

NARRATIVES OF INTERNATIONAL LAW AND LITERATURE AFTER 9/11

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What is the connection between international law and literature—the subject of this meeting? The connection of course, is to be found in the practice of storytelling and narrative. It is the act of storytelling that brings international law and literature together as disciplines and as practices. International law lives on narrative and so does literature. Reasoning in international law depends on the ability to tell a good story, and good story telling in literature depends on the ability of the storyteller to do exactly the same thing. Of course, it is in the telling of the story where the creative art is to be found. Good storytelling requires that one construct the story in a way that is interesting, compelling, and simply enjoyable.

It is in the construction of reality that international law and literature relate and intertwine. A good lawyer knows how to construct facts by constructing a word story of reality, and a good writer of literature will do exactly the same in constructing a good story for the reader. Of course, not all narratives are equal. Sometimes the world changes and then the narratives of the past no longer make sense. Then, one would expect that a new story would be constructed to make sense of the current situation. On the other hand, some stories are so powerful that they are slow to die. When this happens, the continuation of the story itself comes to construct the reality for its readers.

One would have thought that the narrative of public international law, at least as it was once described by legal scholars such as Myers McDougal, Harold Lasswell, and Eugene Rostow, had long since past.¹ In the golden age of international law, McDougal and others helped to develop the notion that international law could be something other than “political authority” or just “politics” by any other name. The self-image of international law, as being something other than politics, developed at a time when legal scholars fell in love with the idea of *policy analysis* and used it to defend “Rule of Law” thinking in international law. International lawyers following McDougal’s lead adopted the view that law could be used as an instrument to remodel the world

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1. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 191-203 (1995)(recounting the rise and fall of the Lasswell-McDougal paradigm of international law).

in accordance with American democratic principles and values. The goal was to develop international legal relations on the basis of policy, which was soft and flexible. Instead of viewing international law as merely a collection of rules and doctrines, McDougal insisted that we regard international law as a process that was slowly evolving into a system of world government that resembled American liberal democracy.

The realities of the Cold War and then later the Vietnam War made it apparent, however, that the McDougal-Lasswell story of international legal relations—the one based on the notion of “one world governed” by democratic policies—was a pipe-dream. During the Cold War, policy analysis of international law became a cloak for Cold War chauvinism; during the Vietnam War we learned how futile it might be to use American military power to remodel a foreign culture in accordance with American ideals of liberal-democracy. If we learned anything from Vietnam, it was that the “best and brightest” policy analysts were blind to the international relations of the diverse culture in Vietnam. We also paid a dear price in terms of blood and money in our attempt to remodel Vietnam in accordance with American values. Consider the results of that war. At the end of the Vietnam war, the communist regime in North Vietnam remained in control of not just South Vietnam, but Cambodia, and Laos as well, and not one of the democratic goals of the United States was ever achieved by military intervention.

By the end of the Vietnam war, international law had lost confidence in its ability to define itself as being separate from political authority. Contrary to the story that was told about international law by scholars who continued to believe in the McDougal-Laswell theory of international law, the world was not ready to be remade in the image of the United States. Yet, there is an important aspect of the McDougal-Laswell story that remains alive today and continues to construct our reality about international public law. Even while many modern international lawyers are quick to dismiss the policy-science story line of the McDougal-Laswell story, these same lawyers continue to believe that the Rule of Law governs international legal relations. International law continues to be taught in American law schools as a collection of rules, treaties, and conventions that are slowly evolving into a global Rule of Law. Of course, the reality of our world is far from being ruled by anything like the Rule of Law imaged by American international legal scholars. The reality of the run up to the war in Iraq reminds us that international law is something that is brushed aside in the face of Western values and politics. The law schools, nevertheless, continue to teach international public law as if the Rule of Law did in fact govern the world. It was as if, as David Kennedy put in 1988, the discipline of

international law as taught in North American law schools had taken on the appearance of a “discipline which had lost its way and kept its jobs.”²

The idea that “the rule of law, not man” governed the world, powerful as it is, continues to be dogged by the reality that laws are not self-enforcing; someone had to interpret the rules and in the act of interpretation, the rules will always be subject to manipulation of powerful elites. The narratives of public international legal scholarship, nonetheless, seem legitimate and compelling because we are motivated to believe that international law can *be* something other than just “political authority.” There may have been reason for believing in the Rule of Law story before September 11, 2001 (9/11). Recall what the world was like in the 1990s.

By 1989 we witnessed the collapse of various communist regimes and the fall of the Berlin Wall. The fall of the Berlin wall gave new hope for those who continued to cling to the “one world” narrative of the Rule of Law. The fall of communism reinforced the belief that the world could be remodeled in accordance with the values and social practices of Western democracies. For a brief moment in history, it did seem that the entire world was evolving into a free society, democratically organized in light of Western values. There is now reason for believing, however, that the “woven world” optimism of the 1990s was just another pipe dream of global enthusiasts who thought that American capitalism and globalization would soon take over the task of world governance.

First, there was the terrorist attack on 9/11; then the war on terror; followed by the Iraq war; and homeland security. We were back to building walls that separate us from dangerous “others.” The world did change after 9/11; the Rule of Law “collapsed” on March 19, 2003, when President George W. Bush delivered his war letter to Congress and issued his order to launch three dozen Tomahawk cruise missiles on a “target of opportunity” in Baghdad. With the submission of a letter and the launching of three dozen cruise missiles, the President made it clear as never before, that the United States would no longer rely on the authority of the international legal community in deciding when and where to use force against other nations of the world community.

In refusing to wait for Security Council approval for the use of force against Iraq, the United States went on record that it would no longer comply with the Rules of International law in the war on terror. The United States, as the single dominant super world power, would instead permit a single person, the President of the United States, to decide when force would be used in waging future wars against terror. The idea that war would be used as a legitimate tool of foreign policy was now an acceptable instrument of international legal relations. Preventive use of force, once thought to be a reason for declaring war and something that was thought to be unacceptable in

2. David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1, 6 (1988).

civilized international relations, was now part of the official international policy of United States and the so-called “coalition of the willing.”

What gave the President of the United States the *appearance* of legal authority was not the Rule of Law, but rather a war resolution enacted by Congress on the eve of a mid-term election year, which many now regard as an act of strategic political opportunism. Congress gave the President the authority of a war resolution so he could have leverage in the United Nations. However, when the French and Germans threatened to veto the United States in the Security Council, then the President was able to say to the world that he did not need the permission from the United Nations or from *anyone* because he was already *authorized* to go to war. The war in Iraq was, without a doubt, a huge exercise of political opportunism; remember how the President was able to persuade lawmakers in the United States to ignore their own Constitutional duty to declare war by raising fears about Weapons of Mass Destruction (WMD) in the hands of Saddam Hussein. The narrative about the meaning of 9/11 and the fears generated about *imaginary WMD* made it relatively easy for lawmakers in the United States to go into denial about the Rule of Law.

With a congressional war resolution in hand, the President was able to claim that he was authorized to wage war against Iraq unilaterally and that he was required to go to war to *defend* the Rule of Law from the *threat* of future terrorist attacks. Ironically, the narrative about the Rule of Law became a reason and rationale for *preventive war* and for violating international law. For the first time in American history, a President took the nation to war before anyone, Congress, the United Nations, or even the President himself could declare a “war emergency.” Rule of Law thinking had thus come full circle in justifying the kind of raw power that was once exercised by tyrants and kings. Where there had been two checks on presidential war power in the first Gulf War of 1991: one in the Security Council of the United Nations; the other in Congress, there were *no* checks in the second “Iraq” War. International law now seems rather *quaint* when viewed in the Post-Iraq war context.

In the face of the fears of another 9/11 and WMD, it is far from clear whether the American people want their President to obey international legal conventions and rules. It may well be that the rules of international law have “collapsed,” as Michael J. Glennon stated in an article in *Foreign Affairs*, written shortly after the invasion of Iraq.³ What was “lawful” or “unlawful” no longer seemed to be pertinent to the question of whether force should be used. If the terrorists are *not* going to play by the rules, why should we? Would it not be better to cut down the Rule of Law to get to the terrorists?

Michael Glennon asserted that the use of force prevailed over the Rule of Law because the threat of WMD proliferation and the danger of global terrorism

3. Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16 (2003).

had created a new world reality based on unsupported threats to the national security. As Glennon put it: "That the world [was] at risk of cascading disorder [and this danger] place[d] a greater rather than a lesser responsibility on the United States to use its power assertively to halt or slow the pace of disintegration."⁴ However, once America announced its decision to maintain its world preeminence as a superpower by essentially deciding for itself whether to go to war, the United States placed itself in the position of rejecting the Rule of Law, and in effect announced that it favored the use of political authority of nationalism in deciding international disputes. Of course, the danger is that someday a nation state will decide to use its power against a rival and the example of the Iraq war will be a powerful narrative legitimating such action. In this way, the fault lines of world power have been shifted to a new terrain where war becomes, once again, a thinkable alternative to diplomacy.

Michael Glennon says that we must go "back to the drawing board" and rediscover a new legal order to deal with reality of a unipolar world with the United States "at the wheel" of power.⁵ Going back to the drawing boards would require that we construct a new narrative about international legal relations; one that would permit the super power to pick and choose the rules other nations of the world must obey. Now that story will be hard to tell. However, before we submit to the fears of terrorism and accept a world dominated by United States military power, and before we begin the task of constructing a new narrative for international legal relations, we might want to consider narratives about what can happen when we ignore international legal community and take on the task of remodeling the world in accordance with the values of the United States. This is where *literature* comes into my narrative. There are important lessons we can learn from the narratives found in literature about what can happen when one person or one nation seeks to govern the world.

We might start with a classic from the Greek tragedies. Homer's *Iliad*, for example, may be the right literary text for our time. Within the story of the *Iliad* one can find the narrative of the conquering hero turned tyrant.⁶ The story starts with noble intentions of a Conquering Hero, the defeat of Troy, and then later the Conqueror's descent to tyranny and corruption. The story can be heard today in media interviews with American soldiers in Iraq who report that they are no longer sure who the "bad guys" are and that they are not even sure if they are the "bad guys." Tony Amersterdam and Jerome Bruner in their book, *Minding The Law*, demonstrate how this Greek tragedy sets out a plot that

4. *Id.* at 34.

5. *Id.* at 31.

6. See THE ILIAD OF HOMER (Richmond Lattimore trans., 1951).

reoccurs in constitutional law and perhaps it can be a useful text for understanding exactly what is at stake in the war on terror.⁷

We also might want to consider how the narrative of preventive war resonates with stories from literature about the clashes of fidelity to law in the face of evil. One classic story that comes to mind is the story of Sir Thomas More and Roper in Robert Bolt's *A Man for All Seasons*. Sir Thomas More and Roper argue about the validity of obeying the law in the face of evil and Roper objects to the notion that the Devil should be given the benefit of the law.⁸ Sir Thomas challenges him: "What would you do? Cut a great road through the law to get after the Devil?" "Exactly so," Roper declares, "I'd cut down every law in England to do that."⁹ Sir Thomas retorts:

Oh? And when the last law was down, and the Devil turned around on you—where would you hide, Roper, the laws all being flat? This Country's planted thick with laws from coast to coast—man's laws, not Gods—and if you cut them down—and you're just the man to do it—do you really think you could stand upright in the winds that would blow then?¹⁰

These lines resonate powerfully with presidential war rhetoric that justified taking the nation to war without United Nation consent, and in clear violation of the United Nation Charter. Roper sounds a lot like President Bush on the eve of the Iraq War, and Sir Thomas can be heard in the critique of preventive war made by France and Germany in the Security Council of the United Nations. Is there not a point to Sir Thomas' retort to Roper? Didn't France and Germany have a point in objecting to the idea that United States should be given *carte blanc* authority to decide for itself when war should be waged against a member of the United Nations (UN)? If we cut down the Rule of Law to get to the terrorists, will we be able to stand up in the winds that blow after international law is no longer relevant? Of course, not everyone would agree that this is the lesson to be gleaned from a reading of Robert Bolt's story.

Maybe, the Rule of Law is simply undefinable; maybe "there is no there, there."¹¹ For many, the Rule of Law is nothing more than a cliché, an expression used for rhetorical purposes. However, even if one is doubtful about

7. See ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES 143-164 (2000). For the original theoretical account of how storytelling shapes cognitive understanding in the law, see STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND THE MIND (2001).

8. ROBERT BOLT, A MAN FOR ALL SEASONS __ (1990).

9. *Id.*

10. *Id.*

11. GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY (1993).

the Rule of Law, the narratives found in literature about law can be useful in determining how Rule of Law thinking can be twisted to support tyranny. Is that not, as Richard Weisberg has argued, the lesson of the Jews when Germany occupied France, and when the Rule of Law supported and legitimated official tyranny in France during World War II. Is this not a lesson for the world we now inhabit after 9/11? A critical reading of Melville's *Billy the Budd, Sailor*¹² can be fruitful for understanding how justice can suffer in the face of narratives of national emergency brought about in times of war. We need to remind ourselves of the lessons of these stories, because they provide needed insight for understanding what is at stake, now in America with the Home Land Security, and the United States of America Patriot Acts. The war on terror is still too young to know the full implications for international legal relations of the future. It is not too early, however, to assess whether mistakes have been made in the narratives we tell to justify the commission of war in violation of the Rule of Law.

In *War and Responsibility*, the late John Hart Ely, writing in the 1990s, looked back on the Vietnam war, including: the secret war in Laos; the bombing in Cambodia; and the notorious Tonkin Gulf Resolution of 1964 that authorized President Johnson to commit the nation to war, concluding that war powers of the United States presidency were in a real mess and that if something was not done soon, we might lose sight of the importance of placing checks on presidential war powers.¹³ Nothing was done and we seem to be stuck with a series of wars, justified by war emergency and brought about by imaged fears of terrorism and *WMD*. This has presented unique dangers of major disruptions in normal international legal practices and good world governments. We will not be able to do anything unless we first understand how the narratives of the past continue to shape and limit the possibilities for the future direction of international legal relations. Understanding the narratives of international law and learning from the lessons to be found in the stories from literature about similar human dilemmas posed by times of great emergency, can help us find our way once again to a more peaceful and sane world order.

I am not an idealist. I am not suggesting that by reading Dickens or Melville we will come to discover the mistakes of the Iraq war. On the other hand, I am saying that literature and poetry can be a fertile ground for self-discovery of the human condition and just might enable us to better understand other people of other cultures. Three billion people live on less than two dollars a day; two billion lack electric power. Narratives of international law that fail to come to grips with these realities will always be the subject of suspicion.

12. See HERMAN MELVILLE, *BILLY BUDD* (1992).

13. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

Rule of Law thinking will never survive if it is nothing more than an expression of American self-interest. We say we are for free trade, but then we adopt trade rules that favor American interests at the expense of the interests of other nations. If there is to be an enduring Rule of Law, it must be one that understands and speaks to the stories of all people of the international community without falling prey to politics of self-interest.

In the emerging new world after 9/11, the “international” is no longer something that is “out there” or “foreign” to our national identity. What was once foreign and dangerous is now part of our national identity, whether we like it or not. We have closer contact with aspects of diverse new cultures that are hostile and dangerous to our world. We can either build walls that attempt to keep others out to keep the homeland safe, or we can begin to build new alliances based on real understanding of other people and other cultures. If we want to understand other people and other cultures then we need to know something about their culture, their law, and their literature.

Ironically, international legal policy-makers continue to rely upon the old McDougal-Lasswell story about international legal relations that once proclaimed that liberal-democratic values could transform the world into a democratic global “free society.” Hence, we wage war in Iraq so that the Iraqi people can embrace Jeffersonian democracy. We send missiles to Iraq so that we can liberate the Iraqi people from tyranny. We destroy the infrastructure of their cities so that we can liberate the cities and free the inhabitants. It is as if we forgot the story of Vietnam War where American international policy sought to remodel a nation in accordance with American liberal-democratic ideals to no avail. The world was not ready to accept American values in 1969 and we can not expect the world to have a change of heart in our time. The ongoing struggle on the streets of Baghdad should have reminded us by now of that lesson.

The point is not that reading a great classic will tell us what to do in the war on terror, rather the point is that literature may give us pause to consider what is at stake in this war and what it is that is worth fighting for. As my friend and colleague Lawrence Joseph recently explained in an editorial in the Metro section of the New York Times: “Writing a poem does not stop the killing of innocent people, but it is an act of resistance. The arc of all our lives is accumulated violence, but with this also comes intensification of the will to live and to love.”¹⁴ It is the inherent human struggle between love and hate that now seems to be embroiled in the war on terror. There is an essential human lesson to be discovered in our great literary classics about this struggle, and those lessons can be useful to us in deciding how to construct stories about a world we want and deserve.

14. Chris Hedges, *Love Conquers Evil: Poetry is About the Timetable*, N.Y. TIMES, April 3, 2002, at B2.