

REALISM INTRUDES: LAW, POLITICS, AND WAR

*Lynn N. Hughes**

[R]ationality is rule-observance, consistency, like treatment of like cases. Unless an authority, an organisation, . . . is rational in this sense, we feel rather helpless in the face of its unpredictability, its caprice.

Ernest Gellner¹

IF THERE MUST be people, there will be politics. Some politics is converted through strict processes into law. Some politics is the resolution of life's frictions—its dilemmas, competitions, and indeterminacies. It can have cooperation and compromise or expedience and exploitation, depending on how well it is done. Some politics is between individuals and some between agglomerations of them. Some politics requires force.

Good and bad people—good and bad politics—require judgments to be made—made and enforced. The rule of law—the disinterested, consistent application of neutral standards—can be used to structure ordinary and violent politics for the good of mankind, but the rule of law is damaged everywhere if we pretend that law is at work when *interest* and *will* use it selectively and partially. Like our Constitution, the concept of the rule of law is largely a question of procedure. From Magna

* Judge, United States District Court, Southern District of Texas, Houston; B.A., University of Alabama; J.D., University of Texas; LL.M., University of Virginia.

This paper is adapted from remarks delivered by Judge Hughes at the University of Houston Law Center, Inaugural *Houston Journal of International Law* Lecture Series on February 12, 2003.

1. ERNEST GELLNER, RELATIVISM AND THE SOCIAL SCIENCES 68 (1985).

Carta's "law of the land"² to the Constitution's "due process of law"³ the idea is equality before the law. As the age of those two documents shows,⁴ we have had a long struggle to get as far as we have. A casual glance at the record shows that we have frequently failed.

The rule of law is philosophically simple. It is the practice of treating like cases alike. It does not say much about the policy content of laws, at least not directly. It does require that contracts by Hindus be enforced just as contracts by Navajos are enforced.

One hard part is deciding what exactly is alike what. Equality before the law should mean that the government, as a party, is obliged when a person would be. Even in countries where law has been established most thoroughly, governments may not be required to respond in legal actions by ordinary citizens. In the United States, we still debate whether to apply law to governments, allowing some Georgia county to claim that it is an immune sovereign like a Stuart king.⁵

A system exemplifies the *rule of law* to the extent that its official standards are prospective, general, comprehensible, coherent, stable, few, and public; and to the extent that they guide—consistently as written—the issuance of limited decisions and to the extent that they hold those who make and apply the rules accountable.

To be law, the reasons articulated for its application must be philosophically moral. They must be general, verifiable, and justified.

Law is prospective. Rules are written before an event. Rules written to apply to a past occasion are not law; they are only rules. People must be able to know what the law requires before they make their choices.

2. MAGNA CARTA chs. 39, 42, 55.

3. U.S. CONST. amend. V.

4. Magna Carta, 1215; The U.S. Constitution, 1789.

5. See *Maughon v. Bibb County*, 160 F.3d 658, 661 (11th Cir. 1998) (holding that Georgia counties are entitled to sovereign immunity); 1 WILLIAM BLACKSTONE, COMMENTARIES *235, *237 (“[N]o suit or action can be brought against the king, even in civil matters . . . [T]he king himself can do no wrong . . .”).

Law is general. Rules written to determine the outcome by some status irrelevant to the case are not law. When rules say, for instance, party members win or blacks cannot testify, they are not law. Their partiality reveals them for what they are—exercises in power.

Law is regular. How elaborate the process should be varies. Known and proportionate procedures are integral to law. Notice and a hearing are the bedrock of justified decision making. The information used to decide a case must be verifiable. The law relies on objective data, not revolutionary truth.

One component of regularity is the concept of jurisdiction. The content of the case—the transaction—must somehow be the business of the court. Regularity requires that the institution, rule, act, and person have a substantial relation among themselves. Usually this relation is grounded in territory—the location of the act.



International law has no consistent answer to the question of whose *legal* business includes gross misdeeds in another country. This question is addressed in international politics, and that is distinct from what we mean by law. It seems natural to us, somehow, that a court in Holland should punish atrocities committed in a Bosnian civil war.⁶

On the other hand, imagine for a moment the response in Europe to this: An Argentine, a Thai, and a Korean get off an airplane in Brussels. They announce that they are aware of violations of human rights in Belgium during its long internal struggle between the Flemish and Walloons. The trio says that as soon as they have arrested the people responsible, they will take them for trial in Singapore.

The trio may not arrest and try Belgians because they cannot. The United Nations may try Croats in the Hague

6. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, arts. 1, 31, U.N. Doc. S/RES/827 (1993).

because it can. That is power, not law.



Law is applied through courts. Courts are institutions. Courts of law are permanent or, at least, pre-existing. They do not spring into existence or travel about so they cannot be found. One of the chapters in Magna Carta required the royal courts to stay put.⁷ Not all adjudicatory functions need the same particular institution. The court structure, like the procedure it uses, must be proportionate to its task.

Traditional courts do not in modern times function as instruments of the rule of law. Church courts have a distinct gnostic component to their law, procedure, and evidence. Tribal and other community courts remain interested in who the parties are, with roots, not reason, pervading them.

Posit universal virtues, and you are immersed in questions about the nature of man. Cultural relativism is represented in the adage that the truth is different on the other side of the Pyrenees.⁸ This is harmless enough when it is applied to dress, drink, and dance. When this relativism is applied generally, it becomes not toleration but abdication.

The problem for law is not the absence of reasonably universal virtues but the pervasive ethno-centrism of their application. If we look at the practices of mankind, no society accepts lying or stealing. Even these modest virtues are qualified. While those acts are never virtuous within the group, they may well be permissible against outsiders. Illustrating the problem, Bret Harte in one of his Westerns referred to “the defective moral quality of his being a stranger.”⁹ Law must overcome disenfranchisement of the stranger—the Other.

7. MAGNA CARTA, ch. 17.

8. See, e.g., BLAISE PASCAL, PASCAL'S PENSEES 213 (H.F. Stewart trans., Pantheon Books 1950) (1672).

9. BRET HARTE, TALES OF THE ARGONAUTS (1872), reprinted in 2 THE WRITINGS OF BRET HARTE 1, 210 (Houghton, Mifflin & Co. 1903) (1872), cited in THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 57 (Charles Scribner's Sons 1926) (1913).



People do not agree on the truth or the possibility of the higher components of liberty, like free religion, so the rule of law can best be extended by working on the practical. Mundane topics are useful starts, for a bill of lading and a check have no ethnicity. When people get used to dealing with “others” on routine, practical matters, they can more easily shift to thinking that those others should be allowed to speak or worship among them.

Voltaire said:

Enter the Exchange of London, that place more respectable than many a court, and you will see there agents from all nations assembled for the unity of mankind. There the Jew, the Mohammedan, and the Christian deal with one another as if they were of the same religion, and give the name of infidel only to those who go bankrupt.¹⁰

Establishing the rule of law has other secondary effects that make it worth the effort. Countries with general laws, juridical equality, and disinterested courts tend to have more jobs, houses, and roads than countries with arbitrary systems.¹¹ True law undermines the rigidities of ideology, caste, creed, and control; that, of course, puts it at odds with most establishments.

10. VOLTAIRE, *LETTRES PHILOSOPHIQUES* (1734), reprinted in *MÉLANGES* 1, 17–18 (1961), quoted in F.H. Buckley, *Culture and Liberty*, QUINNIPIAC L. REV. 665, 669 (2000).

11. JAMES GWARTNEY ET AL., *ECONOMIC FREEDOM OF THE WORLD: 2002 ANNUAL REPORT* 5 (Fraser Inst. ed., 2002); “[N]o substantial famine has ever occurred in any country with a democratic form of government and a relatively free press.” Amartya Sen, *Human Rights and Economic Achievements*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 88, 92 (Joanne R. Bauer & Daniel A. Bell eds., 1999). See HERNANDO DE SOTO, *THE OTHER PATH* 91–92 (1989); see also HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 35, 224 (2000) (noting the value of real estate held but not legally owned by people in third-world countries is at least \$9.3 trillion; modern achievements like Bill Gates’s rest on a system of property rights, neutrally enforced).

When a people becomes accustomed to thinking with reference to law—accustomed to habitual recourse to neutral, prospective standards, regular procedure, and disinterested adjudication—they have the foundation for freedom, peace, and prosperity. The dominance of ascribed status withers, leaving more and more people at liberty to make their own choices.



The system of law has three elements: domestic national rules, inter-government practices, and humanity. Ordinarily, we observe law as a national rule enforced by national institutions. The law among nations is essentially a common law of inter-governmental practice. Some nations have ceded some authority to multi-national institutions to mediate disputes between themselves, as nations. In the third category, international law applies between individuals and nations only in the rarest circumstances. Since World War Two, work has been done to establish the institutions and content of international law. It is still embryonic.

The trials at Nuremberg and Tokyo and the founding of the United Nations are seen as having created a new international regime of justice. Not really. The obligations of nations to their own citizens, to each other, and to humanity are still vaguely defined, selectively imposed, and wholly dependent on the material and moral resources of other nations for enforcement. Politics prevails.

The war crimes trials were the direct political product of the Allies. They were imposed after the unconditional surrender—surrender of the nations, armies, and peoples who were the medium of the defendants' acts.

The inclusion of the Soviet Union in the courts and in the United Nations was a contradiction of the purposes of both; the rule of law had no place where it coincided with Soviet practice.¹²

12. EUGENE DAVIDSON, TRIAL OF THE GERMANS 32 (1966) (noting Soviet's show-trial prosecutor participated in the Nuremberg Trials); Nicolas Werth, *The Great Terror (1936–1938)*, in THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION 184, 190–91 (Jonathan Murphy & Mark Kramer trans., Mark Kramer ed., 1999) (discussing

Concluding the war required a transition. The Allies used the occasion to illustrate the depravity of German institutions and personnel. That the Allies decided to be legalistic—to be careful, to be restrained—does not make the rules they applied into general, prospective law. Those trials were military commissions, functioning as an extension of the occupying forces, with structure and standards invented for the occasion.

Remember that at the end of World War One—without an unconditional surrender of the combatants—the trials of the Germans at Leipzig and of the Turks at Constantinople just unraveled and collapsed. Nothing happened. The Allies had not the will to force arrest and trial.¹³

The current court in the Hague—the International Criminal Court for War Crimes in the Former Yugoslavia—is by its name alone a reaction to specific events through a purpose-created institution run by nations not directly involved. This is not law. This is politics. The process servers in Bosnia are there only because troops of the North Atlantic Treaty Organization are occupying it.¹⁴ This is power politics dressed in the garb of courts and law. It cheapens real courts.

The Rwandan court is the same story. European nations became outraged at atrocities, intervened militarily, and then they established a tribunal to try some people.¹⁵

You cannot recall a time that this kind of international justice was imposed on a powerful country. For perspective, all the fragments of Yugoslavia plus Rwanda together do not have

the Stalin-era arbitrary arrests and executions); Nicolas Werth, *The Other Side of Victory*, in *THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION* 216, 216–31 (Jonathan Murphy & Mark Kramer trans., Mark Kramer ed., 1999) (chronicling Soviet deportations of whole ethnic groups during the 1940's).

13. See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 58–146 (2000).

14. GENERAL WESLEY K. CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* 63 (2001).

15. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 2, U.N. Doc. S/RES/955 (1994); S.C. Res. 872, U.N. SCOR, 48th Sess., 3288th mtg., at 2, U.N. Doc. S/RES/872 (1993).

the population of Texas.¹⁶ They collectively have about half the gross domestic product of Arkansas.¹⁷



In the second stage of law, the actors are nations. The question is: Who in connection to what territory counts as a nation? Who is a nation is ascertained by reference mostly to performance,¹⁸ but history raises the question of who ought to be a nation. Woodrow Wilson's promotion of the "self-determination of peoples" left the world with a problem, not an ideal.¹⁹ The phrase is at cross-purposes with itself. Sanctifying nation states makes it difficult for responsible nations to act to restrain or rehabilitate the irresponsible ones—both those that endanger others and those that just fail.

As a subtle slogan of anti-colonialism, it was so subtle that the leading colonialists of the day could accept it. As a rule of international entitlement, the premise of *peoples* and the goal of self-determined *nations* eventually gave us the problems of (a) the infinite regress of ethnicity and (b) the sanctity of sovereignty. Neither of these is exactly a law; they are custom often and politics usually.

If the phrase is limited to its original context, it is only an historical artifact. It was adopted to explain the forced

16. The population of Texas, at 21 million, exceeds the combined populations of Rwanda, at 7.3 million, and all the fragments of Yugoslavia, at 10.7 million. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 22 (122d ed. 2002); THE WORLD ALMANAC AND BOOK OF FACTS 2002 843, 865 (William A. McGeveran, Jr. ed., 2002).

17. Gross domestic product figures for 1999 show Yugoslavia at \$20.6 billion, Rwanda at \$5.9 billion, and Arkansas at \$62.8 billion. U.S. CENSUS BUREAU, *supra* note 16, at 420; THE WORLD ALMANAC AND BOOK OF FACTS 2002, *supra* note 16, at 843, 865.

18. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.").

19. In 1919, Wilson told Congress, "When I gave utterance to those words, I said them without knowledge that nationalities existed, which are coming to us day after day." MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 12 (2001).

dismemberment of the Hapsburg and Ottoman Empires. And, it was not fully applied to them since many Ottoman possessions were transferred to the European victors as protectorates.²⁰ These looked not much different from the suzerainty of the Turks.

The infinite regress can be illustrated by the politics of Quebec.²¹ If Quebec has some mystical destiny to withdraw from Canada, then a neighborhood within the city of Quebec that disagrees must have the same right. A block within that neighborhood and a house within that block all may split. Under the best circumstances, rough approximations are all that are possible. Even after Pakistan and Bangladesh separated from India, India has the second largest Muslim population of any country.²² The politics of ethnicity works to exacerbate the false distinctions in whatever polities result. Self-determinations do not have to be based on ethnicity. Today, northern and southern Italy threaten to split based on economics.²³ Norway's secession in 1905 from Sweden was not ethnically motivated.²⁴

If you are committed to the idea of self-determination of peoples, you should be willing to file an *amicus curiae* brief supporting Jefferson Davis and his Confederate secession.

We can eliminate the endless schisms of "self-determination" if we shift our focus from a particular configuration of folks and dirt to the method of government. The label for this principle is representative government.

20. DAVID FROMKIN, *A PEACE TO END ALL PEACE* 410–11 (1989); HENRY KISSINGER, *DIPLOMACY* 239 (1994). For further discussion on the division of the Ottoman Empire under the mandates see, ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES*, 315–19 (1991); MACMILLAN, *supra* note 19, at 98–106; PETER MANSFIELD, *A HISTORY OF THE MIDDLE EAST* 167 (1991).

21. See JANE JACOBS, *THE QUESTION OF SEPARATISM: QUEBEC AND THE STRUGGLE OVER SOVEREIGNTY* (1980).

22. *THE WORLD ALMANAC AND BOOK OF FACTS* 2003 762, 793, 794, 825 (William A. McGeeveran, Jr. ed., 2003).

23. FRANCIS FUKUYAMA, *TRUST* 91–111 (1995); Thomas Kamm & Maria Sturani, *Will Northern Italians Give Rome the Boot? Separatists and Tax Rebels Seek an Independent Padania*, *WALL ST. J.*, Sept. 13, 1996, at A6.

24. JACOBS, *supra* note 21, at 26–51.

First, governments should represent their people. Exactly how that representation is mediated can vary. Whether one prefers the parliamentary form of Denmark or the republican form of the United States, a functioning reciprocity should exist between a government and the people it serves.

Second, delegations of power to a government must be effectively revocable. Elections are easy to hold; they are especially easy to hold and win in a country where all life, liberty, and property are at the mercy of those conducting the election. A peaceful transfer of power between rival factions at the top shows the rule of law. If the rule of law is not present at the top, then it is not likely to be present at the bottom—in business permits or tax collection.

Arbitrary government is against peace and prosperity regardless of the source of its vision—pure democracy gave France the Reign of Terror, pure rural romanticism gave China the Cultural Revolution, and pure economics gave Russia the October Revolution. What is needed is constitutionalism. It means that the government is bound by law. It means that government is limited, allowing room for civil society, for diversity in peoples and institutions. When the government is a society's only source of power—of wealth, prestige, and authority—people will use force to get and keep office. When government is the only game in town, players cheat.



Accepting representative government, we remain confronted with the question of who gets to have his own government. Surely at this point in mankind's troubled journey, we cannot think that the legitimate—or the practical—definition of a polity must be determined by reference to biology. Theology and other aspects of culture are only slightly less arbitrary.

We are all mongrels. The myth of ethnic purity at some moment in the past is false and dangerous—as false and dangerous as the myth of race.²⁵ The philosophy of Jean-Jacques

25. "The idea of 'race' represents one of the most dangerous myths of our time,

Rousseau, the paintings of George Catlin, the novels of James Fenimore Cooper refer to what never was. Cultures accrete and evolve. Cultures have founding myths, but we do not want to enact myths. Slavery, human sacrifice, aggressive war, and similar defects in behavior are common in primitive, folk, and modern cultures among people of every race. Resurrecting selectively historic rights and wrongs may be politically opportunistic, but it is required neither by law nor logic. “[W]ill, not fact, is the basis of a nation.”²⁶

There is no glory to return to in our pasts. We have only work to do for our futures.

Romantic leaders—even when sincere—carefully select what to reject of modernity. Gandhi may have dressed like a Gujarati peasant, but he used loudspeakers, typewriters, mimeographs, and railroads. No matter how much the Taliban liked the thirteenth century for the people of Afghanistan, it used modernity for its purposes and participated in the United Nations—cell phones and all. The man in the café in Damascus is selective. From his coffee, cigarettes, and newspaper to his government’s television, weapons, and uniforms, his culture has

and one of the most tragic.” “Not one of the ‘major groups’ is unmixed, nor is any one of its ethnic groups pure; all are, indeed, much mixed and of exceedingly complex descent.” ASHLEY MONTAGU, *MAN’S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 41, 57 (6th ed., AltaMira Press 1997) (1942).

Neither the races nor the cultures are pure

. . . .

In Churchill’s words, “We owe London to Rome.”

. . . .

Centuries of migrations, conquests, and the emergence of widely scattered ethnic enclaves, interspersed among one another, as well as varying degrees of assimilation, have produced such a cultural maelstrom as to defy unscrambling.

. . . .

. . . The kind of idealized unity projected by political leaders and intellectuals has seldom existed among any racial or ethnic minority anywhere.

THOMAS SOWELL, *RACE AND CULTURE: A WORLD VIEW* 6, 63, 80, 147 (1994).

26. ERNEST GELLNER, *CULTURE, IDENTITY, AND POLITICS* 8 (1987).

taken from the West.²⁷

The diffuse, mediated association of plural peoples in one government can be achieved, but not if we identify the state with a particular culture. With their complex territory and four languages, the Swiss are a splendid counter-example to the perverse trend.²⁸

To most Americans, the answer is obvious. Our tradition says that we should skip all the baggage and build by using individuals as the organizing principle. Politics of individuals are going to have conflicts. They will have majorities and minorities, but in an open society of individuals, the majorities are transient. People affiliate, and they disassociate. Majorities provoke new majorities. Status is earned—not ascribed.

Many people will argue that the concept of individualism is too Western. Some Westerners will say that it conflicts with what is genuine within the West. This too is romanticism. “What they are actually calling for is a return to the imaginary virtues of nineteenth-century European peasant life.”²⁹ This nostalgia starts benign, but often turns vicious because it is the refuge of men marginalized by modernity.

The elevation of the individual is too radical for many countries. It is from impolite to dangerous for leaders to endorse a view of society that contradicts the interests of their supporters among priests, landowners, chiefs, and other oligarchs at home.

In the West, democracy is usually supported by reference to the dignity of individuals, with the need for “consent of the governed” being “self-evident.”³⁰ Democracy also has practicality. First, as Winston Churchill observed, “democracy is the worst form of Government except all those other forms that have been tried from time to time.”³¹ Second, in the Darwinian test of

27. BERNARD LEWIS, *THE MIDDLE EAST* 3–18 (1995).

28. *THE WORLD ALMANAC AND BOOK OF FACTS* 2003, *supra* note 22, at 842.

29. RICHARD NELSON CURRENT, *ARGUING WITH HISTORIANS: ESSAYS ON THE HISTORICAL AND THE UNHISTORICAL* 164 (1987).

30. *THE DECLARATION OF INDEPENDENCE* para. 2.

31. *The Oxford Dictionary of Quotations* 150 (3d ed. 1979) (House of Commons on Nov. 11, 1947).

actual performance, democracy succeeds. Third, when the participation of the people is not eviscerated by force or revelation, it is the ultimate separation of powers. Dividing the legislature into two houses is one technique for diffusing power. Dividing the governmental authority among three branches is another. Dividing the power to select officials among the whole adult population is the ultimate diffusion.



We do not need objective criteria for a nation. One should be treated like a nation when one behaves like a nation.

The decision of one nation to recognize a new claimant to membership can be complicated by existing webs of alliances, by heritage, and by domestic politics. In reviewing what has happened, a pattern emerges.

A region and population may be a nation if—

- their combination of resources and culture furnishes an economic base for self-support and self-defense; and
- they can moderate their hostility toward their neighbors and among themselves so that their instability does not threaten their neighbors and so that their domestic strife does not offend large powers.



Building on the monarchical tradition of domestic non-interference, Wilson left us a concept of the nation as an extension of its peoples and their aspirations, giving it a transcendent status. After World War Two, this legacy ossified into a politics of the nation as irreducibly sovereign.

At Westphalia in 1648, European monarchs agreed to stop attacking each other militarily over the faith of their subjects. This was not for the sake of the adherents to the faiths; it was for the utility of the monarchs. The Westphalian agreement

broadened into the practice that it was impolite among monarchs to intervene in another country's domestic affairs, but it was done.³²

The prompt result of absolute sovereignty was a worse mess. At the end of the Napoleonic interlude, the Congress of Vienna adjusted borders and balanced powers without regard for race, religion, or language. The resulting arrangement lasted peaceably, more or less, from 1815 until 1915.³³ The Wilsonian system of 1919 lasted fewer than twenty years—just until the Italian invasion of Ethiopia in 1935, at the latest.³⁴

When it came to drafting a charter for the United Nations, members decided not to cede authority to the supra-national body over domestic arrangements, although there was the potential for U.N. authority when domestic trouble threatened international order.³⁵

At the end of World War Two, only four nations were both strong and active beyond their borders—Russia, England, France, and the United States. The rest of the world—especially the fractious, new, post-colonial nations—had a strong self-interest in establishing barriers to interference. Somehow, the Allies accepted this league of the weak.

Sovereignty merely identifies a nation as a legal person—as a legal entity. Nations recognize another nation's status for a variety of purposes. While the result is a juridical condition, the process of establishment is wholly made of practical politics.

Sovereignty is not a natural right. It is a status accorded under custom by other nations for their convenience. Sovereignty among nations is analogous to autonomy among individuals. Once autonomy is established, others indulge this

32. MICHAEL MANDELBAUM, *THE IDEAS THAT CONQUERED THE WORLD: PEACE, DEMOCRACY, AND FREE MARKETS IN THE TWENTY-FIRST CENTURY 191–93* (2002); Charles W. Kegley, Jr. et al., *The Rise & Fall of the Nonintervention Norm: Some Correlates & Potential Consequences*, 22 *FLETCHER F. WORLD AFF.* 81, 84 (1998).

33. KISSINGER, *DIPLOMACY*, *supra* note 20, at 78–79, 806.

34. F.S. NORTHEGE, *THE LEAGUE OF NATIONS: ITS LIFE AND TIMES, 1920–1946* 221 (1986); ERNEST GELLNER, *NATIONALISM* 44–45 (1997).

35. U.N. CHARTER art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .”).

presumptive, minimal competence to act for oneself in the world at large.

In its current political use, however, sovereignty has become a pretense where governments that objectively behave badly claim to deserve dignity.

Sovereignty is conditional. When an individual loses control of his property, it is no longer his. When a country no longer exercises effective control of part of its territory, it no longer has sovereignty of that part. When Sweden allowed German troops to cross its territory, Sweden had no sovereignty; it had become a vassal. When Cambodia tolerated North Vietnam's military operations against the South from its territory, Cambodia had no sovereignty in that territory that South Vietnam and the United States could have honored.³⁶

When an individual does not pay his debts, his creditors force a receivership. His operations are managed for the benefit of his creditors. When a nation does not pay its debts, creditors are justified in imposing restrictions on its actions to ensure repayment. History is full of customs receiverships and financial councils.³⁷ This has two supporting reasons. Promises ought to be enforceable. Deadbeats have no dignity.

When an individual punches his neighbor, he loses his autonomy. When countries cannot control their aggression, they lose their autonomy. When an individual abuses her family, she loses her opportunity to run the family without interference. When a nation abuses its people, it forfeits its domestic autonomy. We constantly have to make judgments about what levels of aggression, external or internal, justify an intervention—an intervention by the state in an individual's life or an intervention by other states in a state's life. The interests of stability, continuity, peace, cost, and complications are considered, and a political judgment is reached. This is not

36. HENRY KISSINGER, *WHITE HOUSE YEARS* 460–67 (1979); HENRY KISSINGER, *YEARS OF UPHEAVAL* 335–55 (1982).

37. MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* 137 (2002); JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 179, 284 (1990).

retribution or vengeance; it is defense and responsibility.



The relation between two nations is not a binary choice between war or peace. Tolstoy got it right with an *and* between *war* and *peace*. Nations can easily conflict with another nation on some subjects, actively cooperate on others, and indifferently observe yet others.

War is sometimes a legal proposition. When two countries are technically at war, this status carries with it a structure of choices for other countries—about who may deal how with whom.³⁸ Generally, the formal, declared wars have been few. On the other hand, history is liberally punctuated with—in Kipling's phrase—"the savage wars of peace."³⁹ Since 1789, the United States has declared war five times—1812, 1848, 1898, 1917, and 1941. Between 1800 and 1934, the United States landed Marines on foreign soil 180 times other than in a declared war.⁴⁰ Despite Wilson's multi-lateralism, he ordered more of these landings than any other president.⁴¹

Despite a declaration of war, countries may resume relations. We declared war against Germany in 1917.⁴² We quit shooting in the fall of 1918, but we did not conclude a treaty of peace until 1921.⁴³ The world treated the 1917 declaration as a nullity when the putative combatants acted as if it were no longer operative.⁴⁴

38. See generally BENJAMIN MUNN ZIEGLER, *THE INTERNATIONAL LAW OF JOHN MARSHALL* (1939).

39. RUDYARD KIPLING, *THE WHITE MAN'S BURDEN* (1899), reprinted in RUDYARD KIPLING *COMPLETE VERSE* 321 (1989); BYRON FARWELL, *QUEEN VICTORIA'S LITTLE WARS* xvii (1972).

40. BOOT, *supra* note 37, at xiv.

41. FREDERICK S. CALHOUN, *POWER AND PRINCIPLE* 2 (1986). See also BOOT, *supra* note 37, 149; PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 645 (1997).

42. Declaration of War Against Germany, S.J. Res. 1, 65th Cong., 40 Stat. 1 (1917).

43. Treaty of Peace, Aug. 25, 1921, U.S.-Germany, 42 Stat. 1939.

44. Conversely, Wilson used the state of war to justify domestic repression in the United States. CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND*

If significant force is being used to achieve a political arrangement between nations, it is merely force, with the term “war” reserved for the legalistic effects on third parties. The pervasive use of repressive force by a government against its own citizens is easily as destructive as violence in an open rebellion or cross-border aggression. Many civil wars—like the United States’s and Russia’s—have nothing to do with ethnicity, yet they are extraordinarily bloody. The U.S. Civil War produced more casualties than all of our foreign wars combined.⁴⁵

Nations may fight directly using their armies. They may work against each other through methods that run from physical force to pure reason—from blockaded allies to delegated Adlais.



The concept that war is bad is not a recent discovery. Even the members of a primitive people, whose culture was an exaggerated form of warrior ethic, mourned their losses—losses of sons, villages, and cattle. English losses in the Napoleonic Wars equaled those in World War One as a percentage of its population.⁴⁶ What we have slowly concluded is that: when you couple the fruits of the industrial revolution with hostile intent, the injury that a few can do is staggering.

It is not the fault of technology. After all, the recent mass slaughter in Rwanda was done with weapons dating back to the Iron Age.⁴⁷ In history, force is used by nations, both great and small, when they perceive that they have a high probability of not being stopped.

In civil society, when someone decides to use violence to achieve his purposes, society uses counter-force. The force of a

THE WAR POWERS SINCE 1918 1 (1989).

45. BURKE DAVIS, *THE CIVIL WAR* 35 (1982).

46. The English population lost 1.64% in the Napoleonic Wars (203,265 casualties from 12.4 million), compared with 1.61% lost in World War One (658,700 casualties from 40.8 million).

47. Alan F. Kuperman, *Rwanda in Retrospect*, 79 *FOREIGN AFF.* 94, 96 (2000).

policeman's pistol and of the jailer's keys are necessary.

Domestic policing inflicts collateral damage. Force sometimes provokes more force. Targets are missed or mistaken. Pursuers collide with bystanders. Wrong men are arrested. Abjuring force is not a solution; restraining it and managing it is one—a partial but real solution. The world is a bad neighborhood.



Successful countries have a variety of institutions to reduce the strife among their citizens. Chief among these is a functioning court system for rational compensation for actual injury. Vengeance must be depersonalized by transferring it to law and its institutions. Vengeance is a horribly destructive cycle—a downward spiral.

Good faith among nations suggests that a country, having exhausted its alternatives, make its case for use of force before other responsible powers. Announcing our peaceful intentions, though, may be a problem. The Kellogg-Briand treaty of 1928 renounced war;⁴⁸ in practical terms, it was just a press release. It could have helped foster a peaceable faith, or it could have convinced Germany, Italy, and Japan that other countries would not oppose them if they attacked Poland, Ethiopia, and China. The commitment to peace must be balanced with the ability to defend ourselves—peace through strength.

A pacifist holds to the principle that no provocation is more harmful than redress by counter-force. It is not a principle adhered to by governments. India achieved independence in 1947 with the help of courageous practitioners of non-violence,⁴⁹ but within fourteen years, independent India used tanks, not prayer, to seize Goa from the Portuguese.⁵⁰ Whether it is called liberation or aggression, it was done by force, unilaterally.

When force is to be used, it is now argued that no nation

48. General Treaty for Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

49. JOHN KEAY, *INDIA: A HISTORY* 475–81, 484–87, 498–99 (2000).

50. *See id.* at 515; RANBIR VOHRA, *THE MAKING OF INDIA* 200 (2d ed. 2001).

may act alone. Why exactly several nations attacking another is preferred to one nation doing it is not obvious. The most plausible reason for requiring multilateral force would be that the need to recruit a partner—however nominal—will dampen clear excesses.

Sometimes multi-lateralism is a veneer. In Haiti in the 1990s, a multilateral force landed to change regimes. The United States furnished 20,000 troops; twelve other nations supplied an aggregate of 2,000 soldiers.⁵¹

Sometimes multi-lateralism is mixed morality and interest. NATO invaded Bosnia when it thought that act was consistent with the *interests* of its members. It had no warrant other than the collective perception that (a) the mindless slaughter was morally intolerable to their domestic standards and (b) the internal strife in Yugoslavia had a high probability of violent consequences elsewhere in the region, which was—not coincidentally—on Western Europe's periphery.⁵²

Pundits assert that the use of force without U.N. approval is criminal. This is omni-lateralism. It is simply an assertion. The charter allows force.⁵³ The charter has tolerated force, being practical in its attentions.

When North Korea invaded South Korea, the United States acted militarily and unilaterally. U.N. permission was after the act. If the United Nations had not ratified the use of force—if the Soviet Union had not been boycotting the security council—the Truman Administration correctly would not have withdrawn to Japan.⁵⁴

In 1950, China invaded Tibet.⁵⁵ The U.N. General Assembly has resolved three times that Tibet has the right of self-

51. Federation of American Scientists, *Operation Uphold Democracy*, at http://www.fas.org/man/dod-101/ops/uphold_democracy.htm (last updated May 21, 2000).

52. Statement on Former Yugoslavia, paras. 1–2, North Atlantic Council Doc. No. M-NAC-2(92)108, Dec. 17, 1992, <http://www.nato.int/docu/comm/49-95/c921217b.htm> (last updated Oct. 27, 2000).

53. U.N. CHARTER arts. 42, 51.

54. GARY R. HESS, *PRESIDENTIAL DECISIONS FOR WAR* 22 (2001); MICHAEL HICKEY, *THE KOREAN WAR: THE WEST CONFRONTS COMMUNISM* 38–39 (2000).

55. SPENCE, *supra* note 37, at 525.

determination.⁵⁶ Those resolutions have been cold comfort for the Tibetans these last forty-two years as they watched the Peoples Republic be admitted to membership in the United Nations and then be granted a permanent place on the security council.⁵⁷

Cuba did not get permission to send troops to Angola or Mozambique in the 1980s. Argentina did not seek permission to attack Britain in the Falkland Islands. The Soviet Union consulted only its Warsaw Pact before invading Afghanistan in 1980. Vietnam invaded Cambodia in 1978 all on its own. This year, France did not wait for omni- or multi-lateral approval for its armed intervention in the Ivory Coast, although the United Nations did ratify it.⁵⁸ In the 1990s, France intervened unilaterally, originally in support of the genocidal government in Rwanda.⁵⁹ The multi-lateral and omni-lateral institutions were inert. These aggressors, if that is the spin, were either too popular or too strong.

The U.N. conference on disarmament is chaired by a nation that has (a) twice in the last twenty years practiced aggressive war against its neighbors, (b) attempted genocide of two distinct groups within it, and (c) breached its obligation under U.N. resolutions to disarm. The chair of the U.N. conference on disarmament is Iraq.⁶⁰

The chair of the U.N. commission on human rights is Libya.⁶¹

56. G.A. Res. 2079, U.N. GAOR, 20th Sess., Supp. No. 14, at 3, U.N. Doc. A/6014 (1965); G.A. Res. 1723, U.N. GAOR, 16th Sess., Supp. No. 17, at 66, U.N. Doc. A/5100 (1961); G.A. Res. 1353, U.N. GAOR, 14th Sess., Supp. No. 16, at 61, U.N. Doc. A/4354 (1959).

57. G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8429 (1971).

58. S.C. Res. 1464, U.N. SCOR, 58th Sess., 4700th mtg., at 2, U.N. Doc. S/RES/1464 (2003); Clar Ni Chonghaile, *France Escalates Military Involvement in Ivory Coast*, WASH. POST, Dec. 16, 2002, at A21.

59. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 88-90, 157 (1998).

60. SANDRA MACKEY, THE RECKONING: IRAQ AND THE LEGACY OF SADDAM HUSSEIN 235, 259, 287, 313 (2002) (attacking Iran and Kuwait, killing Kurds and Shiites); Press Release, United Nations, Conference on Disarmament to Open 2003 Session on 20 January (Jan. 16, 2003).

61. Press Release, United Nations, Commission on Human Rights Elects

2003]

REALISM INTRUDES

435

The United Nations is a noble experiment. The United States should support it, but membership is not a substitute for responsible action by a nation in defense of itself or its friends. When the League of Nations failed to respond with strength to aggression, it shriveled into insignificance. The U.N.'s malleable principles risk final failure.

Nations and interests use the institutions of international cooperation for their special purposes. The most audible noise in international affairs is the rage of impotent elites. They have no authority, no power, no strength, and they want no one else to have them either. They are perversely selective in their facts, history, morality, and attention.

One of the suggested criteria for intervention is outrage. The use of outrage has two faulty premises. First, except in a few western democracies, public opinion is shallow and manufactured. In countries without some free press, without literacy, and without information, there is no public opinion of weight.

Second, an outraged public can commit atrocities in its own right. A chorus for justice can turn into just another howling mob.

A world at peace is a primary interest of the United States. A world of reduced external and internal strife is an American interest. For the United States, isolation is suicide. Isolation by the United States condemns small states and their populations to others' whims.



In democracies, the use of force must be justified to the electorate. Popular support is not a condition precedent; popular toleration, however, is required in the medium term. This ensures some moderation.

The community of nations is a club where every act of every member is examined from every angle. When a nation prepares to act with force, it will explain its goals and methods to the

other countries where it has ties. It will explain itself to those countries it opposes. It will explain itself to the target. These discussions may be protracted in advance, or they may be concurrent with action. The explanation is not seeking permission; it is letting "facts be submitted to a candid world."⁶²



For most of history, enemies were treated as enemies rather than criminals. Vicious enemies were treated viciously, and, often, generous enemies were treated viciously. Civilization was exceedingly thin and fragile. The chivalric world of Camelot co-existed with things like witch trials, torture, and slavery. Centuries later, barbarism remains.

We must work to reduce it. The most effective work we can do is to focus on small, specific goals that have hope of becoming general prohibitions. Wars of aggression are wrong, but someone must defeat the aggressor to hold him responsible, and the deputy marshals from the Hague are not up to it.

On the other hand, the elimination of soft bullets was a significant improvement in the conduct of war.⁶³ Importantly, it addressed the needs of the common soldier rather than the fate of field marshals. Similarly, conventions on the treatment of prisoners of war help palpable humanity.⁶⁴ Recently, work has been done to stop the use of land mines;⁶⁵ these are hard on combatants of both sides during the conflict and hard on the civilians for ever after.

Historically legalistic impositions of post-war "criminal" penalties have always followed the success of arms. The rules

62. THE DECLARATION OF INDEPENDENCE para. 2.

63. Declaration on Bullets with a Hard Envelope, July 29, 1899, *reprinted in* INTERNATIONAL DOCUMENTS: A COLLECTION OF INTERNATIONAL CONVENTIONS AND DECLARATIONS OF A LAW-MAKING KIND 70-71 (E.A. Whittuck ed., reissued with additions 1909).

64. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3361, 75 U.N.T.S. 135; Convention on the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

65. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997).

and the processes are imposed after the use of counter-force.

The hardest question is: Whom do we select as defendants to represent the defeated country, its war party, and its war machine? Napoleon was exiled, and two of his marshals were shot, but they were shot for treason to the king of France in switching sides, not for war crimes.⁶⁶ In the case of individual atrocities, like murder of U.S. prisoners during the Battle of the Bulge, responsibility can be fixed with precision.⁶⁷ On the other hand, the Allies made a political judgment that Emperor Hirohito was more valuable as a prisoner than as a defendant-martyr.⁶⁸

Prudence suggests that criminalizing the upper levels of an enemy may prolong the war. Similarly, the pressure to refuse sanctuary to despots forces them to cling to power; while we may be self-satisfied in our morality, the absence of escape alternatives prolongs the suffering of their people. Better Ferdinand Marcos in Honolulu than Manila.

When the shooting stops, political decisions will need to be made. "These are matters for statesmen, not for judges," said Robert Lansing, the U.S. secretary of state at Versailles.⁶⁹ Responsible nations must use commissions to decide whether to punish some individuals; whether to excise some leaders from the body politic; and whether to adjust the opponent's government, armaments, civil organs, population, or territory. In the case of punishment of individuals, the commission's function is to assure that the right person is being banished; that much process is due. In general, commissions can make reasonably reliable choices about which parts of the nation

66. BASS, *supra* note 13, at 37–48.

67. U.S. v. Valentin Bersin et al., Case No. 6-24 (July 16, 1946) (conducted by the American Military Tribunal at Dachau under the Office of the Judge Advocate General, War Crimes Branch); THE OXFORD COMPANION TO WORLD WAR II 558 (I. C. B. Dear ed., 1995); *see generally* WHITNEY R. HARRIS, TYRANNY ON TRIAL 181 (1954) (describing the murders).

68. YVES BEIGBEDER, JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE 57 (1999).

69. Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, report to preliminary peace conference, Mar. 29, 1919, Annex II, American Reservations, at 54–56 (quoted in BASS, *supra* note 13, at 103).

require restructuring.

The forcible rehabilitation of defeated nations will provoke cries of cultural imperialism. Yes, choices will need to be made. Cultural imperialism is better than the military type. Whether in Northern Europe or the Middle East, a culture that generates an invasion of a neighbor every few decades objectively needs reconstructing.

In getting from the shooting to post-war recovery, the particular structure of the body that performs the surgery is not important. From the perspective of law, it should have a proportionate process and be public. Pretending that these institutions are courts of law, though, is counter-productive for the establishment of the rule of law. Nations must have the courage of their convictions and act openly and decisively—showing their exercise of power is disciplined, if not legalistic.

While victors may be willing to moderate their justice, they are unlikely to submit their own actions to review by those who did not bear the burdens of enforcement. Whatever the emerging rules of humanity may say about victor's justice toward the defeated, they do not require victors to accept bystanders' justice.



A world order may emerge where institutions are effective and disinterested. It will not be imposed. It will be worked out in the interstices of great events and in the practicalities of ordinary ones.

Near perfect knowledge of what is happening everywhere seems to inundate us in bad news. The times have not worsened; the news media just got more comprehensive. Despite the spasms of violence, despite the lurches backward, every year, year after year, more disputes are settled peacefully than the year before. Despite politicians' worst efforts, every year more people are working together across borders to inoculate children, breed cattle, and reduce waste.

The road to peace is paved with courage, foresight, sacrifice, and restraint. While it is good to announce ideals, it is better to build law. Law that applies to yourself as well as others. Law

2003]

REALISM INTRUDES

439

that is prospective, clear, and stable.

The best source of growth in international law is growth in domestic law. You cannot export what you do not have.

If a nation shows that it knows how to act with decency, . . . if it keeps order and pays its obligations, then it need fear no interference . . . Brutal wrongdoing, or an impotence which results in a general loosening of the ties of a civilized society, may finally require intervention by some civilized nation . . .

Theodore Roosevelt, 1904⁷⁰

70. EDMUND MORRIS, THEODORE REX 326 (2001).