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BOOK REVIEW

On the Law of Nations By Daniel Patrick Moynihan.*
Harvard University Press, 1990. Pp. 211, including index.

*Reviewed by William F. Fox, Jr. ***

When Senator Moynihan, one of the greatest minds and strongest intellects in the United States Senate, speaks we should listen carefully. His new book, *On the Law of Nations*,¹ is a thoughtful, insightful commentary that addresses the role of international law in the formation of American foreign policy. No one should mistake it, however, for a treatise or a primer on international law. Rather, the book is a review of selected examples of American foreign policy, filtered through the prism of Moynihan's personal view of international law, and a lengthy plea that this country pay more attention to rules of law when conducting foreign relations. Moynihan's primary point is that the United States frequently ignores the tenets of international law when international legal principles do not suit its purpose.² This evaluation warrants repeating and requires close analysis. Moynihan's secondary point, that Congress bears at least some responsibility for this state of affairs,³ is also telling. Most international law scholars would probably agree with the Senator.

On the Law of Nations begins with an introduction that recapitulates a number of misadventures in United States foreign policy, and states the premise that international law is an integral component of the law of the United States. As Moynihan points out, this principle is incorporated in the American legal system through the Constitution's express mention of "treaties" in Article III's statement of national judicial powers. This principle is

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1. D.P. MOYNIHAN, *ON THE LAW OF NATIONS* (1990).

2. *Id.* at 176-77.

3. *Id.* at 177.

also echoed in a large number of congressional enactments, and is implicit in the United States' signing of the United Nations Charter.⁴ Having stated this premise, the book moves to a number of chapters, labeled "Peace," "War," "Wilson," and "Roosevelt," describing instances in United States history where the country has adhered or refused to adhere to international legal principles. Each of these chapters makes the point that the United States, particularly under Presidents Woodrow Wilson and Theodore Roosevelt, has historically been committed to the idea that international law and international organizations provide a framework for United States foreign policy.⁵

Moynihan believes, however, that this is no longer the case, particularly since the Reagan Administration. According to Moynihan, the United States has lost sight of its historical commitment and has begun to act as if international law is not necessarily binding on United States foreign policy.⁶ While Moynihan notes a number of instances of past behavior inconsistent with international law, he reserves his greatest wrath for pronouncements such as those made by one of his successors, Jeane Kirkpatrick, former United States Ambassador to the United Nations. In the context of dealing with an unacceptable regime in Nicaragua, she pronounced that a "legalistic approach to international affairs"⁷ cannot succeed when the United States' opponents feel free to disregard international convention.⁸ Moynihan is aghast. He believes that Kirkpatrick's statement is entirely unprecedented. Even if the United States sometimes functioned inconsistently with the rule of law, it had never before disavowed it completely:

[N]o American official had ever before espoused the view that international law was *optional* Th[e] case [that our adherence to international legal principles depends on whether the other side is also abiding by them] can be made, but only by moving to a nihilist extreme. If international law exists, it exists independently of whether any one state agrees with or abides by it.⁹

4. *Id.* at 1-14.

5. The remaining chapters are titled "Big White Space," "*Pacta Sunt Servanda*," and "A Normless Normalcy?"

6. MOYNIHAN, *supra* note 1, at 120. Senator Moynihan states: "Adherence to law was thought to be expedient and practical. In any event it was thought, with varying degrees of conviction, to be obligatory. . . . Somewhere along the line this conviction faltered." *Id.*

7. *Id.* at 133 (quoting Kirkpatrick, *Law and Reciprocity*, 1984 PROC. OF THE 78TH ANN. MEETING, AM. SOC'Y OF INT'L L. (Washington, D.C. 1984)).

8. Kirkpatrick stated: "[W]e cannot permit, in defense not only of our country but of the domain of law . . . in which democratic nations must rest . . . ourselves to feel bound to unilateral compliance with obligations which do in fact exist under the [United Nations] Charter, but are renounced by others." *Id.*

9. *Id.* at 133-34 (emphasis in original).

If the foreign policy of Presidents Reagan or Bush has a fatal flaw, this is it.

Still, Moynihan is not disingenuous. The book is not merely an angry, negative commentary on current United States foreign policy. Recognizing that a fair amount of the blame falls on a Congress that has essentially abdicated its own role in foreign affairs, Moynihan states toward the end of the book:

[I]t is the Congress as much as or more than the president that needs to raise its consciousness of international law as *our* law; American law. . . . International law changes, just as domestic law changes. We are fully within our rights to propose changes; to limit or withdraw commitments. What we must not do is act as if the subject was optional, essentially rhetorical.¹⁰

The basic message of the book is clear. Unquestionably, Senator Moynihan wants the executive branch to conduct foreign affairs in a more principled fashion, with Congress engaging in greater policing of the executive branch's activities. At the same time, however, I am hard-pressed to tell whether this is an optimistic or pessimistic book. On the one hand, the book is a litany of the many instances in which conduct of the United States, vis-à-vis rules of international law, has fallen far short of the mark. When a reader finishes those sections, he may wonder how things could possibly improve; yet, the book seems to be a hopeful, well-reasoned analysis of why it is in the best interest of the United States to recognize and abide by international legal principles. Moynihan clearly rejects what one might term the *realist* school. He does not believe that international relations are merely a matter of the exercise of raw power and Machiavellian maneuvering. Additionally, he does not believe that there is or ever can be such a thing as international "law." Thus, *On the Law of Nations* makes sense if the reader recognizes at the outset that the book incorporates what Moynihan thinks *ought* to be, as opposed to merely describing how things really are.

This is not to say that Moynihan is impossibly naive on these matters. He recognizes that this is an imperfect world, inhabited by imperfect human beings, but he is not satisfied with the current state of affairs. I wonder if some of the Senator's greatest misgivings have been eroded by events surrounding the Persian Gulf War.

Viewed one way, the Persian Gulf War epitomizes everything that Moynihan objects to in recent United States foreign policy. The war, according to President Bush, was about Iraq's "naked aggression" and defiance of a series

10. *Id.* at 177 (emphasis in original).

of United Nations resolutions.¹¹ In contrast, newspaper articles recount Syria's takeover of Lebanon—"naked aggression" by any definition of that term—while the United States has, so far, turned a blind eye, presumably because of Syrian President Assad's participation in the Persian Gulf War coalition. Other articles report a proposal by Israel to move Soviet refugees into the occupied West Bank territories—a move that seems to be in clear defiance of a different series of United Nations resolutions. These are, to say the least, inconsistent, if not indefensible, actions on the part of the United States. Together with other instances described in *On the Law of Nations*, they illustrate the United States' lack of consistency. For example, why did the United States invade Grenada to prevent a Communist takeover, and then Panama to remove Manuel Noriega, but remain passive when India invaded and annexed Goa, and when Turkey invaded and occupied half of Cyprus? Obviously, "naked aggression" moves the United States to action in certain instances and not in others. Much has been made in Bush administration statements of the brutal, arguably genocidal, behavior of Saddam Hussein toward both the Kurds and the Kuwaitis. The United States, however, did nothing when the Khmer Rouge murdered possibly millions of people in Cambodia in the mid-1970s. Even mass murder, it would seem, does not evoke a uniform response by the United States.

Everyone should be willing to concede that one of the fundamental precepts of law is consistency, something that the United States never fails to emphasize in domestic legal matters. In constitutional law, for example, the requirement of consistency grows out of the due process and equal protection clauses of the United States Constitution.¹² In fact, it is consistency which underlies the principle of *stare decisis* in all common law systems.¹³ Yet the Khmer Rouge example, which is discussed in Moynihan's book, illustrates that consistency is curiously lacking on an international level. *On the Law of Nations* makes clear that Senator Moynihan would be happier if the United States followed a more consistent, principled foreign policy. On this point, however, I fear he is doomed to eternal disappointment. Absolutely nothing in past behavior by the United States suggests that the country will conduct a consistent foreign policy even over the short run, let alone

11. *President Pessimistic About Iraq; Bush Tries to Squelch Speculation of Deal*, Wash. Post, Dec. 6, 1990, at A48, col. 1.

12. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 423, 448-50 (2d ed. 1983). In administrative law, consistency is embodied in the idea that agencies may not function on an arbitrary or capricious basis. See 5 U.S.C. § 706 (1988); see also B. SCHWARTZ, ADMINISTRATIVE LAW § 10.14, at 611-13 (2d ed. 1984). When agencies do change their policies, they must explain these changes in detail or have the actions reversed by a reviewing court. *Id.* § 4.10, at 179-80.

13. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

the long term. Even when the United States seems to be abiding by international law, its actions are heavily guided by considerations of *realpolitik*.

Worse than the United States' lack of consistency is the attitude among more than a few commentators on international law, which has impeded civilized discussion of foreign policy issues. During the 1988 presidential campaign there was much discussion concerning the "wimp" factor in American politics. That concept has also penetrated much American dialogue on foreign affairs and international law to the point that many critics of the positions that Senator Moynihan advances may simply disregard his views by branding him a foreign policy wimp. In other words, according to those critics, only those people who are terribly naive and insufficiently tough-minded on global politics would advance the positions he advances. Moynihan really does not discuss this point in his book, but I can envision his detractors raising it. The wimp factor could have grave implications for the future. For example, if the only result of the Persian Gulf War is a lot of macho strutting on the world scene by an over-confident United States, this country will have missed a major point of that conflict.

It is possible, however, to take an entirely different view of the Persian Gulf War. The United States may have a wonderful opportunity to return to more consistency in foreign affairs and to put into practice much of what I believe Moynihan urges in his book: more reliance on the United Nations for collective solutions to international bullying; a return to the processes of arbitration and mediation to resolve such things as conflicts over boundaries and natural resources; and, ultimately, recognition that the use of armed conflict to resolve disputes among nations must be absolutely the last resort.

Using these points as a kind of checklist, it is possible to argue that many of Moynihan's recommendations have actually been implemented. First, the United States made virtually no moves in the Gulf, either economic or military, until the United Nations Security Council had promulgated appropriate resolutions. Cynics might argue that we merely used our dominant position in the Security Council as a tool to enforce our own narrow interests; I am not inclined to agree. I believe President Bush and members of his administration truly welcomed United Nations' support. Beyond this, the Bush administration has to be complimented for seeking congressional approval for its actions before commencing offensive operations in the Gulf. The Persian Gulf War debate in Congress may go down as one of the more genuine and uplifting moments in the history of that body. One only had to watch the faces of the members of Congress during the debate to see how deeply each of them felt on the issues. I have always thought that the Viet-

nam War might have been waged differently, with a consequent different outcome, had Congress courageously entered the debate early on.

Second, while many people may still disagree on the timing of the military conflict, arguing that the sanctions were not given sufficient time, the Bush administration at least tried economic sanctions before resorting to warfare. When the offensive operations began, the United States adhered scrupulously to the rules of land warfare in its conduct of operations, and in its treatment of civilians and prisoners of war. These actions are a healthy indication that the United States is starting to mature as a nation.

Third, the impact of the Persian Gulf War on other nations may convince the bullies of this world that invasion and genocide are not acceptable ways to resolve disputes over borders or natural resources. If the War gives other despots pause before they invade or kill, or if the War persuades other disputing countries to go into the International Court of Justice or to seek mediation of their grievances, the United States will have made a major, enormously healthy contribution to global politics.

Finally, even though the Bush administration had to be jump-started by public opinion on the Kurdish issue, its actions in the Kurdish territories and Secretary of State Baker's attempts to move toward a large-scale resolution of all the Middle Eastern problems suggest to me that Moynihan's views may have prevailed.

If we are truly moving toward a new world order, Senator Moynihan's book can make a large contribution. He has a wealth of personal experience which he brings to the manuscript. He has a sharp mind. He knows when to avoid those age-old dilemmas, such as whether international "law" truly exists, that may intrigue international law theoreticians but usually destroy rational debate. Best of all, Moynihan tempers a scholar's sense of history with a politician's sense of the pragmatic. All of this is reflected in the book.

On the Law of Nations is a solid, worthwhile contribution to the literature of international law. I cannot think of a better time for Senator Moynihan to be writing on these issues and to be debating them in Congress. He may already have had more of an impact than the book itself reflects, since much of what he urges was implemented during the Persian Gulf crisis. Armed with many of the ideas Senator Moynihan advances in *On the Law of Nations*, and with his continuing participation, there is hope that Congress and the executive branch will win the peace as well by making congressional foreign policy debates and consistent executive actions a permanent player in the formulation of United States foreign policy.