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World Politics and International Law

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WORLD POLITICS AND INTERNATIONAL LAW. By *Francis Anthony Boyle*. Durham, N.C.: Duke University Press. 1985. Pp. xii, 366. Cloth, \$32.50; paper \$14.75.

This book arouses great expectations. Francis Boyle brings the dual qualifications of lawyer and political scientist¹ to this effort to bridge the gap between the disciplines of international law and international politics;² his work also comes with an authoritative endorsement as "one of the most important books on international law to appear in the last decade."³ All this makes the disappointment even greater. While not without its interesting and provocative passages, *World Politics and International Law* is on the whole a tedious and poorly written book which deserves to be forgotten.

Boyle's ambition is to show the relevance of international law to international politics, specifically to those situations of "high politics" where a state's "vital national interest" is at stake — and where the relevance of international law is most often doubted. This amounts, in large part, to an attack on the "political realist" or "power politics" school of international relations,⁴ represented by such figures as Boyle's undergraduate mentor Hans Morgenthau (whose supposed *volte-face* on the importance of international law and organizations

1. Boyle holds the degrees of J.D. and Ph.D. in political science from Harvard University. He is Professor of Law at the University of Illinois.

2. The book is drawn from the author's doctoral dissertation: F. Boyle, *Realism, Positivism, Functionalism, and International Law* (1983) (unpublished Ph.D. dissertation, Harvard University). Most of it has already been published in various legal journals. See Boyle, *American Foreign Policy Toward International Law and Organizations: 1898-1917*, 6 LOY. L.A. INTL. & COMP. L.J. 185 (1983); Boyle, *International Law as a Basis for Conducting American Foreign Policy: 1979-1982*, 8 YALE J. WORLD PUB. ORD. 103 (1981); Boyle, *International Law in Time of Crisis: From the Entebbe Raid to the Hostages Convention*, 75 NW. U. L. REV. 769 (1980); Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INTL. L.J. 193 (1980); Boyle, *The Law of Power Politics*, 1980 U. ILL. L.F. 901.

3. Professor Richard Falk, Princeton University (quoted on the back cover).

4. Political realists, according to Boyle, believe that

[t]here are no barriers to the acquisitive nature of the nation state beyond its own inherent limitations and those constraints imposed upon it by the international political milieu. Consequently, the analysis of international relations must concentrate exclusively upon the dynamics of power politics and the machinations of that metaphysical entity known as the "balance of power." Considerations of international law do not and should not intrude into such areas.

Pp. 7-8.

shortly before his 1980 death (pp. 70-72) is a focal point of the book⁵) and Henry Kissinger (whom "the American people should deem . . . to be permanently estopped from ever again offering his pseudo-Machiavellian advice on the proper conduct of U.S. foreign policy" (p. 205)).

The international lawyers also come in for attack. After spending much of the first part of the book defending "international legal positivism"⁶ from the realists' charges of naïveté, moralizing, and responsibility for the Second World War, Boyle argues that public international lawyers today have become preoccupied with a "mechanistic determination of the legality or illegality of a proposed or completed course of state conduct" (p. 59). This exclusive focus on right and wrong tends to make of international law little more than a vehicle for the expression of personal opinion or, worse, a figleaf for "the legitimization of conduct by one party to an international dispute" (p. 88).

In place of the realist/political scientist's focus on whether states respect international law, and the positivist/international lawyer's obsession with whether a given action was legal or illegal, Boyle proposes a "functionalist" analysis which examines the functions performed by international law "in time of crisis." Following Part One's discussion of the realist-positivist debate (and the accompanying schism between the disciplines of international law and international politics), Boyle proceeds in Part Two to the heart of his book: a case study of the functions of international law during an international crisis. From this, the author develops a number of "theoretical propositions" about the role played by international law and organizations, with a view

5. According to Boyle, Morgenthau told a Harvard seminar in 1978 that in today's world of nuclear weapons "power politics" could result in the destruction of the human race; the only solution was world government. P. 70. In 1979 he confided to Boyle his belief that nothing could be done to halt the momentum toward nuclear war. P. 73. Do these views really represent an about-face for Morgenthau? In his classic text, *Politics Among Nations*, Morgenthau sounded the same themes of the impossibility of peace without world government and the unlikelihood of attaining world government:

There is no shirking the conclusion that international peace cannot be permanent without a world state . . . [T]here is also no shirking the further conclusion that in no period of modern history was civilization more in need of permanent peace and, hence, of a world state, and that in no period of modern history were the moral, social, and political conditions of the world less favorable for the establishment of a world state.

H. MORGENTHAU, *POLITICS AMONG NATIONS* 513 (3d ed. 1960).

6. [T]he elements of the American legal positivist approach to international relations during its classical period from 1898 to 1917 came to consist of attaining the following concrete objectives: (1) the creation of a general system for the obligatory arbitration of disputes between states; (2) the establishment of an international court of justice; (3) the codification of important areas of customary international law into positive treaty form; (4) arms reduction, but only after, not before, the relaxation of international tensions by means of these and other legalist techniques and institutions; and (5) the institutionalization of the practice of convoking periodic conferences of all states in the recognized international community.

P. 28.

ultimately to constructing a theoretical model and making foreign policy prescriptions.

Boyle has chosen for his case study the 1976 Israeli raid at Entebbe airport (a choice he does not explain). A major problem in this part, and indeed in the entire work, is that the author does not seem to be clear on *why* he is examining Entebbe: Is it in order to develop theoretical generalizations about the role of international law (the stated purpose), or in order to present a critique of U.S. foreign policy? The lack of clear purpose is fatal, for the author repeatedly undermines his theoretical propositions drawn from the Entebbe study with his counter-examples from American foreign policy. For example, Boyle makes much of the fact that the Israeli Minister of Justice was appointed to his country's "crisis management team" in order to ensure that an international-law perspective was presented on an equal basis with other considerations in the decisionmaking process (pp. 92-93, 98). From this Israeli experience he draws the following "theoretical proposition" about the role of international law in time of crisis: "Members of a crisis management team will request the justice minister's opinions on the legality of their proposed courses of conduct, will accept his opinions as correct, and will weigh his opinions together with the diplomatic, military, political, and other factors involved in order to make their decision" (p. 157). Even if one accepts the accuracy of this statement as a description of the Israeli decision-making process, its value as a generalization is largely undermined by the counter-examples Boyle — perhaps unwittingly — presents in his critique of the U.S. policy-making process (pp. 92, 202-03). Granted that the purpose of generalizations at this stage of theory construction is largely heuristic, one must question not only the validity but even the usefulness of such a clearly contradicted generalization — particularly when the author does not even appear to recognize the contradiction.

The problem is not limited to this example. In Part Three, Boyle presents an extensive critique of the "lawlessness" of U.S. foreign policy. Much of what is said there seems to run directly counter to the generalizations drawn from Entebbe, which emphasize the role played by international law (pp. 157-59). These Part Two propositions were to have general application, so as to serve as a first step toward the construction of theory, but one wonders how different they might have been had Boyle drawn them not from Entebbe, but from the Iranian hostage crisis, for example, where he appears to have a quite different view of the role played by international law (pp. 183-203).

Even limited to the facts of his Entebbe case study, some of Boyle's central propositions seem questionable. For example, he purports to have shown that "considerations of international law and organizations do in fact play a crucial role in governmental decision-making processes during times of international crisis" (p. 100). In regard to

the crucial Israeli decision to launch a military raid, Boyle has, if anything, shown just the opposite. He is able to make his case for the role of international law only because of the way he frames the Israeli options. In Boyle's account, Israel had three basic alternatives: (1) not to undertake a military raid; (2) to launch a raid without having brought the matter to the U.N. Security Council; and (3) to take the crisis to the Security Council, at the risk of having to launch a raid while the Council was debating or after it had passed a resolution urging nonrecourse to force (p. 96). The first option, says Boyle, was not viable in view of Israel's central concerns. Option Two was then chosen over Option Three because it "minimized the force of any allegations that [Israel] had violated international law" (p. 96). But was not the really central question whether or not to intervene militarily? Once that decision was made, the question of whether or not to go to the Security Council was a secondary, tactical matter. And Boyle makes clear that the central decision to use military force was based on considerations other than international law: "The physical survival of approximately one hundred Israeli nationals or dual nationals was perceived to be at stake and, with them, the very ability of the state of Israel to ensure its own existence. . . . So the first option was discarded . . ." (p. 97).

Boyle's efforts to generalize from the Entebbe crisis are not wholly without value. Chapter Eight on Security Council "adjudication" of the dispute contains some nice insights on the existence of a fundamental international consensus on essential points beneath surface inability to agree on a resolution (pp. 108-18). Chapter Nine argues that the Israeli-Ugandan dispute following the Entebbe raid was effectively "resolved" by the Security Council's "non-action," which served to legitimize the status quo and break the cycle of violence (p. 124) — although one wonders whether this would have been true had Uganda in fact possessed the means of retaliation against Israel. And the notion that a state's action must fall within a "penumbra of legality" in order successfully to resolve a crisis (p. 161) is suggestive, as is Boyle's discussion of the role of success and failure in the modification of international legal rules.⁷

Part Three is prescriptive. Examining a number of issues in recent U.S. foreign policy — notably the Iranian hostage crisis, the death of détente, nuclear arms control, and crises in the Caribbean and Central America — Boyle urges abandonment of "Machiavellian power politics" as a basis for U.S. policy and reliance instead on the principles of international law and organization. Quite correctly, Boyle points out

7. "A pattern of successful political action creates new legal rules through legitimization of that state behavior by lack of effective political opposition to it. An accumulation of political failures also creates law by generating political pressures to establish legal rules prohibiting the unsuccessful political conduct in the future." P. 134.

that strengthening the role of international law can only serve the interests of a status quo power like the United States (pp. 175, 179). An American foreign policy informed by the principles of international law and organization would promote not only world order, but also the more narrowly defined American national interest.⁸

There is some stimulating material to be found here, notably a provocative legal justification for the Iranian seizure of the American hostages in 1979 (pp. 188-90). Otherwise, however, there is little new in this forceful polemic.⁹ Much as one may agree with Boyle's evaluation of recent U.S. foreign policy, one is forced to ask whether it was necessary to write the entire book to articulate this critique. What Boyle has to say could have been based just as well on a purely political analysis of America's enlightened self-interest, with little reference to international law.

One is left with the impression, in fact, that most of Part Three could have been written without any reference to the rest of the book. Apart from a general notion of the importance and relevance of international law, it is hard to see how Part Three either builds on or draws from what has preceded it. Indeed, the opposite is more nearly true. Not only does much of what Boyle has to say about the role of international law in U.S. foreign policy directly contradict the propositions he has developed in Part Two (see above), but most of his Part Three analysis would seem to be a prime example of the positivist's "obsessive preoccupation with the determination of legality or illegality" (p. 79), which he so strenuously denounces in Part Two as an inappropriate approach for the international lawyer.¹⁰

World Politics and International Law, then, promises much but de-

8. The argument is not a new one. See, e.g., J. PERKINS, *THE PRUDENT PEACE* (1981).

9. A polemical tone is not necessarily inappropriate, but certain elements of style become irritating, such as the incessant use of the phrase "should have." One particularly egregious paragraph uses this phrase no less than eight times. See p. 225.

10. For examples of "positivist" analysis, see pp. 212, 215, 219, 272-73, 283, and virtually all of Chapter 17. In a rare instance where Boyle's Part Two generalizations do inform his Part Three analysis, the result is little short of bizarre. In evaluating the abortive U.S. hostage rescue attempt in Iran, Boyle borrows from the Israeli Entebbe experience to conclude that a "promising initiative" would be to mandate by statute the inclusion of the Attorney General in any crisis management team, so that "international law and organizations would gain their own personal advocate to compete for influence over the formulation of American foreign policy with those leaders advocating reliance instead on Machiavellian power politics." P. 203. In the Entebbe experience, the Israeli Justice Minister's role was, in fact, to assure his colleagues that an international-law justification of their proposed course of action could be constructed. It is hard to see what would be gained by having the U.S. Attorney General, rather than the State Department's Office of the Legal Advisor, provide such fig leaves. And it is difficult to imagine that the Attorney General would in fact be a real "advocate" for international law. Completely apart from questions about the devotion of some recent Attorneys General to any law, international or municipal, there are institutional considerations. Boyle's instinct to look at the decision-making process from a bureaucratic perspective is correct as far as it goes. But since advocacy of the interests of international law and organizations is hardly what the Justice Department sees as its "organizational essence," it is difficult to imagine that the department would devote any significant resources to this effort. Cf. M. HALPERIN, *BUREAUCRATIC POLITICS AND FOREIGN POLICY*

livers relatively little. A "functionalist" approach to international law undoubtedly *could* contribute much to our understanding of the relationship between international law and international politics. Unfortunately, however, one is forced to agree that "[t]he value of this book lies primarily in giving the reader a real insight into several important issues of today that are familiar to most people only from newspaper headlines and television news."¹¹ Boyle surely was aiming higher than this.

— *John M. West*

28-40 (1974). Moreover, having little role in implementing most foreign policy decisions, the Justice Department would have little political weight in the decision-making process.

11. The quotation is from the Foreword by Professor Louis Sohn. P. x.