Law through War

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Précis: Confronted by news of the wars, we in the developed world, especially in the United States, understand international relations in light of the distinction between civilized and barbarian. That understanding makes us willing to intervene militarily, that is, to engage in barbarism ourselves. We will articulate our engagement with what we regard as the periphery of civilization in legal terms. But what law do we wish to give our capability for violence?

I. UNDERSTANDING, VIOLENCE, AND MORAL POLITICS

Again we have ordered our military to intervene, this time with bombs, cruise missiles, and even helicopters in Yugoslavia, in an effort to prevent slaughter in the province of Kosovo. Such interventions appear to be growing commonplace; I started this Essay a few years and several conflicts back. But the question has remained the same: how should we Americans begin to think about using our capacity

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to make war?

It is a hard question, particularly hard these days. With the end of the Cold War, the conceptual structure with which we understood much of international relations, the East-West order, collapsed. For years, we acted, and we justified our actions as necessary to protect our way of life against the threat from the East. Much of our international conduct was defined by our conception of ourselves as a people that lived in military opposition, or as it was often called, eternal vigilance.¹ The collapse of the East-West order has thus required a global rethinking of our foreign policy: if we cannot judge international politics by reference to Eastern danger, how do we know what conduct, in particular, what deployment of our military, is appropriate? The answer, at least in the democratic terms to which this nation aspires, is that we do not know. No articulate and publicly validated vision of our role in the new world has yet appeared. Bereft of the grammar in which it was conceived, the military policy of the United States is not so much confused as inchoate.²

In the aftermath of the Cold War, the theory class held a plethora of conferences and symposia and wrote stacks of books and papers. The new state of world affairs was characterized as a "new world order,"³ "a multipolar world,"⁴ "a Grotian moment,"⁵ "a uni-multipolar system,"⁶ and so forth. In spite of these efforts, it is not yet clear how to articulate the politics that we have experienced since the collapse of the East-West order. While there is consensus that the world has changed profoundly, none of the myriad grammars newly proposed for international relations enjoys

¹. "Eternal vigilance is the price of liberty." JOHN BARTLETT, FAMILIAR QUOTATIONS 479 n.2 (Emily Morrison Beck ed., 14th ed. 1968) This quote is attributed to Thomas Jefferson.
². For a brief review of the current situation within the military itself, see John Hillen, Defense’s Death Spiral, FOREIGN AFF., July/August 1999, at 2, 4. "[T]he services are in denial about post-Cold War interventions." Id. at 4.
³. No doubt the most significant use of the phrase “new world order” was that by President George Bush. Address Before a Joint Session of Congress on the Cessation of the Persian Gulf Conflict 27 WKLY. COMP. OF PRES. DOC. 259 (1991).
paradigmatic authority.

Events, sadly, do not always wait for theory. As ever, we find ourselves involved in violent drama, but now we no longer claim to understand our role in our various theaters of operation. While we often have practical consensus—at least within the Beltway—we have little conceptual apparatus with which to judge our actions. Yet all too often we must either commit or condone violence. The collapse of the East-West order thus presents the United States with the moral danger of engaging in thoughtless violence.

I conceived and began writing this Essay as an effort at political prescription, as a preliminary step toward a jurisprudence of warfare. As law professors often do, I began by addressing an idealized democratic audience, comprised of reflective participants in the polity. My hope was to foster more self-conscious and responsible, and hence morally defensible, foreign policy.

I confess that I have become somewhat skeptical of this enterprise. Aside from its presumption that argument, specifically my argument, matters so much, how American of me to have expected that politics be morally satisfying, that Washington be the city upon the hill,7 despite the fact that it is quite literally built upon a swamp. I have come to think we may be condemned to episodic violence, publicly justified after the fact. As a practical matter, perhaps we must trust our policy elites, i.e., the internal discourse of the foreign policy community, coupled with somewhat more public interventions in the pages of The New York Times and similarly influential venues, may be the best that we can expect by way of democratic discourse. Such government by bureaucracy might not be so terrible—more public involvement with our decisions to go to war might simply increase the

7. Jesus said: “You are the light of the world. A city that is set on a hill cannot be hid.” Matthew 5:14 (King James). John Winthrop, the founder and first governor of the Massachusetts Bay Colony, made the image central to the American political imagination:

For we must Consider that we shall be as a City upon a Hill, the eyes of all people are upon us; so that if we shall deal falsely with our God in this work we have undertaken and so cause him to withdraw his present help from us, we shall be made a story and a by-word through the world.

amount of hand-wringing, without improving the substance of our policies much. But even if such doubts are true, thoughtful Americans may desire an explanation, an apology, for our wars.

Whether read as prescription or apology, this Essay confronts the present situation with three interrelated arguments. The first argument is that political thinking, prescription, need not wait for the completion of analytic description. For all the variety among individual analyses, contemporary notions of security and depictions of international relations share a great deal. As the East-West order was organized around the division between communism and capitalism, our ideas of international affairs are organized around the distinction, often hushed, between civilization and barbarism. I argue that this distinction will inform our "defense" policy, much as the Cold War was informed by realist theories of national interest in an ideologically polarized world. The sooner we acknowledge what, in broad outline, we have already decided about our world, the sooner we can do some hard thinking about important questions. For example, under what circumstances are we willing to invade another country, kill a certain number of its citizenry, and have a certain number of our own citizens killed in an effort to establish order?

My second argument is that the old ideas of national interest, international law, diplomacy, and the use of force have been fundamentally transformed in our time. As a result, the concepts no longer relate to one another in the same way they long did. In particular, international law is no longer defined in opposition to force. Contemporary international law not only legitimizes, but has begun to articulate, and may even come to require, the use of force against those the international community deems barbarians. In a world where military sanctions are used to achieve compliance with United Nations resolutions and where war crimes tribunals are almost routinely declared as soon as the butchery stops, war has been, literally, legalized. International law is now, if as yet only intermittently, enforceable, and the hoary criticism of international law, that it is not law because it has no enforcement mechanism, has been answered on its own terms. Recognizing that war has been legalized begs the question: what law do we give our wars?

My third argument is that this question is difficult to ask
and vital to answer. A thoughtful answer requires an intellectual perspective from which one could discriminate among proposed interventions, could distinguish between good, problematic, and bad exercises of force. As the rather random and episodic nature of our recent military adventures demonstrates, we currently have little by way of such perspective, and so are left to respond to the claim that the national interest is what our national government, emboldened by polls and a favorable market for securities, says it is. And the government tends to say the national interest is sufficient to justify the military action proposed by the government. At the moment, our political discourse is strikingly free from voices that are both taken seriously and more than superficially critical of this logic.

The collapse of the East-West order was important for Americans in part because it entailed a collapse of the intellectual apparatus that traditionally had been used to criticize, and so ultimately yet, the power of the developed countries, particularly the United States. The left was discredited, or transformed from a critical perspective into generalized affection for the downtrodden, or became an aesthetic stance (pomo multiculturalism), or simply lost heart—however one characterizes recent intellectual history, the left has ceased to fulfill its traditional role of trenchant opposition to current policy initiatives, including military interventions. As I have already suggested, the absence of such criticism, a world without the resistance of thought, poses a moral danger to the forceful. At the core of my third argument is a preliminary effort toward providing a grammar through which political criticism could be made.

To recapitulate: the first argument holds that we have already made a sharp distinction between civilized and barbarian, and that distinction inclines us to military intervention. The second argument maintains that war has become an element of international law and is no longer an object of international law. The third argument suggests ways we may begin to think about our capability for violence. Taken together, the three arguments raise constitutive

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8. This Essay relies throughout on a distinction between force, and its dramatic expression, violence, on the one hand, and power on the other. See HANNAH ARENDT, On Violence, in CRISES OF THE REPUBLIC, at 103, 143-44 (1972). To simplify: power is political, while force is instrumental; power requires assent, while force does not.
questions about the appropriate substance of the new law through war.

I draw no firm conclusions, and confess to uncertainty regarding what the substance of our military policy should be. It is unclear to me when military force should be used to stop what we view as barbaric conduct. Yet I doubt that it is more noble to refrain from violence in the face of barbarism than to create some semblance of order, that it is better to claim a convenient relativism while thousands, even millions, die in far-off lands. This Essay is an effort to think seriously and candidly about the imperial implications of such thoughts.

II. CIVILIZATION AND BARBARISM

For the sake of convenience, and at the price of considerable simplification, I collectively call “realist” the thinking about international relations that was informed by the East-West order. “Realism” has meant a lot of things, so a bit of clarification may be useful. America persists in seeing itself as pragmatic (notwithstanding considerable evidence to the contrary), and “idealist” has often been a term of dismissal. As a result, various foreign policies have often been labeled realist by their supporters. Yet despite the ubiquity of the term, realism also has meant something for American foreign policy in the 20th century: the belief that individual nations could be understood in terms of their particular interests, and that foreign policy was the art and science of satisfying those interests through diplomacy, alliance, economic promise or pressure, threats, and when necessary, war. This, of course, is nothing more or less than the continuation of the 19th century European tradition of Realpolitik—and this is how Henry Kissinger, perhaps the greatest foreign policy realist in twentieth century American politics, uses the word. 9

9. Whether Kissinger should be considered a realist is debatable. The substance of Kissinger’s arguments, in particular, the extensive use of the concept of honor in his discussion of Vietnam—as distinct from Kissinger’s characterizations of his own arguments—may be understood as, in its way, idealistic. See Philip Zelikow, The Statesman in Winter: Kissinger on the Ford Years, FOREIGN AFF., May/June 1999, at 123, 124-26 (reviewing HENRY KISSINGER, YEARS OF RENEWAL (1999)). Conversely, the claim that the Nixon or Ford Administrations had, or could have had, in mind the clear and uncontestable interests in the sense Realism seems to require seems impossible
Even though realism is older than the Cold War, the East-West order was primarily an ordering, and hence a clarification, not of history (then, as now, mysterious), but of national interests. To simplify, the national interest in surviving the Cold War transformed the amorphous set of vague aspirations and uncertain possibilities for more or less dubious political entities into well-defined interests held as a matter of knowable fact by nations whose identities were beyond question. In a world polarized between adversaries armed with nuclear weapons, there could be argument over tactics and even some commitments, but little over ultimate ends. Because the existence and much of the substance of the national interest was not really open for question during the Cold War, some form of realism was the only game in town for anybody in a position of responsibility. So even President Kennedy, who is often if perhaps erroneously remembered as an idealist (a question beyond the scope of even this Essay), supported the overthrow of the government of Cuba, increased U.S. involvement in Vietnam, and faced down the Soviet Union in Berlin—all in the name of defending U.S. interests. It is true that the death toll in Vietnam eventually made the fundamentally bizarre nature of that war only too apparent, so that some people did say better red than dead, but few opponents of the Vietnam War seriously argued for capitulation to the Soviet Union or China. The serious (and correct, as it turned out) argument was that South Vietnam was not vital to U.S. security, and hence not worth the costs of the war. In short, the Cold War's simplification of interests made realist thinking about politics almost inevitable.

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10. Simply put, "we were wrong, terribly wrong." ROBERT S. MCNAMARA, IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM at xvi (1995).

11. There was, of course, another tradition, international legalism. See generally MARTTI KOSKENIEMI, FROM APOLOGY TO UTOPIA (1989). Three points should be made for present purposes. First, as a general matter, legalists did not argue that interests were unimportant, but instead argued that legality was in the long term interests of the United States. Second, during much of this period, the realists seemed to have the better of the argument, in government and perhaps even in the academy. Third, the legalists themselves can be understood as a construct of the Realists. See, e.g., Kissinger's use of "Wilsonian" in framing the problem of détente: "But an attempt to balance rewards and penalties inseparable from consensus-building ran counter to the prevailing Wilsonianism, which tried to bring about a global moral order through the direct application of America's political values undiluted by
The East-West order shaped realist thinking about the use of force in two powerful ways. First, it facilitated a radical separation of strategic thought from political thought. Second, the East-West order inclined people to think of political events in terms of space rather than of time. The collapse of the East-West order made realism, at least as we knew it, no longer a sensible mode of understanding international politics. More specifically, the dissolution of the East-West order integrated strategy and politics, and gave rise to a host of diachronic, that is historical, approaches to international relations. Both the integration of strategy and politics and the emergent historical conceptions of international relations entail a sharp distinction between orderly and disorderly politics, between civilization and barbarism.

A. Strategy

The image of the “balance” of power has been used to describe politics for centuries, but never more aptly than during the Cold War. The balance of power so perfectly described the polarity of the Cold War that it became integral to, indeed practically synonymous with, the concept of the East-West order. Although the image was so familiar as to be almost transparent, a great deal of political presumption was locked within its crystalline structure. East and West existed, and there was a “balance” between them that presumably somehow “weighed” a quality called power, possessed by the enemies, each side, in the way material objects possess mass. This enemy, real enough, but also postulated by the balance of power—without an enemy, what would be balanced?—served to solidify political alliance, and hence political identity, on both sides. Throughout the Cold War, divisions among states party to the North Atlantic Treaty Organization (NATO) or the Warsaw Pact, as well as divisions within each state, were obscured by the need to maintain a common front against the enemy.

In the context of the balance of power, the discipline of strategic studies turned on a single inquiry: to what extent did an event, either actual or possible, enlarge the military potential of one side or the other? This inquiry often raised nice issues of judgment. For example, both the United States compromises with ‘realism.’” KISSINGER, supra note 9, at 93.
and the Soviet Union long maintained inefficient capacity for the manufacture of steel in order to serve anticipated wartime needs. Within the contours of the strategic argument, the precise relationship between the capacity to manufacture steel and military fitness was debatable, but the stakes and the terms of the argument were clear. Equally clear was what was not at issue in the security debate, \textit{viz.} broader questions of political conduct. Political questions, such as how to pay for the subsidy, were not unrelated, but were considered analytically separable inquiries. Just as participants in a sport rarely consider the appropriateness of the rules that inform their game, the balance of power so well defined strategic questions that larger questions went unasked.

Today, strategic studies is a far trickier business. The East-West order, which defined both the actors and the objectives, no longer exists. In the words of Polish politician Bronislaw Geremek, we are confronted by dangers, not enemies.\textsuperscript{12} There is no balance of power with danger, no conflict with danger. Danger may be assessed. But without a hard-edged notion of conflict to provide a context in which probability can be calculated, danger assessment is a hazy enterprise. Suppose, for plausible example, that the European Union is somehow at risk from unrest in Southern Europe. Should the Union attempt to integrate its forces to defend itself against Southern Europe? Should a new wall be built? Or should the Union attempt to integrate Southern Europe into its defense structure, either through NATO or the Western European Union, in the hopes of minimizing the risk of violent disorder? How much of Europe (what is Europe?) should be included in this process of integration? Should this process be limited to the military sector, or should it include the economy? How complete, and how swift, is this effort to be? And so forth.

Strategy that would confront such threats requires a view of politics considerably more nuanced than polarity; policy cannot be determined by argument that one "side" enjoys some military advantage over the other. Strategic thinking now entails politics, economics, and history, in addition to its traditional focus on military capability,

because a strategic world where security is threatened by dangers rather than enemies is complex and vague in ways that the old strategic world was not. In response to uncertainty, the new strategic thinking seeks stability more avidly than it seeks some ill-defined "advantage." Stability is hardly a new concern; what is new is that stability has become virtually the only concern. So, for example, it recently appeared to make strategic sense to cut the size of our military, in part because the federal deficit was thought to hamper national competitiveness and economic unrest was seen as a greater threat to our security than invasion. Similarly, it makes strategic sense for Western European states to give money to help the young governments of Central and Southern Europe stabilize their economies, not because those governments plan to invade, but because their failure may lead to massive immigration or civil war. Rather than the purchase of military hardware, security concerns now impel the provision of loan guarantees. Strategy used to mean the attainment of military superiority, or at least deterrence; it now means the pursuit of social stability. Politics writ large has absorbed strategic studies.

The vague character of threats to social security means that when we cannot quarantine social instability (as we frequently do with those chaotic Africans), intervention is likely. In a dangerous world, security is obtained by proactive measures designed to shore up the social order. In contrast, in the traditional world of enemies, security is the capability to respond to the threat posed by the enemy. (Only rarely has security been thought best obtained by preemptive attack.) So we long preserved the capacity to respond to Soviet aggression with nuclear force, if necessary. The very language of the cliché is reactive. Today, the United States is criticized not for its lack of readiness, but for not taking enough action within the former Soviet Union to help ensure that the weapons of mass destruction remain in sane hands. In this light, the invasion of Panama and the signing of the North American Free Trade Agreement may be understood as attempts to establish a viable social order in situations that present profound threats to our security, our lust for

drugs and the weaknesses peculiar to a highly technological economy.

If security is now better procured than defended, then early intervention will often be more effective and cheaper than late intervention. Contemporary strategic thinking inclines to the adage “a stitch in time saves nine.” Diffuse threats to security should be addressed before they have time to gain focus and momentum. The task for contemporary strategic thinking is therefore the avoidance, rather than the development, of the logic of war. For example, it is has for some time been argued that more decisive action by the European Community (and then the European Union) and the United Nations at the outbreak of violence in Yugoslavia might have prevented at least some of the carnage and associated risks. War, even civil war, has its own awful logic, and the various factions in what was Yugoslavia fought within that logic, to regain territory lost by military action, to avenge loved ones, and so bloody on, in the gyre of public and private violence bemoaned since the Oresteia.  

14. Had the logic of violence not been established, Yugoslavia might be merely politically fractious, like Belgium or even what was Czechoslovakia. The transformation of strategy amounts to an imperative to intervene, militarily if necessary, in the service of order.

B. International Relations: Progress Theories and Culture Theories

If the first powerful way the East-West order shaped realist thinking was to encourage an analytic separation between strategic and political thought, the second way the East-West order shaped realist thinking about international relations was to privilege space over time. Realist theories presented politics in terms of position: East and West were both enemies and directions in space. International events were understood to “tip the balance” in favor of one “side” or the other. The balance was more or less weighted from time to time, more during the Cuban missile crisis, less during
détente, but the balance, conflict, was always there, and each event was analyzed within its a priori and essentially atemporal structure. For the political analysts of several generations, all the imagery was spatial.

Time simply did not figure in realist political calculus. Realist theories spent little effort on the genetic questions of politics, like the causes of conflict and the sources of identity, because conflict and identity were presumed by the imagery of the balance of power. Safe from historical questions, realist theories were able to rest upon confident assertions regarding, inter alia, the relative stability of nations, the objective character of power, and the monolithic quality of national interests. Realist theories tended to mistake a spatial description of a particular political situation, the conflict between East and West, for the essence of international politics. The realist paradigm, despite the claims of its adherents to tough-minded fidelity to fact and hard-nosed pragmatism, was not just a description of the politics informed by the Cold War, but an intellectual expression of those same politics. This goes far to explain the oft-remarked failure of the political sciences to predict virtually any of the surprising events round about 1989. Realist political thought could not envision, much less articulate, the end of the Cold War because that would have required abandoning the working assumptions that defined and made possible realist thought. The realist paradigm was swept aside, not by superior argument, but by a host of events that completely escaped the political imagery which the realists had at their disposal.

A surfeit of new models of international relations have been offered in the last few years. The realist theories were spatial, synchronic. Unsurprisingly, the majority of new accounts are temporal, diachronic, that is, they locate international affairs within historical time rather than within the space of global conflict. Consonantly, the new diachronic theories focus on genetic questions ignored by realist theories. Virtually all contemporary theories of international relations can be grouped under one of two headings, “progress” and “culture.”

15. For a similar approach to recent literature, see the recent Economist survey The Road to 2050: A Survey of the New Geopolitics, The Economist, July 31, 1999, at 46:

The best way to start the search for the right map [of the planet in fifty...
1. Progress Theories. Progress theories are creations of the economically minded. Their general argument is that economic liberalism is the essential condition for, indeed the guarantor of, material progress. Liberalism requires a system of contract and property rights, reasonably stable institutions, freedom of communication and research (some say including the institutionalization of scientific and technological research), and the other elements of a modern market. The societies that adopt these cultural prerequisites are able to harness human ingenuity and to progress. Material progress, the unfolding of human mastery over the circumstances of life, is universally attractive, and is the motive force behind the emergence of a global modern culture. Modernism is the establishment of a continually progressive society, i.e. a society in which the change and innovation of the marketplace is used to transform the marketplace itself, or, phrased cybernetically, in which the growth of information and the ability to handle that information contribute to new methods for processing data.

Progress theories further maintain that although modernity's technological products are universally attractive, modernity itself is a culturally located phenomenon. Modernity does not occur in most cultures at most times, but requires the adoption of economic liberalism, i.e. the social conditions once locally associated with Western Europe and North America. States such as the erstwhile Soviet Union ignore the prerequisites of modernity at their peril. Without adopting economic liberalism, such states can neither produce militarily adequate technology nor satisfy the ever-increasing material desires of their people, and will eventually collapse. Unprogressive societies fail; progressive societies triumph. Progress theorists tend to see the collapse...
of the Soviet Union as vindication of their theory of history.

While the precise relationship between economic and political liberalism remains controversial among progress theorists, progress theories all argue for the political and social stability required by the market. Radical redistribution (inflationary practices, nationalization of assets, excessive taxation, etc.) hinders, or even prevents, the functioning of the market, and so slows, or even precludes, the sweeping social changes wrought by market-driven innovation. Progress theories thus argue for political and institutional stability in the interest of positive material change. Although controversy exists regarding the political liberality appropriate to developing economies, considerable agreement exists that the most effective guarantee of the stability required by established market societies is government by consent of the governed, political liberalism. Stated negatively, authoritarian systems present enormous temptations to their ruling elites to engage in economically ruinous practices. In the long view, progress theories generally hold that the economics of modernity requires political liberalism.

Progress theories regard armed conflict as archaic. Kant was the first to argue, in his essay *Toward Perpetual Peace*, that liberal states do not go to war with one another. The rise of the European Union is taken to be the premier instantiation of the claim that military violence among truly modern societies is improbable. Western Europe, that spawning ground of global war, has been pacified by the creation of a unified European market. Peace, however realized, is generally considered a good thing, and so progress theories use conflict to reinforce their general political prescription: good politics is the establishment of sound markets.

Progress theories usually imply that global order is likely, perhaps inevitable. If, on the one hand, modern societies (governed by states like the United States or Japan) triumph, and on the other hand, both unmodern societies (ruled by states like the Soviet Union) and premodern societies (in which states often do not adopt the economic liberalism mandated by the International Monetary Fund) fail, then sooner or later all states will be progressive.

Modernity will be universal. (Progress theorists are sometimes derided as “One Worlders.”) Progress theorists usually regard the emergence of a global consumer culture with satisfaction, and tend to look forward to the universalization of modernity as a clear improvement in the human condition. After all, in the global market, more and more people will have access to the things they want, and so, presumably, will be more happy. At the same time, participation in the global order eliminates the substantial differences among groups that causes wars.

The progressive utopia is the global market; progress theories are ultimately theories of order. But in our world, even progress theorists must admit that conflict abounds. While predicting the eventual construction of a modern world order, progress theorists acknowledge the reality of conflict by presenting the contemporary world as bifurcated between those who participate in the emerging global market culture, and those who do not. The core, the modern world of trade, is stable, non-violent, efficient. The periphery, the not-yet-modern world, is unstable, violent, messy. The discussion of progress theories thus replicates the discussion of strategy: the world is divided into modern and primitive zones, into the world capable of progress and the world incapable of progress, into order and disorder.

2. *Culture Theories.* While the collapse of command economies occasions progress theories, culture theories attend to a variety of contemporary political phenomena, such as the rise of new nations, the resurgence of fundamentalist religious movements, and the reemergence of ethnic hatreds and local identities. Culture theories maintain that the East-West order temporarily obscured more durable and fundamental species of political life. No longer shadowed by the East-West order, these forms of political life now flourish.

Culture theories emphasize the nuances of particular cultures. There is no unified language of culture theories comparable to the ideology of liberalism in which progress theories are phrased. The rise of Islamic fundamentalism is discussed in terms different from those used for Japanese labor practices and different yet again from the language used to discuss African nationalisms. The first inquiry might be couched in religious language, the second in the jargon of sociology, the third in the language of colonial and tribal
history and development economics. But all culture theories ultimately rest on some notion of identity—Muslim, keiretsu, Ugandan—which can be politically mobilized. If progress theories are the creation of the economically minded, culture theories are the creation of scholars we might broadly call anthropologists, who focus on the unifying differences among groups, that is, on the relationships between individual identity and politics.

The proper relationship between individual identity and political form has long been phrased as a moral imperative, the self-determination of peoples. During the Cold War, the Wilsonian ideal of self-determination was a virtue often honored in the breach, in Vietnam, in Hungary, and elsewhere. The subordination of the “will of the people” to the practical requirements of security obscured the difficulties inherent in the ideal of self-determination. Perhaps because it was so rarely practiced, the ideal of self-determination remained vibrant throughout the Cold War, and upon the dissolution of the East-West order, peoples began clamoring for home rule.

The resultant disintegration and proliferation of states has made the very concept of the state—once the basis of international relations, questioned only as an academic exercise—seem as analytically dubious as it is politically popular. States, it appears in much of the world, are fragile entities that cannot serve to structure our thinking about large scale politics. Culture theories therefore turn from states to cultures in an attempt to understand the essence of politics, to define the substrata on which political institutions are founded. If the cultural foundations of politics could be secured, then perhaps we could build sound institutions. We could appropriately relate states to peoples, as opposed to drawing futile lines on a map, as was done in Africa, Central and Eastern Europe, and the Middle East. The epidemic of civil wars with which we are now confronted, as peoples struggle to define both themselves and so their borders, would thereby be averted. The Wilsonian dream of self-determination would be realized; institutional form would reflect psychological, and hence societal, reality.

The quest has proven confusing rather than fruitless. There are a great many names for the political essence, the object of the quest: identity, community, culture, interest, solidarity, collective subconscious, and so forth. Like a river, that affinity for our fellows prior to and required by the
institutions of ordinary politics has many sources. Attempts to ground political identity in some set of reasonably objective criteria (common candidates are language, religion, shared history, economic interest or class, race, and gender) have failed. The essence of political identity, the one true well-spring of politics presumed by culture theories, has proven ephemeral. Political identity can apparently be formed around any or all of these aspects of life in groups, and no doubt others as well. A general culture theory appears unlikely.

We are thus left with the work of comparativists who attempt to explain relatively local politics, not in terms of a grand theory, but in terms of a specific society. In this self-conscious insistence on particularity, culture theories differ from both progress theories and from realist theories of order, each of which aspires to organize the planet within a single conceptual framework. If progress theories culminate in a vision of one world, an empire of sorts, culture theories aspire to many worlds, each peaceably going about its own business, like islands in an archipelago.

Culture theories are like realist theories, and unlike progress theories, in that culture theories are preoccupied with conflict. Progress theories concentrate on the market order, where conflict is highly localized, primarily as nonviolent economic competition. Outside the market order, warfare exists, but this will be subdued as primitive societies are modernized. Culture theories, in contrast, often stress that different cultures have incompatible beliefs, and that those beliefs may be essential to the culture. For culture theories, conflict, at least conceptual, is both inevitable and perennial. Violent conflict is certainly possible, and it is the widespread outbreak of cultural violence, for example in Algeria, Azerbaijan, and Guatemala, that gives culture theories their urgency.

By insisting on the perennial character of inter-cultural conflict, culture theories spawn prescriptions for cultural coexistence, efforts to establish a language and custom for the archipelago. Politically, culture theories require a certain minimum order, a general respect for the territory and affairs of other cultures, and a universal hesitancy to interfere. The modus vivendi proposed by culture theories for relations among various cultures resembles the practice of the United Nations: a set of formally neutral procedures, which allows each a voice and avoids coercing any. In so doing, culture
theories tend to require, if only sub rosa, that a certain minimum standard of behavior be met. One cannot deal with people one believes to be utter savages. Through their analytical emphasis on conflict, culture theories prescribe a liberal political order for intercultural relations.

Culture theories incline their adherents to liberalism, at least among cultures, just as powerfully as do progress theories. Suppose a culture ignores the minimal order and coerces another culture; suppose the Sudan, Indonesia, or Tibet. The challenge presented by those who flatly ignore cultural pluralism is, at least intellectually, a challenge to the existence of every other culture. Those interested in preserving their own way of life have a powerful interest in curbing the hegemonic efforts of others, lest interference become acceptable. The pluralistic world order can survive only if all are pluralists, whether by choice or perforce. Culture theories thus see conflict against a backdrop of order, the minimal standards of conduct which the world needs to get by. Phrased more pointedly, the analysis and defense of cultural pluralism ironically requires universal participation in the liberal civil society among cultures.

While they provide very different analyses of international affairs, the strategic implications of culture and progress theories are practically indistinguishable. From the perspective of culture theories, the international liberal order is a political accommodation of a conflicted world; from the perspective of progress theories, the international liberal order is the result of the forward march of modernity. Culture theories begin by focusing on conflict and particularity, and are forced to call for a minimal but universal standard of order. Progress theories begin with an abstract vision of universal order and are forced to acknowledge the prevalence of conflict, at least at the margins of the civilized states which are of superior interest. Both sorts of theory are inclined to liberalism among civilized states, and see conflict against a backdrop, even if only imagined, of universal order. The structural oppositions implicit in the strategies of both sorts of theory are identical: order/disorder; peaceful/violent; civilized/barbarian; liberal/illiberal.

Contemporary analyses of international relations thus recapitulate, in somewhat more general fashion, the concerns of contemporary strategic thinking. The world is a dangerous place. Violent disorder lurks. Good politics, then, is the effort
to strengthen the frontiers of the civilized world, and when possible, to tame the wilderness. Circle the wagons. We move at dawn.

III. INTERNATIONAL LAW AND WAR

A. Enforcing International Law

The end of the Gulf War gave United Nations personnel the right to inspect and dismantle the Iraqi program for the construction of weapons of mass destruction. Shortly after the war, however, Iraq ceased cooperating with the United Nations inspectors. Confronted with a recalcitrant Iraq, the United States and its allies, generally referred to as the “Coalition,” began taking limited military action, for example, launching cruise missiles at a site alleged to have been used for the manufacture of weapons-grade fissionable material. Although technically acts of war, such actions were not expected to renew hostilities. Nor was it expected that the cruise missiles would physically destroy Iraq’s weapons program. Instead, cruise missile launches and similar actions were taken in support of the inspection and sanctions regime imposed by international law (through U.N. Security Council resolutions) on Iraq. The United States has continued to use force in this manner up to the time of this writing. Secretary of State Madeline Albright said, in 1999, “[W]e are talking about using military force [against Iraq], but we are not talking about war. That is an important distinction.”

The distinction, while risible, is real: by imposing military sanctions on Iraq, the Coalition used force not as an alternative to law (or to diplomacy), but in the service of law. I believe this relationship between international law and military force is new. The aftermath of the Gulf War integrated law and force in much the same way that they are integrated in domestic legal systems. The violence of police enforcement is not merely countenanced by municipal law, it is part and parcel of the criminal justice system. Similarly, the military sanctions taken by the Coalition against Iraq were not violent expressions of national interests, legitimate (or not) under international law—which is why Secretary

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Albright insisted that the military actions taken against Iraq were not acts of war. Instead, the use of force was actually occasioned by the need to secure compliance with international law, specifically, the resolutions of the Security Council.

From its beginning, international law had been preoccupied with violence. Traditionally, however, international law was opposed to violence. Hugo Grotius, widely known as the father of public international law, published *The Law of War and Peace (De Jure Belli Ac Pacis)* in 1625, which is regarded in the West as the first systematic treatise of international law.\(^8\) (Islamic law claims several older works, notably Shaybani’s *Siyar.*)\(^9\) Grotius employed the traditional distinction between the law of war (*jus ad bellum*), which governs the border line between peace and war, and the law in war (*jus in bello*), which attempts to set minimal standards for the conduct of warfare. International law regarding the use of force traditionally either defined and thereby limited the legal consequences of war, or attempted to regulate, in some small way, the practice of war itself. In either endeavor, international law was an ordering of affairs different from, and opposed to, the use of force, warfare.

This opposition between international law and force traditionally made international law different from much of municipal law, *e.g.* criminal law or, less obviously, commercial law, in which law is intimately associated with the coercive power of the state. Indeed, the 19th century English legal philosopher Austin defined law as the command of the sovereign, backed by a coercive sanction. Because international law had no enforcement mechanism, Austin famously argued, it was not really law at all.\(^{20}\)

International law has been opposed to force in different ways through the twentieth century. At the beginning of the century, international law aspired to end war, at least among civilized countries. Carnegie money built the Peace Palace at the Hague, which now houses the International Court of Justice. After World War I, these efforts were judged naïve, and the League of Nations was founded in order to resolve

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18. HUGO GROTIIUS, THE LAW OF WAR AND PEACE (Kelsey trans., 1925) (1625).
international conflicts before they achieved the momentum of violence. In 1928, most states, including the United States, signed the General Treaty for the Renunciation of War, often called the Kellog-Briand Pact. But the League failed to prevent Italian aggression in Ethiopia, and as the 1930s declined, it was clear that international law's prohibition of war had failed.

When the fire was over, the world stood appalled at Nazi atrocities, and in what had been an age of intellectual relativism, rediscovered the opposition (so popular during the nineteenth century) between civilized and uncivilized. The civilized people of the world had to take some sort of action to prevent the repetition of such horrors. From San Francisco, where the United Nations Charter was signed, and from Nuremberg, where Nazis were tried, it briefly appeared that the victors would regulate, and in that sense legalize, warfare.

The creation of the United Nations and the trial of war criminals introduced the idea of legalized warfare in different ways. The United Nations introduced the idea directly, by providing for collective military action in its Charter. Through the United Nations, the civilized world could forcibly impose order. Such use of force was different from earlier forms of collective action, for example the Holy Alliance formed in response to Napoleon, because the military might of the United Nations was organized through the parliamentary processes of an international organization, rather than by diplomacy among sovereign nations that happened to share military interests. In the United Nations Charter, international law first contemplated its own violent expression.

The Nuremberg trials introduced the idea of legal warfare in a more subtle way. The trials found the actions of individuals who prosecuted an aggressive war and a genocidal campaign to be illegal. Under the traditional law of war, the actions of nations, not individuals, are illegal, and the commission of an illegal action gives other nations the right to respond with force, but does not give rise to the right to try the citizens of the offending state. At Nuremberg, however, the actions of individuals were found illegal under international law. If individual Nazis were guilty of illegal violence, other participants, for example ordinary soldiers, were by implication innocent, even though they also violently prosecuted the same war. To exaggerate: after Nuremberg,
international law claimed to be able to separate war crimes from the legal prosecution of an illegal war, barbarian action from civilized violence within the context of illegality. Making good on this claim required a nuanced law of war, not simply the ability to declare when a state of war, as a legal matter, existed, or even what was prohibited to soldiers. Traditionally, international law had been simply opposed to war, and had tried to curb the worst abuses. After Nuremberg, international law promised to sanction war in both senses of the word sanction: to punish criminals, and in so doing, to countenance the legal conduct of collective violence.

The legalization of warfare announced at San Francisco and Nuremberg may have been illusory from the start. From the era of decolonization forth, public international law has required the assent of many states, representing not only the developed world, but also the developing world. After World War II, a few mostly European states could no longer claim, as they traditionally had, that their shared practice or consensus constituted international law. Any notion of law that hinged on a distinction between civilized and uncivilized—as it now appears any law through war must—was unlikely to be tolerated by nations which had just won their independence from colonial rulers and formed states of their own.

The establishment of a global law of warfare was prevented in fact, however, by the outbreak of the Cold War and its strategic, rather than legal, ordering of violence. Albeit in a dangerous and perverse way, the East-West order was an order. As such, it suppressed violence (or at the very least, moved it to the developing world), but this peace was the result of conflict, of the potential for far more violence, not the product of law. Hostility was thus ubiquitous, notionally present even in areas visibly at peace, even in ostensibly neutral countries. Under the Cold War threat of nuclear destruction there seemed to be no peaceful space outside the global conflict from which to judge actions within the conflict. Military action was interpreted from the perspective of self-interested parties, and few thought that the details of military action should be considered under the relative objectivity of law rather than the frank self-interest of Realpolitik, even if interests were determined largely by ideology. The task set by Nuremberg—the distinction between legal and illegal violence through adjudication—
LAW THROUGH WAR

proceeded no further. Nor was war legalized through the legislative function of the United Nations. Stalemates on the Security Council generally precluded exercise of the collective use of force provided for in the Charter; rare exceptions such as the Korean War were widely regarded as manipulation by the United States rather than examples of collective action.

Finally, scholars poised on the brink of Armageddon could not seriously support the use of force, and so there was little support for the legalization—as opposed to the prevention—of war. Instead, scholars devoted a great deal of attention to non-violent sanctions. (The paradigmatic example of such sanctions was the United Nations policy towards South Africa.) Implicit in the phrase “non-violent sanctions” was the assumption that non-violence was the only hope for quasi-coercive persuasion in the international arena. The United Nations, and by extension international law, did not have the wherewithal for sustained military engagement. Peacekeeping forces would generally be deployed where they were wanted, for example, to oversee an already agreed upon demobilization of forces, or to prevent rioting. In such a world, international law and warfare remained quite separate; warfare remained an object of international legal discourse, but no more.

To understare, the world has changed. The polarity of the East-West order has been replaced by the bifurcation between civilized and barbarian, and warfare, at least some warfare, has become legalized. These propositions are instantiated by recent history: armed interventions by civilized countries, usually but not always under the auspices of the United Nations, into barbaric situations have been almost commonplace in the 1990s. Consider military operations in, for examples, Bosnia, East Timor, Haiti, Kosovo, Kuwait/Iraq, Rwanda, and Somalia. Civilized countries also appear quite willing to punish people in barbaric places who commit atrocities that violate international law. Consider the war crimes tribunals for Bosnia, Croatia, and Rwanda, and the efforts to construct a permanent court of international criminal justice. Law through war, the formalization of the civilized world’s wars on barbarism, is on its way.

The bifurcation between civilization and barbarism is evidently far more authoritative in today’s international law than it ever was before. There are a number of reasons for this. First, nations all over the world are now, officially,
civilized. International law publicists traditionally thought of the “civilized practice” of European states as international law, and maintained that European customs pertaining to international relations were stable and universal enough to be considered a source of law. This was no doubt a prejudice, particularly considering the prevalence of violence in Europe, and while in some quarters the prejudice may have fueled imperialism, among publicists it was primarily an analytic error. Today, states from around the globe participate in international organizations, pay their dues to the United Nations, repay the loans organized under the auspices of the International Monetary Fund or other supranational organ, and generally act as if they were one of the traditional arbiters of international law. Although differences of opinion and interest continue to exist between North and South, between developed and developing nations, these differences are discussed in the terms of public international law. Because international law has largely fulfilled its aspiration to become the law for all nations, because barbarism is relatively isolated, the new distinction between a participant in the global order and a nation which sets itself outside that order, between civilized and barbarian, is more salient than it has ever been before.

The second reason for the contemporary authority of the bifurcation between civilized and barbarian is that current notions of security and international relations have made the bifurcation a political imperative. If the old distinction between civilized and barbarian was a prejudice, the new bifurcation is a creed. Contemporary progress and culture theories of international relations present civilization—stable liberal modernity—as either the inevitable and desired outcome of history, or as the only hope for an irredeemably conflicted world. Strategic thinking transforms these analyses of, and general political prescriptions for, international relations into a security requirement. In a world defined in terms of dangers rather than enemies, the destabilizing potential of anarchic territories or illiberal states renders them a threat to the civilized world of liberal modernity. It is necessary for the safety of all that we ensure the liberal modernity of all.

Consequently, the United Nations Security Council voted for military measures to ensure that Iraq is obedient, and intervention in Somalia or Bosnia, or in Haiti or East Timor is not seriously viewed as military aggrandizement. Instead,
these actions are the expressions of the civilized world toward the barbarian world, the public interest of the police in keeping the peace. Joseph Nye recently argued that the course of events, particularly U.S. commitments, elevated Kosovo from the “C” list of countries (for which U.S. policy is defined by humanitarian sentiments) to the “B” list (for which U.S. policy is defined by direct threats to U.S. interests).\(^{31}\) Perhaps a drawn-out war, in which the credibility of the U.S. military and NATO, and hence possibly widespread destabilization, was at stake, would have elevated tiny Kosovo to the “A” list of countries, for which U.S. policy is defined by threats to the survival of the U.S.—countries like the old Soviet Union, or perhaps that domino, Vietnam. From within the logic of civilized and barbarian, it can always be argued that barbarism is destabilizing, and once barbarism has been engaged, the need to preserve credibility requires that it be defeated.

By using cruise missiles to *engender* compliance with United Nations resolutions—not to *compel* compliance, which would have required a ground invasion—the Coalition introduced the idea of the military sanction into international law. Military sanctions, like acts of war, are violent. But military sanctions and war are also different from one another. War is a means of coercion, an exercise of force. Military sanctions, like economic sanctions and even normal diplomatic maneuvering, are a means of negotiation, not a replacement for negotiation like war, even war legitimated by Security Council resolution. Military sanctions rely on the assent of the party to whom they are addressed, in contrast to military victory, which obviates the need for assent. Thus, incredibly enough, military sanctions are a means of creating community.

In using military sanctions, the Coalition fulfilled the promise of San Francisco and Nuremberg and finally joined what had theretofore been held asunder, international law and publicly organized violence. International law has blessed the use of force; the law now includes, as opposed to excuses, violence. Under what circumstances will such blessings be granted?

\(^{21}\) Joseph S. Nye, Jr., *Redefining the National Interest*, FOREIGN AFF., July/August 1999, at 22, 26, 34.
B. Conceptualizing War

In many places, the Cold War established local peace by asserting global conflict. The end of the global conflict was also the beginning of many local wars. People no longer had geopolitical reasons for not killing each other, nor were they prevented from killing each other by foreign intervention (usually effected through propping up an absolutist regime favorable to one's policies, for example as the United States did, in countries such as Liberia, Somalia, and Zaire, or as the Soviet Union did in countries such as Afghanistan and Ethiopia). For much of the planet, global politics suddenly ceased to matter, and the superpowers not only stopped opposing one another on the soil of third parties, they often decamped altogether, leaving the locals to conduct their own affairs. All too often, local politics degenerated into violence; war broke out in each of the countries just mentioned. The end of the Cold War meant that local political interests could be expressed violently, as they have been throughout most of history.

The nineteenth century Prussian military strategist Clausewitz said that war is politics by other means, and our time has been wryly called a “return to Clausewitz.” Characterizing contemporary affairs as a “return to Clausewitz” makes an important point. In Clausewitz’s Europe, many parties played politics, even the violent politics of war. During the Cold War, only the East and the West pursued politics that mattered. Other wars may have been of great local importance, but they were treated as proxy fights, skirmishes between East and West, usually marshaled by the Soviet Union or China on the one side, the United States on the other. Now, as in Clausewitz’s day, even miniscule


23. It bears mentioning that the United States often understood the world as even more polarized than it was. There was even a minority—I’m tempted to say dissident—policy tradition, that resisted the habits of thought dominant in American policy circles. In the early 1960s, George Kennan famously argued that the Soviet Union remained, in profound ways, Russia—“a creature of its history. As David Halberstam put it, throughout the Cold War it might have been possible for the United States to see “the tensions of the world in traditional terms of nationalism, and not to see communism as a monolith.” David Halberstam, Requiem for the Cold War, PLAYBOY, Jan. 1, 1994, at 161,
places like Serbia can dream belligerent dreams.

Yet despite the decentralization of warfare, Clausewitz departed rather than returned at the end of the Cold War. The world has been decisively recharacterized by the contemporary bifurcation between civilized and barbarian. As result, the conceptual vocabulary of international relations has been transformed. Clausewitz and his heirs understood international politics as a particular structure of relations among civilized nations. Elements of the matrix were described with the vocabulary of national interests, law, diplomacy, or war. Because those concepts have been redefined, the structure articulated by Clausewitz no longer exists.

From the realist perspective, understanding national interests was the key to understanding international affairs. A nation's "interests are eternal and perpetual," said another patron of realism, British Foreign Minister Lord Palmerston. National interests could be expressed in a variety of ways. The most obvious way for a nation to express its interests was directly, through diplomacy. Another expression of national interest was the creation of international law, through which nations made the relationships among themselves binding. Yet another way for nations to express their interests was to go to war. (Realists often called interests for which a nation goes to war vital interests, i.e., interests worthy of killing.)

After a lengthy consideration of the "incompatibility between war and every other human interest," and the resultant impossible exigencies imposed on humans at war, Clausewitz wrote that war was conceptually unified (and hence could be the object of a science in the German sense of \textit{Wissenschaft}) by "the concept that war is only a branch of

\begin{itemize}
\item \text{220. And in the 1970s, after the monolithic view of Communism had led the United States into Vietnam, the policies of the Nixon and Ford Administrations toward both China and Russia relied, at least to some extent, on a triangular, as opposed to polar, political geometry. But these are roads that were barely traveled; this Essay is in part an effort to map the highway.}
\item \text{24. Lord Palmerston, in defending his foreign policy in the House of Commons, remarked, "We have no eternal allies, and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow." \textit{97 Parl. Deb.} (3d ser.) 122 (1848), \textit{quoted in Respectfully Quoted: A Dictionary of Quotations Requested From the Congressional Research Service} 10 (Suzy Platt ed., 1989). The thought was famously repeated by Charles DeGaulle: "A state worthy of the name has no friends--only interests." \textit{Newsweek}, Oct. 1, 1962.}
\end{itemize}
political activity; that it is in no sense autonomous.\footnote{25} For Clausewitz, war was to be understood as a language, one way in which the nation expressed itself:

War in itself does not suspend political intercourse or change it into something entirely different. In essentials that intercourse continues, irrespective of the means it employs. The main lines along which military events progress, and to which they are restricted, are political lines that continue throughout the war into the subsequent peace. How could it be otherwise? Do political relations between peoples and between their governments stop when diplomatic notes are no longer exchanged? \textit{Is war not just another expression of their thoughts, another form of speech or writing?} Its grammar, indeed, may be its own, but not its logic.\footnote{26}

In the same vein, Secretary of Defense Robert McNamara described bombs dropped on North Vietnam as \textit{“bomb-o-grams.”}\footnote{27} The primary purpose of U.S. ordnance is to express the national interests of the United States; the fact that explosives kill people is secondary, if not exactly incidental, to the realization of those interests.

Thus, from a realist perspective, law, diplomacy, and warfare might be viewed as three different languages in which international politics could be conducted. The same action, for example stationing an aircraft carrier in international waters off the coast of another nation, might have made statements in all three languages, statements which were both unified by a single political intention and yet distinguishable. Legally, stationing a carrier was permitted, and did not change the prior legal relations of the parties. Diplomatically, stationing a carrier usually showed displeasure, and militarily, it might have conferred an advantage. Although related, law, diplomacy, and war were obviously distinct languages—the political message of the same action was somewhat different in each language. As with literature, so with politics: translation entailed shifts in meaning.

The metaphor of language—and with it, the idea that law, diplomacy, and war are all expressions of national interest—always had its limitations. These political languages

never had independently determinable meanings. Consideration of one political language required knowledge of the other: law addressed the parameters of war, diplomacy mediated between law and war, and war changed legal relationships. Nor did the three languages mentioned here comprise an exhaustive list. But while the precise contours of the relationships among law, diplomacy, and warfare were both complex and fluid, at a fundamental level each language was a way of expressing, and hopefully of attaining, national interests. From the perspective of realist theories, the languages were functionally equivalent, and the establishment of national interests was logically prior to each of them.

This equivalence and this order of priority no longer exist, which is why I suggested that Clausewitz has departed. Although one still hears the language of the realists (new languages take a while to develop), the contemporary understanding of international politics is vitally different from that of Clausewitz and his realist heirs. The broad outlines of the contemporary reimagining of international law are already becoming familiar: Within the global order, civilization, law is prior to politics. Politics is no longer imagined as the barely fettered pursuit of national interest in the wilderness of international affairs. Contemporary international politics is the orderly pursuit of interests (many defined along non-national lines) within the framework of international civil society, a framework now formed by a web of trans-, multi-, and supranational understandings. This web of understanding forms a legal environment—what my teacher Harold Berman calls world law—in which political and economic activity are embedded.28 We now consider the politics of nations (and other actors on the global stage) to be embedded in law in much if not exactly the same way that we consider domestic activity to be situated in a legal environment. It is true, of course, that politics is also prior to law, because law is made through political processes, i.e., political outcomes alter the environment for subsequent politics. The vital change in our conception of international relations, however, is that we no longer think of international law as an expression of national politics so much as a

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precondition for political action within the civilized order.29

Kosovo has made this shift in the way international law is conceived, implicit in the emergence of the global market, explicit for the heart of traditional public international law, state sovereignty. The broad acceptance among international law scholars of the NATO intervention in Yugoslavia on behalf of the Kosovar Albanians strongly suggests that the nation-state is no longer believed to be the fundamental unit of international law.30 Yugoslavian (Serbian) activity in its own province of Kosovo posed no immediate military threat to another country; there was no Security Council decision authorizing the use of force. The considered view of many international law scholars is that the NATO bombing was, under the Charter at least, illegal. But it apparently did not feel illegal. I have listened to and read numerous impassioned arguments that strained but failed to find traditional legal justification for NATO's actions. At some fundamental level, international law scholars appear to have subordinated the doctrine of state sovereignty to international law's prohibition on genocide, a position which has been explicitly taken by Michael Glennon: "[I]ntestate genocide is no longer entitled to the protection of sovereignty."31

Kosovo appears to teach two lessons important for the purposes of this Essay. First, genocide is barbarism, and the civilized world need not respect the sovereignty of barbarians, even when they pose no threat to security. Warfare against barbarians is permissible; even Germany, with understandable hesitation, supported the NATO intervention in Kosovo.32 Warfare may even, pace Glennon, be

29. This is a point emphasized by another of my teachers, Abram Chayes. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

30. My sense of the scholarly communities is that most American scholars supported the intervention, with varying degrees of discomfort and varying judgments regarding its conformity with international law. I know some Europeans opposed the intervention, and it seems to me that European international law scholars on the whole were more hesitant about the wisdom of the intervention, and on the whole more convinced of, and more concerned about, its illegality.


32. See Niall Ferguson, Mitteleuropa Diarist: Parallels, THE NEW REPUBLIC
required—hence the “new interventionism.” If barbarian (at least genocidal) states are not sovereign, they cease to be states.

The second lesson is the converse of the first: statehood is defined in terms of participation in the civilized order. Whereas international law was once understood to be the product of express or tacit agreement among states, the state itself has come to be defined by its conformity to the basic requirements of international law. Failure to conform to such requirements, for example, by slaughtering one’s minorities, results in the forfeiture of sovereignty and so loss of statehood. Writing about Yugoslavia in a play premiered this summer in Vienna and in Belgrade (while NATO bombarded the city), Peter Handke captured the new international perspective perfectly: “Third International Representative: This is not a people, just a mere entity. This is no country, just a gray zone. And gray zones can no longer be tolerated geopolitically.” Thus substantive international law is prior to national politics.

Within the civilized order, politics can be expressed in a variety of ways, but by definition, warfare is not an expression of orderly politics. The United States is not about to go to war with the European Union over bananas, nor is Japan mobilizing its armed forces in order to sell more light trucks. Trade wars are just that: highly legalistic disputes over the regulation of transfers within the global market. The disputes themselves presume the existence not only of the market, but of various international fora, the press, the World Trade Organization (WTO), the United Nations, and various governmental channels, in which to hold the dispute. Within these fora, modes of expression range from the legal

June 7, 1999, at 50.


34. PETER HANDKE, DIE FAHRT IM EINBAUM, ODER, DAS STUECK ZUM FILM VOM KRIEG [TRAVELLING BY DUGOUT, or THE PLAY ABOUT THE FILM ABOUT THE WAR] 93 (1999) (author’s translation). To put it mildly, Handke is ill at ease with the passage quoted: “Dritter Internationaler: Das ist kein Volk, sondern eine blosse Entitaet. Das ist kein Land, sondern eine Grauzone. Und Grauzone koennen geopolitisch nicht mehr geduldet werden.” Translating Handke’s text into English presents fine challenges. I thank my parents, who saw this play at its premiere in Vienna, for their thoughts on Handke in general, and on the translation of the title and the passage at note 54 infra in particular.
(e.g., adjudication) to the traditionally diplomatic (e.g., WTO negotiation) to the baldly political (e.g., use of the press). Security is now defined in terms of keeping those channels healthy, not as it once was, as military advantage that can be used in the event of the failure of those channels.

The current imagination of international relations is circular (as was the imagination of Clausewitz and his realist heirs), and warfare is simply out of the circle. We have undergone a change analogous to the change from polis to empire: While perhaps the essence of political life is the same as it was during the Cold War, just as the essence of political life perhaps was unchanged by Alexander, the ways in which we can think about politics have shifted. Traditional realism is no longer available to us. The elements of Clausewitz’s scheme of national interests, expressed through law, diplomacy, and war, have been rearranged. Within the civilized order, international law is the precondition for the expression of national interest. It is true that national interest generates international legislation, as well as diplomacy and other forms of ordinary political expression, such as the manipulation of the press, that is, nations still make law. But national interest does not determine political expression, is not some sort of “ground” on which international law or diplomacy is founded. The “national interest” has become a vague yet pervasive construct which suffuses but does not determine the progress of actual affairs. For example, no one would maintain that the cabaret of our trade policy is a consistent expression of some national interest. The national interest is largely unknown, and serves more often as a trope than as the lodestar of trade negotiation.

Politics within the civilized order cannot be militarized, because the civilized order is defined as the area within which politics is not carried forth by military means. Similarly, on the national plane, the civil order is largely defined as an area where the state, but not the individual, enjoys the use of force. When an individual uses force against another, he has to some extent left the civil order; when a state uses force against another, it too has left the civilized order. This does not mean that nations cannot, or do not, use force. But once a state has entered violent relations, at least some civilized relations have been abandoned.

The barbarian world, in contrast, is the world in which violence belongs, the world of warfare. There are two types of
warfare: the warfare in Nigeria, Sudan, and Columbia—the places where locals slaughter one another, where barbarism threatens. (Perhaps the argument is heard that external military forces should intervene, that the world should do something in order to ameliorate the suffering.) The second type of warfare has recently been found in Iraq, Somalia, Rwanda, Kosovo, and East Timor, places where the civilized world intervenes in a local conflict and expresses itself through force, slaughters locals. The now pressing question is how the civilized world will make its violence principled.

C. Legalizing War

Enunciating or expressing a principled conception of law through war, and by implication the relationship between civilization and barbarism, will be difficult for the “civilized” world to accomplish for two reasons. First and morally, it requires setting almost at nought one of the values that we pride ourselves on, tolerance, and admitting that we have, and are acting on, a profound prejudice, the distinction between civilized and barbarian.

The second problem is more subtle. On the one hand, warfare requires expedience. But states that merely do what is expedient will not be regarded as obeying law; a law through war that merely enjoins states to do what they otherwise would will not be recognized as law. Indeed, international law regarding the use of force has always been vulnerable to the exigencies of military conflict. Violations of the law in the name of military necessity predictably lead to the charge that the purported law is merely an apology for power. It therefore may seem more prudent, and more realistic, to leave decisions regarding the use of force up to the political elements of the international community, and to structure military intervention around ad hoc assessments of individual cases.

Although the civilized world has reasons to avoid articulating a law through war, the ad hoc approach is unlikely for at least seven reasons. First, military operations carried out under more than one political authority require public specification, rules, as to how they will be carried out. If military action is carried out under the auspices of the United Nations, for example as in Iraq, by troops recruited and organized by individual states, the various authorities involved need to specify their activities in order to avoid
conflict among themselves. Specification is not the same thing as law, because specification can be restricted to a particular situation, for example, Iraq. Nonetheless, specification does introduce the idea that military action is subjected to a rule, even if it is a rule that applies only to an individual case.

Second, there are no individual cases. Situations are only isolated as a matter of analysis. Practice generates rules; custom arises. That which was authorized or denominated illegitimate once is likely to be so again. Does the declaration of a no-fly zone include passenger planes? Suppose the planes could be carrying troops? Any answer creates a precedent, begins a custom, and custom is the legislation of history. Custom will provide authoritative answers to such questions if written legislation does not. Unlike the coordination of individual political entities, this legislation by custom will be general.

Third, rules are endemic to large bureaucracies. The wars of the civilized world, like much of their politics, are a matter of bureaucratic articulation. Bureaucracy, i.e. "rational" entities that rely on a professional claim to truth for their authority, prefer their particular actions to be understood as instantiations of rules. (Bureaucratic action that does not appear to be dictated by rules undermines the authority of the bureaucracy.) Rules come to the fore when bureaucratic authority is challenged, usually when bureaucracies conflict.35 Such conflicts are jurisgenerative: international institutions, like states acting in concert, will attempt to establish clear lines of competence in order to avoid hindering one another's work, and undermining one another's authority.

Fourth, the United States is unlikely to use force without securing the approval of other important states. Although it is unclear whether the United States would have gone to war in the Persian Gulf even without United Nations approval, it certainly sought that approval. Similarly, NATO, not exactly the United States, intervened on behalf of the Kosovar

35. "If we don't learn anything else out of this operation, we need to learn never to set up another situation like dual key. We have got two separate command organizations working for two different political bodies . . . ." U.S. Navy Admiral Leighton W. Smith Jr., commander-in-chief of Allied Forces in Southern Europe, quoted in Peter Benesh, NATO Chief Faults U.N. Bosnia Bind Admiral Says 'Dual Key' Command Setup Prevents Air Drops of Food to Needy, PITTSBURGH POST-GAZETTE, Apr. 22, 1995, at A4.
Albanians. If one is fighting under the banner of civilization rather than mere national interest, it should be possible to secure international support, or at least explicit acquiescence, for the effort. So the institutional structure of our recent interventions has been international rather than national.

Fifth, the civilized world is unable to intervene everywhere. The sheer scope of contemporary anarchy can lead to conflicts among peoples who, incredibly enough, want to be invaded by a superior power, for example, certain ex-Yugoslavians, Somalis, and Haitians. Such peoples need a principled way to plead their case, and more generally, to resolve their conflicts over that precious resource, the violence required to establish order. In consequence, some principled way of deciding among claimants for intervention is required. Any politically operative articulation of those principles will be international law.

Sixth, from the converse perspective of the civilized world, there needs to be a principled way to decide where to intervene, to sort out the complexities of moral obligation, efficacy, interest, and so forth, so that we feel justified in establishing order in a certain area, and abandoning another area to its destiny unaided, so that we are relatively comfortable in choosing, for example, between intervening in Somalia and Yemen, or between Yugoslavia and Rwanda. Failure to have a principled way to make such decisions leaves the civilized world open to charges of callousness if it does little or nothing, or prejudice (racism) if it acts in one place but not another.

Seventh and finally, the civilized world must base its military interventions on legal principle because failure to do so would leave its military representatives vulnerable to lawsuit in its own courts. For example, as of this writing, various NATO member states have been charged, before the International Court of Justice, with violating Yugoslavia’s sovereignty and hence international law. It will not be surprising if other suits are filed against NATO forces alleging that actions taken in Yugoslavia violated the international law prohibiting war crimes. More generally, a growing number of international tribunals and an increasing willingness on the part of municipal courts to impose international law (consider the courts of both Spain and Great Britain in the Pinochet matter) ensure that even the violence of civilized sovereigns against barbarians (or, in the Pinochet matter, of a sovereign against its own subjects) will
be evaluated, after the fact, in legal terms. In order that they not subsequently be deemed illegal, the civilized world’s military interventions are now required to be defensible in the legal terms the civilized world has articulated in order to judge barbaric action. To summarize: the civilized world’s military interventions will be legally articulated because the law through war is constitutional, a way through which the civilized world sets bounds to its own power.

In this Essay I have discussed a core prejudice in contemporary views of international law, the distinction between civilized and barbarian. The civilized world may impose law on barbarism: by launching cruise missiles to encourage compliance with international resolutions; by disregarding the sovereignty of a barbaric regime and bombing its cities; by trying individual barbarians for their atrocities. Such impositions are legally articulated; we are legislating through war. I would like to finish by asking what thinking about a law through war might entail.

IV. CIVILIZING VIOLENCE

The end of the Cold War engendered a rare level of consensus—or, more precisely, a relative lack of disagreement—over American foreign policy. “Right and left[,]” Stephen Stedman claimed in *Foreign Affairs* in 1992, “agree on the broad outlines of America’s future foreign policy,” and that agreement forms the basis for what Stedman termed the new interventionism, the willingness to deploy the military that occasions this Essay. But, as I said at the beginning of this Essay, the substance of any such agreement on policy—what we might term the Washington consensus—is based upon largely tacit understandings of politics. It would be unreasonable to expect tacit understandings, and hence the Washington consensus, to be very thoughtful. So, before further elaborating the new interventionism, i.e., before articulating a law through war, we should examine the substance and assumptions of this putative policy consensus with some care.

The new consensus—“the lack of vehement disagreement in print, much less violent protest or illegal action, over going to war—is striking. Why does the “liberal” newspaper of

record, the New York Times, join the conservative “newspaper” the Economist in proselytizing for massive intervention in unhappy countries, chiefly Yugoslavia? Why has American force-deployed in Somalia, in the Persian Gulf, in Haiti, in Yugoslavia—raised so few questions? Where have the critics of United States policy, which more out of convenience than in precision I will call “the left,” gone? Jane Fonda did not visit Baghdad, and did not even stop to offer aid and comfort in Port au Prince on her way to the United Nations Conference on Environment and Development in Rio de Janeiro. Whatever happened to the hordes of people who, during and after the Vietnam War, said that America has no moral authority to police the world? One still hears the phrase on occasion, but nowadays it usually indicates the speaker’s belief that we should spend our money on domestic problems and let other folks tend to their own difficulties.

I recently took part in a conference honoring Abram Chayes,37 who, as Legal Adviser in the State Department, authored the U.S. Government’s somewhat tenuous defense of the legality of the naval blockade of Cuba during the Cuban missile crisis in 1962.38 Abe has also been willing to criticize the United States: he represented Nicaragua in its successful suit against the United States before the International Court of Justice in the Hague.39 At present, the United States and its allies seem to be without a well-articulated legal defense for the decision to bomb Yugoslavia, and yet the bombing itself seemed beyond defense and reproach. At the conference, generations of liberal internationalists were unconvinced that a plausible case for the legality of the NATO intervention for Kosovo could be made—and still supported the intervention. Evidently, we do have the moral, if not (yet) the legal, authority to police the world. But one cannot help asking, where is the criticism? Are today’s wars so clearly right, while those of a generation ago were so clearly wrong?

The obvious answer to these questions is that since the Vietnam War was lost, the Cold War was won—a point even the Vietnamese seem eager to concede. The collapse of the Marxist states was more than the predicate for the end of the Cold War and the East-West order. Political collapse marked a profound loss of faith in the possibility that the details of social life could be consciously organized, for example, that the flow of goods and services could be managed by rational planning. But if social life cannot be consciously organized, if government is a failure, then rational criticism of social arrangements is a waste of time. Politics remains a necessity, but serious political critique is hopeless and can be avoided. This skepticism should give Americans pause. It was the United States, not the Soviet Union, that first posed the question “whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”

For all the elegance of the Constitutional frame, who could watch the antics of any recent election and think we Americans have affirmed Hamilton’s first possibility, that is, who is willing to claim that we have a reflective politics? Apparently not the participants: President Clinton opened his first inaugural address as “a celebration of the mystery of American renewal,” and spoke not of governance ordered and fruitful like nature, but in imagery evocative of both Caesar’s birth and rape, of “forcing the spring.” For Americans, the world of politics has become obdurate, unyielding, and in the failure of our minds, we rely on the will, force. Perhaps the American dream of a rational politics, what we with characteristic aspiration used to call the American experiment, is over.

This poses a puzzle. If we so doubt that our peaceful relations are rational, should we not be that much more unwilling to engage in warfare? Vaclav Havel’s argument against political violence should ring true for us. Havel argued that, in claiming that he and other dissidents were plotting the violent overthrow of the state, the authorities badly misunderstood the dissidents’ critique of Marxist politics. For the dissidents, a violent revolutionary was one

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41. We Force the Spring: Transcript of [Inaugural] Address by President Clinton, N.Y. Times, Jan. 21, 1993, at A15 (emphasis added).
who was willing to kill people for the sake of a theoretically possible political imagination, who was willing to trade certain death for dubious ideas—a fool. The dissidents were rebelling against just such tyranny of theory, against a politics that subjugated humanity, in all its messy reality, to the constraints of doctrine. In their world, where no one believed in political certainty, there could be no revolutionaries. For them, the only sensible politics was non-violent politics. Why does this conclusion, which sounds so sensible when applied to authoritarian states and sectarian violence within the developing world, not seem to apply to the United States and other civilized countries in their activities towards at least parts of the developing world?

During the Vietnam War, the American woman of letters Mary McCarthy struggled with the relationship between conscientious politics and military engagement in a review she wrote of Alexander Solzhenitsyn’s *August 1914.*

42. The antipathy of Havel and like-minded dissidents is to be found in the innermost structure of the ‘dissident’ attitude. This attitude is and must be fundamentally hostile towards the notion of violent change - simply because it places its faith in violence. (Generally, the ‘dissident’ attitude can only accept violence as a necessary evil in extreme situations, when direct violence can only be met by violence and where remaining passive would in effect mean supporting violence: let us recall, for example, that the blindness of European pacifism was one of the factors that prepared the ground for World War II.) As I have already mentioned, 'dissidents' tend to be skeptical about political thought based on the faith that profound social changes can only be achieved by bringing about (regardless of the method) changes in the system or in the government, and the belief that such changes—because they are considered 'fundamental'—justify the sacrifice of ‘less fundamental’ things, in other words, human lives. Respect for a theoretical concept here outweighs respect for human life. Yet this is precisely what threatens to enslave humanity all over again.

'Dissident movements,' as I have tried to indicate, share exactly the opposite view. They understand systemic change as something superficial, something secondary, something that in itself can guarantee nothing. Thus an attitude that turns away from abstract political visions of the future toward concrete human beings and ways of defending them effectively in the here and now is quite naturally accompanied by an intensified antipathy to all forms of violence carried out in the name of a ‘better future,’ and by a profound belief that a future secured by violence might actually be worse than what exists now; in other words, the future would be fatally stigmatized by the very means used to secure it.

**VACLAV HAVEL, LIVING IN TRUTH** 92-93 (Jan Vladislav trans., 1987).

Solzhenitsyn’s critique (which presaged Havel’s) extended beyond the particular policies of the Soviet Union to condemn the epistemological assumptions of revolutionary politics per se, in particular the revolutionary’s claim that political understanding sufficient to make violence an instrument is available, at least to the intellectual vanguard. For Solzhenitsyn, little of politics is understood, especially at the time, and the obligation to fight depends on loyalty, not politics. In short, for Solzhenitsyn, one might very well have to be a good soldier in a bad cause, such as the First World War. As an aging radical, McCarthy wished to protect the theoretical legitimacy of revolutionary violence against the arguments of dissidents like Solzhenitsyn and Havel, arguments that, if taken seriously, would (and did) dismantle the leftist belief in violent political rebirth. The American left needed a casuistry of violence, a shorthand way of criticizing events like the Vietnam War while rationalizing events like the civil war in Nicaragua.

McCarthy considered wars against oppression, whether by an invader, like the Germans in Russia or the United States in Vietnam, or by an oppressor class, like the Tsar and the aristocracy in Russia, to be legitimate. Such wars, she seems to have hoped, would contribute to the achievement of true human liberty. Other wars, wars that advanced political self-interest (other than the self-interest in liberty), were illegitimate. Vietnam, for example, was wrong because we killed to further the self-interest of a (more or less demonized oppressor) class, what Eisenhower called the “military industrial complex.”

44. “It is as if his book had been designed to offend ‘advanced people’ wherever they are to be found—revolutionaries, real and false, all those who wish, at least in thought, to be ahead of their time rather than behind it or in the middle of it.” Id. at 161.  
45. See id. at 159.  
46. It is worth noting that McCarthy opposed U.S. entry into World War II, a position she recanted. See id. at 160.  
47. Mary McCarthy explains:  
[Solzhenitsyn] is urging us to turn away from the terrible encircling trap of revolutionary ideology and take the safer course of gradualism and inch-by-inch social progress. Yet to trust in progress today, when no cure for the body politic but surgery is visible, seems old-fashioned, almost simple-minded. It would take a Rip Van Winkle still to hope for gradual betterment through reforms.  
Id. at 160-61.  
48. Dwight D. Eisenhower, Farewell Radio and Television Address to the
The American left thus defended itself from the challenge posed by the dissidents in the terms it best understood, the terms of realism, in which warfare was a language for the achievement of political interests—diplomacy by other means—and moral judgment turned on one's assessment of the political interests for which war was waged. McCarthy's realism differed from that of Henry Kissinger (she criticized the Vietnam War; he planned it) but polemics share contexts. With the passage of time, the bitter controversy over Vietnam has come to reveal substantial agreement between left and right, even between McCarthy and Kissinger, about political life. Revolutions, wars of liberation from colonial powers, and defenses of the motherland against invaders, were all legitimate military actions because they contributed to human freedom. At this level of generality, the left's justification for violence was the same as that offered by many on the right, who understood the American wars, including the Revolution, the Civil War, World War I, World War II, Korea, and Vietnam to be about freedom, indeed, as violent episodes in the process through which freedom was spread across the globe. Left and right differed over whether Marxism offered freedom, that is, whether the politics of The Party were somehow more liberating than the politics of The Market. Left and right also differed over how they characterized freedom: the left thought that freedom was the expression of community; the right saw freedom as the absence of restraint in order that one might go about one's business in an open society. From either perspective, military violence was legitimate because it made the construction of the good polity, and thus human freedom, possible.

In view of the ugliness in the Soviet Union, Germany, Cambodia, and even epiphenomena like our internment of our citizens of Japanese descent and McCarthyism, few still believe that violence is liberating. Violence has its own fearsome logic, and that logic deployed for institutional purposes is totalitarian, not liberating. Under the attack of the dissident literary tradition, the idea that freedom for politics will be advanced by violence has been discredited. Where even a minimal social order exists, violence will be useless to improve the lot of the people because of the nature

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of violence itself. Revolution has failed; gradualism has triumphed.

Prisoners of their sort of realism, the American left could not confront the issue raised by Solzhenitsyn, Havel, and other dissident intellectuals, who asked a question that could not be phrased within the grammar of realism, and that required a new political language. If politics is largely irrational, and violence has its own evil logic, how can we justify political violence? By the time Clausewitz ceased to describe our world, so had Marx, and the idea that enlightened liberation justifies violence became absurd. But the left had nothing else to offer, and so fell silent regarding our military violence. That silence is the measure of the extent to which the left's casuistry had occupied the field of serious critique of our military policy.

The new warfare is not a matter of national interest as traditionally understood. We had no national interest in Somalia or Rwanda; we have no interest in what was Yugoslavia. We had traditional but hardly vital interests in Persian Gulf oil, and in curbing the Iraqi military build-up. Our actions in Africa and Yugoslavia were justified primarily on humanitarian grounds, with the obligatory nod to the need for stability and security in the region in which the troubled country in question is located. The Gulf War was explicitly legitimated, and mildly ridiculed but hardly criticized, as a defense of the new world order, that is, of global modernity. No doubt criticism of our activities in the Persian Gulf or the former Yugoslavia would have mounted if the body count did, as happened in regard to our presence in

49. Hannah Arendt strenuously argued that Marx did not advocate political change through violence; that violence accompanied historical transformation, as labor pains a birth. As a political matter, and as Arendt herself realized, it suffices to note the standard Marxist/revolutionary position. See Arendt, supra note 8, at 124-28. At a deeper level, I doubt that a better reading of Marx would resolve McCarthy's difficulty with Solzhenitsyn, more generally, the Left's difficulty with the dissidents. Ideas that are central to Marx, such as progress, history, and freedom, have been powerfully transformed, even among those who, like Havel, care a great deal about solidarity.

50. It bears remembering that any of these actions could be understood in terms of national interest, if such interest includes that amorphous quality known as prestige. Thus, in the logic of the Cold War, and especially Vietnam, a government's commitment generates a national interest, i.e., the interest in being perceived as following through on one's commitments. In short, from the perspective of a sufficiently thorough realism, all government actions could be justified as in the national interests, and political criticism is superfluous.
Somalia, but the point important for our politics is that the criticism that recently seemed so obvious—that the United States did not have the moral authority to wage war—was hardly made with regard to the Persian Gulf or Yugoslavia (at least in this country). Nor did we hear the dissident criticism, the skeptical belief that government is unlikely to do anything right, and should consequently avoid, whenever possible, killing people. Why not? To borrow from Conrad’s tale of civilization militant, *Heart of Darkness*, it is strange how we accepted this unforeseen partnership, this choice of nightmares forced upon us in the tenebrous land invaded by these mean and greedy phantsoms.  

We have accepted this particular nightmare because our current ideologies, by which I mean merely our collective mythological accounts of politics, do not make much sense of the present situation. We are witnessing the transformation, not the end, of ideology, but such transformations take time, and there simply has not been enough time to come up with a serviceable account of politics after the Cold War, to say nothing of international politics in light of other obviously significant developments, such as the emergence of electronically mediated global capital markets. Without such an account, our experience of politics is tenebrous, shadowy, and all our partnerships are unforeseen and at present almost inexpressible. But there is every reason to believe a new ideology is emerging; I have argued that its outlines are already discernible. This Essay attempts to articulate the structure of belief that appears to be emerging, that is, I have tried to make our rather inchoate understandings of international affairs explicit, and so subject to criticism.  

I have argued that the division between civilized and barbarian is at the core of contemporary understandings of international affairs, like the division between East and West was at the core of understandings of international affairs during the Cold War. But what, in general terms, distinguishes barbarism from civilization? The East and the West were distinguishable by explicit ideological commitments. In the same vein, what do places like Somalia, Bosnia, Cambodia, and East Timor have in common? How do such places differ from our own lands? To ask the question is to answer it: barbaric are those places where people have

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vested identities in groups that can be militarily mobilized, and where such people have not only been mobilized, they have been deployed, and are killing.

The ability to identify violently is a traditional idea of politics, the ability to distinguish friend from foe, the citizen of the polis with whom one fights from the foreigner (in Greek the barbarian) against whom one fights. Unlike the identity of the citizen or of the barbarian, the modern identity is fractured. With whom do we identify? Against whom would we fight? Members of another race? Social class? Religion? Gender? Any locus of identity possible for the true modern would result in heart-ripping conflicts if it were to be militarily mobilized. Civil war is not only the occasion for the construction of the modern order, the preoccupation of Hobbes, it is also the nemesis of the modern condition.

In consequence and defense, we moderns understand the outbreak of violence as a lapse, a return to an earlier stage in history. The conflict in Yugoslavia has continually been referred to as an anachronism, as somehow not part of modern Europe. As Yugoslavia dissolved—in the time

52. See, e.g., THOMAS HOBBES, LEVIATHAN 223 (C.B. Macpherson ed., 1968) (1651):

The final cause, end, or design of men (who naturally love liberty, and dominion over others) in the introduction of that restraint upon themselves (in which we see them live in commonwealths) is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of War, which is necessarily consequent (as has been shown) to the natural passions of men, when there is no visible power to keep them in awe . . . .

Id. at 223.

Hobbes' "overriding concern was with civil war; its avoidance was for him the main purpose of political inquiry." C.B. Macpherson, Introduction to HOBBS, supra, at 9.

53. For example:

To the hundreds of millions who first beheld them on their television screens that August day in 1992, the faces staring out from behind barbed wire seemed powerfully familiar. Sunken cheeked, hollow-eyed, their skulls shaved, their bodies wasted and frail, they did not seem men at all but living archetypes, their faces stylized masks of tragedy. One had thought such faces consigned to the century's horde of images— the emaciated figures of the 1940s shuffling about in filthy striped uniforms, the bulldozers pushing into dark ditches great masses of lank white bodies. Yet here, a mere half century later, in 1992 . . . .

between two World Cup soccer championships—both modernity and Europe, in every way but the purely geological, receded. After World War II, Germany was similarly referred to as an anachronism. Hannah Arendt wrote that “the very word ‘barbarism’ today frequently applied by Germans to the Hitler period, is a distortion of reality; it is as though Jewish and non-Jewish intellectuals had fled a country that was no longer ‘refined’ enough for them.”

From this one might think that we are willing to kill the barbarian because he reminds us of a politics we believe, or hope, that we have already left behind. Violence presents a challenge not only to our physical security, but awakens our fears about ourselves, threatens our identities. We live in fear of an inescapable dissolution of the ties that bind, that one day riots will begin and will not stop, and that we will find ourselves part of the mob. So our greatest enemies are those who practice the old politics, who distinguish black from white, Crip from Blood, Serbian from Bosnian, and who give guns to the followers inflamed with the difference. We are willing to judge, to hate, and to kill, because deep in our hearts, we are afraid. Again Peter Handke on the cosmopolitan psyche:

Third International Representative: Listen! My hatred for this country and people came about like this: Haven't we all, in our hemisphere, long thought that a war would never again take place, in any event, not in our world, not on our continents? War—didn't we think it so—still existed only as a word, the thing itself was gone from the world. The war virus died out, every yet unborn human child immune to it. The message for war scorched entirely from our genes. War not even the stuff of dreams. Extinct like the dinosaurs, and, like them, now a topic almost solely for video games. And then here in this land, that we at the time still counted as part of our world, from one day to the next, there was war.

54. HANNAH ARENDT, EICHMANN IN JERUSALEM 53 (1963).
55. HANDKE, supra note 34, at 59 (author's translation). The original German is:

While it has the intellectual appeal of the ugly, this argument is too strong. If we invaded because we were afraid of old-fashioned politics, civilized states would intervene in more places. We seem content to let most of Africa and Asia be quite as political (in the anachronistic sense) as they wish to be. We also might not intervene where we have, for example in Somalia. Moreover, how many people in the civilized world are likely to be so taken with warrior virtues as to imitate a Somali warlord? Obviously, some people would: we have gangs moving drugs up the coasts who have been known to fire randomly into crowds, and shadowy men on the internet and in drifter hotels who seem to talk often and bomb occasionally, and schoolchildren blowing away their classmates. Nonetheless, most Americans would rather enjoy themselves more peaceably. So, though I think it bears some truth, the civilized world’s fear of pre-modern politics (the anxiety that has impelled much of this Essay) seems insufficient to explain, much less to legitimate, our relationship to violence.

Perhaps our relationship to the barbarian should be viewed more simply. We take it upon ourselves to judge barbarians just because they are barbarians. That is, the consensus that a state is barbaric is, at the same time, license to condemn the state. Barbarians have no standards, or what comes to the same thing, their standards have no authority in the civilized world. Perhaps barbarians judge us, but if so, we do not care.

It was not always so; recent history is instructive. During the Cold War, when East was East and West was West, the twain shared, or at least understood, a standard with which to judge politics. Marxism was a grand synthesis of Western culture, and so resonated deeply in the minds of Western intellectuals. At least in the trace form of “leftist tendencies,” Marxism was nearly universal among Western academics. Marxist critique of the inadequacy of our institutions stung. We recognized that the Communists could, and did, judge us in terms that we ourselves found troubling, often compelling.

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We thus felt it necessary to preempt the judgment of our enemy by judging ourselves. The recognition of our enemy’s power to judge us occasioned our own moral inquiry.

The new barbarians have no such standard with which to judge the West and be heard—the closest thing to such a standard is Hussein’s ranting, the mother of all jokes. We in the civilized world assert the right to judge by default—we are unopposed, and so, unquestioningly, shoulder what was once called the White Man’s Burden and declare ourselves judges. The barbarian’s lack of such a standard means that we do not question our own actions. Our institutional arrangements do not appear to need defending, and so we hardly think about them.

This is wrong. As a matter of political morality, our own actions, whatever the rightness of our opponent’s cause, are always in question. Our enemies’ failure to provide us a standard with which to judge our actions does not relieve us of the obligation to act morally, to judge ourselves. As Ralph Ellison put it: “Consciousness and conscience are burdens imposed on us by the American experiment. They are the American’s agony, but when he tries to live up to their stern demands they become his justification.” So the question remains: what justifies our assumption that we may wage war on the barbarians?

As discussed above, both the left and the right traditionally justified violence when it was liberating. Left and right disagreed about what was oppressive, what was liberating, and so forth. Yet in spite of these substantive differences, left and right shared a grammar for discussing the moral legitimacy of violence: violence was justified if it overthrew an oppressive social order. Other violence was unjustified. But the narrative of liberation on which such justification depends sounds implausible, as implausible as the narrative of progress that long sustained the Communists, but gradually became unbelievable. The same loss of faith that marked the end of Communism—a faith in the rational progress of human affairs—makes it difficult to believe that a state of war is superior to virtually any social

57. RALPH ELLISON, SHADOW AND ACT (1972), at xxiii.
order.

But what if there is no social order, or the social order is truly bestial? What about Rwanda? What about Kosovo? There is no need to recount horrors, but horrors abounded. May we not hope that a strong force can create order, can force the signing of the social contract and thereby make decent human intercourse, politics in the modern sense, possible? Do we have an obligation to act on such hope? So the radical leftist dream, which is also the dream of our hawks, indeed the dream of all crusaders to create order by the sword, has been exiled to situations where anarchy reigns, or where tyrants mobilize hatred. The civilized world, at its best, judges barbarians in the hope of converting them, of creating order so that human intercourse may flow through the channels of politics rather than down the sinews of war. All of our wars, even little adventures in oil rich regions, must therefore be wars to end all wars, must be justified in terms of an enlightened hope for human fruition, must be efforts to impose law. We moderns fight wars in order to prepare people for politics.

V. CONCLUSION

These are ugly thoughts. Most Americans do not consciously, at least not publicly, regard other people as barbarians, and do not want to be told that our prejudice inclines us to kill. We are, still and all, a decent people. That decency is, in part, the reason we consider invading distant countries in the hope of imposing law and bringing peace, the reason for this discussion. Americans feel that we need not tolerate certain horrors, so we intervene.

I would be more comfortable with our interventions if we were not so careful of our own lives, if we did not endeavor to impose military solutions from such high altitudes. I found it unsettling that the NATO intervention in Kosovo was

58. See Walter A. McDougall, Editor's Column, Of Crusaders Old and New, reprinted in 43 ORBIS 345 (1999).
59. "Pecunia nervi belli" ("Money is the sinews of war.") 5 PHILIPPICS, quoted in JAMES BUCHAN, FROZEN DESIRE: THE MEANING OF MONEY 245 (1997). The English "nerves," which once meant tendons or sinews, has gradually come to mean a bundle of neurological fibers. In light of the emphasis placed on information by modern practitioners of both war and finance, Cicero might be more aptly if somewhat anachronistically translated to say that money is the nerves of war.
conducted with such care while the atrocities mounted: if we believe a situation to be so horrible that we will not abide it, that we risk the moral danger of killing, then we should be willing to accept a measure of physical risk as well. If we are not willing to accept casualties, we should ask ourselves whether we are morally serious enough to inflict them.

And I believe that sometimes we may be sufficiently serious. Noble politics is possible, if perhaps rare. Americans care about Africa falling, about refugees streaming up snow covered passes, about the anguish of the world, and if we couple such intentions with courage, we may act nobly. Sadly, this is not enough; noble interventions may nonetheless be wrong, fail. Remember Somalia. Mere nobility—difficult as even that is to achieve—does not justify the acts of dominion that the United States now regularly contemplates. Such justification may not be beyond us, but it requires both that we discern our weakness, including the darkness in our hearts, and hear the pain of others, including the pain that we may cause, before we set forth, flags flying, to do the deeds for which we will be judged.