 1980, at 219.

168. See generally Hardcastle, *The Shatt-al-Arab Saga*, NEW REPUBLIC, Oct. 11, 1980, at 11; *Too Hot to Handle*, MIDDLE EAST, Nov., 1980, at 10; N.Y. Times, Sept. 18, 1980, at A8, col. 1. On the emerging role of Iraq as a Gulf power, see Wright, *Implications of the Iraq-Iran War*, 59 FOREIGN AFF. 275 (1980); Dawisha, *Iraq: The West's Opportunity*, FOREIGN POL'Y, Winter, 1980-81, at 134; Kedourie, *The Illusions of Powerlessness*, NEW REPUBLIC, Nov. 29, 1980, at 17.

169. *Iran-Iraq Conflict*, DEP'T ST. BULL., Nov., 1980, 53, at 53-54 (statement of President Carter).

170. See, e.g., Wash. Post, Aug. 27, 1981, at C31, col. 3 (C.I.A. will use Egypt and Tur-

has been factually as well as legally neutral in the Iran-Iraq war, that position is itself shocking under principles of international law. When has the United States been neutral in the post-U.N.-Charter world in the face of outright aggression? As the United States government should have learned from the tragic history of American neutrality during the 1930s, peace is indivisible. In the nuclear age, aggression is the most dangerous threat to world peace. The United States cannot possibly be consistent in condemning the Soviet invasion of Afghanistan without likewise condemning the Iraqi invasion of Iran. With the hostage crisis now behind it, the Reagan administration should abandon neutrality in the Iran-Iraq war.

The United States, its NATO allies, and Japan possess vital national security interests in preventing the disintegration of Iran due to factional strife, secessionist movements, or external aggression or subversion originating from Iraq or the Soviet Union. Continued destabilization of Iran only generates further opportunities for Soviet penetration and exploitation. The United States must not permit the development of a permanent threat to Saudi Arabia and to the free flow of Gulf oil through the Strait of Hormuz by encouraging conditions that might lead to the installation of an Iranian regime acting at the behest of the Soviet Union. Nevertheless, it is necessary to reiterate that the Iranian people possess the exclusive right to determine their own form of government without overt or covert U.S. intervention, even if this means the continuation of an Islamic fundamentalist regime in Teheran.

Under these circumstances the most prudent course for the Reagan administration is to work towards the establishment of a strong and stable government in Teheran, able to repel the Iraqi invasion and to undertake the military measures necessary to offset Soviet divisions massed on Iran's borders. Of course, improved American relations with Iraq are a desirable objective as well, but must not be purchased by derogation from the fundamental principle of international law requiring the condemnation of aggression or by abandoning Iran to the Soviet Union. Indeed, if the Reagan administration believes that the major U.S. strategic objective in the Persian Gulf is to counteract a Soviet thrust through Iran towards Saudi Arabia, the best American defense can be mounted, not from the borders of Iraq, but from the eastern and northern frontiers of Iran, at the request of the Iranian gov-

key to mount covert operations against Khomeini); N.Y. Times, Mar. 7, 1982, at 1, col. 3. See also MIDDLE EAST, Aug., 1980, at 24.

ernment and with the assistance of the Iranian army. In this context, a credible Rapid Deployment Force could play an effective role in accordance with the requirements of international law. Such action would be consistent with the right of collective self-defense recognized by Article 51 of the U.N. Charter.

To assure that the R.D.F. would be used lawfully, Congress should amend the War Powers Act¹⁷¹ to provide that the President of the United States cannot order the introduction of R.D.F. troops into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances without prior authorization by a joint resolution of Congress. A narrowly drawn exception to this amendment could permit the President to use R.D.F. troops solely for the purpose of rescuing or evacuating a substantial number of American citizens from situations where they face imminent danger of death without the need for prior congressional authorization, though subject to the other requirements of the Act. Otherwise an American president will constantly be tempted to deploy the R.D.F. simply because an effective U.S. interventionary force exists and is subject to his discretionary command.

In order to protect American national interests and the international order in the Persian Gulf, the Reagan administration should restore normal diplomatic relations with Iran as soon as possible and without conditions. The American government must officially label Iraq as the aggressor in the Gulf war and publicly call for an immediate ceasefire. The Reagan administration must attempt to convince its NATO allies to terminate their provision of military weapons and supplies to Iraq.¹⁷² Operating in conjunction with them and Iran, the United States should seek the United Nations' adoption of some program of deploying a transitional U.N. peace-keeping force along the Iran-Iraq border, replacing withdrawing national troops.¹⁷³ The dispute between Iraq and Iran over the Shatt-al-Arab estuary should be submitted to the procedures for compulsory arbitration set forth in Article 6 of the 1975 Iran-Iraq Treaty on International Borders and Good Neighborly Rela-

171. War Powers Act of 1973, P.L. No. 93-148, 87 Stat. 555 (1973).

172. See Wohlstetter, *Meeting the Threat in the Persian Gulf*, SURVEY, Spring, 1980, at 109; *Another Offensive and More Blood?*, ECONOMIST, May 9, 1981, at 34; Wall St. J., Mar. 5, 1982, at 22, col. 1.

173. Thus this author approves of the Reagan administration's decision to adhere to the terms of the Declarations of Algiers as well as of *Dames & Moore v. Regan*, 101 S. Ct. 2972 (1981), for reasons explained elsewhere. See Boyle, 1 & 2 Chicago Daily L. Bull., Feb. 12 & 13, 1981, at 1 & 1. See also Perlmutter, *American Policy in the Middle East: New Approach for a New Administration*, PARAMETERS, June, 1981, at 14; Perlmutter, *Supporting Our Vital Interests in Iran*, Wall St. J., Jan. 23, 1981, at 14, col. 3.

tions.¹⁷⁴ Although insufficient to justify a counter-invasion of Iraq, Iranian demands for the payment of reparations and for the deposition of President Hussein are reasonable and supportable under principles of international law. These Iranian concerns should be recognized and accommodated to some extent within the framework ultimately adopted for the peaceful settlement of this dispute by the U.N. Security Council.

The criticism that such a dramatic reversal of American policy in the Gulf would alienate such friendly regimes as Saudi Arabia, Kuwait, and Jordan overlooks the fact that American neutrality in this war has simply encouraged these Arab countries temporarily to put aside their animosities in aligning themselves with Iraq against non-Arab Iran. Restoring peace to the Persian Gulf demands American leadership acting in strict accordance with the rules of international law and in full cooperation with the relevant international organizations.

Despite the foregoing criticisms of the Carter administration's handling of the Iranian hostage crisis, the United States demonstrated restraint by abstaining from the use of potentially overwhelming military force to terminate the incident. This example stands in stark contrast to the Soviet invasion of Afghanistan and its long-standing threat of military intervention in Poland. In the wake of the Afghanistan invasion there has been a fundamental realignment of political relations among the nations of Southwest Asia, acting in fearful response to the Soviet threat.¹⁷⁵ By its forbearance in Iran, the United States has created an opportunity to work with the states of this area to create individual and collective self-defense arrangements to prevent conditions inviting additional Soviet or intra-regional aggression.

In this regard, the purveyance of sophisticated American weapons systems and technology to the states of Southwest Asia (e.g., Saudi Arabia, Israel, Jordan, Pakistan, China) is an important issue. As events in Iran demonstrated, arms sales can become counterproductive. Any U.S. arms transfer must be required by the legitimate defensive needs of these countries as defined by international law and interpreted in good faith by the American government. Unilateral policy determinations by these foreign governments do not provide adequate criteria. Thus the Reagan administration ought not to provide weapons to Saudi Arabia simply to curry favor and secure a stable flow of oil to the West, or to China as a geopolitical "card" to be played in some Machi-

174. Treaty on International Borders and Good Neighborly Relations, Iran-Iraq, June 13, 1975, reprinted in 14 INT'L LEGAL MATS. 1133 (1975).

175. *India and Pakistan Join in Gulf Game*, MIDDLE EAST, June, 1981, at 31.

avellian balancing game of power politics with the Soviet Union. Nor should such weapons be given to any state that manifests a tendency to employ them in a manner the United States or the U.N. Security Council deems in violation of international law. Thus the Israeli air strikes with American-made planes against the Iraqi nuclear reactor and the P.L.O. headquarters in Beirut and the threat to bomb Syrian anti-aircraft missiles in Lebanon during the summer of 1981 and its illegal invasion of Lebanon, one year later, as well as Pakistan's three wars with India and pursuit of a nuclear weapons capability, should be grounds for additional concern and re-evaluation by the Reagan administration. All these states bear heavy burdens of proof in regard to pending American arms transfers that have yet to be discharged in a manner satisfactory to the requirements of international law and U.S. statutes.¹⁷⁶ Unfortunately, the Reagan administration has apparently chosen to rely on the wholesale provision of American military equipment to various governments around the world, an ineffectual and ultimately self-defeating substitute for performing the hard task of formulating a set of coherent principles for the conduct of American foreign policy on some basis other than Machiavellian power politics.

In a long-term perspective on Persian Gulf security, the Reagan administration should encourage the efforts of six local states to form a viable Gulf Cooperation Council.¹⁷⁷ Such an organization could become an effective security organization, affiliated with the United Nations under Chapter 8 of the Charter, possessing a standing peacekeeping force, or the ability to field one on short notice. Though the Council aims to keep both superpowers out of the region, a Gulf security organization could only advance the interests of the U.S., its NATO allies, and Japan by the establishment of some degree of peace, order, and stability in this area. Geography gives the Soviet Union advantages the West cannot match without an active local defense system. A Gulf security organization would be far more successful in peacefully resolving local disputes, opposing intra-regional aggression, and suppressing externally fomented disturbances than the American Rapid Deployment Force ever could be. The Reagan administration should therefore shift the emphasis of its strategic planning in the Gulf from the creation of a formal anti-Soviet "strategic consensus" under

176. See, e.g., 22 U.S.C. §§ 2302, 2314(d), 2753(c) & 2754 (1976).

177. See *Together, at Last*, ECONOMIST, Mar. 14, 1981, at 37; *Gulf Security Document*, MIDDLE EAST, Jan., 1981, at 16; *No Secrets on Gulf Security*, *id.*, Mar., 1981, at 18; *Caution: Building in Progress*, *id.*, Apr., 1981, at 8; *Gulf Council Shifts into Second Gear*, *id.*, Oct., 1981, at 25; Wall St. J., Jan. 28, 1982, at 28, col. 3.

American leadership, to the foundation of a Gulf regional security organization in which the United States is not a member and plays no formal role outside the context of the Article 51 right of collective self-defense.

Finally, the success of any American foreign policy in the Persian Gulf cannot be divorced from the issue of peace between Israel and its neighbors. A necessary precondition to Persian Gulf security is active American support for progress towards implementing the right to self-determination for the Palestinian people in accordance with the rules of international law.¹⁷⁸ Otherwise the primary political objective of Gulf states will continue to be to organize their efforts and substantial resources in opposition to both Israel and the United States. Conversely, in this regard the Reagan administration's decision to assign troops from the 82nd Airborne Division, already designated as part of the Rapid Deployment Force, to serve as a component unit within the multinational peacekeeping force that is to police the easternmost section of the Sinai desert after Israel's withdrawal on April 25, 1982, is short-sighted. The peace between Egypt and Israel should not be linked in any way to the prospect of illegal American intervention in the Persian Gulf.

V. International Law and the Future Conduct of American Foreign Policy

A. *Cuba*

The conclusion compelled by this analysis requires that American foreign policy stand on international law and work with international organizations to achieve the nation's goals, and cease the illegal threat or use of force, retaliation, reprisal, retorsion, intervention, and self-help against its adversaries. Thus, in regard to Cuba, the best way to "neutralize" Castro as an anti-U.S. actor in international relations excludes the means hitherto used: military invasion, naval blockade, covert operations, or measures of economic and political destabilization, all of which violate international law.¹⁷⁹ Rather, the Reagan administration should seek to re-establish normal diplomatic relations with the Castro government; to remove U.S. economic sanctions imposed against Cuba; to prosecute Cuban refugee groups located in the United States that prepare armed expeditions against the Castro government in

178. *Interview with Abdullah Bishara, Secretary General of the Gulf Co-operation Council, MIDDLE EAST*, Sept., 1981, at 35.

179. See Lovler, *Training for the Counterrevolution*, 233 *NATION* 265-68 (1981).

violation of 18 U.S.C. § 960 (1976), and, under 22 U.S.C. § 461 (1976); to employ U.S. military forces to thwart such expeditions whenever detected; to reverse the 1962 Punta del Este resolution by the Eighth Meeting of Consultation of the Ministers of Foreign Affairs of the American Republics that excluded the Castro government from participation in the inter-American system; and, finally, to include Cuba within President Reagan's proposal for an economic development program for the Caribbean basin. Such measures would dissolve Cuba's burdensome, and, at times, counterproductive and unwanted reliance on the Soviet Union for military defense and financial subsistence. Such a new Cuban policy would facilitate a peaceful settlement to the conflict in El Salvador negotiated by all internal parties under the auspices of the Organization of American States, or the United Nations, or both. In conjunction with a much needed improvement of U.S. relations with the Sandinista government in Nicaragua, this new Cuban policy would set the stage for restoring peace and stability in Central America. There are current indications that the Reagan administration is supporting military operations against Nicaragua from Honduras; such actions make for illegal, irresponsible, and counterproductive policy toward this region. Because of the immediate present danger of further U.S. military intervention into Central America, Congress should enact an equivalent of the Clark Amendment prohibiting U.S. intervention in Nicaragua, El Salvador, Honduras, Guatemala, Costa Rica, Cuba, and Grenada.

U.S. initiation of a *rapprochement* with Castro could bring such other tangible benefits as the gradual withdrawal of Cuban troops from Angola. This result depends on a renewed and strengthened U.S. commitment to the independence of Namibia along the lines of the plan approved by the U.N. Security Council in Resolution 435 (1978). Meanwhile, the Reagan administration should establish normal diplomatic relations with the M.P.L.A. government in Luanda, obey the terms of 22 U.S.C. § 2293 note (1976) prohibiting assistance of any kind for military or paramilitary operations in Angola without explicit congressional authorization, and participate in the condemnation by the U.N. Security Council of all South African military raids mounted from Namibia into Angola. The Reagan administration's concentration on the Cuban presence in Angola will only link the United States more closely with the apartheid regime in South Africa. The Reagan administration's failure actively to support the independence of Namibia will undermine the good political and economic relationships with Black African states that were successfully promoted by the Carter

administration, and will contravene the principles of international law and resolutions of international organizations concerning Namibia and South Africa. The right of the Namibian people to self-determination had been firmly established under international law before the American, South African, and Cuban governments decided to intervene in the Angolan civil war. Consequently the Reagan administration must not obstruct the achievement of Namibian independence by conditioning it on the withdrawal of Cuban troops from Angola.

B. *SALT*

International peace and stability would also be strengthened by a continuation of the SALT process. The rhetoric of the 1980 presidential campaign obscured several points about SALT II that are crucial for the future. Foremost is that SALT II is not an effective arms control measure. It places no real restrictions on either side, but left both superpowers essentially free to build all their currently planned weapons systems up to the SALT II limits.¹⁸⁰ The Soviets agreed to dismantle obsolete weapons systems. Both countries agreed to limit the number of MIRVs per missile that, in any case, they would not be technologically able to exceed until after the expiration of SALT II in 1985. The freeze on the number of Soviet "heavy" SS-18s at 308 did not matter much because that figure represented their planned deployment of the missile. The Chairman of the U.S. Joint Chiefs of Staff testified that the treaty would not impede the U.S. nuclear weapons program to any significant extent.¹⁸¹ Therefore, the Carter administration's constant refrain that all SALT II restrictions applied to the Soviet Union, and none to the United States,¹⁸² was misleading. Likewise, charges by groups such as the Committee on the Present Danger (C.P.D.)¹⁸³ and, later, under its influence, by candidate Reagan, that SALT II undermined the foundations of Western strategic nuclear deterrence were unfounded.¹⁸⁴ Yet, because the C.P.D.'s strategic nuclear assumption (e.g., the "window of vulnerability") dominate the defense and foreign

180. See *Reagan Strategic Arms Policy: No Big Surprises Seen Soon*, 39 CONG. Q. 177 (1981).

181. *Senate Testimony of General Brown on SALT II*, in U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, CURRENT POLICY NO. 72A, at 33, 35-36 (July 9-11, 1979). See also *Senate Testimony of Secretary Brown on SALT II*, in *id.* at 9, 15.

182. See, e.g., Warnke, *Remarks*, 74 AM. SOC'Y INT'L L. PROC. 212, 213 (1980).

183. Rostow, *The Case Against SALT II*, COMMENTARY, Feb. 1979, at 23; Rostow, *SALT II: A SOFT BARGAIN, A HARD SELL* (Committee on the Present Danger, 1978).

184. See, e.g., Lens, *A-bomb Almanac*, 232 NATION 389 (1981); Metcalf, *Missile Accuracy—The Need to Know*, STRATEGIC REVIEW, Summer, 1981, at 5; Wicker, *Rethinking the MX(2)*, N.Y. Times, Aug. 28, 1981, at 23, col. 5.

policies of the Reagan administration, they must be seriously re-examined and ultimately repudiated. The C.P.D.'s unwarranted assumptions do not justify the enormous conventional and nuclear weapons buildup currently proposed by the Reagan administration which, it admits, will be financed directly by cuts from scarce resources previously allocated to social welfare programs and human services. This wasteful and unnecessary arms buildup constitutes a greater present danger to the peace, stability, security, and prosperity of the United States at home and abroad.

SALT II possessed little more than symbolic significance without SALT III. Yet the great value of SALT II was that it could have paved the way for successful SALT III negotiations concerning theater nuclear forces in Europe and for genuine arms reduction agreements between the two nuclear superpowers and their allies in the future. An indefinite extension of SALT II beyond 1985 could help forestall the development of any "window of vulnerability" for both Soviet and U.S. ICBM systems.

The intrinsic value of SALT lies less in the numerical limitations and procedural requirements formally set forth in each treaty, than in the process of negotiation itself. The technology of mass destruction develops too rapidly for cumbersome, time-consuming, and highly politicized treaty negotiation and ratification procedures to control. The SALT process cannot stop the arms race until it can first control the technology race. In the meantime, however, the uninterrupted continuation of the SALT process serves the purpose of attempting to regulate technological evolution in the nuclear arms race. SALT makes the arms race appear more understandable, predictable, less irrational, and thus more susceptible to governmental control. Undoubtedly these appearances are dangerous. But nuclear deterrence is essentially a psychological phenomenon. In the absence of genuine arms reductions these illusions render the strategic balance of terror between the two nuclear superpowers more stable and thus less dangerous than would be the case without them.

On assuming office, the Reagan administration immediately should have begun formal negotiations with the Soviet Union over the "modernization" of theater nuclear weapons in Europe: SS-20s, the Pershing 2, ground-launched cruise missiles, the neutron bomb, and the Backfire bomber, *inter alia*. Furthermore, the Reagan administration should have called for an immediate opening of formal negotiations concerning strategic systems not prohibited by SALT II: the new, "light" ICBM, cruise missiles, high energy, anti-satellite, and space-based

weapons, and so on. This post-SALT II stage of the nuclear arms race has already begun. The two superpowers, in conjunction with their allies, must negotiate immediately and comprehensively to prevent the loss of control over the development of these new and destabilizing weapons systems. Regrettably, the Reagan administration has wasted precious time debating whether even to participate in SALT III and START negotiations with the Soviet Union.

In the immediate future the Reagan administration should officially disavow Presidential Directive 59, another Carter campaign fiasco, that naively contemplates the possibility of fighting a limited nuclear war as well as Secretary Weinberger's plan for "protracted" nuclear war.¹⁸⁵ The Reagan administration, moreover, should not deploy any land-based MX or Pershing 2 systems or sea-based Trident II system that possesses a first-strike capability against the Soviet ICBM force. Likewise, Pentagon proposals to defend a multibillion dollar land-based MX with a multibillion dollar anti-ballistic missile system would compound one tragic mistake with another.¹⁸⁶ Therefore, the 1972 U.S.-U.S.S.R. Anti-Ballistic Missile Systems Treaty must not be abrogated when it is reviewed in 1982 or 1987.¹⁸⁷ The Reagan administration should work assiduously toward conclusion of the partially completed Comprehensive Test Ban Treaty.¹⁸⁸ Finally, the United States should continue to resist further proliferation of nuclear weapons technology and materials.

To support movement in this direction, the Reagan administration must continue to adhere to the terms of the unratified SALT II Treaty. Ultimately, American ratification of SALT II or of some cosmetic substitute will prove to be the precondition for further progress in reaching strategic nuclear arms control and reduction agreements with the Soviet Union. START I can only succeed within the context of a ratified

185. See Warnke & Schneider, *A Nuclear War Must Never be Fought*, ACROSS THE BOARD, Mar., 1981, at 14; *Command and Control: Use It or Lose It?*, F.A.S. PUB. INTEREST REPORT, Oct., 1980, at 1; Boyle, *Book Review*, 75 AM. J. INT'L L. 402 (1981); Nunn, *Termination: The Myth of the Short, Decisive Nuclear War*, PARAMETERS, Dec., 1980, at 36. Compare Beres, *Presidential Directive 59: A Critical Assessment*, PARAMETERS, Mar., 1981, at 19, with Gray, *Presidential Directive 59: Flawed But Useful*, *id.* at 28, and Howard, *On Fighting a Nuclear War*, INT'L SECURITY, Spring, 1981, at 3, with Slocombe, *The Countervailing Strategy*, *id.* at 19, and Trofimenko, *Counterforce: Illusion of a Panacea*, *id.* at 29.

186. See Robinson, *Layered Defense System Pushed to Protect ICBMs*, AVIATION WEEK & SPACE TECH., Feb. 9, 1981, at 9; Quirt, *Washington's New Push for Anti-Missiles*, FORTUNE, Oct. 19, 1981, at 142.

187. Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503, amended by Protocol of July 3, 1974, 27 U.S.T. 1645, T.I.A.S. No. 8276.

188. See *Report on CTB Negotiations*, DEP'T ST. BULL., Nov., 1980, at 47; Caldwell, *CTB: An Effective SALT Substitute*, BULL. OF ATOMIC SCIENTISTS, Dec., 1980, at 30.

SALT II. Consequently, the Reagan administration must repudiate its adoption of Kissinger's theory of "linkage" between considerations of geopolitical power politics (e.g., Poland, Afghanistan, El Salvador) and those of nuclear weapons control.¹⁸⁹ Human survival depends on the success of these endeavors to control the nuclear arms race. While defective, they represent the only substitutes for the increasing risk of a nuclear war. There is no alternative. If the treaty ratification procedure in the U.S. Senate proves a major obstacle to the realization of the foregoing agenda, future administrations must submit arms control agreements for approval by a joint resolution of Congress.¹⁹⁰ They must not be held hostage to the self-interested votes of a few Senators. Obstinacy over a revised SALT II or SALT III or START must not be permitted to pave the way for World War III.

C. *The Struggle for International Law*

The members of the American international legal community have often assisted the Machiavellian foreign policies of the United States government by manufacturing legal arguments as *ad hoc* or *ex post facto* justifications for decisions taken on the grounds of power politics. Their fascination by the possibility of someday wielding governmental power has seduced American international lawyers into becoming apologists for its profligate use, rather than teachers of its proper exercise, in international relations. In the process, both the vital national security interests of the United States and the strength of international law and international organizations have grievously suffered. Historically the cause of neither has been advanced by the subservience of American international lawyers to the Machiavellian policy pronouncements issued from the White House, the Departments of State and Defense, and the Central Intelligence Agency.

For at least the past twenty years, these American governmental policymakers have tried to base their foreign policies on Machiavellian power politics. The result has been a series of disasters for the United States. They have seriously damaged the integrity of the international legal order that the United States helped construct at the San Francisco Conference in 1945. This resulted because Machiavellian power poli-

189. See, e.g., Hamilton, *To Link or Not to Link*, FOREIGN POL'Y, Fall, 1981, at 927. See also Selin, *Looking Ahead to SALT III*, INT'L SECURITY, Winter, 1980-81, at 171; Drell & Wisner, *A New Formula for Nuclear Arms Control*, *id.* at 186.

190. See Comment, *Approval of SALT Agreements by Joint Resolution of Congress*, 21 HARV. INT'L L.J. 421 (1980). See also McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, (pts 1 & 2), 54 YALE L.J. 181, 534 (1945).

tics contradicts several of the most fundamental normative principles which the United States should cherish: the inalienable rights of the individual, self-determination, the sovereign equality and independence of states, nonintervention, the peaceful settlement of international disputes, and respect for international law and organizations. Throughout the twentieth century, the promotion of international law and international organizations traditionally has provided the United States with the means for reconciling the idealism of American values and aspirations with the realism of world politics and historical conditions.¹⁹¹

Practitioners of Machiavellian power politics such as Kissinger, Brzezinski, and Haig demonstrate little appreciation of, or sensitivity to the requirements of the U.S. constitutional system of government. The American people have never been willing to provide sustained popular support for a foreign policy that has violated the elementary norms of international law because they have habitually perceived themselves to constitute a democratic political society governed by an indispensable commitment to the rule of law in all sectors of their national endeavors. The U.S. government's resolute dedication to the pursuit of international law in foreign affairs has proved to be critical both for the preservation of America's internal equilibrium and for the protection of America's global position.

By contrast, according to *The Prince*, the practice of Machiavellianism abroad requires the practice of Machiavellianism at home. American foreign policymakers cannot realistically expect to exercise Machiavellian power politics in international relations without experiencing its intrusion into domestic affairs. The Nixon-Kissinger administration is an outstanding example of this proposition. Painfully aware of this interconnection, the American people cannot tolerate, but instead ultimately will resist the practice of Machiavellian power politics by their government when it becomes obvious. Thus, despite the Machiavellian predilections held by international political scientists of the "realist" school, it is the unalterable nature of this "legalist" reality so intrinsic to the United States that must be understood, internalized, and effectuated by its foreign policymakers. The harmful thesis propounded by international political scientists that, for some mysterious reason, a democracy is inherently incapable of developing a coherent and consistent foreign policy without Machiavellianism simply reflects

191. See Boyle, *American Foreign Policy Towards International Law and Organizations: 1898-1917* (forthcoming).

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their refusal to accept the well-established primacy of law over power in the American constitutional system of government.

The present danger is power politics. The only antidote is international law. The choice is stark, ominous, and compelling. International lawyers, therefore, must organize themselves into the vanguard of a struggle against the current domination of the American foreign policy establishment by the Machiavellians. The U.N. Charter must be restored as the underlying premise of American policy. Otherwise nuclear catastrophe envisioned most recently by such pragmatic and experienced leaders as Hans Morgenthau, George Kistiakowski, George Kennan, and Hyman Rickover, will be inevitable.

October 8, 1982