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THE POLICY-SCIENCE APPROACH TO INTERNATIONAL LEGAL STUDIES

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The task assigned to me by our hosts is that of talking quite casually and informally upon the "policy science" approach to international legal studies. In recent years various specialists have produced a very considerable literature which might be related to a "policy science" approach. I do not profess, however, to be competent, or willing, to speak for all these writers.[1] What I proposed to offer for your consideration is simply a few of the more general ideas in a structure of analysis which Professor Harold Lasswell and I have sought to work out and apply in collaboration with our students in the Yale Law School.[2]

The differences between the policy-science approach which we recommend and traditional theory about international law may, I think, be most economically summarized under five main points, as follows:

> The first relates to the conception of the subject matter of study. International law is regarded not as a mere body of inherited rules but as a continuous process of decision, by authoritative decision-makers guided by community perspectives, within a context of

1. An introduction to this literature, with references, is offered in Lerner and Lasswell (eds.), The Policy Sciences (1951). See also Lasswell and Kaplan, Power and Society (1950); Snyder and Furniss, American Foreign Policy (1954); David Easton, The Political System (1953); Simon, Administrative Behavior (1947); Barnard, The Functions of the Executive (1946); Bross, Design for Decision (1953).
2. An initial formulation was offered in Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 Yale L. J. 203 (1943). More detailed elaboration with respect to international and comparative law is offered in McDougal, "International Law, Power and Policy: A Contemporary Conception," Hague Academy of International Law, 82 Recueil des Cours 137 (1953) and "The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order," 1 Am. J. Comp. Law 24 (1952) and 61 Yale L. J. 915 (1952).

many different social processes which transcend the boundaries of nation-states.

The second involves the range of intellectual tasks regarded as relevant for rational inquiry into this subject matter. The emphasis of a policy-science approach is not merely upon scientific modes of inquiry but upon the integrated and configurative use of many different skills of thought, such as the clarification of goal values, the description of trends in past decisions, the projection of future probabilities, the appraisal of decisions in terms of clarified policies, and the invention of alternatives in rule and institutional practice.

The third relates to the framework of inquiry necessary to the effective performance of these intellectual tasks. A policy-science approach distinguishes carefully between that theory (rules, prescriptions, myth) which is invoked and applied by decision-makers in justification of decision and the very different type of theory which is required by the detached observer for performance of the various policy-oriented tasks in the study of decisions, seeking in the creation of the latter type of theory to formulate concepts which will facilitate the relation of specific decisions, in terms of the variables which affect them and the effects they achieve, to the various social and power processes in which they occur.

The fourth relates to the explicit postulation of the goal values of human dignity in clarifying the policies and practices of international law. A policy-science approach assumes, not that merely one "international law" is possible, but that many different international laws are possible, and recommends to decision-makers confronted with alternatives in policy that they clarify and make the choices most compatible with human dignity in a free and abundant society.

The fifth, and final, point involves the recommendation to scholars of the deliberate use of the postulated goal values of human dignity in deciding what problems are most important and worthy of investigation. The principal emphasis of policy-science, as indicated above and as the hyphenated name is intended to epitomize, is upon policy—that is, upon affecting the choices of patterns of values which decision-makers project into the future—and its recommendation is that all the findings and techniques of contemporary science, as well as the

other relevant skills in thought, be brought to bear in promoting the policies of human dignity in all the world's communities. The urgent role of the scholar is that of clarification and recommendation. The effective performance of this role is indispensable to more rational decision.

Let us now develop, in the order stated, each of these points. We begin with the difference in conception of the subject of inquiry.

It is common knowledge in this group that for many decades, if not centuries, international law has been almost universally conceived as a body of rules governing the relations between nation-states. Illustration is superfluous.

Integral to this traditional conception of international law as a body of rules are of course also certain equally well-known ancillary misconceptions: that there are no objective decision-makers to apply the rules, that such decision-makers as may exist are moved by "political" rather than "legal" considerations, that important disputes between nation-states are not by nature amenable to "legal" settlement, that few, if any, "policies" or "interests" of nation-states transcend their own boundaries and so on.

In recent times, however, there has been a growing dissatisfaction with this conception of international law as a body of rules—a dissatisfaction which extends beyond noting that contemporary transnational processes of effective and authoritative power exhibit many participants other than the nation-state. The traditional conception does not direct attention to many difficult questions.

The type of question left unanswered, and often unraised, by the traditional conception of international law as a body of inherited rules may be indicated as follows: How does one identify the authoritative and controlling rules? Who, by what authority, prescribes what rules, for whom, by what procedures? Who makes recommendations to such authoritative prescribers and upon what intelligence? Who, authorized how, may invoke the application of prescriptions, with respect to whom, in what arenas? Who, for the promotion of what policies, applies prescriptions to whom, by what procedures? Who appraises prescriptions and terminates them when they cease to serve community purposes? By what factors in the environments and predispositions of decision-makers are all the activities and decisions above affected? What is the impact of community process, culture, class, personality, crisis, and so on, upon the expectations of decision-makers?

It is, therefore, becoming increasingly recognized that what students of international law are concerned with is not a mere body of rules but a process of decision, and a process of decision taking place within the context of a larger community process.

Perhaps the easiest way to clarify this emerging conception of international law as a process of decision is to begin with the context of community process, the context which presents the events to which decision is a response, which conditions decision and receives the impact of decision. The community process to which we refer is that of individual human beings interacting across the boundaries of nation-states. From the perspective of anthropologist, or of the much over-worked little man from Mars, one may observe that individual human beings interact across national boundaries in both organized and unorganized forms. Sometimes the individual acts through the form of, or plays organizational roles in, the nation-state, but at other times he may play roles in and exercise influence through international governmental organizations or political parties or pressure groups or private associations of the greatest variety, such as churches or business associations. Sometimes, further, a particularly gifted or endowed individual may be observed to act as a total personality, playing for his own purposes many different roles in many different organizations. The values sought by the individual and his groups in these interactions may cover the whole gamut of human demand—power, wealth, enlightenment, respect, well-being, skill, rectitude, affection, and so on. The values which the individual and his groups may employ to influence outcomes in particular interactions may cover an equally broad range. The particular practices adopted by the individual and his groups to affect outcomes include all those commonly characterized as diplomatic, ideological, economic and military and such practices may be combined in many different modalities, ranging through a spectrum from maximum persuasion to maximum coercion. The effects of any particular interaction upon the values of the participants or others may be confined to a locality or a region or may extend to a continent or a hemisphere or even to the globe. The perspectives of the participants in any given interaction may, further, include expectations that any decisions made will be made with varying degrees of deference to authoritative community policy, from minimum to maximum or somewhere between.

In describing interactions across national boundaries as "community process" it is not our intention to pass judgment

upon the degree of intensity of these interactions. The only reference we make is to the facts of interaction (in Professor Wright's apt words, "fields of interaction") and to the consequent interdetermination of values. In conventional literature it is greatly debated whether the globe today presents a "world community" or a "world society," with the positions of adversaries being determined largely by the definitions of "community" and "society" offered and with very little actual inquiry into the degree to which the peoples of the world in fact cherish common demands, expectations, and identifications. When, however, the rising common demands of people about the globe for many different values are noted, and when account is taken both of peoples' increasing interdependence with respect to these values and their increasing consciousness of such interdependence, it seems suggestive of at least mild disorientation to assert that there are few "common interests" which today transcend national boundaries. Both the process of power balancing which has characterized the world arena for several centuries and that great host of new-born international governmental organizations bear explicit testimony not only to interaction, but to common interest.

Let us now look more closely at the interactions in which the perspectives of the participants include expectations that decision will be taken with some deference to authoritative community policy. The recent book by Mr. Halle, mentioned by our Chairman this morning, offers excellent popular exposition of the important role that such perspectives of authority, transcending in varying degrees the boundaries of particular nation-states, play in the world power process. A more systematic presentation might be somewhat as follows.

The process of transnational interactions, the world community or social process, continually exhibits certain participants as depriving, or threatening the deprivation of the values of other participants, and both sets of participants, threatening as well as threatened, appealing to processes of authority, transcending themselves, to facilitate or restrain the deprivation. Comprehended in these processes of authority one may observe a wide variety of policy functions being performed.

Nation-state officials, officials of international governmental organizations, representatives of political parties, pressure groups, and private associations, educators, operators of mass media of communication, and so on, are continuously gathering, processing, and disseminating information for the enlightenment of the prescribers and appliers of policy.

All the above-mentioned and others are continuously recommending specific policies to the authoritative prescribers and appliers. The increasing role of officials of international governmental organizations is notable.

Both nation-state officials and officials of international governmental organizations are continuously formulating broad, general policies with respect to events transcending national boundaries in their effects and projecting such formulations into the future as authoritative community prescription. The specific practices by which such formulations are authoritatively projected include both explicit agreement and what is ambiguously called "custom," a complex process of reciprocal claim and mutual tolerance. In this latter form, much prescription is of course formulated by the decision-makers of particular controversies, who make and project policy as they apply it. Excellent example is offered by the Norwegian Fisheries Case,[3] where the International Court of Justice, having neither explicit agreement nor prior uniformity in claim and tolerance as sources of policy, drew, as authorized by its Charter, considerations of equity, principles of civilized law, and a variety of other variables. The prescriptions so projected by this process of agreement and custom both establish certain authoritative decision-makers and delineate the authoritative policies which are expected to guide decision. The policies so delineated include authoritative rules with respect to every claim and activity in transnational interaction. Such rules purport to prescribe what participants shall be admitted to what arenas for performance of what policy functions, how participants may establish and stabilize their claims to bases of power (resources, people, institutions), what practices in the range from persuasive to coercive among the diplomatic, ideological, economic, and military instruments are permissible or impermissible for the shaping and sharing of values, and what effects in terms of control over particular value changes and over the activities of other participants are permissible or impermissible for each particular participant.

Each participant in the world social process may be observed to have, in turn, access to certain arenas for the purpose of invoking the application of authoritative prescription. Though some arenas, such as international courts, may be restricted to nation-state officials or the officials of international governmental organization, still other arenas, such as national courts, are open to all participants, including the non-governmental groups and the individual human being.

3. The Anglo-Norwegian Fisheries Case 1951 I. C. J. Reports 116.

Both nation-state officials and officials of international governmental organizations are, similarly, continuously engaged, in response to invocation by all participants, in the process of applying authoritative prescriptions to specific situations or to the settlement of specific controversies. The notion that there is no objective decision-maker in international law, or that there is no international law because each nation-state makes and applies its own policy, simply belies the facts. External to any particular nation-state, and sitting in judgment upon it, are all the other nation-states and all of the officials of international governmental organizations, as well as the other effective participants in the world power process. The further notion that there are no "sanctions" for international law is equally erroneous. The appliers of authoritative prescription have at their disposal for securing conformity to application all those bases of power, including control over resources and people, and all those instruments of influence (diplomatic, ideological, economic, and military), which are otherwise at their disposal in effective interactions.

Both nation-state officials and officials of international governmental organizations may be observed, finally, in a constant process of appraising and terminating authoritative prescriptions when such prescriptions cease to serve policy purposes. The procedures for such termination are much the same as for initial prescription, with both agreement and unilateral application of "custom" playing major roles, but guiding prescriptions are different and international governmental organizations are beginning to serve an ever-increasing part in easing the shock of transition from old to new policies.

The contrast we make with these situations in which the perspectives of the participants include expectations that decision will be taken in accord with authoritative community policy is, of course, in terms of those situations in which the expectations of the participants are that decision will be taken with minimum deference to authority. In our imperfectly organized world arena, situations not infrequently recur in which the participants expect that a decision will be taken, in the sense that severe deprivations or the threat of such deprivations will be marshalled in support of demands, but that such decision will be affected by coercion or violence in disregard rather than support of world authority and order. Such decisions may be controlling but they are no commonly regarded as authoritative. In such contexts any asserted authority becomes but pretended authority.

This distinction between decisions taken in accordance with

authority and those taken by exercise of effective power in disregard of authority may now enable us to clarify and sharpen our conception of international law. When effective power is not at the disposal of authority, authority is not law but illusion. When authority is not the guiding policy of effective power, the decisions made effective are not law but tyranny or "naked power." The conception of international law that we recommend is, accordingly, that of the process of decision in the world arena, a part of the total world power process, in which authority is conjoined with effective control—in other words, that part of the world power process in which decisions are both authoritative and controlling. It is only when we thus explicitly focus attention upon patterns in decision of both authority and control that we achieve a conception of international law adequate to guide and facilitate the type and scope of investigation that our times require.

With this brief clarification of a recommended conception of international law, we come now to our second principal point in distinguishing a policy-science from traditional approaches to international legal studies: the consideration of the intellectual tasks regarded as relevant, or even indispensable, to the effective study of the authoritative and controlling decisions so brought within our field of interest.

The various possible intellectual tasks which a scholar might wish to perform with respect to such decisions may perhaps be most economically categorized as follows:

First, one may seek simply to describe trends in past decisions. Description in terms of trends, description which will permit comparisons through time and in terms of different decision-makers differently located in community structures of authority, must, of course, extend beyond mere reporting of the anecdotal features of decisions to careful categorizations of the events (value changes between participants) to which decisions are a response and of the effects of decisions upon the values of participants.

Secondly, one may seek by scientific study to account for the variables which affect or determine decisions. Such study, if it is to be consequential, must obviously bring many skills and disciplines to bear in inquiry with respect to a great range of environmental and predispositional factors such as the factual claims put forward by the parties, the technical legal doctrines invoked, the policy formulations argued, the attitudes, class, skills, personality, and affiliations of decision-makers, the number and disposition of different participants in the world and lesser arenas, the intensities in expectations of violence, and so on.

Thirdly, one may seek to project patterns into the future and to forecast what decisions will be. When appropriately disciplined by scientific knowledge of conditioning variables and by appreciation of the rate of change of such variables in the world and lesser arenas, such anticipations of the future are not likely to have much in common with simple-minded extrapolation of past decisions.

Fourthly, one may seek to clarify policies with respect to decisions and to state preferences about what future decisions should be. Particular past decisions, or trends in past decisions, may be appraised in terms of conformity to postulated goal values and detailed preferences and, when discrepancies are observed, recommendations may be made of future patterns of decision more in conformity with projected demands.

Fifth, and finally, one may undertake the task of inventing and evaluating new alternatives in rule and institution, in prescription and practice, for the more effective promotion of recommended policies.

It is not, of course, our intent to suggest either that there is anything novel in this itemization of intellectual tasks or that contemporary scholars do not attempt, with varying degrees of success, to perform each and all of these tasks. Our contention is merely that traditional approaches to international legal studies, by certain simple confusions in thought and theory, cause all of these tasks to be performed badly, with corresponding disadvantage to community policy.

The all-pervasive confusion in traditional theory begins with its failure to distinguish the very different perspectives of the detached observer and of the decision-maker and, hence, the further failure to distinguish the theory necessary for inquiry about decisions, from the authoritative myth which decision-makers apply in the course of decision. The assumption common to all traditional approaches is that the same technical formulations can perform at one and the same time all of the intellectual tasks indicated above: the rules, principles, standards, or prescriptions distilled by scholarship are put forward as competent uno ictu to describe what decision-makers have done in the past, to predict what they will do in the future, and to prescribe what they ought to do. The result is a body of theory which both focusses in excessive degree upon the policy function of applying prescriptions, in relative disregard of all the other important functions indicated above, and exhibits itself as composed of highly ambiguous and contradictory statements, making simultaneous reference with indiscriminate abandon to the facts to which decision-makers are

responding, to the policies invoked before decision-makers, and to the particular responses of decision-makers which are sought to be predicted or justified.

The epitome of this confusion is found in the common insistence that the principal and distinctive task of legal scholarship is simply to ascertain and state "what the law is." Freed from any reference to decision-makers located in a context of community and time, "what the law is" shifts uncertainly and bewilderingly back and forth among "what the law was," "what the law will be," "what the law ought to be," and "how the law ought to be changed." For example of this commingling and confusion of intellectual tasks in the observation of decisions, we offer a selection from Sir John Fischer-Williams:

> Our standpoint is thus to treat the study of law in the great international society as a factual study. On this view the question to be asked is: "What at the given time are the rules which the determining authority of a society ... considers proper for enforcement?" This is a question of fact. What is the existing law, sometimes called in Latin lex lata? We do not ask what rules might properly be derived from general principles and would if accepted be productive of peace, order and good government—the general aims of law—(what, to use a Latin expression again, is the lex ferenda?) but what in fact at any given time are the rules which are actually recognized as law.[4]

The briefest recall of traditional theory, with all its normative-ambiguity in concept and complementarity or bipolarity in rule, should quickly dispel any notion that the tasks of legal scholarship can be so simplified. In the most comprehensive constructs of public international law, it may be remembered, appropriate "subjects of international law" (nation-states, international governmental organizations) are paired against "non-subjects" (individuals, private associations, political parties, pressure groups), "sovereignty," "independence," "equality," and "domestic jurisdiction" against "international concern," "world order," and "collective security", "aggression" and "intervention" against "self-defense" and "police action", and "military necessity" against "humanitarianism", "violations of the law of war" against "reprisals", "reprisals" against "proportionality", pacta sunt servanda (agreements must be honored)

4. Williams, Aspects of Modern International Law (1939) 8, 9.

against rebus sic stantibus (but not if conditions change), "freedom of the seas" against "contiguous zones" and "territorial sea", "change of government" against "change of state", and so on. Similarly, in so-called private international law, with respect to the claims of nation-states to "jurisdiction," to the power to prescribe and apply policy in particular interactions, justifications in terms of "territoriality" may be opposed to justifications by "nationality," or "passive personality," or "protection of interests," or "universality," and vice versa, and any or all of these justifications may be countered by claims to reciprocal tolerance or deference under the labels of "immunity" or "act of state." It should require little demonstration that theory so formulated makes but darkening reference to the events that precipitate decision, the variables that affect decision, and the values affected by decision and, hence, can make but modest contribution to, much less perform simultaneously, the intellectual tasks of describing past decisions, of predicting future decisions, and of relating decisions to fundamental community policies.

It is the aspiration of a policy-science approach to escape this traditional confusion, so disastrous for the study of decisions and community policy, by formulating theory and devising of techniques of investigation which will promote the deliberate, integrated, and configurative use of all the necessary skills of thought in bringing all the intellectual resources of the modern world to bear upon the urgent problems of our time.

This brings us to our third principal point, the indication of a framework of inquiry recommended for promoting the more effective performance of the various intellectual tasks.

The broader outlines of such a theory are implicit in what has been said above about transnational interactions and processes of authority and in criticism of traditional approaches. In most general statement the necessary theory must, after appropriately distinguishing the perspectives of the detached observer from those of the decision-maker, offer ways of talking about transnational social and power processes sufficiently comprehensive both to subsume authoritative language and decisions among the phenomena to be investigated and to locate such decisions and language in particular social and power processes with sufficient precision to facilitate performance of all the indispensable intellectual tasks.

For describing the transnational interactions which both precipitate and are affected by authoritative decisions, a policy-science approach suggests the deliberate use of both "value" and "institutional" terms. In highest abstraction, a social process

may be described in terms of people seeking to maximize values by applying institutions to resources. Values refer to demand relations between human beings and, for purposes of the widest geographical coverage, we have suggested categorizations under the eight headings of power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude. Any other categorizations would, however, serve equally well if operational indices of sufficient precision are offered to permit translation of equivalences in reference. Institutions are the detailed patterns of practices in persuasion and coercion by which values are pursued. Any particular value process may, accordingly, be described, with whatever degree of refinement necessary, in terms of participants in the process (individuals and groups specialized to the particular value), situations of interaction in which the value is deemed at stake, bases of power brought to bear to effect outcomes in such situations, the particular practices in persuasion and coercion employed, and the effects of outcomes upon the values of the participants and others. The totality of world, or any lesser community, social process might thus be described in terms of a series of interrelated value processes: a power process, a respect process, an enlightenment process, a wealth process, and so on with the power process being affected by and in turn affecting all the other social processes. The greater the degree of both comprehensiveness and detail achieved in such description, the more effective would be performance of the various intellectual tasks in the study of decisions, but policy purposes might be measurably served by achievement somewhat less than perfection, even by a clarification of the facts of interaction and legal technicality which merely consistently keeps at the focus of attention the distinctions between precipitating events, authoritative response, and the effects of response.

For the detailed description of power processes, the processes of direct professional concern to international lawyers, the mode of analysis we recommend parallels that suggested for any other social process. When power is conceived not simply as naked force but as a coercive relation between human beings in which some are able, by threats of severe deprivations or promises of high indulgence, to make and enforce for others choices affecting the distribution of values, inquiry must extend comprehensively to the interacting participants, who make power demands upon each other, to the situations or arenas of interaction, in which they expect decisions to be taken, to the particular base values upon which the participants premise their threats of severe deprivation of promises of high indulgence, to the particu-

lar practices, tactics and strategies, in the management of base values, by which the participants seek to exercise their influence and, finally, to the effects, particular and general, that are achieved by decision upon the values of the participants and others.

In application of this general analysis to the world power process, considered as a whole,[5] we have recommended that participants may be conveniently and realistically characterized as "nation-states" and their dependent units (territorially organized bodies politic), international governmental organizations, transnational political parties, transnational pressure groups, transnational private associations, and individual human beings. It is obvious that all the participants so categorized both interact in the various world social processes to which authoritative and controlling decisions are response and play important roles, though differing in modality and degree, in the various functions by which policy is prescribed and applied in the making of such decisions.

For describing the arenas in which such participants demand and shape and share power, it is convenient, as has been indicated above, to distinguish different types of arenas in terms of varying degrees of expectation of decision in accordance with community authority. In some arenas, the arenas of naked power, the expectations of participants are that decisions will be taken with minimum, if any, deference to authoritative community prescription. In other arenas, those afforded by the structures of national and international government, expectations are that decisions will be taken with varying degrees of deference to community authority.

The bases of power at the disposal of different participants in the world power process may be usefully described in either value or institutional terms. It may easily be observed both that any value may on occasion be at the disposal of any participant and that appropriate study of decisions may require categorization of detailed institutional practices in controls over people and resources for power purposes.

The general practices by which the participants in the world arena engage each other in effective interactions may be economi-

5. A fuller exposition of the mode of analysis recommended for describing the world power process is offered in the Hague Academy lectures referred to in Note 2 above.

For comparable modes of analysis, see Schwarzenberger, Power Politics (2d ed., 1951) and Strausz-Hupe and Possony, International Relations (1950).

cally categorized, as in much contemporary writing, as diplomatic (deals and agreements), ideological (appeals to mass audiences), economic (manipulation of goods and services), and military (management of instruments of violence). To such categorizations of practice in effective interaction, must of course be added modes of describing the practices in formulating and applying community policy (commonly referred to as legislative, executive, administrative, and judicial), which we have called policy functions. The categorization we recommend, in an effort to escape the ambiguity of the traditional terms of institutional description, is, as was illustrated above, in terms of the functions of intelligence, recommending, prescribing, invoking, applying, appraising, and terminating.

The effects achieved by participants in their interactions may be described in terms of impact upon all their values. Short-term effects include changes in particular value distributions and long-term effects may include structural changes in participants and arenas.

It is this broad framework of analysis which we propose for the more detailed investigation of each and all participants and their interactions. With respect to each participant, such investigation must entail a whole series of related enquiries: What specific factual claims does this participant make to effective interaction in the various world social processes? How in the past has community authority been prescribed and applied to such claims? What have been the significant conditioning factors? What are likely to be future trends in decision? How compatible are past and probable future trends in decision with clarified policies? What alternatives in prescription and practice may be suggested and established? And so on.

The kind of detail called for by "factual claims to effective interaction" may perhaps be indicated by brief reference to the "nation-state" as participant. For initial inquiry into the role and regulation of "nation-state" some of the appropriate questions might be: What territorially organized bodies politic does the world arena exhibit? How are these bodies politic related to each other in terms of degrees of independence and dependence in fact? What bodies politic claim admission to what arenas of effective control and formal authority? Over what bases of power, resources and people, do what bodies politic make what continuing claims to what control? By what practices, diplomatic, ideological, economic, and military do these bodies politic claim to shape and share values? By what particular practices do these bodies politic claim to participate in the various functions involved in the

formulation and application of community policy to all interactions? What claims do these bodies politic make to prescribe and apply policy in reference to particular value changes occurring both within and beyond their boundaries? And so on.

From the perspective of this orientation in the facts of interaction, with contending claimants identified and their claims described in any necessary degree of precision, inquiry might rationally proceed to how community authority has in the past been prescribed and applied to such claims. Decision-makers might be identified and comparisons might be made through time of how different decision-makers, variously located in national and international structures of authority and affected by various environmental and predispositional factors, have prescribed and applied different policies and have accepted or rejected different technical doctrines. By such study an observer might obtain insight into how the different decision-makers, so variously located and affected, have employed the traditional technicalities of "nation-state," "subjects of international law," "domestic jurisdiction," "sovereignty," "self-defense," "nationality," "territoriality," and so on, for the promotion of various policies in context, which would greatly facilitate performance of the preferential and alternative-inventing intellectual tasks of policy oriented inquiry.

A relatively brief illustration of how this general framework of inquiry may be applied to a particular problem is offered in the article on The Hydrogen Bomb Tests in Perspective,[6] which has been referred to by other speakers. For purposes of appraising the "legality" of the hydrogen bomb tests, an associate and I sought both to categorize the factual claims made by effective participants to the use of the oceans of the world and to explore the responses of authorized decision-makers to such claims in the prescription and application of community authority. The factual claims we found to range from the comprehensive continuous claims to practically all competence within the "territorial sea," through less continuous and more limited claims to navigation, fishing, and cable-laying upon the "high seas," to relatively temporary and limited claims to exercise authority and control for such purposes as security and self-defense, enforcement of health, neutrality and customs regulations, conservation or monopolization of fisheries, the conducting of military exercises, and so on. Examining how the authoritative decision-makers of the world community had in the past resolved conflicts between

6. McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 Yale L. J. 648 (1955).

such claims, we observed that they had elaborated a comprehensive body of technical doctrine, known as "the regime of the high seas" and composed of two complementary sets of prescriptions: the one set, generally referred to under the label of "freedom of the seas," being formulated and invoked to honor unilateral claims to navigation, fishing, and cable-laying and the other set, referred to by a wide variety of technical terms such as "territorial sea," "contiguous zones," "jurisdiction," and "continental shelf," being formulated and applied to protect all that great variety of claims, both comprehensive and particular, which may interfere, in more or less degree, with navigation and fishing. The over-riding policy infusing all these decisions we found to be that of promoting the fullest, peaceful, and conserving use of a great common resource, and authoritative decision-makers were observed, in implementing this policy, to regard technical prescriptions and concepts not as inelastic dogmas but rather as flexible policy preferences, opening up all specific controversies for the explicit consideration of all factors affecting reasonableness. From this perspective, we did not find it difficult to affirm the protection of free world security as more reasonable than the precluding of certain relatively minor interferences with navigation and fishing.

Our fourth principal point, in distinguishing a policy-science from traditional approaches to international law, relates to the explicit postulation of a set of goal values for the purpose of appraising decisions. The making explicit in full detail of the values affected by decision may both enable the authoritative decision-maker to increase the rationality of his choices and afford the holders of effective power a more rational basis for their determinations of whether to maintain or remove particular decision-makers or to continue or discontinue particular structures of authority. Historic formulations in terms of the "realization of justice" or "maintenance of public order" are at simply too high a level of abstraction and are too primitive to afford adequate guidance to decision, such formulations can be employed, and have in fact too often been employed with the greatest variety in meaning, to refer to the consistent application of any value system, even one of human indignity. For decision-makers, authoritative or effective, to seek to relate inherited prescriptions and procedures in detailed effects to fundamental contemporary community policies is not an expression of arbitrariness or caprice but rather of appropriately disciplined responsibility.

The values we recommend for postulation are, of course, those which are today commonly described as the values of hu-

man dignity in a free and abundant society. For some two centuries, despite well-known counter-currents, the world arena has exhibited a growing unity and ever increasing intensity in the demands of people everywhere for a wider sharing of all the values which we have categorized in terms of power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude. The evidence of this growing unity and intensity of demand is broadcast in both national and international formulations of authority, including the United Nations Charter, the Universal Declaration of Human Rights, the proposed covenants on human rights, the regional agreements, other existing and proposed international agreements, and in national constitutions, political party platforms, and private group programs of widest distribution in space and time. Though the demands being expressed through all these many different sources are still formulated at many different levels of abstraction and with little systematic ordering, their trend and direction in demand for fundamental relationships between human beings are unmistakable, and the intellectual tools are at our disposal for ordering and elaborating such demands in all necessary degrees of generality and specificity for clarifying an international law of human dignity.

It is sometimes objected by critics of this postulation of the goal values of human dignity that we overestimate the degree to which the peoples of the world today do in fact subscribe to such values.[7] It is urged by such critics both that even in the free world different peoples pursue basic values by very different institutional practices and that in much of the world dominant elites do not demand or even permit sharing of basic values. To the first point it may be answered that an international law designed to promote human dignity and freedom can tolerate, even encourage, the greatest variety and nuance in detailed institutional practices in different communities and cultures when the over-riding goal of the wide sharing of basic values is secured and protected by the authoritative and controlling decisions of a more inclusive community. To the second point it may be answered that the strong counter-currents in the world today against human dignity merely increase the urgency and magnitude of the task confronting those who prefer the values of human dignity. With full awareness of the pall on the horizon of man's future on this planet caused by the continuing cleavage in the world community and the concomitant tragic expectations of violence, it is our responsibility as scholars—as the advisors and critics of those who are more fully

7. See Northrop, "Contemporary Jurisprudence and International Law," 61 Yale L.J. 623 (1952).

engaged in making or registering the decisions of our time—to concern ourselves with the world arena as a whole and to seek not only to clarify and recommend practices of human dignity but also to originate the detailed institutional arrangements and proposals capable of enlisting the effective support necessary to their adoption and application at particular times and in particular contexts. It is clear that because of developments in the instruments of destruction and all technology and because of the increasing interdependences of peoples, whatever their present values and identifications, the world arena will be increasingly ordered by authoritative prescriptions and procedures. Such prescriptions and procedures may incorporate and implement the values of human indignity or of human dignity, in every decision such choice must in varying degree be made. The only rational action for scholars committed to the values of human dignity is, therefore, to bring to bear all the intellectual resources of the modern world for securing the incorporation and implementation of such values. If cooperation in such enterprise cannot be obtained on a global scale, it may be sought in the half-world, in the hemisphere, in the region, in the nation, or even in lesser areas. If "universality" be a dream, at least the beaches remain: it may be recalled that some of the most influential innovations in world institutions have taken place first on a limited or regional scale, from which they have won their way into the life of other areas, and eventually into more universal acceptance. The United States is today an official participant in a large interlocking and mutually influencing network of transnational organizations and activities, which owes much to the vision, ingenuity, and even tenacity of our predecessors and contemporaries. In the future as in the past we can nurture every flame of sentiment or interpretation of interest which in our best judgment affords opportunity of advance toward reducing the precariousness of perpetual crisis and bringing into existence a greater security for freedom.

The clarification of an international law of human dignity, in the sense that we suggest, would of course require continuous application by appropriate specialists of all the relevant skills of thought and techniques of investigation within some such detailed framework of inquiry as we have proposed. It might, however, be anticipated that such clarification would suggest a great many changes in inherited prescriptions and procedures. Recommendations might, for example, include such items as the more realistic categorization of authoritative participants, with less emphasis upon the "nation-state"—"no-nation-state" dichotomy

and with the admission of many functional groups and individuals to many new arenas, the creation of many new arenas of authority for the performance of many policy functions, other than application; the stabililizing of the claims of territorially organized communities to resources on clearer regional lines, the internationalization of the remaining unappropriated resources of the universe, and the increase of individual freedom of choice with respect to membership in communities, and movement from community to community; improvement in procedures for administering community prohibitions of coercion and violence and for performing all the various policy functions in the prescription and application of authority, extension of the traditional prescriptions about "jurisdiction," embodying merely mutual tolerance between nation-state officials, to multilateral and broad functional programs for the positive promotion of all particular values; and so on.

The fifth, and final, principal point we would make in characterizing a policy-science approach, that scholars should keep in mind their postulated goal values when deciding what problems to investigate, may appear anti-climactic but it is important. Skilled personnel and resources for inquiry into international law are scarce and require wise allocation. It may be recalled that our law schools in the 1930's poured very considerable resources into "factual" investigations which proved relatively fruitless because investigators had neither criteria of importance to guide them in their search for "facts" nor standards to appraise what little they learned. Our common anecdotal inquiry under traditional doctrinal headings has yielded no greater enlightenment. Even in this conference we will probably have opportunity if we have not already had it, to see alleged problems kicked about somewhat futilely and inconclusively because discussants had no framework for relating problems to each other or clearly articulated values for appraising the consequences of decisions. It is only, we would recapitulate in conclusion, by the explicit postulation of the goal values of human dignity and by the systematic and continuous employment of all the relevant skills of thought and inquiry that legal scholars can hope to rise to their contemporary responsibilities, release their creative potentialities, and make their appropriate contribution to clarifying and recommending an international law of human dignity, for a free and abundant society in the accessible world.

COMMENT

PROF. OLIVER J. LISSITZYN (Columbia University). It is quite clear that the approach to international law just outlined for us by Professor McDougal is an outgrowth of the great tradition of American legal realism. As a matter of fact, the policy science approach may be regarded as an attempt to organize and develop the insights of the legal realists into a coherent and explicit system within the conceptual framework of a particular model of the political process—that developed by Professor Lasswell—dispensing with the impressionism, the indirection, and even the whimsicality that have characterized many of the presentations of the realist ideas in the past. This raises two questions: (1) Is it desirable to systematize at all? (2) Is it desirable to systematize within the particular framework chosen by Professor McDougal?

American lawyers regard with suspicion all attempts to construct comprehensive systems. What they usually have in mind in this connection is the kind of system familiar in analytical jurisprudence—an attempt to construct an elaborately organized, internally consistent scheme of legal doctrines and deductions purporting to explain all legal phenomena in terms of legal logic.

Professor McDougal's system is of a different type. It purports to clarify the role of law as an institution in the political processes of mankind. If law is to be integrated with the social sciences, as I strongly believe it must and will be, systematization in the framework of the concepts of the social sciences seems essential. Unfortunately, within the social sciences themselves, there is as yet no generally accepted concepted framework. The Lasswellian model chosen by Professor McDougal is one of several systems struggling for recognition. There is no time today to go into any extended critique of this model. I think we must recognize, however, that the seeming novelty and difficulty of Professor McDougal's ideas tend to be magnified by the strangeness to most of us of the Lasswellian terminology he often employs, and the semantic shifts it involves. Perhaps he should be more generous in translating this language into more familiar terms for the benefit of the uninitiated.

In this connection, it is interesting that in Professor McDougal's discussion of the lawfulness of the H-Bomb tests in the Pacific, in his recent, truly excellent article, the criterion that emerges is one of reasonableness. Now this is a very familiar concept to all of us. In fact, if one reads the reputedly

conservative and positivist treatise of Hyde, one comes time and again across this criterion being employed to appraise various doctrines and claims.

It also seems to me that the Lasswellian framework has some gaps. For example, I do not think that it ever comes to grips with the problem of the differences in the hierarchies or orderings of values, and with its significance for the decision-makers and the subjects of the law. Whether the systematization attempted by Professor McDougal is, on balance, desirable or not, it does offer the advantages of an explicit model, a logical structure. It presents opportunities for further rational analysis and, as a result, for the enhancement of our understanding of the law and its relation to the world political process.

A problem that merits further consideration is the place of formal prescriptions or doctrines in the law. As I see it, the policy science approach, as it stands today, does not logically exclude either an emphasis on the application of prescriptions or doctrines in the interest of stability and uniformity, or an emphasis on getting the desired results in particular situations with prescriptions or doctrines relegated to a very modest role. The choice would depend on the perspectives and values of the decision-maker. Furthermore, there is always the danger, which I am sure Mr. McDougal recognizes, of the policy science approach being misused to serve arbitrary, subjective value preferences.

All of this, it seems to me, points to the need of further clarification through rational and, if possible, empirical investigation of such problems as the following: How important is apparent adherence to prescription or doctrine in the maintenance of the authority and dignity of the law? Is explicit subordination of prescriptions and doctrines to policy considerations likely to undermine this authority? Is such subordination likely to weaken, even among lawyers what has been called the law habit, and if so, is this good or bad? How far can prescriptions be manipulated without losing their quality as symbols of legitimacy? Furthermore, is the explicit identification of law with policy, or its use as an instrument of policy, likely to weaken its role in inhibiting arbitrary conduct on the part of the decision-makers? To be very blunt, is it possibly another step on the road to "1984"? Are prescriptions and rules an important psychological block in the way of arbitrariness, a block on the road to "1984"? If so, and if the prescriptions and doctrines are explicitly subordinated to other considerations, what specific values, perspectives, and habits must be cultivated to take their

place in the minds of the decision-makers, the elites, and the masses? In short, what symbols of legitimacy need to be developed?

Is the standard of human dignity as offered by Professor McDougal adequate? Or, on the contrary, as Professor McDougal no doubt would maintain, is the frank disclosure and discussion of factors other than the formal prescriptions that enter into the decision-making likely to enhance rational understanding of the realities involved, and thereby prevent or minimize the misuse of formal prescriptions for improper purposes? I ask these questions bluntly, because I do not think they should be passed over or dismissed lightly. They are the very heart of the problem of the role of law in our society.

In this connection, we must note that the policy science approach has so far been expounded primarily from the viewpoint of the decision-maker. In this, it has shared the tendency of the legal realists to over-emphasize the individual decision and also the law as an institution for the settlement of conflicts and disputes, with the concomitant tendency to minimize the importance of uniformity and predictability. Yet, as Professor Bishop has so well put it: "The application of any system of law, and above all of a customary law, finds its greatest place in action taken according to its rules and principles rather than in litigation or the settlement of controversies which have arisen between parties... Daily reliance upon international law in the normal relations between states far exceeds in frequency, and probably in importance, its role as a basis for settlement of differences."

It would follow that more attention should be paid to the implications of the policy science approach for the subject of the law, including here most emphatically the private individual and his legal adviser, and also for the legislator including here the treaty maker and such a body as the International Law Commission, attempting to lay down rules of conduct to be followed in the future.

Again, Professor McDougal has tended to stress in his studies of specific problems, such as the veto in the United Nations, or the H-Bomb tests, situations of conflict, particularly those of the cold war. More attention, it seems to me, should be paid to the functions of law in preventing conflict and facilitating co-operation. Here mutual trust and good faith are very important, particularly so since international law has no centralized organs for enforcement.

Again, there is much room here for empirical study of the operation of law in society, of such problems as the actual im-

portance of predictability and uniformity in various types of situations, conflict and non-conflict, and the reliance actually placed on the effectiveness of prescriptions or doctrines by the subjects of the law and their legal advisers, and by the legislators.

Perhaps I am misinterpreting Professor McDougal in thinking that his stress on the effectiveness of law leaves little room for consideration of still another role of international law, its role as a symbol of rectitude to which appeal is made in situations of conflict even where effective decisions cannot be made. We may deplore the use of legal symbols and prescriptions for propaganda purposes, but we must nevertheless recognize and study it as a reality.

It all boils down to this: before we let any system purporting to explain the role of law in society, including the world community, jell, we must know much more than we do about the impact of law and legitimacy on the human mind and human behavior under various conditions. This can be accomplished only by an extensive program of empirical studies.

Recognizing, as we must, the valuable contribution of the policy science approach to our perspectives, and to our understanding of the nature of law and its social significance, we must ask ourselves whether or not it is a culture-bound phenomenon, as suggested with reference to American legal realism, by Professor Northrop.[1] That such typical American conditions as the character of our legal system, the relative harmony between the rulers and the ruled in an open society, the generally optimistic and pragmatic outlook of Americans, and perhaps the prominent role played in our official and business life by the legal adviser or the general counsel, have all facilitated the rise of the policy science school, cannot be doubted. But trends of thought somewhat similar to our legal realism have appeared in other countries as well. I should particularly like to mention in this connection, some Scandinavian legal thinking, which is too little known in this country, and the recent book by de Visscher. Even existentialism has been drawn upon by the Danish writer George Cohn to challenge the traditional conceptualism of Continental law in a manner reminiscent of some legal realists. Finally, we must note the plain fact that there are similarities as well as differences between American legal realism and the Soviet conceptions of law.

Time does not permit me to elaborate on the evident significance of the policy science approach for legal education, which

1. Northrop, "Cultural Values," in Kroeber et al., Anthropology Today (1953), 668.

has already been much commented on. Clearly in international law as in other fields, this approach requires that law schools pay explicit attention not only to the prescriptions and doctrines, but to all other factors, political, social, economic, psychological, that enter into decision-making. There may be considerable practical difficulties, however, in fitting an adequate amount of instruction in these fields into the law curriculum. I doubt that this problem, in all its magnitude, has been fully solved anywhere as yet.

All in all, Professor McDougal has presented us with a challenging and fruitful system of concepts, which we can ignore only at our peril.